

2003-2011

**DIGEST OF  
CASE LAWS  
DIRECT TAXES**  
Including Allied Laws  
**A Tax Companion**

Important Cases  
Supreme Court  
High Courts  
Appellate Tribunal  
AAR



The Income Tax Appellate  
Tribunal Bar Association, Mumbai



All India Federation of  
Tax Practitioners

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*All disputes are subject to Mumbai Jurisdiction.*

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### MESSAGE

I am glad that Income Tax Appellate Tribunal Bar Association, Mumbai and All India Federation of Tax Practitioners have jointly published the first edition of **“Digest of case laws – Direct taxes (including allied laws) (2003-2011) - A Tax Companion”** to commemorate the 150<sup>th</sup> anniversary of the Bombay High Court, which has made a mark by rendering several landmark judgments in the field of Direct Taxes.

The Digest is comprehensive as it covers the decisions of the Supreme Court, High Courts, Income Tax Appellate Tribunal and Authority for Advance Rulings. The Digest will prove to be a useful reference book. It is designed as a ready reckoner on direct tax laws to be a tool for the busy lawyers and overworked Judges.

All Judges sitting on the Tax Bench always notice that the lawyers arguing tax cases are well prepared and familiar with the judicial precedents on the issues involved. The credit for this commendable feature of the Tax Bar must go to the Income Tax Appellate Tribunal Bar Association and All India Federation for Tax Practitioners for organising continuing legal education programmes for the members in various forms. This Digest will go a long way in equipping the tax advocates for discharging their duties with competence and confidence.

In the 150<sup>th</sup> year of establishment of the Bombay High Court, I extend my best wishes to the Income Tax Appellate Tribunal Bar Association, Mumbai and All India Federation of Tax Practitioners for continuing to render yeomen services to the Bar and the Bench.

10 August 2012

  
(Mohit S. Shah)

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**DR. JUSTICE D. Y. CHANDRACHUD**



901, "VIDHI"  
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4 September 2012

The ITAT Bar Association and the All India Federation of Tax Practitioners have brought out a comprehensive digest of precedent on direct taxes for the period between 2003 to 2011. The publication is dedicated to the sesquicentennial of the Bombay High Court. The editorial team as well as the research team which collaborated together with Dr.K.Shivaram and Mr.Pradeep Kapasi have brought to bear their wide experience in direct tax litigation in preparing this volume. The digest will provide a user friendly source to search for judgments on diverse aspects of direct tax legislation in the country. Much of the information which professionals need for their work is now available in an electronic form. But that does not dispense with the importance of books. Research in the conventional mode allows a researcher to cover not only the specific area of focus, but several related areas which have a bearing on the issue. Those who have collaborated in the production of this digest are eminent practitioners. They have spared their time and effort to ensure that this venture provides a valuable addition to the law.

*Dhananjaya J. Chandrachud*



**JUSTICE S. J. VAZIFDAR**



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2281 06 45(R)

*August 23, 2012*

A digest of case law is always most useful for a legal practitioner in any branch of law. I am sure this Digest will be of invaluable assistance to the legal profession, especially direct tax practitioners. The Digest is an appropriate contribution by the Income Tax Appellate Tribunal Bar Association and the All India Federation of Tax Practitioners on the 150<sup>th</sup> Anniversary of the Bombay High Court.

  
S.J. Vazifdar

Justice J. P. Devadhar



501, "VIDHI"  
(Queens Barracks),  
General Jagannath Bhosale  
Marg, Mumbai 400 021.

DATE: 16/08/2012

**MESSAGE**

On the eve of the sesquicentennial of the High Court of Judicature at Bombay, the members of the Income Tax Appellate Tribunal Bar Association and All India Federation of Tax Practitioners have brought out this unique publication titled "**2003-2011 Digest of case laws – Direct taxes (including allied laws) – A Tax Companion**".

Perusal of the said publication shows that considerable effort has gone into compiling the decisions of various authorities meticulously and systematically. Care has been taken to see that almost all important decisions have been compiled Section wise, so that complete conspectus of the judicial pronouncements on each and every Section of the Direct and Allied Taxes are easily made available to the readers.

Truly, this commendable digest will be handy to all those who want to have an insight of the decisions under the direct tax law.

J.P. Devadhar.



Justice M. S. Sanklecha,  
High Court, Bombay.

10.08.2012

To,  
The President,  
Income Tax Appellate Tribunal  
Bar Association.

Dear Dr. Shivram,

Congratulation to you and your team for the outstanding "Digest of case laws-Direct taxes (2003-2011)". The Tax companion made by your team to commemorate 150<sup>th</sup> anniversary of the Bombay High Court is indeed a fitting tribute to the 150<sup>th</sup> anniversary celebration of our court.

I have had the privilege of going through the manuscript and found it to be extremely informative and full of knowledge providing a gist of decision of various Tribunals and Courts. The digest would be extremely useful to be practitioners and adjudicators of direct tax laws.

Let me once again compliment the Income Tax Appellate Tribunal Bar Association for this very useful publication.

Thanking you,

*M. S. Sanklecha*  
(Manoj S. Sanklecha)



जी ई वीरभद्रप्पा  
अध्यक्ष

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दिनांक / DATE : 21-08-2012

### MESSAGE

I am pleased to note that I.T.A.T. Bar Association, Mumbai and All India Federation of Tax Practitioners have jointly compiled the very first edition of A Tax Companion "**DIGEST OF CASE LAWS - DIRECT TAXES**" and equally delighted to know that they are publishing this tax literature to commemorate the 150<sup>th</sup> Anniversary of the Bombay High Court. I feel that it is a great tribute and respect to the Hon'ble Bombay High Court which has always been the front-runner in deciding many issues on the tax side of the litigation in the country.

2. It is heartening to know over 10,000 important cases are digested in this voluminous publication covering decisions of the Supreme Court, High Court, ITAT. and Authority for Advanced Rulings.

3. It is a unique digest which at one place publishes the cases on a given subject and section, rendered by the different Judicial Forums. It is also unique in another sense that it is not prepared by one individual or a professional or an academician but by a group of professionals most of them are youngsters who have spent tremendous time in compilation of this voluminous Text despite their busy professional engagements in hand.

4. This digest is for the cases rendered by different Judicial Authorities between 2003 to 2011 is the latest of this kind and nature and will be definitely useful in catering to the needs of the tax professionals, departmental authorities and the Judicial Officers. It will help one in locating the decided case law on the subject both section-wise and subject-wise which I am sure will enrich its utility.

5. I have gone through the few pages of this voluminous publication and I appreciate the great work done by the research and editorial team under the able assistance of Dr. K.Shivram, and C.A.Pradeep Kapasi who are its Chief Editors.

6. I place on record my sincere appreciation to this voluminous work and laud the efforts made by its Authors on this subject who have compiled this so that the society gets benefitted in the long run. I wish them all success.

  
(G.E.VEERABHADRAPPA)



**Sincerely thanks**



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## Acknowledgements



We sincerely thank the members of the research and editorial teams for their untiring and ceaseless efforts in making this publication possible. Contribution of Mr. Mitesh Kotecha, Chairman of Journal Committee of the AIFTP, Mr. Subhash S. Shetty, Mr. M. Subramanian, Mrs. Arati Vissanji, Mr. Keshav Bhujle deserves special mention. Mr. Rajesh Bhagat, Rema and Appu of the Finesse Graphics deserve special appreciation for designing and printing the Digest. It would not have been possible for us to publish this mammoth work without the active and continuous assistance of the staff members of the ITAT Bar Association, AIFTP and KSA Legal Chambers. We shall remain thankful to all of them.

**Dr. K. Shivaram**

**CA Pradip Kapasi**

7th September, 2012

# Abbreviations

## MAGAZINES

ACAJ	- Ahmedabad Chartered Accountants' Society Journal
AIFTPJ	- All India Federation of Tax Practitioners Journal
AIR	- All India Reporter
BCAJ	- Bombay Chartered Accountants' Society Journal
BLR	- Bombay Law Reporter
Comp. Cas	- Company Cases
CTR	- Current Tax Reporter
DTR	- Direct Tax Reporter
ELT	- Excise Law Times
ITD	- Income Tax Tribunal Decisions
ITR (Trib)	- Income-Tax Reports (Tribunal)
ITR	- Income Tax Reports
ITRJ	- Income Tax Review (Journal of The Chamber of Tax Consultants)
Tax World	- Journal of Rajasthan Tax Consultants' Association
JT	- Judgement Today
SCC	- Supreme Court Cases
SOT	- Selected Orders of ITAT
TLR	- Taxation Law Reports
TTJ	- Tax Tribunal Judgements
VST	- VAT and Service Tax Cases

## AUTHORITIES

UOI	- Union of India
AAR	- Authority for Advance Rulings
AO	- Assessing Officer
ACIT	- Assistant Commissioner of Income-tax
CIT	- Commissioner of Income-tax
Dy. CIT	- Deputy Commissioner of Income- tax
DG	- Director General
DI	- Director of Investigation
ITO	- Income Tax Officer
JCIT	- Joint Commissioner of Income-tax
TRO	- Tax Recovery Officer

## COURTS

Supreme Court	- (SC)
High Court	- (HC)
Allahabad	- (All.)
Andhra Pradesh	- (AP.)
Assam	- (Assm.)
Bombay	- (Bom)
Bombay	- (Nagpur)
Bombay	- (Panaji.Goa)
Calcutta	- (Cal.)
Chhattisgarh	- (Chhattisgarh)
Delhi	- (Delhi)
Gauhati	- (Gau.)
Gujarat	- (Guj.)
Himachal Pradesh	- (HP)
Jammu & Kashmir	- (J&K)
Jharkhand	- (Jharkhand)
Karnataka	- (Karn.)
Kerala	- (Ker.)
Madhya Pradesh	- (MP.)
Madhya Pradesh (Gwalior)	- (MP)
Madras	- (Mad.)
Orissa	- (Orissa)
Patna	- (Patna.)
Punjab & Haryana	- (P&H)
Rajasthan	- (Raj.)
Sikkim	- (Sikkim)
Uttarakhand	- (Uttarakhand)
Uttar Pradesh	- (UP)

## TRIBUNAL BENCHES

Agra	- (Agra)
Ahmedabad	- (Ahd.)
Allahabad	- (All.)
Amritsar	- (Amritsar)
Bangalore	- (Bang.)
Bilaspur	- (Bilaspur)
Calcutta	- (Kol.)
Chandigarh	- (Chd.)
Chennai	- (Chennai)
Cochin	- (Cochin)
Cuttack	- (Cuttack)
Delhi	- (Delhi)
Guwahati	- (Gau.)
Hyderabad	- (Hyd.)
Indore	- (Indore)
Jabalpur	- (Jab.)
Jaipur	- (Jp.)
Jodhpur	- (Jodh.)
Lucknow	- (Luck.)
Mumbai	- (Mum.)
Nagpur	- (Nagpur)
Panaji	- (Panaji)
Patna	- (Patna)
Pune	- (Pune)
Rajkot	- (Rajkot)
Ranchi	- (Ranchi)
Visakhapatnam	- (Visakha.)

## About the Digest

The Digest, placed in your hands, is a unique publication of its kind, published by the two prestigious non-profit organizations of professionals with the untiring and selfless assistance of the eminent people, entrenched in the serious practice of tax laws. It captures at one place, in one volume, more than ten thousand cases of contemporaneous relevance that are handpicked from twenty four reports and magazines that print virtually all that is published in India on the direct tax laws. All the cases on the subject, delivered by different forums (SC, HC, ITAT & AAR), are arranged at one place to provide an easy and quick reference. Each case is duly numbered and is digested in brief with at least three catch words for a quick reference and carries, wherever possible, the relevant assessment year, an editorial note and the news about the status of an SLP, if any. Its utility is fortified with the robust case laws and subject indexes prepared with a high degree of precision.

Like any other good digest of case laws, the reader can reach to the desired case law by referring to any of the indexes on Case Laws, Section, Subject and Chapter. Further to avoid any confusion, the citations of the cases specifically highlight the respective judicial forums that delivered the decisions, while citing the cases. Care has been taken to refer to all the respective reports and the magazines while digesting the cases.

By way of an experiment, which is likely to be followed by many in the times to come, the cases where the Union of India or an officer of the revenue service, whether by name or designation, is the appellant, are indexed in the table of cases under the respective names of the assessee in alphabetical order.

### **Name of the case:**

### **Presented in Digest as:**

\*CIT v. Abad Fisheries,

- Abad Fisheries; CIT v.

\*Dy. CIT v. Abad Fisheries,

- Abad Fisheries; Dy. CIT v.

\*Director of Income-tax v. Abad Fisheries,

- Abad Fisheries; Director of Income-tax, v.

\*Laxmi Iyer 1st ITO TDS v. Abad Fisheries,

- Abad Fisheries; Laxmi Iyer 1st ITO TDS v.

The Digest shall be of great use for the Judges, Advocates, Chartered Accountants, Tax Professionals, Tax Executives and Tax Authorities, alike.

Wish you a happy referencing.



## Preface

*'Stare decisis et non quieta movere'* ; to stand by decisions and not disturb the undisturbed. In legal context; *the courts should abide by the decisions delivered in the past by it and or superior courts and not disturb a settled law.* This doctrine known as the law of precedent supports administration of the quick and uniform justice and helps in bringing the stability and the respect for the judiciary and the judges.

Article 141 of the Constitution of India mandates that the law declared by the Supreme Court of India shall be binding on all courts within the territory of India. The principles enshrined in this Article are a tacit approval of the relevance of law of precedents which fiercely advocates the binding nature of a decision delivered by a court of law. The famous decision of the Supreme Court in Kamlakshi Finance Corporation Ltd.'s case has the effect of confirming the position of a precedent as the one with the force of law.

Precedents, besides providing uniformity of construction and interpretation, helps speedy disposal of issues in an over congested courts and helps in delivering timely justice. It immensely helps a professional in proper appreciation of the case before him and the better presentation thereof before the authorities and the courts. It assists in dispensation of advise based on the views of the courts.

Realizing the importance of the case laws for an efficient dispensation of justice, an idea was mooted by the distinguished people to present at one place, the gist of case laws, which are current and importantly, relevant. This herculean task of selecting about eleven thousand cases, out of tens of thousands of cases, reported in 24 magazines, and to summarize them, without being verbose, was undertaken and accomplished by the eminent professionals engaged in the daily practice of law. The publishers realizing the reference value, the Digest would command, has ensured that the contents are accommodated in one volume by the use of the best quality papers.

The Digest is the best tool for managing the scarce resource of any professional, namely, time. Every care has been taken to examine that the Digest gives information that is accurate and contemporaneous and that the citations of the case laws digested are correct. It will however be presumptuous on our part to rule out mistakes that could not have been noticed or corrected, mainly, on account of the mammoth size of the task on hand. Nonetheless, we seek your pardon for such mistakes and request the readers to bring such mistakes to our attention for improvements.

We acknowledge our sincere gratitude to the entire editorial team and all our friends who with their ceaseless efforts and unstinted support made this publication see the light of the day. We shall remain thankful to them forever. We also record our appreciation of the several publications whose reports of the cases, helped us in preparation of the Digest.

We have the pleasure in commemorating the Digest to mark the 150th Anniversary of the Bombay High Court, a court whose contribution to the development of the law has led the judiciary in India to command the great respect.

**Dr. K. Shivaram**

**CA Pradip Kapasi**

7th September, 2012



## From the President

Commemorating 150 years of the Bombay High Court I am pleased to present before you a Unique digest of case laws jointly published by the ITAT Bar Association, Mumbai and All India Federation of Tax Practitioners titled "Tax-Companion – Direct Taxes – Digest – 2003-2011". The Bombay High Court, which was established on August 14, 1862 celebrated 150 years on the 14th August, 2011. The Bombay High Court as an institution has produced what can be described as a galaxy of legal luminaries. Hon'ble Chief Justice of Bombay High Court Mr. Mohit S. Shah speaking on the occasion, pointed out that the Bombay High Court has given eight Chief Justices to the Country. No one can overlook the contribution made by the tax bar of Mumbai in the 150 years of Bombay High Court. On the occasion of the release of the Postage Stamp to commemorate of Shri N. A. Palkhivala on 16th January, 2004, then Prime Minister of India Hon'ble Atal Behari Vajpayee stated :—

*"In those dark days, the battle for democracy was fought by many people in many different ways. Many of us in politics under the leadership of Jayaprakash Narayanan fought it in prisons. But I have no doubt that one of the finest battles was fought in the court rooms and that fighter was Nani Palkhivala."*

Citizens of this country cannot forget the contribution of Shri Palkhivala to preserve the basic structure of Constitution of India. We are proud to say that he was President of ITAT Bar Association, Mumbai and instrumental in formation of the All India Federation of Tax Practitioners.

Hon'ble Chief Justice of India Mr. S. H. Kapadia, then as Judge of Bombay High Court in a message dated June 9, 2003; *"My Tribute to stalwarts of Tax Bar"* wrote :— (AIFTP Journal – August, 2003 P. 4)

*"In the field of Income Tax Law, out of few Luminaries, three legends; i.e. Late Shri R. J. Kolah, Late Shri S. P. Mehta and Late Shri Nani Palkhivala, who devoted their professional practice to the field of Direct Tax Laws. I deem it a great privilege to have been requested by All India Federation of Tax Practitioners to forward to them my tribute to the above stalwarts in the form of a message for their publication."*

*All the three stalwarts led the Tax Bar in intellect, clarity and integrity. They have provided a valuable legacy in the form of their juniors who today, have emulated these three stalwarts in the above virtues and who, in turn, today are the leaders of the Tax Bar."*

*I was lucky to have seen the three stalwarts in action when they were not so young and yet, after hearing them for few moments, I came out of the Court with the following words which flashed across my mind."*

*"The spirit knows no youth or age, no fatigue or death".*

*These are the qualities and virtues which should inspire our young professional lawyers and I am happy to state that, even today, in the Tax Bar practicing in the High Court, there are young professional lawyers who are following the footsteps of these three legends".*

We highly appreciate the very sincere efforts made by the Hon'ble Chief Justice of Bombay High Court and Puisne Judges in disposal of pending cases. It is very much heartening to know that Judiciary in Maharashtra has in two years disposed of backlog of 50 lakhs pending cases. In Direct tax matters about 3500 old references and about 3,000 matters admitted and final hearing, Writ petitions and about 2,450 appeals for admission are pending. We are sure this publication will help the Court in quick disposal of matters and precious time of Court and professionals can be saved. I therefore, dedicate this publication to commemorate 150 years of Bombay High Court as a contribution of Tax Bar to the tax payers.

I make an appeal to the tax professionals to adopt the values and ethics followed by the stalwarts of the Tax Bar and make an honest attempt to preserve the honour and respect of the Tax Bar, without compromising on value and ethics. The Income Tax Bar Association, Mumbai is the first Association which has formulated and adopted a code of ethics. I hope other tax professionals who are not members of the Income-Tax Appellate Tribunal Bar Association, Mumbai will also follow the footstep of the ITAT Bar Association, Mumbai.

I am pleased to state that the surplus realised from this publication will be utilised for research and educational activities of the ITAT Bar Association, Mumbai and All India Federation of Tax Practitioners including Nani Palkhivala Memorial National Tax Moot Court Competition.

**Dr. K. Shivaram**

*President*

Income Tax Appellate Tribunal Bar Association Mumbai

7th September, 2012



## From the President

All India Federation of Tax Practitioners in association with ITAT Bar Association, Mumbai is publishing a publication titled "Digest of case laws – Direct Taxes (including allied laws) (2003-2011) – A Tax Companion" dedicated in commemoration of the 150th Anniversary of the Bombay High Court having Digest of around 10400 Case Laws from Hon'ble Supreme Court, High Courts, Income-tax Appellate Tribunals and Authority for Advance Rulings. The Digest of around 10400 cases will help the tax practitioners to find out the latest decisions at one place. AIFTP has been publishing a monthly Journal and quarterly Digest of Case Laws by referring to more than 24 reports/magazines which has been found most useful, purposeful and handy by all the life members. Through this publication, our 5300 Life Members and 106 Associations spread over the country having a membership of around 60,000 tax practitioners will be benefited at large.

I am glad that Federation in association with ITAT Bar Association, Mumbai is publishing a very useful publication in commemoration of the 150th Anniversary of the Bombay High Court for the benefit of tax professionals, Hon'ble Judges, Hon'ble Members and for the benefit of revenue officials.

Dr. K. Shivaram, Past President, AIFTP, CA. Pradip Kapasi, CA. Mitesh Kotecha, Chairman, AIFTP Journal Committee Arati Vissanji, Chairperson, Publication Committee, ITAT Bar Association and all other associated with the publication deserves our appreciations and heartfelt thanks. I am of the considered opinion that, all our members getting the benefit of this publication will feel obliged for this very handy book for which very useful case laws are mentioned in a very precise manner.

I am especially grateful to my colleagues and everyone who is associated with this publication, since this prestigious publication is coming out during my tenure of office as National President and I will feel proud of everyone connected with this publication through which the year 2012 will be remembered for a landmark publication.

I wish our publication a grand success and I extend my appreciation to all concerned under the editorship of Dr. K. Shivaram.

**S. K. Poddar**

*National President*

All India Federation of Tax Practitioners

7th September, 2012



## The Income Tax Appellate Tribunal Bar Association, Mumbai

The Income Tax Appellate Tribunal Bar Association was established on 18th November, 1965. Amongst those who held the office of President were Shri G. A. Gaitonde, erstwhile President of the Income Tax Appellate Tribunal, Shri N. A. Palkhivala (1967-2002), Shri Y. P. Trivedi (2003-06), Shri S. E. Dastur (2007-08) and Shri Dinesh Vyas (2009-10). Dr. K. Shivaram has been elected as the President of the ITAT Bar Association for the term 2011-12.

The members of the ITAT Bar Association include Advocates, Chartered Accountants and Tax Practitioners practising before the Income Tax Appellate Tribunal. It has 450 members as on 12-7-2012.

The ITAT Bar Association has one of the best equipped tax law libraries in Mumbai. More than 25 magazines and journals covering tax and allied subjects are available. The journals subscribed include virtually every journal in the taxation field published in India as well as international tax journals, and journals of special interest areas such as company law, excise, sales tax and service tax as well as also AIR and SCC journals to enable Members to keep abreast of the law in other non-tax areas. The ITAT Bar Association Library is considered as one of the finest libraries in India in the field of taxation, both domestic and international. The ITAT Bar Association has a website [www.itatonline.org](http://www.itatonline.org) to enable its members and guests to access latest news and judgments, cause lists, etc. It has a lively interactive forum where Members can post queries which are discussed and answered. For the benefit of members our research team is preparing a digest of important case laws monthly. We are pleased to state that [www.itatonline.org](http://www.itatonline.org) has more than 19,000 subscribers. The library is fully air-conditioned. The library was initially funded by Shri Chunilal Karsandas, a past member and has been subsequently supported by the D. M. Harish Foundation. A magnanimous contribution from Shri S. E. Dastur, Past President of ITAT Bar Association, enabled the ITAT Bar Association to set up a separate section on International Law Library dedicated to late Shri R. J. Kolah. Shri Dinesh Vyas Past President of ITAT Bar Association has also contributed a magnanimous contribution to renovate the Library.

The ITAT Bar Association plays an active role in matters of vital importance to the Tribunal. It makes representations to concerned authorities from time to time. The Income Tax Appellate Tribunal has always enjoyed judicial independence. When there was a threat of interference from the Executive in the administration of justice, the ITAT Bar Association filed a public interest petition before the Bombay High Court. The judgment of the Supreme Court in *ITAT v. V. K. Agarwal (1999) 235 ITR 175 (SC)* dealt with the scope of administrative supervision by the Ministry of Law over the functioning of the ITAT. On another occasion, there was a move to shift the headquarters of the ITAT to Delhi. It was mainly due to the representations and efforts of the ITAT Bar Association that the Govt. was persuaded against taking this step and the headquarters continued in Mumbai. Again, when there was a proposal to constitute 5 additional Benches of Income Tax Appellate Tribunal at Navi Mumbai, it was the ITAT Bar Association that strongly opposed the move and convinced the Govt. that setting up additional Benches at Navi Mumbai was not in the interest of the tax payers or the Govt. This would not have been possible but for the PIL filed by the ITAT Bar Association before the Bombay High Court. It is of significance that not only did the Govt. accept this suggestion but allotted additional space previously occupied by the All India Radio to the Income Tax Appellate Tribunal so that the additional Benches now function alongside the then existing five Benches on the same floor.

For the development of the Tax Bar, the ITAT Bar Association since 2004 in association with All India Federation of Tax Practitioners and Government Law College have started the "Nani Palkhivala Memorial National Tax Moot Court Competition" and "Research in Tax Law" under the banner of "Palkhivala Foundation" at Mumbai, the number of participants has increased over the years. Last year students from more than 35 leading law colleges of India participated in the competition and more than 300 Law colleges participated in the Research Paper Competition.

The ITAT Bar Association has a Library Committee, Publication and Research Committee and Representation Committee.

The members of the ITAT Bar Association have adopted a code of ethics. The Committee is headed by three eminent professionals.

The members of the ITAT Bar Association share a very healthy cordial relationship. The logo of ITAT Bar Association is "Justice be our Goal".

7th September, 2012



## All India Federation of Tax Practitioners

All India Federation of Tax Practitioners is an apex body of tax practitioners associations and tax practitioners of India established on 11-11-1976, by the blessings of former Chief Justice of India, honourable Mr. Justice J.C. Shah and distinguished jurist Mr. N. A. Palkhivala. It has 119 leading associations and 5250 individual members from 26 States and 4 Union Territories. Most of leading senior advocates, advocates and chartered accountants who are practicing on direct and indirect taxes from different parts of our country, are members of the Federation. Many members of the Federation have been elevated to be Judges of the High Courts, Supreme Court and appointed as members of Income Tax Appellate Tribunal.

One of the object of the Federation is to provide an effective forum for the discussion of matters pertaining to tax laws, other laws, accountancy and their administration, for the collection, dissemination of information relating thereto, for the development of better understanding and co-operation amongst the members, tax administration, tax payers and all others concerned and to strive and work for independence of Quasi-Judicial Authorities, Appellate Authorities, the Settlement Commissions, Tribunals, Authority for Advance Ruling, Courts, or other similar Authorities.

Federations' eminent Past Presidents are Late Shri N. C. Mehta, Mumbai (1978-83), Shri B. C. Joshi, Advocate, Mumbai (1984-90), Late Shri L. M. Mahurkar, Nagpur (1991-93), Shri P. C. Joshi, Advocate, Mumbai (1994-96). Late Shri Sukumar Bhattacharya, Kolkata (1997-99), Shri N. M. Ranka, Sr. Advocate, Jaipur (2000-02), Dr. K. Shivaram, Advocate, Mumbai (2003-05) Late Shri V. Ramachandran, Sr advocate, Chennai (2006 & 07), Shri Bharatji Agrawal, Sr. Advocate, Allahabad (2008 & 09) and Shri M. L. Patodi, Advocate, Kota (2010 & 2011). Mr. S. K. Podar advocate from Ranchi has been elected as President for the term 2012-13.

The Federation has various sub-committees, such as Journal Committee, Law & Representation Committee (Direct & Indirect Taxes), Palkhivala Foundation and Research Committee, Times Committee, Membership development, etc.

The Federation publishes a monthly Journal "AIFTP Journal" covering the latest reported & unreported decisions of the Supreme Court, High Courts and Income Tax Appellate Tribunals including the articles, opinions and latest developments on direct and indirect taxes by experts in the field. The unique feature is that every quarter, it publishes the gist of important case laws published in 33 Tax Magazines from all over the country. The Federation publishes a monthly Newsletter called AIFTP TIMES which is sent to all the members. The Federations' website at [www.aiftponline.org](http://www.aiftponline.org) is an informative source for the members. Federation has its library at Mahalaxmi Income-tax office. The Federation has been making Representations to focus the grievances of trade, industry and professionals. It regularly sends Pre and Post Budget Memorandums. Many of the suggestions and the recommendations are accepted. The Kar Vivad Samadhan Scheme, 1998 was suggested by our Federation. In order to get tax laws simplified and rationalised, it has filed more than 20 Writ Petitions in public interest. Representations are made to the Central and State Governments and higher tax administration for redressal of grievances and simplification of tax laws. It regularly publishes books in simple language and question answer format at a low cost. It has published more than 33 books.

The Federation jointly with the Association Members organize National Seminars, Conferences and Conventions in various parts of the Country to update its members on all aspects of Direct and Indirect Taxation.

A unique feature of the Federation is that the faculties, chairman, trustees, office bearers and members of the National Executive and Zonal Committees pay a registration fee and bear their own travel and stay expenses. They serve with dedication, devotion and generously contribute to 'BUILD THE NATION'. Since 1994, the Federation has installed 'RANKA BEST TAX SEMINAR' competition. Since 2005, The Ranka Charitable Trust has installed Ranka Best Zone Chairman award. National Convention is held every second year. Many Chief Justices of India, Judges of the Supreme Court and High Courts have inaugurated the conferences, appreciated and applauded efforts and activities of the Federation. As per the request of the Federation, Government of India has released Commemorative Postage Stamp in Memory of Shri N. A. Palkhivala on 16th January, 2004. The then Hon'ble Prime Minister of India, Shri Atal Bihari Vajpayee released the stamp at Mumbai.

For the development of the Tax Bar Federation since 2004 in association with ITAT Bar Association and Government Law College have started the "Nani Palkhivala Memorial National Tax Moot Court Competition" and "Research in Tax Laws" in the banner of "Palkhivala Foundation" at Mumbai, wherein every year students from more than 35 leading law colleges of India are participating in the competition and more than 300 Law Colleges are participating in the Research Competition. All India Federation of Tax Practitioners in association with Asia Oceania Tax Consultants Association (AOTCA) has organized the First International Tax Conference at Mumbai from 19th to 21st November, 2009, representing 14 countries wherein 105 delegates enrolled, including 55 foreign delegates. Federation has voluntarily adopted the code of ethics in its Constitution for its members. Ethics are a way of life. The Federation is affiliated to the Asia Oceania Tax Consultants Association, Japan. The Federation has organised a successful International Study Tour in the month of May 2004 and May 2007.

Today, the Federation is considered a national integration of tax professionals of India. The Federation is making an honest attempt to develop a strong Tax Bar for our country.

7th September, 2012

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Income-tax Act, 1961

**CHAPTER I  
PRELIMINARY**

**Section 2 : Definitions**

**S. 2(1A) : Definitions – Agricultural income – Sale of rubber scrap – Industrial activity**

Sale of scrap rubber which is generated in course of extraction of rubber latex from trees cannot be brought to Income tax by applying Rule 7A because scrap is generated in the course of taking yield which is purely an agricultural operation. However, income from scrap generated in industrial activity of processing latex in to products referred to in Rule 7A(1) has to be brought to income tax under rule 7A.

*CIT .v. State Farming Corporation of Kerala (2011) 199 Taxman 371 / 244 CTR 560 / 58 DTR 104 (Ker.)(HC)*

**S. 2(1A) : Definitions – Agricultural income – Hybrid seeds – Human labour – Sale [S. 10(1)]**

Irrespective of nature of produce or product of land, whatever is grown on land with assistance of human labour and effort and whatever does not grow wild or spontaneously on soil without human labour and effort would be an agricultural product and process of producing it would be 'agriculture' within the meaning of expression in section 2(1A), therefore seeds are agricultural product and sale of seeds can be agricultural income. However, where the assessee company was interested only to have healthy foundation seeds grown for process of converting same as certified seeds, income arising to assessee by sale of hybrid seeds could not be treated as agricultural income for purpose of exemption under section 10(1). (A.Ys. 1998-99 to 2004-05).

*CIT v. Namdhari Seeds (P) Ltd. (2011) 203 Taxman 565 / 64 DTR 153 / 341 ITR 342 (Karn.)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Trees waste land – Compensation**

In the absence of any evidence of any agricultural operations having been carried out on the waste lands, the enhanced compensation received by the assessee for

compulsory acquisition of the said waste lands and trees by the State Government cannot be treated as agricultural income. (A.Y. 1989-90)

*Sajjansinh N. Chauhab v. ITO (2010) 38 DTR 155 / 232 CTR 268 (Guj.)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Income derived – Growing and maintaining trees**

Income derived by the assessee under a scheme where a land earmarked by the assessee was given to another company for growing and maintaining the trees, was not the income derived from agriculture or agricultural operation. (A.Ys. 1993-94, 1994-95)

*Papaya Farms (P) Ltd. v. Dy. CIT (2010) 325 ITR 60 / 236 CTR 311 / 46 DTR 367 (Mad.)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Undisclosed income – Sugarcane**

Where there is material to show that assessees were holding lands in which sugarcane was raised and supplied to sugar industries, for which payment was made to the assessees by cheques, no part of income disclosed by the assessees could be treated as their undisclosed income holding it to be non agricultural income.

*ACIT v. C. Subba Reddy (2005) Vol. I Tax L.R. 373 (Mad.)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Nursery – Subsequent operations**

Tribunal set aside the matter to the Assessing Officer to examine how the assessee could be said to be carrying on agricultural operation in the primary sense, i.e. tilling of the land, sowing of seeds and planting and doing similar other operations on the land. After examining that aspect, the Assessing officer had to examine the subsequent operations carried out by the assessee. Mere performing of the subsequent operations would not make the assessee's activity an agricultural activity. The High court upheld the order of Tribunal. (A.Ys. 1996-97 to 1998-99)

*Jugal Kishore Arora v. Dy. CIT (2004) 269 ITR 133 / 141 Taxman 187 / 192 CTR 174 (All.)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Fallow land – Crops**

Assessee's land which was used for growing Crops & treated as agricultural Land in Wealth Tax assessments for several years & also classified as such could not be treated non-agricultural mainly for the land lying fallow in the relevant years or being in locality where development had taken place. (A.Ys. 1988-89 to 1990-91)

*CIT v. D. RM. M. SP. SV A. Annamalai Chettiar (2004) 192 CTR 288 / (2005) 273 ITR 404 (Mad.) (High Court)*

**S. 2(1A) : Definitions – Agricultural income – Exemptions – Jagir income**

Jagir income is agricultural income. (A.Ys. 1970-71, 1971-72)



*CIT v. Satinder Singh (2003) 127 Taxman 554 (Delhi)(High Court) – followed CIT v. Satinder Singh (2001) 249 ITR 183 (Delhi)(High Court)*

**S. 2(1A) : Definitions – Agricultural income – Agricultural land – On money**

Surplus consideration on sale of agricultural land always partakes the character of agricultural Income even though surplus consideration is tainted with expression “on money” as true colour of that “on money” is Agricultural Income. (A.Y. 1999-2000)  
*ITO v. Koshy George (Dr.) (2010) 190 Taxman 4 (Mag.)(Cochin)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Sale of hybrid seeds**

Assessee is engaged in research, production, and sale of basic seeds and hybrid seeds by following method of contract farming in its own as well as leasehold land. When basic as well as secondary agricultural operations are carried on by assessee, entire income is agricultural income. (A.Y. 2002-03)  
*Advanta India Ltd v. Dy. CIT (2010) 5 ITR 57 (Bang.)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Seeds – Crops**

Seeds or crops produced at first level by assessee would constitute agricultural income as per rule 7(I)(a).  
*Pioneer Overseas Corporation v. Dy. CIT (2010) 35 SOT 467 / 127 TTJ 640 / 34 DTR 10 (Delhi)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Tea plantation**

Income generated from tea plantation taken on lease, cannot ceased to be an Agricultural Income, on ground that basic operations had already been carried out in agricultural land by the lessor. That cultivation charges and harvesting charges incurred by assessee along with other basic operations cannot be said as towards secondary operation, so as to treat the income as Non-agricultural Income. (A.Y. 2002-03)  
*Wilson & Co. Ltd. v. ACIT (2009) 184 Taxman 79 / 121 TTJ 258 / (2008) 16 DTR 428 (Chennai)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Income from fishing**

Income derived from fishing over land covered by water and which is not used for any agricultural purpose cannot be treated as agricultural income inasmuch as fish cannot be treated as produce of the land. (A.Y. 2002-03)  
*Karra Jayabhyarathi v. ITO (2006) 100 TTJ 257 / (2005) 96 ITD 414 (Hyd.)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Undisclosed income**

Reasonable agricultural income shown by the assessee could not be treated as income from undisclosed sources merely because assessee has shown agricultural income for the first time and the land records show a different produce than what was sold by assessee. (A.Y. 2001-02)  
*Bhanuben Chimanlal Malavia (Smt.) v. ITO (2006) 100 TTJ 337 (Rajkot)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Growing of grass**

Income derived by growing special quality of grass required for creating golf course, is agricultural income. (A.Y. 1997-98)

*ACIT v. P.Z. Estate (P.) Ltd. (2005) 2 SOT 563 (Delhi)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Lessee did not carry on agricultural operation**

Where assessee gave its agricultural land on lease to a party for its business operations and lessee did not carry out any agricultural operations on land, income derived by assessee from lease was not an agricultural income and was rightly treated as income from other sources. (A.Ys. 1998-99, 2000-01)

*Varinder Dass v. ITO (2005) 3 SOT 1 / 93 TTJ 201 (Chd.)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Sale of Seeds**

Income arising from use of Land for agricultural purpose will be exempt from Tax. It was held that Income from sale of seeds grown by assessee company based on agricultural research could not be treated as Agricultural Income. (A.Y. 1996-97)

*Proagro Seeds Co. Ltd. v. Jt. CIT (2003) / 126 Taxman 37 (Mag.)(Delhi)(Trib.)*

**S. 2(1A) : Definitions – Agricultural income – Nursery**

Income from Nursery would be exempt, if it is proved that basic Agricultural operations on Land were carried out. Thus Income earned from such Nursery even if meant for business would amount to agricultural Income. (A.Y. 1998-99)

*Sudisha Farm Nursery v. ITO (2003) 81 TTJ 714 / (2004) 88 ITD 638 (Delhi)(Trib.)*

**S. 2(1B) : Definitions – Amalgamation – Subsidiary – Tax avoidance**

As the scheme has been sanctioned by High Court it cannot be held that there was motive to avoid tax. Further the shares were issued to outside shareholders by assessee company in terms of scheme sanctioned by High Court and the allotment of shares was done on the basis of valuation report submitted by an independent valuer. (A.Y. 2004-2005)

*ACIT v. TVS Motors Co. Ltd. (2010) 36 DTR 89 / (2011) 128 ITD 47 / 137 TTJ 220 (Chennai)(Trib.)*

**S. 2(7A) : Definitions – Assessing officer – Addl. CIT Jurisdiction [S. 120(4)]**

The Addl. CIT cannot exercise the authority of Assessing Officer to make assessment of income, and assessment made by such Addl. CIT is liable to be quashed. Law amended w.e.f. 1-6-1996 by Finance Act, 2007. (A.Y. 1999-2000)

*Bindal Apparels Ltd. v. ACIT, 104 TTJ 950 / 8 SOT 498 (Delhi)(Trib.)*

**S. 2(11) : Definitions – Block of assets – Monies payable – Fair market value [S. 43(6)(c)]**

When an asset is sold, the block of assets stands reduced only by monies payable on account of sale of the asset and not by the fair market value of the asset sold.

*Dy. CIT v. Cable Corporation of India Ltd. ITA No. 5592/Mum/2002 dt. 29-10-2009 Bench E/392 (2010) 41B BCAJ (Jan)(Mum.)(Trib.)*

### **S. 2(11) : Definitions – Block of assets – Capital gains [S. 32(1)(iii), 50]**

Building owned by the assessee, and also building deemed to be owned by assessee as per Explan. 1 to section 32(1) in respect of which same rate of depreciation is prescribed has to be taken together for determining WDV of block of assets. No loss on account of any shortfall between the individual WDV of building of deemed ownership and any amount realised in respect thereof can be allowed as a capital loss under section 50 or as business deduction under section 32(1)(iii). (A.Y. 2004-05)

*Anand and Anand v. ACIT (2009) 29 DTR 489 / 125 TTJ 794 / 33 SOT 148 / (2010) 1 ITR 788 (Delhi)(Trib.)*

### **S. 2(11) : Definitions – Block of assets – Prescribed rate – Rules – Rate of depreciation**

#### **[S. 32(1)(iii)]**

Since rate of depreciation is prescribed in substantive provisions of Act, word 'prescribed' appearing in definition of 'block of asset' under section 2(11) cannot be construed only to mean rate of depreciation as prescribed under Income Tax Rules, 1962.

*Ulka Advertising P. Ltd. v. Dy. CIT (2005) 94 ITD 282 (Mum.)(Trib.)*

### **S. 2(13) : Definitions – Business – Adventure in nature of trade – Dividend stripping [S. 28(i)]**

One of the relevant factors for determining whether the transaction was on "Capital" or "Investment" account or was a "business activity" or "an adventure in the nature of trade" is whether the assessee has carried on similar transaction in future years.

*Anil Jain v. CIT (2007) 294 ITR 435 / 9 RC 581 / 164 Taxman 319 / 212 CTR 347 (SC)*

### **S. 2(14) : Definitions – Capital asset – Business – Adventure in nature of trade**

Where investment was made in agricultural land within limits of town panchayats, and agricultural income was shown and declared year after year, though permission was sought to develop lands, no further action was taken for over 12 years till date of sale, and entire land was sold after its value appreciated, it would not become an adventure in the nature of trade.

*ITO v. Chandar - HUF (2011) 47 SOT 17 (Chennai)(Trib.)*

### **S. 2(14) : Definitions – Capital asset – Agricultural land in India – Distance – Measurement**

Measurement of distance for the purpose of deciding the character of land, whether agricultural or not, is to be done in terms of the approach by road and not by straight line distance on horizontal plane or as per crow's flight. (A.Y. 2001-02)

*CIT v. Satinder Pal Singh (2010) 188 Taxman 54 / 229 CTR 82 / 33 DTR 281 (P&H)(High Court)*

#### **S. 2(14) : Definitions – Capital asset – Capital gains – Land [S. 45]**

Where the assessee had neither any intention to sell the purchased land at a profit nor the assessee was a regular dealer in real estate, piecemeal sale of land by the assessee which was purchased long ago would constitute disposal of 'capital asset' and not an 'adventure in the nature of trade' and surplus thereof was taxable under the head capital gains.

*CIT v. Sohan Khan (2008) 7 DTR 361 / 304 ITR 194 (Raj.)(High Court)*

#### **S. 2(14) : Definitions – Capital asset – Capital gains – Stock [S. 45]**

Stock left with the assessee on sale of the plant and machinery by the creditors in satisfaction of their dues would not constitute a capital asset and accordingly, the profit arising out of sale of such stock could not be taxed as capital gain.

*CIT v. Poddar Industrial Corporation (2008) 6 DTR 340 (All.)(High Court)*

#### **S. 2(14) : Definitions – Capital asset – Capital gains – Agricultural land – No agricultural income**

Land which was shown as agricultural land in the revenue records and never sought to be used for non agricultural purposes by the assessee till it was sold has to be treated as agricultural land, even though no agricultural income was shown by the assessee from this land, and therefore, no capital gain was taxable on the sale of the said land.

*CIT v. Debbie Alemao (Smt.) (2010) 46 DTR 341 / (2011) 331 ITR 59 / 239 CTR 326 / 196 Taxman 230 (Bom.)(High Court)*

#### **S. 2(14) : Definitions – Capital asset – Capital gains – Ownership – Granting of sub-lease constitutes transfer [S. 45]**

According to the definition of Capital Asset, "any kind of property" held by an assessee would come within the definition of Capital Asset. Therefore, it does not necessarily mean that the property which the assessee holds, must be his own.

The assessee took on lease an immovable property under a lease agreement dated 6.9.1985 for 22 years. The assessee sub-leased the said property by a Lease Deed dated 10-9-1985 for a period of 20 years. Now the question before the Assessing Officer was, whether transfer of leasehold rights in the land by the assessee in favour of the sub-lessee would amount to transfer of a capital asset at the hands of the assessee, and if so, the consideration paid by the sub-lessee to the assessee would partake the character of Capital Gains and be assessable to tax as such. The Assessing Officer held that as transfer and taxed it as Capital Gain.

On appeal to High Court by revenue, it was held that as per the Supreme Court Judgment in the case of *Palshikar (R.K.) HUF v. ITO (1988) 172 ITR 311 (SC)* the transfer by way of lease would amount to transfer of a capital asset and therefore tax is leviable as capital gains.

*CIT v. Sujatha Jewellers (2007) 290 ITR 631 / 210 CTR 313 / 160 Taxman 183 (Mad.) (High Court)*

### **S. 2(14) : Definitions – Capital asset – Cost of acquisition – Agricultural land [S. 45, 48]**

Agriculture land acquired before 1st Jan., 1954, agricultural land became capital asset only on amendment of section 2(14) w.e.f. 28th Feb., 1970 and therefore, cost of acquisition of agricultural land as on 28th Feb., 1970, is to be taken for computation of capital gains and not as on 1st Jan., 1954.

*CIT v. Gurcharan Singh (2007) 212 CTR 420 / 292 ITR 387 / 160 Taxman 211 (P&H) (High Court)*

### **S. 2(14) : Definitions – Capital asset – Lease rights – Transfer**

The assessee has taken a building on 99-year lease from her husband and executed a sub-lease against receipt of lump sum consideration as advance adjustable against future lease rentals for 97 years. The Court held that lease rights of the assessee in property constitute a capital asset and since such rights were held for less than 36 months the assessee was liable to pay short-term capital gains tax.

*G. Seetha Kamraj v. CIT (2007) 165 Taxman 117 / 284 ITR 54 / (2006) 204 CTR 487 (AP) (High Court)*

### **S. 2(14) : Definitions – Capital asset – Agricultural land – Municipal limits**

Gains arising on transfer of land not situated within 8 kms. from the municipal limits, on which agricultural operation were carried on till the date of transfer are not exigible to capital gains tax.

*CIT v. Sanjeeda Begam (Smt.) (2006) 154 Taxman 346 (All.) (High Court)*

### **S. 2(14) : Definitions – Capital asset – Capital gains – Agricultural land – Rural area – Union Territory [S. 2(14)(iii)(a)]**

Provisions of section 2(14) (iii)(a) are applicable to the rural areas of Union Territory of Delhi. Thus the land in rural areas of Union Territory of Delhi constitutes capital asset and is exigible to capital gain tax on its transfer.

*CIT v. Ranjit Singh (2004) 265 ITR 680 / 136 Taxman 440 (Delhi) (High Court)*

### **S. 2(14) : Definitions – Capital asset – Capital gains – Agricultural land – Within municipality having a population of more than 10000**

Agricultural land in area within municipality having a population of more than 10000, is a capital asset, hence capital gain arising on transfer of agricultural lands belonging to the assessee in village Nagal Dewat, Delhi was chargeable to tax.

*CIT v. Shri Chand (2004) 141 Taxman 57 (Delhi) (High Court)*

**S. 2(14) : Definitions – Capital asset – Agricultural land – Payment of compensation on acquisition [S. 194LA]**

Definition of “agricultural land” as given in section 2(14) cannot be imported for purpose of payment of compensation on acquisition of certain immovable property as per section 194LA. (A.Y. 2005-06).

*ITO v. Special land Acquisition Officer (2011) 46 SOT 458 (Mum.)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Capital gains – Town panchayat**

A Town Panchayat is notified for urban agglomeration, but it is not a municipality. Agricultural lands falling within said town panchayat would not fall within municipality, and hence is not a capital asset as per the definition under section 2(14)(iii). (A.Y. 2006-07)

*ITO v. Chander-HUF (2011) 47 SOT 17 (Chennai)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Capital gains – Agricultural land – Outside municipal limits [S. 45]**

The agricultural land, which was 2.5 kms. away from the outer limits of the municipal limits did not come within the purview of section 2(14)(iii) either under sub clause (a) or (b). Hence, the same could not be considered as capital asset. (A. Y. 2007-08).

*Dy. CIT v. Arjit Mitra (2011) 48 SOT 544 (Kol.)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Capital gains – Agricultural land – Beyond 5 Kms. municipal limits – Not notified [S. 45]**

Where land was not located in area falling within 5 Kms. of local municipal limit as notified by Central Government, it was to be regarded as an agricultural land and thus capital gains arising on its sale was not liable to tax. Tehsildhar's statement is not relevant. (A. Y. 2003-04).

*ITO v. Gahlot Farmas (P) Ltd. (2011) 48 SOT 303 / 138 TTJ 13 (UO)(Delhi)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Transfer – Capital gains – Forfeiture of Deposit [S. 2(47)]**

Assessee entered in to an agreement with power of attorney holder of land owners and paid certain amount as advance. Sale deed was required to be executed within six months from the date of agreement. As the assessee could not manage funds within the prescribed period, agreement was cancelled and amount paid by assessee was forfeited. Assessee claimed that amount forfeited represented short term capital loss, which could be set off against long-term capital gains. The Tribunal held that essential requirement for charging capital gains (or allowing capital loss) is that a transfer of capital asset should be effected in the relevant previous year. In the instant case, by paying advance money assessee did not get any right which could be termed as capital asset within meaning of section 2(14), and which was transferred within the meaning of section 2(47), therefore the assessee's claim was not allowable.



*Dinesh Babulal Thakkar v. ACIT (2010) 39 SOT 332 (Ahd.)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Membership card of stock exchange**

Membership card of a stock exchange can be construed as capital asset within the meaning of section 2(14) and therefore, consideration received on transfer is exigible for capital gains tax.

*R. M. Valliappan v. ACIT (2006) 103 ITD 63 / 287 ITR(AT) 203 / 104 TTJ 756 (SB)(Chennai)(Trib.)*

**S. 2(14) : Definitions – Capital asset – Technology information – Dossier**

Technology information in the form of a dossier is a capital asset.

*Pfizer Corporation, in Re (2004) 271 ITR 101 / 141 Taxman 642 / 192 CTR 193 (AAR)*

**S. 2(14)(iii) : Definitions – Capital asset – Agricultural land – Capital gains [S. 54B]**

Reports of the Tahsildar having certified that the assessee's land was 8 kms away from the municipal limits, the land constituted agricultural land, entitled to exemption under section 54B.

*CIT v. Lal Singh & Ors (2009) 32 DTR 345 / (2010) 325 ITR 588 / 195 Taxman 420 / 228 CTR 575 (P&H)(High Court)*

**S. 2(14)(iii)(b) : Definitions – Capital asset – Agricultural land – Capital gains [S. 45]**

Since assessee's land falling under the Rajendranagar Mandal and Rajendranagar Municipality not notified by the Central Government. Therefore merely because the land is located within a radius of 8 km. of Hyderabad District which is notified by the Central Government, the land cannot be treated as a capital asset.

*Srinivas Pandit (HUF) v. ITO (2010) 39 SOT 350 (Hyd.)(Trib.)*

**S. 2(15) : Definitions – Charitable purpose – Development and maintenance of minor Ports – Registration [S. 12A]**

The assessee was constituted for the purpose of development and maintenance of minor ports in the State of Gujarat with no profit motive. The Supreme Court held that the expression "any other object of general public utility" is of a wide connotation and includes development and maintenance of ports. The expression would prima facie include all objects which promote welfare of the general public. If the primary purpose and the predominant object are to promote the welfare of the general public the purpose would be a Charitable purpose, therefore, entitled to registration under section 12A.

*CIT v. Gujarat Maritime Board (2007) 295 ITR 561 / (2008) 166 Taxman 58 / 1 DTR 1 / 203 Taxation 263 / 214 CTR 81 (SC)*

**S. 2(15) : Definitions – Charitable purpose – Facilitate diamond trade [S. 13]**

The Assessee whose principal object was to facilitate diamond trade so that maximum revenue could be earned by way of foreign exchange by the trade and also to make diamond trade more competitive at international level, was an institute established for charitable purpose.

*DIT v. Bharat Diamond Bourse (2003) 1 SCC 741 / 259 ITR 280 / 126 Taxman 365 / (2003) 179 CTR 225 (SC)*

**S. 2(15) : Definitions – Charitable purpose – Production of television and radio programmes – Registration [S. 12A]**

Production of television and radio programmes for purpose of telecasting and broadcasting through assessee's own network or through one hired by it would not constitute advancement of any object of general public utility within the meaning of section 2(15). Application for registration has to be considered with reference to objects of assessee available as at the end of previous year during which registration is sought under section 12A.

*CIT v. A. Y. Broadcast Foundation (2011) Tax L.R. 892 / 199 Taxman 376 / 58 DTR 167 / (2012) 340 ITR 166 / 246 CTR 301 (Ker.)(High Court)*

**S. 2(15) : Definitions – Charitable purpose – Charitable trust – Registration [S. 12A & 12AA]**

Imparting education with the primary purpose of earning profits cannot be said to be a charitable activity for the purpose of Registration under section 12AA.

*CIT v. National Institute of Aeronautical Engineering Educational Society. (2009) 226 CTR 582 / 226 CTR 582 / 315 ITR 428 / 181 Taxman 205 / 184 Taxman 264 / 26 DTR 193 (Uttarakhand)(High Court)*

**S. 2(15) : Definitions – Charitable purpose – Educational activities – Registrations [S. 12A, 12AA(3)]**

Assessee is preparing students by providing coaching/guidelines to get admissions in professional institutions to pursue their studies. Assessee is *prima facie* engaged in educational activities which fall under charitable purpose. There was no evidence to show registration obtained by fraud or forgery. Cancellation of registration on ground of profit motive not permissible.

*Oxford Academy for Career Development v. CCIT (2009) 315 ITR 382 / 226 CTR 606 / 29 DTR 160 (Cal.)(High Court)*

**S. 2(15) : Definitions – Charitable purpose – Interested person – Advance of funds – Free of interest [S. 11, 12 & 13]**

Assessee trust having advanced funds to interested person free of interest and without adequate security, there was violation of Sec. 13(3) r.w.ss. 13(1)(c) and 13(2)(a), hence exemption under section 11 and 12 was rightly denied in respect of trust's income including voluntary contributions.

*Pt. Kanahya Lal Punj Charitable Trust v. CIT (2008) 297 ITR 66 / 9 DTR 100 / 218 CTR 311 (Delhi)(High Court)*



**S. 2(15) : Definitions – Charitable purpose – Mandatory fees from members – Truck operators Association [S. 12AA]**

Association charging fee from its members before the transportation on basis of the distance involved. Membership and payment of fees are mandatory and the element of voluntary contribution is missing. It cannot be termed for general public utility within the meaning of S. 2(15). Not eligible for grant of registration under section 12AA.

*CIT v. Truck Operators Association (2010) 328 ITR 636 / 243 CTR 302 / 58 DTR 260 (P&H)(High Court)*

**S. 2(15) : Definitions – Charitable purposes – Promotion of yoga and meditation – Registration [S. 11, 12AA, 80G]**

The main object of the trust was promotion of yoga and meditation and propagation of teachings of philosophers. The objects and activities of the trust were for the advancement of other objects of general public utility like attainment of physical, mental and spiritual health. No part of the income was distributed among the trustees or any other beneficiaries. Registration was granted to the assessee after the amendment of 1997, when section 12AA was incorporated. Donations to assessee-trust were entitled to get the benefit of deduction under section 80G and certificate under section 80G was valid upto 31st March, 2007.

The Hon'ble Court held that the objects of the assessee were charitable within the meaning of section 2(15) and entitlement to exemption under section 11 was valid as held by the Tribunal.

*CIT v. Rajneesh Foundation (2006) 280 ITR 553 / (2005) 199 CTR 490 / 148 Taxman 396 (Bom.)(High Court)*

**S. 2(15) : Definitions – Charitable purpose – Activity yielding profit – Education and medical relief**

In order to achieve objects of giving relief to poor and in furtherance of education and medical relief, if assessee was running some activity that yielded profit, even then registration cannot be denied.

*Prasanna Trust v. DIT (2010) 36 SOT 135 (Bang.)(Trib.)*

**S. 2(15) : Definitions – Charitable purpose – Modification of objects – Registration [S. 12A]**

Assessee-association having modified its objects to incorporate charitable purposes in the trust deed only after rejection of its earlier application for registration under section 12A the modified objects are to apply prospectively and not retrospectively and, therefore, registration was correctly granted to the assessee from the date of modification of the objects, and not retrospectively.

*Tamilnadu Leather Tanners Exporters & Importers Association v. ADIT (Exemption) (2006) 99 TTJ 1138 (Chennai)(Trib.)*

**S. 2(15) : Definitions – Charitable purpose – Form No. 10 – Accumulation of funds [S. 11(2)]**

Once the assessee had filed Form No. 10 stating the object of accumulation of funds in time, and thereafter complete minutes of the meetings containing the specified object of the accumulation before the conclusion of the assessment proceedings the claim of the assessee for accumulation of funds under section 11(2) could not be rejected. (A.Y. 1998-99)

*Associated Electronics Research Foundation v. Dy. DIT (Exemption) (2006) 100 TTJ 480 (Delhi)(Trib.)*

**S. 2(15) : Definitions – Charitable purpose – Local Authorities – Registration [S. 12A]**

Application under section 12A by a local authority constituted under the respective State Act, was rejected on the ground that objects were commercial and not charitable in nature, as the activity carried on were of commercial nature where profit motive was involved.

*Punjab Urban Planning & Development Authority v. CIT (2006) 156 Taxman 37 / 103 TTJ 988 (Chd.)(Trib.)*

**S. 2(18) : Definitions – Company in which public are substantially interested – Second subsidiary**

The second subsidiary company of first subsidiary company, whose parent company is listed in recognized stock exchange of India, would meet the requirement of being company in which public are substantially interested as per Sec. 2(18)(b)(B)(c), even if parent company does not hold any/requisite shares in the second subsidiary, or even if first subsidiary company does not hold 100% shares of second subsidiary. (A.Y. 1991-92)

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

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan or advance to share holder – Effect of finding of fact – Sham Transactions – Device adopted**

Assessee withdrawing sums from his capital account in firms and making investment. Sums debited to assessee's capital account with respective firms, firms borrowing money from companies which are closely held companies wherein assessee has substantial interest. Amount paid on behalf of assessee, transactions satisfy test of section 2(22)(e). Payments made by company whether for benefit of share holder is a question of fact.

Ratio Decidendi:

"Whether payment made by the company is for the benefit of shareholders or for the individual benefit of the assessee is a question of fact to be determined after taking into account all circumstances."

*CIT v. Mukundray K. Shah (2007) 290 ITR 433 / 209 CTR 97 / 160 Taxman 276 (SC) / 4 SCC 327*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loans or advances – Share holder**

In order that the first part of cl.(e) of section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be either to a shareholder, being a beneficial owner holding not less than ten percent of the voting power or to any concern in which such a share holder is a member or a partner and in which he has a substantial interest. Amount received from a company having been misappropriated by shareholder, there was no loan or advance. Further, even assuming that it was a dividend, it have to be taxed in the hands of the shareholders and not in the hands of the assessee concern. (A.Y. 2003-04)

*CIT v. Universal Medicare (P.) Ltd. (2011) 237 CTR 147 / (2010) 324 ITR 263 / 37 DTR 409 / 190 Taxman 144 (Bom.)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loans or advance – Share holder**

Where assessee is not a shareholder of the paying company, the dividend is not assessable in its hands. The legal fiction in section 2(22)(e) enlarges the definition of dividend but does not extend, or broaden the concept of a "shareholder". *ACIT v. Bhaumik Colour Pvt. Ltd. (2009) 313 ITR 146 (Mum)(AT)(SB)* approved in *CIT v. Universal Medicare Pvt. Ltd. (2010) 324 ITR 263 (Bom.)* & *CIT v. Hotel Hilltop (2009) 313 ITR 116 (Raj.)* followed.

*CIT v. Ankitech Pvt. Ltd. (2011) 57 DTR 345 / 242 CTR 129 / (2011) Tax LR 629 / (2012) 340 ITR 14 / 199 Taxman 341 (Delhi)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Security deposit – Date of deposit**

Since on the date on which the security deposit was given by the company to the assessee, the assessee held less than 10 percent beneficial interest in the company, the amount of security deposit cannot be treated as deemed dividend under section 2(22)(e), merely on the ground that share holding later increased to 44% on issue of shares by the company in lieu of security deposit. (A.Y. 1998-99)

*CIT v. Late C.R. Dass (2011) 57 DTR 201 / (2012) 204 Taxman 227 (Delhi)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan or advances – Shareholder – Allotment of shares of another company**

Addition of deemed dividend under section 2(22)(e) by rejecting the explanation that the payment was made for allotment of shares in another company, was justified since no certificate from the ROC in support of the contention that shares had indeed been allotted to the investing companies was produced. The Court held that findings of the Tribunal are perverse and addition under section 2(22)(e) was sustainable. (A.Y. 2005-06).

*CIT v. Sunil Chopra (2011) 242 CTR 498 / 201 Taxman 316 / 58 DTR 305 (Delhi)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Shares held in the name of partners of the firm – For purpose of S. 2(22)(e) firm is considered as “shareholder”**

It was held that for section 2(22)(e), a firm has to be treated as the “shareholder” even though it is not the “registered shareholder”. The first limb of section 2(22)(e) is attracted if the payment is made by a company by way of advance or loan “to a shareholder, being a person who is the beneficial owner of shares”. While it is correct that the person to whom the payment is made should not only be a registered shareholder but a beneficial share holder, the argument that a firm cannot be treated as a “shareholder” only because the shares are held in the names of its partners is not acceptable. If this contention is accepted, in no case a partnership firm can come within the mischief of section 2(22)(e) because the shares would always be held in the names of the partners and never in the name of the firm. This would frustrate the object of section 2(22)(e) and lead to absurd results.

*CIT v. National Travel Services (2011) 202 Taxman 327 / (2012) 249 CTR 540 / 70 DTR 321 (Delhi)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Compensation for keeping the property as mortgage – By way of advance or loan**

Advance given by company to assessee shareholder by way of compensation for keeping his property as mortgage on behalf of company to reap benefit of loan could not be treated as deemed dividend within the meaning of section 2(22)(e). Phrase ‘by way of advance or loan’ appearing in section 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is beneficial owner of shareholding not less than 10 percent of voting power, but if such loan or advance is given to such share holder as a consequence of any further consideration received by the company from such a share holder, such advances or loan cannot be treated to be deemed dividend with in the meaning of section 2(22)(e). (A.Y 1999-2000)

*Pradip Kumar Malhotra v. CIT (2011) 338 ITR 538 / 203 Taxman 110 / 64 DTR 378 / (2012) 246 CTR 493 (Cal.)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Not a share holder – Loan or advance**

Assessee is not a share holder of company from which it received a loan or advance. Section 2(22)(e) does not apply. (A.Y. 2006-07).

*CIT v. Navyug Promoters (P) Ltd. (2011) 203 Taxman 618 (Delhi)(High Court)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan to share holder – Applicable only to loans given in the year – Section 2(22)(e) not applicable if lending is not “trivial” part of business**

Section 2(22)(e) covers only the amount received during the previous year by way of loans / advances and not amounts received in an earlier year. The second condition, the expression "substantial part" does not connote an idea of being the "major part" or the part that constitutes majority of the whole. Any business which the company does not regard as small, trivial, or inconsequential as compared to the whole of the business is substantial business. (A.Y. 1997-98)

*CIT v. Parle Plastics Ltd. (2010) 236 CTR 382 / (2011) 332 ITR 63 / 196 Taxman 62 / 48 DTR 7 (Bom.)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loans for business advantages**

The amount advanced for business transaction would not fall within the definition of "deemed dividend".

*CIT v. Creative Dyeing & Printing (P) Ltd. (2009) 184 Taxman 483 / 30 DTR 143 / 318 ITR 476 / 229 CTR 250 (Delhi)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Trade advance**

The word 'advance' is used in company of the word 'loan' and hence has to be read in conjunction with the word 'loan' by applying the rule of 'noscitur a sociis'. Therefore the word 'advance' can only mean such advance which carries with it an obligation of repayment. Therefore trade advance for the purpose of commercial transaction is out of the purview of the word 'advance' as appearing in section 2(22)(e). (A.Y. 1996-97)

*CIT v. Raj Kumar (2009) 318 ITR 462 / 181 Taxman 155 / 23 DTR 304 / 228 CTR 506 (Delhi)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Normal business transactions**

Normal business transactions entered into between two entities cannot be termed as deemed dividend under section 2(22) (e) of the Act because of the share holding pattern of the two companies.

*CIT v. Ambassador Travels P. Ltd. (2008) 8 DTR 108 / 220 CTR 475 / 318 ITR 376 / 173 Taxman 407 (Delhi)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan advance to partners of firm – Firm not a Shareholder in Company**

Amount of loan advanced by the company to partners of a firm, which is not a shareholder in company, cannot be assessed as deemed dividend in the hands of the firm, even though all the partners of the firm are shareholders of the company.

*CIT v. Hotel Hilltop (2008) 5 DTR 46 / 313 ITR 116 / 217 CTR 527 (Raj.)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Advance to director – Lease of premises**

Assessee was managing director of company and company had agreed to pay an advance of

10 lakhs when it had taken the first floor on lease from assessee for the purpose meeting the cost of construction of the other three floors and the lease deed provided that the advance so paid was to be adjusted against the rent payable for other three floors, advance was to be treated as deemed dividend in assessee's hands. (A.Y. 1983-84)

*CIT v. P. K. Abubucker (2003) 259 ITR 507 / 185 CTR 558 / (2004) 135 Taxman 77 (Mad.)(High Court)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Debenture – Loan – Investment**

Debenture is a loan and therefore, debentures subscribed by the assessee shareholder are to be taken in to account for ascertaining his indebtedness to the company vis-à-vis the loan or advance taken by him and determining deemed dividend under section 2(22)(e). (A. Y. 2003-2004)

*Anil Kumar Agarwal v. ITO (2011) 51 DTR 251 / 132 ITD 314 / 138 TTJ 175 (Mum.)(Trib.)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Transfer of sum from one company to another**

Assessee was a director in two companies holding substantial shareholding in both. Certain sum was transferred from one company to another at the instance of the assessee. Assessee having substantial credit balance with company, the sum transferred cannot be treated as loan or deposit nor can be assessed as deemed dividend. (A.Ys. 2001-02, 2005-06).

*ACIT v. C. Rajini (Smt.) (2011) 9 ITR 487 / 140 TTJ 218 / 58 DTR 554 (Chennai)(Trib.)*

*Dy. CIT v. C. Subba Reddy (HUF) (2011) 9 ITR 487 / 140 TTJ 218 / 58 DTR 554 (Chennai)(Trib.)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan to a concern in which shareholder is a partner – Security deposit**

Partners of the assessee firm and not the assessee firm being share holders of the company AG Ltd., amount received by the assessee firm from the company as security deposit cannot be regarded as deemed dividend. Even other wise, the amount received from AG Ltd. being security deposit under an agreement between the parties coupled with certain obligations, cannot be regarded as payment by the company by way of advance or loan and hence, it cannot be assessed to tax under section 2(22)(e). (A.Y. 2006-07).

*Dy. CIT v. Atul Engineering Udyog (2011) 57 DTR 433 / 133 ITD 1 / 142 TTJ 209 (Agra)(Trib.)*

### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Share holder – Unsecured loan**



Assessee company not being a shareholder in the company HEBPL, unsecured loan received by the assessee from that company cannot be taxed as deemed dividend under section 2(22)(e) in the hands of the assessee company merely because a common share holder holds more than 20 percent shares in both companies. (A.Ys. 2002-03 to 2005-06).

*ACIT v. Bombay Real Estate Development Company (P) Ltd. (2011) 64 DTR 137 (Mum.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Share holder – Security deposit**

Deemed dividend can be assessed only in the hands of a person who is a shareholder of lender company and not in hands of a person other than a share holder. Expression “share holder being person who is beneficial owner of shares” referred in first limb of section 2(22)(e), refers to both a registered share holder and beneficial share holder. (A.Y. 2003-04)

*Dy. CIT v. Madusudan Investment & Trading Co. (P) Ltd. (2011) 48 SOT 360 (Kol.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Normal business transactions**

Transactions in the normal course of business cannot be treated as deemed dividend more so as the assessee is not a share holder of the payer company and none of the shareholders of the latter is a share holder in the assessee company having substantial interest. (A.Y 2006-07)

*Dy. CIT v. Timeless Fashions (P) Ltd. (2010) 128 TTJ 489 / 33 DTR 48 (Delhi)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Receipts in the ordinary course of Business**

Receipts which are in the ordinary course of business cannot be treated as deemed dividend. Also share application money received by a company from another company where the assessee has substantial interest cannot be construed as loan or advance and consequently, the same falls outside the purview of S. 2(22)(e). (A.Y. 2005-06)

*ACIT v. Sunil Chopra (2010) 2 ITR 469 (Delhi)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Loan granted to the company**

Loan granted by company to assessee company. Common share holders having more than 10% in both companies. Fact that the assessee company was neither a registered shareholder nor a beneficial share holder in both the companies, provisions of section 2(22)(e), of the Act were not applicable. (A.Y. 2003-04)

*Shruti Properties P. Ltd. v. ITO (2010) 4 ITR 186 (Mum.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Advance or loan – Other than share holder**

Deemed dividend under section 2(22)(e), can only be assessed in hands of person, who is share holder of lender company and not in hands of a person other than shareholder.

*MTAR Technologies (P) Ltd. v. ACIT (2010) 39 SOT 465 (Hyd.)(Trib.)*

#### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Advance**

Advances equal to the amount advanced during the relevant assessment year not exceeding accumulated profit after adjustment of deemed dividend of earlier assessment year is treated as deemed dividend of the relevant assessment year under section 2(22)(e). (A.Ys. 2003-04, 2004-05, 2005-06)

*Aswani Enterprises v. ACIT (2009) 120 ITD 38 / 121 TTJ 408 / 17 DTR 260 (Chennai)(Trib.)*

#### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Commercial profits – Depreciation – To be reduced from commercial profits**

Depreciation, which has been recognized as a charge towards profit both under the Companies Act, 1956 as well as the Income-tax Act has to be reduced from the commercial profit for the purpose of Section 2(22)(e) of the Act. Since Income-tax Act has prescribed particular rates of depreciation, such depreciation has to be reduced from commercial profit. (A.Y. 2004-05).

*ACIT v. Yasin Hotels (P) Ltd. (2009) 121 TTJ 713 / 19 DTR 306 (UR)(Chennai)(Trib.)*

#### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Registered shareholder**

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

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

#### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Individual – HUF**

Individual and HUF are two different entities, and their shareholding cannot be clubbed for applying provisions of section 2(22)(e).

*Jt. CIT v. Kunal Organics (P) Ltd. (2007) 164 Taxman 169 (Ahd.)(Trib.)*

#### **S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Normal business transaction**

If an amount is advanced in ordinary course of its business, and when same has never been doubted by Assessing Officer, then invoking provisions of section 2(22)(e) is not justified.

*Dy. CIT v. Lakra Brothers (2007) 162 Taxman 170 / 106 TTJ 250 (Chd.)(Trib.)*



**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Normal business transaction**

Loan by company in ordinary course of business. Company engaged in the money lending business having advanced money in the ordinary course of business the loan cannot be treated as deemed dividend under section 2(22)(e). (A.Y. 2000-01)

*Jhamu U. Sughand v. Dy. CIT (2006) 100 TTJ 1034 / 99 ITD 1 (Mum.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Undisclosed income – Block assessment**

Undisclosed income assessed by the Assessing Officer in block assessment under section 158BC would not constitute 'accumulated profits' for purposes of applicability of section 2(22)(e) and existence of accumulated profits has to be ascertained as on the date of loan or advance.

*Parmod Kumar Dang v. Jt. CIT (2006) 105 TTJ 511 / 6 SOT 301 (Delhi)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Accumulated profits – Debit balance**

Debit balance of P&L a/c is required to be adjusted to arrive at the figure of accumulated profits under section 2(22)(e) – In the absence of accumulated profits after such adjustment, loan amount cannot be treated as deemed dividend. (A.Y. 1996-97)

*Dy. CIT v. Oscar Investments Ltd. (2006) 99 TTJ 1202 / 99 ITD 339 / 7 SOT 330 (Mum.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Loan or advance – Closely-held company**

Loan or advance received by the assessee-company from a closely-held company within the same group had to be treated as deemed dividend under section 2(22)(e)

*Dy. CIT v. Oscar Investments Ltd. (2006) 99 TTJ 1202 / 98 ITD 339 / 7 SOT 330 (Mum.)(Trib.)*

*Editorial : Not good law in light of the decision of the Special Bench in case of ACIT v. Bhaumik Colour Pvt. Ltd. (2009) 118 ITD 1 (SB)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Deposits**

Huge deposits in the imprest account held by a shareholder/director without any utilization of those funds during the year is indicative of the fact that the amount given by the company to the shareholder/director towards the so-called imprest account was in fact a short – term loan and, therefore, the same is assessable as deemed dividend under section 2(22)(e). (A.Y. 1998-99)

*ITO v. Ajanta Cycle (P) Ltd. (2006) 99 TTJ 1159 (Chd.)(Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend income – Accumulated profits**

Term 'accumulated profit' has to be understood in real and commercial sense and it is not same, for purposes of examining applicability of section 2(22)(e), as is usually understood as 'taxable income' or 'assessable income'; even if a particular liability is not allowable as deduction in computing taxable profit, same has to be considered in computation of accumulated profit. (A.Y. 1989-90)

*Vikram M. Kothari v. Dy. CIT (2005) 94 ITD 496 / 96 TTJ 926 (Luck.) (Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend income – Accumulated profits – Share forfeiture receipts**

Share capital forfeiture receipts available with a company are capital receipts and do not form part of accumulated profits for purpose of section 2(22)(e). (A.Y. 1998-99)

*Jaikishan Dadlani v. ITO (2005) 4 SOT 138 (Mum.) (Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Subsidy**

The subsidy being capital receipt would be outside the scope and ambit of word Profits, so as to be treated as accumulated profits, liable to be treated as deemed Dividend under section 2(22)(e). (A.Y. 1995-96)

*Dy. CIT v. Rajasthan Wires (P) Ltd. (2003) SOT 648 / 130 Taxman 93 (Mag.) / 81 TTJ 673 (Jp.) (Trib.)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Bonus redeemable preference shares whether deemed dividend**

Applicant allotted bonus redeemable preference shares to existing equity shareholders. AAR observed that not only there has to be a distribution by the company of accumulated profits, but such distribution must entail the release of assets by the company to the share holders; mere issue of redeemable bonus preference shares would not tantamount to payment of dividends unless these shares are redeemed by the Company. Accordingly it was held that it can not be considered as deemed dividend, but would be taxable at the time of redemption of preference shares.

*Briggs of Burton (India) Pvt. Ltd. (2005) 274 ITR 595 / 145 Taxman 400 / 195 CTR 113 (AAR)*

**S. 2(22)(e) : Definitions – Dividend – Deemed dividend – Interest bearing loan from resident to non-resident group company**

Resident company intends to extend interest bearing loan to non-resident group company. Revenue's contention was that the proposed loan would be deemed dividend based on the shareholding pattern. AAR observed that for a loan to be treated as deemed dividend, it must be directly given by the company to its shareholder or such shareholder must have beneficial interest in the concern that is the recipient of the loan; but in the instant case, recipient is not a registered shareholder of lending company; also lending company's shareholder is neither a member nor a partner and does not have substantial interest in recipient as per S. 2(32), therefore it ruled that loan is not deemed dividend to the extent of

"accumulated profits". Section 2(22)(e) is a deeming provision and it is well settled that it has to be construed strictly and to attract sub clause (e) the share holder must be a registered share holder.

*Madura Coats Pvt. Ltd. (2005) 274 ITR 609 / 145 Taxman 366 / 195 CTR 193 (AAR)*

**S. 2(24) : Definitions – Income – Prizes won in entertainment programmes on television – Amendment prospective**

Prizes won in entertainment programmes on television included by amendment in section 2(24) w.e.f. 1-4-2002, and the said amendment is prospective.

*Lopamudra Misra (Miss) v. ACIT (2010) 40 Tax L.R. 49 (Orissa)(High Court)*

**S. 2(24) : Definitions – Income – Prize money – Coupon**

Incentive Prize received by the assessee on account of the coupon given to him on the strength of National Saving Certificate (NSC) would not fall within the definition of lottery, as such amount cannot be treated as income of the assessee chargeable to tax. Amendment of S. 2(24)(ix) by the Finance Act, 2001 w.e.f. 1st April, 2002 is not retrospective.

*B.K. Suresh v. ITO (2008) 16 DTR 345 / 221 CTR 80 (Karn.)(High Court)*

**S. 2(24) : Definitions – Income – Incentive bonus – Income from other Sources**

Incentive bonus received by the assessee on purchase and sale of units of mutual fund is to be reduced from the cost of purchase of the units. Such incentive received cannot be taxed as "Income from Other Sources".

*CIT v. V. S. Bhagat (Shri) (2007) 201 Taxation 251 (Delhi)(High Court)*

**S. 2(24) : Definitions – Income – Accrual – Advance lease amount – Mercantile system of accounting [S. 4, 145]**

Lease amount received in advance for leasing out film for five years, accrues on execution of agreement and is taxable in year of receipt and cannot be spread for five years, though assessee was maintaining accounts on mercantile basis. (A.Y. 1986-87)

*P. L. Ganapathi Rao v. CIT (2006) 285 ITR 501 / 206 CTR 242 (AP)(High Court)*

**S. 2(24) : Definitions – Income – Foreign exchange – Devaluation of rupee**

Accretion to balance in foreign bank due to devaluation of rupee. Foreign exchange gain earned by assessee was revenue in nature and hence be treated as income of assessee.

*Motor Industries Co. Ltd. v. CIT (2007) 291 ITR 269 / 206 CTR 23 / 160 Taxman 316 (Karn.)(High Court)*

**S. 2(24) : Definitions – Income – Non-occupancy charges – Transfer fee – Voluntary contribution – Co-operative Housing Society**

The receipt of non-occupancy charges, transfer fee and voluntary contribution from its members by the Co-operative Housing Society is not taxable.

*ITO v. Grand Pradi CHS Ltd. (2011) BCAJ Jan., 2011. P. 20 (Vol. 42B. Part 4. 436)(Mum.)(Trib.)*

**S. 2(24) : Definitions – Income – Mutually – Trade – Professional Association [S. 11]**

Since assessee had not been granted benefit of section 11 and it was also not an institution referred to in clause (21) or clause (23) or clause (23C) of section 10, provision of section 2(24)(ia) cannot be applied. (A.Y. 2005-06).

*ADIT v. Hologram Manufacturing Association (2011) 48 SOT 39 (Delhi)(Trib.)*

**S. 2(24) : Definitions – Income – Waiver of loan – Capital asset**

Waiver of loan obtained and utilized for purchasing any capital assets is not taxable as it is a capital receipt.

*Fidelety Textiles P. Ltd v. ACIT (2008) 305 ITR 97 (AT)(TM)(Chennai)(Trib.)*

**S. 2(24) : Definitions – Income – Right to transmit/broadcast – Time of accrual**

The assessee was the world satellite telecast right holder of certain feature films. In consideration for transfer of exclusive rights to transmit, broadcast, etc. of four feature films to Asian net for the period of five years, she was paid a sum of ` 4 lakhs. The Tribunal accepted the contention that she had transferred/sold her rights in the said pictures for a period of five years, which according to it, showed that the entire sum of ` 4 lakhs was the consideration for the exercise of the rights by Asianet for a period of five years. Accordingly, the Tribunal accepted the contention of the assessee that the sum of ` 4 lakhs had to be assessed in five years and not in the year under appeal alone. (A. Y. 2001-02)

*Molly Boban v. ITO, ITA No. 01/Coch./2007, Bench – N, dt. 11-3-2008 - BCAJ P. 293, Vol. 40-A, Part 3, June 2008. (Cochin)(Trib.)*

**S. 2(24) : Definitions – Income – Value of licence – DEPB**

The Assessee notionally computed the value of advance licences/DEPB and credited to the Profit and Loss account. In its return of income filed, the said amount was excluded from its income. The Assessing Officer added the same to the income of the assessee. Held that merely because book entries were passed when there was no real income accrued, there was no justification to support the addition. The addition was deleted. (A.Y. 2000-01)

*National Leather Mfg. Co. v. Jt. CIT, ITA No. 8294/Mum/2003, Bench – E, dt. 13-6-2008, (2008), Vol. 40-B, 796 BCAS (Mum.)(Trib.)*

**S. 2(24) : Definitions – Income – Non-occupancy charges – Co-operative housing society**

Assessee, co-operative housing society, earning non-occupancy charges from its members and interest from money invested – Such receipts is not liable to tax.

*ITO v. Sagar Sanjog C.H.S. Ltd., Mumbai ITAT, Bench 'H', ITA Nos. 1972 to 1974 & 2231 to 2233/Mum/2005, A.Ys. 1998-99 to 2000-01 dated 10th July, 2006 – BCAJ P. 276, Vol. 39-C, Part 2, December 2006 (Mum.)(Trib.)*

**S. 2(24) : Definitions – Income – Gift – Profit in lieu of salary [S. 17(1)(iv)]**

Gift from employer out of love and affection having no connection with employment cannot be charged as income or as profits in lieu of salary in the hands of employee. (A.Y. 2000-01)

Receipt of gift by the assessee from the donor before taking employment under him. On the facts, it cannot be treated as income of the assessee.

*Meena Rajagopal (Mrs.) v. ACIT (2006) 103 TTJ 54 (Mum.)(Trib.)*

**S. 2(24)(iv) : Definitions – Income – Benefit or perquisite – Foreign travel expenses of wife**

Expenditure incurred by company on foreign travel of wife of managing director, who went on foreign tour, was assessable under section 2(24)(iv). (A.Y. 1985-86)

*CIT v. Surekha P. Kothari (Smt) (2004) 267 ITR 406 / 135 Taxman 539 / 188 CTR 177 (Mad.)(High Court)*

**S. 2(24)(iv) : Definitions – Income – Benefit or perquisite – Director – Interest free advance**

In view of the judgment of the Apex Court in case of *V.M. Solgaocar & Bros v. CIT (2000) 243 ITR 383(SC)*, interest free advance granted by the lessor, the company to the assessee and director of the company did not constitute perquisite and, therefore interest calculated at market rate was not income under section 2(24)(iv).

*Girdhari Lal Saraf v. CIT (2003) 185 CTR 465 (Raj.)(High Court)*

**S. 2(24)(iv) : Definitions – Income – Benefit or perquisite – Shares – “Owner” of Demat shares in depository’s books, Mere “pledgee”, – No Benefit or perquisite**

With respect to dematerialized shares, though section 12 of the DP Act provides for the manner of creating a pledge, this is not the only method. Dematerialized shares continue to be “goods” and the law laid down in the Companies Act and the Sale of Goods Act for deciding whether a sale of shares has taken place or not will continue to govern;

Though a person is shown as the beneficial owner in the register of a depository participant, this is not conclusive and he can show that he is not the beneficial owner of shares but only holds the shares as a Pawnee and as security for repayment of debts due by the real beneficial owner;

As a Pawnee / pledgee, the assessee does not have absolute rights over the shares. He could sell the security in a manner contemplated by law. In case the proceeds were greater than the amount due to him, he had to pay the surplus to the pawnor. Consequently, there was no “benefit” assessable under section 2(24)(iv). (A.Y. 2004-05)

*Jt. CIT v. Mukesh D. Ambani (2011) 8 ITR 353 / 55 DTR 137 (Mum.)(Trib.)*

**S. 2(24)(iv) : Definitions – Income – Benefit or perquisite – Allotment of shares at less than book value**

No income can be said to have accrued or arisen to the assessee-company on allotment of shares of a society at alleged concession when there was no pre-existing relationship between the assessee and the society and assessee had no substantial interest in the society.

(A.Y. 2001-02)

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / 8 SOT 167 / (2007) 104 ITD 427 (Delhi)(Trib.)*

**S. 2(24)(ix) : Definitions – Income – Winning from lotteries – Winning a car on the basis of scratch card**

Winning a car under the scheme, under which a purchaser is given a scratch card, is taxable as per the Explanation (i) to the section 2(24)(ix) as winning from lottery. The value of car is taxable as such as the purchase price under the scheme included payment for the chance to win a prize in the scratch card.

*D.N. Thakur v. ITO (2007) 292 ITR 382 (At)(Chd.)(Trib.)*

**S. 2(28A) : Definitions – Interest – Interest on borrowed capital – Pre-payment premium**

Pre-payment premium for restructuring the loan, being interest paid on moneys borrowed for business purpose and allowable as revenue expenses is deductible in year in which it is paid irrespective of the previous year in which the liability to pay such sum is incurred by the appellant. Therefore, there is no scope for spreading over liability over a period of 10 years as sought to be done by Assessing Officer.

*Gujarat Guardian Ltd. v. Jt. CIT (2008) 177 Taxman 434 / 222 CTR 526 / 19 DTR 75 (Delhi)(High Court)*

**S. 2(28A) : Definitions – Interest – Unpaid purchase price**

Meaning of the word "interest" is very wide and would include on unpaid purchase price payable in any manner which would include amount payable by means of irrecoverable letter of credit. (A.Y. 1995-96)

*CIT v. Vijay Ship breaking Corporation (2003) 129 Taxman 120 / 261 ITR 113 / 181 CTR 134 (Guj.)(High Court)*

**S. 2(28A) : Definitions – Interest – Business expenditure – Discounting charges on sale bills [S. 40(a)(i), 195]**

Discounting charges on discounting bills of exchange do not amount to interest and therefore assessee was not under obligation to deduct tax at source under section 195 and hence, the discounting charges can not be disallowed by invoking section 40(a)(i). (A.Y. 2004-05)



*ACIT v. Cargill Global Trading (I) Ltd. (2009) 126 TTJ 516 / 31 DTR 289 / 34 SOT 424 / (2011) 9 ITR 558 (Delhi)(Trib.)*

**S. 2(28A) : Definitions – Interest – Discounting of promissory note – Debt**

Discounting of a promissory note does not involve creation of a debt or existence of a debtor – creditor relationship, the amount of discount cannot be termed as “interest” paid by seller of promissory note with in the meaning of section 2(28A).

*ABC International Inc USA (2011) 199 Taxman 211 / 241 CTR 289 / 55 DTR 393 (AAR)*

**S. 2(29A) : Definitions – Long-term capital asset – Period of holding – Date of possession**

For the purpose of computing period of holding of asset, the date on which the entire cost was paid would be relevant and not the date of possession.

*ITO v. Amrit Lal Aggarwal (2003) SOT 434 (Chd.)(Trib.)*

**S. 2(31)(v) : Definitions – Person – Association of persons – Individual – Assessment – HUF – Capital gains [S. 4, 45]**

After the death of sole male member of the family, the only person left in the family was the widow of the deceased and three daughters were already married. The property of the deceased would devolve on the widow and three married daughters in equal shares. Since the property of the deceased was sold without dividing the same among the assessee and her three married daughters, the capital gains on the sale of the property would be assessable in the hands of the BOI consisting of the assessee and her three married daughters. (A.Y. 2005-06).

*ITO v. Shanti Dubey (2011) 139 TTJ 502 / 58 DTR 422 (Jab.)(Trib.)*

**S. 2(36) : Definitions – Profession – Secretary to film star**

Assessee rendering service of secretary to film star. Assessee was the mother of the film actress. There was no fixed schedule or fixed nature of work, which is generally observed in case of an employment. Her work involved rendering consultation and advice on a wide array of matters. On the facts held that same is taxable as her professional income. (A.Y. 2000-01)

*Dy. CIT v. Krishna Ram Mukerji, ITA No. 45 Mum/2004, Bench – D, dt. 28-2-2007 – BCAJ P. 162, (2009) Vol. 39-D, 162 (Mum.)(Trib.)*

**S. 2(40) : Definitions – Regular assessment – Reassessment – Interest [S. 147, 217]**

Reassessment under section 147 is not a regular assessment in terms of section 2(40) and therefore, interest under section 217 could not be charged in reassessment. (A.Ys. 1988-89, 1989-90)

*Saroj Gupta (Smt.) v. ITO (2007) 106 TTJ 1073 (Delhi)(Trib.)*



**S. 2(42A) : Definitions – Short-term capital asset – Capital gains – Short term capital loss – Colourable Transaction – Genuine transaction.**

In November, 1995 assessee company took over SKB with all its assets and liabilities including rights under contract for using trade mark of Pepsico Inc., USA for certain consideration which was paid through account payee cheques. However, assessee company could not run business of SKB for various reasons including necessity of making further investment, therefore it sold entire shares of SKB vide share purchase agreement dated 23-12-1995 at a loss of ₹ 8.60 crores. Held, that the loss was allowable as a business loss despite the short holding period. (A.Y. 1996-97)

*CIT v. Oberoi Hotels (P) Ltd. (2011) 334 ITR 293 / 198 Taxman 310 / 59 DTR 272 (Cal.)(High Court)*

**S. 2(42A) : Definitions – Short-term capital asset – Capital Gains – Long Term or Short Term – Flat allotted under self finance scheme – DDA – Reinvestment [S. 2(29A), 45, 54]**

Under section 2(29A), long term capital asset is one which is not a short term capital asset. According to section 2(42A) short term capital asset at the relevant time means a capital asset held by an assessee for not more than thirty six months immediately preceding the date of its transfer. A conjoint reading of these provisions leads to one conclusion that a capital asset which is held by the assessee for 36 months would be termed as a long term capital asset and any gain arising on account of sale thereof would constitute long term capital gain.

*Vinod Kumar Jain v. CIT (2010) 195 Taxman 174 / 46 DTR 185 (P&H)(High Court)*

**S. 2(42A) : Definitions – Short-term capital asset – Capital gains – Land – Building – Short term – Long term**

If the land is held by Assessee for a period of more than the period prescribed under section 2(42A), of the Income-tax Act i.e. 36 months then it is not possible to say that by construction of a building thereon, the land which is to say that by construction of a building thereon, the land which is a long term capital asset ceased to be such long term capital asset. In case of lease hold land, the lease hold right would be a capital asset under section 2(14), of the Income Tax Act, in the hands of lessee. Therefore, capital gains arising out of sale of land and building can and would be required to be bifurcated, a gain arising out of the sale of land and gain arising out of super structure whether the building is complete or not. (A.Y. 1996-97)

*CIT v. Hindustan Hotels Ltd. (2010) Vol. 112 (10) Bom. L.R. 4664 / (2011) 237 ITR 32 / 335 ITR 60 / 49 DTR 17 (Bom.)(High Court)*

**S. 2(42A) : Definitions – Short-term capital asset – Capital gains – Short-term or long-term – dissolution – period of holdings [S. 45, 49(1)(iii)(b)]**

On dissolution the property was taken over by the partner. Partner sold the property within three days of acquiring it. Sale has to be treated as short term. The benefit of

section 49(1)(iii)(b) is not available. Benefit under section 49(1)(iii)(b) is available only if the dissolution of the firm has taken place at any time before 1-4-1987.

*P. P. Menon v. CIT (2009) 31 DTR 159 / 183 Taxman 242 / 227 CTR 573 / (2010) 325 ITR 122 / 183 Taxman 242 (Ker.)(High Court)*

### **S. 2(42A) : Definitions – Short-term capital asset – Self financing scheme – DDA**

Assessee is said to have acquired right in flat allotted under self financing scheme of DDA, from the date of draw and not from the date of registration with DDA.

In the instant case sale in A.Y 93-94 would give rise to STCG, in spite the registration with DDA was in 1981, since the right have been acquired in 1990 when the draw was held. (A.Y. 1993-94)

*H G Malik v. ACIT (2003) 85 ITD 79 / 79 TTJ 844 (Delhi)(Trib.)*

### **S. 2(47) : Definitions – Transfer – Capital asset – Capital gains – Agreement for sale of land – Divided into plots [S. 45]**

Assessee entering into an agreement for sale of land for ` 25 lakhs, but the agreement was subsequently rescinded. The assessee between the date of sale and date of rescission sub divided the land and 24 plots were conveyed by the assessee to the nominees of purchaser for a total consideration of 15,20,900/-. Assessing Officer computed Capital Gain with reference to entire sale proceeds of ` 25 lakhs. Tribunal allowed the appeal of the assessee. High Court revised the order of the Tribunal. Since in the present case no finding *qua* possession has been recorded by the Tribunal and also no sale deed was produced before the department and further there is nothing on record to indicate the name of the applicant who applied for sub-division nor revenue or municipal records have been produced, the Supreme Court remitted the matter to the Tribunal to consider the matter afresh.

*Ajay Kumar Shah v. CIT (2008) 205 Taxation 445 / 168 Taxman 53 / 215 CTR 396 / 4 DTR 214 (SC)*

### **S. 2(47) : Definitions – Transfer – Capital asset – Capital gains – Possession [S. 45]**

After introduction of the concept of deemed transfer under section 2(47)(v) of the Act, if the contract, read as a whole, passes of or transfers complete control over the property in favour of the developer, then the contract would be relevant to decide the year of chargeability. On facts the actual possession of property was handed over on 30-5-1996, hence the capital gain will be chargeable in assessment year 1997-98. (A.Y. 1996-97)

*CIT v. T. K. Dayalu (Dr.) (2011) 202 Taxman 531 / 60 DTR 403 (Karn.)(High Court)*

### **S. 2(47) : Definitions – Transfer – Capital gains – Non-compete fee – Not liable to capital gain**

The amount received for not competing with the purchaser company in future in the suburbs could not be made taxable under the heading "capital gains".

*CIT v. Amol Narendra Dalal (2009) 318 ITR 429 / 13 DTR 87 (Bom.)(High Court)*

**S. 2(47) : Definitions – Transfer – Capital gains – Capital assets – Retirement of partner**  
**[S. 45(3), 45(4), 47(ii)]**

When all the old partners retired from the firm on introduction of two new partners and new partners continued the business of firm, there was transfer of capital assets within the meaning of section 2(47) attracting section 45(4). (A.Y. 1995-96)

*CIT & Anr. v. Gurunath Talkies (2009) 226 CTR 474 / 328 ITR 59 / 189 Taxman 171 / 26 DTR 314 (Karn.)(High Court)*

**S. 2(47) : Definitions – Transfer – Capital gains – Forfeiture of earnest Money**

Where the share allotted to the assessee were forfeited by the company upon the assessee's failure to pay the call money, the cancellation of allotment was held to be transfer within the meaning of section 2(47) of the Act and the consequent forfeiture of earnest money amounted to short – term capital loss. (A.Y. 1998-99)

*Dy. CIT v. BPL Sanyo Finance Ltd. (2009) 23 DTR 75 / 223 CTR 461 / 312 ITR 63 (Karn.)(High Court)*

**S. 2(47) : Definitions – Transfer – Capital gains – Contributing as share capital**

A plot of land was contributed as share capital in a firm. The difference between the value credited in the firm's book and cost of acquisition of plot was treated as capital gain and taxed accordingly by the assessing officer. On appeal the High Court held that as the partnership in nothing but a compendium of partners and property owned by the firm is property of partner, there was no transfer of asset by the partner to the firm and accordingly no capital gain tax liability arose.

*CIT v. Shri Parker Chand Jain (2007) 200 Taxation 106 (P&H)(High Court)*

**S. 2(47) : Definitions – Transfer – Capital asset – Specific performance – Conveyance**

Giving up of right to claim specific performance of conveyance of immovable property is a relinquishment of capital asset within meaning of Act, which is chargeable to Capital Gains Tax. (A.Y. 1990-91)

*K.R. Srinath v. ACIT (2004) 268 ITR 436 / 141 Taxman 268 / 190 CTR 517 (Mad.)(High Court)*

**S. 2(47) : Definitions – Transfer – Capital assets – Capital gains – Possession of property**  
**[S. 45]**

Assessee was given possession of property as per sale agreement dated 3-4-1999 and assessee also made part payment of the consideration, the property would be deemed to have been transferred to the assessee on 3-4-1999 and since land was sold on 4-4-2003 / 2-5-2003, it would be liable to long term capital gains.

*Hasmukhbhai M. Patel v. ACIT (2011) 46 SOT 419 (Ahd.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Shares – Broker – Delivery of shares**

In case of shares, transfer by way of sale through a share broker in a stock exchange is complete only when delivery of share certificate together with instrument of transfer duly signed are delivered and consideration for transfer is paid and not when broker issues a contract note. (A.Y. 2000-01)

*Suresh K. Jajoo v. ACIT (2010) 39 SOT 514 (Mum.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital asset – Possession – Sale deed [S. 53A of Transfer Property Act, 1882]**

As no possession was taken in pursuance of contract for sale, same cannot be construed as a transfer for the purpose of section 2(47) r.w. Section 53A of the Transfer of Property Act, 1882.

Transfer takes place only when sale deed is executed and title of property is transferred. The telephone/electricity connection obtained without possession or executing sale deed cannot be treated as transfer of Capital Asset. (A.Y. 2002-03)

*ACIT v. Hotel Harbour View (2009) 184 Taxman 42 (Mag.) / 133 TTJ 454 / 44 DTR 41 / (2010) 2 ITR 178 (Cochin)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital bonds – Redemption**

Capital bonds surrendered after the date of redemption amounts to extinguishment of right and therefore, it is regarded as transfer under section 2(47). Thus, resultant loss amount to capital loss.

*Perviz Wang Chuk Basi (Mrs.) v. Jt. CIT (2007) 290 ITR 246 (AT) / (2006) 104 TTJ 805 / 102 ITD 123 (Mum.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Hire purchases agreement**

The agreement of hire purchase was entered into on 1-9-1986 and it provided for situation wherein the assessee could acquire the right of ownership over the immovable property in question, and with the condition that the consideration was to be paid by assessee in stipulated time. However assessee was allowed the possession of flat in part performance of above contract. Conveyance deed was executed on 13-1-1997; i.e., day when full and final payment was made. Property was sold on 27-1-1997. Held, that flat be treated as Long Term Capital Asset, and Income earned was Long Term Capital Gain.

*Sushma Rani Bansal (Smt.) v. ACIT (2007) 165 Taxman 145 (Mag.)(Delhi)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Capital loss – Sale of land**

Capital loss arising to the assessee on sale of land at book value to its sister concern could not be disallowed. (A.Ys. 1989-90, 1991 to 1994 & 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Capital loss – Investment written off**

Investment written off by the assessee could not be allowed as a loss, there being no transfer of capital asset within the meaning of s. 2(47). (A.Ys. 1995-96, 1996-97 & 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

**S. 2(47) : Definitions – Transfer – Income – Registration possession**

Sale of plots vis-à-vis registration — Assessee having sold and given possession of the properties to the buyers against payment of consideration in earlier years, there was transfer within the meaning of s. 2(47) at that time notwithstanding that the sale deeds were executed subsequently and, therefore, addition of profit on the sale of said plots could not be made in the relevant year. (A.Ys. 1984-85 to 1989-90)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 297 (Amritsar)(Trib.)*

**S. 2(47) : Definitions – Transfer – Conversion of Firm Part IX of the Companies Act – Revaluation [S. 45, 50]**

Conversion of Firm under Part IX of the Companies Act, 1956, does not involve any liability under Capital Gains as there is no transfer, and there is no applicability of Sections 50, 45 or any other provisions of the Income-tax Act.

Mere revaluation of assets of Firm will not result into any Capital gains liability. (A.Y. 1995-96)

*Well Pack Packaging v. Dy. CIT (2003) 78 TTJ 448 / 130 Taxman 215 (Mag.)(Ahd.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Possession – Payment**

On facts of the case, the necessary condition of transfer was said to be fulfilled during the relevant year when major payments were received and possession was transferred resulting into the capital gains liability. (A.Y. 1996-97)

*Chatrabhuj Dwarkadas v. Jt. CIT (2003) 87 TTD 147 (Mum.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Document of transfer**

Capital gain on sale of Land is assessable in the year in which document of transfer is executed, and not in the year in which registration of sale deed took place. (A.Y. 1985-86)

*Jai Marwar Co. (P) Ltd. v. ACIT (2003) 79 TTJ 178 / 131 Taxman 191 (Mag.) / (2004) 2 SOT 847 (Jodh.)(Trib.)*

**S. 2(47) : Definitions – Transfer – Capital gains – Land Building – Separate assets**

The Tribunal held, that Land & Building are separate assets, and if it is possible to work out the cost on the basis of material on record, they have to be considered separately for the purpose computing Capital gains. (A.Y. 1994-95)

### **Section 3 : "Previous year" defined**

#### **S. 3 : Previous year – Setting up of business – Commencement of business**

The date of setting up of business and date of its commencement could be two separate dates. Section 3(1) of the Act, as it stood at the relevant time and even today, has reference to the date of setting up the business as the starting point of the previous year in case of newly set up business. Expenses incurred such as travelling, conveyance, rent, telephone, brokerage, maintenance and sales promotion etc after setting up business is allowable as business expenditure.

*CIT v. L.G. Electronic (India) Ltd. (2006) 282 ITR 545 / (2005) 149 Taxman 166 / 199 CTR 205 (Delhi)(High Court)*

#### **S. 3(1)(b) : Previous Year – Income – Separate source of income**

Until 31st Dec 1981, S. Enterprises was an "AOP" and thereafter, it became a proprietary concern of the assessee w.e.f. 1st Jan., 1982, and therefore, section 3(1)(b) and not section 3(1)(f) was applicable and the Tribunal was not justified in holding that remuneration received by assessee from CTC was assessable in the A.Y. 1982-83, previous year ended on 27th Oct., 1981. Income tax liability crystallized on the last day of the previous year, therefore, new source of income could be ascertained end of previous year. (A.Ys. 1982-83, 1983-84)

*Pradeep Trust v. CIT (2010) 194 Taxman 420 / 234 CTR 187 / 325 ITR 1 / 44 DTR 44 (Cal.)(High Court)*

## **CHAPTER II BASIS OF CHARGE**

### **Section 4 : Charge of Income-tax**

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Sales tax subsidy**

The assessee received sales-tax incentive for setting up a new industrial undertaking in Patalganga. The assessee claimed that the said subsidy was a capital receipt. The Special Bench (*Dy. CIT v Reliance Industries Ltd. (2004) 88 ITD 273*) upheld the assessee's claim. On appeal by the department (for a subsequent year), the Bombay High Court held that as a finding had been recorded by the Special Bench that the object of the subsidy was to encourage the setting up of industries in the backward area by generating employment therein, by applying the "purposive test" in *CIT v. Ponni Sugars and Chemicals Ltd. (2008) 306 ITR 392 (SC)*, the subsidy was a capital receipt. On appeal, the Supreme Court held that the High Court ought not to have dismissed the appeals. Accordingly, the following question was referred back to the High Court for its consideration "Whether on the facts and circumstances of the case



and in law the Hon'ble Tribunal was right in holding that sales tax incentive is a Capital Receipt?". (A.Y. 1997-98)

*CIT v. Reliance Industries Ltd. (SC) Source : [www.itatonline.org](http://www.itatonline.org)*

*Editorial: Refer CIT v. Reliance Industries Ltd. (2011) 339 ITR 632 (Bom.) (High Court) / Dy. CIT v. Reliance Industries Ltd. (2004) 88 ITD 273 (SB) (Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Income or capital – Liquidated damages – Purchase of additional cement plant**

The supplier failed to supply the machinery within the stipulated time and the assessee received ₹ 8,50,000/- from the supplier by way of liquidated damages. The Department sought to assess the amount to Income Tax. The appellate Tribunal held that the amount was a capital receipt. The High Court answered the issue in favour of assessee. On appeal to the Supreme Court, held, affirming the decision of the High Court, that the damages to the assessee were directly linked with the procurement of a capital asset, viz. the cement plant. The amount received by the assessee towards compensation for sterilization of the profit-earning source, not in the ordinary course of business, was capital receipt in the hands of assessee. (A.Y. 1974-75)

*CIT v. Saurashtra Cement Ltd. (2010) 325 ITR 422 / 233 CTR 209 / 192 Taxman 300 / 42 DTR 49 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Subsidy [S. 28(i), 80(P)(2)(a)(i)]**

Incentive subsidy under a scheme floated with a view to boost the tempo of establishing new sugar factories and substantial expansion of existing factories and to facilitate repayment of term loans for that purpose was capital in nature, notwithstanding the mechanism of price and duty differential through which it was routed. (A.Y. 1986-87)

*CIT v. Ponni Sugars & Chemicals Ltd. (2008) 13 DTR 1 / 306 ITR 392 / 174 Taxman 87 / (2009) 208 Taxation 59 / 219 CTR 105 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Waiver of interest – Mercantile system of accounting**

Where the assessee entered into an agreement for transfer of its industrial undertaking under which the buyer agreed to pay to it interest on the unpaid consideration w.e.f. 1-3-1977 and subsequently on 30-6-1978 the parties agreed to defer the date of commencement for payment of interest to 1-7-1979 and the question arose whether the interest foregone by the assessee could be assessed for the A.Ys. 1979-80 and 1980-81 under the accrual system of accounting. The Court held that;

- (a) As regards A.Y. 1979-80, the interest had already accrued and could not be wiped out by the subsequent agreement. The waiver could not have retrospective effect.
- (b) As regards A.Y. 1980-81, there was full scope to the assessee to defer the interest and as this was done before accrual, the interest was not chargeable to tax. (A.Y. 1980-81)



*CIT v. Sarabhai Holdings Pvt. Ltd. (2008) 11 RC 593 / 307 ITR 89 / 175 Taxman 82 / 219 CTR 644 / 14 DTR 137 / (2009) 208 Taxation 351 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Continental Shelf – Notification**

Notification dated 31-3-1983 extending provisions of 1961 Act, to Continental Shelf and Exclusive Economic Zone of India with effect from 1-4-1983 was not retrospective and, hence did not apply to assessment year 1983-84. (A.Ys. 1983-84, 1984-85)

*Oil & Natural Gas Corporation Ltd. v. Atwood Oceanic International., SA (2008) 170 Taxman 203 / 217 CTR 305 / 8 DTR 257 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Association of persons – Mutuality**

Once, it is held that assessee could not be taxed on the income earned by it from letting rooms to its members on the basis of principle of mutuality; no useful purpose would be served in proceeding with other questions in appeal in relation to assessee.

*CIT v. Cawnpore Club Ltd. (2004) 140 Taxman 378 / 184 Taxation 205 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Reserve Fund**

Amount collected and set apart towards Molasses Storage Reserve Fund by sugar manufacturer is not taxable as income. (A.Y. 1998-99)

*CIT v. New Horizon Sugar Mills (P.) Ltd. (2004) 269 ITR 397 / 141 Taxman 254 and CIT v. Ambur Co-op. Sugar Mills Ltd. (2004) 269 ITR 398 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Deposit non-refundable – Chief Minister's Relief Fund – Cane Development Fund – Sugar manufacturing Co-operative society**

Considering the bye-laws as a whole, it was difficult to hold that either the assessee or the depositor would exercise complete dominion over the deposited amounts. Thus the non refundable deposits of members could not be treated as income of the assessee-society. Refundable deposits clearly liable to be excluded from the assessee's taxable income. Amount collected on account of the Chief Minister's Relief fund, etc., should not be treated as income of the assessee. The amount collected as Cane Development Fund shall be treated as income of the assessee. (A.Ys. 1984-85 to 1988-89)

*Siddheshwar Sahakari Sakhar Karkhana Ltd. v. CIT (2004) 270 ITR 1 / 139 Taxman 434 / 191 CTR 66 / 183 Taxation 477 (SC) / 12 SCC 1*

*Editorial:- Decision of the Bombay High Court in CIT v. Chhatrapati Sahkari Sakhar Kharkhana Ltd. (2000) 245 ITR 498 / 111 Taxman 176 (Bom.) / 163 CTR 275 reversed in part.*

#### **S. 4 : Charge of Income-tax – Income – Income or capital – Arbitration award – Interest on compensation awarded [S. 28]**

The arbitrator awarded a certain amount by way of compensation for work done and also awarded interest thereon. The interest awarded by the arbitrator was assessable as a business receipt. It cannot be treated as capital in nature.

*CIT v. B. N. Agarwala & Co. (2003) 259 ITR 754 / 180 CTR 311 / 129 Taxman 78 (SC)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Subsidy for setting up Industry**

Subsidy received for setting up agro based industrial unit in backward area was determined with reference to capital investment, is a capital receipt.

*CIT v. Siya Ram Garg (HUF) (2011) 49 DTR 126 / 237 CTR 321 (P&H)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Interest – Pre-commencement**

Interest on deposit of margin money for opening of letter for credit for import of machinery at the stage of setting up of industrial unit of the assessee is a capital receipt and the same is to be set off against pre-operative expenses. (A. Y. 1996-97)

*CIT v. Arihant Threads Ltd. (2011) 49 DTR 251 (P&H)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Compensation – Termination**

Compensation received from the land owner on termination of development agreement was the deprivation of potential income and loss of future profits as mentioned in the settlement agreement and not for divesting the assessee of its earning apparatus as restrictive covenant in the said agreement only prohibited the assessee from undertaking a similar project in the vicinity of the existing project without consent of the land owner for the limited duration of three years, and therefore, the compensation was a revenue receipt. (A. Y. 2001-02)

*Ansal Properties & Industries Ltd. v. CIT (2011) 238 CTR 126 / 196 Taxman 45 / 49 DTR 78 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Assessment – Law Applicable – Financial Year – Assessment Year [S. 143]**

Unless it is made clear in an amendment as to whether it comes in to effect for the assessment year or financial year, normally it is to be deemed that such benefit of the amendment is for the assessment year. (A. Y. 2000-01)

*Mukesh C. Patel v. CIT (2011) 238 CTR 332 / 51 DTR 62 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Interest Income – Banks and Non-banking Financial Institutions – Non-performing assets – Accrued interest to be excluded from income**

Credit of accrued interest may be excluded from the income of Bank and non banking financial institutions, where interest outstanding is attributable to assets characterised as a non-performing assets under the notification issued by the RBI. The High Court

held that mercantile system of accounting recognises only income which is realisable. (A.Ys. 1995-96 to 2000-01)

*CIT v. Coimbatore Lakshmi Inv. and Finance Co. Ltd. (2011) 331 ITR 229 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Excess refund – Interest subsidy**

Excise Refund and Interest Subsidy received by the assessee from Government of India in pursuance to a New Industrial Policy of Government which was aimed at acceleration of industrial development and generating employment in the State in public interest were held to be capital receipt in the hands of the assessee.

*Shree Balaji Alloys & Ors. v. CIT & Ors. (2011) 51 DTR 217 / 239 CTR 70 / 333 ITR 335 / 198 Taxman 122 (J&K)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Income of Club from surplus funds – Interest from fixed deposits and government securities**

Assessee company is running a recreation club for its members the income earned from the members is exempt on the principle of mutuality. Income of the club from FDR's in banks and Government securities, dividend income and profit on sale of investment is also covered by the doctrine of mutuality and is not taxable. (A.Y. 2003-04)

*CIT v. Delhi Gymkhana Club Ltd. (2011) 53 DTR 330 / 339 ITR 525 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Interest earned – Performance guarantee**

Interest income earned by the assessee on the fixed deposit for performance of guarantee of contract was held to be capital in nature which could not be assessed as income from other sources. (A.Y. 2003-04)

*CIT v. Jaypee DSC Ventures Ltd. (2011) 335 ITR 132 / 53 DTR 305 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Method of accounting – Non-performing assets [S. 145]**

Income from non-performing assets should be assessed on cash basis and not on mercantile basis despite of the assessee maintaining accounts on mercantile basis.

*CIT v. Canfin Homes Ltd. (2011) 201 Taxman 273 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Interest – Mortgage**

Assessee advanced certain amount against mortgage. Right from date of granting loan borrowers had neither paid principal amount nor interest amount. The guarantor company was declared as sick company. Assessee had not shown the interest on the ground that enforceability of mortgage as a mode of recovery was complicated. The

Court held that mere difficulty in successfully enforcing mortgage does not make debt bad, therefore interest was assessable on accrual basis. (A.Ys. 2000-01 to 2003-04). *Rohini Holdings (P) Ltd. v. CIT* (2011) 202 Taxman 341 / 64 DTR 360 / (2012) 246 CTR 500 (Mad.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Income or capital – Capital receipt – Sales tax incentive**

The object of the subsidy was to encourage the setting up of industries in back ward area by generating employment therein, thus, the subsidy was on capital account and the sales tax incentive was a capital receipt. (A. Y. 1997-98).

*CIT v. Reliance Industries Ltd.* (2011) 339 ITR 632 (Bom.)(High Court)

*Editorial: Supreme Court set aside the matter to the High Court to decide the question afresh. CIT v. Reliance Industries Ltd. www.itatonline.org. Refer CIT v. Reliance Industries Ltd. (2011) 339 ITR 632 (Bom.) (High Court) Dy. CIT v. Reliance Industries Ltd. (2004) 88 ITD 273 (SB)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Subsidy for industrial development – 90% of sales tax paid**

Subsidy received by assessee from the State Government under a scheme of industrial promotion, which was meant to provide financial assistance to specified industries for expansion of capacities, modernization and improving their marketing capabilities, is capital receipt, though the amount of subsidy is equivalent to 90 percent of the sales-tax paid by the beneficiary. (A. Y. 1995-96).

*CIT v. Rasoi Ltd.* (2011) 245 CTR 667 / 335 ITR 438 / 59 DTR 369 (Cal.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Share capital in foreign country – Gains due to fluctuation in foreign exchange – Capital receipt**

The assessee is a multiproduct company, had issued equity shares overseas by way of global depository receipts in US dollars, which was to be repatriated into the country as and when required for end uses as approved by the Ministry of Finance and Industry. It was intimated to the Government of India, that the share capital so raised abroad, 79% of which would be used to acquire assets and 21% for general corporate use. The balance amount not utilised were kept in fixed deposits in the UK and the same was reflected in the balance sheet at the exchange rate prevailing on March 31st The assessee for the relevant year had accounted in its balance sheet, the gains arising from exchange rate fluctuation of foreign currency. The Assessing Officer treated this entire foreign gain on exchange rate fluctuation as revenue receipt. On appeal to the High Court by the department the High Court while dismissing the appeal held that the relevant consideration would be to see the source of funds held and not the utilizations of the funds. The High Court held that even in cases where money is raised in India, the money thus collected as share capital would be treated as capital receipt, and merely because part of the share capital was used for working capital, the same could not be treated as revenue receipt. (A.Y. 1997-98)

*CIT v. Jagatjit Industries Ltd. (2011) 337 ITR 21 / (2010) 191 Taxman 54 / (2009) 32 DTR 168 (Delhi)(High Court)*

**S. 4 : Charge of Income-tax – Income – Capital receipt – Interest and Rent**

Interest and rent receipt from its employees and oustees in dam area had a nature of capital receipt as the construction process was still on and business activity not started. (A.Ys. 2000-01, 2001-02)

*[Followed CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315 / 151 CTR 276 / 102 Taxman 94 (SC)]*

*CIT v. Tehri Hydro Development Corporation (2009) T.L.R. 456 / (2009) 183 Taxman 246 / 25 DTR 100 (Uttarkhand)(High Court)*

**S. 4 : Charge of Income-tax – Income – Capital receipt – Affirmative voting rights [S. 2(14)]**

Amount received by assessee for affirmative voting on a resolution was not a business receipt, but received as bounty or wind fall for voting affirmatively and supporting a resolution and was a capital receipt. Amount received by Assessee as casual receipt in the nature of windfall and not repetitive in character would not amount to income and therefore, not liable to tax.

*CIT v. David Lopes Menezes Late (2011) 336 ITR 337 / 50 DTR 203 / 238 CTR 38 / (2010) 195 Taxman 131 / (2010) Vol. 112 (10) Bom. L. R. 4655 (Bom.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Duty drawback and cash assistance – Accrual basis**

Addition on account of duty drawback and cash assistance on accrual basis held to be not justified.

*CIT v. Bajaj Auto Ltd. (2010) 322 ITR 29 / 20 DTR 241 / 182 Taxman 163 (Bom.)(High Court)*

*Editorial:- CIT v. Matchwell Electricals I Ltd. (2003) 263 ITR 277 / 181 CTR 562 / 127 Taxman 159 (Bom.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Association of persons – Principle of consistency**

Nursing home run by two individuals Authorities accepting for long length of time that it was not an association of persons. No new material or fact found. Held that nursing home cannot be treated as an AOP on same facts. (A.Ys. 1995-96 & 1997-98)

*Narendra Prasad (Dr.) & Ors. v. CIT (2010) 322 ITR 171 / 42 DTR 132 / 235 CTR 580 (Patna)(High Court)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipts – Non-compete fee**

Non-compete fee received by assessee for refraining from manufacturing and selling timepieces for a period of ten years after the sale of one unit while it was

continuing with its other business activities constituted revenue receipt. (A.Y. 1995-96)

*CIT v. Tata Coffee Ltd. (2010) 326 ITR 214 / 229 CTR 38 / (2009) 29 DTR 336 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Concession in rate of excise duty**

Receipts from the sale of levy free sugar and concession in the rate of excise duty were capital receipts not liable to tax. (A.Ys. 1991-92 to 1994-95)

*CIT v. Tiruttani Co-op. Sugar Mills Ltd. (2010) 322 ITR 59 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Compensation – Revenue or capital**

The assessee firm entered into an agreement for sale of a cinema building along with land. The agreement failed and as per terms of agreement the firm became entitled to compensation. It was held that compensation amount received on breach of contract was a capital receipt. (A.Y. 1974-75)

*S. Zoraster & Co. v. CIT (2010) 322 ITR 35 / 31 DTR 107 / 182 Taxman 52 (Raj.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Club – Fixed deposits**

Interest income earned by the assessee club from fixed deposits and other investments made by it is not exempt on the principle of mutuality.

As regard the other miscellaneous income viz hall charges, guest house charges, mike charges, etc. the High Court remanded these issues back to the Tribunal to be decided in light of Apex Court decision in the case of *CIT v. Bankipur Club Ltd. [(1997) 226 ITR 97 / 140 CTR 102 / 92 Taxman 278 (SC)]*, as the Tribunal had not given any finding on these miscellaneous receipts. (A.Ys. 1994-95 to 1997-98)

*Coimbatore Cosmopolitan Club v. CIT (2010) 34 DTR 62 / 229 CTR 414 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Surplus on cancellation of forward foreign exchange contract [S. 2(47), 28(iv)]**

Surplus received by the assessee upon cancellation of forward foreign exchange contract was a capital receipt not liable to tax, as the foreign exchange acquired under the contract is for the purpose of discharging an obligation on capital account. Mere cancellation of the contract does not result in any transfer of any asset, even if the extended definition under section 2(47) is made applicable. (A.Y. 1993-94)

*Dy. CIT v. Garden Silk Mills Ltd. (2010) 38 DTR 48 / 320 ITR 720 / 231 CTR 392 (Guj.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Reimbursement of expenses – Travelling**



Amount received by assessee towards reimbursement of traveling expenses of its technicians who were deputed to the establishment of a customer is not chargeable to tax. (A.Y. 1998-99)

*DIT v. Krupp Udhe GmbH. (2010) 38 DTR 251 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Interest on bank fixed deposits**

The excess of income over expenditure in respect of the effluent receipts is exempt from income tax on the principle of mutuality. Income from interest on fixed deposits are chargeable to Income tax Act. (A.Y. 2001-02)

*CIT v. Common Effluent Treatment Plant (Thane Belapur) Association (2010) 328 ITR 362 / 46 DTR 78 / (2010) Vol. (6) (Bom.) L.R. 2791 / 192 Taxman 238 / 235 CTR 548 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Rental income**

Rental income earned by assessee a partnership firm by letting out its property to its partners is not exempt on the principle of mutuality, since the business of the firms is not restricted to partners only. (A.Ys. 1996-97 to 1999-2000)

*Prabhashankar Plaza v. ITO (2010) 40 DTR 37 / 191 Taxman 249 / 327 ITR 582 / 233 CTR 379 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Development Fund**

Matter remanded to the Assessing Officer to find out whether the development fund is created by the assessee on his own or at the instance of the association pursuant to the agreement entered in to between the association and the assessee and whether the assessee is entitled to claim the development fund from the association as a matter of right and then to decide the taxability in assessee's hands. (A.Ys. 1996-97 to 2002-03)

*CIT v. Mahesh Bhupathi (2010) 43 DTR 159 / 235 CTR 301 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Excess cash received from customer – Bank**

Excess cash received at the cash counters of the branches of the bank represents the liability to pay to the customers as and when they may demand payment, therefore such excess cash collection cannot be considered as the income of the assessee. (A.Y. 2002-03)

*CIT v. Bank of Rajasthan Ltd. (2010) 233 CTR 530 / 40 DTR 173 / 326 ITR 526 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Arbitration proceedings pending**

Amount due to assessee in terms of royalty agreement. Dispute between parties and arbitration, proceedings pending. There is no accrual of income. Income would be



assessable only on completion of arbitration proceedings, and when the award is made.

*FGP Ltd. v. CIT* (2010) 326 ITR 444 / (2008) 9 DTR 295 / 177 Taxman 147 (Bom.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Interest – Sale of shops**

Assessee, a co-operative housing society, was formed for the development and construction of residential houses / flats for its members and to provide them necessary common amenities and facilities, and therefore, the principle of mutuality would apply to the income of the society, including the income from sale of shops. Principle of mutuality is attracted also to the interest derived from deposits made by the society out of contribution made by its members. (A.Y. 2001-02)

*CIT v. Talangang Co-operative Group Housing Society Ltd.* (2010) 44 DTR 58 / 195 Taxman 110 (Delhi)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Interest from banks**

Interest income on investments with banks is not exempt on the principle of mutuality even though the concerned banks are members of the club. (A.Ys. 2001-03 to 2005-06)

*CIT v. Wellington Gymkhana Club* (2010) 46 DTR 22 (Mad.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipts – Incentive Scheme**

Amount received under incentive scheme for repayment of loans to set up new units is capital receipt. (A.Y. 1996-97)

*CIT v. Kisan Sahkari Chini Mills Ltd.* (2010) 328 ITR 27 (All.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Gift by devotees – Vocation – Profession [S. 2(36), 28(i)]**

Where the devotees out of natural love and affection and veneration used to assemble in large numbers on the birthday of the assessee and voluntarily made gifts, it cannot be said that the amount received by the assessee by way of gift would amount to vocation or profession since it is not the case of the Department that the devotees were compelled to make gifts on the occasion of the birthday of the assessee and therefore the same were not taxable as income in the hands of the assessee. (A.Y. 2004-05)

*CIT v. Gopala Naicker Bangaru* (2010) 46 DTR 280 / 193 Taxman 71 / 236 CTR 82 (Mad.)(High Court)

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipts – Compensation**

Compensation in the form of annual installments under U.P. Zamindari Abolition Compensation Bond & U. P. Zamindari Abolition Compensation Grant Bonds is nothing

but Capital Receipt in the hands of the recipient – Therefore, not exigible to tax even though the same happened to be in excess of its purchase value. (A.Y. 1979-80)  
*Anand Babu Agarwal v. ITO (2010) 236 CTR 598 / 326 ITR 51 / 48 DTR 194 (All.)(High Court)*

#### **S. 4 : Income – Capital receipt – Interest earned by parking surplus funds in bank**

Prior to commencement of business, interest earned by parking surplus funds in bank, constitutes a capital receipt and hence is eligible for being set-off against pre-operative expenses. (A.Ys. 2001-02, 2002-03)

*Indian Oil Panipat Power Consortium Ltd. v. ITO (2009) 181 Taxman 249 / 230 CTR 199 / 315 ITR 255 / 20 DTR 107 (Delhi)(High Court).*

#### **S. 4 : Charge of Income-tax – Income – Principle of mutuality – Co-operative society**

Non-occupancy charges received by housing co-operative society. Object of the contribution is for the purpose of increasing the society's funds, which could be used for the object of the society. Object of the society is to provide services, amenities and facilities to its members. In these circumstances principle of mutuality will apply to non-occupancy charges. Transfer fees received from members is not taxable on principle of mutuality.

*Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) 320 ITR 414 / (2009) 184 Taxman 292 (Bom.)(High Court)*

*Editorial:- Sind Co-op. Hsg. Society v. CIT (2009) 317 ITR 47 / 182 Taxman 346 / 226 CTR 145 / 26 DTR 149 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual of income – Sales tax refund [S. 41(1)]**

Once an order of refund of sales tax has been passed, the same has to be treated as income notwithstanding pendency of appeal against refund order. (A.Y. 1989-90)

*CIT v. Beirsdorf (India) Ltd. & Anr. (2009) 28 DTR 188 / 183 Taxman 178 / 324 ITR 106 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Foreign exchange fluctuations**

Gains on account of foreign exchange fluctuations in respect of share capital collected in foreign exchange is capital receipt. (A.Y. 1997-98)

*CIT v. Jagatjit Industries Ltd. (2009) 32 DTR 168 / 191 Taxman 54 / 337 ITR 21 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Interest income not exempted**

Investment of surplus funds by the assessee club with member banks and institutions not with a definite idea of using the same in any specific projects for the further

development of the infrastructural facilities of the club did not satisfy the concept of mutuality and therefore benefit of exemption cannot be extended to the interest income. (A.Ys. 1996-97 to 1998-99)

*Madras Gymkhana Club v. Dy. CIT (2009) 226 CTR 176 / 328 ITR 348 / 183 Taxman 333 / 28 DTR 9 (Mad.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Election agent – Receipt – Spent**

Amount received and spent by the election agent of the assessee could not be treated as income in the hands of the assessee, as there was no evidence to show that amount was used by the assessee for only personal purpose of the assessee. (A.Y. 1992-93)

*CIT v. Late Rajesh Pilot (2008) 11 DTR 115 / 219 CTR 403 / 175 Taxman 8 (Delhi) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Fixed deposits**

Interest earned on the fixed deposit by a Company formed for the benefit of certain section of shopkeepers, was held to be not exempt from tax on the principle of mutuality as the memorandum and article of association of the Company permitted it to do various businesses, which involved commercial activities. (A.Y. 1995-96)

*Devi Ahilya New Cloth Market Co. Ltd. v. CIT (2008) 12 DTR 33 / 222 CTR 583 (MP) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Sale of business**

Where the assessee sold his business as a going concern for certain consideration and by a separate agreement the assessee agreed not to compete with the purchaser, the High Court held that the amount received by the assessee under the non-compete agreement was a capital receipt not chargeable to tax under the Act.

*CIT v. Amol N. Dalal (2008) 13 DTR 87 / 318 ITR 429 (Bom.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Income shown in the return [S. 10(13)(ii), 264]**

The assessee filed return for the A.Ys. 1990-91, 1991-92 and 1993-94 including the annuity received on superannuation as income. The assessee filed application under section 264 seeking exemption under section 10[13][ii] on the said annuities. The same was rejected as the assessee himself has offered the same for tax. The Hon'ble court, on a writ petition under Article 226 of the Constitution, observed that Article 265 of the Constitution mandates that no person shall be taxed without the authority of law. Since in the present case there is no authority to tax annuities received by the petitioner, we consider it appropriate to exercise our extraordinary power to correct the injustice. (A.Ys. 1990-91 to 1993-94)

*S.D.S. Mongia v. C.B.D.T. (2007) 160 Taxman 101 / 211 CTR 357 (Delhi) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Sale of technical know-how**

Outright sale of technical know-how, lump sum consideration received by assessee for sale of five models of boilers developed by it along with technical know-how to a company and for giving up the business of manufacturing and/or designing any type of boilers is a capital receipt. (A.Y. 1978-79)

*Lipi International v. CIT (2007) 213 CTR 1 / 301 ITR 262 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Non-compete fee [S. 28(1)]**

Agreement entered into between assessee and one construction company created by assessee that assessee was not to compete with said company for certain period viz. 5 years, in consideration, said amount of compensation be treated as income of assessee and not as capital receipt, even by invoking section 28(va). (A.Ys. 1992-93, 1994-95, 1995-96)

*Tam Tam Pedda Guruva Reddy v. Jt. CIT (2007) 291 ITR 44 / 206 CTR 97 / 165 Taxman 85 (Karn.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – HUF – Property of HUF – One male member**

Joint family property does not lose its character merely because at one point of time there was only one male member or one coparcener; hence an assessee receiving share on partition of HUF property who subsequently gets married, is entitled to be assessed in respect of the said property in the status of HUF. (A.Ys. 1981-82, 1982-83)

*Prakash B. Sultane (Dr). v. CIT (2006) 280 ITR 593 / (2005) 148 Taxman 353 / 198 CTR 529 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Assignment of trade mark – Non-competition – Certain period**

The amounts received for assignment of right to use trade mark for a period of eight years and for non-competition in manufacturing, selling and distribution of ice-cream for a period of ten years are capital receipts not exigible to tax prior to the A.Y. 1998-99.

*CIT v. Milk Food Ltd. (2006) 152 Taxman 50 / 280 ITR 331 / 199 CTR 567 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mercantile system of accounting – Accrual**

Assessee following mercantile system of accounting engaged in construction work, Part of amount retained by clients to be paid after completion of contract and after inspection did not accrue to the assessee till the job was done. (A.Ys. 1997-98, 1998-99)

*CIT v. East Coast Construction Ind. Ltd. (2006) 283 ITR 297 / 203 CTR 460 / 160 Taxman 399 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual of Income – Retention money**

The payment of retention money in the case of contract is contingent on satisfactory completion of contract work. The right to receive the retention money accrues only after the obligations under the contract are fulfilled and therefore, it would not amount to income of the assessee in the year in which the amount is retained.

*CIT v. Associated Cables P. Ltd. (2006) 286 ITR 596 / 206 CTR 580 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Non members – Renting of hall**

Income by way of rent derived from letting of marriage hall to non-members. No application of the principles of mutuality in this case as the hall was let out to non-members who are made temporary members only for the purpose of such letting. (A.Y. 1988-89)

*CIT v. Trivandrum Club (2006) 202 CTR 265 / 282 ITR 505 / 153 Taxman 481 (Ker.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Non-complete fees**

Amount received by the assessee from the company of which he was Chairman, which is engaged in the business of manufacture and marketing of shaving blades, for not associating with any person who is engaged in the similar business. The amount received is a Capital Receipt and not taxable.

*CIT v. Saroj Kumar Poddar (2006) 151 Taxman 153 / 200 CTR 616 / (2005) 279 ITR 573 (Cal.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Compensation on acquisition – Interest**

In case where the compensation awarded by the Government was disputed and the compensation was deposited in Fixed Deposit. The interest accrued on the Fixed deposit was included in the income of the assessee by the Assessing Officer. Held that interest on Fixed Deposit Receipt has already accrued and there was no lien or encumbrance created on this amount of interest, Further, the bank in the present case has also not provided any guarantee to the extent of interest accrued and thus there is no liability on the bank to deposit this amount in case the appeal of the State goes against the assessee. (A.Y. 1994-95)

*CIT v. M. R. Sapra (Dr.) (2005) 276 ITR 41 / 197 CTR 207 / 148 Taxman 292 (P&H)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Double taxation – Different legislations**

Where tax is imposed by two different legislation under different enactments, it can not be said to be double taxation. (A.Y. 1986-87)

*Mahaveer Kumar Jain v. CIT (2005) 277 ITR 166 / 142 Taxman 130 / 191 CTR 303 (Raj.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Grant in aid – Capital receipt**

Grant in aid received by assessee under scheme of State of U.P. introduced with object to promote construction of permanent cinema buildings in backward area, was a capital receipt. Thus even though the grant-in-aid was given after the business had been set up and was related to the amount of entertainment tax. (A.Ys. 1990-91, 1991-92)

*Kalpana Palace v. CIT (2005) 275 ITR 365 / (2004) 141 Taxman 392 / 191 CTR 466 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Payment to partners legal heirs**

Out going partner has a right to share of profits made by assessee – firm since he ceased to be partner and payment of such sum to his legal heirs by assessee firm would amount to diversion of income by overriding title. The said amount is allowable as a deduction (A.Y. 1977-78)

*CIT v. Varanasi Nagar Vikas (2005) 275 ITR 140 / 142 Taxman 224 / 192 CTR 323 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Charity – Collections**

Sum collected by assessee on account of charity would not constitute assessee's income.

(A.Y. 1973-74)

*CIT v. Duttom Enterprises (2006) 150 Taxman 482 / (2005) 197 CTR 606 (P&H)(High Court)*

**S. 4 : Charge of Income-tax – Income – Underwriting commission – Own subscription**

Underwriting commission earned on shares subscribed by public is taxable as income of underwriter; however commission earned on shares subscribed by underwriter itself, is not chargeable to tax. Such amount merely goes to reduce the cost of the shares and cannot be treated as income. (A.Ys. 1972-73, 1973-74)

*CIT v. U.P. State Industrial Development Corpn. (2005) 145 Taxman 547 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Compensation – Capital or revenue**

Amount received by assessee from Coca Cola Export Corporation, USA, as compensation for destruction of bottles of said drink having Coca Cola trademark after government prohibited use of concentrates prepared by said foreign company in India, was revenue receipt. (A.Y. 1979-80)

*CIT v. Srikrishna Bottlers (P.) Ltd. (2005) 274 ITR 11 / 144 Taxman 23 / 193 CTR 681 (AP)(High Court)*



#### **S. 4 : Charge of Income-tax – Income – Deposits – Customer**

Where assessee, engaged in liquor business, used to collect money as deposit/ security from each customer against bottles sold to customer and on, fulfillment of conditions stipulated in that behalf, assessee had to refund money to customer, surplus in bottle deposit account was not taxable income of assessee. (A.Ys. 1978-79 to 1981-82)

*CIT v. Doongaji & Co. Distillery (2005) 276 ITR 402 / 146 Taxman 154 / 196 CTR 574 (MP)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Deposits – Agents**

Security deposit received by assessee – soft drinks company from agents and retailers for bottles used as containers for soft drinks did not constitute income of the assessee and are not taxable in the hands of the assessee. (A.Y. 1990-91)

*CIT v. Madurai Soft Drinks (P.) Ltd. (2005) 276 ITR 607 / 146 Taxman 572 / 197 CTR 480 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Deposits – Refundable**

Where assessee, a co-operative sugar mill, collected non- refundable deposits from price payable to its sugarcane grower members for issuance of shares in future and the excess amount is to be refunded. Deposit so collected by assessee could not be termed as trading receipt and it could not be included in income of assessee. (A.Y. 1981-82)

*CIT v. Ramala Sahkari Chini Mills Ltd. (2005) 278 ITR 670 / 148 Taxman 565 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Deposits – Non-refundable**

Where assessee, a cooperative sugar factory made certain deductions on account of non refundable deposits C.M. Relief Fund, Famine Relief Fund, Sugarcane Development fund, Education Fund, etc., from price of sugarcane crop supplied by its members, only deduction made from cane price towards Sugarcane Development Fund could be treated as assessee's income and not other deductions. (A.Ys. 1987-88 to 1994-95)

*CIT v. Malegaon Sahkari Sakhar Karkhana Ltd. (2005) 279 ITR 19 / 148 Taxman 329 / 199 CTR 658 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Excess sugar price collected – Interim order**

Excess collection of levy sugar price under an interim order passed by the Court is not income of the assessee. (A.Y. 1981-82)

*CIT v. Swadeshi Mining & Mfg. Co. Ltd. (2005) 146 Taxman 619 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Pre-commencement receipts – Sale of tender forms**



Income from sale of tender forms before commencement of business cannot be assessed as income from other sources but it would go to reduce capital cost.

*CIT v. Indian Charge Chrome Ltd. (2005) Tax L R 697 (Orissa)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Power subsidy – Revenue receipt**

Power subsidy received by an industrial unit is a revenue receipt. (A.Y. 1989-90)

*CIT v. Premier Proteins Ltd. (2005) 195 CTR 223 / 277 ITR 406 / 144 Taxman 147 (MP) / CIT v. Neo Sack Ltd. (2006) 203 CTR 162 / (2005) 148 Taxman 603 (MP)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Nature**

Question whether a particular amount received by an assessee from state or its agency by way of subsidy can be treated as capital receipt or revenue receipt, could only be decided on the basis of nature of subsidy received.

*CIT v. Abhishek Cineco (P.) Ltd. (2005) 275 ITR 280 / 144 Taxman 358 (MP)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Statutory contribution – Molasses fund**

Sum credited to molasses storage Fund is not to be included in income of assessee. (A.Ys. 1987-88, 1988-89)

*DCM Ltd. v. CIT (2005) 145 Taxman 124 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Devolution – Individual on HUF**

In view of Hindu Succession Act, property of father devolves on his own son in individual capacity and not as karta of Hindu Undivided Family and for it to be treated as HUF property, there should be an independent act of throwing it into common hotchpot of HUF. (A.Ys. 1977-78 to 1985-86)

*H.N. Mehrotra (Dr) v. CIT (2005) 276 ITR 158 / 147 Taxman 488 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Share of Income from firm – Hindu Undivided Family**

Share of Income of from firm belong to HUF was assessable as HUF income. (A.Y. 1975-76)

*CIT v. Ashok Bhargava (2005) 146 Taxman 400 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutual concern – Distribution on dissolution**

Where assessee organization was an AOP formed to promote and protect interest of its members and its rules and regulations provided that upon dissolution, surplus of subscription amount and other contributions should be distributed amongst members of the organization on basis of their contribution and there was no finding that organization was catering to needs of any outsider, income of assessee would be exempt from tax on ground of mutuality. (A.Ys. 1976-77 to 1980-81)

*CIT v. J.K. Organisation Ltd. (2005) 279 ITR 503 / 144 Taxman 560 / 196 CTR 35 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Hindu undivided family – Beneficiary in trust**

Rights of assessee — Beneficial interest was held by assessee as an individual. Beneficiary did not have absolute rights in property. (A.Ys. 1984-85 to 1989-90)  
*Maharaja Bahadur Singh Kasliwal v. CIT (2005) 277 ITR 483 / 144 Taxman 29 / 193 CTR 734 (MP)(High Court)*

**S. 4 : Charge of Income-tax – Income – Hindu undivided family – Agricultural land**

Agricultural land governed by U.P. Zamindari and Land Reforms Act is to be assessed in assessee's individual hands and not in status of HUF. (A.Y. 1978-79)  
*CIT v. Sarv Shakti Swarup (2005) 144 Taxman 430 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Sikkim Lottery prize – Applicability of Act**

No tax was payable under 1961 Act on prize money of lottery of Government of Sikkim, prior to coming into force of 1961 Act in Sikkim from assessment year 1990-91 (A.Y. 1988-89)  
*Nirmala L. Mehta v. A. Balasubramaniam (2004) 269 ITR 1 / 139 Taxman 394 / 191 CTR 8 (Bom.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Assessable as – Sales tax collection**

Where assessee, engaged in business of hire-purchase of motor vehicles, maintained its account on mercantile basis and assessee used to collect entire sales tax on vehicle at time of financing transaction, sales tax collected by assessee constituted income of assessee in assessment year in which it made collection.  
*CIT v. Motor & General Sales P. Ltd. (2004) 266 ITR 261 / 135 Taxman 426 / 188 CTR 42 (All.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Association of persons – Joint purchasers of lottery ticket**

Mere purchase of a lottery ticket jointly falls short of considerations which ought to weigh in concluding that purchasers have formed an association of persons. (A.Y. 1984-85)  
*Jaswant Kaur Sehgal (Smt.) v. CIT (2004) 271 ITR 475 / 193 CTR 530 / 144 Taxman 243 (Gau.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Diversion by overriding – Obligation to pay**

Where payment of amount as overriding charge was an integrated part of sale deed by which going concern was transferred to assessee and obligation to pay said

amount was attached to very source of income, payment of overriding charge was diversion of income at source hence deductible. (A.Y. 1979-80)

*Jit & Pal X-Rays (P) Ltd. v. CIT (2004) 267 ITR 370 / 134 Taxman 62 / 186 CTR 541 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Hindu undivided family – Self acquired property**

When a Hindu male dies, intestate nature of his property changes and even his self acquired property becomes ancestral property in his son's hands. Hence even if the property was self-acquired property of the deceased, it become HUG property on his death. (A.Ys. 1986-87 to 1991-92)

*Girdhari Lal v. CIT (2004) 269 ITR 50 / 193 CTR 656 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – AOP – Trustees and beneficiaries**

Mere fact that beneficiaries or trustees being representative assessee are more than one, can not lead to a conclusion that they constitute an "association of persons" and in absence of element of volition on part of either trustee or beneficiaries, by no stretch of imagination it can be considered to be an AOP. (A.Y. 1995-96)

*CIT v. S.A.E. Head Office Monthly Paid Employees Welfare Trust (2004) 271 ITR 159 / 141 Taxman 364 / 192 CTR 70 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Trustee – Individual**

Where assessee is partner in firm as trustee of a trust, income from firm can not be assessed in his individual hands.

*CIT v. Rangraj Keshumal (2004) 267 ITR 476 / 141 Taxman 290 / 187 CTR 471 (Guj.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Interest – Excess amount of advance tax [S. 214]**

Interest granted under section 214 by Government on excess amount of advance tax paid by assessee is liable to be taxed as income of assessee. (A.Y. 1985-86)

*Tamilnadu Industrial Investment Corporation Ltd v. Dy. CIT (2004) 270 ITR 566 / 192 CTR*

*521 / 145 Taxman 386 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Capital receipt – Surrender of mining lease**

Amount received by assessee for premature surrender of mining lease right in favour of another company was a capital receipt. (A.Y. 1988-89)

*CIT v. Gotan Lime Stone Khanij Udhyog (2004) 269 ITR 399 / 135 Taxman 19 / 186 CTR 125 (Raj.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Luxury tax**

Luxury tax collected by assessee – hotelier from occupants of hotel rooms can not be said to be diverted by overriding title and has to be regarded as forming part of trading receipts.

*Pandyan Hotels Ltd. v. CIT (2004) 266 ITR 172 / 137 Taxman 542 / 189 CTR 144 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Deposits – Capital receipts**

Deposits collected by assessee under different finance schemes are capital receipts. (A.Y. 1991-92)

*CIT v. Sahara India Investment Ltd. (2004) 266 ITR 641 / 136 Taxman 61 / 188 CTR 370 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Compensation – Termination of distributorship**

Compensation received by assessee for termination of distributorship is a capital receipt.

(A.Y. 1986-87)

*CIT v. Ambadi Enterprises Ltd. (2004) 267 ITR 702 / 139 Taxman 96 / 188 CTR 179 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Tax planning – Sale and lease back**

Assessee entered into transactions with parties to sell and lease back assets, sale price was determined by an independent valuer, and what had been done was to minimize tax liability, which was permissible under the law. The court held that tax management is permissible if the law authorizes so. (A.Ys. 1988-89, 1989-90, 1996-97)

*CIT v. George Williamson (Assam) Ltd. (2004) 265 ITR 626 / 136 Taxman 52 / 187 CTR 499 (Gau.)(High Court)*

*Industrial Development Corpn. of Orissa Ltd v. CIT (2004) 268 ITR 130 / 137 Taxman 556 / 189 CTR 417 (Orissa)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Chargeable – Admission by assessee – Retirement**

What is not otherwise taxable can not become taxable because of admission of assessee. Nor there be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed.

*Sail DSP VR Employees Association, 1998 v. UOI (2003) 128 Taxman 704 / 262 ITR 638 / 181 CTR 367 (Cal.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Double taxation – Firm – Partner**

Once income shown in name of assessee firm is taxed in the hands of one of its partners, no addition can be made in hands of the firm.

*CIT v. Taj Oil Traders (2003) 130 Taxman 585 / 262 ITR 500 (Raj.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Exemption – State Industrial area development authority – Constitution of India [Articles, 285, 289(1)]**

Income of State Industrial Area Development Authority is not exempt from taxation. It can not be said that Income and Property of the Industrial Area Development Authority is that of the State and consequently exempt from taxation. Explanation to section 10(20) which was introduced by the Finance Act, 2002, clarifying which are local authorities and excluding from them corporations or authorities like assessee.

*Adityapur Industrial Area Development Authority v. UOI (2003) 262 ITR 289 / 132 Taxman*

*242 / 185 CTR 384 (Jharkhand)(High Court)*

**S. 4 : Charge of Income-tax – Income – Tax planning – Lease back – Depreciation**

Every person is entitled to so arrange his affairs to avoid taxation, the arrangement must be real and genuine and not a sham or make to believe one. It is the duty of the High Court not to give judicial vindication to such an act of avoidance of payment of tax in the guise of sophisticated use of language tax planning. On facts it was found that documents in question were not registered, that machinery /equipment were not identified nor their written down value could be ascertained, there was no actual delivery of possession of machinery / equipment by the APSEB to the assessee on completion of sale nor there was delivery of possession by the assessee to the APSEB and the machinery / equipment were also embedded in the earth, the court held that tribunal was justified in holding that transaction in question was colourable transaction and disallowing the claim of assessee. (A.Y. 1996-97)

*Avasarala Automation Ltd v. Jt CIT (2003) 133 Taxman 678 / 185 CTR 402 / 266 ITR 178 (Karn.) (High Court)*

**S. 4 : Charge of Income-tax – Income – Compensation – Termination of agreements**

Assessee was distributor for products of several companies. Amount received on termination of agreements by way of compensation from those companies was capital receipt. (A.Ys. 1986-87, 1987-88)

*CIT v. T.I. & M. Sales Ltd. (2003) 129 Taxman 444 / 259 ITR 116 / 181 CTR 461 (Mad.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Returnable deposits – Course of Business**

Returnable deposit received by manufacturer of soft drinks for bottles and crates could not be treated as income in assessee's hands. (A.Y. 1987-88)

*CIT v. Soft Beverage (P) Ltd. (2003) 129 Taxman 227 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Embezzled amount – Construction of House [S. 24]**

One who uses another's property or money to secure gain or profit there from, falls within the wider definition of "income" under the Act. Thus, the amount embezzled by the assessee in the assessment year in question and utilized by him in construction of the house property was "income" within the meaning of section 2 (24) and liable to be taxed. (A.Y. 1981-82)

*CIT v. Troilakya Chandra Bora (2003) 128 Taxman 344 / 261 ITR 299 / 182 CTR 456 (Gau.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Non refundable entrance fees – Members**

Non refundable entrance fees received by the assessee from its members being capital receipt could not be treated as its income. (A.Y. 1987-88)

*CIT v. Diners Business Services Pvt. Ltd. (2003) 263 ITR 1 / 132 Taxman 758 / 185 CTR 623 (Bom.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Excess sale price – Interim order of Court**

Excess price of sugar collected over and above control price fixed by the Government under the interim order of High Court is not taxable. (A.Y. 1978-79)

*CIT v. Walchandnagar Industries Ltd. (2003) 128 Taxman 649 / 262 ITR 212 / 180 CTR 118 (Bom.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Excess sale price – Sugar levy**

In view of the decision of Apex court in *K.C.P. Ltd v. CIT (2000) 245 ITR 421 / 162 CTR 320 / 112 Taxman 66 (SC)*, the amount relating to excess levy sugar price is liable to tax. (A.Y. 1972-73)

*CIT v. Dhampur Sugar mills Ltd. (2003) 132 Taxman 88 (All.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Gift to children – Professional income**

Gifts made by the producers to the children of assessee, who is an actor could not be construed as consideration received by the assessee for the professional service rendered by him. (A.Ys. 1985-86, 1986-87)

*CIT v. G.S.R. Krishnamurthy (2003) 262 ITR 393 / 132 Taxman 341 / 184 CTR 414 (Mad.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Character**

Character of subsidy in the hands of recipient, whether revenue or capital will have to be determined having regard to the purpose for which the subsidy is given. Transport subsidy, matter sent back to decide in the light of decision of apex court in *Sahney Steel and Press Works Ltd v. CIT (1997) 228 ITR 253 (SC)*, in the absence of any



finding by the taxing authorities regarding the purpose for which the subsidy was given and utilisation of subsidy by the assessee.

*Dy. CIT v. Assam Asbestos Ltd. (2003) 263 ITR 357 / 132 Taxman 808 / 185 CTR 223 (Gau.) (High Court)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Power subsidy – Revenue receipt**

Power subsidy received by the assessee company for functioning of company is not a capital receipt but a revenue receipt. (A.Y. 1992-93)

*CIT v. S. Kumars Tyre Mfg Co. (2003) 131 Taxman 207 / 266 ITR 325 / 183 CTR 590 (MP)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Grant in aid – Revenue receipt**

Grant in aid given to Government company for functioning of company is not a capital receipt but a revenue receipt. (A.Ys. 1973-74, 1974-75, 1975-76)

*CIT v. Steel Authority of India Ltd. (2003) 263 ITR 211 / 133 Taxman 659 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Purchase tax benefit – Revenue receipt**

Purchase tax benefit in form of subsidy extended by Government, to assessee sugar factories, which was in no way linked to the expenditure incurred in setting up industry was taxable as revenue receipt. (A.Y. 1989-90)

*CIT v. Ponni Sugars & Chemicals Ltd. (2003) 127 Taxman 188 / 260 ITR 605 / 179 CTR 477 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Subsidy from State Government for social welfare – Capital receipt**

State Government, taking in to welfare of Adi Dravida and their poor representation in assessee – firm sanctioned certain subsidy to assessee to recruit certain Adi Dravadiga, amount of subsidy received by assessee from State Government was in nature of capital receipt. The amount received by the assessee had nothing to do with the trade or business of the assessee. It was not a reimbursement of salary, it was not made for normal working of the mills, and for the benefit of the assessee, but reimbursement with a social objective in mind to achieve a social purpose of providing employment to socially oppressed class of people to enable them to get employment with a decent salary and to lead a normal and decent life, therefore the amount received by way of subsidy under the scheme was capital in nature. (A.Y. 1985-86)

*CIT v. Kanyakumari Distt Co-op. Spg. Mills Ltd. (2003) 128 Taxman 544 / 264 ITR 684 / 182 CTR 151 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Incentive – Business income**

Incentive provided by Government of India to sugar manufacturers in respect of difference in sale price in levy sugar and excise duty repaid would form part of sale price and would be taxable as business income. (A.Ys. 1986-87 to 1988-89)

*CIT v. Ponni Sugar & Chemicals Ltd. (2003) 129 Taxman 231 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Incentive for discharging loan – Trading receipt**

Incentive provided for indirect assistance in the setting up of the industry. The incentive given solely for the purpose of repayment of term loans, obtained from public financial institutions for acquiring the capital assets, was capable of being recorded as an indirect assistance provided for setting up of the industries to the extent the incentive given by Central Government in the form of higher free sale quota of sugar and excise duty concession was concerned, no tax was exigible thereon. Amount will be a capital receipt in the hands of recipient. (A.Y. 1989-90)

*CIT v. Ponni Sugar & Chemicals Ltd. (2003) 127 Taxman 188 / 260 ITR 605 / 179 CTR 477 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Bank interest – Molasses Storage fund**

Bank interest earned on the molasses storage fund constitutes assessee- sugar mill's income as the assessee was not treating the same as part of molasses storage fund and the same was transferred to saving bank account and used by the assessee for its business purpose. (A.Y. 1986-87)

*CIT v. Madurantakam Co-operative Sugar mills Ltd. (2003) 263 ITR 388 / 186 CTR 203 / 138 Taxman 150 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Rebate on excise duty – Higher levy free quota**

Incentive received by way of rebate on excise duty payable and increased percentage of levy free quota of sugar, is not assessable as income of the assessee sugar mill.

*CIT v. Maduranatakam Co-operative Sugar Mills Ltd. (2003) 263 ITR 388 / 186 CTR 203 / 138 Taxman 150 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Non compete fee – Use of building and equipment**

Assessee was partner in firm which owned the buildings and equipment and also ran hotels and the brothers floated a new company in which all of them were shareholders and all of them controlled the company and all of them were directors and managed the company. Payment made by the company for the building and equipment used by the company for running the hotel and not for engaging in similar business was revenue receipt in their hands. (A.Y. 1986-87)

*K. Ramasamy v. CIT (2003) 261 ITR 358 / 182 CTR 640 / 133 Taxman 802 (Mad.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Diversion of, by overriding title – Statutory provision**

Provision made by the assessee Sugar Mill's towards Molasses Storage Funds diverted by overriding title to the fund and allowable as deduction. (A.Y. 1986-87)

*CIT v. Madurankatam Co-Operative Sugar Mills Ltd (2003) 263 ITR 388 / 138 Taxman 150 / 186 CTR 203 (Mad.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Diversion of, by overriding title – Statutory provision**

Amount set apart towards Molasses Storage Reserve Fund created by sugar manufacturer is not includible in total income. (A.Ys. 1985-86, 1986-87, 1987-88, 1988-89)

*CIT v. New Horizon Sugar Mills (P) Ltd. (2003) 129 Taxman 229 / CIT v Ponni Sugar & Chemicals Ltd. (2003) 129 Taxman 231 (Mad.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Remuneration to karta – Firm – Partner**

Assessee was partner in firm representing HUF, share income earned from firm was to be excluded from his income.

*CIT v. Vimal kumar & Nirmal Kumar Soorana (2003) 131 Taxman 264 (Raj.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Remuneration to karta – Personal skill**

Remuneration paid to karta by firm in which he was partner in representative capacity for his special skill and personal exertion was assessable in his individual assessment. (A.Y. 1987-88)

*CIT v. K.A. Rajagopal (2003) 132 Taxman 39 (Mad.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Property of HUF – Tenants in common**

Co-sharers were holding property of deceased as tenants-in-common, Tribunal was justified in holding that sale was effected by co-sharers individually and not by HUF. (A.Y. 1976-77)

*CIT v. Vishwas D. Ranade (2003) 127 Taxman 218 / (2004) 266 ITR 713 (Bom.)(High Court)*

**S. 4 : Charge of Income-tax – Income – Property received by will – HUF**

Property received in bequest from father, without indication in Will to contrary will be treated as assessee's personal property and not as property of his HUF. (A.Y. 1976-77)

*CIT v. Shambhu Ram (2003) 133 Taxman 15 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Partial partition – HUF – Share to mother**

At the time of partial partition of HUF, the mother was not allocated any portion of the properties under division nor she was compensated in lieu of the loss of her share in the said properties, it was held that partition was not valid.

*Mahendra Kumar Sewti Devi v. CIT (2003) 263 ITR 589 / (2004) 140 Taxman 87 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Partial partition of HUF – Unequal partition – Minor – Consent by father can give consent on behalf of minor sons**

A partial partition of any joint family property by father between himself and his sons, would not become invalid on the ground that there had been no equal distribution amongst co-sharers, and the father has a right to give consent for partition on behalf of his minor sons, in view of *Appurva Shantil Lal Shah v. CIT (1983) 141 ITR 558 (SC)*.

*CIT v. Kailash Kumar Dixit (HUF) (2003) 132 Taxman 597 / 185 CTR 17 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Partial partition of HUF – Share of each group**

It is not necessary to define share of each member of each group and partition by allotting a share of property to a group is valid. (A.Ys. 1976-77, 1977-78)

*CIT v. Mahendra Kumar (2003) 132 Taxman 888 / CIT v. Shyam Lal (2003) 132 Taxman 890 (All.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – AOP – Beneficiaries of trust**

Beneficiaries of the trust could not be assessed as an AOP, as they had not joined together to earn income. They were entitled to receive the income in fixed proportion by virtue of the deed of trust. (A.Ys. 1987-88, 1988-89)

*CIT v. Mecca Trust (2003) 130 Taxman 384 (Mad.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Mutual concern – Co-operative society – Interest**

Interest income derived by the assessee co-operative society on deposits made out of contribution from members of society was not taxable in hands of society on the principle of mutuality. (A.Ys. 1989-90, 1991-92)

*DIT v. All India Oriental Bank of Commerce Welfare Society (2003) 130 Taxman 575 / 184 CTR 274 (Delhi)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Application**

Assessee had availed various facilities from Madurai Bank over years, repayment of which was guaranteed by way of charge on properties of assessee. As assessee failed to

pay dues, bank filed a civil suit. Subsequently, out of Court settlement was reached at an amount of ` 160 lakhs. Vide Government resolution dt. 14-12-1994 and 19-7-1995, NSSK was permitted to buy spares, plant and machinery of assessee. It was to pay, on behalf of assessee a sum of ` 160 lakhs to Madurai Bank towards settlement of amount due. The assessee claimed that as NSSK directly paid Madurai Bank it should be excluded from the sale consideration as that never became the income of the assessee as it stood diverted by overriding title and hence, should be ignored for the purpose of calculating capital gain. The Tribunal held that payment to bank is only application of income not a charge on income. The payment to bank and sale consideration of its assets are entirely two distinct transactions having no relation with each other except for the fact that there was a charge by bank on assets. Hence, amount was not deductible from sale consideration. (A. Y. 1996-97)

*Shree Changdeo Sugar Mills Ltd. v. Jt. CIT (2011) 44 SOT 479 / 58 DTR 340 / 139 TTJ 646 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Compensation for premature termination – Joint Venture agreement**

Consideration received for premature termination of the joint venture agreement constituted revenue receipt. (A.Y. 1999-2000)

*Ion Exchange (India) Ltd. v. ITO (2011) 130 ITD 318 / 52 DTR 411 / 140 TTJ 576 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Receipt by widow of partner**

Payment towards recognition of valued services rendered by partner during life time and as relief to the distressed family. As per terms of partnership deed could not be said to have a revenue character in wife's hands. Amount received by assessee, after death of her husband, from the firm in which he was a partner, would be a capital receipt. (A. Y. 2005-06).

*Dy. CIT v. Lakshmi M. Aiyar (Mrs.) (2011) 131 ITD 436 / 142 TTJ 780 / 64 DTR 420 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Interest awarded by High Court – Capital receipt – Income wrongly offered for tax – Powers of Commissioner (Appeals) [S. 139, 251]**

Interest awarded by High Court is a capital receipt and not taxable.

Though the amount was erroneously offered to tax in the return, the assessee is entitled to raise plea before Appellate Authorities against the assessment. (A.Y. 2005-06)

*Sushil Kumar Das v. ITO (2011) 11 ITR 17 / 48 SOT 102 (URO)(Kol.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Business income – Capital gains [S. 28(i), 45]**

Assessee, administrator of the estate of deceased, purchased the right to receive the sale proceeds of the estate by entering into an indenture with the legatee on account of close personal relations with her and not for overriding commercial considerations. The transaction cannot be construed as an adventure in the nature of trade. The said receipt cannot be taxed even as capital gains as the estate continued to be the owner of the properties and payment did not result in extinguishment of assessee's right, but it was a case of mere working out of rights, and, hence there was no transfer of any capital asset. (A.Y. 2004-05).

*Dy. CIT v. Nusli Neville Wadia (2011) 61 DTR 218 / 141 TTJ 521 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Chargeable – Interest on Income-tax refund – Set off against interest paid – Gross or net**

Assessee earned interest income on income tax refund. It also paid interest on late payment of tax. Assessee claimed that interest paid by it was to be set off against interest received and only net interest was liable to tax. The assessing officer rejected the claim. The Tribunal confirmed the view of the Assessing Officer that the gross interest was liable to be assessed. (A. Y. 1992-93)

*Dy. CIT v. Sandvik Asia Ltd. (2011) 133 ITD 126 / (2012) 65 DTR 350 / 143 TTJ 528 (TM)(Pune)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Housing project – Project completion method – Certificate of completion – Occupancy certificate – Handing over of possession**

Assessee following the project completion method of accounting having completed the construction of flats in all respect according to the specifications and handed over to same to the purchasers only after the end of the financial year 2006-07, revenue in respect of the said flats is to be recognized in assessment year 2008-09 and not in the relevant assessment year i.e. 2007-08, though the occupancy certificates were obtained on 26th June, 2006 and 29th September, 2006. (A.Ys. 2002-03 to 2005-06).

*ACIT v. Bombay Real Estate Development Company (P) Ltd. (2011) 64 DTR 137 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Court decree – Capital receipt – Income from other sources – Easement [S. 56]**

In year 2004, the assessee had purchased certain land. "P" a public company of developers, had trespassed assessee's property by using a private road to reach their land located on the said property. To get the encroached portion retrieved, the assessee filed civil suit for restraining that company's entry on assessee's land. As per the Court decree by way of compromise between parties, the assessee permitted the use of private road enabling "P" to reach its property and in turn "P" paid certain amount to assessee. The assessee treated the said receipt as capital receipt. The assessing officer treated the said receipt as rent and taxable as income from house property. Commissioner (Appeals), reversed the finding of Assessing Officer. The



Tribunal held that there being no relationship of land lord and tenant, between parties, amount received by assessee was only a capital receipt could not be taxed under the Act being an intangible asset having no cost. The Tribunal also held that the said receipt cannot be taxed as income from other sources. (A.Y. 2007-08).

*Dy. CIT v. T. Kannan (2011) 48 SOT 374 (Chennai)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Cenvat credit – Nature of receipt**

Cenvat credit available to the assessee does not constitute income in the hands of the assessee. (A.Y. 2007-08)

*ACIT v. Mercury Rubber Mills (2011) 142 TTJ 1 (UO)(Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Transfer fee – Non occupancy charges [S. 2(24)]**

Amount received in excess of the limits prescribed under the law from its members by the Housing Society is also exempt from tax on the principle of mutuality. (A. Y. 2005-06).

*ITO v. Damodar Bhuvan CHS Ltd. ITA No. 1610/Mum/2010 dated 16-9-2011 Bench 'D'. 421 (2012) 43-B BCAJ. (2012) Jan 33 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Sportsman – Award Money – Cricketer**

The Tribunal held that the assessee is entitled to exemption in respect of award money as per Circular No. 447 dtd. 22nd January, 1986. (A.Ys. 1996-97, 1997-98)

*Ajay Jadeja v. Dy. CIT (2010) 5 ITR 233 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital receipt – Receipt for damage of goodwill [S. 28(i)]**

If goodwill of the business is damaged on account of action of supplier of goods and later on some compensation is awarded in lieu of that, it will fall in the same category of loss to the source of income and consequently such a receipt will qualify to be characterized as a capital receipt. (A.Y. 1988-89)

*Inter Gold (India) (P) Ltd. v. Jt. CIT (2010) 47 DTR 150 / 37 SOT 45 / 137 TTJ 188 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Association of persons – Rent Income – Joint purchase of land**

Assessee jointly with other 17 persons purchased land, and Income was generated from plinth constructed on said land. Held, that entire Rent cannot be assessed in status of AOP, when Investments were from Individual sources, and the shares were definite and ascertainable. Also as Assessee was merely authorized to collect Rent cheques, which were issued separately and in individual names, Rent Income cannot be taxed in Assessee's hands as AOP. (A.Y. 2000-01)

*Daljit Singh v. ITO (2010) 194 Taxman 16 (Mag.)(Chd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Compensation on termination of license agreement**

Compensation received on premature termination of leave & license agreement is chargeable to tax as revenue receipt. (A.Y. 2003-04)

*ACIT v. Das & Co. (2010) 133 TTJ 542 / 44 DTR 124 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Forfeiture of security deposit – Capital receipt**

Forfeiture of security deposit is not chargeable as revenue receipt as the deposit was in the nature of loan and in the capital field.

*ACIT v. Das & Co. (2010) 133 TTJ 542 / 44 DTR 124 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Capital subsidy**

The purpose of the grant or the subsidy being for the construction of the capital assets viz. the tube wells and lift irrigation schemes, which constitute the permanent apparatus from which the assessee derives income by way of water charges, the subsidy has to be held to constitute capital receipt by applying the "purpose test".

*Gujarat Water Resources Development Corporation Ltd v. Jt. CIT, ITA No. 167/168 Bench A dt. 16-10-2009 (Feb., 2010 P. 594 Vol. 33 Part 11. ACAJ (Ahd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Trade advance from foreign buyer – Cessation of liability**

Assessee received advance of ` 9 crores from certain foreign buyers, however, he could not export within one year as stipulated by RBI vide its regulation, notification No. FEMA 23/2000-RB dt. 3-5-2000, and assessee periodically withdrew the amount and used for other business purpose. Assessing Officer treated the said receipt as income and made addition. On appeal CIT(A) deleted the addition. The Tribunal held that in the relevant year liability to pay was existing and foreign party's claim was still enforceable under the law. After getting the permission from RBI the assessee remitted the amount to the buyer through banking channel, therefore, there was no cessation of liability and the same cannot be treated as assessee's income, the order passed by the CIT(A) was upheld. (A.Y. 2005-06)

*ITO v. Eurostar Distilleries (P) Ltd. (2010) 42 DTR 1 / 41 SOT 434 / 131 TTJ 680 (TM)(Cochin)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Assignment of marketing rights – Non-compete fee**

Amount received on account of transfer or assignment of marketing rights being towards impairment of source of income is a capital receipt. Amount received as non-compete fee is a capital receipt. Capital gains not taxable where cost of acquisition not determinable. (A.Y. 2001-02)

*BASF India Ltd. v. Addl. CIT (2010) 6 ITR 156 / 125 TTJ 355 / 119 ITD 337 / 23 DTR 347 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Mutuality – Interest from banks – Bonds – Company**

Principle of mutuality is applicable to the assessee even though it is an incorporated company. Interest earned by the mutual association from banks bonds etc on surplus funds is not liable to tax.

*ITO v. Hill Properties Ltd. (2010) TIOL 481 ITAT – Mum. (2010) BCAJ (October) P. 20 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Reimbursement of expenses – No mark up**

No part of reimbursement of specific and actual expenses received by the assessee which do not involve any mark up can be treated as income of the assessee. (A.Y. 1995-96)

*Linklaters LLP v. ITO (2010) 132 TTJ 20 / 42 DTR 233 / 40 SOT 51 / (2011) 9 ITR 217 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Entrance fee club**

Entrance fees paid to acquire right to avail of services and facilities extended by assessee is capital receipt. (A.Y. 2006-07)

*ACIT v. Karnavati Club Ltd. (2010) 4 ITR 174 (Ahd.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Payment to retiring partners – Application of income**

Payment made by assessee to its retiring partners were a self-imposed obligations being gratuitous and hence, application of income hence, not allowable as deduction. (A.Y. 2002-03)

*S. B. Billimoria & Co. v. ACIT (2010) 125 ITD 122 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital receipt – Salary [S. 15, 56]**

Where amount received by assessee was not in her capacity as employee, but was only compensation for injury caused to her by denying her employment, after having been declared employable by following a discriminatory general practice prohibited by law in USA, it amounted to capital receipt not liable to tax. So far as pre-judgment interest on amount of compensation was concerned, if it was a part of settlement amount, its character would be same as that of principal amount of compensation i.e., Capital receipt, not liable to tax. (A.Ys. 2003-04, 2004-05)

*ACIT v. Rani Shanker Mishra (Smt.) (2010) / 122 ITD 360 (Delhi)(Trib.)*

*Editorial : Approved by High Court (2009) 222 CTR 128 / (2010) 320 ITR 542 / 178 Taxman 324 / 17 DTR 261 (Delhi)(High Court)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Right to sue – Specific performance**

Compensation received for forgoing right to sue for specific performance of contract not a trading liability, the said amount being on account of capital account is a capital receipt.

(A.Y. 2005-06)

*Govindbhai C. Patel v. Dy. CIT (2010) 1 ITR 34 / 36 SOT 270 (Ahd.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Incentive – Subsidy**

Incentives in the form of excise duty refund and interest subsidy which has been granted for substantial expansion of unit, only after commencement of production and not for setting up of new industries or to purchase capital assets, same constitute revenue receipt. (A.Y. 2005-06)

*Shree Balaji Alloy v. ITO (2010) 33 DTR 67 / 127 TTJ 129 (Amritsar)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Mutuality – Club**

Assessee was running a recreation club for its members. Its receipts from providing food, room facilities to its members and their guest was not liable to tax. (A.Y. 2003-04)

*Delhi Gymkhana Club Ltd. v. Dy. CIT (2010) 35 SOT 335 / 131 TTJ 329 / 39 DTR 48 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Contractual payment to retiring partner – Diversion of income [S. 28]**

Contractual payment made by the firm to its retiring partners, in terms of partnership deed, is not includible in the total income of the firm, since to that extent income has never reached the hands of the assessee. (A.Y. 2004-05)

*RSM & Co. v. ACIT (2010) 125 ITD 243 / 38 DTR 246 / (2011) 10 ITR 164 / 130 TTJ 437 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Transport subsidy – Raw material transport**

Transport subsidy from State Govt. under the Transport Subsidy Scheme, 1971 of the Govt. of India against transfer cost of raw material and finished goods would be revenue receipt. (A.Y. 1995-96)

*ACIT v. Steel Strips Ltd. (2009) 108 ITD 720 / 110 TTJ 66 (Chd.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital receipt – Compensation for termination of agency agreement**

Termination of an agency agreement which has no major effect on profit earning apparatus, the compensation received is taxable as revenue receipt but the part of the compensation which is attributable to restrictive covenant is capital receipt and not chargeable to tax. (A.Y. 2000-01)

*Chemet v. Addl. CIT (2009) 122 TTJ 766 / 27 SOT 574 / 22 DTR 72 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Accrual of income – Compensation for termination of agreement – Project completion method [S. 5, 28(ii)]**

When agreement itself got terminated there could be no other completion except completion as a result of termination of agreement and to that extent income is liable to tax, on due / on accrual basis. (A.Y. 2001-02)

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

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Non-compete fee [S. 28(ii), 28(iv), 45]**

Non-compete fee received by assessee constituted capital receipt and it can not be taxable as salaries or profits in lieu of salary. (A.Y. 1998-99)

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

**S. 4 : Charge of Income-tax – Income – Salary – Stock appreciation rights – Non-payment of advance tax – Interest [S. 2(24), 4, 15, 45, 56, 234B]**

Amount received by assessee, Managing Director of PGI India, a part of group companies headed by PGU in USA on redemption of stock appreciation rights issued in favour of assessee by PGU was income chargeable to tax under head salaries or in alternative under head income from other sources. Amount received by the assessee being subject to TDS he could not be said to be defaulted for not paying advance tax, hence interest under section 234B was not chargeable. (A.Y. 1998-99)

*Sumit Bhattacharya v. ACIT (2008) 112 ITD 1 / 113 TTJ 633 / 19 SOT 663 / 2 DTR 25 (SB) (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital receipt – Forfeiture application**

Forfeiture of application money received against partly convertible debentures is capital receipt and not chargeable to tax. (A.Ys. 1997-98 to 2001-02)

*Deepak Fertilisers & Petrochemicals Corp. Ltd. v. Dy. CIT (2008) 117 TTJ 752 / 116 ITD 372 / 10 DTR 27 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Mesne profit and interest**

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

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

#### **S. 4 : Charge of Income-tax – Income – Capital receipt – Sale of technical know-how**

Consideration of sale of technical know-how. Consideration received by assessee for transferring manufacture and process know-how to another company in terms of a technology transfer agreement, is capital receipt. (A.Y. 1997-98)

*Dy. CIT v. Indian Syntans Investments (P) Ltd. (2007) 106 TTJ 388 / 107 ITD 457 (Chennai)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Club**

Income derived by assessee club letting out its premises and by extending services to members guest, relatives, etc. is not taxable.

*Bhubaneswar Club Ltd. v. ACIT (2007) 107 TTJ 40 (Cuttack)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Non Compete fee – Goodwill**

Non Compete Fee received by the assessee cannot be treated as goodwill and it is not taxable as income. (A.Y. 1997-98)

*Dy. CIT v. Indian Syntans Investments (P) Ltd. (2007) 106 TTJ 388 / 107 ITD 457 (Chennai)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Distributorship rights**

Consideration for transfer of distributorship rights, goodwill and non-compete covenant for a particular period constituted capital receipt. (A.Y. 1998-99)

*Dy. CIT v. Sri K. S. N. Enterprises (P) Ltd. & Ors. (2007) 108 TTJ 940 / 105 ITD 375 / 10 SOT 59 (Hyd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Database**

Receipt for transfer of skilled personnel and database was chargeable revenue receipt. (A.Y. 1998-99)

*IBM India Ltd. v. CIT (2007) 108 TTJ 531 / 105 ITD 1 (Bang.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital revenue receipt – Surrender of goodwill**

Amount received by assessee on surrender of goodwill, user of trade mark rights, brand name was capital receipt. (A.Y. 1996-97)

*Jt. CIT v. Kwaliti Café & Restaurant (P) Ltd. (2007) 108 TTJ 230 / 105 ITD 169 (Chd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Benamidar – Double taxation**

Assessee was benamidar, and had declared Capital Gains income on asset held as benamidar. Subsequently on income being assessed in hands of real owner, it was



held that, same cannot be taxed in the hands of benamidars, as it would amount to double taxation which is not permissible by law. (A.Y. 1995-96)

*Jt. CIT v. Ladu Ram (Jaipur) (2006) 152 Taxman 1 / 94 TTJ 908 (Jp.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue receipt – Compensation from insurance company [S. 28(1)]**

Compensation received from Insurance Company in connection with the machinery damaged in fire to be treated as capital receipt and hence not liable for tax. (A.Y. 1993-94)

*Loyal Textile Mills Ltd. v. Dy. CIT (2006) 6 SOT 97 (Chennai)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Wife of assessee – Benami**

Wife of an assessee cannot be held as his benami in absence of any evidence. (A.Y. 1998-99)

*Adeshwar Jain v. ITO – ITAT, Jodhpur Bench, ITA No. 261/JU/2004, dated 20th January, 2006 (Tax World – May 2006 – Vol XXXV – P. 150)(Jodh.)(Trib.)*

**S. 4 : Charge of Income-tax – Income Tax – Business income – Adventure in the nature of trade**

Sale of agricultural land by the assessee could not be treated as business transaction as it was found that the assessee cultivated the land for about three years prior to the sale and land was sold in view of disturbed law and order situation prevailing in the State of Punjab. Land is situated far away from the urban limits. (A.Ys. 1984-85 to 1989-90)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 297 (Amritsar)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Assessment – Status – AOP**

Agricultural land received by three brothers from their father on inheritance acquired by Government, compensation received is chargeable in their hands in individual status and not AOP.

*ITO v. Govindbhai Mamaiya & Ors. (2006) 102 TTJ 712 / 100 ITD 265 (Rajkot)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue – Non-compete fee**

Non-compete fee being capital receipt is not exigible to tax.

*Dy. CIT v. Ram Kumar Giri (2006) 103 TTJ 352 (Chennai)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue – Compensation**

There being clear admission on the part of the Revenue authorities that the car was a capital asset, compensation received in respect of the same was rightly treated by the assessee as capital receipt and, therefore, neither any addition nor consequential penalty under section 271(1)(c) was attracted. (A.Y. 2001-02)

*Prem Nath Vishwa Nath Nanda v. ACIT (2006) 102 TTJ 598 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue – Issue of non-convertible debentures – Forefeiture [S. 41(1)]**

Advance amounts received by assessee on issue of non-convertible debentures for raising capital for setting up business and forfeited for non-payment of call money is not chargeable to tax-sec. 41(1), is also not attracted. (A.Y. 1997-98)

*Prism Cement Ltd. v. Jt. CIT (2006) 103 TTJ 63 / 101 ITD 103 (Mum.)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue – Sale of top layer of land**

Sale consideration received by assessee on sale of top layer of land was revenue receipt as the land was not consumed or exhausted. (A.Y. 1996-97)

*E. M. Johnny v. Dy. CIT (2006) 100 TTJ 651 / 97 ITD 317 (Cochin)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Capital or revenue – Additional quota sugar**

Sale proceeds of additional free sale quota sugar allowed under the incentive scheme notified by the government which are specifically required to be utilised for repayment of term loans advanced by financial institutions and the Sugar Development Fund for capital outlay for installation/expansion of sugar mill under the terms of the scheme cannot be assessed as trading or revenue receipt. (A.Ys. 1993-94, 1996-97)

*Jt. CIT v. Dalmia Cement (Bharat) Ltd. (2006) 99 TTJ 1109 / 97 ITD 78 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Sovereign State [S. 2(17), 2(31)]**

There is no immunity from taxation to any sovereign State unless specifically provided either by the Constitution of India or any other enactment, in the absence of any specific provision in the act or any treaty between the Government of India and Government of Jordan or any Government order to that effect; Royal Jordanian Airlines being a company and a person within meaning of Sec. 2(31) r.w.s. 2(17) does not enjoy any immunity from taxation in India and is liable to be assessed in the status of a foreign company. (A.Ys. 1995-96, 1996-97)

*Dy. CIT v. Royal Jordanian Airlines (2006) 98 ITD 1 / (2005) 97 TTJ 434 (SB)(Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Deployment of funds – Brokerage – Cost of shares**

Incentive received on account of deployment of funds through particular broker, out of the brokers brokerage, is capital receipt and rightly adjusted to reduce cost of shares and same was not chargeable to tax. (A.Y. 1996-97)

*Tamil Nadu Minerals Ltd. v. Jt. CIT (2006) 100 TTJ 738 / 95 ITD 294 (Chennai)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Professional fee – Taxability [S. 176(4)]**

Outstanding professional fee received for professional services rendered prior to the appointment as a Judge of High Court is not taxable neither under section 28 or 56 or under section 176(4). (A.Y. 1999-2000)

*Dy. CIT v. Justice Dilip Kumar Seth (2006) 98 ITD 241 / 280 ITR (AT) 248 / 101 TTJ 90 (Kol.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Deduction of tax at source – Credit [S. 28, 145, 198, 199]**

Sections 198 and 199 do not in any way change the year of assessability of income. Sections 198 and 199 are only machinery provisions which deal with the matters of procedure and not either with the computation of income or chargeability of income. They deal with year in which credit for TDS has to be given by Assessing Officer. The basis of charge of income to tax in the case of business income is provided in section 28 and in computing the income the method of accounting followed by the assessee is relevant because the computation is made in accordance with the method of accounting regularly followed by the assessee as provided in section 145(1). (A.Y. 1997-98)

*Varsha G. Salunke (Smt) v. Dy. CIT (2006) 98 ITD 147 / 281 ITR (AT) 55 / 101 TTJ 703 (TM) (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Club – Interest**

Interest income earned by club on deposits with its corporate members is not liable to tax, the club being a mutual concern. (A.Ys. 1996-97, 1998-99 to 2002-03)

*Secunderabad Club v. ITO (2006) 100 TTJ 236 / 97 ITD 541 (Hyd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Interest – Enhanced compensation**

Interest awarded on enhanced compensation though received, did not accrue to the assessee during the pendency of appeals against the award and, therefore, since, the assessee was following accrual system of accounting, assessment of interest cannot be made until the matter is finally settled by the High Court. (A.Ys. 1994-95, 1995-96)

*Dy. CIT v. Bhim Singh Lather (2006) 100 TTJ 170 / 99 ITD 46 (TM)(Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Capital investment subsidy**

Subsidy received by assessee from the State Government under the Capital Investment Subsidy Scheme for New Industries, 1986 was in the nature of capital receipt not chargeable to tax. (A.Ys. 1996-97, 2001-02)

*ITO v. Symphony Comfort Systems Ltd. (2006) 101 TTJ 224 (Ahd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital or revenue – Compensation – Collaborator – Demurrage**

Compensation received by the assessee company from its collaborator for discharging the latter of the obligations under different performance and financial guarantees given by it under the project agreements was a capital receipt as the project agreements were on capital account and the amount was received towards compensation for extinction of capital asset and not in the ordinary course of assessee's business. (A.Y. 2000-01)

*Shyam Telelink Ltd. v. ITO (2006) 101 TTJ 387 / 99 ITD 576 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Salary – Diversion by overriding title – Foreign citizen tax withholding**

Citizen tax being a statutory levy in Japan which is required to be withheld by the employers from the salaries of their employees, the income is diverted at source by way of an overriding title and hence not liable to be included in the total income of the assessee. (A.Ys. 1988-89 to 1998-99)

*NHK – Japan Broadcasting Corporation v. Dy. CIT (2006) 101 TTJ 292 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Waiver of loan – Payment by guarantor**

Discharge of liability by the guarantor towards the project loan taken by the assessee from a bank resulting in waiver of loan did not constitute income in the hands of the assessee. (A.Y. 2000-01)

*Shyam Telelink Ltd. v. ITO (2006) 101 TTJ 387 / 99 ITD 576 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Interest – Mutuality – Bus operators association**

Bus operators association purchasing spare parts, etc. from third party and selling to members at cheaper rates is a mutual concern not exigible to income tax. (A.Y. 2001-02)

*Bus Operators Association v. ACIT (2006) 100 TTJ 904 / 94 ITD 169 (TM)(Cochin)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Non-compete Fee – Capital or revenue – Transfer of shareholdings**

Assessee being a financier and co-promoter of GSL, non-compete fee received by assessee from GSL while agreeing to transfer its shareholding in GSL was capital receipt not chargeable to tax. (A.Y. 1998-99)

*Gomti Credits (P) Ltd. v. Dy. CIT (2006) 100 TTJ 1132 (Delhi)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Accrual – Interest**

Interest on enhanced compensation received by assessee unconditionally is chargeable to tax by spreading over the years to which it pertains.

*ITO v. Govindbhai Mamaiya & Ors. (2006) 102 TTJ 712 / 100 ITD 265 (Rajkot)(Trib.)*

**S. 4 : Charge of Income-tax – Income – Co-operative society – Yarn quota**

Assessee, a co-operative society of weavers, having sold the yarn quota allocable to the members in the open market for and on behalf of the members in terms of a resolution and paid the difference between the sale price and the quota price to the members, the rate difference distributed by the assessee-society amongst the members cannot be treated as income of the assessee. Alternatively, it is case of diversion of income by overriding title. (A.Ys. 1991-92 and 1992-93)

*Ichalkaranji Co-operative Spinning Mills Ltd. v. Dy. CIT (2006) 103 TTJ 593 / 102 ITD 177 (TM)(Pune)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – DTAA – Taxability**

Taxability of any sum payable by assessee in India has to be first looked into with respect to provisions of the Act and thereafter, with reference to provisions of DTAA. (A.Y. 1999-2000)

*Essar Oil Ltd. v. Jt. CIT (2005) 4 SOT 161 / (2006) 102 TTJ 270 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Statutory corporation – Juristical entity – Notification**

Statutory corporation is a separate juristic entity and whatever may be control exercised by state government on corporation, income of corporation cannot be construed as an income of state. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corp. v. Addl. CIT (2005) 93 ITD 184 / 94 TTJ 576 (Nagpur)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Tax planning – Minimisation of tax liability**

If liability is brought to minimum by adopting one device, it cannot be held illegal only because if assessee had not adopted that device he would have been liable to pay higher tax. (A.Y. 2001-02)

*Bus Operation Association v. ACIT (2005) 94 ITD 169 / 100 TTJ 904 (Cochin)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Tax planning – Purchased units of UTI**

Where assessee purchased units of UTI from bank on 21/5/1990 and sold them back to same bank on 5/7/1990 after receiving dividend, resulting in substantial loss, such tax planning could not be approved in law. (A.Y. 1991-92)

*Porritts and Spencer (Asia) Ltd. v. Addl. CIT (2005) 92 TTJ 541 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Capital receipt [S. 2(24)(vi)]**

Unless particular capital receipt is liable to be taxed as income by virtue of specific deeming provision under section 2(24)(vi), capital receipts are outside ambit of income.

*Niyati B. Yodh v. ACIT (2004) 4 SOT 941 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Burden of proof – Receipt**

The revenue cannot assess more than the real income in respect of the transactions entered into by the section. (A.Ys. 1995-96, 1996-97)

*Amitabh Bachchan v. Dy. CIT (2005) 97 TTJ 516 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Bidding fee – Capital receipt**

Bidding fee being received by assessee in process of setting up a steel plant from contractors was liable to be set off against capital cost of project and would not form part of income. (A.Y. 1995-96)

*Neelachal Ispat Nigam Ltd. v. ACIT (2005) 147 Taxman 15 (Mag.)(Cuttack)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Compensation – Capital receipt**

Assessee had jointly promoted a company in India with a foreign company and it received compensation in lieu of agreeing to forgo its right/ first option to purchase shares of jointly promoted company when its co-promoter was desirous of disposing its shares, compensation received by it was a capital receipt in assessee's hands. (A.Y. 1995-96)

*Dy. CIT v. Sak Industries (P.) Ltd. (2005) 1 SOT 798 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Damages – Capital receipt**

Liquidated damages were received by assessee in connection with expansion of projects. As the amount received by the assessee had relation with delay caused in execution of contract of construction and supply of plant and machinery, it was a capital receipt. (A.Y. 2000-01)

*Shri Rama Multi Tech Ltd. v. ACIT (2005) 92 TTJ 568 (Ahd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Interest – Before commencement of business**

Interest income earned before commencement of business is to be treated as capital receipt adjustable against expenditure pending capitalization.

*International Hospital (P.) Ltd. v. ITO (2005) 147 Taxman 78 (Mag.)(Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Interest – Set off – Share application money**

Interest received on share application money has to be set-off against share issue expenses. (A.Y. 1988-89)

*Gujarat Ambuja Cement Ltd. v. ACIT (2005) 4 SOT 59 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Interest – Opening of LC – Capital receipt – Interest on surplus fund revenue receipt – Income tax department – Setting up of business [S. 244]**

Deposit was made out of borrowed funds under business compulsion for opening LC in favour of machine suppliers, interest received thereon was a capital receipt; however interest earned on deposit of surplus funds available out of money received on equity



was a revenue receipt assessable as income from other sources. (A.Ys. 1995-96, 1997-98)

Interest received from IT department under section 244 on the income tax refund during process of setting up a plant cannot be allowed to set off against the capital cost of the project by treating such income as capital receipt.

*Neelachal Ispat Nigam Ltd. v. ACIT (2005) 147 Taxman 15 (Mag.)(Cuttack)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mesne profit – Decreed by court of law**

'Mense Profit' decree by a court of law are assessable as taxable income in hands of decree holder. (A.Y. 1997-98)

*Dy. CIT v. Sardar Exhibitors P. Ltd. (2005) 1 SOT 918 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Non compete fee – Managing Director [S. 28(va)]**

Amount received by assessee MD in A.Y. 1997-98 from company, on leaving a company, for not taking up employment which could be detrimental to interest of company, was a capital receipt. It is a well settled legal position that the onus is on revenue to establish that the sum being sought to be taxed in the hands of the assessee is a revenue receipt. (A.Y. 1997-98)

*ACIT v. Ashit M. Patel (2005) 96 TTJ 439 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Cancellation of forward contract**

Amount received by assessee on account of forward contract in foreign currency entered into for safeguarding against loss by fluctuation in foreign currency for purchase of plant and machinery was a capital receipt not exigible to tax. (A.Ys. 1993-94, 1994-95)

*Munjal Showa Ltd. v. Dy. CIT (2005) 147 Taxman 69 (Mag.) / 94 TTJ 227 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Revenue receipt**

After completion of construction of cinema house, assessee received subsidy under MP Naya Cinema Gharon Ke Nirman Ko Protsahan Yojna ke Sahayata Anudam Niyam, 1982 from State Government, subsidy having been given to assist assessee in business operation only after cinema house was constructed after 14/01/1980 in specified areas, same was to be treated as revenue receipt. (A.Ys. 1992-93 & 1993-94)

*ITO v. Shreejee Chitra Mandir (2005) 97 ITD 66 / 98 TTJ 935 (Indore)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Diversion of, by overriding title – Commission**

Commission paid by assessee to property agent in connection with letting of property cannot be allowed as income diverted by overriding title and even though assessee company was under an obligation to pay commission amount to property agents,

mere existence of such obligation to pay said amount was not enough for application of rule of diversion of income by an overriding title. (A.Y. 1998-99)

*Piccadilly Holiday Resorts Ltd. v. Dy. CIT (2005) 94 ITD 267 / 97 TTJ 362 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Diversion of, by overriding title – Application of income**

As per agreement entered into between assessee and a company, namely by ABCL, in year 1995 assessee was to hand over all income earned by him to ABCL and as per that agreement, and as per an arbitration award, assessee transferred ` 21.67 crores out of 23 Crores received by him for hosting KBC show on star TV to ABCL, income to extent of ` 21.67 was diverted at source and could not be taxed in assessee's hands. (A.Y. 2004-05)

*Amitabh Bachchan v. Dy. CIT (2005) 97 TTJ 516 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Diversion of, by overriding title – Individual**

Assessee is said to have purchased a lottery ticket along with two others which won a car and declared 1/3rd share in prize money and broker through whom car was sold confirmed the assessee that he distributed sale proceeds among three co-owners, entire prize money was not assessable in assessee's hand but only one-third was assessable in its hands. (A.Y. 1993-94)

*ITO v. Prem Raheja (2005) 95 TTJ 178 (Jodh.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutual concern – Non-members**

Principle of Mutuality applies to an institution as well as to nature of income of that institution; if mutual institution also receives income and contribution from non-members, that income from non members shall not be governed by principle of mutuality whereas other incomes from members only towards institute's common fund shall be exempt as per principle of mutuality. (A.Y. 1998-99)

*Sumerpur Truck Operation Union v. Dy. CIT (2005) 97 TTJ 147 (Jodh.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutual concern – Co-operative Society**

Assessee, premises co-operative society, received transfer / betterment charges on account of sale of flats / tenements by its members, as assessee society received amounts for effectuating transfer of flats, paid by transferees ostensible through transferring members and since transferees were not members of assessee-society on the date of payment, such receipt were not exempt on principle of mutuality. (A.Y. 1993-94)

*Maker Chambers V. Premises Co-op. Society Ltd. v. ITO (2005) 2 SOT 797 (Mum.)(Trib.)*

*Editorial : This is no more good law. See Mittal Court Premises Co-op. Society Ltd. v. ITO (2009) 184 Taxman 292 / (2010) 320 ITR 414 (Bom.)(High Court)*

#### **S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Duty Drawback**

Duty drawback had accrued to assessee on exports merely because it was passed on to its sister concern, it would not mean that it was diverted by overriding title. (A.Y. 1996-97)

*Western Apparels P. Ltd. v. ACIT (2004) 4 SOT 245 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Accrual – Interest on sticky loan**

Decision of the Board of directors, that to recover only principle sum and not to claim interest from the debtors who became sick and did not provide for interest payable to the assessee in their books. Conduct of the parties shows that it had virtually given up its claim to receive the interest and had treated the interest income as non-existent. Applying the concept of Real Income it was held the accrued interest on sticky loan was not taxable. (A.Y. 1996-97).

*Jt. CIT v. Pankaj Oxygen Ltd. (2003) 78 TTJ 119 (Nagpur)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Grants-in-aid to cinema owners – Capital or revenue**

Adjustment of entertainment tax by way of grants given by State Government for the purpose of making the business of cinema more profitable in the backward areas and it was not to acquire any asset or against any capital outlay. Grant was admissible only after the commencement and during course of running of the business. It was free to utilise for any purpose as the assessee likes. Therefore, grants-in-aid received by way of adjustment of entertainment tax being treated as paid and retained by the assessee constituted as revenue receipt. (A.Y. 1990-91)

*Mudit Refrigeration Industries (P) Ltd. v. ACIT (2003) 84 ITD 289 / 80 TTJ 259 (All.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Non-compete fee – Capital or revenue – Surrender of manufacturing and distributing activities**

Consideration received for surrender of manufacturing, marketing and distributing activities of patented products under agreement for a period of five years constituted capital receipt as the said capital asset having been generated over the years. As a result of which it resulted in curtailment of its manufacturing activity and closure of its marketing activity altogether. Therefore, the consideration received was a capital receipt and not liable to capital gains tax in view of CBDT Instruction No. 1964, dated 17th March, 1999. (A.Y. 1996-97)

*PL Chemical Ltd. v. ACIT (2003) 86 ITD 46 / 86 TTJ 745 (Mad.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Tax planning – Tax avoidance [S. 80M]**

Once it is found that the intention of the assessee was neither of a business nor of an Investment, but only to avoid and reduce tax liability, by claiming Short Term capital

Loss on one hand, and claiming deduction u/s 80M on other hand, was held as Tax avoidance applying the principle of Mc Dowell. (A.Y. 1991-92)

*Soma Textiles & Industries Ltd. v. Dy. CIT (2003) 87 ITD 326 / 81 TTJ 1002 (Ahd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Source of fund – Charitable organisation**

Assessee can not challenge the authority of Revenue, to question the source of funds and its expenditure, even if the object is charitable viz propagation of Christianity in India in the instant case. (A.Ys. 1981-82 to 1986-87)

*Jashua Gootam v. ACIT (2003) 85 ITD 727 / 80 TTJ 658 (Visakha.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Benefit of prospective nature – ESOP**

A benefit which is prospective in nature cannot be taxed as Income unless it is specifically included by legislature or is in the nature of Income. In absence of any law or rules providing the methodology to quantify the benefit under an ESOP for A. Y. 1997-1998 to 1999-2000, same can not be taxed as Income.

*Infosys Technologies Ltd. v Dy. CIT (2003) 130 Taxman 129 (Mag.) / 86 ITD 312 / 78 TTJ 598 (Bang.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Overseas gifts – Circular**

Once the conditions laid down as per Circular No 302 dt 25.09.1981 (1981) 131 ITR 63 (st) in case of overseas gifts are fulfilled, Gifts cannot be taxed in India. (A.Y. 1994-95)

*ACIT v. Hansa Chaganlal (2003) 79 TTJ 992 / (2004) 2 SOT 507 (Visakha.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Interest – Income tax refund [S. 143(1), 143(2)]**

Interest on Income Tax Refund determined as per Intimation under section 143(1)(a) is revenue receipt liable to be taxed in the relevant year. Interest so determined can not be said to be contingent in nature in the context of section 143(2) which may or may not be taken.

Intimation is an independent enforceable statutory demand notice, and assessee has a right to enforce the contents of the Intimation. (A.Y. 1997-98)

*Saffron Trading Co. (P) Ltd. v. ACIT (2003) 84 ITD 70 / 80 TTJ 115 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Life membership subscription – Magazine – Refundable**

Amount received by a publisher from subscribers towards Life membership of magazine over last 15 years was treated as capital receipt on ground that same was refundable. Assessing Officer taxed the same as revenue receipt on ground that no amount has been refunded so far, and also since 10 years and annual subscription are being considered as Revenue receipt. (A.Y. 1991-92)

*ITO v. Mritunjay Sharma (2003) SOT 635 (Agra)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Loan renounced by lender – Capital receipt**

Loan received as a capital receipt, in the context of an Order of BIFR as a measure of restructuring, will not change its character and become revenue receipt, on its renunciation by the lender, even though written back to the P & L account. (A.Y. 1994-95)

*APR Ltd. v. Dy. CIT (2003) 87 ITD 618 (Hyd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Surplus amount recovered on behalf of principal**

The amounts recovered by the assessee a consignee agent, in excess of the authorised amount from the dealer, which was not on account of principal, was held to be an assessee's Income liable to tax. (A.Y. 1986-87)

*ITO v. Orient Trading Co. (2003) 84 ITD 97 / 79 TTJ 487 (Ahd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Subsidy – Interest Liability**

The subsidy granted to the assessee by converting interest liability into a subsidy, for rehabilitation and for modernization and expansion was held to be an capital receipt. (A.Y. 1990-91)

*R B Narain Singh Sugar Mills Ltd. v. Dy. CIT (2003) 85 ITD 552 / 80 TTJ 402 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Body of individual – Partners of erstwhile firm**

Partners of an erstwhile Firm cannot be assessed as an BOI, when the firm is dissolved on death of one of the partner, in absence of contrary provision in the Deed. (A.Y. 1988-89)

*United Enterprises v. ITO (2003) SOT 439 (Mum.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Diversion by overriding title – Payment to share holder – Scheme of arrangement – Approved by court**

Amount given to shareholders by assessee company on scheme of arrangement duly approved by High Court, can not be said as received/ accrued by/to the assessee, and said to have been diverted at source, and cannot be taxed. (A.Y. 1997-98)

*Salora International Ltd. v. Jt. CIT (2003) 129 Taxman 68 (Mag.) / SOT 671 / 88 TTJ 53 (Delhi)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Club**

In a mutual concern the surplus can either be given back to the contributors or if it does not come back individually, they should have right over disposal of the surplus to upheld mutuality. (A.Ys. 1989-90 to 1991-92)

*Investor's Club v. ITO (2003) 84 ITD 273 / 90 TTJ 1009 (Cochin)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Interest on bank fixed deposit**

Interest received by the assessee club on fixed deposits with banks is not taxable on ground of mutuality, as placing surplus funds with banks is not tainted with commerciality. (A.Ys. 1983-84 to 1997-98)

*Fateh Maidan Club v. ACIT (2003) 81 TTJ 831 / 3 SOT 679 (Hyd.)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Mutuality – Guest Fees – Club**

Guest fees received cannot be said to be income from non-members, and same would fall within the concept of mutuality and would not be taxable merely on basis of accounting entry. (A.Y. 1994-95)

*Summair Sports Club v. ACIT (2003) SOT 360 (Rajkot)(Trib.)*

#### **S. 4 : Charge of Income-tax – Income – Joint venture – Association of persons – DTAA – India-Austria [Articles 5, 7 & 12]**

Austrian Company enters into JV with two Indian companies to provide consultancy services for development of seven tunnels in Himachal Pradesh. AAR observed that it is an Association of Persons as (a) contract is with JV and not the individual members, (b) members have collaborated for all the work, (c) they are jointly and severally responsible for performance of the work, even though income on gross basis goes to the members directly and not to the JV and (d) formation of association with a common object and unified management is evident. AAR held that that JV to be assessed to tax as AOP only and questions of Permanent Establishment and taxability as business profits or fees for technical services does not arise

*Geoconsult ZT GmbH (2008) 304 ITR 283 / 172 Taxman 396 / 11 DTR 121 / 218 CTR 337 (AAR)*

### **Section 5 : Scope of total income**

#### **S. 5 : Scope of total income – Income – Accrual – Advance receipt**

Fees received in advance by the assessee from the clients of its beauty and slimming clinics which is attributable to “unexecuted packages” i.e. services are to be rendered in the succeeding year did not accrue in the relevant year. (A.Y. 1997-98).

*CIT v. Dinesh Kumar Goel (2011) 239 CTR 46 / 50 DTR 254 / 331 ITR 10 / 197 Taxman 375 (Delhi)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Interest on enhanced compensation of land**

Interest on enhanced compensation of land is liable to be taxed once it was received. (A.Ys. 2000-01 to 2002-03)

*Dy. CIT v. Gopal Ramnarayan Kasat (2010) 328 ITR 556 / (2011) 240 CTR 266 / 54 DTR 228 (Bom.)(High Court)*



**S. 5 : Scope of total income – Income – Accrual of income – Waiver of interest – Method of accounting [S. 145]**

Waiver of interest before end of accounting year, interest did not accrue to assessee. (A. Y. 1997-98).

*Bagoria Udyog v. CIT (2011) 334 ITR 280 / 60 DTR 386 / 244 CTR 339 (Cal.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Excise duty refund – Decision in case of a third party**

Hypothetical income credited by the assessee in the profit and loss account in respect of excise duty refund based on a Supreme Court decision in case of a third party cannot be said to have accrued to the assessee. (A.Y. 1988-89).

*CIT v. Nuchem Ltd. (2011) 55 DTR 14 (P&H)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Advance from customers towards booking of cruise tickets**

Assessee being engaged in the business of travel agency as a representative of RCCL bookings tickets for the latter's cruise and entitled to base commission of 25% on all bookings as per the terms of the agreement between the parties, the commission accrues to the assessee with the booking of tickets against full payment as per the mercantile system of accounting followed by him; however, assessee is entitled to deduct 10% on account of travel agents commission which is payable by him. (A.Ys. 2003-04, 2005-06 & 2007-08)

*CIT v. Gautam R. Chadha (2011) 62 DTR 58 / 244 CTR 493 (Delhi)(High Court)*

**S. 5 : Scope of total income – Income – Salary – Non-resident – On board of Ship**

**[S. 9(1)(ii), 15]**

Salary earned by non-resident for services performed during his stay of 225 days outside India working on board on ship which was outside India, did not accrue or arise in India and as such the same was not taxable in India. (A. Y. 2005-06)

*DIT (IT) v. Prahlad Vijendra Rao (2011) 51 DTR 95 / 239 CTR 107 / 198 Taxman 551 (Karn.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest on enhanced compensation of land – Cash System of Accounting**

Where the assessee is following cash system of accounting interest received on enhanced compensation under land Acquisition Act, is taxable on receipt basis irrespective of pendency of appeal in higher Courts in respect of such compensation. (A.Y. 2002-03)

*CIT v. Burfi (Smt.) (2010) 46 DTR 354 / 241 CTR 277 / 331 ITR 1 (P&H)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest on enhanced compensation**

Interest on enhanced compensation accrues from year to year and has to be spread over respective years. (A.Y. 1989-90)

*Sajjansinh N. Chauhan v. ITO (2010) 38 DTR 155 / 232 CTR 268 (Guj.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Interest on Government Securities**

Interest on Government Securities can be said to accrue only when it becomes due and therefore there cannot be charge to such income until such time that becomes due. (A.Y. 2002-03)

*CIT v. Bank of Rajasthan Ltd. (2010) 233 CTR 530 / 40 DTR 173 / 326 ITR 526 (Bom.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Interest – Interest on NPA not assessable on “accrual” basis [ S. 145 ]**

Under section 45Q of the RBI Act read with the NBFCs Prudential Norms (Reserve Bank) Directions 1998, it was mandatory on the part of the assessee not to recognize the interest on the ICD as it had become a NPA. The assessee was bound to compute income having regard to the recognized accounting principles set out in Accounting Standard AS-9. AS-9 provides that if there are uncertainties as to recognition of revenue, the revenue should not be recognized. Accordingly, the argument of the revenue that the interest on the NPA can be said to have accrued despite it being a NPA is not acceptable.

*CIT v. Vasisth Chay Vyapar (2011) 238 CTR 142 / 330 ITR 440 / 196 Taxman 169 / 49 DTR 300 (Delhi)(High Court)*

**Editorial :** Appeal of revenue was dismissed, *CIT v. Vasisth Chay Vyapar ( 2018) 253 Taxman 401/ 301 CTR 263/ 163 DTR 169 ( SC)*

#### **S. 5 : Scope of total income – Income – Accounting – Change of method [S. 143]**

There being genuine difficulties compelling assessee to change over from mercantile to cash system of accounting as regards to interest income, the change was bonafide, hence, the CIT(A) and the Tribunal were justified in setting aside the order of Assessing Officer rejecting the change. (A.Y. 1986-87)

*ACIT v. Coromandal Investment (P) Ltd. (2009) 225 CTR 313 / 316 ITR 104 / 174 Taxman 194 / 12 DTR 152 (Guj.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual of Income – Interest**

Accrued interest but not due which was receivable by the assessee only after the end of the previous year cannot be assessed to tax in the current year even though the assessee is following mercantile system of accounting. (A.Y. 1992-93)

*CIT v. FAL Industries Ltd. (2009) 17 DTR 308 / 314 ITR 47 / 189 Taxman 400 (Mad.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Duty draw back**

Duty drawback and cash assistance could not be charged to tax on accrual basis.

*CIT v. Bajaj Auto Ltd. (2009) 20 DTR 241 / 322 ITR 29 / 182 Taxman 163 (Bom.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Interest**

Assessee had offered interest income in some years on accrual basis though not actually received by it on the loans, recovery of which was doubtful. Thereafter, assessee entered into a settlement with the debtor and also assigned the entire debt to a third party. Amount received by it on such assignment, which was lower than the amount of interest on which the assessee had already paid tax, addition/cannot be made on account of accrued interest.

*CIT v. Eicher Ltd. (2009) 26 DTR 310 (2010) 320 ITR 410 / 185 Taxman 243 (Delhi)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Notional**

Where the assessee was in a transport franchisee business and the franchisee agreement was rescinded and there was no evidence that the assessee conducted the said business thereafter, addition of notional income from such business cannot be brought to tax on a notional basis under the Act. (A.Y. 2001-02)

*CIT v. Jaipur Golden Transport Co. (Regd.) (2009) 25 DTR 236 / 183 Taxman 480 (Delhi)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Mercantile system of accounting**

Where the assessee was following mercantile system of accounting, any waiver of interest chargeable on accrual basis on the outstanding loans after the close of the accounting year would not stop the accrual of interest on the basis of real income theory. (A.Y. 1982-83)

*H. P. Mineral & Industrial Corporation v. CIT (2008) 302 ITR 120 / 7 DTR 345 / 217 CTR 388 (HP)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Additional compensation**

The Government had appealed against the additional compensation awarded to the assessee by the Court and during the pendency of the appeal filed by the Government, the assessee was allowed to withdraw the decretal amount. The High Court following series of decisions of High Court and Apex Court held that such additional compensation did not accrue to the assessee and same was not taxable at this stage.

*Mohan v. Government of India & Anr. (2008) 13 DTR 239 (Bom.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Royalty**

The assessee entered into an agreement with another company, under which a certain amount of royalty was payable to the assessee. However, some dispute arose between the assessee and the company and the same was pending before the

arbitration. The High Court held that there was no real accrual of royalty income which was chargeable under the Act.

*FGP Ltd. v. CIT (2008) 9 DTR 295 / 326 ITR 444 / 177 Taxman 147 (Bom.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Dispute pending in court**

Where in the case of assessee, pension was first credited in assessee's account in Malaysia and then the same was remitted to him in India. The High Court held that the salary did not accrue to the assessee in India under the provisions of sections 5(1)(a) & 5(1)(c) read with Article 18(3) of the DTAA between Indian and Malaysia which states as follows, "Any person paid by the Government of the contracting states to any individual may be taxed in that contracting state". As such the pension so received by the assessee was not taxable in India.

*CIT v. M.P. Philip (Shri) (2008) 203 Taxation 217 (Ker.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Capital or revenue – Subsidy**

Incentive subsidy received by assessee as capital receipt, hence, not includible in total income. The Court held that, Tribunal was right in law in holding that the incentive subsidy received by the assessee was a capital receipt and could not be included in total income. (A.Y. 1986-87)

*CIT v. Salem Co-operative Sugar Mills Ltd. (2006) 286 ITR 635 (Mad.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Time of accrual – Excess price realization**

Excess levy sugar price charged by assessee manufacturer of sugar as per interim order of High Court and credited to Levy Price Equalization Fund, could not be said to have accrued as income to assessee. (A.Y. 1994-95)

*CIT v. Dhampur Sugar Mills Ltd. (No. 1) (2005) 274 ITR 340 / 142 Taxman 362 / 194 CTR 170 (All.)(High Court)*

#### **S. 5 : Scope of total income – Income – Accrual – Accrued or arisen or received – Income from Sikkim State Lottery – Territorial operation – Validity [S. 4]**

For the assessment year 1986-87, in case of resident assessee provisions of Income Tax Act, 1961 were attracted to income accrued or arisen or received in Sikkim though the Act was not extended to Sikkim during such year, and as such, income from Sikkim State Lottery was taxable under the Act. Provisions of sections 5 and 6 are to make reach of Income Tax Act, 1961, extra territorial, but a provision which has extra – territorial operation by itself is neither invalid nor ineffective. (A.Y. 1986-87)

*Mahaveer Kumar Jain v. CIT (2005) 277 ITR 166 / 142 Taxman 130 / 191 CTR 303 (Raj.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Real income – Legal obligation**

An amount which party was never under legal obligation to pay to assessee and which never became debt due to assessee would not become income of assessee accrued or otherwise merely because such amount had been cumulatively credited to “deferred accrued account”. (A.Ys. 1990-91, 1991-92)

*National Handloom Development Corporation Ltd. v. Dy. CIT 266 ITR 647 / 136 Taxman 81 / 188 CTR 195 (All.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Notional interest**

If transaction is genuine, notional interest in respect of interest free loan given to sister – concern can not be added. (A.Y. 1995-96)

*CIT v. Sanghi Finance & Investment Ltd. (2005) 273 ITR 268 / (2004) 141 Taxman 466 / 191 CTR 150 (MP)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Interest – Arbitration award**

Accrual of interest on arbitral award where pending appeal, interest is deposited in court and is allowed to be withdrawn by furnishing bank guarantee as per the order of the Court. Therefore the determinative date was the date on which the decision is rendered by the Court and interest accrued on that date only.

*Paragon Constructions (India) P. Ltd. v. CIT (2005) 274 ITR 413 / 142 Taxman 215 / 192 CTR 418 (Delhi)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Interest – Zero coupon bonds**

Accrual of Interest on zero-coupon bonds, which were saleable and where tax had to be paid on maturity of bonds could not be said to have been accrued. (A.Ys. 1991-92, 1992-93)

*CIT v. MGF India Ltd. (2005) 272 ITR 191 / (2004) 187 CTR 511 / 142 Taxman 205 (Delhi)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Service charges**

Service charges collected by assessee company carrying on business in television sets, which related to services to be rendered in future, could not be taxed in the year of receipt. (A.Ys. 1983-84, 1988-89)

*CIT v. Coral Electronics (P) Ltd. (2005) 274 ITR 336 / (2004) 192 CTR 369 / 142 Taxman 481 (Mad.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Real income – Interest**

Where recovery of the principal amount itself was in doubt, there was no question of addition of estimated amount of interest on loan advanced by assessee to debtor. (A.Y. 1983-84)

*CIT v. Laxmi Dal Mills (2005) 146 Taxman 625 (All.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Real income – Interest**

Where assessee was maintaining mercantile system of accounting and assessee was still showing principal as outstanding in its books of account and Tribunal found that there was no evidence on record to show that debt or payment of interest was ever denied by debtor, it could not be said that interest had not accrued to assessee.

*Uikam Investment & Finance v. CIT (2005) 195 CTR 97 (Delhi)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Real income – Interest on sticky loans**

Interest on sticky loans transferred to suspense account cannot be treated as income accrued to assessee. (A.Ys. 1985-86, 1986-87)

*CIT v. State Bank of Indore (2005) 144 Taxman 348 / 193 CTR 68 (MP)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Real income – Interest**

Amount credited by assessee- State Financial Corporation in 'interest suspense (suit filed) account' and 'interest suspense (recalled) account' could not be said to have accrued to assessee even though it was following mercantile system of accounting. (A.Y. 1980-81)

*Maharashtra State Financial Corpn. Ltd. v. CIT (2005) 278 ITR 654 / 200 CTR 168 / 151 Taxman 260 (Bom.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Time of accrual – Interest**

Where assessee company advanced money against potatoes stored in its cold storage against interest and before close of accounting year, assessee company decided not to charge any interest from its debtors whose out standings were for more than six months. In absence of fixation of any date of payment of interest and in absence of any finding that waiver of interest was actuated by any consideration other than business expediency, it could not be said that interest accrued to assessee, even though it was following mercantile system of accounting. (A.Y. 1981-82)

*CIT v. Giriraj Udyog (P) Ltd. (2005) 273 ITR 495 / 151 Taxman 75 (All.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Time of accrual – Interest**

Where the Tribunal, from evidence and material on record, had found that financial position of debtors had deteriorated to such an extent that even the chance of principal amount being recovered was very doubtful. In these circumstances, assessee had not charged any interest from its debtors, it could not be said that it had not acted as a prudent businessman; thus, Tribunal was right in law in deleting addition made on account of accrual interest on such debt. (A.Ys. 1978-79 & 1979-80)

*CIT v. Abbas Wazir (P.) Ltd. (2005) 274 ITR 448 / 145 Taxman 249 (All.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Time of accrual – Interest on deposit**



Where assessee had a share in evacuee property which was sold and sale proceeds were deposited in bank, interest received by assessee on such deposit, after prolonged litigation, could not be taxed in year of receipt as it accrued from year to year. (A.Y. 1975-76)

*CIT v. Azimunnisha Begum (Smt) (2005) 277 ITR 48 / 145 Taxman 38 / 194 CTR 72 (All.)(High Court)*

**S. 5 : Scope of total income – Income – Time of accrual – Interest on compensation**

Where the assessee was following mercantile system of accounting, interest awarded to her on enhanced compensation for acquisition of her plot was assessable on accrual basis from year to year and not in year of receipt. (A.Y. 1980-81)

*Angoori Devi (Smt) v. Chief Commissioner (Admn.) (2005) 145 Taxman 64 (All.)(High Court)*

**S. 5 : Scope of total income – Income – Time of accrual – Interest on compensation**

Where compensation received by assessee on acquisition of land was deposited in FDs, merely because amount of compensation was in dispute, it could not be said that interest on FDs had not accrued. (A.Y. 1994-95)

*CIT v. M.R. Sapra (Dr.) (2005) 276 ITR 41 / 148 Taxman 292 / 197 CTR 207 (P&H)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest – Pendency of suit**

Interest on loan would not accrue during pendency of suit for recovery of loan. (A.Ys. 1975-76, 1976-77)

*CIT v. U.P. Financial Corporation (2004) 191 CTR 135 / 143 Taxman 47 (All.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest on debenture**

Where entire interest income on debentures was taxed in subsequent year on the basis of method of accounting adopted by the assessee with respect to that interest income, the tribunal was justified in deleting the addition of the said interest income from the total income of the year under reference. (A.Y. 1984-85)

*CIT v. Sabarmati Investment (P) Ltd. (2004) 188 CTR 570 (Guj.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest [S. 214]**

Interest received under section 214 accrues in the year in which it is granted. (A.Y. 1985-86)

*Tamilnadu Industrial Investment Corporation Ltd. v. Dy. CIT (2004) 270 ITR 566 / 192 CTR 521 / 145 Taxman 386 (Mad.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest on sticky loans – Credited to suspense account**

The amount credited to the suspense account was not taxable in the assessment year in question. (A.Ys. 1976-77, 1978-79, 1980-81)

*CIT v. State Bank of India (2003) 129 Taxman 409 / 262 ITR 662 / 181 CTR 63 (Bom.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Mercantile system – Accrue**

When an assessee maintains his accounts on mercantile system, what has to be seen is whether income can be said to have really accrued to him or not. If the income has accrued, it is taxable in the year of accrual irrespective of the fact whether he has received the same or not. (A.Y. 1973-74)

*Seth Madan Lal Modi v. CIT (2003) 126 Taxman 129 / 261 ITR 49 / 179 CTR 67 (Delhi)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Compensation – Insurance claim**

Compensation in respect of insurance claim for damage to assessee's factory etc, could be said to have accrued in the year in which on Assessee's own showing insurance company accepted its liability. (A.Y. 1978-79)

*Amartaara Ltd v. CIT (2003) 262 ITR 598 / 132 Taxman 766 / 178 CTR 199 (Bom.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest – Mercantile system of accounting**

When assessee follows mercantile system of accounting, actual receipt of interest during relevant assessment year is not necessary. (A.Y. 1973-74)

*S.M.S. Investment Corporation (P) Ltd v. CIT (2003) 132 Taxman 279 / 184 CTR 365 / (2005) 272 ITR 613 (Raj.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Interest – Additional compensation – Land acquisition**

Interest amount received by assessee in respect of enhanced compensation awarded by Court for acquisition of land should be assessed on accrual basis. (A.Y. 1982-83)

*CIT v. T.A.S. Chellaya (2003) 260 ITR 211 / 134 Taxman 755 (Mad.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Remuneration – Approval by Central Government**

When Directors remuneration required to be approved by Central Government, remuneration can not be said to accrue in the absence of approval. (A.Y. 1973-74)

*Seth Madan Lal Modi v. CIT (2003) 126 Taxman 129 / 261 ITR 49 / 179 CTR 67 (Delhi)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Remuneration – Approval of Government**

Remuneration for which approval of Government was not received and which had been forgone prior to the end of relevant previous year could not be said to have accrued. (A.Y. 1979-80)

*CIT v. Mahendra Kumar Modi (2003) 130 Taxman 271 / 185 CTR 229 (Delhi)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Lease income – Distributor of film**

Lump sum amount of lease rent paid by distributor of films to assessee film actor under an agreement, which assessee was not liable to return at all, was to be treated as income of year of receipt and provision for such amount's adjustment towards rental over a period of five years was immaterial. (A.Ys. 1985-86, 1986-87)

*CIT v. G.S.R. Krishnamurthy (2003) 132 Taxman 341 / 262 ITR 393 / 184 CTR 414 (Mad.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Mercantile system of accounting – Lease of horses**

The assessee derived income from lease of horses. Assessee was maintaining mercantile system of accounting and entire lease income accrued in year of auction, it was not open to assessee to claim that it should be assessed proportionately in the years of receipt of income. (A.Ys. 1979-80, 1981-82)

*M. CT. Muthiah v. CIT (2003) 260 ITR 629 / 135 Taxman 144 (Mad.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Place of accrual – Dividend – Malaysia**

Dividend income received by assessee from Malaysia is not taxable in India. (A.Y. 1984-85)

*CIT v. A.V.M. Nazimuddin (2003) 131 Taxman 515 (Mad.)(High Court)*

**S. 5 : Scope of total income – Income – Accrual – Accrual real income – Time of accrual – Mercantile system of accounts – Entry in books of account**

Where the income is accrued according to the accounts of the assessee and there is no indication by the assessee to treat the income as not having accrued, there is no suspension of the accrual of the income. Once accrual takes place and income accrues, the same can not be defeated by any theory of real income. Normally under mercantile system, income is not entered in the books of account, then such non entry can be construed to establish that income has not accrued, but this is dependent on facts and circumstances of case and conduct of the assessee. (A.Y. 1988-89)

*CIT v. Balampur Commercial Enterprises Ltd. (2003) 130 Taxman 845 / 262 ITR 439 / 183 CTR 578 (Cal.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Income foregone – Remuneration**

Remuneration could not be said to have accrued to assessee where it was foregone even before right to receive remuneration accrued. (A.Y. 1980-81)

*CIT v. Kishan Kumar Modi (2003) 131 Taxman 229 (Delhi)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Interest on sticky loans – Mercantile system of accounting**

Assessee bank was following mercantile system of accounting for purpose of computing its profit but cash system of accounting in respect of interest arising on stocky loans and revenue had been accepted for past over 30 years, interest on "sticky loans" should be assessed on cash basis and not accrual basis. (A.Y. 1987-88)

*CIT v. Syndicate Bank (2003) 127 Taxman 287 / 261 ITR 528 / 180 CTR 1 (Karn.)(High Court)*

### **S. 5 : Scope of total income – Income – Accrual – Interest on sticky loans – Credited to suspense account**

The assessee bank was not liable to be taxed in respect of the amounts credited to Interest Suspense Account being interest on sticky loans and advances. (A.Y. 1981-82)

*CIT v. Bank of America NT and SA (2003) 262 ITR 504 / 183 CTR 251 / 133 Taxman 648 (Bom.) (High Court)*

### **S. 5 : Scope of total income – Income – Capital or revenue – Collection from buyers**

Where assessee is collecting sum from every buyer towards flat owners association, such corpus fund cannot be assessed as income of assessee. (A. Ys. 2001-02, 2005-06)

*ACIT v. C. Rajini (Smt.) (2011) 9 ITR 48 7 / 140 TTJ 218 / 58 DTR 554 (Chennai)(Trib.)*

*Dy. CIT v. C. Subba Reddy (HUF) (2011) 9 ITR 487 / 140 TTJ 58 / 58 DTR 554 (Chennai)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Tuition fees received in advance [S. 145]**

Assessee in receipt of non-refundable advances from coaching students can be charged to tax only to the extent of receipt which accrued to the assessee as income during the relevant previous year and not the entire receipts. (A.Ys. 2005-06, 2006-07)

*Career Launcher (India) Ltd. v. ACIT (2011) 139 TTJ 48 / 131 ITD 414 / 56 DTR 10 (Delhi)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Earnest money – Sale of land**

Earnest money received for transfer of land. Transaction not taking place in year. Earnest money received not to be treated as income in year under consideration. (A.Y. 2004-05).

*Dy. CIT v. Shiv Sai Developers (2011) 10 ITR 80 / (2012) 134 ITR 445 (Mum.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Dividend recovered – Right to receive**

Assessee, a non banking finance company, sold shares which it held as investment. Transfer of names of transferee was not recorded in register of members of company whose shares were transferred by assessee. Therefore, dividend declared by companies on those shares was paid to assessee. The assessee showed the said dividend as under the heading "Excess dividend received refundable". Assessing Officer treated the same as income of the assessee. The Tribunal held that the is right to receive income cannot be said to have been accrued and without legally enforceable right there can be no accrual of income. (A. Y. 2006-07).

*Dy. CIT v. Tata Investment Corporation Ltd. (2011) 46 SOT 359 / 61 DTR 473 / 142 TTJ 335 (Mum.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Fixed deposits in banks – Interest – Deduction at source – Certificate**

Assessee society held fixed deposits in banks for a term exceeding more than one year. It had not shown any interest income from said FDs during previous year on ground that income from FDs would be offered to tax on its receipt from bank on maturity on basis of certificate of TDS issued by bank. Assessing Officer added interest at 10% on estimate basis. The Tribunal held that the assessee was not liable to declare interest income accrued but not due to it in relevant assessment year in view of fact that said sum was not acknowledged by bank or by assessee itself. (A.Y. 2007-08).

*Puri District Co-op. Milk Producers' Union Ltd. v. ITO (2011) 132 ITD 127 (Cuttack)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Builder – Slum rehabilitation project – Sale of TDR – Project completion method – Method of accounting [S. 145]**

Assessee being a builder, had taken a slum rehabilitation project. Assessee had been allotted TDR in lieu of handing over possession of constructed transit building. Assessee has sold the TDR in two installments. Assessing Officer taxed the receipts of TDR as independent income. Assessee contended that as they are following project completion method as per AS. 7, income from project had to be computed in year of completion. The Tribunal directed the Assessing Officer to compute the income of project after taking into consideration entire expenditure and receipt from beginning of year including TDRs. In case the project was not found complete, Assessing Officer would set off TDR receipts against work in progress and no income would be assessed on account of TDR receipts separately. (A. Y. 2007-08).

*ACIT v. Skylark Build (2011) 48 SOT 306 (Mum.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Security deposit – Method of accounting [S. 145]**

Assessee company engaged in manufacturing of ice-creams, cheese, butter, etc., supplied freezers to venders after taking security deposits. On termination of agreement, assessee would own freezers and it would deduct certain percentage of cost of freezers from security deposit. Assessing Officer treated the deposit as income. The Tribunal held that the assessee could not treat these two amounts as receipts in nature of income unless agreement terminated. (A. Y. 2007-08).

*High Range Foods (P) Ltd. v. Dy. CIT (2011) 48 SOT 453 (Cochin)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Interest on RBI Bonds – Cash Basis**

Assessee were entitled to recognize the interest income attributable to 8 % RBI Bonds on cash basis to be reckoned at the time of redemption of the bonds. Assessing Officer was not justified in making addition on yearly accrual basis. (A.Y. 2006-07)

*K. Nagendrasa & Ors. v. Dy. CIT (2010) 48 DTR 492 / 132 ITD 152 / 135 TTJ 253 (Bang.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Excise duty refund**

Claim of Excise Duty refund under duty drawback rules by assessee following mercantile method of accounting being an incentive for deemed exports, is liable to be taxed in the year of claim. (A.Y. 2003-04)

*Nathpa Jhakri Joint Venture v. ACIT (2010) 41 DTR 233 / 37 SOT 160 / 131 TTJ 702 / 5 ITR 75 (Mum.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Guarantee commission**

When the bank gives guarantee for period extending the close of the year and there is no obligation to refund the amount in case such guarantee is revoked prior to the prescribed period, the entire commission accrues to it at the time of giving guarantee and no part of such commission can be said to be deferred to next year. (A.Ys. 1997-98 & 1999-04)

*Dy. DIT v. Chohung Bank (2010) 40 DTR 75 / 4 ITR 627 / 126 ITD 448 / 133 TTJ 331 (Mum.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time share membership fee**

Timeshare membership fee is taxable only over the term of contract. (A.Ys. 1998-99, 1999-2003)

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

**S. 5 : Scope of total income – Income – Accrual – Retention Money**



Amount retained by clients under agreement to the extent of 5 to 10 per cent of the bill value which was released to the assessee only after satisfactory completion of the work could not be added to the income of assessee even following mercantile system of accounting. It was held that when the assessee had no right to receive the money by virtue of the contract between the parties and the assessee also had no right to enforce payment, it could not be said that the right to receive payment of the remaining 10 per cent of the value of job had accrued. (A.Y. 2003-04)

*Dy. CIT v. East Coast Constructions & Industries Ltd. (2009) 23 DTR 225 (Chennai)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Notional Gain on foreign currency swap**

Notional gain arising on revaluation of foreign currency loan at the end of relevant previous year is not a real income and therefore, it is not taxable even though assessee is following mercantile system of accounting. (A.Ys. 2002-03, 2003-04)

*EIH Associated Hotels Ltd. v. Dy. CIT (2009) 126 TTJ 246 / 16 DTR 181 (Kol.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Accounts – Rejection – Validity**

Payment being unvouched and unverifiable and there being steep fall in GP rate as compared to last year, accounts were rightly rejected by AO. (A.Y. 2003-04)

*Pannalal Construction Co. v. ITO (2007) 107 TTJ 114 (Jodh.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Enhanced Compensation**

Enhanced compensation is chargeable to tax in the year in which such compensation is received. However, interest on enhanced compensation is to be assessed on accrual basis from year to year. It can be subjected to tax only after it is finally determined. (A.Y. 1995-96)

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

#### **S. 5 : Scope of total income – Income – Accrual – Unilateral charge of interest**

Unilateral decision of assessee to charge interest not enforceable in law does not amount to accrual of income, more so when the debtor did not make any provision for interest payable to assessee. (A.Y. 1994-95)

*Dy. CIT v. Reliance Petroleum Ltd. (2006) 100 TTJ 565 / 5 SOT 165 (Mum.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – TDS – Method of accounting**

Receipts having been credited to the accounts of succeeding assessment year as per the method of accounting regularly employed by assessee, Assessing Officer was not justified in adding the receipts to relevant assessment year and giving credit of TDS. (A.Y. 1997-98)

*Varsha G. Salunke (Smt.) v. Dy. CIT (2006) 101 TTJ 703 / 98 ITD 147 (TM)(Mum.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Interest on loan**

Assessee having taken legal steps and realized the whole amount of principal and part of interest, interest accrued to assessee according to mercantile system of accounting regularly followed by it. (A.Ys. 1998-99 & 2001-02)

*Magnum Power Generation Ltd. v. ACIT (2006) 102 TTJ 163 / 6 SOT 569 (Delhi)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Notional interest**

Notional interest on debit balance could not be charged to tax when the debtor company had gone into liquidation and the outstanding amount was not recoverable. (A.Ys. 1993-94 to 1995-96)

*ITO v. Chotulal Ajit Singh (2006) 102 TTJ 663 (Jp.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Escrow – Interest**

Consideration receivable under the agreement kept under escrow and interest earned thereon – Assessee's claim that the interest was taxable in the year of receipt and not on accrual was justified. (A.Y. 2000-01)

*Dy. CIT v. Ram Kumar Giri, (2006) 103 TTJ 352 (Chennai)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Interest**

Assessee having not credited any interest on the debit balance of a party in the relevant year as the principal amount itself was not likely to be recovered in the prevailing circumstances and the debtor having credited the amount of interest only in the subsequent accounting year which the assessee has shown in the corresponding assessment year, interest income did not accrue to the assessee in the assessment year under consideration. (A.Y. 1999-2000)

*Ganga Prashad Parshotam Lal v. ITO (2006) 99 TTJ 201 (Amritsar)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Interest on securities – Accrues**

Interest on securities accrues only on the specified dates and not on day-to-day basis. (A.Ys. 1991-92, 1992-93)

*Dy. CIT v. Housing Development & Finance Corporation Ltd. (2006) 99 TTJ 1188 / 98 ITD 319 (Mum.)(Trib.)*

**S. 5 : Scope of Total Income – Income – Accrual – Interest on refund**

Interest on refund allowed on last day of accounting year cannot be added as income of the relevant year as there is always time gap between date of issue and date of receipt of refund order. (A.Y. 1998-99)

*Om Prakash Nargotia v. ITO (2006) 100 TTJ 657 (Amritsar)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual of Interest – Enhanced compensation**

Interest awarded on enhanced compensation by the Addl. District Judge, though received, did not accrue to the assessee during the pendency of appeals against the award and, therefore, since the assessee was following accrual system of accounting, assessment of interest cannot be made until the matter is finally settled by the High Court. (A.Ys. 1994-95 & 1995-96)

*Dy. CIT v. Bhim Singh Lather (2006) 100 TTJ 170 / 99 ITD 46 (TM)(Delhi)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Completion contract**

In the absence of any dispute regarding payments under the civil contract executed by assessee, payments received by assessee on completion of contract could not be treated as outstanding liability and were assessable to tax. (A.Y. 2001-02)

*Marg Constructions Ltd. v. Dy. CIT (2006) 102 TTJ 997 (Chennai)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Non-performing assets**

Income from non-performing assets. Income of a housing finance company from non-performing assets cannot be taxed merely on the basis of accrual. (A.Ys. 1996-97, 1997-98)

*Canfin Homes Ltd. v. Jt. CIT (2006) 103 TTJ 108 / 7 SOT 916 (Bang.)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Interest – Indian Branch**

Interest receivable by Indian branch from head office/overseas branches of non-resident bank is to be taken into account for the purposes of computing profits arising or accruing in India under section 5(2)(b). (A.Y. 1998-99)

*Dresdner Bank AG v. Addl. CIT (2006) 105 TTJ 149 / (2007) 108 ITD 375 / 11 SOT 158 (Mum.)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Discounting charges**

Assessee was discounting bills of company which was declared as a relief undertaking and such discounting charges receivable by assessee from such party had become unenforceable, no addition could be made on account of discounting charges deemed to have been received on accrual basis. (A.Y. 2001-02)

*Marwah Steels P. Ltd. v. Dy. CIT (2005) 3 SOT 339 (Mum.)(Trib.)*

### **S. 5 : Scope of total income – Income – Accrual – Unrecorded sales**

Assessee makes purchases outside books and also sells goods outside books, profit, i.e. difference between sale price and expenditure incurred by assessee, is income from unrecorded sale, where an assessee records all expenditure in books of account but part of sale consideration is not recorded in books of account, then unrecorded sale itself would be income of assessee. (A.Y. 1992-93)

*Dy. CIT v. Bhogilal Mulchand Kandoi (2005) 3 SOT 211 / 96 ITD 344 / 98 TTJ 108 (Ahd.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Arbitration award**

Income under contract would accrue to party only when dispute arising from the contract, referred to arbitration, is resolved by an award and award is accepted by both the parties. (A.Y. 1989-90)

*HCL Ltd. v. ACIT (2005) 1 SOT 59 (Delhi)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Brokerage – Commission**

Assessee- broker was following cash system of accounting for brokerage income and because of postponement of delivery of stocks, etc., brokerage receipts were postponed to next financial year, brokerage income was to be taxed in assessee's hand when received by assessee and not in earlier year when delivery of stocks was normally due. (A.Y. 1992-93)

*Somayajulu & Co. v. Dy. CIT (2005) 3 SOT 185 /94 TTJ 184 (Chennai)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Duty Drawback**

No amount of duty drawback can be said to accrue to assessee until such claim is accepted by concerned authorities. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 92 TTJ 987 (Delhi)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Insurance Claim**

losses were incurred in earlier year and claims with insurance company did not materialize during the year, amount of claims lodged with insurance company could not be subjected to tax in AY in question merely on strength of entries passed in books of accounts. (A.Y. 1996-97)

*Jt. CIT v. Deva Singh Sham Singh (2005) 95 ITD 235 / 96 TTJ 914 (Amritsar)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Interest**

A mere denial by debtor to pay amounts to creditor is not enough to come to a conclusion that there was a remission of liability so as to hold that there was no accrual of interest on debt. (A.Y. 1997-98)

*Dy. CIT v. Uikam Investments & Finance P. Ltd. (2005) 94 TTJ 195 (Delhi)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of accrual – Interest**

Interest on retained retirement benefits of Central Government employees taking absorption in Central Government undertaking accrued from year to year and was taxable as such and not on receipt basis. (A.Y. 1997-98)

*Dhansukhlal C. Patel v. ITO (2005) 1 SOT 157 (Mum.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Time of Accrual – Interest**

Interest accrues on Indira Vikas patra (IVPs) only on maturity and therefore it cannot be said that such interest has accrued to assessee on year to year basis

*Dy. CIT v. Roshan Singh (2005) 95 TTJ 485 (Amritsar)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Mesne Profit**

Mesne profit are not liable to tax under all circumstances is not a correct proposition, and decision of Calcutta High Court in case of Smt Lila Ghosh is not an authority for said proposition. The nature of mesne profit has to be determined with reference to the claim, and depending on the deprivation of entire asset or the yearly revenue. (A.Ys. 1996-97, 1997-98)

*Sushilkumar & Co. v. Jt. CIT (2003) 81 TTJ 864 / (2004) 88 ITD 35 (SB)(Kol.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Non compete fee – Capital Receipt**

The amount received in lieu of agreement to not to compete for a period of 5 years was held to be Capital receipt, as assessee was deprived of its main earning apparatus. (A.Y. 1996-97)

*PL. Chemicals Limited v. ACIT (2003) 86 ITD 46 / (2004) 86 TTJ 745 (Chennai)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Real Income – Interest – BIFR – Mercantile system of accounting**

Held, that the Interest accrued from debtor companies, which were sick and referred to BIFR, can not be taxed on basis of Real Income theory, notwithstanding the fact that assessee followed mercantile system of accounting. (A.Y. 1996-97)

*Jt. CIT v. Pankaj Oxygen Ltd. (2003) 78 TTJ 119 / 130 Taxman 120 (Mag.)(Nagpur)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Method of accounting [S. 145]**

Income which has neither accrued nor received within the meaning of Sec 5, cannot be taxed by virtue of Sec 145, even if the accounting entries are made in the books.

*Canara Bank v. Joint CIT (2003) 84 ITD 310 / 79 TTJ 398 (Bang.)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Chit business**

Commission or remuneration to foreman conducting the Chit accrues at each monthly draw and becomes due and payable to him from out of the monthly subscriptions and not on completion of chits.

*Shriram Chits and Investments (P.) Ltd. v. ACIT (2003) 263 ITR 65 (AT)(SB)(Chennai)(Trib.)*

#### **S. 5 : Scope of total income – Income – Accrual – Savings trust**

Interest from savings Trust cannot be taxed merely on the basis of terms of agreement, without the ascertainment of Income from said trust, whose accounts are

not finalized, and since the Incidence of Tax is based either at the time of credit to any account or on actual payment.

*Dalhousie Holdings Ltd. v. ITO (2003) 85 ITD 61 / 80 TTJ 346 (TM)(Kol.)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Right to receive**

Once the Income generating asset is extinguished by operation of law/act of parliament, then there cannot be any accrual of Income, and there is no right to receive an Income. Income will be taxed on accrual basis only if there is a right to receive. (A.Ys. 1979-80 to 1986-87)

*Hindustan Metal Works v. ACIT (2003) SOT 442 (Agra)(Trib.)*

**S. 5 : Scope of total income – Income – Accrual – Non-resident – Income received in India [S. 9(1)(i)]**

Non-resident purchases for export and purchases for manufacture and export through Indian proprietary concern – AAR relied upon past legislation and the commentary of Kanga, Palkhiwala & Vyas in respect of scope of said sections that in respect of income which is received in India, residents and non-residents are alike chargeable under section 5 irrespective of the place of accrual of the income – Hence ruled that as export proceeds are received in India, it is held taxable.

*Mustaq Ahmed (2008) 307 ITR 401 / 220 CTR 321 / 176 Taxman 65 / 15 DTR 201 (AAR)*

**S. 5 : Scope of total income – Income – Accrual – Accrue or arise in India – Income received in India – Tax exempt status – India-USA DTAA [S. 9(1), 90, Article 1(2)]**

Foreign non-profit institutions conducting professional examinations / certification programmes in India - IRS, USA has determined them as 'tax exempt organizations' under section 501(c)(6) of Internal Revenue Code - Article 1, para 2 of DTAA permits such exemptions – AAR observed that as income is actually received in India instead of accruing or arising or deemed to accrue or arise in India, section 9 would not be attracted and question of business connection does not arise – hence ruled that examination fees from Indian students collected through Indian agent not taxable in India in terms of their tax exempt status read with DTAA

*KnoWerx Education (India) Private Ltd. (2008) 217 CTR 50 / 301 ITR 207 / 170 Taxman 98 / 7 DTR 7 (AAR)*

**S. 5 : Scope of total income – Income – Accrual – Income deemed to accrue or arise in India – Source of income arising in India [S. 9(1)]**

Applicant organizes food & wine shows in India and appoints agents abroad for canvassing participation and for booking space in the exhibition to be held in India payment for which is paid directly to non-resident outside India - AAR observed that as the source of income by the non-resident agent is the participation by the exhibitors in the exhibition in India, the right to receive the commission arises in India when the exhibitor participates in the exhibition and makes full and final



payment to the applicant in India; further, said Sections state that all income accruing or arising whether directly or indirectly, through or from any source of income in India shall be taxable in India and hence non-resident's income is taxable in India and is also subject to TDS.

*Rajiv Malhotra, In Re (2006) 284 ITR 564 / 155 Taxman 101 / 203 CTR 607 (AAR)*

#### **S. 5 : Scope of total income – Income – Accrual – Sale**

USA Company having entered into contracts with Government of Andhra Pradesh through local paid agent acting for and on behalf of USA Company in India, it has a permanent establishment in India and income from such contracts shall be taxable in India as is attributable to the permanent establishment.

*Sutron Corpn, In re (2004) 268 ITR 156 / 138 Taxman 87 / 189 CTR 366 (AAR)*

#### **S. 5 : Scope of total income – Income – Accrual – Place of accrual**

Where no payment is made by assessee to US contractor in India for feasibility report and work for preparation of report is done in U.S.A., section 5 (2) will have no application.

*Airports Authority of India, in re (2004) 269 ITR 355 / 140 Taxman 147 / 191 CTR 1 (AAR)*

#### **S. 5 : Scope of total income – Income – Accrual – Place of accrual**

Where license granted to Indian company to use technology information belonging to applicant company was terminated, it could not be said that any asset in form of technology information was located in India, and as such, profit arising to applicant on transfer of such technology information, after termination of licence in India, by applicant to another company in Bangkok would not be chargeable in India under section 5(2)(ii) read with section 9(1)(i). (A.Y. 1968-69)

*Pfizer Corporation, In re (2004) 271 ITR 101 / 141 Taxman 642 / 192 CTR 193 (AAR)*

#### **S. 5 : Scope of total income – Income – Accrual – Technical know-how – Situs [S. 2(47), 9(1)(i)]**

Outright sale of Technology Information in form of a dossier by non-resident owner to another non-resident - Transfer takes place in Bangkok - Such know-how was earlier used for many years by Indian group company of the transferee under license that was now terminated prior to outright sale - Relying on judgments of various courts in prior cases, AAR ruled that transfer of technical information in the form of a dossier was transfer of a capital asset; hence situs of such capital asset was relevant; in this connection, AAR observed that the Indian company was only a licensee and original technical know-how was always available with the owner i.e. the applicant. Once the Indian company entered into an agreement for early termination of license, the technical know-how reverted back to the owner and there was extinguishment of right to manufacture for which consideration has been paid to Indian company. As a result no asset related to technical know-how was located in India either in tangible or intangible form after termination of license granted to Indian company and hence

the situs of the technical information was not in India in any form after early termination of license – Hence ruled that receipts by applicant from above transaction is not chargeable to tax in India.

*Pfizer Corp., Panama (2004) 141 Taxman 642 / 271 ITR 101 / 192 CTR 193 (AAR)*

**S. 5(1)(c) : Scope of total income – Income – Accrual – Residence in India – Not ordinarily resident [S. 4, 6]**

Assessee had not stayed in India during the preceding nine years and he was not ordinary resident in India, therefore, he would be governed by the proviso to section 5(1)(c) of the Income Tax Act, 1961. Assessee was a technician working with Kraft Work Union (Siemens) and was drawing his salary in Germany, hence, he was not taxable in India and therefore, his salary could not be included in the total income to be assessed in India. (A.Ys. 1990-91, 1991-92)

*CIT v. Morgenstern Werner (2003) 259 ITR 486 / 180 CTR 202 / 132 Taxman 214 (SC) / 11 SCC 445*

**S. 5(2) : Scope of total income – Income – Accrual – Non-resident – Deduction at source [S. 195]**

Payment of hire charges of vessels to non-resident by way of fish catch. As per section 5(2), total income of a non-resident includes all income from whatever source derived, received or deemed to be received in India, including the income which accrues, arises or is deemed to accrue or arise to the non-resident in India. In the instant case, assessee chartered two fishing vessels from a non-resident company. Charter fee was to be paid in terms of money i.e. USD 600,000 per vessel per annum “payable by way of 85% of gross earning from the fish sales”. Chartered vessels with the entire catch were brought to an Indian port, the catch were certified for human consumption, valued and 85% of the catch was given to the non-resident after customs and port clearance, as per the terms of the agreement. So long as the catch was not apportioned, the entire catch was the property of the assessee and not of the non-resident. It is only after the non-resident was given its share of 85% of the catch; it did come within its control. Thus, the non-resident effectively received the charter fee in India and this being the first receipt in the eyes of law, it is chargeable to tax. Once 85 % of the catch was received by the non-resident in India, in sum and substance, it amounted to receipt of value of money. Therefore, income earned by the non-resident was chargeable to tax under section 5(2) and assessee was liable to deduct tax under section 195 on the payment made to the non-resident and was liable to the tax deduction at source under section 195 of the Act. (A.Ys. 1991-92 to 1994-95)

*Kanchanganga Sea Foods Ltd. v. CIT & Anr. (2010) 41 DTR 209 / 325 ITR 540 / 233 CTR 1 / 192 Taxman 187 (SC)*

**S. 5(2) : Scope of total income – Income – Accrual – Non-resident [S. 5(2) and S. 68, 69]**

The conflict between provisions of Sec 5(2) vis-à-vis Section 68 or Section 69 is only with context to burden of proof and not on issue of taxability of Income.

*Dy. CIT v. Finlay Corporation Ltd. (2003) 86 ITD 626 / 84 TTJ 788 (Delhi)(Trib.)*

## **Section 6 : Residence in India**

### **S. 6(1) : Residence in India – Non-resident – Status – Previous years**

For the assessment year 1982-83, a person would be an ordinary resident only if (a) he has been resident in India in nine out of ten preceding years, and (b) he has been in India for at least more than two years (730 days) in the previous seven years. (A.Y. 1982-83)

*Pradip J. Mehta v. CIT (2008) 216 CTR 1 / 300 ITR 231 / 169 Taxman 453 / 5 DTR 250 / 206 Taxation 169 (SC) / 14 SCC 283*

*Editorial:- Pradip J. Mehta v. CIT (2002) 256 ITR 647 (Guj.)(High Court) reversed.*

### **S. 6(1) : Residence in India – Non-resident – Residential Status – Business – Profession**

For purpose of Explanation (a) to section 6(1)(c), "employment" include self employment like business or profession taken up by assessee abroad. (A. Y. 1989-90) *CIT v. O. Abdul Razak (2011) 337 ITR 267 / 198 Taxman 1 / 241 CTR 485 / 56 DTR 133 (Ker.)(High Court)*

### **S. 6(1) : Residence in India – Non-resident – Visit to India**

Assessee already employed and deputed abroad, his status could not be taken as resident on the ground that he came on a visit to India and therefore, the period of 60 days as mentioned in section 6(1)(c), should be extended to 182 days, by ignoring his subsequent visit to India after completing the deputation, outside India. The first day in series of a day is to be excluded if the word "from" is used and since for computing of the period, one has to necessarily, import the word "from" the first day is to be excluded and so computed. Assessee's stay in India did not exceed sixty days and therefore his status had to be taken as non-resident during the relevant year. (A.Y. 2005-06)

*Manoj Kumar Reddy v. ITO (2010) 42 DTR 171 / 132 TTJ 328 / 34 SOT 180 (Bang.)(Trib.)*

### **S. 6(1) : Residence in India – Non-resident – Status [S. 2(30), 5(1)(C)]**

Applicant who left India for USA for employment and was in India for 123 days in the relevant previous year neither satisfies cl. (a) nor cl. (c) of section 6(1) and therefore, he was a non-resident during the relevant period and the income that accrued to him outside India by reason of his employment in USA cannot form part of taxable income in India. (A.Y. 2009-10)

*Anurag Chaudhry In Re. (2010) 322 ITR 293 / 35 DTR 77 / 217 Taxation 470 / 229 CTR 343 / 190 Taxman 296 (AAR)*

### **S. 6(1) : Residence in India – Non-resident – Status [S. 2(30)]**

Employee, an Indian citizen commenced employment with British Gas India Pvt. Ltd. in Feb/March 2002 and w.e.f. July 2005, he was deputed to British Gas, UK for two years and accordingly was in India for less than 182 days in that financial year - Revenue contended that as he was in India for more than 60 days, he was resident as per S. 6(1)(c) and that explanation (a) was not applicable as he was already in employment with British Gas in India - AAR observed that a careful reading of explanation (a) would show that the requirement of the explanation is not leaving India for employment but it is leaving India for the purposes of employment outside India. For the purpose of the explanation an individual need not be an unemployed person who leaves India for employment outside India. Therefore, the fact that Mr. Gupta was already an employee at the time of leaving India is hardly material or relevant. For all these reasons, it held that Mr. Manish Gupta is not a resident in India in the financial year 2005-2006. (A.Y. 2006-07)

*British Gas India Pvt. Ltd. (2006) 157 Taxman 225 / 287 ITR 462 / 206 CTR 385 (AAR)*

### **S. 6(1)(a) : Residence in India – Non-resident – Residential status**

While deciding the residential status of an assessee, the Assessing Officer should consider the provisions of both sections 6(1)(a) and 6(1)(c) and this is mandatory requirement of law. (A.Ys. 1992-93,93-94)

*Vijay Mallya v. ACIT (2003) 131 Taxman 477 / 185 CTR 233 (Cal.)(High Court)*

### **S. 6(1)(c) : Residence in India – Non-resident – Deputation – Period of visit to India**

Assessee was in India for a period of 78 days during the relevant assessment year and more than 365 days during the past four years. It was held that the assessee was on deputation from April 2004 to January 2005 and his stay from 18th Aug 2004 to 6th September 2004 was in respect of a visit to India and this is to be excluded while computing the applicability of section 6(1)(c). Thus, his status was to be of a non-resident. (A.Y 2005-06).

*DIT v. Manoj Kumar Reddy Nare (2011) 62 DTR 358 / 201 Taxman 30 / 245 CTR 350 (Karn.)(High Court)*

### **S. 6(1)(c) : Residence in India – Non-resident – Leave or vacation**

Assessee who was employed in foreign country was not on leave or vacation while he was in India for less than 90 days in the relevant previous year but on termination of one service, and, therefore, his case does not fall within the Explanation to section 6(1) and he has to be treated as a resident under section 6(1)(c) and not a non-resident. (A.Y. 1980-81)

*V. K. Ratti v. CIT (2007) 212 CTR 552 / 299 ITR 295 / 165 Tax 177 (P&H)(High Court)*

### **S. 6(3)(ii) : Residence in India – Non-resident – Control and management – Outside India**

Control and management means central control and management and not carrying on of day-to-day business. If a slightest control and management of the company is exercised from outside India it would not fall within the ambit of S. 6(3)(ii) and the company would be treated as a non-resident. (A.Y. 2002-03)

*Radha Rani Holding (P) Ltd. v. Addl. Dir. of IT (2007) 110 TTJ 920 / 16 SOT 495 (Delhi)(Trib.)*

### **S. 6(6) : Residence in India – Not ordinarily resident – Amendment by Finance Act 2003 – Circular No. 7 of 2003 – Substantive in nature**

Amendment of section 6(6) by Finance Act 2003, w.e.f. 1st April 2004, is substantive in nature and cannot be given retrospective effect, since assessee was not a resident in three out of ten previous years preceding the A.Ys. 1998-99 and 1999-2000, he has to be treated as "resident but not ordinarily resident" in the said years as per the pre-amended section 6(6). Though Circular No. 7 of 2003 dt. 5th Sept., 2003, states that the amendment of section 6(6) by Finance Act, 2004 is clarificatory in nature, it cannot be held clarificatory, as residential status of an assessee determines his tax burden, said amendment has been made effective from 1st April, 2004 and can be held only as substantive in nature and cannot be given retrospective effect. (A.Ys. 1998-99, 1999-2000)

*CIT v. Karan Bihari Thapar (2010) 46 DTR 265 / 236 CTR 22 / 335 ITR 541 (Delhi)(High Court)*

### **S. 6(6) : Residence in India – Not ordinary Resident – Term 'or' and 'not'**

The Tribunal noted that the provisions of section 6(6)(a) uses the term 'or' and not 'and' between the two conditions given therein. Accordingly, a person would be considered as RNOR if he complies with either of the two conditions given therein. It disagreed with the CIT(A) that in order to qualify as RNOR, the assessee should fulfil both the conditions. In the case of the assessee, since he was not resident in India in nine out of ten previous years, his status would be that of RNOR. (A.Y. 2001-02)

*Jayram Rajgopal Poduval v. ACIT, (2008) 114 TTJ 276 / 116 ITD 482 / 21 SOT 514 / 3 DTR 326 (Mum)(Trib.)*

*Editorial : The provisions of section 6(6) have been substituted by the Finance Act, 2003*

*w.e.f.*

*1-4-2004.*

## **Section 8 : Dividend income**

### **S. 8 : Dividend income – Not charging – Computer mechanism – Provision**

Section 8 is a part of computation machinery. It is not a charging section. (A.Ys. 1976-77, 1977-78)

*Pfizer Corporation v. CIT (2003) 259 ITR 391 / 129 Taxman 459 / 180 CTR 319 (Bom.)(High Court)*

## **Section 9 : Income deemed to accrue or arise in India**

### **S. 9 : Income deemed to accrue or arise in India – Finance Act, 2010 – Review of High Court decision**

Since by Finance Act, 2010, section 9 has been amended with effect from 1-6-1976, department was permitted to move to High Court by way of review petition against its judgment in *Jindal Thermal Power Co. Ltd. v. Dy. CIT* (2009) 182 Taxman 252 / 321 ITR 31 / 225 CTR 220 / 26 DTR 172 (Karn.)

*Dy. CIT v. Jindal Thermal Power Co. Ltd.* (2011) 196 Taxman 495 (SC)

### **S. 9 : Income deemed to accrue or arise in India – Sale of shares by Mauritius Co. – 100% USA parent. – Taxable if object is to acquire the Indian assets (S. 148, 163, 195)**

- (i) The argument that s. 163 applies only with respect to income “deemed to accrue or arise” in India under section 9 and not to income “accruing or arising” is not acceptable. Pursuant to *CIT v. Eli Lilly and Co. (India) P. Ltd.* (2009) 312 ITR 225 (SC), the income accruing or arising in India to NCWS, USA on transfer of a capital asset situate in India, (shares of Idea Cellular) is deemed to accrue or arise in India to NCWS and can be assessed either in the hands of NCWS or in the hands of the payer as agent of the non-resident u/s 163;
- (ii) The argument that the Assessing Officer having issued a NOC under section 195(2) permitting Aditya Birla Nuvo to remit the sale proceeds without TDS could not recover the tax from the payer by treating it as agent is not acceptable because the said order was obtained by “suppressing material facts” relating to the circumstances in which the shares of Idea Cellular were issued in the name of AT&T Mauritius. As the payer had obtained the section 195(2) Certificate by making a representation which was incorrect to its knowledge, it could not claim that the section 195(2) Certificate was validly issued. Further, the proceedings under section 163 & 195 operate in different fields;
- (iii) The argument that once the Assessing Officer exercises his option under section 166 to assess the non-resident NCWS USA directly by issuing notice under section 148, the proceedings initiated against the payer must come to an end is not acceptable because there is nothing in the Act to suggest that the option to assess either the representative assessee or the non-resident must be exercised at the threshold itself and not at the end of the assessment proceedings. While ordinarily, the Assessing Officer must not proceed against the representative assessee once proceedings are initiated against the non-resident, in exceptional cases like the present one where complex issues are involved and the Assessing Officer is unable to make up his mind on account of suppression of material facts, it is open to the Assessing Officer to continue with the assessment proceedings against the representative assessee and the non-resident simultaneously till he decides to assess either of them;



- (iv) NCWS' argument that the section 148 notice is without jurisdiction is not acceptable because the prima facie belief of the Assessing Officer that the transaction was in fact a transaction for transfer of a capital asset situate in India (shares of Idea Cellular) had substance. It is open to NCWS to prove to the contrary by placing all material facts in the assessment proceedings;
- (v) Tata Industries' argument that no gains are taxable in India as the subject matter of sale were shares of AT&T Mauritius and not the shares of Idea Cellular is not acceptable because prima facie it appears that the transaction for sale of shares of AT&T Mauritius was a "colourable transaction" and was in fact for sale of the shares of Idea Cellular.

*Aditya Birla Nuvo Limited v. Dy. DIT (2011) 200 Taxman 437 / 59 DTR 1 / 242 CTR 561 (Bom.)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Permanent establishment – DTAA – India-UK [S. 5(2), Art. 5]**

Assessee was British Company. It supplied certain parts and equipments to Indian customers. RRIL was assessee's 100% subsidiary set up in India through which it carried out marketing and selling of goods to Indian customers. Assessing Officer after holding RRIL as PE of assessee, attributed 100% of profits earned from sale of goods to Indian customers to activities carried on in India. The Tribunal restricted such attribution to 35% holdings that profits attributed to manufacturing activity and research and development activities, i.e. 50 % and 15%, respectively had to be excluded. Assessee filed appeal before the High Court contending that net research and development expenses should also be reduced while computing operating profits; and that Tribunal had not considered objections and documents filed by it on aspect of PE properly and, therefore, matter should be remanded for reconsideration. Held that expenses on research and development were already taken care of when remuneration at rate of 35% was attributed to marketing activities in India on which global profits was apportioned. From the order of the Tribunal it was clear that while holding that RRIL constituted PE of assessee, it had undertaken critical analysis of material on record including objections and documents filed by the assessee and therefore there was no reason to remand the case back to the Tribunal. (A.Ys. 1997-98 to 2003-04).

*Rolls Royce PLC v. DIT (International Taxation) (2011) 339 ITR 147 / 202 Taxman 309 / 244 CTR 372 / 61 DTR 145 (Delhi)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Fees for technical Services – DTAA – India-Canada [S. 115A, 234B, Art. 12(4)]**

The assessee was a non-resident company engaged in the business of providing consultancy for infrastructure projects. It had entered into an agreement with the National Highway Authority of India and under the agreement the assessee was to provide technical drawings and reports to NHAI to enable it to use the technology for its infrastructure projects which were funded by the World Bank. Held, the fee received from NHAI was to be treated as "fees for included services" as per article

12(4) of the Double Taxation Avoidance Agreement between India and Canada and the tax was chargeable at 15%. The assessee was not liable to pay advance tax and therefore, interest under section 234B was not chargeable.

*DIT v. SNC Lavalin International, Inc. (2011) 332 ITR 314 (Delhi)(High Court)*

**S. 9 : Income deemed to accrue in India – No income deemed to arise even if revenue arises due to viewers in India – International Taxation**

For income to be taxable under section 9(1)(i), the carrying of operations in India is a sine qua non. Merely because the footprint area included India and programmes were watched by Indian viewers, it did not mean that the assessee was carrying out business operations in India. The transponder used was in orbit and merely because its footprint was on India did not mean that the process had taken place in India. *Ishikawajima-Harima Heavy Industries 288 ITR 408 (SC)* followed. It was further observed that the payment by the telecast operators outside India to the assessee cannot be taxed on the basis that the end consumers are in India.

*Asia Satellite Telecommunication Co. Ltd. v. DIT (2011) 51 DTR 1 / 238 CTR 233 / 197 Taxman 263 / 332 ITR 340 (Delhi)(High Court)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Offshore supply of equipment – International Taxation**

Consideration for the offshore supply of equipment by the assessee, a Korean company, to an Indian company cannot be deemed to have accrued or arisen in India as the terms of the agreement stipulated transfer of title / property in the goods as soon as the goods were loaded on the ship at the port of shipment i.e. outside India, and there is no material to show that the accrual of income from this sale was attributable to any operations carried out in India or that the PE of the assessee in India had any role to play in the off shore supply of equipment. (A.Y. 2002-03)

*DIT v. LG Cable Ltd. (2011) 237 CTR 438 / 50 DTR 1 / 225 Taxation 386 / 197 Taxman 100 (Delhi)(High Court)*

*Editorial:- LG Cable Ltd. v. Dy. DIT (2008) 119 TTJ 34 (Delhi)(Trib.), affirmed.*

**S. 9 : Income deemed to accrue or arise in India – “Office PE” or “Construction Site PE” – DTAA – India – Netherlands [Art. 5(3), 5 (2)]**

The assessee had a “site” or “project” in India. Under Article 5(3) of the treaty, such a “site” or “project” is a PE only if it continues for a period of more than six months. As the assessee’s contract was completed in two months, there was no PE under Article 5(3). The argument that the Mumbai office was a PE under Article 5(2) is not acceptable because while Article 5(2) is a general provision, Article 5(3) is a specific provision which prevails over Article 5(2). (A. Y. 1994-95)

*CIT v. BKI/HAM V.O.F. (2011) 63 DTR 108 / 245 CTR 140 / 203 Taxman 58 (Uttarakhand)(High Court)*

**S. 9 : Income deemed to accrue or arise in India – Dependent agent permanent establishment – Fees for technical services – DTAA – India-Singapore [Art. 5(9)]**

The assessee, a Singapore company, rendered repair and maintenance services and supplied spares to customers in India. While the income from repairs was offered to tax as “fees for technical services”, the income from supply of spares was claimed to be not taxable on the ground that it had accrued outside India. The Assessing Officer, CIT (A) and Tribunal took the view that the assessee had a “permanent establishment” on the basis that it had a “dependent agent” in India under Article 5(9) of the India-Singapore DTAA and that the income earned from supplying spare parts was taxable in India. On appeal to the High Court, held that (i) To constitute a “Dependent Agent Permanent Establishment” under Article 5(9) of the DTAA it has to be seen whether the activities of the agent are “devoted wholly or almost wholly on behalf of the assessee”. While the issues as to (a) whether the agent is prohibited from taking competitive products and (b) whether the assessee exercised extensive control over the agent were relevant, they are not conclusive. It is not correct to say that merely because the agent is prohibited from taking a competitive product means that it is not an agent of independent status. What has to be seen is whether the “activities” of the agent are devoted wholly or almost wholly on behalf of the assessee. If the assessee can show that it was not the sole client of the agent and that activities of the agent were not devoted wholly or almost wholly on behalf of the assessee, there may be no DAPE. The income earned by the agent from other clients and the extent of such income is very relevant to decide whether the criteria stipulated in Article 5(9) is satisfied or not. (Matter remanded for fresh consideration);

- (ii) While in principle it is correct that if a fair price is paid by the assessee to the agent for the activities of the assessee in India through the DAPE and the said price is taxed in India at the hands of the agent, then no question of taxing the assessee again would arise, this is subject to a Transfer Pricing Analysis being undertaken under section 92. The Transfer Pricing analysis to determine the “arms length” price has to be done by taking the “Functions, Assets used and Risk involved” (FAR). As this has not been done, the assessee’s argument on “arms length” price is not acceptable
- (iii) As the commission paid by the agent to the DAPE is not at “arms length”, the estimation that 10% of the profits on sales of spare parts were attributable to the activities carried out by the agent in India and taxable is reasonable. The test is “profits expected to make” and has to be determined bearing in mind the fact that the agent was merely rendering support services and had no authority to negotiate and accept contracts and also assumed limited risk. (A. Ys. 2000-01 & 2004-05)

*Rolls Royce Singapore (P) Ltd. v. Addl. CIT (2011) 64 DTR 95 / 202 Taxman 45 (Delhi)(High Court)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Permanent establishment – Royalty – Offshore supply of equipment & software – DTAA – India-Sweeden [Article 13]**

The assessee, a Swedish company, entered into contracts with ten cellular operators for the supply of hardware equipment and software. The contracts were signed in India. The supply of the equipment was on CIF basis and the assessee took responsibility thereof till the goods reached India. The equipment was not to be accepted by the customer till the acceptance test was completed (in India). The assessee claimed that the income arising from the said activity was not chargeable to tax in India. The Assessing Officer & CIT(A) held that the assessee had a "business connection" in India under section 9(1)(i) & a "permanent establishment" under Article 5 of the DTAA. It was also held that the income from supply of software was assessable as "royalty" under section 9(1)(vi) & Article 13. On appeal, it was held that as the equipment had been transferred by the assessee offshore, the profits therefrom were not chargeable to tax. It was also held that the profits from the supply of software was not assessable to tax as "royalty". On appeal by the department to the High Court, HELD dismissing the appeal that:

- (i) The profits from the supply of equipment were not chargeable to tax in India because the property and risk in goods passed to the buyer outside India. The assessee had not performed installation service in India. The fact that the contracts were signed in India could not by itself create a tax liability. The nomenclature of a "turnkey project" or "works contract" was not relevant. The fact that the assessee took "overall responsibility" was also not material. Though the supply of equipment was subject to the "acceptance test" performed in India, this was not material because the contract made it clear that the "acceptance test" was not a material event for passing of the title and risk in the equipment supplied. If the system did not conform to the specifications, the only consequence was that the assessee had to cure the defect. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India. Consequently, the assessee did not have a "business connection" in India.
- (ii) The argument that the software component of the supply should be assessed as "royalty" is not acceptable because the software was an integral part of the GSM mobile telephone system and was used by the cellular operator for providing cellular services to its customers. It was embedded in the equipment and could not be independently used. It merely facilitated the functioning of the equipment and was an integral part thereof. The fact that in the supply contract, the lump sum price was bifurcated is not material. There is a distinction between the acquisition of a "copyright right" and a "copyrighted article".

*DIT v. Ericsson AB (2012) 66 DTR 1 / 204 Taxman 192 (Delhi)(High Court)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Off shore supply contract**

The profits from the off shore supply contract held not to be liable to tax in India on the ground that the transfer of title in the goods had passed outside India. As no

operations *qua* the agreement for supply of equipment were carried out in India, no income can be deemed to have accrued or arisen in India whether directly or indirectly or through any business connection in India. (A.Y. 2002-03)

*Dy. CIT v. LG Cables Ltd. (2011) 50 DTR 1 / 237 CTR 438 / 197 Taxman 100 (Delhi)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Royalty – Plant know-how – Purchase**

When there is outright purchase of plant know-how and not a case of transfer of interest, the payment could not be treated as royalty.

*CIT v. Maggronic Devices (P) Ltd. (2010) 190 Taxman 382 / 31 DTR 65 / 228 CTR 241 / 329 ITR 442 (HP)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Service rendered and utilised in India – Deduction at source**

The deductor of TDS (i.e., the payer) is entitled to question the imposition of tax liability on the payee. In order to impose liability on a non-resident assessee for income from services rendered to an Indian party, under section 9 of the Act, it is imperative that services are rendered in India and are also utilised in India – the twin conditions have to be satisfied. To this extent, the newly inserted Explanation to section 9 does not disturb the ratio of the Supreme Court's decision in *IsshikawaJima Harima*. (A.Ys. 1996-97, 1997-98)

*Jindal Thermal Power Co. Ltd. v. Dy. CIT (2009) 182 Taxman 252 / (2010) 321 ITR 31 (Karn.)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Supply of design and drawings – Technical services – Engineering fees**

Supply of design and drawings can not in all circumstances be, treated as cost of plant and machinery, in a case of installation of sophisticated machinery, where manufacturing process is involved through machinery, supply of necessary design and drawings, would enable working of machinery can be considered as technical services rendered. Engineering fees for supply of designs and drawings was held to be fee for technical services and not as cost of plant and machinery. (A.Y. 1984-85)

*AEG Aktiengesellschaft v. CIT (2004) 267 ITR 209 / 137 Taxman / 188 CTR 497 (Ker.)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Technical services – Expatriates deputed in India – Salaries [S. 192, 195]**

The Income tax department after a paper six years issued notices requiring the assets to show cause why the permitting male visit to interest of salary paid by HP(USA) on behalf of the assessee to foreign technicians/expatriates not treated as fee for technical services. The Tribunal received interest the payment of salary and rightly deducted tax at source under section 192. The expatriate to s. 1(1)(vii) makes it clear but salaries



would not pay within expatriate fees for technical services. The court fees paid the tribunal was substantial question of law for the order.

*DIT v. HCL Info systems Ltd. (2004) 192 CTR 108 / 274 ITR 261 / 144 Taxman 492 (Delhi)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Interest – Non-resident**

Interest income of the type covered by clause (v)(b) of section 9(1) will be deemed to be accruing or arising in India, even if it is actually received by the non-resident outside India. (A.Y. 1995-96)

*CIT v. Vijay Ship Breaking Corpn. (2003) 129 Taxman 120 / 261 ITR 113 / 181 CTR 139 (Guj.)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Royalties – Fees for technical services – Reimbursement of expenses**

Payments made by resident company to non-resident company under an agreement to meet expenses of travel, living and pocket expenses of specialist sent by the latter would not attract section 9(1)(vii). (A.Ys. 1980-81 to 1982-83)

*CIT v. Sundwiger EMFG & Co. (2003) 129 Taxman 776 / 262 ITR 110 / 183 CTR 434 (AP)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Royalties – Fees for technical services – Information**

Payments made for any information cannot earn status of royalty and for payment to have status of royalty information has to have some special features. (A.Y. 1993-94)

*CIT v. HEG Ltd. (2003) 130 Taxman 72 / 263 ITR 230 / 182 CTR 353 (MP)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Foreign agent – Commission – Business connection – Permanent establishment [S. 4(1), 40(a)(ia), 195]**

Where a foreign agent of an Indian exporter operates in his own country and his commission is directly remitted to him, such commission is not received by him or in his behalf in India. Such agent is not liable to income tax in India on commission received by him. As there was no right to receive income in India nor there was any business connection between assessee and ETUK, therefore, when income was not chargeable to tax in India under section 4(1), there was no question of invoking provisions of section 195 hence no disallowance be made under section 40(a)(ia). (A.Y. 2007-08).

*Dy. CIT v. Eon Technology (P) Ltd. (2011) 46 SOT 323 (Delhi)(Trib.)*

*Editorial:- Affirmed by CIT v. Eon Technology (P) Ltd. (2011) 203 Taxman 266 / 64 DTR 257 / 246 CTR 40 / (2012) 343 ITR 366 (Delhi)(High Court)*

### **S. 9 : Income deemed to accrue or arise in India – Deduction at source – Technical services [S. 40(a)(i), 194J]**



Assessee was a dealer for Xerox India Ltd. (XIL). It was authorized to sell and otherwise promote latter in specified territories. Apart from sales, assessee was also required to render service support to customers, i.e. purchasers of product of XIL. These services were earlier provided by XIL directly to customer. To compensate XIL for the loss of revenues on account of hiring of the service function to assessee, the assessee was to pay a certain sum out of service fee received from customers to XIL. Assessee claimed that payments made to XIL could not be treated as "fees for technical services". Tribunal held that the payment in question amounted to fees for technical services and were covered under section 194J. Hence disallowance under section 40(a)(i) made by the lower authorities were justified. (A. Y. 2007-08)

*Divya Business Systems (P) Ltd. v. ACIT (2011) 43 SOT 155 / 138 TTJ 582 / 155 DTR 103 (Cochin)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Principles on "splitting of turnkey contracts" – Offshore supply – DTAA – India-Korea. [Art. 5(1), 5(2)]**

The assessee, a Korean company, entered (together with L&T) into a contract dated 28.2.2006 with ONGC for the "surveys, design, engineering, procurement, installation" etc of a project on turnkey basis. On 24.5.2006, the assessee opened a Project Office which constituted a 'Permanent Establishment'. The assessee claimed, relying on Ishikawajima-Harima 288 ITR 408 (SC) & Hyundai Heavy Industries 291 ITR 482 (SC) that the revenue from "offshore supply" and "offshore services" was not assessable to tax in India as no part of it was attributable to the PE. The Assessing Officer & DRP rejected the claim on the basis that (i) the assessee had actively participated in pre-bid meetings and the project office was in existence even at the stage of the "kick-off" meeting, on appeal by the assessee to the Tribunal, The Tribunal held (i) The contract was not divisible into one part for the fabrication of platform and the other for installation & commissioning. Its terms showed that it was a composite contract from surveys of pre-engineering to start-up and commissioning of the entire facilities;

(ii) The opening of the Project Office was a condition precedent before the commencement of the activity of the contractor. The scope of the Project Office was not restricted either by the assessee or by the RBI. Also, the resolutions of the assessee showed that the Project Office was opened for coordination and execution of project. It was clear that all the activities to be carried out in respect of the contract were to be routed through the Project Office;

(iii) Hyundai Heavy Industries (2007) 291 ITR 482 (SC) is not applicable because there (a) the project office was to work only as a liaison office and was not authorized to carry on any business activity and (b) the contract was divisible into two parts and so the argument that the PE does not come into existence till the fabrication work is done was accepted;

(iv) The argument that if an "installation PE" is to come into existence under Article 5(3), one cannot have regard to the PE under Articles 5(1) & 5(2) is not acceptable. The Project Office constituted a PE under Article 5(1) and an "Installation PE" was not necessary;

- (v) The onus is on the assessee to show that office did not play a role in the project. On the other hand, the contract proceeds on the basis that the PO played a vital role in the execution of the project;
- (vi) The attribution to India of profit from off-shore supply has to be based on material and done based on the extent of activity done by the PO (matter remanded). (A.Y 2007-08)

*Samsung Heavy Industries Co. Ltd. v. ADCIT (2011) 63 DTR 65 / 142 TTJ 564 / 133 ITD 413 / 11 ITR 513 (Delhi)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Royalties – Fees for included services – Permanent establishment – DTAA – India-USA. [Article 12(3)]**

Assessee was non resident incorporated as corporation under Laws of USA. Main object of assessee was to provide high quality medical training and enhance quality of patient care and research by teaching training and sharing medical and technological know how with scientists and health care professionals in various countries. During the relevant assessment years the assessee received certain amount from hospitals located in India. Assessing Officer held that 90 percent of receipts taxable as royalty under Article 12(3) of DTAA between India and USA and 10 percent of payment was in nature of Fees for included services (FIS) taxable under Article 12(4). The Tribunal held that consideration received by assessee could not be said to be royalty as it was not a payment for right to use any copy right, trade mark or industrial, commercial or scientific experience. Assessee also did not make available any technical knowledge, experience, skill for included services. Therefore, it could be concluded that entire payment received by assessee from WHL was in the nature of business profits and since assessee did not have permanent establishment in India, same could not be brought to tax in India. The assessee received certain amount as reimbursement of expenses. Assessing Officer was of the view that reimbursement of expenses was also part of consideration for rendering the services he applied the same ratio. The Tribunal held that if it is held to be business income the same cannot be taxable in India applying as the assessee does not have any permanent establishment. If it is held to be other income the same cannot be brought to tax in view of Article 23(1) of DTAA. Accordingly the Tribunal deleted the addition made by the Assessing Officer. (A.Ys. 2002-03 and 2003-04).

*Jt. CIT v. Harward Medical International, USA (2011) 48 SOT 623 / (2012) 13 ITR 503 (Mum.)(Trib.)*

*Wokhordt Hospital Ltd. v. DIT (2011) 48 SOT 623 / (2012) 13 ITR 503 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Permanent establishment – Cargo consolidation – Agent – DTAA – India-Singapore [S. 163, Article 5(9)]**

One "W" Ltd. was engaged in the business of Cargo Consolidation. It received Cargo from various shippers / consignors at Mumbai Port / Container Freight Station Mumbai / JNPT for shipments to various destinations world wide. A delivery

schedule of Cargo had to be strictly adhered to. Assessing Officer noticed that "W" Ltd. had payment to assessee, a company located at Singapore on which no tax was deducted at source. Assessing Officer issued show cause notice to "W" Ltd. calling upon to why it should not be treated as an agent of Non-resident under section 163. Assessing Officer estimated profitability at 10 percentage of freight income earned by assessee and same was treated as business income. Commissioner (Appeals) confirmed the order of Assessing Officer. Tribunal found that "W" Ltd. was acting on behalf of several non-residents and therefore, Article 5(9) was not attracted as the "W" Ltd. had no permanent Establishment in India, even if income accrued or arose to it in form of business income, same could not be taxed in India. (A. Ys. 2002-03 and 2003-04).

*WSA Shipping (Bombay) (P) Ltd. v. ADIT (IT) (2011) 48 SOT 551 / (2012) 65 DTR 226 / 143 TTJ 423 (Mum.)(Trib.)*

#### **S. 9 : Income deemed to accrue or arise in India – Permanent establishment – Liaison office of non-resident – Permanent establishment**

Liaison office of non-resident assessee in India carrying out activities of selection of right goods and negotiation of price as part of purchasing process as per instructions of assessee could not be considered as permanent establishment of assessee in India and therefore profit attributable to liaison office could not be held to have accrued or arisen in India. (A.Ys. 2004-05 and 2005-06).

*Dy. DIT (International) v. M. Fabricant & Sons Inc. (2011) 48 SOT 576 (Mum.)(Trib.)*

#### **S. 9 : Income deemed to accrue or arise in India – Business connection – Permanent Establishment – DTAA – India-UK**

Non-resident lessor does not have permanent Establishment (PE) or business connection in India on account of leased assets used in India but delivered outside India, provided the lease agreement is entered on principal to principal basis.

*Dy. CIT v. Calcutta Test House P. Ltd. (ITA No. 1782/Del/11) Dated 28-10-11, BC&J, December – 2011, P. 37, Vol 43-B, Part 3 (Delhi)(Trib.)*

#### **S. 9 : Income deemed to accrue or arise in India – Business connection – Activities of liaison office in India. [S. 5(2)(b)]**

Since the Indian Office of the non resident assessee-company practically carries out all operations of the business of the commission agent except the formation of the contract between the vendors and the buyers, it cannot be argued that no income accrues or arises in India from the commission. However, as the CIT(A) had overstated the role of the Indian Offices in the overall conduct of business, instead of allocation of commission at 72 percent commission income is allocated to the Indian operations at 50 percent. (A.Ys. 1999-2000 to 2005-06).

*Linmark International (Hong Kong) Ltd. v. Dy. CIT (2011) 57 DTR 340 / 139 TTJ 697 (Delhi)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Non-resident, with “business connection”, taxed only in respect of business operations carried out in India – canvassing agent – not ‘business connection’ – Fair fee extinguishes non-residents liability to tax**

- (i) The expression ‘business connection’ does not cover mere canvassing for business by an agent in India. It postulates a real and intimate relation between business activity carried on outside India and business activity within India, the relation between the two contributing to the earning of income by the non-resident in his business activity. The business operations carried out outside India and inside India must have such a relationship as to contribute to business operations as a whole.
- (ii) If the agent (“the business connection”) has been compensated with fair remuneration, there cannot be further income of the non-resident which can be brought to tax under section 9(1)(i) r.w.s. 5(2)(b). (A. Y. 2006-07)

*ACIT v. Star Cruise India Travel Services Pvt. Ltd. (2011) 59 DTR 418 / 140 TTJ 561 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Purchase of technical know how – Royalty – Permanent Establishment – Business Receipt – International Taxation – Tax Deduction at Source [S. 195]**

Purchase of technical know how by foreign company, was business receipt. As there was no permanent establishment in India, the same was not liable to be taxed in India. (A. Y. 1991-92).

*Vesil SPA Italy v. Jt. CIT (2011) 43 SOT 137 / 138 TTJ 357 / 54 DTR 316 (Hyd.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – DTAA – India-Netherlands [Art. 12]**

One of the group companies of assessee, located at Netherlands had acquired musical recording rights from other repertoire companies and granted commercial exploitation rights of such musical track in India to “U” Ltd. The assessee received royalty for four years from “U” Ltd. The royalty agreement was approved by Government of India. Further assessee had filed a certificate from tax authority of Netherlands having Jurisdiction over it in which it was certified that assessee was beneficial owner of royalty income received from “U” Ltd, within the meaning of article 12 of DTAA. Thus, the assessee was beneficial owner of royalty and same had to be taxed at rate of 10 percent for all the years. (A.Ys. 2000-01 to 2003-04).

*ADIT v. Universal International Music BV (2011) 141 TTJ 364 / 45 SOT 219 / 55 DTR 348 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Software embedded in off-shore supply may be taxable even if supply not taxable**

The assessee, a USA company, entered into two separate contracts with AAI, one for supply of equipment and the other for rendering installation and training services. The

Assessing Officer & CIT(A) held (i) that the two contracts were an “indivisible works contract”, (ii) that as the supply involved embedded software, the income had to be bifurcated between “supply of equipment” and “royalty” in the ratio of 30:70, (iii) that the equipment-supply profits had accrued on completion of contract and not at the time of transfer of title, (iv) that 50% of the equipment-supply profits was attributable to the assessee’s PE in India and this was taxable at the global profit rate of 13.4%. On appeal to the Tribunal, Held,:

- (i) The two contracts constitute one agreement because (a) the essential purpose of both contracts was to set up the ATS, (b) the contract for supply of equipment and software would have been of no consequence without installation and performance services, (c) the dates of payment for the supply contract were connected with the service contract and (d) it was difficult to segregate the contract from installation/service contract (*Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income-tax (2007) 288 ITR 408 (SC) referred*);
- (ii) The PE came into existence on clearance of the goods in India because after transfer of title outside India, the possession was handed over to the assessee for safe custody, installation etc. This required storage space and supervision which cannot be said to be preliminary or auxiliary activities in nature as the equipments were required to be installed;
- (iii) The bifurcation of revenue into supply of equipment and software in the ratio of 30:70 had to be upheld because (a) though the software was embedded in the equipment and supplied as one package for one price, it was permissible to segregate the composite consideration into different components and (b) the assessee had not shown the segregation done by the customs authorities for imposing duty on the equipment and software (*Rotem Company (2005) 279 ITR 165 (AAR) & Motorola Inc v. Dy. CIT (2005) 95 ITD 269 (SB) referred*);
- (iv) In a turnkey contract, in which the assessee is under obligation to supply the equipment and the software and also install them, the profit is taxable on completion of each milestone and not at the time of handing over the functioning system to the contracting party. The department’s argument that in a works contract, mere supply of equipment and software is of no consequence till installation and so profits should be taxed at that stage is not correct because even if “turnkey”, the taxable events in the execution of a contract may arise in several stages in several years if the obligations under the contract are distinct ones. The supply profits are consequently not taxable as it accrued on supply outside India;
- (v) On facts, as the supply of equipment and software constituted a milestone in the contract, the income therefrom arose in the year of shipment which was in an earlier year. It did not accrue or arise in the present year. As the PE came into existence when the equipment was handed over to it by the AAI, the profits from installation contract and services was taxable. (A. Y. 1999-2000)

*Raytheon Company v. Dy. DIT (2011) 142 TTJ 137 / 62 DTR 1 (Delhi)(Trib.)*



**S. 9 : Income deemed to accrue or arise in India – Salary to staff at Netherland [S. 40(a)(iii), 192]**

Assessee did not deduct tax at source on salary payments made to staff at Netherlands. Assessing officer invoked the provisions of 40(a)(iii), and disallowed the payments made on the ground that the tax was not deducted under section 192. The Tribunal held that since salaries had been paid to non-residents for services rendered abroad, provisions of Explanation to section 9(1)(ii) were not applicable to assessee. Since salary paid to non resident's for services rendered in Netherlands was not chargeable to tax in India, provisions of section 192 cannot be applied hence disallowance made by applying the provisions of section 40(a)(iii) were liable to be deleted. (A. Y. 2003-04).

*Dy. CIT v. Mother Dairy Fruits & Veg (P) Ltd. (2011) 45 SOT 186 / 141 TTJ 97 / 60 DTR 220 (Delhi)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Royalty or fee for technical services – Band width charges paid to foreign companies for data communication. [S. 40(a)(i), 195]**

Where the assessee had made payments to service providers such as AT&T or MCI Telecommunications for use of band width provided for down linking signals in United States and it was found that the payments were not in the nature of managerial, consultancy or technical services nor was it for use or right to use industrial, commercial or scientific, equipment. The payment was not in the nature of royalty or fee for technical services assessee was not liable to deduct tax at source. (A. Y. 2004-05).

*Infosys Technologies Ltd. v. Dy. CIT (2011) 45 SOT 157 / 139 TTJ 18 (UO)(Bang.)(Trib.)*

**S. 9 : Income deemed to accrue and arise in India – Royalty or fee for technical services – For “Equipment Royalty” under section 9(1)(vi), control of equipment by payer essential**

- (i) The word “use” in relation to equipment occurring in clause (iva) of Expl to section 9(1)(vi) is not to be understood in the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions “use” and “right to use” followed by the word “equipment” indicate that there must be some positive act of utilization, application or employment of equipment for the desired purpose. If an advantage was taken from sophisticated equipment installed and provided by another, it could not be said that the recipient/customer “used” the equipment as such. The customer merely made use of the facility, though he did not himself use the equipment. What is contemplated by the word “use” in clause (iva) of Expl. 2 to section 9(1)(vi) is the customer came face to face with the equipment, operated it or controlled its functions in some manner. But if it did nothing to or with the equipment and did not exercise any possessory rights in relation thereto, it only made use of the facility created by the service provider who was the owner of the entire network and related equipment and there was no scope to invoke



clause (iva) in such a case because the element of service predominated (ISRO Satellite Center (ISAC) (2008) 307 ITR 59 (AAR), Dell International Services (India) P. Ltd. (2008) 305 ITR 37 (AAR) & *Asia Satellite Tele Communications Co. Ltd. v. Director of Income-tax* (2011) 332 ITR 340 (Delhi) followed;

- (ii) On facts, the banner advertisement hosting services did not involve use or right to use by the assessee any industrial, commercial or scientific equipment and no such use was actually granted by Yahoo (Hong Kong) Ltd to the assessee. Uploading and display of banner advertisement on its portal was entirely the responsibility of Yahoo (Hong Kong) and the assessee was only required to provide the banner Ad to Yahoo (Hong Kong) for uploading the same on its portal. The assessee had no right to access the portal of Yahoo (Hong Kong) and there was nothing to show any positive act of utilization or employment of the portal of Yahoo (Hong Kong) by the assessee. Therefore, payment for the banner advertisement hosting services was also not royalty. (A. Y. 2004-05)

*Yahoo India Pvt. Ltd. v. Dy. CIT* (2011) 59 DTR 1 / 140 TTJ 195 (Mum.)(Trib.)

#### **S. 9 : Income deemed to accrue or arise in India – Liaison office – DTAA – India-US**

On facts, Liaison office purchasing diamonds for export to Head Office did not constitute PE under India-US DTAA and it was covered under Explanation 1(b) to section 9(1)(i) of Income Tax Act. (A.Ys. 1999–2000 to 2002-03 & 2003)

*ADIT v. M. Fabrikant & Sons Ltd.*, (2004) BCAJ P. 42, Vol. 43-A, Part 2, May 2011 (Mum.)(Trib.)

#### **S. 9 : Income deemed to accrue or arise in India – Permanent establishment**

To compute the PE 'duration test' under Article 5(2) of the DTAA, different project sites can be aggregated only if the test of interconnection and interrelationship is satisfied. (A.Y. 2001-02)

*ADIT v. Valentine Maritime (Mauritius)* (2010) 38 DTR 117 / 130 TTJ 417 / (2011) 45 SOT 34 (Mum.)(Trib.)

#### **S. 9 : Income deemed to accrue or arise in India – Agent – Arm's Length**

Foreign company not liable to tax in India if Indian agent is paid on arm's length basis.

*BBC Worldwide v. Dy. DIT* (2010) 35 DTR 257 / 128 TTJ 411 / 37 SOT 253 (Delhi)(Trib.)

#### **S. 9 : Income deemed to accrue or arise in India – Supply of equipment – DTAA – India-Australia [S. 5(2), Art. 7]**

Where a transaction of off shore supply of equipment got completed outside India and the payment was also received by assessee in foreign country, no income accrued or arose in India, hence not taxable. (A.Y. 2000-01)

*Xelo PTY Ltd. v. Dy. CIT (2010) 37 DTR 154 / 129 TTJ 597 / (2009) 32 SOT 338 / 6 ITR 391 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Activities of identification of suppliers**

Activities of identification of suppliers, quality control, preproduction meeting online inspection, post manufacturing inspection, handling of logistic and co-ordination carried out by the Indian branch office the foreign company (assessee) under an agreement with another foreign company for providing assistance to its customers in connection with purchase of goods from India fall within the scope of Expl. 1(b) to section 9(1)(i) and therefore, no part of assessee's income from such services is taxable in India. (A.Ys. 2003-04 to 2005-06)

*Mondial Orient Ltd. v. ACIT (2010) 37 DTR 267 / 129 TTJ 560 / 42 SOT 359 (Bang.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Cruises operated by SCML did not touch any port in India – Booking of cruise packages**

Cruises operated by SCML did not touch any port in India. It was also noted that services rendered by assessee were general in nature which could not be interpreted as "business connection" within the meaning of section 9(1)(i), therefore no income had accrued to SCML in India in respect of booking of cruise packages by assessee. (A.Ys. 2002-03, 2005-06)

*Dy. CIT (International) v. Star Cruises (India) Travel Services (P) Ltd. (2010) 39 SOT 18 / 134 TTJ 204 / 46 DTR 284 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Permanent establishment – Dependent agent – DTAA – India-Germany [S. 90, Art. 5]**

Sale of raw materials/CKD units to DCIL. DCIL carried out further activity of assembling the same and selling the finished cars. There were no further activities carried out by the assessee in India in this connection. Mere sale of raw materials / components would not result in business connection and even if it did as per the terms and conditions of the contract between the assessee and DCIL no income occurred to the assessee on the basis of any activities carried out on behalf of the assessee in India. Mere existence of subsidiary does not by itself constitute the subsidiary company as a PE of the parent. The DCIL was merely rendering a very insignificant auxiliary / preparatory service in the sale of CBU cars by assessee to the Indian Clients. Therefore, DCIL did not constitute a dependent agent of the assessee. (A.Ys. 2001-02, 2002-03)

*Dy. DIT v. Daimler Chrysler A. G. (2010) 39 SOT 418 / 133 TTJ 766 / 46 DTR 242 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Services rendered through Indian subsidiary**

Assessee a US company, providing IT enabled services to its clients by assigning or sub contracting execution of the contracts to its wholly owned Indian subsidiary EFI and supplying the relevant software and data base to the later, free of charge, has business connection in India within the meaning of section 9(1)(i) as well as a PE in the form of EFI as per Art. 5 of the Indo-US DTAA, profits attributable to the PE are to be worked out by applying the proportion of Indian assets, including EFI's assets, to the aggregate of global profits and reducing resultant figure by the assessed profits of EFI. (A.Ys. 2000-01 to 2002-03, 2004-05 & 2005-06)

*eFunds Corporation v. ADIT (2010) 45 DTR 345 / 42 SOT 165 / 134 TTJ 1 (Delhi)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Compensation – Arbitration award – DTAA – India-UK [S. 90, Article 5 & 7]**

The Assessing Officer was of the view that compensation was taxable in India under section 9(1)(i) of the Act, since it was an income deemed to accrue or arise in India Commissioner (A) upheld order of Assessing Officer It was held by the Tribunal that the compensation in question was not taxable as there was no PE in India in terms of Article 5 of Indo-UK DTAA and the compensation awarded under arbitration award was not taxable in India. (A.Y. 2005-06)

*Goldcrest Exports v. ITO (2010) 46 DTR 15 / 42 SOT 1 / 134 TTJ 355 (Mum.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Business connection [Expln. 1(b)]**

Assessee, having its main office in USA having opened a liaison office in India solely for the purpose of helping its affiliates located at different parts of the world to buy goods, etc. for trading operations, acting through liaison office as purchasing agent, placing orders with local manufacturers specifying the quantity, price, the affiliate with address on whom the bill is to be raised and the destination and not in any way communicating with the manufacturers other than supervising the manufacturing operations to ensure quality as per approved samples and specifications, the same amounts to purchase in the course of export and Expln. 1(b) to section 9(1)(i) is attracted, hence no income is deemed to accrue or arise to assessee in India. (A.Ys. 1999-2000 to 2002-03)

*Nike Inc. v. ACIT (2009) 21 DTR 107 / 122 TTJ 201 / 125 ITR 35 (Bang.)(Trib.)*

**S. 9 : Income deemed to accrue or arise in India – Fees for technical services – DTAA – India-France [Art 13(4)]**

Expression 'fees for technical services' as appearing in provision of article 13(4) of DTAA between India and France as well as in Explanation 2 to section 9(1)(vii) means payment made to any person in consideration of managerial, technical or consultancy services. Since test reports had been used by assessee in India in manufacturing of

cars payment made to "U" company of France were chargeable to tax in India. (A.Y. 2005-06)

*Maruti Udyog Ltd. v. ADIT (2009) 34 SOT 480 / 37 DTR 85 / 130 TTJ 66 (Delhi)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Freight income – DTAA – India-UK [Article 9(1)]**

In view of Article 9(1) of DTAA between India and UK, freight income earned by non-resident assessee on account of transportation of cargo in international traffic by ships operated by other enterprises under slot chartering, arrangement would be taxable only in State of residence and consequently, such income would be exempt from taxation under Indian Income tax law. (A.Ys. 2001-02 & 2002-03)

*Dy. DIT v. Balaji Shipping (UK) Ltd. (2009) 121 ITD 61 / 117 TTJ 865 / 25 SOT 325 / 12 DTR 93 (Mum.)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Business connection – Liaison office – Permanent establishment [S. 90]**

The term "business connection" is so broad in scope. Explanation 2 inserted below section 9(1) by the Finance Act, 2003 with effect from 1-4-2004 expands the scope of the expression. Though the Explanation does not apply to the year under consideration; i.e., A.Y. 2001-02, even applying the tests laid down in decided cases the issue resolved against the assessee. In *CIT v. R.D. Aggarwal & Co. [1965] 56 ITR 20* the Supreme Court held that the expression means something more than a business, that it presupposes an element of continuity between the business of the non-resident and the activity in the taxable territory though a stray or isolated transaction would not be taken in, that the connection may take several forms, that it may include carrying on a part of the main business or activity incidental to the non-resident through an agent or it may merely be a relation between the business of the non-resident and the activity in the taxable territory which facilitates or assists the carrying on of that business. (A.Y. 2001-02)

Liaison office of the US company engaged in the business of trans border money transfers cannot be regarded as fixed place PE of the company in India as it carries out only the prepatory or auxiliary activities, nor the agents appointed by the company in India constitute agency PE as they are independent and render services of money transfer on behalf of the company in the ordinary course of the business carried on by them and therefore, profits if any, attributable to the Indian operations of the company cannot be assessed as business profits under Article 7 of the DTAA and are therefore, not taxable in India. (A.Y. 2001-02)

*Western Union Financial Services Inc. v. ADIT (2007) 104 ITD 34 / 101 TTJ 56 (Delhi)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Foreign technicians**

Foreign technicians working on oil rigs in India – Field breaks spent by foreign technicians outside India during which they are required to undergo training for updating of knowledge and keep themselves in a state of readiness to serve

anywhere in the world at a short notice under the terms of the service contract with their employer is not equivalent to rest period or a leave period as enshrined in the Explanation to S. 9(1)(ii) and there, off-period salary received by the foreign technicians was not taxable in India. (A.Ys. 1999-2000 & 2000-01)

*Dy. CIT v. Sedco Forex Intt. Drilling Inc. (2006) 103 TTJ 99 / (2007) 11 SOT 17 (Delhi)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Business Connection – Signing the agreement**

As per Explanation (a) to section 9 (1) (i), where part of the operations of business are carried out side India, only part of income reasonably attributable to operations carried outside India shall be deemed to accrue or arise in India. The use of the word “shall” in the said Explanation is unequivocally indicative of the legislative mandate contained therein. The explanation, in no uncertain terms, envisages only such type of income to be deemed to accrue or arise in India under section 9(1)(i). Thus an income cannot be said to be deemed income just because either agreement was signed in India or income had been received in India. (A.Y. 1993-94)

*McDermott ETPM Inc. v. Dy. CIT (2005) 92 ITD 385 / 92 TTJ 733 / 1 SOT 133 (Mum.)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Business connection – Telecom equipment**

Assessee, a foreign supplier of telecom equipments, entered into supply contract with Indian Cellular Operators to sell GSM equipment and two other group companies entered into installation contract with such cellular operators for installation of equipment, neither it could be said that the assessee had a fixed place of business in India, nor a permanent establishment in India so as to treat payment received by it as business profits or royalty; thus it could not be said that the assessee had business connection in India from which profits could be deemed to accrue or arise in India. (A.Y. 1997-98)

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

### **S. 9 : Income deemed to accrue or arise in India – Salary – Service rendered in India**

Salary paid overseas to managing director for services rendered by him in India would fall under head ‘salaries’ as income earned in India and will be chargeable to tax. (A.Ys. 1998-99 & 1999-2000)

*Kinetic Technology (India) Ltd. v. ITO (2005) 96 ITD 441 / 98 TTJ 90 (Delhi)(Trib.)*

### **S. 9 : Income deemed to accrue or arise in India – Royalty – Deduction of tax at source**

#### **[S. 195, Art. 12(3)(c)]**

Payment made by Indian company to Australian company for obtaining credit rating certificate amounted to payment for supply of commercial information within meaning

of Article 12(3)(c) of DTAA with Australia and hence, payment made therefore was 'royalty' within meaning of section 9(1)(vii)(b) subject to deduction of tax at source under section 195. (A.Y. 1999-2000)

*Essar Oil Ltd. v. Jt. CIT* (2005) 4 SOT 161 / (2006) 102 TTJ 270 / 4 SOT 161 (Mum.)(Trib.)

**S. 9 : Income deemed to accrue or arise in India – Business connection – Deduction of tax at source – Non-resident [S. 195]**

Sec 9(1)(i) is not applicable for payments to non resident ship owners on basis of charter party agreements, and no TDS was required to be deducted.

*Dy. CIT v. Reliance Industries Ltd.* (2003) 81 TTJ 787 (Mum.)(Trib.)

**S. 9 : Income deemed to accrue or arise in India – Business income – Discounting of promissory note – DTAA – India-USA [Art. 7]**

It was not in dispute that income arising to applicant from discounting promissory note payable in India is business income. However, as per article 7 of DTAA, profits of an enterprise of a contracting State shall be taxable only in that State unless such enterprise carries on business in the other contracting state through a permanent establishment situated therein. It was assumed for the purpose of this Ruling that applicant has no permanent establishment in India. Therefore, AAR held that income of applicant from discounting of promissory note would not be taxed in India.

*ABC International Inc.* (2011) 199 Taxman 211 / 241 CTR 289 / 55 DTR 393 (AAR)

**S. 9 : Income deemed to accrue or arise in India – Business connection – Offshore supply of equipments - Deduction at source – Non-resident**

Non-resident company is not liable to tax in India in respect of payments for off shore supply of equipments under the composite contracts for setting up transmission lines and consequently, no tax is required to be deducted at source from the payments made to it for the supply of equipments.

*Deepak Cables (India) Ltd.* (2011) 242 CTR 469 / 337 ITR 127 / 59 DTR 95 (AAR)

**S. 9 : Income deemed to accrue or arise in India – Business connection – Offshore supply of equipments materials – DTAA – India-Korea [S. 245R(2)]**

Applicant, a Korean company, having entered into a separate contract for off shore supply of equipments and materials along with two other contracts for on shore supply and on shore services for various projects in India, and the consideration for the sale being separately specified, it can be separated from the whole, and since the transaction of sale and the transfer of ownership and property in goods took place outside Indian territory, applicant is not liable to tax in respect of off shore supplies.

*LS Cables Ltd.* (2011) 59 DTR 216 / 337 ITR 35 / 243 CTR 60 (AAR)

**S. 9 : Income deemed to accrue or arise in India – Business connection – Liaison office of foreign company – DTAA – India-USA [Art. 5, 7]**



Liaison office of the applicant foreign company operating in India was carrying on various activities. It cannot be said that the operations of the liaison office are confined to purchase of goods in India for the purpose of export and its income is covered by Explanation 1(b) to section 9(1)(i), even though no product of the applicant is sold in India. The liaison office can be termed as permanent establishment within the meaning of Article 5(1) of the Indo-USA DTAA and cannot be excluded from the definition of Permanent establishment by reason of clause (d) and (e) of Article 5(3), hence, the applicant is liable to tax in India in terms of Article 7(1).

*Columbia Spotsweat Company (2011) 337 ITR 407 / 59 DTR 233 / 243 CTR 42 / 201 Taxman 214 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Permanent establishment – Technical services – DTAA – India-USA [Articles 4, 12(4)(b), 5(c)]**

Non-resident (Indian company) entering into agreement with Defence Research Development Organisation to assist in identification of global technologies for existing defence related innovations. Lump sum paid by the applicant, activities of Institute of Texas University is not technical services, not taxable in India.

*Federation of Indian Chambers of Commerce and Industry, In Re: (2010) 320 ITR 124 / 227 CTR 456 / 32 DTR 73 / 186 Taxman 161 / 323 ITR 399 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – India-Russia – DTAA [S. 90, Articles 5 & 7]**

Applicant a Russian company, is not entitled to tax in India in respect of the amount received from the Indian company NTPC for execution of off shore supply contract as the materials were shipped outside India, the title to goods passed outside India (on high seas) and payment was also received outside India as per the terms of the contract.

*Joint Stock Company Foreign Economic Association "Technopromexport" (2010) 322 ITR 409 / 189 Taxman 337 / 36 DTR 25 / 230 CTR 139 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Permanent establishment – Independent service providers – India-Singapore DTAA [Article 5.1]**

Applicant, a Singapore company having entered into agreement with independent service providers (ISPs), in India who are obliged to make adequate space available to store applicant's products, provide other facilities apart from storage, handling, repacking, etc., and deliver the goods to the customers on behalf of the applicant, the demarcated space in the warehouse of ISP constitutes the fixed place of business and the applicant has a PE in India - Held, demarcated space in warehouse of independent service providers is fixed place of business, hence, Permanent Establishment in India

*Singate Singapore Headquarters (P) Ltd. (2010) 230 CTR 110 / 322 ITR 650 / 189 Taxman 181 / 35 DTR 242 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Non-resident – Permanent establishment – India-South Africa – DTAA [S. 15 (2)195, Article 5(2)]**

Applicant pays commission to non-resident for marketing & promotion services outside India — AAR observed that as per Circular No. 23 dt. 23-7-1969 issued by CBDT and Circular No. 786 of 7-3-2000, no part of non-resident's income arises in India as it operates outside India, it has no PE in India and no part of its operations are carried out in India - hence held non-resident not taxable in India.

*Spahi Projects Pvt. Ltd. 3 (2009) 315 ITR 374 / 183 Taxman 92 / 225 CTR 133 / 26 DTR 303 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Royalty – Fees for technical services – India-USA-DTAA [S. 9(1)(vi), 115A, Article 12]**

Non-resident applicant entered into a technology transfer agreement with CEAT Ltd. transferring the ownership in designs for manufacture of radial tyres and granted a perpetual irrevocable right to use the know-how - Applicant contended such transfer be considered as 'plant' not liable to taxation either under section 5 or 9; also not 'fees for included services' relying on Article 12(5)(a) of DTAA – AAR observed essential nature of transaction is not the sale of property, but conferment of right to use the technical know-how not merely for the plant that is being set up but also for similar plants in the future; further territorial nexus cannot be invoked as the technical know-how embodied in various documents is received in India from time to time and is put to use in India with the assistance and advice offered by the technical personnel of the applicant deputed to India - Hence ruled it cannot be treated as 'plant' or as sale of property but gets covered as 'Royalty' – Tax @ 10%.

*International Tyre Engineering Resources LLC. (2009) 227 CTR 21 / 319 ITR 228 / 185 Taxman 209 / 30 DTR 161 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Royalty or fees for technical services – Protocol to interpretation – India-USA – DTAA [Articles 5, 7 & 12]**

Canadian pharma company provides biotechnical services to Indian companies where under, based on methods / protocols developed by it, evaluation work is carried out and only final reports and conclusions are made available to the clients – Relying upon the protocol to the India-US Convention on DTAA which provides guidance on interpretation of Article 12(4) of the Treaty, AAR ruled that in order to qualify as 'fees for technical services', mere provision of technical services is not enough, but the service provider should also furnish his technical knowledge, experience etc. to the recipient such that the recipient can independently perform the technical function himself in the future without the assistance of the service provider. As this was not the case here, payment cannot be considered as fees for technical services. Neither is it royalty as applicant only imparted its final conclusions and was not transferring any knowhow ; further in view of Articles 7 and 5 of the Treaty, such income could only be taxed in India if applicant had a PE in India and in the absence of which the same is not taxable in India.

*Anapharm In (2008) 174 Taxman 124 / 305 ITR 394 / 219 CTR 209 / 13 DTR 74 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Liaison office for purchase of goods from India [S. 5, 2(b)]**

Liaison office in India of non-resident for purchasing goods in its own name but consigned / supplied directly to group companies or customers outside India - AAR observed that applicant's activity in India is confined to the purchase of goods only as the applicant sells goods outside India and the sale price is also recovered outside India; further, the delivery of the goods was requested to be consigned to the customers of the applicant with a view to save time and freight - hence held no income can be attributed to such activity and hence not taxable in India.

*Ikea Trading (Hong Kong) Ltd. (2008) 221 CTR 201 / 308 ITR 422 / 176 Taxman 344 / 17 DTR 204 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Situs of intangibles that are integral part of business in India – Capital gains – Intangible property – Trade mark [S. 2(14), 55(2)]**

Applicant, Fosters Australia entered into a Brand License Agreement with Foster's India granting it an exclusive license to brew, package, label, and sell Foster's Lager (beer) and an exclusive right of user of the trade-marks within India; subsequently, the applicant enters into an agreement with a UK company to transfer shares and other intangible assets in India; UK purchaser nominates an Indian company in its place and Deed of Assignment is executed between applicant and such nominee Indian company SKOL Breweries – Issue is whether the trade-marks and Foster's Brand and Brewing IP rights owned by the applicant Foster's Australia and conveyed/ assigned to SKOL Breweries can be said to be capital assets situate in India and the consideration received in connection therewith is liable to be treated as income that accrues or arises in India - AAR observed that situs of capital asset is important as the charge to tax is attracted if the asset is situated India; AAR held that the intellectual property comprising of Foster's trade-marks and brand I.P. can be said to be located in India where the business of Foster's India was being carried on in conjunction with the applicant as the trade-marks registered in India together with the other features of Foster's brand had undoubtedly generated appreciable goodwill in Indian market and such goodwill has been nurtured in India by reason of coordinated efforts of the applicant and Foster's India till the date of the agreement - Hence ruled that transfer of intangibles such as trade-marks and Intellectual Property are integral part of business in India and hence situate in India and hence taxable in India.

*Fosters Australia (2008) 302 ITR 289 / 217 CTR 21 / 170 Taxman 341 / 302 ITR 289 / 7 DTR 206 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Royalty – Technical services – Permanent establishment – Article 13 of India-UK – DTAA [S. 195]**

Resident applicant hiring transponder space segment capacity from non-resident owner - AAR observed that the control & operation of transponder is not with the applicant and thus there is no user of equipment but applicant is only accessing it as a transmission media for the data; therefore charges paid by applicant cannot be treated as payment for use of equipment and is not in the nature of Royalty under the ITA or Treaty nor it is fees for technical services as per the treaty; further as there is no PE attributable in India applicant is not liable to tax or TDS in India.

*ISRO Satellite Centre (ISAC) (2008) 220 CTR 13 / 307 ITR 59 / 175 Taxman 97 / 14 DTR 212 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Transfer of shares in Indian subsidiary in corporate reorganization – India-Netherlands DTAA [Article 13(5)]**

Capital Gains arises from transfer of shares in Indian wholly-owned subsidiary in course of corporate reorganization – Applicant contended that since the transaction involves transfer of shares of an Indian company the resulting income shall be deemed to accrue or arise in India and the same would be taxable as capital gains in India; but the transaction would also attract Article 13(5) of the DTAA which stipulates that if capital gains are realized in the course of a corporate organization/reorganization, amalgamation, division, etc., such gains shall be taxable only in the State in which the alienator is resident – AAR upheld applicant's views in entirety and ruled transfer is exempt from tax in India; further, as there is no chargeability in India, there is also no applicability of TDS and of filing return of income; further, transfer pricing norms also not applicable in absence of liability to pay tax.

*Vanenburg Group B.V. (2007) 208 CTR 177 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Royalty – India-Switzerland – DTAA [S. 90, Articles 5 & 7]**

Assignment of Turbocharger Development and Supply Agreement by non-resident applicant to newly set-up Indian resident subsidiary – AAR observed that based on facts, it appeared that the Indian subsidiary would be carrying on business in its own rights and not on behalf of the applicant and that it has also acquired business under the deed of assignment that was executed outside India and consideration for which is also payable outside India; the situs of the deed being of Switzerland (outside India), the income or profit if any, accruing or arising to the applicant on account of deed of assignment cannot therefore be said to arise in India. It therefore follows that the applicant has no business connection in India; AAR further observed that from a close reading of the said agreements, it was amply clear that none of the clauses of explanation-2 of S. 9(1)(vi) is attracted and hence consideration cannot be treated as royalty; hence ruled that receipt from proposed assignment would not be taxable in India.

*ABC Ltd., Switzerland (2007) 208 CTR 117 / 289 ITR 438 / 159 Taxman 344 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Transfer of shares in Indian company – Non-resident transferee as a representative assessee – India-USA-DTAA [S. 45 (1), 163, Article 13]**

Transfer outside India of shares of an Indian Company by one non-resident to another non-resident - AAR observed that the capital asset viz. shares of an Indian company that has been transferred is situated in India and hence income accruing from it is chargeable as per S.9(1); further as per Article 13 of DTAA, each contracting state may tax capital gains in accordance with the provisions of its domestic law and hence, even the DTAA will not bail out the transferee from the chargeability of the capital gains under section 9(1)(i) of the Act read with section 45(1) of the Act; also ruled that as per S. 163 which is a inclusive provision, the non-resident transferee (the applicant) may be assessed as a representative assessee of the transferor and S. 195 relating to TDS is also applicable to the applicant.

*Trinity Corp. USA (2007) 213 CTR 257 / 165 Taxman 272 / 295 ITR 258 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Royalty – Fees for technical services – India-Singapore – DTAA [Articles 7 & 12]**

Non-resident has developed an Internet based carrier-neutral air cargo portal located on its server in Singapore; Cargo agents utilize it to check & book cargo space; it opened a liaison office in Chennai to act as a communication channel between the Head Office and parties in India; it also imparts training by way of demonstration only and no technical knowledge is imparted to the subscribers - Revenue contended that provision of on-site Helpdesk and training to the Agents indicate that Liaison office is carrying on the business of the Applicant either wholly or partly and is therefore a PE in India - AAR observed that the complex portal designed by the applicant is the result of long standing commercial experience and research in the line of cargo booking and that the portal and the server together constitute integrated commercial-cum-scientific equipment and for obtaining Internet access to airlines, the use of portal without server is unthinkable. Hence, it falls within the definition of Royalty as per IT Act as well as the DTAA; further, the technical and consultancy services being rendered by the employees of the applicant in training the subscribers and providing help desk support in India is covered by the description of 'Fees for technical services'; hence payments cannot be considered as business income but are in nature of Royalty & Fees for Technical Services and are subject to TDS in India.

*Cargo Community Network Pte Ltd. (2007) 208 CTR 184 / 289 ITR 355 / 159 Taxman 243 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Liaison office – Purchase for export**

Non-resident applicant intends to open a liaison office in India for co-ordination purchase of goods for export – AAR observed this is clearly covered by clause (b) of Explanation 1 to said Section as proposed activities of the liaison office is confined to purchase of goods for export. It is immaterial whether the export is to Hong Kong or to any other country as the said clause does not specify that the export should only



be to the country of which the applicant is a tax resident – Hence ruled that it cannot be held to have earned any income taxable in India.

*Angel Garments Ltd, Hong Kong (2006) 157 Taxman 195 / 287 ITR 341 / 206 CTR 393 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Royalty – Deduction of tax at source – Non-resident – India-USA – DTAA [S. 195, Articles 7 & 12]**

Periodical payments are made to the non-resident person having no office/establishment in India, in connection with the use (on internet) of software developed by him - AAR observed that Article 12 defines 'Royalty' to mean payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment. The software application of non-resident is ruled to be scientific equipment, licensed to be used for commercial purpose; therefore payment is in nature of royalty and were subject to TDS

*IMT Labs India Pvt. Ltd. (2006) 157 Taxman 213 / 287 ITR 450 / 206 CTR 304 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Investments by FII whether business income or capital gains – Non-resident – FII regulations – India-USA – DTAA [Articles 5 & 7]**

Portfolio investments by non-resident pension fund under FII scheme of SEBI for investments in India – Applicant sought advance ruling whether sale of portfolio investments in India would be treated as business income and whether in the absence of PE in India, such business income will be taxable in India as per the DTAA – Revenue contended such sale would constitute capital gains – AAR observed that it is no doubt true that the provisions of the FII investors scheme suggest that the investment in shares would be to acquire the capital assets; the requirement of Section 18 of the FII's regulations also speaks on realization of capital gains of investment from the corpus and Section 115 AD, a special provision in the Act, provides special rate for taxation of short term capital gains as well as long term gains. But relying on various judgments / rulings, Authority observed that substantial nature of transactions, manner of maintaining books of accounts, magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions and if object of the investment in shares of a company is to derive income by way of dividend etc. then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not revenue receipt; further details submitted by applicant shows substantial nature of transactions and magnitude of the purchases and sales of shares/securities in various companies in India. Nothing was produced before AAR to show that the object of the investment in the was to derive only the income by way of dividend; hence held to be business income and not capital gains – Further as regards DTAA, it observed that import of article 1(1) read with Article 4(1)(b) of the DTAA is to exclude the income of a trust that is not subject to tax in that state (USA) from the definition of resident of a Contracting State (USA) for purposes of the treaty. Hence, it ruled that the applicant is not a resident of Contracting State (USA) and therefore it



cannot avail the benefit of the terms of the Treaty and hence profits are taxable in India as Business Income

*General Electric Pension Trust, USA (2006) 280 ITR 425 / 200 CTR 121 / 150 Taxman 545 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Permanent establishment – Fees for included services – Repair contracts Soft ware modification – India-USA – DTAA [Articles 5, 7 & 12]**

Resident applicant entered into a Repairs contract and a Software modifications contract with non-resident from whom it had earlier purchased the system; Repair of the hardware would require dispatch of defective parts to non-resident's facilities in USA or Canada where repairs would be done or replacement part will be supplied. Similarly, the defects in the software would also be attended to outside India – AAR observed that insofar as software and documentation are concerned, the applicant acquired a right to use the same subject to certain conditions but the hardware and other equipment were subject matter of outright sale in favour of the applicant; hence in regard to repair of hardware, payment received by non-resident does not fall within the meaning of income from the furnishing of services as defined in article 12 and would, therefore, be business profits within the meaning of para 7 of article 7. As it has no PE in India the payment will not be taxable in India in view of the provisions of article 7 of the treaty. In regard to repair of software, payment received by non-resident answer the description of fees for included services within the meaning of sub-para (a) of para 4 of article 12 and the same shall be taxable in India.

*Airports Authority of India, IN Re (2005) 273 ITR 437 / 143 Taxman 129 / 193 CTR 487 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Capital gains on reorganization of investment funds [S. 2(47)]**

Conversion of UK-based investment funds structured as Unit Trusts into Open-ended investment companies; there is no sale, exchange, or extinguishments of underlying assets (including the Indian securities) as a result of change from the Unit trusts to the OEICs; also there was no payment of consideration by the OEICs to the Unit trusts – AAR observed that as a result of reorganization the position of the applicant as a trustee of the funds has been changed to that of a depository of OEICs and this by itself would not attract the provisions of section 9(1) (i) of the Act; if, however, the reorganization results in transfer of shares held by the applicant in Indian companies, it would attract section 9(1)(i) of the Act; further, SEBI has also communicated its 'no objection' to the proposed change in name of fund from Trustee to Depository and also the applicant obtained the clearance of the Inland Revenue of UK to the reorganization and it is registered as FSA and it has necessary permission to act as a trustee and a depository - Hence ruled that the transaction being in the nature or reorganization is not chargeable to tax in India or under the India-UK DTAA.

*Citicorp Trustee Company Ltd. (2005) 278 ITR 300 / 147 Taxman 509 / 197 CTR 211 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – Permanent establishment – Independent agent – India-UK – DTAA [Articles 5 & 7]**

Non-resident publisher sourcing advertisements from India through Indian agent who collects the advertisement charges from Indian advertisers in Indian currency and remits the same in foreign currency; question is whether such an arrangement is tantamount to income being deemed to accrue or arise in India to the non-resident – AAR stated that on the facts of the case, it is clear that business activities mentioned in Explanation 2 to said Section are carried out in India by resident agent for non-resident and hence, there is 'business connection' between them in India; however, as per Article 7 of DTAA, profit shall be taxable in India only if it has PE situated in India and only so much of them as is directly or indirectly attributed to that PE; further, Article 5(5) implies that a non-resident shall not be deemed to have a PE merely because it carries on business in the other State through a broker, general commission agent or any other agent of an independent status provided that such persons are acting in the ordinary course of business; there is no doubt that resident is sole agent of non-resident, but what is required to be shown is that non-resident is the sole client of agent to bring it within the mischief of the second part of para 5; but it is shown that agent has other clients from whom it earns between 22% to 25% of its income, so it cannot be said that its activities are carried out wholly or almost wholly for non-resident – Hence held it is Business Connection but not Permanent Establishment as Indian agent is independent and not working wholly or almost wholly for non-resident.

*Speciality Magazines Private Ltd., (2005) 274 ITR 310 / 144 Taxman 153 / 194 CTR 108 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business Connection – India-USA  
[Art. 5 (4)]**

Where applicant, an Indian Company, under an agreement with American Company is to provide services to American Company for transportation of packages through out world, since in case of outbound consignments, booking orders, collection parcels etc., as also in case of inbound consignments in regard to clearance and delivery of parcels / packages, applicant is acting for American Company, article 5(4) of DTAA with USA will be applicable and, thus applicant will be treated as permanent establishment and, income arising to American company from transaction entered into by it with applicant under transportation agreement would be taxable in India both under provisions of Act as well as DTAA.

*Indian JV Co., In re (2005) 274 ITR 501 / 143 Taxman 71 / 193 CTR 328 (AAR)*

**S. 9 : Income deemed to accrue or arise in India – Business connection – DTAA – India-UK**

Where applicant – UK Company, which was earlier trustee of a group of funds holding securities in India, underwent a restructuring / reorganization and reorganization of the securities in UK resulted in applicant changing its status from that of a 'trustee' to that of a 'depository' of the Open Ended Investment Companies, but there is no change in assessee's ownership of Indian Securities as a consequence of reorganization of the applicant, as there has been no transfer of shares held by applicant in Indian Companies, applicant is not chargeable to tax in India under provisions of Income Tax Act, 1961, or the Double Taxation Avoidance Agreement between India and UK.

*Citicorp Trustee Co. Ltd., In re (2005) 278 ITR 300 / 147 Taxman 509 / 197 CTR 211 (AAR)*

### **S. 9 : Income deemed to accrue or arise in India – Business connection – Liaison office**

Where scope of assignment of applicant is to promote products of 'principal company GVB', and to provide support to GVB for obtaining data related to credit risk and credit rating of customers or potential customers, as also to provide assistance for timely collection of outstanding dues from customers and agreement specifically state that applicant is prohibited from concluding contracts on behalf of GVB or collect payments on behalf of 'principal company' and applicant sets up liaison office in India to act only as a channel of communication between principal company and Indian Companies, traders / customers, it follows that activities of 'liaison office' would tantamount to having a 'business connection' in India; however, in case scope of activities of 'liaison office' is enlarged and it enters into negotiations for import /purchase of goods by Indian customers, in any manner it would come within expression 'business connection' as used in section 9(1)(i).

*Gutal Trading Est., In re (2005) 278 ITR 643 / 149 Taxman 498 / 198 CTR 417 (AAR)*

### **S. 9 : Income deemed to accrue or arise in India – Business connection – Permanent establishment – Liaison Office – Essential features – India-UAE – DTAA [Article 5]**

Non-resident applicant is in business of remitting amounts from UAE to India; has liaison offices in India whose activities are incidental to the main business of the company and do not earn any income in India; applicant contends there is no income from any source in India; also under DTAA, maintaining a fixed place of business solely for carrying on activity of a preparatory or auxiliary character would not amount to maintaining PE in India - AAR observed that applicant remits amount to India in one of the following two modes: (a) Telegraphic remittance directly from UAE where the liaison offices have no role to play except attending to the complaints, if any, in India which is undoubtedly a work of auxiliary character in terms of Article 5(3)(e) concerning exclusion from definition of 'Permanent Establishment'; and (b) Cheques/drafts prepared by liaison offices and dispatching through courier to the beneficiaries in India where the role of liaison offices is nothing short of performing the contract of remitting the amounts at least in part and is an essential activity in performance of contractual obligation - Hence held that direct remittances from UAE does

not constitute 'Business Connection' but cheques/drafts printed and couriered by Indian liaison offices deemed to be 'Permanent Establishment' and income attributable to such activities deemed to accrue or arise in India.

*UAE Exchange Centre LLC, Abu Dhabi; (2004) 268 ITR 09 / 139 Taxman 82 / 189 CTR 467 (AAR)*

*Sutron Corpn, In re (2004) 268 ITR 156 / 138 Taxman 87 / 189 CTR 366 (AAR)*

**S. 9(1)(i) : Income deemed to accrue or arise in India – Liaison office – Business connection – DTAA – India-South Korea [S. 90, Art 5 & 7]**

Liaison office of the South Korean company being engaged in procuring purchase orders in India for the latter after negotiating the deal, there exists a business connection in India. Liaison office is also a PE, with in meaning of Article 5 of the DTAA between India and South Korea as it is having freedom to fix the sale price and conclude the contract and therefore, its activities could not be of preparatory or auxiliary nature. Income attributable to the Liaison office is taxable under Article 7 of the DTAA. (A.Ys. 2001-02 to 2006-07)

*Dy. CIT v. Jebon Corporation India Liaison Office (2010) 1 ITR 655 / 127 TTJ 98 / (2009) 31 DTR 187 / 125 ITD 340 (Bang.)(Trib.)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Explanation – Retrospective**

Explanation to section 9(1)(ii), substituted with effect from 1/4/2000, was not retrospective in nature; therefore, in case of employees of appellant non-resident company working on rigs of Indian Company, salary paid for field breaks in UK was not for service rendered in India within the meaning of Explanation added to section 9 by Finance Act, 1983 and it could not be subjected to tax under section 9(1)(ii) for assessment year 1992-93 & 1993-94.

*Sedco Forex International Drill Inc. & Others v. CIT (2005) 279 ITR 310 / 149 Taxman 352 / 199 CTR 320 / (2006) 192 Taxation 27 (SC)*

*Editorial:- Please see amendment in Explanation to section 9(1)(ii) inserted w.e.f. 1-4-2000 by the Finance Act, 1999. CIT v. S.R. Patton (1998) 233 ITR 166 / 151 CTR 235 (SC) and CIT v. Gostino Mario and others (2000 )241 ITR 312 / 158 CTR 538 (SC).*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Non-resident – ONGC**

Notification of extension of Act to continental Shelf was not applicable for assessment year 1983-84 and salary paid to assessee for AYs. 1982-83 & 1983-84, an employee of non-resident company working with ONGC, for lay-off period outside India was not chargeable under section 9(1)(ii). (A.Ys. 1982-83, 1983-84)

*CIT v. E. Hammet (2006) 286 ITR 657 / 147 Taxman 458 (All.)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Non-resident – Off shore oil rigs – Foreign technician**

Salary for all periods received by assessee employee of non-resident company, working off-shore oil rigs in India, was income earned in India for services rendered in India under section 9(1)(ii).

*Reading & Bates Drilling Co. v. CIT (2005) 277 ITR 253 / 147 Taxman 499 / 199 CTR 66 (Uttaranchal)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Off shore oil rigs – Foreign technician**

Salary received by assessee non-resident foreign technician for off- periods while working on oil rigs in India, was assessable under section 9(1)(ii).

*CIT v. Reading & Bates Exploration Co. (2005) 278 ITR 47 / 148 Taxman 457 / 198 CTR 670 (Uttaranchal)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Foreign technician**

Where a French collaborator had entered into an agreement with an Indian Company and deputed two French technicians who worked in India at the site of Indian Company and the terms and contract stipulated that salary paid by foreign collaborator to technical personnel would be reimbursed by Indian company in Paris, since assessment years involved were 1977-78 and 1978-79, Explanation to section 9(1)(ii) inserted with effect from 1-4-1979, was not attracted and as such salary paid to foreign technician could not be deemed to have accrued in India. (A.Ys. 1977-78, 78-79)

*CIT v. Andre Parrian (2005) 145 Taxman 329 / 198 CTR 410 (All.)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Service rendered out side India – Salary – Off period**

From Explanation to section 9(1)(ii) it is not possible to infer corollary, that in all cases where services are rendered outside India, salary can not be deemed to accrue in India ipso facto. Payment received by assessee – non-resident employee, working in India, for off period outside India is chargeable to tax under section 9(1)(ii).

*CIT v. Halliburton Offshore Services Inc (2004) 271 ITR 395 / 140 Taxman 405 / 192 CTR 507 (Uttaranchal)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Salary – Foreign employee on oil rig – Off period**

Salary paid to foreign employee on oil rig for off period in his contract, is also exigible to tax under section 9(1)(ii), as the payment was directly connected with the work on rigs in India. (A.Y. 1992-93)

*CIT v. Sedco Forex International Drilling Co Ltd. (2003) 264 ITR 320 / 134 Taxman 109 / 186 CTR 144 (Uttaranchal)(High Court)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Retrospectiveness – Explanation – Finance Act 1999**

Explanation to section 9(1)(ii) substituted by Finance Act, 1999, w.e.f. 1st April, 2000, is not declaratory/clarificatory but expands the scope of main section. Therefore, retrospective effect cannot be given to said Explanation. (A.Y. 1993-94)  
*Addl. CIT v. Hughes Services (Far East) (P) Ltd. (2003) 87 ITD 137 / 90 TTJ 227 (Delhi)(Trib.)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Non-resident – Turnkey project – composite contract involving operation in India and out side India [S. 5(2), Art 7(1)]**

Following principles emerges regarding accrual /deemed accrual of income of non resident from sale of goods in India.

- (1) In a case of sale of goods simpliciter by non-resident to a resident in India, if the consideration for sale is received abroad and the property in the goods also passes to the purchaser outside India, no income accrues or arises or is deemed to accrues or arise to the seller in India.
- (2) In a case of transaction, sale of goods by the non-resident to an Indian resident which is part of a composite contract involving various operations within and outside, income from such sale shall be deemed to accrue or arise in India if it accrues or arises through or from any business connection in India.
- (3) In the case of a business of which operations are not carried out in India, the deemed accrual or arising of income shall be only such part of the income as is reasonably attributable to the operations carried out in India.
- (4) Whether there is business connection in India or whether all operations of the business are not carried out in India are questions of fact which have to be determined on the facts of each case.

*Ishikawajima Harima Heavy Industries Co. Ltd, In re (2004) 271 ITR 193 / 141 Taxman 669 / 192 CTR 289 (AAR)*

**S. 9(1)(ii) : Income deemed to accrue or arise in India – Non-resident – Technicians – Salary**

Salaries of non resident technicians paid in USA, for period they worked in India, shall be deemed to arise in India. (A.Ys. 2000-01 to 2004-05)

*Hindustan Powerplus Ltd., in re (2004) 271 ITR 433 / 141 Taxman 658 / 192 CTR 311 (AAR)*

**S. 9(1)(iv) : Income deemed to accrue or arise in India – Dividend – Paid to non-resident**

Dividend income paid to non-resident by Indian company is deemed to accrue in India only on payment and not on declaration. (A.Ys. 1976-77, 77-78)

*Pfizer Corporation v. CIT (2003) 259 ITR 391 / 129 Taxman 459 / 180 CTR 319 (Bom.)(High Court)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Income from license of software assessable as “royalty” – Deduction at source [S. 195]**



The assessee imported "shrink-wrapped"/ "off-the-shelf" software from suppliers in foreign countries and made payment for the same without deducting tax at source under section 195. The Assessing Officer & CIT(A) held that the payments were assessable to tax as "royalty" under section 9(1)(vi) / Article 12 and that the assessee was liable to pay the tax under section 201. On appeal, the Tribunal relied on the judgment of the Supreme Court in *Tata Consultancy Services v State of AP (2004) 271 ITR 401 (SC)* and held that the assessee had acquired a "copyrighted article" but not the "copyright" itself and so the amount paid was not assessable as "royalty". On appeal by the department, held reversing the Tribunal:

- (i) Under section 9(1)(vi) of the Act & Article 12 of the DTAA, "payments of any kind in consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work" is deemed to be "royalty". Under the Copyright Act, 1957, a software programme constitutes a "copyright". A right to make a copy of the software and use it for internal business by making copy of the same and storing it on the hard disk amounts to a use of the copyright under section 14(1) of that Act because in the absence of such a license, there would have been an infringement of the copyright. Accordingly, the argument that there is no transfer of any part of the copyright and the transaction involves only a sale of a copyrighted article is not acceptable. The amount paid to the supplier for supply of the "shrink-wrapped" software is not the price of the CD alone nor software alone nor the price of license granted. It is a combination of all. In substance unless a license was granted permitting the end user to copy and download the software, the CD would not be helpful to the end user;
- (ii) There is a difference between a purchase of a book or a music CD because while these can be used once they are purchased, software stored in a dumb CD requires a license to enable the user to download it upon his hard disk, in the absence of which there would be an infringement of the owner's copyright. [TCS v State of AP (supra) distinguished as being in the context of sales-tax]; (A.Ys. 1999-2000 to 2001-02)

*CIT v. Samsung Electronics Co. Ltd. (2011) 203 Taxman 477 / 245 CTR 481 / 64 DTR 178 (Karn.)(High Court)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalties and fees for included services – Data base – DTAA – India-USA – Non-resident – Deduction at source [S. 195, Art. 12]**

Assessee made certain payments to a non-resident 'G' USA/ Ireland, on which no tax was deducted under section 195, on the ground that the payment was akin to making a subscription for a journal or magazine of a foreign publisher and though the journal contained information concerning commercial, industrial or technical knowledge, payee made no attempt to impart same to payer and thus, payment fell outside scope of clause (ii) of Explanation 2 to section 9(1)(vi) as well as article 12 of Indo-US DTAA. Assessing Officer held that payments made to 'G' was 'royalty' within the meaning of Explanation 2 to section 9(1)(vi) and in alternative 'fees for technical

services'(Included services) both of which were liable for tax in India in terms of section 195, read with section 9(1)(vi) and (vii) and relevant provisions of DTAA. The Court held that 'G' had maintained a data base and it had granted online access of same to assessee therefore, the payment made by assessee for licence to use data base maintained by 'G' was to be treated as royalty. Since assessee failed to deduct tax at source while making payment of royalty to 'G' impugned order passed by Assessing Officer was up held. (A.Ys. 2001-02 to 2003-04).

*CIT v. Wipro Ltd. (2011) 203 Taxman 621 (Karn.)(High Court)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Plant know how – Product know how – Sale – Royalty**

Under the agreement, the foreign company was to supply plant knowhow and product know how. Agreement was concluded and data was delivered abroad. Transaction was that of a sale, hence, no income could be deemed to accrue or arise to non-resident.

*CIT v. Maggronic Devices (P) Ltd. (2010) 190 Taxman 382 / 31 DTR 65 / 228 CTR 241 / 329 ITR 442 (HP)(High Court)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Copyrighted software – Non-resident – Royalty – Double taxation avoidance agreement – India-Mauritius [Art. 12]**

Both the assessee companies did not have permanent establishment in India. The payments received against sale of software could not be treated as income from royalty either under the Income-tax Act, 1961 or under the terms of the Double Taxation Avoidance Agreement because payments were made for sale of copyrighted articles. (A. Y. 2005-06)

*Velankani Mauritius Ltd. v. Dy. CIT (2011) 7 ITR 171 / (2010) 42 DTR 193 / 132 TTJ 124 (Bang.)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – "Equipment-Use" Royalty If payer has no control over equipment – DTAA – India-UK [Art. 12(3)(b)]**

The activity of transmitting raw data to user, processing of the data by such user by using software belonging to assessee and transmission of such data to assessee does not involve "use of any process" so as to constitute royalty under Article 12(3)(a).

In order to constitute 'use of equipment', the customer should actually have domain or control over the equipments it should be at its disposal. (A. Y. 2004-05)

*Standard Chartered Bank v. Dy. DIT (2011) 11 ITR 721 / 61 DTR 370 / 45 SOT 494 (Mum.)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Income from license of software not assessable as "royalty". Gracemac not followed; Motorola still good law – DTAA – India-Israeli**

The assessee, an Israeli company, entered into an agreement with Reliance Infocomm for supply and license of software for RIL's wireless network in India. The assessee received

₹ 3 crores which it claimed to be "business profits" and not taxable for want of a permanent establishment (PE) in India. The Assessing Officer took the view that the said sum was assessable as "royalty". This was reversed by the CIT(A) following *Motorola Inc. (2005) 96 TTJ 1 (Delhi)(SB)*. In appeal before the Tribunal, the department argued that in view of *Gracemac Corp. (2010) 42 SOT 550 (Delhi)*, the use of software was assessable as "royalty". The Tribunal dismissing the appeal held that, (i) Under Article 12(3) of the India-Israel DTAA, royalty is defined inter alia to mean payments for the "use of" a "copyright" or a "process". There is a distinction between "use of copyright" and "use of a copyrighted article". In order to constitute "use of a copyright", the transferee must enjoy four rights viz: (i) the right to make copies of the software for distribution to the public, (ii) The right to prepare derivative computer programmes based upon the copyrighted programme, (iii) the right to make a public performance of the computer programme and (iv) The right to publicly display the computer programme. If these rights are not enjoyed, there is no "use of a copyright". The consideration is also not for "use of a process" because what the customer is paying for is not for the "process" but for the "results" achieved by use of the software. It will be a hyper technical approach totally divorced from ground business realities to hold that the use of software is use of a "process". (*Motorola Inc. (2005) 96 TTJ 1 (Delhi)(SB)* and *Asia Sat (2011) 332 ITR 340 (Delhi)* followed. *Gracemac Corp. (2010) 42 SOT 550 (Delhi)* not followed);

(ii) It is well settled that a DTAA prevails over the Act where it is more favourable to the assessee. The view taken in *Gracemac*, relying on *Gramophone Co. AIR 1984 SC 667*, that the Act overrides the treaty provisions where there is irreconcilable conflict is not acceptable because (a) it is obiter dicta, (b) contrary to *Azadi Bachao Andolan 263 ITR 706 (SC)* and (c) *Gramophone Co.* not applicable to Income-tax Act, 1961 as it dealt with law in which specific enabling clause for treaty override did not exist. (*Ram Jethmalani v. UOI (2011) 339 ITR 107 also considered*) (A. Y. 2006-07).

*ADIT v. TII team Telecom International Pvt. Ltd. (2011) 60 DTR 177 / 140 TTJ 649 / 12 ITR 688 (Mum.)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Payment for "live telecast" of event is not "royalty" nor arising from "business connection"**

The assessee entered into an agreement with Nimbus, a Singapore entity, for receiving and broadcasting matches that were to be played in Bangladesh. The signals to be broadcast were on account of live matches as well as recorded matches. The assessee applied for a certificate under section 195 in which it accepted that the payment on account of recorded matches was in the nature of "royalty" but claimed that the payment towards live matches was not "royalty". The Assessing Officer held that there was no distinction between the payment for live matches and that for recorded matches and both were assessable as "royalty". He also held that as the matches were to be broadcast in Indian Territory and the income by way of

advertisements and subscription was to be received by the assessee, there was a "business connection" between Nimbus and receipt in India. On appeal, the CIT(A) upheld the Assessing Officer's finding on "business connection" though he reversed the finding that the payment for live matches was "royalty". On further appeal by the department, the assessee filed application under Rule 27, challenging, the issue of "business connection". The Tribunal held deciding both issues in favour of the assessee that :

(i) Expl 2 to 9(1)(vi) defines "royalty" to mean consideration for "the transfer of all or any rights in respect of any copyright." Under the Copyright Act, the term "copyright" means the exclusive right to use the "work" in the nature of cinematography. The question of granting exclusive right to do any work can arise only when such "work" has come into existence. The existence of "work" is a precondition and must precede the granting of exclusive right for doing of such work. Unless the work itself is created, there is no question of a copyright of such work. The result is that there is no copyright in live events and depicting the same does not infringe any copyright. Accordingly, the amount paid for broadcast of live matches is not assessable as "royalty" (clause 314 (220) of the Direct Tax Code Bill, 2010 referred to which proposes to define "royalty" to include "live coverage of any event");

(ii) The department's argument that because the matches will be broadcast in India and the assessee will earn advertisement & subscription income, Nimbus has a "business connection" in India is not correct because Nimbus has merely given a license for the live broadcast of the matches and continues to retain the rights in such broadcast. The mere act of allowing the assessee broadcast the matches for consideration does not constitute a "business connection" in India. In order to constitute a "business connection", it is necessary that some sort of business activity must be done by the non-resident in the taxable territory of India (*CIT v. R. D. Aggarwal and Co. and Anr.* (1965) 56 ITR 20 (SC) referred) (A.Y. 2008-09). *ADIT v. Neo Sports Broadcast Pvt. Ltd.* (2011) 133 ITD 468 / (2012) 67 DTR 170 / 144 TTJ 412 (Mum.)(Trib.)

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Use of software – Royalty – DTAA – India-United Kingdom [Art. 7(13)(6)]**

Amount received under license agreement for allowing use of software, not royalty but business profits. Receipts on account of maintenance charges and training fees incidental to software receipts is of same character. (A.Y. 2003-04)

*Infrasoft Ltd. v. ADIT* (2010) 1 ITR 390 / 28 DTR 215 / 28 SOT 179 / 125 TTJ 53 (Delhi)(Trib.)

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Non-resident – Lead managers – Service – Made available – Fees for Technical Services – Royalty – DTAA – India-UK [Art. 7]**

Services rendered by non-resident lead managers to the assessee company for bringing out GDR issue, though in the nature of technical or managerial services, were not "made available" to the assessee and therefore cannot be taxed in India.

Underwriting commission was neither fees for technical services under section 9(1)(vi) nor chargeable to tax as "business profits" under Art. 7 of the DTAA in the absence of any PE of the non-resident in India, payment towards reimbursement of expenses not being in the nature of income was not taxable. (A.Y. 1999-2000)

*Dy. DIT v. Tata Iron & Steel Co. Ltd. (2010) 42 DTR 204 / 132 TTJ 566 / 6 ITR 463 / 34 SOT 83 (Mum.)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Rent for use of equipment – Royalty – Permanent Establishment – DTAA – India-Netherlands [Art. 5, 7, 12]**

Receipt of bare boat rentals i.e. rent for use of or payment for use of equipment cannot be brought to tax as royalty. As the assessee had no personnel located in India for purpose of execution of contract entered into by it with HAM, it could be said that it had no PE in India and lease in question was merely a dry lease of an equipment, hence, receipt in question cannot be taxed in India. (A.Ys. 1999-2000, 2000-01, 2002-03)

*Dy. CIT v. Nederlandsche Overzee Baggermaatsehappiji bv (2010) 39 SOT 556 (Bom.)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Income from supply of 'shrink-wrapped' software assessable as 'royalty' – A tax-treaty can be unilaterally overridden**

Payment made for grant of licence in respect of Copy right by end user is taxable as royalty as per section 9(1)(vi), domestic tax legislation to override treaty provisions in case of irreconcilable conflict. (A.Y. 2003-04)

*Microsoft Corporation v. ADIT / Cracemac Corporation v. ADIT (2010) 47 DTR 65 / 134 TTJ 257 / 42 SOT 550 / (2011) 8 ITR 522 (Delhi)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Services rendered through satellites for telecommunication – Broad casting – Process – Meaning of 'royalty – Explanation 2.'**

- (i) The services rendered through satellites for telecommunication or broadcasting amounts to "process".
- (ii) To fall within the meaning of 'royalty' as envisaged in Explanation 2 to section 9(1)(vi), it is not necessary that the services rendered must be through "secret process" only. Even services rendered through simple process will also be covered within the meaning of 'royalty'.
- (iii) Payment received by assessee from their customer is on account of use of process involved in the transponder and it amounts to royalty within the meaning of section 9(1)(vi). It also amounts to royalty within the meaning of respective articles of the DTAA. (A.Ys. 2000-01 to 2004-05)



**S. 9(1)(vi) : Income deemed to accrue or arise in India – Business connection – Programmes of T.V. Channels – Transponder on its satellite – Royalty – Rental charges for transponder capacity**

The assessee was amplifying and relaying the signals in the footprint area after having been up linked by the TV channels. The essence of the agreement of the TV channels with the assessee was to relay their programmes in India. If India is not in the footprint then the entire exercises become futile. The responsibility of the assessee was to make available programmes of the TV channels in India through transponder on its satellite. On the facts, it was not the mere user of any goods or information/technology in India, which was supplied by the assessee. The duty of the assessee was to amplify the programmes and then pass over the same in India. However, it was held that the assessee would acquire the right to receive the income only when these programmes are made available in India. The crux of the contacts with the TV channels was to ensure that the assessee provide the signals in India after carrying out certain processes in the space. Similarly, all the TV channels approached the assessee only because it had its footprint in India. Had India been not in its footprint, no customer interested in showing their programmes in India would have availed the services of the assessee. If the assessee had only amplified the programmes and passed over to its customer outside India, who in turn had made arrangement for sending the same to cable operators for use in India, it would have been the case of no business connection of assessee in India. Since the signals are provided by the assessee for direct use in India, it was held that the case of assessee was having business connection in India. In the present case it was not merely the user of any goods sold by the TV channels in India but a continuous process through which the TV channels were showing their programmes in India by the medium of the assessee. However, it was held that the assessee has business connection in India. As per the Explanation (a) to sub-clause (i) of Sec. 9(1) which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. However, the effect of this Explanation is that unless the operations are carried out in India, no part of income arising from business connection can be said to be covered in clause (i). In other words, if all the business operations are carried out in India then the income arising from business connection in India would be taxed in entirety under the said clause. And if no operations are carried out in India then no income from business connection in India can be taxed in India.

However, on the facts of the case, it was held provisions of s. 9(1)(i) were not attracted as no part of operations of assessee's business was carried out in India although the assessee, a foreign satellite company, had business connection in India as it was making available programmes of TV channels directly in India through



transponder on its satellite by amplifying and relaying the signals after up linking by TV channels.

As the assessee was making available transponder capacity to TV channels and receiving signals from its customers, i.e., TV channels, by way of up linked beam, changing its frequency, amplifying the same and relaying it from the transponder of the satellite to cable operators in India and signals sent by the customers come into contact with the process in transponder it was held that the TV channels were clearly 'using' the transponder capacity for carrying on their business in India. The word 'secret', occurring before the word 'formula' in clause (iii) of Explanation 2 to s. 9(1)(vi), cannot be prefixed to 'process' as well-What the TV channels were using was the process made available by the assessee through its transponder which is a part of satellite, cannot be termed as an equipment and hence leasing out of transponders cannot be equated with the leasing out of any equipment and therefore, the contention that the rental income could be charged to tax only after clause (iva) of the Explanation came into effect was held to be not acceptable. Merely because the lease rentals were fixed on annual basis it cannot be said that the payment is for any consideration other than rendering of said services. However, the activity which is resulting into income in the hands of TV channels who are non-residents is the ultimate viewer ship of programmes transmitted by them in the footprint areas including India.

Thus, these TV channels were not only carrying on their business in India but were also earning income from the source in India. Accordingly, on the facts of the case it was held that the lease rent paid by the TV channels to the assessee was 'royalty' within the meaning of s. 9(1)(vi) read with the Explanation 2. (A.Y. 1997-98)

*Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT (2003) 85 ITD 478 / 78 TTJ 489 (Delhi)(Trib.)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Non-resident – Royalty – Assignment of software developed by Indian Company – Compensation – Capital or revenue receipt [S. 4, 195]**

Compensation paid by the Satyam to the applicant, a non-resident company as per terms of settlement agreement for severing their business relationship, deficiency in the patents assigned to the applicant by Satyam and for grant of perpetual world wide royalty fee license by the applicant on all its patents is capital receipt but not capital gain, except the portion of the amount ascribable to the consideration for licensing of the right to use the patented software. Assessing Officer is directed to determine the portion of the compensation amount that may be attributable to royalty and thereafter to consider the question whether it is taxable in terms of section 9(1)(vi).

*Unpaid Systems Ltd. (2011) 338 ITR 517 / 244 CTR 465 / 62 DTR 153 / 203 Taxman 28 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Software**

Consideration received by the applicant, a Sri Lankan Company, from ICEL for giving it the right to use its copyrighted software and use it for latter's own purposes whenever and wherever needed by it is taxable in India as royalty under cl. (v) of Explan. 2 of section 9(1)(vi) as well as under Art.12.2 of the Indo-Sri Lanka DTAA and consequently, provision of withholding tax under section 195 is applicable.

*Millennium IT Software Ltd., In Re (2011) 62 DTR 1 / 338 ITR 391 / 202 Taxman 510 / 244 CTR 233 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Fees for technical services – Royalty – Avoidance of tax – Transfer pricing – Provision of support services to maintain group standard – Makes available technical knowledge, skills, etc. – DTAA – India-Netherland [Article. 12.5]**

The applicant, a company based in Netherlands is in the business of manufacture and sale of sugar confectionary and gum and also provides operational and other support services for the benefit of Perfetti Van Melle Group companies. It is providing these support services to Perfetti Van Melle India Pvt. Ltd. (Perfetti India) and invoicing on cost to cost basis. The employees and other personnel of applicant does not visit India for providing these services. The question arises as to whether the payment made by Perfetti India for the services will not be chargeable to tax in India as per the provisions of DTAA?

If the answer to (a) above is negative, whether the cost to be allocated to Perfetti India will not be in nature of income and not chargeable to tax in India?

If the Applicant is not taxable in India for the costs to be allocated, whether Perfetti India will not be liable to withhold taxes under section 195?

Assuming that the Applicant has no other taxable income in India, whether the Applicant will be absolved from filing a tax return and whether the transfer pricing provisions of section 92 to section 92F will be applicable to the Applicant?

Applicant submits that the functions in respect of which costs will be allocated are managerial and not technical or consultancy in nature and Perfetti India will not get equipped with the knowledge or expertise for application in future. Being managerial services, these are outside the purview of Article 12 and in the absence of a specific clause of service PE in the DTAC, the question of service PE for the services to be rendered by the Applicant does not arise

The Revenue argued that these services will enable Perfetti India to manage its services efficiently based on the reports, codes and procedures without further help from the Applicant. The services are in the nature of managerial and consultancy services since there is no technical services, the phrase "make available" would have no application.

Authority placed reliance on the decisions in case of Intertek Testing Services (2008) (307 ITR 418) and G.V.K. Industries (228 ITR 564) and held that the services are of technical in nature. The fruits of the services remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills, etc. The decision in case of Raymond Ltd. (86 ITD 791) is relied upon.

Trademark Technology and Know-how License Agreement (TTLA) gives right to manufacture and the service agreement brings the efficiency in such manufacture. The two agreements are inextricably attached to each other or atleast complimentary to each other. The meaning of make available cannot be drawn from the DTAA between India and US. Thus it was held by the Authority that services under the Service Agreement when read with TTLA, fall within the purview of Article 12.5(a) of the DTAC as such services "are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received".

The payment will be taxable in India under Article 12.5(a) and 12.5(b). Thus appropriate taxes are required to be deducted and the tax return is to be filed in India. Also the provisions of transfer pricing would be applicable.

*Perfetti Van Melle Holding B.V. (2012) 65 DTR 12 / 246 CTR 8 / 204 Taxman 166 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Geophysical services to Oil companies – Permanent establishment – Exploration of mineral oils – Royalty – Cyprus – India-Malta – DTAA [S. 44BB, Art 12]**

Applicant, a UAE company provides geophysical services to oil companies in India for which purpose it enters into Bareboat Charters ('BBC') with various international vessel providing companies ('VPC') - held hire charges paid by applicant under BBC to VPCs not taxable as no PE in India nor any source of income from India as agreement was executed outside India and the delivery of the vessel also took place outside India; but held taxable under section 44B in case of vessels delivered or deemed to have been delivered in India.

*Seabird Exploration FZ, UAE (2010) 192 Taxman 471 / 326 ITR 558 / 233 CTR 425 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Off the shelf – Non-customised computer software – Royalty – India-Netherlands DTAA [Article 12]**

The applicant company, incorporated in Netherlands, supplies special purpose, off-the-shelf, non-customized computer software for exploration of mineral oils - Under the Software License Terms, the applicant or its licensor shall at all times retain title to all intellectual property rights including the modifications and updates and on termination of license, the customer shall discontinue all uses of the software and return the software and proprietary information to the applicant including all copies – AAR observed that passing on a right to use and facilitating the use of a product for which the owner has a copyright is nothing but a use of copyrighted material and does not amount to royalty; further, contract cannot be categorized as fees for technical services as the applicant has not undertaken any technical services and has not made available to ONGC its technical knowledge and expertise – Hence held that amount payable to the applicant does not amount to 'royalty' as per Tax Treaty

between India and The Netherlands, nor can it be treated as 'fees for technical services'.

*GeoQuest Systems B. V., Netherlands (2010) 327 ITR 1 / 234 CTR 73 / 193 Taxman 81 / 43 DTR 129 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Dependent agents – Permanent establishment – Sale of soft ware – Non-Resident – India-Japan – DTAA [Articles 7, 12]**

Sale of Software - Payment received by the applicant from VARs on account of supplies of software products to the end customers is not in the nature of royalty to the applicant. As the VAR cannot be said to be the agents or dependent agents hence the applicant cannot be deemed to have a PE in India therefore the payment received by the applicant from VARs cannot be taxed as business profits in India under Indo-Japan DTAA.

*Dassault Systems K. K. (2010) 322 ITR 125 / 229 CTR 105 / 188 Taxman 223 / 34 DTR 218 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Data base – Outside India – Royalty – Technical services – India-USA – DTAA [Art. 12]**

US based company maintains a 'database' outside India of financial and economic information of companies world-wide and grants limited, non-exclusive, non-transferable rights to its customers to use it for which it receives subscription fees outside India - AAR observed that although the database is intellectual property of the applicant and copyright attaches to it, the applicant grants only the non exclusive access right to the customer and several restrictions are placed on the licensee so that he cannot distribute the data downloaded by it to others and hence does not constitute royalty or fees for technical services – Also as there is no PE in India, it cannot be taxed as business income in view of Article 7.

Subscription fees are received by the non-resident applicant for allowing use of data base concerning financial and economic information of companies without conferring any proprietary rights or any exclusive rights - Held this will not amount to Royalty and payment cannot therefore be brought either under IT Act or Treaty - No tax liability arises in India.

*Factset Research Systems Inc. (2009) 182 Taxman 268 / 225 CTR 49 / 317 ITR 169 / 25 DTR 146 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Engineering services – Royalty – Territorial nexus – India-Australia – DTAA [Articles 5, 7 & 12]**

Australian applicant's activities concerning basic engineering services were primarily carried out in Perth, Australia which accounts for 80% of the scope of work detailed in the agreement whereas the procurement functions were 'essentially' performed in India - AAR ruled that considering the observations made by the Supreme Court in the case of Ishikawajima, even though major part (80%) or most of the services

relating to Basic Engineering & Procurement (BE&P) Agreement were carried out in Perth, it afforded sufficient territorial nexus to tax the receipts in India as royalty income on gross basis at the rate of 15 per cent; further ruled that the receipts from the Project Management Services agreement, shall be treated as business income and be taxable only to the extent they are attributable to the operations of PE in India.

*Worley Parsons Services Pty Ltd. (2009) 21 DTR 12 / 179 Taxman 347 / 312 ITR 273 / 223 CTR 46 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Data processing – Technical support – Royalty – Fees for Technical Services – India-USA – DTAA [Article 12]**

Non-resident enters into agreement with resident call centre, data processing, technology support company for providing two-way transmission of voice and data over telecom bandwidth - Authority observed that main issue is whether any consideration is payable for the use or right to use scientific/commercial equipment; if the customer does not exercise any possessory rights in relation thereto, it only makes use of the facility created by the service provider who is the owner of entire network and related equipment; further, element of service predominates and also, similar bandwidth services through private circuits are being provided by many other telecom operators. Hence, the royalty definition under the Treaty relating to secret process is not attracted here. Further, the requirement in article 12(4) of the Treaty that technical knowledge, experience, skill, etc. should be made available has not been satisfied as there is no transfer of any technology in the sense that the recipient of the service is enabled to apply technology by itself; hence the payment does not constitute a fee for included service or fees for technical services - Ruled that payment are neither Royalty nor Fees for Technical Services or Fees for included Services and not chargeable to tax in India.

*Dell International Services India Pvt. Ltd., (2008) 172 Taxman 418 / 218 CTR 209 / 305 ITR 37 / 10 DTR 249 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Feasibility study – Royalty or fees for technical services – Payment to non-resident from grant received by resident from USA Govt. agency – India-USA – DTAA [Articles 7 & 12]**

Resident applicant 'AAI' gets a grant from USA Govt. agency for feasibility study to be conducted by a 'Contractor' also an US entity - Payment for such study to be made directly by US agency to the US entity - AAR observed that role of AAI is limited only to granting approval to the contractor's performance of the study; US Contractor has no legal remedy to recover money from AAI if payment is not made by USA Govt. agency; therefore, in substance the amount is not payable by AAI at all. AAI cannot even be termed as a conduit agency for passing the money, because the amount has never been transferred to India to the full and exclusive control of AAI. The amount of grant all along remains within the control of the Government of USA - Hence held that



no income can be deemed to accrue or arise in India; further, as the source of payment to Contractor is the grant made by the Govt. of USA, the royalties/fees for included services shall be deemed to arise in USA and subject to tax only in that state under the provisions of DTAA between India and USA and therefore not taxable in India either under the Income-tax Act or under the DTAA.

*Airport Authority of India; In re (2004) 269 ITR 355 / 140 Taxman 147 / 191 CTR 1 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Consultancy fees – Fees for technical services – Royalty – International taxation – Deduction of tax at source [S. 195]**

Where assessee is a pharmaceutical company entered into an agreement with US Company with a view to expanding its business in India and paid consultancy fees to it, reimbursed fee paid by US company to advocate and also paid commission in addition to consultancy fee to US company, as US company is rendering consultancy services in India all such income accrues to US company in India and assessee is liable to deduct tax at source there from u/s 195.

*Wallace Pharmaceuticals (P.) Ltd. In re (2005) 278 ITR 97 / 148 Taxman 347 / 198 CTR 63 (AAR)*

**S. 9(1)(vi) : Income deemed to accrue or arise in India – Prospecting and extraction of mineral metals ore – Fees for technical services – royalty – International taxation – Deduction of tax at source – DTAA – India-Canada [Art. 12]**

Where the applicant is a resident company engaged in prospecting and extraction of minerals, metals, ores, etc., as well as exporting minerals, entered into an agreement with a non- resident consultant of Canada for getting samples of ores analysed and tested at technical services was payable outside India in Dollars, fees payable by applicant to consultant satisfied all requirements of definition of 'fees for technical services' within the meaning of Explanation 2 to Sec. 9(1)(vii) (b) and tax was deductible there from at source; rate of tax applicable for purpose of TDS would be lesser of rates prescribed under Finance Act, 2005 or in para 2 of Article 12 of the DTAA between India and Canada, that is whichever is more beneficial to applicant.

*South West Mining Ltd., In re (2005) 278 ITR 233 / 148 Taxman 366 / 198 CTR 195 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Technology advanced in countries – Income Tax Department – Technical Experts – Deduction at source – International Taxation**

In cases requiring examination by technical experts, the department ought not to proceed only by the contracts placed before the officers. The department ought to examine technical experts so that the matters could be disposed off expeditiously. In the instant case, a cellular provider under an agreement paid interconnect / access / port charges to BSNL / MTNL, the question whether the cellular provider has rendered



technical services and has to deduct tax at source, depended on whether the charges were for technical services and this involved determination of whether any human intervention was involved, which could not be determined without technical assistance. The decision of Delhi High Court in *CIT v Bharati Cellular Ltd. (2009) 319 ITR 139*, set aside and matter remanded to the Assessing Officer with directions.

*CIT v. Bharati Cellular Ltd. 2011) 330 ITR 239 / 234 CTR 146 / 193 Taxman 97 / 44 DTR 190 (SC) / CIT v. Hutchison Essar Telecom Ltd. (2011) 330 ITR 239 / 234 CTR 146 / 193 Taxman 97 / 44 DTR 190 (SC)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Validity challenged – Parliament’s power to make laws with extra – Territorial effect**

The constitutional validity of section 9(1)(vii)(b) was challenged by way an appeal to the Supreme Court so as to determine the extent to which laws enacted by Parliament can have extra-territorial effect under Article 245. The Constitution Bench held that Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians. In all other respects, Parliament may enact legislation with extra-territorial effect. All that is required is that the connection to India be real or expected to be real, and not illusory or fanciful. Parliament can only make laws for India and any law which has no impact on or nexus with India would be ultra-vires.

*GVK Industries Ltd. v. ITO (2011) 332 ITR 130 / 239 CTR 113 / 197 Taxman 337 / 52 DTR 1 / 162 Comp. Case 574 (SC) (5 Member Bench)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Business Connection – Fees for technical services – Permanent Establishment – DTAA – India-Japan – Offshore supply’s and offshore services – Technical Services – International Taxation [Art. 5]**

Amount receivable by assessee company a resident of Japan, in respect of off shore supply of equipments and materials as part of a composite contract executed in India was not taxable in India as all parts of the transaction were carried outside India and the assessee’s permanent establishment in India had no role to play in the transaction, if income arises without any activity of the PE, taxation liability would not arise in India even under DTAA. In the present case, the entire transaction of transfer of title in goods was completed on high sea. Since all the activities in connection with the offshore supply were outside India, therefore, under section 9, income could not be deemed to accrue or arise in India. And the fact that the contract was signed in India was of no material consequence. Once excluded from the scope of taxation under the Income-tax Act, application of Double Taxation Avoidance Treaty would not arise. Further the concept of ‘a business connection’ as provided under the Income-

tax Act and 'a permanent establishment' as provided under the Double Taxation Avoidance Treaty are distinct.

In relation to offshore services, under section 9(1)(vii)(c) for a technical services to be taxable in India, two conditions are required to be satisfied – services must be rendered in India and the services must be utilized in India. In the present case since both the conditions are not fulfilled, they will not be taxed in India under the Income-tax Act itself. The Supreme Court further held that, income must have a sufficient territorial nexus with India so as to furnish a basis for imposition of tax in India.

*Ishikawajima-Harima Heavy Industries Ltd. v. DIT (2006) 288 ITR 408 / 207 CTR 361 / 198 Taxation 103 / (2007) 158 Taxman 259 (SC)*

*Editorial:- The effect of the decision is sought to be nullified by an amendment in section 9(1)(v) to (vii) w.r.e.f. 1-4-1976 by the Finance Act, 2010.*

### **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services**

Income received by a US company, by way of fees for technical services could not be deemed to have accrued or arisen in India as the services under the agreement were not rendered within India even though services received from it may have been utilized by the Indian company in India. (A. Y. 1991-92).

*Grasim Industries Ltd. & Ors. v. CIT (2011) 58 DTR 47 / 242 CTR 166 / 199 Taxman 184 / 332 ITR 276 (Bom.)(High Court)*

### **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA – India-Australia – Permanent Establishment – Foreign companies – Royalties – Even if not assessable as “fees for technical services” under DTAA, bar in section 44D against deduction of expenses will apply [S. 44D, 115A, Article 7(3)]**

The assessee, an Australian company, set up a permanent establishment (PE) in India to render technical services for evaluation of coal deposits and conducting feasibility studies for transportation of iron ore. The Assessing Officer & CIT(A) held that the payments received by the assessee were taxable as “fee for technical services” under section 9(1)(vii) read with section 115A on a gross basis without any deduction in view of section 44D at the rate of 20%. On appeal, the Tribunal held that as the assessee had a PE in India, the receipts were chargeable to tax as “business profits” after deduction of expenses under Article 7 of the DTAA and section 44D & 115A did not apply. On appeal by the department, held partly reversing the Tribunal:

- (i) As the assessee had a PE in India from which the income arose, the income was chargeable to tax as “business profits” under Article 7 of the DTAA and not as “fees for technical services” under Article 12;
- (ii) Article 7(3) permits a deduction of expenditure “in accordance with and subject to limitations of the law” relating to tax in India including executive and general administrative expenses so incurred regardless whether they have incurred in India or elsewhere. The words “in accordance with and subject to limitation of the

law relating to tax" applies not only to the "executive and general administrative expenses" but to all expenditure;

- (iii) The income received by the assessee, though not assessable as "fees for technical services" under the DTAA, is "fees for technical services" under Explanation 2 to section 9(1)(vii) because it is for providing technical information and does not arise from a "project". Consequently, section 44D, which provides that no deduction shall be admissible while computing income of the nature of "fees for technical services" shall apply.

*DIT v. Rio Tinto Technical Services (2012) 340 ITR 507 / 66 DTR 401 (Delhi)(High Court)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Internet bandwidth – Fees for technical services – Technical services – Deduction at source**

Assessee using internet bandwidth of one US party T for providing access to its subscribers and the payment was made to T – As there is no privity of contract between the customers of assessee and T, the court held that no technical services were provided by T to the assessee within the meaning of sec. 9(1)(vii) and the assessee need not deduct TDS from payments made to T.

*CIT v. Esstel Comunicación (P) Ltd. (2008) 217 CTR 102 / 318 ITR 185 / 7 DTR 157 (Delhi)(High Court)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Royalty – Computer Software – Copyrighted Article – Deduction at source – International Taxation – DTAA – India-USA – Art. 7 and 12 [S. 195]**

Where the payment is made in respect of the software which is granted on terms of non-exclusive, perpetual, irrevocable, royalty free worldwide license to use the number of copies of the software enumerated in the agreement solely for internal operation, and not directly accessible to third party could not be considered as a "Royalty" under the Act. As the payment was "business income" of the party receiving the payment, as that non-resident party did not have a Permanent Establishment in India and thus as per D.T.A.A. the same cannot be taxed in India. The assessee is not liable to deduct tax at source.

*Dy. DIT v. Reliance Industries Ltd. (2011) 43 SOT 506 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – International Taxation – DTAA – India-Denmark**

Amount received by assessee, a Danish shipping company, from its agents in India towards their share of cost of global telecommunication facility provided to the agents to enable them to have access to variety of information regarding tracking of cargo, transportation schedule, etc., to facilitate international shipping business being only reimbursement of cost and not involving any profit element, cannot be considered as fees for technical services. (A.Ys. 2001-02 and 2002-03)

*Dampskibsselskabet AF 1912 A/S Akties Iskabet v. Addl. DIT (2011) 51 DTR 148 / 142 TTJ 70 / 130 ITD 59 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Permanent establishment – Deduction at source – DTAA – India-Italy [S. 90, 195, Arts. 5, 7, 13]**

Consideration paid to foreign company was only for supervising the erection of machines which can not be said to be a payment for assembly of machines to fall within the exclusion clause of Explanation 2 to section 9(1)(vii). However, as persons who rendered services were not present in India for the required number of days as envisaged by Art. 5(j) of the DTAA read with Art. 13(5), income was not chargeable to tax in India and there was no obligation to deduct tax at source on such payment. (A. Y. 2006-07).

*Aditya Birla Nuvo Ltd. v. ADIT (2011) 56 DTR 100 / 11 ITR 812 / 44 SOT 601 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Developing tooling – Validating new process for manufacture – Deduction at source – DTAA – India-USA [S. 195, 201, Art 12 (4)]**

Assessee is engaged in the manufacture of steel wheels for commercial vehicles, passenger cars, utility vehicles, earth moving construction equipment, agricultural tractors and defence vehicles. Assessee developed the new process of manufacturing steel wheels for trucks etc., however, it did not have requisite know how for designing the machine capable of manufacturing the product as patented process. Assessee approached the two US Companies which had the required knowledge. Assessee made advance payment in respect of the entire services, which were rendered outside India and hence claimed that no income was chargeable to tax in India. The Tribunal held that in terms of Article 12(4) of India US tax treaty, payment made to US company for 'developing tooling' and 'validating new process for manufacture' of wheels for commercial vehicles is 'fees for included services' and hence liable to tax in India. (A.Y. 2005-2006).

*Wheels India Ltd. v. ITO, ITA No. 1792/Mds./2006, dt.19-04-2011, Chennai ITAT, BC&J P. 29, Vol. 43-A, Part 3, June 2011 (Chennai)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Deduction at source – Payment to non-resident – Training its personnel – Fees for technical service – Income deemed to accrue or arise in India [S. 40(a)(i), 195]**

Assessee company during relevant assessment year made payment to non resident party for training its personnel or customers to explain proposed buyers salient features of products imported by assessee in India and to impart training to customers to use equipment. The payment made could not be said to be fees for technical services and not liable for deduction of tax at source. (A.Y. 2007-08).

*ACIT v. PCI Ltd. (2011) 46 SOT 183 (Delhi)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA – India-USA [Art. 12]**

Assessee running business of Hotel made payments to US based interior Landscaping consultants M. Work done by M was basically inspection of hotel, reviewing of the facilities, comparing the same with M's standards and suggesting improvements / change wherever required to M standard, which did not amount to technical services and therefore, no tax was deductible at source. Similarly, fees paid to UK company A was also for work of design, documentation and did not fall under Art. 13 of Indo-UK DTAA, likewise, fees paid to Thailand company BD for rendering services of landscape architectural consultancy was not assessable in India. (A.Ys. 2003-04 to 2005-06).

*ACIT v. Viceroy Hotels Ltd. (2011) 60 DTR 1 / (2012) 143 TTJ 627 (Hyd.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Royalties – Fees for technical services – DTAA – India-United Kingdom [Article 13(4)(c)]**

The reinsurance broking service rendered by the assessee did not involve technical expertise, nor assessee made available any technical know how expertise, skill, etc., and was merely acting as an intermediary in process of finalization of reinsurance suggesting various options to Indian Insurance company for their consideration and acceptance. It could not be said that payment received by assessee from insurance company in India was fee for technical services, therefore, it could not be brought to tax in India. (A. Y. 2006-07).

*Guy Carpenter & Co. Ltd. v. Addl. DIT (2011) 48 SOT 463 (Delhi)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Permanent establishment – Fees for technical services – Double taxation relief – DTAA – India-Singapore [S. 90, Art. 5]**

Assessee had no fixed place or service permanent establishment in India within the meaning of Art. 5 of DTAA between India and Singapore and assessee's receipts from PB production and generation of live television signals were in the nature of "fees for technical services" and not by way of "business income" since assessee had no PE in India, receipts were taxable @ 10 percent as per Art. 12(2). Advertisement revenue received by the assessee in Singapore for matches played abroad was not taxable in India. (A.Ys. 2002-03, 2003-04 & 2004-05).

*Nimbus Sport International Pte. Ltd. v. Dy. CIT (2011) 63 DTR 374 / 12 ITR 709 / (2012) 145 TTJ 186 / 136 ITD 69 (Delhi)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services**

In the absence of revenue having brought anything on record to show that assessee was doing construction work, consideration received by assessee was not from doing construction work and consequently, did not fall within the exclusion of Explanation 2 to section 9(1)(vii). Therefore, the income of assessee was liable to tax in terms of section 115A @ 10%.



*Joint Stock Company Zangas v. ADIT (2011) 47 SOT 175 (URO) / 12 ITR 57 (Ahd.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Professional services rendered by Foreign firm**

In view of Explanation to section 9(1), as amended retrospectively by Finance Act, 2010, the fees for professional services earned by the assessee a UK based partnership firm, in connection with projects in India is taxable in India under the domestic law. (A.Y. 1995-96)

*Linklaters LLP v. ITO (2010) 132 TTJ 20 / 42 DTR 233 / 40 SOT 51 / 9 ITR 217 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical Services – DTAA – India-Singapore [Art. 5(2)(b), 12(6)]**

A Singapore resident company had PE in India, which provided information available in public domain to subscribers. The Assessing Officer held that the income was fees for technical services (FTS) under the Income Tax Act and taxable on gross basis and not on net basis as claimed by the Tax payer under DTAA. The Tribunal held that the assessee can choose between DTAA and the Income Tax Act and tax authorities cannot thrust provisions of the Income Tax Act unless they are more beneficial.

*Jt. CIT v. Telerate (2010) TII 72–Mum-Intl. (2010) (October) BCAJ P. 25 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services**

Fees for technical services, is taxable in India, even if services rendered outside India. (A.Y. 2008-09)

*Ashapura Minichem Ltd. v. ADIT (2010) 40 DTR 42 / 40 SOT 220 / 131 TTJ 291 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Technical services – Managerial or consultancy services for being lead managers to the GDR issue [S. 201(1A)]**

Services rendered by lead manager and other managers, being foreign companies, in connection with the GDR issue of the assessee-company are “managerial” or “consultancy” services and fall within the definition of “technical services” under section 9(1)(vii) read with Explanation 2 thereto but the said payments do not fall within the definition of “fees for technical services” under Article 13.4(c) of the DTAA with UK which is applicable to the facts of the case and therefore, such payments not taxable in India.

Consequently, assessee-company was not liable to deduct tax from the payments and cannot be treated as an assessee in default under section 201 and, therefore, interest under section 201(1A) could not be charged. (A.Y. 1998-99)

*Raymond Limited v. Dy. CIT (2003) 86 ITD 791 / 80 TTJ 120 (Mum.)(Trib.)*



**S. 9(1)(vii) : Income deemed to accrue or arise in India – Underwriting fees – Royalty – Fees for technical services – Deduction of tax at source [S. 195(1)]**

Underwriting fees paid to company incorporated in UK was held to be chargeable to tax in India as fees for technical services, and being liable for TDS, as services were utilised for the purposes of assessee's business carried on in India, though rendered outside India.

*Raymond Ltd. v. Dy. CIT (2003) 86 ITD 791 / 80 TTJ 120 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Reimbursement of Expenses – Fees for technical services**

Reimbursement of Expenses cannot be considered as taxable in India even under section 9(1)(vii).

*Raymond Ltd. v. Dy. CIT (2003) 86 ITD 791 / 80 TTJ 120 (Mum.)(Trib.)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Deduction at source – DTAA – India-UK [S. 90, 195]**

Services rendered by the UK company to the applicant Indian Company pursuant to the data processing services agreement being in the nature of routine data entry, application sorting, document handing and data capturing services, cannot be said to be managerial or technical services within the meaning of Art. 13 of the Indo-UK DTAA or Explanation 2 to section 9(1)(vii) and therefore, consideration received for such services is not taxable in India and accordingly, there is no question of withholding tax under section 195.

*R. R. Donnelley India Outsource P. Ltd. (2011) 335 ITR 122 / 241 CTR 305 / 199 Taxman 255 / 56 DTR 1 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Installation project – Fees for technical services – Permanent establishment – DTAA – India-Singapore [Art. 5.3]**

Four installation projects undertaken by the applicant, a Singaporean company, in India required setting up, fitting, placing and positioning projects covered under Art. 5.3 of the Indo-Singapore DTAA, and all these projects being independent projects with no interconnection and interdependence amongst them, it could not be said that the applicant had a Permanent establishment in terms of Art. 5.2 of the DTAA provided that the duration of each of the projects did not exceed 183 days in one financial year and therefore, income earned by the applicant from its activities of execution of the installation project was not liable to tax in India.

*Tiong Woon Project & Contracting Pte Ltd. (2011) 61 DTR 337 / 338 ITR 386 / 202 Taxman 491 / 244 CTR 121 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Consultant – Architectural designs and drawings – Fees for technical services – DTAA [Article 12]**

Applicant a German company having undertaken a contract as consultant for supply of architectural designs and drawings for constructing complex of Tamil Nadu legislative assembly whereby it is preparing complete working drawings and details for proper execution works during construction and offering technical advice to the sub-contractor by deploying its expertise and is required to be associated with conceptual design stage and ending with the “completion” the transaction cannot be described as a pure sale of drawings and designs and therefore the consideration received by the applicant can be legitimately treated as fees for technical services.

*GMP International GmbH In Re. (2010) 229 CTR 139 / 321 ITR 411 / 188 Taxman 143 / 34 DTR 258 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA – India-Australia [Art. 5 & 12]**

Applicant, a not-for-profit resident of Australia provides accreditation to Conformity Assessment Bodies ('CABs') in many countries including India - held that as there is no transfer of any skills or technical knowledge or experience, or process or know-how to the CABs on account of grant of accreditation, it cannot be taxed either as fees for technical services or royalty.

*Joint Accreditation System of Australia and New Zealand, In Re (2010) 194 Taxman 11 / 326 ITR 487 / 234 CTR 165 / 43 DTR 241 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Telecommunication service – Technical services – Permanent establishment – India-UK – DTAA [Art. 13]**

Non-resident telecom company to provide international leg of International Long Distance Telecom services – AAR observed that applicant is not providing any technical, managerial or consultancy services, nor it is providing services of its technical or other personnel; therefore it would not amount to. Also it does not make available any technical knowledge, skill or experience as per Treaty; also as it does not have PE in India it is not taxable in India.

*Cable & Wireless Networks India Pvt. Ltd. (2009) 224 CTR 463 / 315 ITR 72 / 182 Taxman 76 / 25 DTR 49 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Reimbursement of salary of technical personnel – DTAA – India-Korea**

Korean company deputed a Korean national to its Indian joint venture; Indian applicant reimburses only a part of such secondees salary and other benefits; AAR observed that such deputation by non-resident of staffer is in nature of provision of technical personnel and reimbursement of part of staffer's salary to non-resident company is not in nature of fees for technical & consultancy services - further ruled

that it is not subject to TDS as reimbursement of salary is not a revenue receipt / income.

*Cholamandalam MS General Insurance Co Ltd., (2009) 221 CTR 721 / 309 ITR 356 / 19 DTR 1 / 178 Taxman 100 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Business connection – Managerial and consultancy services – Fees for technical services**

Payment made to non-resident by Indian hotel owner for marketing & business promotion abroad of Marriott chain of hotels in India as re-imbursement of expenses – AAR observed that it is clearly evident from the agreement that it is a business contract and contention of the appellant that he is not earning any profit is not well founded; further, business connection exists as relation between activities carried on by non-resident outside India and activities in India are real and intimate; also there is continuity of relationship and not a mere isolated or stray nexus as agreement is for 25 yrs - hence ruled that services amount to managerial & consultancy services.

*International Hotel Licensing Co SARL (2007) 207 CTR 261 / 288 ITR 534 / 158 Taxman 231 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Deduction at source – Non-Resident – Fee for technical services – DTAA – India-Austria [Art. 12(4)]**

Applicant, a subsidiary of a non-resident Austrian company enters into a Secondment Agreement with it where under non-resident assigns qualified employees to Indian applicant who are to work for the applicant and will receive compensation substantially similar to what they would have received as employees of Austrian company or its other subsidiaries; payments are to be made by applicant to non-resident as reimbursement of expenses – AAR observed from an analysis of Foreign Collaboration Agreement (PCA) and the Secondment Agreement that it is clear that pursuant to the obligation under the FCA, the non-resident has actually offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the Secondment agreement; though the term "reimbursement" is used in the agreements, the nature of payments under the Secondment agreement have to satisfy the characteristic of reimbursement and no evidence has been shown to that effect - Hence ruled that payments made by the applicant to AT&S Austria are in the nature of fees for technical services within the meaning of said Section of IT Act and the DTAA and therefore they would be subject to withholding of tax at source of the Act.

*AT&S India Pvt. Ltd. (2006) 157 Taxman 198 / 287 ITR 421 / 206 CTR 315 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Composite Contract – Design – Supply – Testing – Passenger rolling stock for Delhi Metro – Deduction at source**

Resident applicant pays to non-resident consultant monthly consultancy fees, commission for orders sourced and reimburses payments made by such consultant to other professionals for services rendered to applicant - AAR observed that the benefit of consultancy services provided by non-resident, whether by way of promoting sales or otherwise, is utilized in India by the applicant; as the consultancy fee payable is in respect of services utilized is not in connection with a business or profession carried on by the applicant outside India for the purposes of making or earning any income from any source outside India, it would be deemed income arising in India - Hence held payments are in nature of 'fees for technical services' and subject to TDS.

*Wallace Pharmaceuticals Pvt. Ltd. (2005) 278 IT R 97 / 148 Taxman 347 / 198 CTR 63 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Non-resident – Fees for technical services – Foreign company rendering services in USA to Indian Subsidiary – Royalty – Deduction at source – DTAA – India-USA [S. 44D, 115A, 195, Art 12(4)]**

Indian subsidiary entered into agreement with non-resident holding company pursuant to which the holding company agreed to render various services in favor of the applicant in USA and no part of the same was to be rendered in India. It was also agreed between the parties that the compensation payable by the applicant to Timken-USA for the services would cover only the cost actually incurred by the Timken-USA and that no profit element or mark-up on the cost would be added to it - AAR observed that agreement that Timken-USA has to render services including management services, system development and computer usage, communication services, engineering services, process in tool design services, manufacturing services etc. Any payment for providing these services is clearly "fees for technical services" as per explanation (2) to section 9(1)(vii) of the Act and "fee for included services" as per Article 12(4) DTAA of the, which would be the deemed income of Timken-USA accruing or arising in India within the meaning of sub-section(1) of Section-(9) of the Act. Further Authority reasoned that an element of profit is not an essential ingredient of receipt to be taxable as income and hence this is not a case of reimbursement of expenses and entire amount is liable to be taxed in India. Further, section 44D read with section 115A of the Act provides gross basis for taxation of such fees in the hands of non-resident corporate-assessee at the rate of 20% of such fees and there is no option in section 44D for computing income on net basis allowing the benefit of sections 28 to 44C as the principle laid down by the Hon'ble Supreme Court in the case of *Union of India v. A. Sanayasi Rao and others* in the context of presumptive basis of taxation of certain receipts, would apply. Accordingly, the applicant is obliged to withhold Income-Tax at appropriate rate (under the Act or the Treaty) whichever is lesser under section 195(1) of the Act.

*Timken India Ltd IN RE. (2005) 273 ITR 67 / 143 Taxman 257 / 193 CTR 610 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Deduction at source – DTAA –India-Canada [Art. 12(2)]**

Applicant, an owner of mines in India gets analysis of samples of ores conducted by non-resident in lab at Canada - Authority observed that it is evident that the fees is being paid to the consultant for the rendering of technical and consultancy services and not as consideration for any construction, assembly, mining or like project undertaken by it and that it would not also be the income of the consultant chargeable under the head 'salaries'. It follows that the fees payable by the applicant to the consultant satisfies all the requirements of the definition of fees for technical services within the meaning of Explanation 2 to said section and hence is considered rendered in India. Further, the rate of tax applicable for the purpose of TDS would be the lesser of the rates prescribed under Finance Act, 2005 or in para 2 of article 12 of the Treaty, that is whichever is more beneficial to the applicant.

*South West Mining Ltd., (2005) 278 ITR 233 / 198 CTR 195 / 148 Taxman 366 (AAR)*

**S. 9(1)(vii) : Income deemed to accrue or arise in India – Non-Resident – Turnkey project – Permanent establishment – Fees for technical services – DTAA – India-Japan [Articles 5, 7, 12]**

Resident grants contract of turnkey project to non-resident applicant who along with five other enterprises formed a consortium to execute the contract involving work categorized as: offshore supply, offshore services, onshore supply, onshore services and construction / erection – Issue is whether amounts received / receivable by applicant for offshore supply are liable to tax in India - AAR observed that it is not just a case of offshore supply as certain operations are inextricably linked in India – signing of contract in India which imposes liability on the applicant to procure equipment and machinery in India, receiving, unloading, storing and transporting, paying demurrage charges and other incidental charges on account of delay in clearance; thus, as some operations of the business were carried out in India, it follows that income accrued to the applicant through business connection in India but the profit deemed to accrue/arise in India shall be only such part of profit as is reasonably attributable to the operations carried out in India; further, it is clear that the applicant has PE in India within the meaning of article 5(3) of the Treaty as project is for more than 6 months - further ruled that from the description of the offshore services, it is evident that the price of offshore services would be deemed to accrue or arise in India as 'fees for technical services'.

*Ishikawajima-Harima Heavy Industries Co. Ltd., Japan (2004) 271 ITR 193 / 141 Taxman  
669 / 192 CTR 289 (AAR)*

**CHAPTER III**

**INCOME DO NOT FORM PART OF TOTAL INCOME**

**Section 10 : Incomes not included in total income – Exemption**

**S. 10(1) : Exempt incomes – Agricultural income – Hiring of tractors**

The State Government Corporation whose activities were related to agricultural farms. Income from hiring of tractors and combines by the corporation were held to be agricultural income as all the activities of the assessee were connected to agricultural activities and farming. (A.Y. 1987-88)

*CIT v. Haryana Land Reclamation Development Corporation Ltd. (2007) 200 Taxation 529*

*(P&H)(High Court)*

**S. 10(1) : Exempt incomes – Agriculture income – Plants – Nursery**

Sale proceeds of plants raised in nursery on land belonging to assessee is agricultural income exempted from tax.

*CIT v. Green Gold Tree Farmers (P) Ltd. (2007) TLR (Oct.) 609 (Uttaranchal)(High Court)*

**S. 10(1) : Exempt incomes – Agricultural income – Share income from AOP**

Assessee was a partner of a firm which was assessed as AOP and as such AOP had only agricultural income, in view of rule 5 of Part IV of First Schedule to Finance Act, 1999, share of assessee in agricultural income of AOP was to be regarded as his agricultural income; hence such, share of agricultural income was exempt under section 10(1). (A.Y. 1999-2000)

*Murlidhar Kanoi v. Dy. CIT (2005) 93 ITD 615 / 93 TTJ 917 (Kol.)(Trib.)*

**S. 10(2A) : Exempt incomes – Share of partner in partnership firm – Deduction – Business expenditure [S. 14A, 28(v), Rule 8D]**

Partnership firm is a separate assessable entity for the purpose of Income Tax Act. Income charged in the hands of partnership firm can not be treated as non exempt income in the hands of such firm and therefore, provisions of section 14A, are applicable in computing the total income of such partner in respect of his share in profits of the firm. Assessee partner having received salary from the partnership firm besides share of profit, disallowance under section 14A has to be worked out as per the provisions of Rule 8D same being retrospective. (A.Y. 2001-02)

*Dharamsingh M. Popat v. ACIT (2009) 31 DTR 295 / 127 TTJ 61 / 2 ITR 586 (Mum.)(Trib.)*

**S. 10(3) : Exempt incomes – Casual and non recurring receipts – Prize won [S. 2(24)(ix)]**

Prize won by assessee in a caption context held by a company can not be treated as casual and non recurring receipts.

*Wg Cdr K.P. Ghosh v. CIT (2004) 268 ITR 140 / 140 Taxman 437 / 191 CTR 32 (All.)(High Court)*



**S. 10(3) : Exempt incomes – Casual and non recurring receipts – Income – Non-compete Fee [28(va)]**

Amount received by assessee pursuant to a restrictive covenant as non compete fee is not taxable as revenue receipt. Provisions of section 28(va) introduced w.e.f. 1st April 2003, are prospective and not retrospective. Receipt by assessee under restrictive covenant is not taxable as a casual and non recurring receipt under section 10(3). (A.Y. 2000-01)

*TTK Health Care Ltd. v. ACIT (2008) 4 DTR 530 / 115 TTJ 412 / 114 ITD 171 (Chennai)(Trib.)*

**S. 10(3) : Exempt incomes – Casual and non recurring receipts – Winnings from lotteries – Allowability – Basic Exemption [S. 115BB]**

Assessee having no other source of income receipt of ` 22,500 from lottery will be taxed under cl. (i) of s. 115BB at a flat rate of 40 per cent after allowing ` 5,000 under section 10(3). (A.Y. 1993-94)

*K. R. Syamkumar v. ITO (2006) 102 TTJ 1057 / 100 ITD 500 (Cochin)(Trib.)*

**S. 10(3) : Exempt incomes – Casual and non-recurring receipts – Cancellation of auction sale**

Amount received by the assessee, auction purchaser, on cancellation of auction sale, as per order of court, from original owner was held to be a casual and non-recurring receipt, and not a capital receipt, as no capital asset can be said to have been acquired once the deal was set aside. (A.Y. 1993-94)

*Gynendra Bansal v. ACIT (2003) 86 ITD 421 / 81 TTJ 240 (Delhi)(Trib.)*

**S. 10(4) : Exempt incomes – Interest Income – Non-resident – FERA – Residential status**

From plain reading of the sub section (4) it is clear that income by way of interest on money standing to the credit in a NRE account in any bank in accordance with FERA, 1973 would qualify for exemption subject to the condition that such person is a resident out side India as defined in clause (q) of section 2 of FERA. Therefore for the purpose of examining whether the person is entitled to exemption under section 10(4), one has to see the residential status under the FERA and not under the Income tax Act. (A.Ys. 1997-98 to 2000-01)

*Rachpal Singh v. ITO (2005) 94 ITD 79 / 93 TTJ 283 (Amritsar)(Trib.)*

**S. 10(4)(ii) : Exempt incomes – Interest income – Non-resident – Interest on FDR – NRE account**

Where original deposit in NRE account had been made in accordance with FERA and Rules. The said Act and Rules do not prohibit any individual from earning interest on such deposit. Thus, the interest earned on the FDR is exempt under section 10(4)(ii). (A.Ys. 1986-87 to 1995)

*CIT v. Asandas Khatri (2006) 152 Taxman 655 / 203 CTR 73 (MP)(High Court)*

**S. 10(5) : Exempt incomes – Travel concession or Assistance to employees**

Provisions of rule 2B (a), making difference between air travel charges and railways first class AC charges exigible to tax under the Act, and are not *ultra vires* provision of section 10(5).

*K.P. Harihara Kumar v. UOI (2004) 270 ITR 194 / 142 Taxman 64 / 190 CTR 606 (Ker.)(High Court)*

**S. 10(5B) : Exempt incomes – Non-resident – Technicians – Diploma holder**

Assessee having a diploma in textile technology who has extensive knowledge and experience in the field of textile manufacturing and yarn manufacturing machines having produced documentary evidence showing that he was actively involved in providing consultation for erecting spinning plants etc, in the course of his employment with an Indian company was entitled for exemption under section 10(5B). (A.Y. 1997-98)

*ACIT v. Andreas Beising (2010) 130 TTJ 100 (UO) / (2009) 34 SOT 143 (Delhi)(Trib.)*  
*Editorial: - Section omitted by the Finance Act, 2002 w.e.f. 1-4-2003.*

**S. 10(5B) : Exempt incomes – Non-resident – Technicians – Managing Director**

Assessee qualifies to be a "technician" within the meaning of section 10(5B) and is entitled to exemption, notwithstanding the fact that he is managing director of the company.

(A.Y. 1998-99)

*John Lewis Banner v. Jt. CIT (2006) 105 TTJ 298 (Delhi)(Trib.)*

**S. 10(5B) : Exempt incomes – Non-resident – Technicians – Foreman – Experience**

General Foreman, employee of a German company having 36 years of experience in said field, is technician and eligible for exemption under section 10(5B).

*Erwin Bocksteigel, In re (2004) 139 Taxman 253 / 189 CTR 484 (AAR)*

**S. 10(5B) : Exempt incomes – Non-resident – Technicians – Specialized knowledge**

Korean Civil Engineer engaged for design and construction of metro corridor for which he has specialized knowledge and technical expertise is a technician and qualifies for exemption.

*M.H. Yoon, In re. (2004) 139 Taxman 61 / 189 CTR 483 (AAR)*

**S. 10(6) : Exempt incomes – Foreign technicians – Qualified Chef – Perquisite**

Assessee, a foreign national, was qualified chef in pastry shop was employed by a resident hotel company 'H' as its Vice – President (Operations) and General Manager, since assessee had not been employed in a capacity in which he had actually used his specialized knowledge and experience, assessee could not be treated as a technician

within the meaning of section 10(6) and tax paid on his salary by employer was a perquisite in his hands. (A.Ys. 1991-92, 93, 94)

*Rudolph Staudinger v. Dy. CIT (2005) 1 SOT 844 (Mum.)(Trib.)*

**S. 10(6) : Exempt incomes – Not a citizen of India – Foreign technicians – Tax borne by Indian Company**

Exemption in respect of Tax borne by Indian company on behalf of foreign technician, an employee of foreign company is allowable under section 10(6)(viiia). (A.Y. 1989-90)

*B. Nakazono v. ACIT (2003) SOT 31 (Delhi)(Trib.)*

**S. 10(6)(viiia) : Exempt incomes – Not a citizen of India – Foreign technicians – Scientific research**

Pre-condition for claiming exemption under section 10(6)(viiia) is that such an individual should be in employment for carrying on scientific research or in any business carried on in India; where under an agreement, assessee (a foreign national) was deputed in India by his foreign employer to carry out some technical work for an Indian Company for business carried on in India and, therefore, exemption under section 10(6)(viiia) was not available to him. (A.Y. 1979-80)

*CIT v. De Marche Enricho (2005) 278 ITR 89 / 146 Taxman 247 / 197 CTR 394 (All.)(High Court)*

**S. 10(10AA) : Exempt incomes – Encashment of leave – During service**

Payment received by employee in lieu of leave encashment while in service, are not exempt under section 10(10AA) (A.Y. 1983-84)

*CIT v. Ram Rattan Lal Verma (2005) 145 Taxman 256 / 273 ITR 126 / 195 CTR 375 / 144 Taxman 504 (All.)(High Court)*

**S. 10(10AA) : Exempt incomes – Encashment of leave – Currency of services**

Leave encashment paid by an employer to employee during currency of contract of employment is not exempted.

*CIT v. Vijai Pal Singh (2005) 273 ITR 126 / 144 Taxman 504 / 195 CTR 375 / 145 Taxman 256 (All.)(High Court)*

*CIT v. Ashok Kumar Dixit (2005) 144 Taxman 504 / 273 ITR 126 / 195 CTR 375 / 145 Taxman 256 (All.)(High Court)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Employee – RBI [S. 89]**

The amount received by retiring employees of the Reserve Bank of India opting for optional early retirement scheme is eligible for exemption from Income Tax under section 10(10C) of the Income-tax Act. (A.Y. 2004-05)

*Chandra Ranganathan & Others v. CIT (2010) 326 ITR 49 / 235 CTR 365 / 195 Taxman 418 / 46 DTR 95 (SC)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Salary [S. 89]**

Amount received under voluntary retirement scheme exempt upto 5 lakhs under section 10(10C). Amount in excess of 5 lakhs entitled to relief under section 89. (A.Y. 2002-03)

*CIT v. T. K. Paliwal (2010) 322 ITR 101 (Raj.)(High Court)*

*CIT v. S. N. Sharma (2010) 322 ITR 105 (Raj.)(High Court)*

*Sunil Kumar Ganguly & Ors v. OIR (2010) 322 ITR 297 (Cal.)(High Court)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Salary Income [S. 89]**

Amount received by the employees of the Reserve Bank of India opting for the 'Optional Early Retirement Scheme' is eligible for deduction under section 10 (10C) of the Act as all the condition of rule 2BA of the Income Tax Rules, 1962 were complied with. The Hon'ble High Court further held that the employees were also entitled for relief under section 89 of the Act.

*CIT v. Koodathil Kallyatan Ambujakshan (2008) 12 DTR 138 / (2009) 309 ITR 113 / 219 CTR 80 (Bom.)(High Court)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Salary [S. 17(3)]**

Amount received on account of voluntary retirement consequent upon termination by the employer is profit in lieu of salary within the meaning of sec. 17(3); therefore, covered under section 10(10C). (A.Y. 2002-03)

*CIT v. Nagesh Devidas Kulkarni & Ors. (2007) 291 ITR 407 / 210 CTR 471 (Bom.)(High Court))*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Salary**

VRS of SAIL could not be said to be in conflict with the requirement of rule 2BA, in as much as clause (8) of the Scheme clearly laid down that retiring employee would not be eligible for employment in any of the plants, subsidiaries or joint ventures of the SAIL. This is in consonance with clause (v) of rule 2BA. Benefit payable under VRS is benefit in lieu of salary and is chargeable / exemption cessation of service, even though payment is spread over a number of years and would not be hit by second proviso to section 10(10C). Terminal benefits cannot be brought within scope of 'amount received' under section 10(10C).

*SAIL DSP VR Employees Association 1998 v. UOI (2003) 128 Taxman 704 / 262 ITR 638 / 181 CTR 367 (Cal.)(High Court)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Salary [Rule 2BA]**

Claim for exemption under section 10(10C), cannot be denied on the ground that the scheme of voluntary retirement framed by the employer is not in accordance with

(A.Y. 2007-08)

*Pandya Vinodchandra Bhogilal v. ITO (2010) 45 DTR 105 / 133 TTJ 253 (Ahd.)(Trib.)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Exemption**

An employee, who takes voluntary retirement, is entitled to exemption under section 10(10C). (A.Y. 2002-03)

*Dy. CIT v. Krishana Gopla Saha (2009) 121 ITD 368 / 125 TTJ 577 / 29 DTR 385 (TM)(Kol.)(Trib.)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Voluntary retirement**

In view of clarification given in Circular No. 7 of 2003, dt. 5th Sept., 2003, exemption under s. 10(10C) is to be allowed to the extent of ` 5,00,000 and is not to be restricted to the amount actually received in the relevant previous year when the entire amount is charged to tax on accrual basis. (A.Y. 2003-04)

*Firturam Yadav v. ACIT (2006) 101 TTJ 256 (Nagpur)(Trib.)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Compensation – Limit**

Compensation received on account of voluntary retirement is exempt under section 10(10C) subject to overall limit of ` 5,00,000 even if spread over several years. (A.Y. 2001-02)

*V. G. Ramachandiron v. ITO (2006) 102 TTJ 952 / 100 ITD 545 (Chennai)(Trib.)*

**S. 10(10C) : Exempt incomes – Voluntary retirement schemes – Gratia**

Where assessee, a bank employee, retired voluntarily under Voluntary Retirement Scheme (VRS) framed by bank and received an amount of ` 8.04 lakhs as gratia payments, since assessee had received payments as a matter of right irrespective of nomenclature, it was compensation entitled to exemption under section 10(10C) to the extent of ` 5 Lakhs. (A.Y. 2001-02)

*ITO v. Chandra Kant S. Dharma (2005) 94 ITD 152 / 95 TTJ 151 (Indore)(Trib.)*

**S. 10(10)(C) : Exempt incomes – Voluntary retirement – Optional employees retirement scheme**

Employees retiring under Optional Employees Retirement Scheme of RBI fulfil the requirement of section 10 (10C), r/w R. 2BA, hence eligible for exemption under section 10(10C) to the extent of ` 5 lakhs.

*Anant Kumar Agarwal v. ITO (2008) 3 DTR 97 / 114 TTJ 67 / 113 ITD 1 (TM)(Luck.)(Trib.)*

**S. 10(10CC) : Exempt incomes – Perquisite – Tax paid by employer**

Tax paid by employer in respect of salary paid to employees would constitute a non-monetary perquisite eligible for exemption under section 10(10CC). (A. Y. 2004-2005).

*Transocean Discoverer v. ACIT (2011) 44 SOT 248 (Delhi)(Trib.)*

#### **S. 10(10CC) : Exempt incomes – Perquisite – Tax paid by employer**

Taxes paid by the employer can be added only once in the salary of the employee, thereafter tax on such perquisite is not to be added again. (A.Y. 2004-05)

*RBF Rig Corpn. LIC (RBFRC) v. ACIT (2007) 109 ITD 141 / 165 Taxman 101 (Mag.) / (2008) 113 TTJ 143 / 1 DTR 203 (SB)(Delhi)(Trib.)*

#### **S. 10(10D) : Exempt incomes – Tax paid by employer – Keyman insurance**

In view of the conflicting clarification given by the LIC, regarding the status of keyman insurance policy after assignment, issue regarding taxability of the amounts received on the maturity of such policy remanded to Assessing Officer for fresh consideration after obtaining clarification from higher authorities of LIC. (A.Y. 2005-06)

*Rajan Nanda v. Dy. CIT (2009) 31 DTR 249 / 30 DTR 304 / 126 TTJ 924 (Delhi)(Trib.)*

#### **S. 10(12) : Exempt incomes – Accumulated balance in recognised provident fund – Payment**

Amount which is exempt is balance in account of employee during currency of his employment; and amount credited in account of an employees who have ceased to be employees, would not be exempt. (A.Ys. 1997-98 to 2000-01)

*ONGC Ltd. v. ITO (TDS) (2005) 4 SOT 333 / 98 TTJ 1111 (Delhi)(Trib.)*

#### **S. 10(13) : Exempt incomes – Payments from approved superannuation fund – DTAA – India-USA [Article 16(1)]**

NRI receives payment from Superannuation Fund of former employer in India with whom he was employed prior to resigning and shifting to USA - AAR observed that Article 16 (1) of the DTAA with USA says that salaries in respect of employment in USA shall be taxable only in that State. As the payment under consideration is received from former employee in India, DTAA is of no help. Further, as per S. 10(13) of IT Act, exemption of payment from an approved superannuation fund is available only if it is received on retirement or after a specified age. Payments made on resignation will be exempt only if it is after the specified age which was not the case in this instance – Hence held it is not exempt and hence taxable in India.

*Yogesh Prabhakar Modak, USA; In Re (2004) 268 ITR 26 / 138 Taxman 121 / 189 CTR 478 (AAR)*

#### **S. 10(14) : Exempt incomes – Daily allowances for expenses – Foreign Technician**

Daily allowance received by Foreign Technician is exempt from Income Tax Act as per the notification dated 21st February, 1989. (A.Ys. 1990-91, 91-92)



*CIT v. Morgenstern Werner (2003) 259 ITR 486 / 180 CTR 202 / 132 Taxman 214 (SC) / 11 SCC 445*

**S. 10(14) : Exempt incomes – Special allowances for expenses – Development Officers**

Circular dated 24-4-2004, issued by LIC directing branch managers to deduct tax at source conveyance allowance payable to development officers in accordance with taxation laws and circular issued by CBDT in that behalf and directing them that to the extent development officer furnished copies of vouchers/ bills for actual expenditure incurred, amount mentioned therein could be taken note of for purpose of section 10(14), is not to detriment of Development Officers, but it enables them to claim benefit in terms of section 10(14) and therefore cannot be quashed.

*K.R. Murlidhar v. Life Insurance Corpn. of India (2005) 274 ITR 459 / 144 Taxman 572 / 195 CTR 149 (Karn.)(High Court)*

**S. 10(14) : Exempt incomes – Special allowance for expenses – Employee of LIC**

Conveyance and additional conveyance allowance paid to employee of LIC were not exempt under section 10(14)(ii), where assessee furnished no evidence that amount had been reimbursed only because of actual use of that amount for performance of duty during course of employment.

*D.C. Charaya v. ITO (2004) 191 CTR 356 / 276 ITR 60 (Raj.)(High Court)*

**S. 10(14) : Exempt incomes – Special allowances for expenses – Foreign technician**

Living allowance received by foreign technician is exempt.

*CIT v. C. Babbington (2003) 130 Taxman 579 (Delhi)(High Court) / CIT v. Sam Orie (2003) 131 Taxman 301 / 266 ITR 630 (Delhi)(High Court) / CIT v. R. Frohnholzer (2003) 130 Taxman 506 / 180 CTR 560 (Delhi)(High Court). / CIT v. Kammholz Kurt (2003) 130 Taxman 270 / 185 CTR 525 (Delhi)(High Court)*

**S. 10(14) : Exempt incomes – Special allowances for expenses – Development officer – LIC**

Conveyance allowance / additional conveyance allowance received by Development Officer of LIC is exempt under section 10(14). (A.Y. 1989-90)

*CIT v. A.K. Ghosh (2003) 131 Taxman 124 / 263 ITR 536 (MP)(High Court) / CIT v. Gurudeo Singh Jaggi (2003) 132 Taxman 755 (MP)(High Court)*

**S. 10(14) : Exempt incomes – Special allowances for expenses – Development Officer – LIC**

Development Officers in the LIC are entitled to claim exemption under section 10(14) in respect of conveyance allowance / additional conveyance allowance upon satisfying the conditions that such allowances have actually been spent for the purpose for

which they were given, i.e., wholly, necessarily and exclusively in the performance of duties. (A.Y. 1990-91)

*Life Insurance Corpn. of India v. Union of India (2003) 129 Taxman 205 / 260 ITR 41 / 179 CTR 432 (Raj.)(High Court) / J. P. Mathur v. CIT (2003) 133 Taxman 390 (Raj.)(High Court)*

**S. 10(14) : Exempt incomes – Special allowances for expense – Incentive bonus – Development officer – LIC**

Development Officer of LIC is not entitled to any deduction on account of expenditure out of incentive bonus received by him. (A.Y. 1994-95)

*CIT v. Gurudeo Singh Jaggi (2003) 132 Taxman 755 / 267 ITR 763 (MP)(High Court)*

**S. 10(14) : Exempt incomes – Special allowances for expense – MLA – MP [S. 10(17)]**

Only those allowances are exempt which are specified in section 10(14), or section 10(17), or in Rule 2BB. Conveyance allowance or clerical allowance received by an MLA are exempt under section 10(14) r.w. Rule 2BB, subject to proof that the same were incurred in the performance of duties of the office. Telephone allowance and constituency allowance are not exempt under section 10(14), in the absence of specific clause in Rule 2BB(1). If the medical allowance is reimbursement of medical expenditure exemption can be allowed and not otherwise, as it does not find place in Rule 2BB(1). (A.Ys. 2000-01 to 2004-05)

*M. Venkata Subbaiah v. ITO (2010) 47 DTR 403 / 127 ITD 399 / 134 TTJ 763 (Visakha)(Trib.)*

**S. 10(14) : Exempt incomes – Special allowances for expense – Salary – Perquisite**

Reimbursement of payment made by employee to help in official duties is not perquisite and is exempt under section 10(14)(i) r/w R. 2BB(1)(d).

*A. D. Choubey & Ors. v. ITO (2006) 99 TTJ 1295 / 98 ITD 57 (Jab.)(Trib.)*

**S. 10(14) : Exempt incomes – Special allowances for expense – Special allowance or benefit**

Daily allowance received by a commercial pilot for tours to places inside as also outside India is eligible for exemption under section 10(14)(i) r.w.r. 2BB(1)(b).

*ACIT v. Capt. K.P. Singh (2006) 103 TTJ 962 / 107 ITD 82 / 9 SOT 642 (Mum.)(Trib.)*

**S. 10(14) : Exempt incomes – Special allowances for expense – Living allowance – Foreign technician**

The sum paid by the applicant to foreign technician towards the estimated living expenses and other benefit and facilities is no doubt income but is exempt under section 10(14). (A.Ys. 2000-01 to 2004-05)

*Hindustan Powerplus Ltd., In re (2004) 271 ITR 433 / 141 Taxman 658 / 192 CTR 311 (AAR)*

### **S. 10(15) : Exempt Incomes – Foreign loans – Interest payment**

Interest earned on notified Public Sector Bonds is entitled to exemption where all conditions mentioned in item (h) of section 10(15)(iv) are fulfilled irrespective of whether bonds are subscribed for or purchased in market. (A.Y. 1990-91)

*Ashok Leyland Ltd. v. ACIT (2005) 277 ITR 22 / 147 Taxman 665 / 198 CTR 574 (Mad.)(High Court)*

### **S. 10(15) : Exempt incomes – Foreign loans – Interest payments – Withdrawal of exemption**

Where to finance its project, External Commercial Borrowings (ECB) were made by assessee company in terms of policy of government of India granting permission for ECB to be utilized by industrial undertakings in India and it was further conveyed by the government that payment of interest, commission and fees in respect of said loan was exempt from withholding tax under section 10(15)(iv)(f), subsequent withdrawal of such exemption on ground that end use of money was not proper, was unjustified and impermissible.

*Reliance Industries Ltd. v. DDI (International Taxation) (2005) 3 SOT 501 / 98 TTJ 856 (Mum.) (Trib.)*

### **S. 10(15)(iv) : Exempt incomes – Foreign loans – Interest – Double taxation relief – India-Mauritius**

Approval granted by RBI under FERA can not be equated with approval by Government of India. Exemption of interest income in article 11 of DTAA, with Mauritius is independent of exemption granted to interest income under various items of section 10(15) (iv).

*Yu Bo Investment Co (P) Ltd. In re (2004) 267 ITR 734 / 139 Taxman 277 / 189 CTR 288 (AAR)*

### **S. 10(15)(iv) : Exempt incomes – Foreign loans – Exemption – Interest income**

Though exemption under section 10(15)(iv), is not available for borrowings made after

1-6-2001, tax exemption under article 11(4) of DTAA with Mauritius can still be available.

*Rockwool (India) Ltd., In, re (2004) 268 ITR 20 / 138 Taxman 106 / 189 CTR 382 (AAR)*

### **S. 10(15)(iv) : Exempt incomes – Foreign loans – Interest – Foreign currency [S. 14A]**

Exemption is allowable in respect of gross interest on foreign currency but any expenditure incurred in relation to earning of exempt income is to be disallowed under section 14A.

*Dresdner Bank AG v. Addl. CIT (2006) 105 TTJ 149 / 108 ITD 375 / 11 SOT 158 (Mum.)(Trib.)*

**S. 10(15A) : Exempt incomes – Payments for Aircraft lease- Rejection of exemption by CBDT was held to be not justified and authorities were directed to grant approval for exemption. [ S. 195 ]**

*Allowing the petition the Court held that new lease agreements were necessitated because of change in ownership and not mere substitution of new agreements in place of old ones without there being any reason for entering into new agreements. Accordingly the order of CBDT was quashed and authorities were directed to grant approval under S. 10(15A) of the Act.*

*AFT Trust -Sub-1 v. Chairman, CBDT ( 2008) 174 Taxman 356/ 220 CTR 59 ( Delhi) (HC)*

**Editorial:** *SLP of revenue was dismissed on ground of delay ,Chairman, CBDT v. AFT Trust -Sub-1 ( 2017) 247 Taxman 220 (SC)*

*S. 10(15A) : Exempt incomes – Payments for Aircraft lease – Agreement*

Rejection of application for approval of agreement by Central Government without a speaking order is not justified.

*AFT Trust - Sub 1 and others v. Chairman, CBDT (2004) 192 CTR 406 / 277 ITR 244 / 144 Taxman 907 (Delhi)(High Court)*

**S. 10(15A) : Exempt incomes – Payments for Aircraft lease – Agreement**

Supplementary rent paid by assessee-airline for taking aircraft on lease, in absence of material to show that it fell under exclusionary clause of section 10(15A), continued to be exempt and assessee was not liable to deduct tax at source while making payment thereof. (A.Ys. 1998-99 & 1999-2000)

*Dy. CIT v. Sahara Airlines Ltd. (2005) 96 TTJ 969 / (2006) 6 SOT 237 (Delhi)(Trib.)*

**S. 10(16) : Exempt incomes – Scholarships – Stipend**

Scholarship / stipend received by a student from College / Government for pursuing higher studies cannot be termed as salary and therefore, same would be exempt under section 10(16). (A.Y. 2005-06)

*Rahul Tugnait (Dr.) v. ITO (2010) 124 ITD 480 / (2009) 123 TTJ 251 / 23 DTR 301 (Chd.)(Trib.)*

**S. 10(17A) : Exempt incomes – Award or allowance in public interest – Reward by Government**

Amount received as reward by the informer from the customs department is exempt under section 10(17A). (A.Ys. 1986-87, 1989-90 to 1991-92)

*ITO v. Mariam Beevi & Ors. (2011) 128 ITD 59 / (2010) 46 DTR 229 / 134 TTJ 125 (Chennai)(Trib.)*

**S. 10(20) : Exempt incomes – Local authority – Agricultural Market committee**

The appellant which is an agricultural marketing committee established under the Delhi Agricultural Produce Marketing (Regulation) Act, 1998, to provide facilities for marketing agricultural produce and for performing other functions such as superintendence and direction and control of market, etc. was not a local authority under section 10(20) of the Act, as amended by the Finance Act, 2002. (A.Y. 2003-04)

*Agricultural Produce Market Committee v. CIT (2009) 208 Taxation 103 / (2008) 305 ITR 1 / 173 Taxman 115 / 218 CTR 433 / 11 DTR 289 / 9 SCC 434 (SC)*

**S. 10(20) : Exempt incomes – Local authority [Article 289(1) of the Constitution of India]**

With the omission of section 10(20A) and adding of Explanation to section 10(20), explaining local authority, by the Finance Act 2002, the authorities constituted under a state legislation like Industrial Development Authority earlier exempt under section 10(20A), would be liable to be assessed to tax under this Act. Further, the exemption under Article 289(1) of the Constitution will also not be available to such authority as it is a distinct legal entity and its income could not be said to be the income of the state.

*Adityapur Industrial Area Development Authority v. UOI (2006) 153 Taxman 107 / 283 ITR 97 / 202 CTR 464 / 193 Taxation 570 / (2006) AIR SC 2375 / (2006) 5 SCC 100 (SC)*

**S. 10(20) : Exempt incomes – Local authority – State Forest Corporation**

State Forest Corporation is not a local authority and therefore is not entitled to exemption under section 10(20). (A.Y. 1983-84)

*CIT v. U.P. Forest Corpn. (2005) 146 Taxman 733(All.) / CIT v. U.P. Forest Corporation (2005) 148 Taxman 481 (All.)(High Court)*

**S. 10(20) : Exempt incomes – Local authority – Krishi Utpadan Mandi Samiti**

Krishi Utpadan Mandi Samiti is not "local authority" within the meaning of section 10(20). (A.Y. 2003-04)

*Krishi Utpadan Mandi Samiti v. UOI (2004) 267 ITR 460 / 139 Taxman 258 / 188 CTR 556 (All.)(High Court)*

**S. 10(20) : Exempt incomes – Local authority – Notified area – Surat – Municipality**

The assessee was a notified area in Surat for industrial development. It had been notified by the State Government under Gujarat Industrial Development Act, 1962. The assessee had been entrusted with the work of collection of tax under a

notification issued by Gujarat Municipality Act, 1963. On the facts of the present case, the assessee was regarded as a 'municipality' under section 10(20) and therefore its income was exempt under the said section. (A. Y. 2003-04)

*ITO v. Sachin Notified Area (2011) 43 SOT 411 / 7 ITR 699 / 132 TTJ 610 / 42 DTR 478 / 128 ITD 211 (Ahd.)(Trib.)*

### **S. 10(20) : Exempt incomes – Local authority – Gujarat Municipality Act**

Provisions of Gujarat Municipalities Act are applicable to all notified areas created under section 16 of GIDA and such notified areas have same power under the Municipalities Act, therefore a notified area for industrial development under GIDA is municipality covered by cl. (ii) of section 10(20) and its income is exempt. (A.Y. 2003-04)

*ITO v. Sachin Notified Area (2010) 42 DTR 478 / 132 TTJ 610 / 128 TTD 211 / 43 SOT 411 / 7 ITR 699 (Ahd.)(Trib.)*

### **S. 10(20A) : Exempt incomes – Development authority – Vidarbha Irrigation Dev. Corp.**

Assessee, corporation contended that it was a 'development authority' within meaning of section 10(20A) and its claim was not accepted by Tribunal mainly relying on the preamble to Vidarbha Irrigation Development Corporation Act, 1997 (VIDC), it was impermissible for Tribunal to ignore substantive provisions and it was necessary for tribunal to consider issue in light of provisions of the VIDC Act, Maharashtra Irrigation Act, 1976 and Bombay Canal Rules, 1934 and, accordingly matter was to be remanded to it. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corporation v. Addl. CIT (2005) 278 ITR 521 / 200 CTR 555 (Bom.)(High Court)*

### **S. 10(20A) : Exempt incomes – Local authority – Development authority – Company – Vidarbha Irrigation Dev. Corp.**

Once a person falls in definition of a company, it can never fall under category of local authority; thus Vidarbha Irrigation Development Corpn. Fitted in definition of company and could not be treated as local authority. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corpn. v. Addl. CIT (2005) 93 ITD 184 / 94 TTJ 576 (Nagpur) (Trib.)*

### **S. 10(22) : Exempt incomes – Educational institution – Publication of books to the students**

Exemption under section 10(22) was denied by the Assessing Officer on the ground that, since the assessee had income exclusively from publication and selling of text books to the students, it did not exist solely for educational purposes. The action of the Assessing Officer was confirmed by the High Court. The Supreme Court took into account the prior history of the corporation particularly the context in which it was incorporated. It also noted that a similar issue was decided by the Rajasthan and



Orissa High Courts. It noted that the Gauhati High Court in the impugned order had omitted to take into account several factors. Therefore, the matter was set aside to the Assessing Officer to consider the issue de novo in the light of the judgment of the Rajasthan and Orissa High Courts. (A.Ys. 1981-82 to 1988-89 & 1990-91 to 1996-97) *Assam State Text Book Production & Publication Corpn. Ltd. v. CIT* (2009) 227 CTR 105 / 319 ITR 317 / 185 Taxman 58 / 31 DTR 25 / (2010) 216 Taxation 218 (SC)

**S. 10(22) : Exempt incomes – Educational Institution – Purpose of profit [S. 11(1)(a), 13(1)(c), 13(3)]**

Exemption under section 10(22) is available only if the assessee is running an educational institution solely for educational purposes and not for purposes of profit : Exemption under section 10(22) is not allowable to the assessee as its objects include establishing small-scale industries of all kind and to aid and assist the poor, the grief-stricken, the destitute, and persons and animals suffering from calamities. (A.Ys. 1983-84 to 1985-86).

*CIT v. Gurukul Ghatkeswar Trust* (2011) 332 ITR 611 / 58 DTR 122 / 243 CTR 154 (AP)(High Court)

**S. 10(22) : Exempt incomes – Educational institution – Educating public concerning safety**

The assessee was a society registered under the Societies Registration Act, 1860, as well as the Bombay Public Trust Act, 1950, with the principal object of educating the public concerning safety, etc. Held, that the return filed for the asst. year 1993-94 revealed that the entire income had been utilized for the purpose of its objects. Therefore, the finding of the Tribunal was not perverse and there was no substantial question of law arising for consideration. (A.Y. 1993-94)

*Dy. CIT v. National Safety Council* (2008) 305 ITR 257 / 217 CTR 289 / 2 DTR 137 (Bom.)(High Court)

**S. 10(22) : Exempt incomes – Educational institution – Deemed income [S. 68]**

Word 'income' in sub-section (22) of section 10 of the Act is wide enough to include deemed income under section 68 of the Act. The Court held that as the words 'derived from' (or some other similar words) do not occur in section 10(22) of the Act, therefore, the word 'income' as occurring in section 10(22) cannot be given restrictive meaning and must be given its natural meaning or the meaning ascribed to it in section 2(24) of the Act. (A.Ys. 1987-88, 1998-99)

*DIT (Exemption) v. Raunaq Education Foundation* (2007) 164 Taxman 266 / 294 ITR 76 / 213 CTR 541 (Delhi)(High Court)

**S. 10(22) : Exempt incomes – Educational institution – Donation towards development and building**

The society, which was running several schools cannot be denied the exemption under section 10(22) for accepting donation for the purposes of development and

construction of building, when the same was used for the purpose for which they were collected.

*DIT v. Andhra Educational Society (2006) 155 Taxman 157 / 198 CTR 573 (Delhi)(High Court)*

**S. 10(22) : Exempt incomes – Educational institution – Interest income from investments – School**

If an assessee trust or society exists solely for educational purposes, the fact that assessee had other objects will not disentitle it to exemption so long as activity carried on by it in that assessment year was that of running an educational institution and not for profit; where assessee-trust existed only for educational purposes i.e for running schools and not for purposes of making profit, it would be entitled to exemption under section 10(22) on interest income derived from investment of surplus funds of school (run by assessee-trust) for assessment years in question. (A.Ys. 1979-80, 1980-81)

*Trustees of Vanita Vishram v. CIT (2006) 280 ITR 345 / (2005) 148 Taxman 546 / 198 CTR 521 (Bom.)(High Court)*

**S. 10(22) : Exempt incomes – Educational institution – Running of dispensary**

Assessee was running several schools (about 16 in number) employing more than one thousand teachers and nuns and imparting education to several thousand students, merely because assessee was also running a dispensary for children and teacher, a church for nuns and orphanage for abandoned children, it could not be said that assessee was not existing solely for educational purposes

*DIT (Exemption) v. Institute of the Franciscan Clarist (2005) 148 Taxman 78 / 196 CTR 582 (Delhi)(High Court)*

**S. 10(22) : Exempt incomes – Educational institution – Learning of Russian language**

Assessee's claim for deduction was denied on ground that the assessee's work related to performance of contract and not for providing regular education for anybody interested in learning Russian language but Tribunal found that assessee was carrying on educational activities in learning of languages, Tribunal was justified in allowing assessee's claim for exemption. (A.Y. 1990-91)

*DIT v. Indo Soviet Medicare & Research Foundation (2005) 146 Taxman 384 / 196 CTR 183 (Delhi)(High Court)*

**S. 10(22) : Exempt incomes – Educational institution – Assist Colleges**

Assessee's claim could not be denied on ground that it had violated provisions of section 11(4A) where assessee's objects were to establish, run, manage and assist colleges, etc. and for that purpose to collect funds / donations. etc. (A.Y. 1992-93)

*ITO v. Rao Bahadur AKD Dharmaraj Education Charity Trust (2005) 273 ITR 256 / 147 Taxman 350 (Mad.)(High Court)*

### **S. 10(22) : Exempt incomes – Educational institution – Formal education**

An educational institution under section 10 (22) is more than a body carrying on charitable activities in the field of education as contemplated by section 2(15). Section 10(22), contemplates is an institution imparting formal education, which institution is accountable to some authority and has control over the taught. (A.Y. 1981-82)

*Saurashtra Education Foundation v. CIT (2005) 273 ITR 139 / (2004) 141 Taxman 26 / 190 CTR 295 (Guj.)(High Court)*

### **S. 10(22) : Exempt incomes – Educational institution – Violation of section 13 [S. 11, 13]**

In the context of exemption under section 10(22), conditions as stipulated in either section 11 or 13 are irrelevant. Violation of section 13 has no bearing on the question whether the assessee exists solely for the purposes of and not for purposes of profits, so as to fall within the ambit of section 10(22). (A.Y. 1993-94)

*CIT v. Lagan Kala Upvan (2003) 259 ITR 489 / 126 Taxman 205 / 179 CTR 243 (Delhi)(High Court)*

### **S. 10(22) : Exempt incomes – Educational institution – Incidental objects not implemented**

Assessee-institution solely existed for educational purposes, and the incidental object of constructing houses for weaker sections was never implemented or acted upon by assessee in relevant assessment year, assessee was entitled to the exemption.

*CIT v. Vidya Vikas Vihar 2003 Tax LR 639 (Bom.)(High Court)*

### **S. 10(22) : Exempt incomes – Educational institution – Genuineness of trust**

Under section 10(22) the scope of the powers of the revenue is confined to examining the existence of the institution for the sole purpose of education and to examine the object of the trust or institution; once the revenue has not doubted the genuineness of the activities of the assessee society, nor doubted the object its scope or powers it cannot be allowed to travel beyond it and to enter into the scope to find out as to whether assessee is a charitable institution or not or whether assessee is carrying on any activity which is covered under the definition of section 10(22) of the Act. (A.Y. 1994-95)

*Vellammal Educational Trust v. ACIT (2005) 4 SOT 280 / 95 TTJ 665 (Chennai)(Trib.)*

### **S. 10(22) : Exempt incomes – Educational institution – Investment in shares**

Where in the past assessee-trust had been allowed exemption of income from running of school and there was no change in circumstances in year in question, its claim for exemption could not be denied in AY in question on ground that it existed for profit or because it had invested in shares of companies in which trustees were interested. (A.Y. 1998-99)

*Nopany Education Trust v. Addl. DIT(E) (2005) 93 ITD 152 / 144 Taxman 4 (Mag.) / 92 TTJ 1143 (TM)(Kol.)(Trib.)*

**S. 10(22) : Exempt incomes – Educational institution – Other sources – University [S. 11(5)]**

If the objects or the sole purpose of an entity in substance and reality is to impart education, then the incidental Surplus resulting there from, would not detract its exemption under section 10(22), on ground that it does not exist solely for educational purposes. Provisions under section 11(5) prescribing form and mode of investment do not apply to educational institutions under section 10(22)).

Exemption under section 10(22) is available even if Income is generated from various sources such as rental Income, Dividend, so long as the object is educational and Income is not diverted for personal profit. Thus it is not necessary that Income should generate from school or college only. If object is educational, the means of achievement or implementation of the object would not alter the character of the object. (A.Y. 1995-96)

*Shree Education Society v. ADIT (2003) 85 ITD 288 / 80 TTJ 365 (Kol.)(Trib.)*

**S. 10(22) : Exempt incomes – Educational institution – Printing and publishing text books**

Assessee corporation assessed as a company, carrying out the printing and publishing of text books for school students, as prescribed by the competent authorities, was held to be falling under other educational institutions as specified in section 10(22). Further, held that exemption granted for one year is not a blanket exemption for future years and exemption should be evaluated each year. Exemption can not be denied on ground that assessee failed to claim the same in earlier year, if entitled on merit in the year of claim. (A.Ys. 1978-79 & 1981-82 to 1988-89)

*Assam State Text – Book Production & Publication Corpn. Ltd. v. Dy. CIT (2003) 87 ITD 99 / 81 TTJ 10 (TM)(Gauhati)(Trib.)*

**S. 10(22) : Exempt incomes – Educational institutions – Alternative claim under section 11**

Assessee centre carrying out multifarious activities for the benefit of womenfolk, and some relating to educational purposes, was denied exemption under section 10(22), as it did not exist solely for educational purposes.

The tribunal also held that, Assessee having claimed exemption under section 10(22), and when there is no specific or alternative claim u/s 11, Assessing Officer is still under an obligation to seek explanation for examining the case for the purposes of Sec 11. (A.Y. 1997-98)

*Centre for Women's Development Studies v. Dy. DIT (2003) 78 TTJ 744 / 130 Taxman 174 (Mag.)(Delhi)(Trib.)*

**S. 10(22A) : Exempt incomes – Hospitals and nursing homes – All income**

It was not in dispute that assessee existed solely for philanthropic purposes and not for the purposes of profit, all income from all sources received by assessee was exempt. (A.Ys. 1985-86 to 1987-88)

*DIT (Exemptions) v. A.M.M. Hospitals & Medical Benefit Society (2003) 262 ITR 241 / 187 CTR 567 / (2004) 140 Taxman 81 (Mad.) (High Court)*

**S. 10(23C) : Exempt incomes – Charitable purpose – Education – Subsidy – Grant [S. 2(15)]**

A grant coming from Government will qualify for exemption from taxation if same has been granted for a particular purpose of public utility or public importance or to alleviate a situation affecting general public and cannot be used for any other purpose. Assessee which is Government company within the meaning of section 617 of Companies Act, 1956, which is engaged in business of printing, sale of text book and job works relating to printing, etc., the income will be exempt. The activity of assessee were covered by expression "education" as well as "advancement of any other object of general public utility" occurring in definition of "Charitable purpose" under section 2(15). (A.Y. 2005-06)

*Bihar State Text Book Publishing Corporation v. CIT (2011) 199 Taxman 196 / 241 CTR 403 / 56 DTR 178 / 2011 Tax L.R. 845 (Patna) (High Court)*

**S. 10(23C) : Exempt incomes – Educational institutions – Charitable purpose – Adult education – Sports [S. 2(15), 12]**

The petitioner filed application seeking exemption under section 10(23C)(vi). The petitioners application was rejected on the ground that the object of the petitioner does not exist solely for educational purpose. The rejection order was challenged before the High Court. The High Court held that, the 'education' means process of training and developing, knowledge, skill, mind and character of students. Activities such as maintaining, library, conducting classes of stitching, weaving, embroidery and adult education, fall within 'education'. Sports and recreational activities also fall within modern concept of education. Educational society running school having such other objects cannot be denied approval under section 10(23C)(vi) on ground that society is not existing solely for educational purpose.

*Little Angles Shiksha Samiti Dal Bazzar, Gwalior & Anr. v. UOI (2011) Tax L.R. 941 (MP) (High Court)*

**S. 10(23C) : Exempt incomes – Educational institutions – Order of court to withdraw utilization and invested in funds – Compliance – Exemption [S. 11(5)]**

In the instant case the assessee had complied with the direction of the High Court on its earlier writ petition of withdrawing the amount invested in IEML and placing the amount in a scheduled bank in accordance with section 11(5) of the Income-tax Act, 1961. However the DGIT did not grant exemption to the assessee for the relevant year under consideration even after the assessee had complied with the order of the High Court. On a petition to the High Court again, the High Court while allowing the

petition held that the DGIT could not have refused exemption for the relevant year, when the assessee had complied with the High Court Order. The Original order passed by the High Court had held that the second application would be moved by the assessee pursuant to the order of the High Court, would be treated as having been filed was to be an entire substitute of the original application, and therefore exemption was to be given for A.Y. 2008-09. (A.Y. 2008-09)

*Export Promotion Council for Handicrafts and other v. DGIT (Exemption) (2011) 337 ITR 26 / (2010) 40 DTR 73 (Delhi)(High Court)*

**S. 10(23C) : Exempt incomes – Charitable funds – Power of Chief Commissioner**

The Chief Commissioner of Income-tax cannot condone the delay on the part of the assessee in presenting the application for grant of exemption under section 10(23C) of the Act. (A.Y. 2007-08)

*Roland Educational and Charitable Trust v. CCIT & Ors. (2008) 16 DTR 329 / 221 CTR 88 / 309 ITR 50 (Orissa)(High Court)*

**S. 10(23C) : Exempt incomes – Charitable funds – Hospital – Cumulative losses of earlier years – Profit in some years**

Assessee trust maintained a hospital for philanthropic purpose. Philanthropy is not restricted to giving free treatment only to extremely poor, but it would also be philanthropy to give treatment at a concessional rate to those who, though not extremely poor yet cannot afford to pay full and normal charges. There was profit in some years and cumulative losses in earlier years, as this aspect has not been considered the matter was set aside. (A.Ys. 2002-03 to 2010-11)

*Breach Candy Hospital Trust v. CCIT (2011) 220 Taxation 112 / (2010) 322 ITR 246 / 228 CTR 381 / 192 Taxman 98 (Bom.)(High Court)*

**S. 10(23C)(iiiab) : Exempt incomes – Educational institution – Profit Motive**

Where the objects and activities of the assessee institution are educational in nature and the revenue has not brought any material on record to show that the college account was having surplus or profit, year after year and the revenue has not disputed that surplus was only because of salary grant from the State Government and another grant from UGC, revenue's plea that the college run by assessee was for profit motive cannot be accepted. Expenditure on conducting entrance examination being application of income, non-availability of evidence cannot be reason of denying the exemption under section 10(23C)(iiiab). (A.Y. 2005-06)

*Shree Saket Mahavidyalaya Samiti v. Dy. CIT (2010) 132 TTJ 39 (UO)(Luck.)(Trib.)*

**S. 10(23C)(iiid) : Exempt incomes – Educational institution – Lease rent to relatives**

Exemption under section 10(23C)(iiid) could not be denied to the assessee society established for educational purposes on the ground that the society had paid lease



rent to the sons and wife of the principal of the school who were owners of the land on which school building was constructed where such lease rent was reasonable. Salary to the principal also cannot be a ground for refusing the exemption. (A.Ys. 1999-2000 to 2004-05)

*Oasis Educational Society v. ADIT (2010) 132 TTJ 59 (UO)(Hyd.)(Trib.)*

**S. 10(23C)(iiiad) : Exempt incomes – Educational institution – Donation**

Receipt of donations not being an object of the assessee, an educational institution is not entitled for exemption under section 10(23C)(iiiad).

*Jhunjhunu Academy Sammittee v. ITO (2006) 103 TTJ 260 (Jp.)(Trib.)*

**S. 10(23C)(iv) : Exempt incomes – Charitable purpose – Coaching classes and conduct of examination – Applicability of proviso [S. 2 (15), 11(5)]**

The Director General was not justified in refusing exemption under section 10(23C)(iv) by cryptic order on the ground that by holding coaching classes for fee, the petitioner institute was engaged in "business" without considering whether it was engaged in "trade commerce or business" within the meaning of first proviso to section 2(15) and further without considering the plea of assessee that it had not violated section 11(5) or third proviso to section 10(23C)(iv). The Court remanded the matter for consideration afresh keeping in view the observations made. (A.Ys. 2006-07 to 2009-10).

*The Institute of Chartered Accountants of India & Anr. v. DGIT (Exemption) (2011) 245 CTR 541 / 64 DTR 226 / 202 Taxman 1 (Delhi)(High Court)*

**S. 10(23C)(iv) : Exempt incomes – Charitable purpose – Society – Profit**

Merely because the assessee society earned some profit, does not make the society disentitled for exemption under section 10(23C)(iv) of the Income-tax Act, 1961.

*Haryana State Counselling Society v. CCIT (2010) 40 DTR 169 / 233 CTR 402 (P&H)(High Court)*

**S. 10(23C)(iv) : Exempt incomes – Educational institution – Company – Fees – Remuneration – Research**

Where the assessee is a Company registered under section 25 of the Companies Act, 1956 created for imparting, spreading and promoting knowledge in the field of accountancy, it will fall under the category of institutions which are for research and charitable purpose, eligible for exemption under section 10 (23C)(iv) of the Act. Merely because such institution is charging fees and remuneration for research projects undertaken by it does not make it commercial activity.

*ICAI Accounting Research Foundation & Anr. v. DIT (Exemption) & Ors. (2009) 28 DTR 220 / 226 CTR 27 / 321 ITR 73 / 183 Taxman 462 (Delhi)(High Court)*

**S. 10(23C)(v) : Exempt incomes – Charitable purpose – Capital expenditure – Deduction**

Section 10(23C)(v) benefit cannot be denied merely because there are profits. In computing the profits, capital expenditure has to be deducted. (A.Ys. 2000-01 to 2007-08)

*Pinegrove International Charitable Trust v. UOI (2010) 327 ITR 73 / 188 Taxman 402 / 37 DTR 105 / 230 CTR 477 (P&H)(High Court)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – Existing solely for educational purposes and not for profit – Initial approval – Considerations – Prescribed authority**

The third proviso to section 10(23C)(vi) confines the words "application of income" to the objects for which the institution is established. It does not use the words "in India" in the matter of application or accumulation of income though in several other sections like sections 10(20A), 10(22B), and 11(1)(a) etc., Parliament has used the words "in India". Therefore, the words "in India" cannot be read in to the third proviso. But while imposing conditions subject to which the application is granted the prescribed authority may insist upon a certain percentage of accounting income being utilized/applied for imparting education in India.

*American Hotel & Lodging Association Educational Institute v. CBDT (2008) 301 ITR 86 / 206 Taxation 126 / 216 CTR 337 / 170 Taxman 306 / 7 DTR 183 (SC)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – Registration under Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments, Act, 1987 – Seminars – Symposiums – Work shops – Application of income – Advance of money to another educational institutions**

In order to be eligible for exemption, under section 10(23C)(vi), it is necessary that such institution must exist solely, for educational purposes, and institution should not exist for purpose of profit. Registration under section 43A of A.P. Act is not a condition precedent for seeking approval, Chief Commissioner has to examine independently. Object of Society to conduct seminars, symposiums, workshops and invite experts from India and abroad to improve quality of education and to support students to elevate themselves to international standards is incidental and ancillary object to primary objects of carrying on educational activities. Money advanced to another educational institution cannot be treated as application of income solely for the purpose of education. (A.Y. 2009-10)

*New Noble Education Society v. CCIT (2011) 334 ITR 303 / 201 Taxman 33 / 242 CTR 266 / 58 DTR 63 (AP)(High Court)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – University existing for educational purposes – Haryana Private Universities Act, 2006**

Petitioner university created under section 3 of Haryana Private University Act, 2006 having obtained recognition from the Bar Council of India as well as University Grants Commission and also set up infrastructure for starting law courses, it is an existing educational institution and therefore entitled to approval. Rejection on the ground

that petitioner is yet to commence educational activities is set aside and the Commissioner was directed to pass an order granting approval under section 10(23C)(vi). (A.Y. 2008-09).

*O. P. Jindal Global University v. CCIT (Exemption) (2011) 64 DTR 22 (P&H)(High Court)*

#### **S. 10(23C)(vi) : Exempt incomes – Educational institutional – Surplus**

The assumption that for exemption there should not be any surplus and if it is otherwise the institution society exists for profit and not charity is not justified. Thus, exemption cannot be rejected merely because there is a surplus. *Vanita Vishram Trust v. CCIT (2010) 327 ITR 121 (Bom.)*, *Maa Saraswati Educational Trust v. UOI (2010) 194 Taxman 84 (HP)* and *Pinegrove International Charitable Trust v. UOI (2010) 327 ITR 73 (P&H)* followed). (A. Y. 2008-09)

*St. Lawrence Educational Society v. CIT (2011) 53 DTR 130 / 197 Taxman 504 (Delhi)(High Court)*

#### **S. 10(23C)(vi) : Exempt incomes – Educational institution – Conditions – CBDT**

Condition imposed by the CBDT while granting approval under section 10(23C)(vi) to the petitioner, a US based educational institution, that the petitioner must apply seventy five percent of its total income for educational purposes in India is upheld as valid; prescribed authority is directed to furnish to the petitioner an opportunity to comply with the monitoring conditions and to allow a reasonable period to do so in the event of the Assessing Officer coming to the conclusion that there is any shortfall in compliance. (A.Ys. 1999 to 2006-07)

*American Hotel & Lodging Educational Institute v. CBDT & Ors. (2011) 220 Taxation 292 / (2010) 329 ITR 16 / 42 DTR 54 / 235 CTR 223 / 192 Taxman 275 (Bom.)(High Court)*

#### **S. 10(23C)(vi) : Exempt incomes – Educational institution – Charitable purpose**

Surplus does not mean trust ceases to be "solely for educational purposes and not for profit". (A.Ys. 2005-06 to 2010-11)

*Vanita Vishram Trust v. CCIT (2010) 327 ITR 121 / 40 DTR 225 / 192 Taxman 389 / 233 CTR 90 (Bom.)(High Court)*

#### **S. 10(23C)(vi) : Exempt incomes – Educational institution – Accumulation of Surplus – Benefit will not be lost**

Merely because an educational institution accumulates income, it does not go out of consideration of section 10(23C)(vi). The exemption can be lost if application of income is for purpose other than education. (A.Ys. 2004-05 to 2007-08)

*Maa Saraswati Educational Trust v. UOI (2010) 194 Taxman 84 / 46 DTR 360 / 236 CTR 400 (HP)(High Court)*

**S. 10(23)(vi) : Exempt incomes – Educational institution – CBDT – Power to cancel**

Up to A.Y. 2001-02 the prescribed authority for granting approval under section 10(23)(vi) was the Central Board of Direct Taxes (CBDT), thus approval granted by the CBDT for assessment year upto 2001-02 cannot be cancelled/ rescinded by the Director General of Income Tax as the same was beyond his jurisdiction. (A.Ys. 1999-2000 to 2007-2008)

*Maharashtra Academy of Engineering & Educational Research v. DIT (Inv) & Anr. (2009) 28 DTR 143 / 226 CTR 408 / 319 ITR 399 (Bom.)(High Court)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – Deemed university**

Where the assessee is an educational institute, imparting education in a systematic manner, and the institution is recognised as a 'deemed university', by the University Grant Commission (U.G.C.), exemption under section 10 (23C)(vi) of the Act cannot be denied to such society.

*Jaypee Institute of Information Technology Society v. DIT (Exemption) (2009) 28 DTR 242 / 227 CTR 124 / 184 Taxman 110 (Delhi)(High Court)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – Objects**

Merely because the object of the petitioner society were also to serve the church and the Nation that would not mean that the educational institution was not existing solely for educational purpose. The order passed by CCIT could not be sustained and was set aside. The CCIT was directed to pass a fresh order. (A.Y. 2007-08)

*Ewing Christian College Society v. CCIT (2009) 318 ITR 160 (All.)(High Court)*

**S. 10(23C)(vi) : Exempt incomes – Educational institution – Objects**

The eligibility of exemption under section 10(23C) has to be determined with reference to the objects of the institution. Further, exemption cannot be denied if there results some surplus after meeting the expenditure incurred towards the activities, to attain the objects.

(A.Y. 2003-04)

*Arvind Bhartiya Vidyalaya Samiti v. ACIT (2008) 173 Taxman 119 / 115 TTJ 351 / 5 DTR 436 (Jp.)(Trib.)*

**S. 10(23C)(via) : Exempt incomes – Hospital – Application – Beyond time**

Application under section 10(23C)(via) filed beyond time. Accounts not maintained properly. No evidence regarding activities. Registration under section 80G and exemption under section 12A in prior years not conclusive. Rejection of application was justified.

*All India J. D. Educational Society v. DGIT (Exemptions) (2010) 48 DTR 353 / (2011) 338 ITR 218 / 237 CTR 9 / 198 Taxman 443 (Delhi)(High Court)*

**S. 10(23FB) : Exempt incomes – Venture capital fund – Income from other sources**

It was held that exemption claimed in respect of any income from any VCF prior to 1/4/2008 was exempt as the amendment to section 10(23FB), which restricted the exemption to income from investment by VCF, is with effect from 1/4/2008 and is prospective. (A. Y. 2006-07)

*ITO v. Kshitij Venture Capital Fund (2011) 131 ITD 290 / 10 ITR 136 / 140 TTJ 6 / 58 DTR 403 (Mum.)(Trib.)*

**S. 10(23FB) : Exempt incomes – Income of venture capital company – Interest**

Assessee trust has been registered under the provisions of Registration Act, 1908 and also registered under SEBI as per Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996. The assessee deposited certain amount on deposit with banks and earned interest on said deposits. The assessee contended that the entire income must be exempt. Assessing Officer held that investment in fixed deposit is in violation the conditions. The Tribunal held that the assessee Trust was registered under the provisions of Registration Act 1908, as well as under SEBI (Venture Capital Funds) Regulations, 1996 and hence interest income from fixed deposit will be exempt under section 10(23FB) of the Income-tax Act. The Tribunal held that it is only from the Assessment year 2008-09 onwards that the income from investment in specified undertakings would be exempt and other income will be taxable. (A.Ys. 2001-02 to 2005-06).

*ITO v. Gujarat Information Technology Fund (2011) 64 DTR 169 / 45 SOT 529 (Ahd.)(Trib.)*

**S. 10(23FB) : Exempt incomes – Venture Capital Companies and venture capital funds – Interest – Investment**

Interest income from FDR's was exempt for the A.Y. 2002-03. The words "from investment" having been substituted the words "set up to raise funds for investment", by the Finance Act, 2007, w.e.f. 1st April 2008, cannot be read in the earlier provisions. (A.Y. 2002-03)

*India Value Fund v. ACIT (2010) 37 DTR 169 / 129 TTJ 611 (Mum.)(Trib.)*

**S. 10(23G) : Exempt incomes – Investment – Infrastructure capital company – Change of name**

Change in the name of the entity at the time when the shares of such undertaking are sold does not affect the claim of exemption under section 10(23G). (A.Y. 2005-06)

*Jaykay Fineholdings (India) (P) Ltd. v. Addl. CIT (2010) 38 DTR 302 / 130 TTJ 227 (Mum.)(Trib.)*

**S. 10(26) : Exempt incomes – Scheduled Tribes – Migrated Member**

Member migrating from his place of origin in one area specified in section 10(26), to another area also specified therein, benefit of exemption is available. (A.Y. 2005-06)

*Pradip KR Taye and Others v. UOI (2010) 320 ITR 29 / 189 Taxman 483 / 35 DTR 87 / 229 CTR 381 (FB)(Gau.)(High Court)*

**S. 10(26AAA) : Exempt incomes – Sikkimese – Dividend – Interest – Revision – Condonation of delay – Retrospective amendment for granting relief [S. 264]**

In matters giving benefit to assessee, Department must avoid pedantic approach. Amendment made retrospectively exempting the interest and dividend income of Sikkimese, the Court held Commissioner should have condoned the delay in filing the application under section 264 and ought to have granted the relief. (A.Ys. 1997-98 to 2005-06)

*Danny Denzongpa v. CIT (2010) 46 DTR 129 / 235 CTR 449 / 194 Taxman 415 (Bom.)(High Court)*

**S. 10(26AAB) : Exempt incomes – Income of agricultural produce market – Local authority [S. 10(20)]**

Section 10(26AAB) inserted by the Finance Act, 2008 w.e.f. 1st April 2009 cannot be applied retrospectively w.e.f. 1st April 2003 and is applicable w.e.f 1st April 2009 and shall apply for the A. Y. 2009-10 and for the subsequent assessment years. Assessee were not entitled to exemption under section 10(26AAB) for the A.Ys. 2003-04 to 2008-09).

*CIT v. Agricultural Market Committee Tansuku & Ors. (2011) 337 ITR 299 / 63 DTR 119 / 245 CTR 182 (AP)(High Court)*

**S. 10(29) : Exempt incomes – Marketing authorities – Letting of godowns – Warehouses**

Income derived by the Marketing Authority only from letting of Godowns and warehouses are exempt, and not other receipts like interest from banks, on belated refund of advance etc. Held, that the words derived from has to be given restricted meaning and not wider meaning. (A.Ys. 1989-90 & 1990-91)

*Dy. CIT v. Tamilnadu Warehousing Corpn (2003) 84 ITD 51 (Chennai)(Trib.)*

**S. 10(33) : Exempt incomes – Dividend – Domestic Companies**

Exemption under section 10(33) is available only in respect of dividends which have been declared by the domestic companies on or after 1st day of June, 1997. (A.Y. 1998-99)

*Vanndra Agro Chem. Ltd. v. Dy. CIT (2006) 100 TTJ 1114 (Chd.)(Trib.)*

**S. 10(33) : Exempt incomes – Dividend – Management expenses**

Investment were made by the assessee in shares during course of carrying on business, proportionate management expenses were required to be deducted while computing dividend income for purpose of exemption under section 10(33). (A.Y. 2000-01)



*Southern Petro Chemicals Industries v. Dy. CIT (2005) 3 SOT 157 / 93 TTJ 161 (Chennai)(Trib.)*

**S. 10(38) : Exempt incomes – Capital gains – Shares – Security Transaction Tax [S. 45, 112]**

Assessee was a promoter–director of a company “PLL”. PLL issued shares for public subscription through initial public offer (IPO) as per SEBI guidelines, which permitted existing shareholders also to sell their shares in IPO for diluting their equity holding. Assessee sold certain shares of “PLL” and received certain amount as sale consideration. Assessee claimed that said gains were not includible in his total income. Assessing Officer did not allow the exemption on the ground that the assessee had not paid STT on said shares and the Shares of PLL were not listed on any stock exchange on the date of sale. The Tribunal confirmed the order of Assessing Officer and held that the assessee was liable to be taxed at 20 percent. (A.Y. 2006-07).

*Uday Punj v. Dy. CIT (2011) 133 ITD 354 / (2012) 145 TTJ 640 / 70 DTR 123 (Delhi)(Trib.)*

**S. 10(38) : Exempt incomes – Capital gains – Transfer of shares – Security Transaction Tax – Stock-in-trade [S. 112]**

Exemption under section 10(38) can be allowed only on sale of shares held as capital asset which has suffered Securities Transaction Tax (STT). If on the date of sale, shares are converted into stock-in-trade, exemption would not be available under section 10(38). Provisions of section 10(38) are applicable only to capital assets and not in case of business transaction. (A. Y. 2006-07).

*Alka Agrwal v. ADIT (2011) 48 SOT 493 (Delhi)(Trib.)*

**S. 10(38) : Exempt incomes – Long term capital asset – Loss – Set off**

Long term capital loss suffered prior to 1st Oct. 2004 cannot be set off against capital gain exempt under section 10(38) but has to be allowed to be carried forward. (A.Y. 2005-06)

*G. K. Ramamurthy v. Jt. CIT (2010) 2 ITR 139 / 129 TTJ 361 / 37 SOT 345 / 36 DTR 257 (Mum.)(Trib.)*

**Section 10A : Special provision in respect of newly established undertaking in Free trade zone, etc.**

**S. 10A : Newly established undertakings – Free trade zone – Loss of other units (including B/f loss) Set-off against sections 10A, 10B profits**

The issue before the High Court was whether the loss incurred by a non-eligible unit and the brought forward unabsorbed loss & unabsorbed depreciation of the eligible unit had to be set-off against the profits of the eligible unit before allowing deduction under section 10A/10B.

Held that (a) section 10A allows deduction “from the total income”. The phrase “total income” in section 10A means “the total income of the STP unit” and not “total

income of the assessee". Consequently, section 10A deduction has to be given before computing the "profits & gains of business" under Chapter IV. Though section 10A was amended to make it a "deduction" provision, it continues to remain in Chapter III and was not moved to Chapter VI-A. The result is that even now section 10A is in the nature of an "exemption" provision and the profits of the eligible unit have to be deducted at source level and do not enter into the computation of income.

(b) Section 10A(6) as amended by the FA 2003 w.e.f. 1.4.2001 provides that depreciation and business loss of the eligible unit relating to the AY 2001-02 & onwards is eligible for set-off & carry forward for set-off against income post tax holiday. This amendment does not militate against the proposition that the benefit of relief under section 10A is in the nature of exemption with reference to commercial profits. However, to give effect to the legislative intention of allowing the carry forward of depreciation and loss suffered in respect of any year during the tax holiday for being set off against income post tax holiday, it is necessary that a notional computation of business income and the depreciation should be made for each year of the tax holiday period. Such loss is eligible to be carried forward. But, as the income of the section 10A unit has to be excluded at source itself before arriving at the gross total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the section 10A profits does not arise.

*CIT v. Yokogawa India Ltd. (2012) 204 Taxman 305 / 246 CTR 226 / 65 DTR 170 (Karn.)(High Court)*

## **S. 10A : Newly established undertakings – Free trade zone – Competent authority**

### **FEMA – RBI**

The assessee made an application to the RBI on 7-10-2004 seeking extension of time for realisation of the export proceeds. The RBI granted approval in realisation of exports proceeds but said approval was issued in the context of the provisions of the FEMA and there was no formal approval was granted by the RBI under section 10A. The Tribunal held that once the assessee had applied for extension and had completed all the formalities and in response the RBI had taken the remittances on record, then non issuance of formal letter of approval by the RBI could not be held against the assessee, it must be held that the extension had been granted in substance and therefore the benefit of section 10A had to be allowed. The court upheld the order of the Tribunal. (A.Y. 2004-05).

*CIT v. Morgan Stanley Advantage Services (P) Ltd. (2011) 202 Taxman 40 / 62 DTR 351 / 245 CTR 121 / 339 ITR 291 (Bom.)(High Court)*

## **S. 10A : Newly established undertakings – Free trade zone – Local sales**

Section 10A provides for exemption only on profits derived on export proceeds received in convertible foreign exchange. Benefit cannot be extended to local sales made by units in special Economic Zone, whether as part of domestic tariff area sales or as inter unit sales within zone or units in other Zones. (A.Y. 2004-05).

*CIT v. Electronic Controls & Discharge Systems (P) Ltd. (2011) 202 Taxman 33 / 64 DTR 40 / 245 CTR 465 (Ker.)(High Court)*

**S. 10A : Newly established undertaking – Free trade zone – Reconstruction**

Assessee was a 100 percent captive centre providing software design and development services to its parent company. Assessee claimed benefit under section 10A from 1-1-2003 to 31-3-2003 after getting approval from Director of soft ware Technology Park of India (STPI) on 31-12-2002. Assessing authority declined to grant benefit under section 10A on ground that application filed before STPI was seeking approval to establish a new unit and not for recognizing an existing unit. In Appeal the CIT(A) and Tribunal has held that the undertaking of assessee in question was not formed by splitting up at an existing business and hence it was entitled to deduction under section 10A. High Court held that it was not a case of reconstruction.(A.Y. 2003-04).

*CIT v. Maxim India Integrated Circuit Design (P) Ltd. (2011) 202 Taxman 365 (Karn.)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Total turnover – Export turn over – Communication charges [S. 263]**

The Assessing Officer in the original assessment proceedings had not included the communication charges in the figure of total turnover for computing eligible deduction under section 10A. Commissioner passed the revision order under section 263. On appeal the Tribunal upheld the order of Commissioner. However, on merit, the Tribunal held that the communication charges had to be excluded from the total turnover for the purpose of computing the deduction under section 10A. The High Court held that when export turnover was component of total turnover and consequently, when telecommunication charges had been specifically excluded from export turnover, it being a component of total turnover, it stood to reason that telecommunication charges had also to be excluded from total turnover. Hence, the Tribunal was justified in directing the Assessing Officer to exclude communication charges out of total turnover for computing eligible deduction under section 10A. (A.Y. 2004-05).

*CIT v. Genpat India (2011) 203 Taxman 632 (Delhi)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Computation – Freight and insurance – Turnover – Foreign Exchange Fluctuation – Addition and disallowance**

Freight and insurance charges do not have an element of turnover and are to be excluded from the total turnover for the purpose of computing exemption under section 10A. Gain from foreign fluctuation realized within stipulated period forms part of the sale proceeds and is directly related with the export activities and as such gain should be considered as income derived from export activities eligible for exemption under section 10A, in the year in which export took place. Assessee is entitled to exemption, under section 10A with reference to addition of disallowance of PF/ESIC

payments as the plain consequence of the disallowance and add back made by the Assessing Officer is an increase in business profits of the assessee. (A.Y. 2003-04)  
*CIT v. Gem Plus Jewellery India Ltd. (2011) 330 ITR 175 / (2010) 42 DTR 73 / 233 CTR 248 / 194 Taxman 192 (Bom.)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Exempt incomes – Change in share holdings**

Even though the number of shares held by the assessee are less than 51% of the total shares issued by the assessee company, the original promoters continue to hold shares of the company carrying not less than 51% of the voting power and thus the ownership of the company was not transferred by any means within the meaning of sub section (9) of section 10A and therefore, the assessee company is right in claiming deduction under section 10A. Expln 1 to section 10A(9), is not retrospective and will apply only to those entities which for the first time got entitled to exemption under section 10A w.e.f. 1st April 2001. (A.Y. 2001-02)

*Zycus Infotech (P) Ltd. v. CIT (2011) 331 ITR 72 / (2010) 235 CTR 113 / 45 DTR 307 / 191 Taxman 13 (Bom.)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Manufacture or production – Blending of tea**

Blending and packing of tea for export in industrial unit in special economic zone amounts to manufacture or production of an article qualifying for exemption under section 10A, for the A.Y. 2004-05 even though the then existing provisions of section 10A, for the A.Y. 2004-05 did not contain definition clause. (A.Y. 2004-05)

*Girnar Industries v. CIT (2010) 36 DTR 402 / 187 Taxman 136 / 230 CTR 401 / 338 ITR 277 (Ker.)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Audit report – Export – Return**

Benefit of Section 10A would be available to the petitioner even though it did not file Audit Report along with the return but filed before the framing of the assessment.

*CIT v. WEB Commerce (India) P. Ltd. (2009) 318 ITR 135 / 178 Taxman 310 (Delhi)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Interest income – Derived from**

In case of interest income derived by the assessee from funds in connection with letter of credit, is not income derived from the profits of the business of the Industrial undertaking so as to be entitled to get the benefit of section 10A. (A.Y. 1985-86)

*CIT v. Menon Impex (P.) Ltd. (2003) 259 ITR 403 / 128 Taxman 11 / 180 CTR 40 (Mad.)(High Court)*

**S. 10A : Newly established undertakings – Free trade zone – Allocation of expenses**

Foreign Trade (Development and Regulation) Act, 1992, does not contain any provision overriding provisions of Income Tax Act, therefore, the assessee can get the exemption only as per section 10A of the Income Tax Act. Where travel expenses, telecommunication charges, professional charges and professional consultancy charges as reduced from "export turnover" bore no element of profit which would require allocation by apportionment, the said charges would stand to be excluded from computation of "Total Turnover" as well. (A.Ys. 2001-02 to 2004-2005)

*Dy. CIT v. IBS Software Services (P) Ltd. (2011) 129 ITD 21 / 137 TTJ 54 / 52 DTR 179 (Cochin)(Trib.)*

#### **S. 10A : Newly established undertakings – Free trade zone – Interest – Turnover – Freight**

Interest received from bank deposit and other income shall not form part of "profit from business" for the purpose of computation of deduction under section 10A. After substitution of sub section (4) of section 10A by Finance Act, 2001, total turnover for relevant assessment years shall comprise of total turnover of business carried on by eligible "undertaking" only and not total turnover of all units of assessee for the purpose of calculation of deduction under section 10A. For the purpose of calculating deduction under section 10A, export turnover has to be reduced by freight charges, telecommunication charges or insurance charges attributable to delivery of articles or things or computer software outside India or expenses if any incurred in foreign exchange, in providing technical services out side India. Commission charges that are deducted from export turnover should also be deducted from total turnover. (A.Ys. 2003-2004 to 2005-06)

*Miracle Software Systems India (P) Ltd. v. ACIT (2011) 44 SOT 203 / 59 DTR 333 / 140 TTJ 703 (Visakha.)(Trib.)*

#### **S. 10A : Newly established undertakings – Free trade zone – Interest – STPI – Total turnover**

Deduction under section 10A is not available for interest on Bank Deposit. When the amount to be proportioned did not include the unrealized sale proceeds, the same would also not be included in the total turnover under section 10A. When assessee excluded travel expenses telecommunication charges and professional consultancy charges in the computation of "export turnover", the same has also to be reduced from the figure of 'total turnover', for the purpose of section 10A. (A.Ys. 2001-02 to 2004-2005).

*Dy. CIT v. IBS Software Services (P) Ltd. (2011) 137 TTJ 54 / 52 DTR 179 / 129 ITD 21 (Cochin)(Trib.)*

#### **S. 10A : Newly established undertakings – Free trade zone – Adjustment of loss against taxable profit of other unit – Export turn over**

From Assessment year 2001-02 section 10A is no longer an exemption provision and it allows only deduction from total income, loss from 10A unit has to be adjusted against taxable profit of other unit after deduction under section 10A has been

allowed in respect of eligible units. Assessee had incurred data line cost being telecommunication charges in respect of its unit and same was included in export turnover for purpose of deduction under section 10A. Assessing Officer excluded the data line cost from export turnover. Since expenses incurred on development of software in India could not be considered as expenses attributable to delivery of computer software outside India, such expenses could not be excluded from export turnover. (A.Y. 2006-07).

*Capgemini India (P) Ltd. v. Addl. CIT (2011) 46 SOT 195 / 141 TTJ 33 (UO)(Mum.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Set off of losses – Non-eligible unit**

Deduction has to be made at the stage of computing the income under head “Profits & gains” and not at the stage of computing the gross total income. The deduction under section 10A attaches to the undertaking and not to the assessee. The losses of a non-eligible unit cannot be set off against the profits of an eligible unit and are eligible to be set-off against other income or to be carried forward. (A.Ys. 2003-04 & 2004-05)

*Scientific Atlanta v. ACIT (2010) 2 ITR 66 / 129 TTJ 273 / 37 DTR 46 / 38 SOT 252 (SB) (Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Interest – Derived from**

Interest earned on fixed deposits and miscellaneous income, is not profit derived by an undertaking from export, hence not exempt under section 10A. (A.Ys. 2003-04 & 2004-05)

*Global Vantage P. Ltd. v. Dy. CIT (2010) 1 ITR 326 / 37 SOT 1 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Allocation – Two periods [S. 80HHE]**

For the A.Y. 2003-04, assessee claimed under section 80HHE in respect of period 1-4-2002 to 13-1-2003 and further claimed deduction under section 10A, in respect of profits from 14-1-2003 to 31-3-2003 as the registration was obtained only from 14-1-2003. The Tribunal held that as the assessee computed profits for two periods on reasonable basis, the claim of assessee is allowed. (A.Ys. 2003-04 to 2005-06)

*ITO v. Vidya Tech Solutions (P.) Ltd. (2010) 35 SOT 25/1 ITR 705 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Unit outside STP**

There is no requirement in Notification No. 30 (RE) 1992-97 dt. 22-3-1994, that a particular unit must be located inside STP and it is enough if the unit situated at a particular location is notified as STP, in view of the said notification, assessee's unit located at Gurgaon with the approval of Government of India is entitled to exemption under section 10A. (A.Y. 2002-03)

*Xerox India Ltd. v. ACIT (2010) 127 TTJ 84 / (2009) 32 DTR 441 (Delhi)(Trib.)*



**S. 10A : Newly established undertakings – Free trade zone – Domestic sales**

Profits and gains on domestic sales not exceeding twenty five percent of total sales shall also be deemed to be profits and gains derived from export of articles qualifying deduction under section 10A. Where assessee company had made local sales of raw materials as well as of finished goods to its holding company, value of said sales was to be included in total sales for the purpose of calculating benefit of deduction under section 10A. (A.Y. 2001-02)

*T. Two International (P.) Ltd. v. ITO (2010) 122 ITD 255 / 3 ITR 353 / (2009) 122 TTJ 957 / 26 SOT 583 / 22 DTR 342 (Mum.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Unabsorbed business loss and depreciation – Carry forward and set off**

After the amendment with effect from April 1, 2001, onwards the brought forward loss pertaining to the specific undertaking eligible for deduction under section 10A are allowed to be carried forward and set off against the income of such undertaking in the future assessment year and setoff within the block period itself. (A.Ys. 2003-04, 2004-05)

*Global Vantage P. Ltd v. Dy. CIT (2010) 1 ITR 326 / 37 SOT 1 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export incentive**

Export incentive which are includible in the profits of the business of the undertaking are entitled to exemption under section 10A. (A.Ys. 2001-02 & 2002-03)

*Wipro Ltd. v. Dy. CIT (2010) 34 DTR 493 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export – customized data**

Assessee having provided the services of recruitment and training of software professionals to its parent company in USA by storing the relevant data in an electronic device and transmitting the same to USA for the use of the parent company, it is a customized electronic data with in the meaning of clause (I). The assessee is entitled to deduction in India under section 10A in respect of the income earned by it from its parent company for providing the said services. (A.Y. 2001-02)

*ITO v. Accurum India (P) Ltd. (2010) 126 ITD 69 / 34 DTR 301 / 128 TTJ 249 (TM)(Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Onsite development**

Payment made by assessee in foreign exchange to engineers employed on site for development of software could not be excluded from its export turnover for computing deduction under section 10A. (A.Y. 2004-05)

*Relq Software (P) Ltd. v. ITO (2010) 125 ITD 101 / (2009) 25 DTR 353 / 123 TTJ 856 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Business loss or unabsorbed depreciation loss – Non STPI unit**

Business loss or unabsorbed depreciation of non STPI unit of assessee could not be set off from its income of STPI unit for computing deduction under section 10A. (A.Y. 2004-05)

*Relq Software (P) Ltd. v. ITO (2010) 125 ITD 101 / (2009) 25 DTR 353 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export Oriented Unit – Computation – Brought forward loss and unabsorbed depreciation**

Brought forward loss and unabsorbed depreciation of earlier years to be set off before allowing deduction under section 10A. (A.Y. 2004-05)

*Intellinet Technologies India P. Ltd. v. ITO (2010) 5 ITR 96 / 48 ITR 129 / 134 TTJ 744 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Two Units**

Assessee having 3 STP units, suffered loss in 1 unit and had profit in other 2 units. Assessing Officer adjusted the loss against profit of other 2 units. Assessee contended that loss incurred in 1 unit be disregarded, and deduction under section 10A be granted in respect of profits of other 2 units.

Held, if the loss making unit is independent, and activities were not associated with other 2 units, then loss from such unit was to be independently calculated, and can not be adjusted against profit of other two units. (A.Ys. 2002-03, 2003-04)

*T Gate Global Solutions Ltd. v. ACIT (2010) 194 Taxman 83 (Mag.)(Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export of manufactured and traded goods**

Assessee is entitled to relief under section 10A on export of both manufactured goods as well as purchased goods. (A.Y. 2001-02)

*T. Two International (P) Ltd. v. ITO (2009) 122 TTJ 957 / 122 ITD 255 / 26 SOT 583 / 22 DTR 342 / 3 ITR 353 (Mum.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone (STPI)**

Held, assessee is entitled to exemption under section 10A as it was merely a case of shifting of business from one place to another and not a new business, and there is no violation of sub clauses (ii) & (iii) of section 10A(2), it only seeking continuation of exemption under section 10A. (A.Y. 2002-03).

*Paradigm IT (P) Ltd. v. Dy. CIT (2009) 180 Taxman 24 (Mag.)(Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Carry forward and set-off – unabsorbed depreciation**

In view of section 10A(6) by the Finance Act, 2003, unabsorbed depreciation relating to A.Y. 1993-94 and 1995-96 of an industrial unit located in free trade zone cannot be set-off against income of the unit for the A.Y. 2003-04.

*Phoenix Lamps Ltd. v. Addl. CIT (2009) 30 DTR 245 / 126 TTJ 945 / 29 SOT 378 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Turnover – Profit**

As the term Total Turnover and profits of the business are not defined in section 10A, then both the terms have to be understood as is given in section 80HHE, since formula in section 10A is same as prescribed for section 80HHE.

If the Export Turnover is arrived at after excluding certain expenses, then expenses has to be excluded from Total Turnover also.

*Tata Elexi Ltd. v. ACIT (2009) 184 Taxman 46 (Mag.)(Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Setting of Loss – Non STPI**

**[S. 70]**

Since 10A, was not forming part of sections mentioned in section 29, business losses of the undertaking whose income was not exempt under section 10A, cannot be set-off against profits of the undertaking whose income is exempt. Loss of the non STPI is allowed to be carried forward. (A.Ys. 2003-04 & 2004-05)

*ACIT v. Honeywell Technology Solutions Lab. Pvt. Ltd., ITA Nos. 344 & 345/Bang/2009,*

*dt. 4-8-2009, Bench – A – BCAJ P. 30, Vol. 41-B, Part 3, December 2009 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Splitting up or reconstruction**

Assessee having taken over the medical transcription unit from another company along with obligation of exports, etc., it is a case of purchase of business undertaking in view of circular no F. No. 15/S/63-ITA-1) dt. 13th Dec., 1963, it cannot be said to be a case of formation of undertaking by using assets previously used and, therefore, assessee is entitled to deduction under section 10A, more so as deduction has already been allowed to the assessee for two assessment years. (A.Y. 2004-05)

*ITO v. Heartland K. G. Information Ltd. (2009) 31 DTR 98 / 131 TTJ 216 (Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – New industrial undertaking – Substantial investment**

New Industrial Undertaking established by substantial investment in plant and machinery and manufacturing same article would not amount to splitting or reconstruction of the old unit and therefore, it would be entitled to the benefit under section 10A. (A.Y. 2002-03)

*ITO v. Servion Global Solutions Ltd. (2009) 308 ITR 375 (AT) 116 ITD 133 / 18 DTR 426 / 120 TTJ 1081 (Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Foreign exchange gain**

Foreign exchange gain is includible in the profits eligible for deduction under sections 10A & 10B. (A.Ys. 2001-02 to 2003-04)

*Sony India (P) Ltd. v. Dy. CIT (2008) 118 TTJ 865 / 114 ITD 448 / 14 DTR 228 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export – Service charges**

Service charges received by assessee for manufacturing jewellery for others on job work being operational income is eligible for exemption under section 10A. Service charges earned by assessee from job work contracts having direct and proximate connection with business of eligible undertaking would form part of total turn over for purpose of sub section (4) of section 10A. Service charges for job work received by assessee being its operational income is eligible for exemption under section 10A. (A.Y. 2001-02)

*Inter Classic Jewellery (I) (P) Ltd. v. ITO (2008) 3 DTR 339 / 114 TTJ 402 (Mum.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Software technology Park**

The assessee was in business of development of computer software. Its three units were located in Software Technology Parks at Bangalore, Chennai and Pune. The assessee had claimed deduction under section 10A in respect of the profit of the undertaking established in Software Technology Park. It was held that (i) telecommunication charges which were reduced for ascertaining the export turnover were also not to be considered for the purposes of total turnover, as total turnover is the sum total of export turnover and domestic turnover (ii) loss suffered by one industrial undertaking need not be adjusted against the profit of the other industrial undertaking (iii) the amount equal to the adjustments made by the assessee to the arm's length price, while filing the return of income, was eligible for deduction. (A. Ys. 2002-03 & 2003-04)

*Gare Global Solutions Ltd. v. ACIT, ITA Nos. 248 & 249 /Bang/2007, Bench – B, dt. 27-11-2007 – BCAJ P. 395, Vol. 39-E, Part 4, January 2008 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Foreign Currency**

Expenditure incurred in foreign currency is to be excluded from Export turnover and from total turnover to grant relief under section 10A. (A.Y. 2001-02)

*ITO v. Servion Global Solutions Ltd (2008) 117 TTJ 380 / 115 ITD 95 / 10 DTR 235 (Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export turnover – Expenditure – Total turnover**

While computing deduction under section 10A, if a certain expenditure is excluded from export turnover, same should be excluded from its total turnover also. (A.Ys. 2002-03, 2003-04)

*ACIT v. Infosys Technologies Ltd. (2008) 172 Taxman 134 (Mag.)(Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Export of software [S. 80HHE]**

Exemption under section 10A cannot be denied to the assessee simply because it has availed of deduction under section 80HHE in an earlier year. (A.Y. 2002-03)

*Dy. CIT v. Interra Software (I) Pvt. Ltd (2007) 112 TTJ 982 (Delhi)(Trib.)*

**S. 10A : Newly established undertaking – Free trade zone – Conversion in to private limited company – Part IX Companies Act, 1956**

Where the firm was entitled to exemption under section 10A, exemption could not be denied on its conversion into private limited company under Part IX of Companies Act, 1956, on the ground that company was separately granted recognition by STPI from a later date. (A.Y. 1999-2000)

*Kumaran Systems (P) Ltd. v. ACIT (2007) 106 TTJ 484 (Chennai)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Development – Software**

Development vis-à-vis sale of software sold through STP unit. Software designed and developed by assessee during the course of its business is eligible for deduction under section 10A.

(A.Y. 1997-98)

*Infosys Technologies Ltd. v. Jt. CIT (2007) 108 TTJ 282 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Conversion of firm in to company – Not transfer**

The assessee was a firm. During its existence as a firm it was in export of software and claiming deduction under section 80HHE. During the year the assessee registered itself as a company and later got registered as STP unit and claimed deduction under section 10A for the first time. The claim was rejected by the Assessing Officer. on the ground that conditions of sections 10A(2)(ii) and (iii) were not fulfilled and further assessee was also hit by section 10A(9).

The CIT(A) allowed the appeal. The Tribunal agreed with the CIT(A) that conversion of a firm into a company was not a transfer as held by Bombay High Court in case of *CIT v. Texspin Eng and Manufacturing Works (2003) 263 ITR 345 (Bom)(High Court)*). Therefore, there was no violation of any condition of sections 10A(2)(ii) and (iii). (A.Ys. 2002-03 to 2004-05)

*ITO v. Foresee Information Systems Pvt. Ltd., ITA No. 3014/Bang/2004, 1363-1364/Bang/2005, Bench-A, dt. 16-3-2007 - (2007) BCAJ P. 422, Vol. 39-D, Part 4, July 2007 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Close connection – Arrangement – Evidence [80-I(9)]**

In the absence of any evidence and cogent reason showing close connection and arrangement as envisaged in s.80-I(9) addition made by Assessing Officer by invoking s. 10A(6) r/w s.80-I(9) was not sustainable. (A.Ys. 1992-93, 1995-96, 1996-97)

*Digital Equipment India Ltd. v. Dy. CIT (2006) 103 TTJ 329 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Manufacture – Stitching of button – Labelling-Ironing**

It was held that stitching of buttons, ironing, labelling etc. done by company situated in EPZ on the garment received by it from other party, is a manufacturing process against which claim under section 10A is justifiable. (A.Y. 2001-02)

*ITO v. Ektara Exports (P) Ltd. (2006) 152 Taxman 18 (Mag.)(Kol.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Foreign Exchange gain**

Deduction under section 10A has to be allowed in respect of profit on account of foreign exchange gain.

*Renaissance Jewellery P. Ltd. v. ITO (2005) 4 SOT 50 / (2006) 104 TTJ 382 / 101 ITD 380 (Mum.) (Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Royalty – Export of software**

Royalty earned from export of software is entitled to relief under section 10A. (A.Ys. 1998-99 & 1999-2000)

*Wipro Limited v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – STPI Unit – Export of software**

Merely because assessee was an old STPI unit and had earlier claimed deduction under section 80HHE, its claim for exemption under section 10A in year under consideration could not be denied. (A.Ys. 2000-01 & 2001-02)

*Legato Systems India (P.) Ltd. v. ITO (2005) 2 SOT 719 / 93 TTJ 828 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – Interest – Margin money**

Assessee needed funds to run industrial undertaking and bank provided funds on condition of depositing sufficient margin money with bank in form of fixed deposit, interest earned on such fixed deposit was eligible for deduction under section 10A.

*Samtex Fashions Ltd. v. ACIT (2005) 92 ITD 535 / 92 TTJ 59 (Delhi)(Trib.)*

**S. 10A : Newly established undertakings – Free trade zone – STP Unit – Circular**



Held, that CBDT circular dt 23.11.1994 does not overrule specific language of Sec 10A.

*Infotech Enterprises Ltd. v. CIT (2003) 85 ITD 325 / 80 TTJ 589 (Hyd.)(Trib.)*

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

**S. 10B : Newly established hundred per cent export oriented undertakings – Actual export**

Assessee was hundred percent export oriented undertaking (EOU), which commenced production prior to 1st April 1994. Exemption under section 10B was allowable even if its export was less than seventy five percent as under the pre-amended provisions, the benefit was available by merely obtaining a certificate of EOU under the IDR Act. (A.Y. 1999-2000)

*CIT v. Baehal Software Ltd. (2011) 240 CTR 316 / 54 DTR 185 (Karn.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Job work done by sister concern – Outsourcing job**

Assessee, an EOU, approved by NEPZ authorities, being engaged in manufacture of articles and exporting the same cannot be denied deduction under section 10B only because it was getting some job work done from its sister concern. (A.Y. 2003-04).

*CIT v. Continental Engines Ltd. (2011) 60 DTR 40 / 338 ITR 290 (Delhi)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Export out of India – Delivering machines in India to 100 percent EOU**

Transaction of manufacturing machines in India by EOU and delivering them in India to another 100 percent EOU, which is alleged to be the agent of a foreign buyer does not amount to "export out of India" either under the Customs Act or under the Income Tax Act, hence the assessee is not entitled to exemption under section 10B. (A.Y. 2007-08)

*Swayam Consultancy (P) Ltd. v. ITO (2011) 63 DTR 205 / 336 ITR 189 / 245 CTR 583 (AP)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Computation – Brought forward unabsorbed depreciation [S. 32(2)]**

Deduction under section 10B has to be granted with reference to the profit of the industrial unit computed under the provisions of the Act, which includes set off of unabsorbed depreciation carried forward from earlier years. (A.Ys. 2001-02 to 2005-06).

*CIT v. Patspin India Ltd. (2011) 62 DTR 364 / 203 Taxman 47 / 245 CTR 97 (Ker.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Set off of loss amended section w.e.f. 1-4-2001**

Loss arising in a 100% Export Oriented Unit cannot be disallowed to be set off against other normal business profits of assessee since provisions of section 10B of the Act provide for deduction and not exemption as per the amended section with effect from 1st April 2001. (A.Y. 2004-05)

*Hindustan Unilever Ltd. v. Dy. CIT (2011) 237 CTR 287 / (2010) 38 DTR 91 / 191 Taxman 119 / 325 ITR 102 (Bom.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Manufacture or production – Blending of tea – Processing**

Assessee engaged in blending and packing of tea for export which is recognized as a 100 per cent export oriented unit is entitled to exemption under section 10B notwithstanding deletion of the definition of “manufacture” w.e.f. 1st April 2001, from section 10B under which “processing” was covered by “manufacture”. (A.Ys. 2001-02, 2002-03)

*Tata Tea Ltd. v. ACIT (2010) 42 DTR 251 / 189 Taxman 303 / 234 CTR 90 / 338 ITR 285 (Ker.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Development of computer software – Plant and machinery**

Assessee, an exporter of computer software was using old plant & machinery/infrastructure of another concern to develop its software. The Assessing Officer rejected the assessee's claim under section 10B on this ground that the assessee was using old plant & machinery/infrastructure of another concern. Held that since the instant case was not a case of manufacture of any article but development & creation of intellectual property namely software programme, and the essential / main inputs for such activity were that of personnel belonging to assessee and their intellect, and hence, use of computers was not significant. Therefore assessee was entitled for deduction under section 10B. (A.Y. 2002-03)

*CIT v. Teehdrive (I) P. Ltd. (2010) 186 Taxman 208 / 39 DTR 179 / 232 CTR 117 (Delhi)(High Court)*

*Editorial:- CIT v. Teehdrive (India) (P) Ltd. (2010) 124 ITD 249 / 122 TTJ 264 / 21 DTR 52 (Delhi)(Trib.) affirmed.*

**S. 10B : Newly established hundred per cent export oriented undertakings – Manufacturing – Processing Stone – Marble**

Activity of processing stone, marble, etc. was held to be manufacturing activity eligible for deduction under section 10B of the Act.

*CIT v. Ramsons Organics Ltd. (2009) 31 DTR 83 / 228 CTR 502 / 189 Taxman 393 (Delhi)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Interest – Sister concern**

Language of section 10B, provides for exemption with respect to any "profits and gains" of business and profession and same is not confined to "profits and gains" of business provided under section 14(D), hence, interest income received by assessee from its sister concern would fall within expression "profits and gains" and assessee would be entitled to exemption under section 10B in respect of such interest income. (A.Ys. 1993-94, 94-95)

*CIT v. Hycron India Ltd. (2009) 185 Taxman 70 / 210 Taxation 289 / 219 CTR 288 / 308 ITR 251 / 13 DTR 13 (Raj.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Production – Cutting – Polishing – Sizing – Granites**

Activity of cutting, polishing and sizing of granites amounts to production in case of assessee engaged in activity entitled to exemption under section 10 B of the Act. (A.Y. 2001-02)

*CIT v. Fateh Granite (P) Ltd. (2009) 20 DTR 257 / 222 CTR 638 / 314 ITR 32 (Bom.)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Audit report – Directory not mandatory**

Filing of Audit Report under section 10B(5) along with the return is directory and not mandatory.

*CIT v. Web Commerce (I) P. Ltd. (2008) 178 Taxman 310 / 318 ITR 135 (Delhi)(High Court)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Change of ownership of unit – Reconstruction of existing unit**

Firm converted into company, change of ownership of unit is not reconstruction. Hence, deduction under section 10B is available. (A. Y. 2007-08).

*ITO v. Veto Electropowers (2011) 8 ITR 76 / 56 DTR 313 (Jp.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Export turnover – Software – Foreign branch**

Expenses incurred in connection with development of software by the employees at foreign branch should not be excluded from the export turnover for computing deduction under the section 10B. (A. Y. 2003-04)

*Zylog Systems Ltd. v. ITO (2011) 128 ITD 105 / 135 TTJ 129 / 7 ITR 348 / 49 DTR 1 (SB) (Chennai)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Option – Declaration**

If an assessee files a declaration to avail option of not claiming deduction under section 10B, then provisions of section would not be applicable for any of the relevant

assessment year. Filing of declaration is mandatory and time limit is directory. (A.Y. 2003-04)

*Wipro BPO Solutions Ltd. v. Dy. CIT (2011) 44 SOT 353 (Bang.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Computation – Transaction with related concern [S. 80IA(10)]**

Assessee was engaged in manufacturing of precious and semi precious stones. GP rate assessed was much higher as compared to another concern i.e. V.R. Exports. Assessing Officer clubbed the turnover of both the concerns and determined the average GP rate after considering the direct expenses and reduced deduction under section 10B. The Tribunal held that since there is no business between the assessee and VR Exports, provisions of section 80IA(10) are not applicable and net profit rate of the two concerns cannot be apportioned in the ratio of turnover of both concerns. (A.Y. 2005-06).

*ITO v. Kanchan Tara Exports (2010) 47 DTR 420 / (2011) 138 TTJ 592 (Jp.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Splitting up or reconstruction of existing business – Lease of undertaking**

Assessee company claimed the deduction under section 10B on the basis of the lease arrangement between the assessee company and the predecessor, the Tribunal held that such claim of benefit under section 10B for the balance unexpired period was not allowable because the claim was not based on the establishment of new industrial undertaking. (A. Ys. 2006-07 & 2007-08).

*Synergies Casting Ltd. v. Dy. CIT (2011) 57 DTR 503 / 139 TTJ 627 (Hyd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Export of computer software – Back office operation – Computation – Transaction with related concerns [S. 80IA(10)]**

Activities of software programming carried on by the assessee company to render quality and testing assurance services to foreign clients and transmitting the same through internet are in the nature of back office operations covered by CBDT Notification no 890 (E) dt 26th September, 2000 issued for the purpose of Explanation 2 to section 10B and therefore, assessee company registered as a 100 percent EOU with STPI is entitled to deduction under section 10B. The assessee company had raised the bills for the services rendered by it in consonance with the terms of agreement settled between it and its clients from time to time and STPI having certified such services, it cannot be said that profits shown by the assessee are on the higher side and therefore, profits of the assessee company could not be reworked by applying the provisions of section 80IA(10) for the purpose of allowing exemption under section 10B. (A.Ys. 2005-06 to 2007-08).

*Bebo Techlogies (P) Ltd. v. Jt. CIT (2011) 57 DTR 402 / 139 TTJ 428 (Chd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – ‘Manufacturing’ includes ‘any Process’ – Conversion of gherkin in to gherkin pickles – Manufacture – Law applicable when business started**

Assessee agricultural products processing company was engaged in manufacturing of gherkin pickles by purchasing raw gherkin and putting them through various processes. Assessing officer held that the assessee is not doing the manufacturing hence not entitled to exemption under section 10B. The Tribunal held that the assessee started its business on 1-4-1999, and current assessment years fell within the permissible period of 10 years, therefore the provision of section 10B as it stood before its substitution, section 10B and explanation thereto had categorically held that manufacture include any ‘process’, therefore assessee is entitled exemption under section 10B. (A.Ys. 2005-06 to 2007-08)

*Sterling Agro Products Processing (P) Ltd. v. ACIT (2011) 48 SOT 80 (Chennai)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Carry forward of losses of earlier Years**

Brought forward losses are to be adjusted against total income of relevant assessment year and, it is out of balance income only that deduction under section 10B can be granted. (A.Y. 2003-04)

*Sword Global (I) (P) Ltd. v. ITO (2010) 122 ITD 103 / (2008) 13 DTR 569 / 119 TTJ 427 (Chennai)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Income derived – Interest income on FDR**

Interest income on FDRs and surplus funds could not be held to have been derived from export of information technology services. (A.Y. 2005-06)

*Tricom India Ltd. v. ACIT (2010) 36 SOT 302 (Mum.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Computer programmes [S. 10BB]**

Technical data received from overseas clients on basis of which designs drawings and layouts created by assessee’s engineers using computer software is “management of electronic data” and the assessee is entitled to exemption under sections 10B, 10BB. (A.Y. 1997-98)

*Dy. CIT v. Tecnimont ICB Pvt. Ltd. (2010) 2 ITR 480 / (2009) 123 TTJ 680 / 119 ITD 151 / 23 DTR 261 / (2008) 25 SOT 133 (Mum.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Profit on forward contracts in Foreign Exchange [S. 28, 43(5)]**

Exporter having entered in to forward contracts in respect of foreign exchange receivable as a result of export of turnover, the profit from forward contract could not be included in the profits of business of the undertaking for the purpose of computing deduction under section 10B. Such profit assessable as profit from speculation business. (A.Y. 2005-06)

*ACIT v. K. Mohan & Co. (Exports) (P) Ltd. (2010) 39 DTR 97 / 130 TTJ 719 / 126 ITD 59 / 7 ITR 507 (Bang.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Brought forward Loss and unabsorbed depreciation**

Benefit of section 10B has to be allowed to an assessee before setting-off brought forward loss and unabsorbed depreciation. (A.Ys. 2001-02 to 2005-06)

*Patspin India Ltd. v. CIT (2010) 38 SOT 369 / 132 TTJ 227 / 42 DTR 550 (Cochin)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Export Turnover – Foreign expenditure for self purpose – Turnover retained abroad**

The assessee was engaged in the business of development of software by way of on site and off shore development and had a branch in USA for which separate accounts were maintained. The assessee claimed deduction under section 10B in respect of the exports of software made. In computing the export turnover, the Assessing Officer held that the amount of ` 3.33 crores incurred by the USA branch constituted "expenses incurred in foreign exchange in providing technical services outside India" and had to be deducted from the export turnover as provided under section 10B. He also held that the turnover of the USA branch to the extent of ` 15.14 crores had to be reduced from the export profits as it had not been received in convertible foreign exchange in India within the period specified in section 10B(3). On appeal CIT(A) upheld the claim of assessee with regard to ` 15.14 crores while rejected the claim with regard to ` 3.33 crores. The cross appeals of the parties were referred to Special Bench. The Special Bench referring the circular No. 621 dated 19-12-1991 and 694 dated 23-11-1994 held that expenditure incurred on site abroad is eligible for deduction under section 10B. As regards the turnover of ` 15.14 retained abroad, one limb of the Government cannot be allowed to defeat the operation of other limb. While section 10B requires the foreign exchange to be brought to India within the prescribed period, the RBI permits the assessee to retain the said foreign exchange abroad for specific purpose. RBI is the competent authority for section 10B as well. The result is that reinvestment of export earning is deemed to have been received in India and thereafter to have been repatriated abroad. (Principle in J. B. Boda & Co. (1998) 233 ITR 271 (SC) followed). (A.Y. 2003-04)

*Zylog Systems Ltd. v. ITO (2011) 49 DTR 1 / 7 ITR 348 / 128 ITD 105 / 135 TTJ 129 (SB) (Chennai)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Convertible foreign exchange – Investment in equity shares**

In order to avail deduction under section 10B sale proceeds must be received in convertible foreign exchange, sale proceed received in convertible foreign exchange means "actual receipt" and not deemed receipt. Amount received by an assessee in



form of investment in equity shares in foreign exchange cannot be considered to be received in form of convertible foreign exchange. (A.Y. 2004-05)

*ACIT v. Bodhtree Consulting Ltd. (2010) 41 SOT 230 / 46 DTR 220 / 134 TTJ 214 (Hyd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Machinery previously used – Takeover of undertaking**

Assessee having used the machinery which was previously used by another company prior to its transfer and takeover by the assessee, section 10B(9) is attracted to the facts of the case and therefore, assessee is not entitled to exemption under section 10B for the A.Ys. 2002-03 and 2003-04, however, assessee is entitled to exemption for A.Y. 2004-05 as the provision contained in section 10B(9) did not exist on the statute book in that year. (A.Ys. 2002-03 to 2004-05)

*ITO v. Heartland Delhi Transportation & Services (P) Ltd. (2010) 45 DTR 239 / 133 TTJ 682 (Delhi)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Deduction – Delay in filing return [S. 139(1)]**

Proviso four to section 10B(1), which prohibits deduction if the return is not furnished on or before the due date specified under section 139(1), is directory and not mandatory therefore, relief can be granted by the appellate authority in case, there was genuine and valid reason for the marginal delay in filing of return. (A.Y. 2006-07)

*ACIT v. Dhir Global Industrial (P) Ltd. (2010) 45 DTR 290 / 133 TTJ 580 / 43 SOT 640 (Delhi)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Uncoding and decoding an eligible EOU**

Assessee having obtained order from the Development Commissioner stating that the assessee has been abounded and does not enjoy the status of 100% EOU, and the same having being produced before Assessing Officer though not filed before the due date of filling of return as required by section 10B(8), the assessee has to be held as opted out of the benefit of section 10B and entitled to carry forward the loss. (A.Y. 1999-2000)

*Torry Harris Sea Foods (P) Ltd. v. Dy. CIT (2009) 28 DTR 165 / 125 TTJ 280 (Cochin)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Export – Total turnover for computation of exemption [S. 10B(4)]**

Expenses on freight, telecommunication charges or insurance incurred outside India or expenses incurred in foreign exchange for providing technical services outside India are required to be excluded from Export Turnover as defined in Explanation 2 below section 10B and similarly, in view of the principle of parity such expenses have to be excluded for the purpose of computing 'Total Turnover' while applying the provisions of section 10B(4) of the Act.

*ITO v. Advent Development Centre (India) & Others (2009) 313 ITR (AT) 353 (Chennai)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Option to claim – Exemption – Directory not mandatory**

The procedure laid down to avail/or not to avail concession provided under section 10B are just directory and not mandatory. Held, that letter filed for withdrawing the claim during assessment proceeding cannot be rejected while framing assessment under section 143(3). Also held that Assessing Officer cannot thrust exemption under section 10B. (A.Ys. 2000-01 to 2004-05)

*Techtran Polylenses Ltd. v. ITO 177 Taxman 28 (Mag.)(Hyd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Separate books of account – Not mandatory**

Exemption under section 10B in respect of 100% export-oriented unit. One out of three units eligible. The section does not require the maintenance of separate books of account in order to be eligible for exemption. (A.Ys. 1997-98, 1998-99)

*Dy. CIT v. Arabian Exports Ltd., (2007) 109 TTJ 440 (Mum.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Declaration under section 10B(7) is directory not mandatory**

- (a) Section 10B is a code by itself as it contains scheme of taxation formulated by the Govt. for taxability of units set up in the export processing zone.
- (b) Exemption under section 10B is available for five consecutive assessment years falling within the block of eight years beginning from the year in which the undertaking commences commercial production as specified by an assessee at his option. Therefore, once the period of five years is specified, it is irrevocable and therefore, the assessee cannot thereafter seek to change the five years period. Only condition is that the exemption cannot extend beyond the period of eight years from initial assessment year.
- (c) The requirement of filing declaration as per the provisions of section 10B(7) is directory in nature and not mandatory and therefore, it is open to an assessee not to claim tax holiday benefit under section 10B for any one year or more of the relevant block of five assessment years by filing declaration under section 10B(7). If the assessee opts out of the provisions of section 10B by filing declaration under section 10B(7) during the course of assessment proceeding of the relevant assessment year then in such case the revenue could not thrust the exemption upon the assessee. (A.Ys. 1996-97 to 1998-99)

*Moser Baer India Ltd. v. Jt. CIT (2007) 108 ITD 80 / 110 TTJ 807 / 11 SOT 715 (Delhi)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Deemed export of EOU – Sale to another EOU**

Sale of goods by one EOU to another at the relevant time was deemed as export and, therefore, assessee, an EOU was entitled for exemption under section 10B on sale of goods to another EOU. (A.Y. 1999-2000)

*ITO v. Anita Synthetics (P) Ltd. (2006) 100 TTJ 277 (Ahd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Reconstruction – Change in ownership**

Continuity of business structure & continuity of business activity is to be seen and not the ownership. In other words subsequent change in ownership does not amount to 'reconstruction' within the meaning of section 10B. (A.Ys. 2000-01 & 2001-02)

*Techbooks Electronics Services Pvt. Ltd. v. Addl. CIT (2006) 100 ITD 125 / 104 TTJ 306 (Delhi)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Splitting – Reconstruction**

Ownership, management and control of the assets of the business having continued to vest in the hands of same assessee both prior to and subsequent to its being accorded approval as EOU, it could not be said that the unit was formed by splitting/reconstruction of an existing unit. (A.Y. 1999-2000)

*ITO v. Anita Synthetics (P) Ltd. (2006) 100 TTJ 277 (Ahd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Receipt from Insurance company – Eligibility**

In order to consider a receipt under section 10B, primary requisite is that it should be a profit or gain and, therefore, amounts received by an export oriented unit from insurance company on account of loss of goods being not profit and gain, cannot be claimed as exempt under section 10B. (A.Y. 1996-97)

*Srinivasa Cystine Ltd. v. Jt. CIT (2005) 92 ITD 460 / 93 TTJ 622 (Hyd.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Professional recruiting agency**

Exemption is not allowable to assessee with reference to revenue derived from services rendered as a professional recruiting agency. (A.Ys. 1997-98 to 1999-2000)

*Cybertech Systems & Software Ltd. v. Dy. CIT (2005) 3 SOT 121 / 106 TTJ 257 (Mum.)(Trib.)*

**S. 10B : Newly established hundred per cent export oriented undertakings – Interest income – Margin money**

Deduction under section 10B is not allowable on interest income earned by export oriented unit from margin money deposited with bankers for obtaining letter of credit for import of raw materials. (A.Y. 1997-98)

*Orchid Chemicals & Pharmaceuticals Ltd. v. Jt. CIT (2005) 97 ITD 277 / 98 TTJ 32 (Chennai) (Trib.)*

**S. 10B(6) : Newly established hundred per cent export oriented undertakings – Depreciation – Unabsorbed – Carry forward and set off**

Unabsorbed depreciation of earlier assessment years in which no deduction was claimed under section 10B is available for set off against other taxable income of the subsequent assessment years. (A.Ys. 2001-02, 2002-03, 2004-05).

*Patspin India Ltd. v. Dy. CIT (2011) 51 DTR 57 / 129 ITD 35 / 136 TTJ 377 (TM)(Cochin)(Trib.)*

**S. 10B(6) : Newly established hundred per cent export oriented undertakings – Depreciation – Unabsorbed – Carry forward and set off – Income from other sources [S. 32(2), 56, 72(2)]**

Assessee being entitled to deduction under section 10B upto Asst. Year 2005-06, provisions of section 10B(6) are not applicable in Asst. Year 2004-05 and therefore unabsorbed depreciation brought forward from Asst. Year prior to Asst. Year 2000-01 can be set off against business income or against any other head of income including income from other sources. (A.Y. 2004-05).

*Dy. CIT v. Akay Flavours & Aromatics (P) Ltd. (2011) 55 DTR 1 / 130 ITD 41 / 138 TTJ 513 (TM) (Cochin)(Trib.)*

**Section 11 : Income from property held for charitable or religious purpose**

**S. 11 : Charitable or religious purposes – Registration of charitable trust [S. 12A]**

The registration of trust under section 12A of the Income-tax Act, once done is a fait accompli and the Assessing Officer cannot thereafter make further probe into the objects of the Trust. (A.Ys. 1991-92, 1992-93)

*ACIT v. Surat City Gymkhana (2008) 300 ITR 214 / 170 Taxman 612 / 216 CTR 23 / 5 DTR 115 (SC)*

**S. 11 : Charitable or religious purposes – Registration [S. 12, 12A]**

For a trust or an institution to claim benefit under section 11(1)(a), of the Income Tax Act, 1961, registration of Trust or institution under section 12A, is a condition precedent. (A.Ys. 1977-78, 1980-81, 1984-85)

*U. P. Forest Corporation & Anr. v. Dy. CIT (2007) 213 CTR 473 / 165 Taxman 533 / (2008) 297 ITR 1 (SC)*

**S. 11 : Charitable or religious purposes – Application of income – Depreciation**

Depreciation claim is nothing but application of income, hence, depreciation should be reduced from the income for determining the percentage of funds which had to be applied for the purposes of the trust. (A. Y. 2005-06)

*CIT v. Tiny Tots Education Society (2011) 330 ITR 21 (P&H)(High Court)*

### **S. 11 : Charitable or religious purposes – Set off of loss**

The excess of application of the current year / past year can be set off against the income of subsequent/current year.

*Raghuvanshi Charitable Trust and others v. DIT (2011) 221 Taxation 250 / 197 Taxman 170 / (2010) 44 DTR 223 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Application of income – Legal expenses [S. 12, 37(1)]**

Legal expenses incurred by the assessee Society to defend its member in contempt of Court Proceedings cannot be said to be for promoting the objects of the association nor for the benefit of the association, therefore, could not be allowed as deduction. (A.Ys. 2004-05, 2005-06 and 2006-07).

*CIT v. IAS Officers Association (2011) 335 ITR 254 / 241 CTR 574 / 56 DTR 239 (Karn.)(High Court)*

### **S. 11 : Charitable or religious purposes – Property sub-let**

In order to carry out the charitable activity of the trust in effective manner if the property of the trust is sub-let and rental income is received thereon the exemption under section 11 cannot be denied by invoking provisions of section 11(4A) of the Income-tax Act, 1961. (A.Y. 1991-92).

*DIT (Exemption) v. Sahu Jain Trust (2011) 56 DTR 402 / 243 CTR 131 (Cal.)(High Court)*

### **S. 11 : Charitable or religious purposes – Advance of money to treasurer [S. 12A, 13]**

Assessee a registered society under section 12A, advanced certain sum without any security to its treasurer. It could not furnish any detail about rate of interest and mode of recovery of loan and same was also not reflected in its books as well as audit report except resolution which could not be relied upon. It was a clear case of violation of section 13 and exemption had been rightly denied to it. (A. Y. 2001-02).

*CIT v. Audh Educational Society (2011) 203 Taxman 166 (All.)(High Court)*

### **S. 11 : Charitable or religious purposes – Depreciation – Application of income – Expenditure incurred in earlier year [S. 32]**

Assessee charitable trust is entitled claim for depreciation on the assets owned by it. If depreciation is not allowed as a necessary deduction in computing the income of a charitable trust, then there would be no way to preserve the corpus of trust. Expenditure incurred in the earlier year can be met out of the income of the subsequent year and utilization of such income for meeting the expenditure of the earlier year would amount to such income being applied for charitable or religious purposes. (A.Ys. 2004-05 to 2006-07).

*CIT v. Shri Gujarati Samaj (Regd.) (2011) 64 DTR 76 (MP)(High Court)*

### **S. 11 : Charitable or religious purposes – Contribution from institutional members [S. 13(1)(c)]**

Assessee was set up under sponsorship of Government of India for sole purpose of providing physical environment to various institutions for carrying out their activities. Assessee claimed the exemption under section 11 which was granted by the Assessing Officer. Commissioner under section 263 set aside the order of Assessing Officer on grounds that institutional members fell within category of substantial contributors in terms of section 13(3) and since space in superstructure had been allotted to organizations below market price, provisions of section 13(1)(c) read with section 13(3)(b) were attracted and therefore the assessee was not entitled to exemption. The Tribunal reversed the finding of Commissioner. On appeal the Court held that in view of fact that funds received from institutional members were shown in balance sheet of assessee as liabilities and not as contributions towards "corpus", there is no violation of section 13(3). Since allotment of space was subject to approval of Government and was based on a self financing model, there could be no question of allotment of super structure at price below market price hence there is no violation of section 13(1)(c). (A. Y. 1990-91).

*DIT v. India Habitat Centre (2011) 203 Taxman 510 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Application of income – Construction of hospital building**

Assessee trust established for the purpose of running hospitals, nursing home etc., spending the income for construction of hospital building, is an application of income for the objects of running hospitals and entitled to exemption. (A.Y. 1985-86)

*CIT v. Mool Chand Sharbati Devi Hospital Trust (2010) 41 DTR 153 / 190 Taxman 338 / 234 CTR 197 (All.)(High Court)*

### **S. 11 : Charitable or religious purposes – Capital assets – Depreciation [S. 32]**

Depreciation is allowable on capital assets from income of charitable trust for determining the quantum of funds which have to be applied for the purpose of the trust in terms of section 11. (A.Y. 2005-06)

*CIT v. Market Committee, Pipli (2011) 238 CTR 103 / (2010) 45 DTR 381 / 330 ITR 16 (P&H)(High Court)*

### **S. 11 : Charitable or religious purposes – Borrowed funds**

The trust, the trust borrowed fund from the Bank for augmenting Income in order to carry out the objectives of the trust. The capital asset built with borrowed fund, under no circumstances, could be regarded to be outside the scope of its objectives. If raising of loan does not stand in the way of its charitable activities the repayment thereafter must be treated as application of its income. Hence, trust was eligible for exemption under section 11 of the I.T. Act, 1961. (A.Y. 1993-94)

*DIT (Exemption) v. Govindu Naicker Estate (2009) 315 ITR 237 / 227 CTR 283 / 30 DTR 138 (Mad.)(High Court)*



### **S. 11 : Charitable or religious purposes – Activities remained same**

Where the activity of the trust / institution was held to be charitable since inception by the assessing authorities and the activity carried out by the institution remained the same during the current year. The action of the assessing officer treating the same as not a charitable activity was held to be not justified. (A.Y. 1994-95)

*Dy. CIT v. M.P. Madhyam (2009) 31 DTR 15 (MP)(High Court)*

### **S. 11 : Charitable or religious purposes – Renting of building**

The income derived from renting out the building was used for repayment of loans with the ultimate object of applying the income, after the loans had been fully repaid, towards charitable objects of the trust. Therefore the application of rental income for the repayment of loan was towards charitable object. Further, the rent received by the trust was more than the standard rent as computed under the rent control laws, as such, no benefit was derived by any interested person, therefore provisions of section 13(1)(c) were also not attracted. (A.Ys. 2002-03, 03-04)

*DIT (Exemption) v. Span Foundation (2009) 17 DTR 283 / 178 Taxman 436 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Delay in filing Form No. 10 [S. 139(1)]**

The CIT rejected the application for condonation of delay in filing Form No. 10, before the expiry of time allowed under section 139 (1) of the Act, being notice for accumulation of income by the trust. On writ filed by the assessee trust the High Court considering the fact that the assessee was a State Government undertaking and has been registered under section 12A of the Act since many years and also the fact that the delay in filing Form No. 10 was because the chartered accountant of the trust was not able to finalize the accounts in time, the High Court quashed the order of the CIT and directed him to pass appropriate orders. (A.Y. 2000-01)

*Kerala Rural Employment & Welfare Society v. ADIT & Anr. (2009) 18 DTR 300 / 312 ITR 51 / 184 Taxman 93 (Ker.)(High Court)*

### **S. 11 : Charitable or religious purposes – Breach of terms of trust deed**

Assessing Officer denying benefit of exemption to a charitable cum religious trust on ground that trust violated terms of trust deed. It was held that breach of conditions would not disentitle assessee from getting benefits which it has been getting in previous years. (A.Y. 1981-82)

*CIT v. Karimia Trust (2008) 302 ITR 57 / 218 CTR 670 (Jharkhand)(High Court)*

### **S. 11 : Charitable or religious purposes – Order giving effect to ITAT – Assessing Officer cannot reopen the entire assessment**

In the present case the assessee incurred certain expenditure on a conference, the Assessing officer disallowed the expenditure relating to conference. However, the Assessing officer held that the assessee was entitled to exemption under section 11 of

the Act. The Tribunal set aside the issue before it with regard to allowability of conference expenses, with certain directions for verifications. While giving effect to the Tribunal order the Assessing Officer however reopened the entire assessment and concluded that the assessee was not eligible for deduction under section 11 of the Act. On appeal the High Court held so far as the issue for exemption under section 11 was concerned it was already decided by the Assessing officer in his first assessment order and as such, that issue could not be reopened while giving effect to the order of the Tribunal. While giving effect to the order of the Tribunal, the Assessing Officer has to restrict himself only to the issue of allowability or not of the conference expenses and no other issues were open before it for consideration.

*DIT (Exemption) v. Dharam Pratishthanam (2007) 201 Taxation 40 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Letting out marriage hall**

Income received by assessee from letting out marriage hall was exempt where objects of assessee were education and relief to poor.

*CIT v. Gordhandas Bhagwandas Charitable Trust (2006) 136 Taxman 161 / 186 CTR 684 (Mad.)(High Court)*

### **S. 11 : Charitable or religious purposes – Accumulation – Specific purpose**

The assessee had accumulated a sum for promotion of its charitable objects. The Assessing Officer denied the exemption as the accumulation was not for a specific purpose. The Hon'ble High Court held that exemption could not be denied to the assessee in the present case as accumulation of income can be made by the assessee trust for plurality of purposes.

*DIT v. Raghuvanshi Charitable Trust (2006) 193 Taxation 334 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Accumulation of income – Rule cannot prescribe time limit [Rule 17]**

In absence of any specific time-limit prescribed under section 11(2), time limit prescribed in rule 17 by rule making authority for submission of Form No. 10 is invalid. (A.Y. 1980-81)

*CIT v. Mayur Foundation (2005) 274 ITR 562 / 194 CTR 197 (Guj.)(High Court)*

### **S. 11 : Charitable or religious purposes – Accumulation of income**

Where out of 29 purposes/ objects stipulated in memorandum of association, assessee had specified eight purposes in Form No. 10 for which it was accumulating unspent income while claiming benefit u/s 11, just because more than one purpose had been specified and just because details about plans which assessee had for spending on such purposes were not given, that may not be sufficient to deny exemption admissible to it under section 11.

*DIT (Exemption) v. Daulat Ram Education Society (2005) 278 ITR 260 / (2006) 156 Taxman 399 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Cash credits [S. 68]**

Assessee, a charitable trust, had disclosed donations received by it as its income and had spend 75% of amount of charitable purposes but on failure of assessee to furnish details of donations Assessing officer treated that amount as cash credit under section 68 and benefit under section 11 was denied, Assessing officer was not justified in doing so, as fact that complete list of donors was not filed or that donors were not produced, did not necessarily lead to inference that assessee was trying to introduce unaccounted money by way of donation receipts. (A.Y. 1991-92)

*DIT (Exemption) v. Keshav Social & Charitable Foundation (2005) 278 ITR 152 / 146 Taxman 569 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Meditation – Preaching and propagation of philosophy**

Meditation and even preaching and propagation of philosophy is an activity for general public utility, and if assessee collected certain fees or charges for same and that amount was ploughed back for carrying on activities of assessee and not for distribution of income amongst trustees or any other beneficiaries, assessee could claim exemption from tax. (A.Y. 1991-92)

*CIT v. Rajneesh Foundation (2005) 148 Taxman 396 / 199 CTR 490 / 280 ITR 553 (Bom.)(High Court)*

### **S. 11 : Charitable or religious purposes – Waiver of loans – Application of income**

Where during assessment year in question assessee waived loans and advanced in earlier years to weaker sections of society as part of its charitable objects, assessee must be said to have applied its income when it gave up its rights to recover. (A.Y. 1985-86)

*CIT v. Sacred Heart Church (2005) 278 ITR 180 / 149 Taxman 367 / 198 CTR 189 (Guj.)(High Court)*

### **S. 11 : Charitable or religious purposes – Business held in trust**

Even if assessee trust has income from business and such income has been employed to achieve its charitable objects, notwithstanding provisions of sub-section (4A), assessee would be entitled to exemption under section 11. (A.Ys. 1993-94, 1994-95)

*CIT v. Janakiammal Ayyandar Trust (2005) 277 ITR 274 (Mad.)(High Court)*

### **S. 11 : Charitable or religious purposes – Business held in trust**

Assessee engaged in business of purchase and sale of horticultural product will be entitled to exemption and exemption could not be denied to it on ground that it was engaged in commercial activity by growing plants, selling seeds and getting corpus donation by using premises for shooting movies, TV serials, etc. (A.Y. 2000-01)

*DIT (Exemption) v. Agri-Horticultural Society (2005) 273 ITR 198 (Mad.)(High Court)*

### **S. 11 : Charitable or religious purposes – Subscription from members**

Income received by assessee-trust by way of subscription from its members is to be treated as income derived from property held under trust and therefore, it is exempted under section 11.

*CIT v. Divine Light Mission (2005) 278 ITR 659 / 146 Taxman 653 / 196 CTR 135 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Application of income**

A combined reading of both provisions of sections 11(1) and 11(2), would clearly show that section 11(2), while enlarging scope of exemption, removes restriction imposed by section 11(1)(a), but it does not take away exemption allowed by section 11(1)(a). (A.Y. 1994-95)

*CIT v. G.R. Govindarajulu & Sons Charities (2004) 271 ITR 145 / 193 CTR 323 / 144 Taxman 300 (Mad.)(High Court)*

### **S. 11 : Charitable or religious purposes – Donation to another trust**

When a charitable trust donates its income to another trust, provisions of section 11(1)(a) can be said to have been met even if donor gives specific direction to done – trusts to treat part of donation as part of corpus. (A.Y. 1977-78)

*CIT v. Shri Ram Memorial Foundation (2004) 269 ITR 35 / 140 Taxman 263 / 190 CTR 454 (Delhi)(High Court)*

### **S. 11 : Charitable or religious purposes – Exploitation of forest [S. 2(15)]**

Assessee derived income from exploitation of forest, which was commercial activity, since such income was spent on 'preservation, supervision and development of forest', it was to be treated for general public utility and was exempt under section 11(1)(a). (A.Y. 1977-78)

*U. P. Forest Corpn. v. Dy. CIT (2003) 129 Taxman 527 / 183 CTR 191 (All.)(High Court)*

### **S. 11 : Charitable or religious purposes – Property held under Trust – Application of income [S. 2(15)]**

Monies given by assessee-trust to sister concern purportedly for construction of hospital which kept lying unused with sister concern could not be regarded as having been applied for charitable purposes. (A.Y. 1987-88)

*CIT v. VS.G.P. Foundation (2003) 262 ITR 187 / 183 CTR 330 / (2004) 134 Taxman 663 (Mad.)(High Court)*

### **S. 11 : Charitable or religious purposes – Religious trust – Carryforward deficit of earlier year – Setoff against surplus of subsequent year [S. 2(15)]**

Carry forward of deficit of earlier year and its set off against the surplus of subsequent years is allowable.

*CIT v. Institute of Banking Personnel Selection (IBPS) (2003) 131 Taxman 386 / 264 ITR 110 / 185 CTR 492 (Bom.)(High Court)*

**S. 11 : Charitable or religious purposes – Religious Trust – Excess of expenditure over income**

Assessee-trust had incurred expenses from charity fund and they were in excess of income earned, it was not entitled to exemption under section 11(1)(a).

*Akhey Ram Ishwari Prasad Trust v. CIT (2003) 130 Taxman 827 / 266 ITR 281 / 183 CTR 287 (Raj.)(High Court)*

**S. 11 : Charitable or religious purposes – Religious Trust – Accumulation of Income**

Plurality of the purposes for accumulation is not precluded but it depends on the precise purpose for which the accumulation is intended. (A.Y. 1992-93)

*CIT v. Hotel & Restaurant Association (2003) 261 ITR 190 / 132 Taxman 76 / 182 CTR 374 (Delhi)(High Court)*

**S. 11 : Charitable or religious purposes – Income from property – Commercial activity**

In case income is derived from commercial activities and income is accumulated it could not be held that income is accumulated only for charitable purposes. (A.Y. 1977-78)

*U. P. Forest Corpn. v. Dy. CIT (2003) 129 Taxman 527 / 183 CTR 291 (All.)(High Court)*

**S. 11 : Charitable or religious purposes – Investment in specified Securities**

Assessee held investments contrary to section 11(5) and by virtue of section 13(l)(d), proviso (iia), it had time till 31-3-1993 to disinvest, it could not be said that it had become disentitled to benefit of exemption under section 11 for A.Y. 1985-86.

*DIT v. Estate of C. Audikesavalu Naidu (2003) 129 Taxman 983 / 183 CTR 338 (Mad.)(High Court)*

**S. 11 : Charitable or religious purposes – Religious Trust – Business held in Trust**

Provision of section 11(4A) substituted by the Finance (No. 2) Act, 1991 would operate with effect from 1-4-1992 and not from an earlier date. For purposes of section 11(4A), it is the activity of assessee that would be relevant and the test as to whether the predominant object of the trust was to make profit or not would not be relevant. (A.Ys. 1986-87 to 1988-89)

*DIT v. Paramartha Bhushanam Sri Nathalla Sampath Chetty Charities (2003) 128 Taxman 201 / 182 CTR 380 (Mad.)(High Court)*

**S. 11 : Charitable or religious purposes – Exemption of Income from Property**

Assessee carried on business for sole benefit of trust, beneficiary being Aurobindo Ashram, which was exempt from tax under section 11, income which assessee received for benefit of Ashram was also exempt. (A.Ys. 1973-74, 1974-75)

*Honesty Engineers & Contractors Trust v. CIT (2003) 262 ITR 266 / 181 CTR 321 / 138 Taxman 131 (Mad.)(High Court)*

**S. 11 : Charitable or religious purposes – Accumulation of income – Form No. 10 was filed before assessment**

Form No. 10 was available with the assessee before passing of the original assessment order, hence claim of the assessee for accumulation of income cannot be rejected merely on the ground that form no 10 was not filed along with the return of income. Matter remanded with the direction to verify whether assessee has made investment in accordance with the condition of cl (b) of section 11(2). (A.Y. 1994-95). *Kandla Dock Labour Board v. ITO (2011) 62 DTR 234 / 133 ITD 156 / 142 TTJ 342 (Rajkot)(Trib.)*

**S. 11 : Charitable or religious purposes – Accumulation of income – Form No. 10**

Tribunal held that the filing of Form No. 10 before assessment is not an empty formality, benefit of accumulation of income under section 11(2) cannot be availed in the absence of filing of Form No. 10 before completion of assessment. (A. Y. 2007-08).

*Hans Raj Samarak Society v. ADIT (2011) 133 ITD 530 / (2012) 145 TTJ 250 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Income from property [S. 2(15), 12AA]**

Assessee authority was formed with object to promote and secure development of certain area according to plan. For said purpose assessee had power to acquire hold manage and dispose of land and other property. The assessee had the registration under section 12AA of the Income-tax Act. The assessee filed the return of income claiming exemption under section 11. Assessing Officer held that the nature of activities carried on by the assessee were in the nature of carrying on of business hence surplus of said activity was liable to tax. The Tribunal held that in such situation, exemption under sub-sections (1)(2)(3)(3A) of section 11 would be available to assessee only if it maintained separate books of account for said business. Since aforesaid aspect had not been examined by authorities below, matter was remanded back to Assessing Officer for fresh disposal. (A. Y. 2007-08).

*ITO v. Moradabad Development Authority (2011) 133 ITD 485 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Educational institution – Loan to another Society [S. 12, 12AA, 13(1)(d)]**

Assessee running a educational institutions was registered under section 12A. It had filed its Income-tax return declaring nil income. Assessee had given loan of ` 1.28 crores to another society which was also engaged in charitable activities of education. Assessing Officer and Commissioner (Appeals) held that as assessee had violated provisions of section 13(1)(d) invoked the provisions of section 11(5) and denied the



exemption under sections 11 and 12. Tribunal held that assessee neither invested impugned amount nor deposited same otherwise than in any one of forms or modes specified in section (5) of section 11 because loan was neither an investment nor a deposit, provisions of section 13(1)(d) were not applicable hence the Assessing Officer was directed to allow the exemption (A. Y. 2006-07).

*Kanpur Subhash Shiksha Samiti v. Dy. CIT (2011) 133 ITD 182 / 45 SOT 153 (URO) / 11 ITR 23 (Luck.)(Trib.)*

**S. 11 : Charitable or religious purposes – Survey – Capitation fee – Voluntary contribution – In Voluntary contributions – Denial of exemption [S. 12]**

During survey Assessing Officer observed that assessee had collected capitation fee from students and no receipt were given for such collection. Assessing Officer was of the view that what is exempted from taxation under sections 11 and 12 were are only voluntary contributions and not contributions collected against allotment of seats. However, there was no material on record to show that assessee had accepted capitation fee against allotment of seats, in view of decision of earlier year the exemption was allowed. The Tribunal further held that there is no difference between voluntary contributions and involuntary contributions, only distinction is that voluntary contributions are to be treated as income under section 12 and corpus donations are to be treated as capital receipt under section 11. If the said income is applied for the charitable purpose the exemption to be allowed. (A.Ys. 2002-03 to 2008-09).

*ACIT v. Balaji Educational & Charitable Public Trust (2011) 48 SOT 281 / 11 ITR 179 (Chennai)(Trib.)*

**S. 11 : Charitable or religious purposes – Non Filing of Audit Report**

Non-filing of audit report with ROI not fatal to section 11 exemption. Report filed in the course of assessment proceedings should be considered. (A.Y. 2006-07)

*ITO v. Sir Kikabhai Premchand Trust (2010) 46 DTR 302 / 42 SOT 403 (Mum.)(Trib.)*

**S. 11 : Charitable or religious purposes – Educational institution [S. 13(1)(d), (1)(c), (2)(a), (3)]**

Advance paid by assessee an educational institution registered under section 12A, to a club towards membership fee for providing certain amenities to the staff and students of the assessee did not attract the provisions of section 13(1)(c) r.w.s. 13(2)(a) as the said club is not a prohibited person as specified in section 13(3). Provisions of section 13(1)(d) were also not attracted as the said advance was neither a deposit nor an investment and therefore, exemption under section 11 is allowable to the assessee more so when the Assessing Officer has allowed assessee's claim of exemption under section 11 on the same set of facts in the preceding year. (A.Ys. 2004-05 to 2006-07)

*Vidya Pratishthan v. Dy. CIT (2010) 44 DTR 145 / 133 TTJ 472 (Pune)(Trib.)*

**S. 11 : Charitable or religious purposes – Debenture – Bond [S. 13(1)(d)]**

Bond is covered by the expression "debenture" and therefore, investment in bonds of certain companies by the assessee, a Charitable Trust did not amount to infringement of the provision of section 13(1)(d) and therefore, exemption under section 11 could not be denied on that ground.

*DIT v. Shree Visheswar Nath Memorial Public Charitable Trust (2010) 46 DTR 49 / 333 ITR 248 / 194 Taxman 280 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Donations collected in a donation box – Corpus**

Donations collected by the assessee, in a donation box in the face of its appeal that the amounts so collected would be used for the construction of a building can be considered as carrying specific directions for being used for construction of building and therefore, it is to be treated as donations toward corpus as such amount did not constitute income for the purpose of section 11/12. (A.Y. 2006-07)

*Shree Mahadevi Tirath Sharda Ma Seva Sangh v. ITO (2010) 133 TTJ 57 (UO)(Chd.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Bar of Section 13(1)(d)**

Exemption under section 11 could not be denied as there was no violation of provisions contained in section 13(1)(d). (A.Y. 2005-06)

*Dy. CIT (Exemptions) v. Help Age India (2010) 133 TTJ 590 / 127 ITD 371 / 45 DTR 270 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Application of income need not be in India**

Application of income should result and should be for the purpose of charitable purposes in India and application need not be in India. Expenditure incurred at an event at Hanover, Germany is eligible for exemption. (A.Ys. 1998-99, 2004-05, 2005-06)

*National Association of Software & Services Companies (NASSCOM) v. Dy. CIT (2010) 38 DTR 105 / 130 TTJ 377 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Partly charitable and partly religious [S. 13]**

A trust established to carry out partly charitable purposes and partly religious purposes would be entitled to exemption under section 11. (A.Y. 2003-04)

*Society of Presentation Sisters v. ITO (2009) 121 ITD 422 / 30 DTR 1 / 125 TTJ 909 (TM) (Cochin)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Computer education – General public**

Assessee society established for advancement of computer education among general public was having a charitable object and element of any personal benefit being

totally absent, was eligible for exemption under section 11. (A.Ys. 1999-2000 & 2000-01)

*ACIT v. Graphic Era Educational Society (2007) 108 TTJ 608 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Charitable purpose – Stock Exchange**

Revenue authorities having consistently held that the assessee, a stock exchange, is a charitable institution and allowed exemption under section 11 and there being no change in the objects of the assessee it is eligible for exemption under section 11. (A.Ys. 1995-96 & 2000-01)

*ACIT v. Jaipur Stock Exchange (2007) 108 TTJ 393 (Jp.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Charitable purpose – Small community**

Trust created for the benefit of a particular small community cannot be denied benefit under section 11 on the ground that it is not for general public utility.

*Rajkot Visha Shrimali Jain Samaj v. ITO (2007) 109 TTJ 286 / 111 ITD 238 (Rajkot)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Letting of wedding hall – Rule of consistency**

Income from letting out wedding hall is to be regarded as a charitable trust entitled for exemption under section 11. (A.Y. 2002-03)

*ACIT v. Kalyan Mitra Trust (2007) 106 TTJ 241 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Letting of wedding hall – Rule of consistency**

Exemption is allowable following the rule of consistency as exemption has been allowed to the assessee for several assessment years either by the Assessing Officer himself or by the Tribunal. (A.Ys. 1977-78, 1980-81, 1981-82)

*Samaj Kalyan Parishad v. ITO (2007) 107 TTJ 302 / 105 ITD 29 / 11 SOT 632 (SB)(Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Auditorium – Ladies hostel – Rental income**

Auditoriums and ladies hostel constructed by assessee in terms of its objects were property held under trust and rental and other income therefrom being utilized by assessee towards objectives of trust, excess of income over expenditure was exempt under section 11. (A.Ys. 1996-97 to 98-99)

*Dy. DIT (Exemptions) v. Willingdon Charitable Trust (2007) 106 TTJ 1121 / 107 ITD 493 (Chennai)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Scope and applicability – General public**

Assessee trust having been all along held to be pursuing an object of general public utility, assessee is eligible for exemption under section 11 despite the fact that it is carrying on the activity for profit. (A.Ys. 1984-85, 1986-87, 1990-91)

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

### **S. 11 : Charitable or religious purposes – Accumulation of income**

Once the assessee had filed Form No. 10 stating the object of accumulation of funds in time requirement of law stood complied and, therefore, the claim of the assessee for accumulation of funds under section 11(2) could not be rejected. (A.Y. 1998-99)

*Associated Electronics Research Foundation v. Dy. DIT (Exemption) (2006) 100 TTJ 480 (Delhi)(Trib.)*

### **S. 11 : Charitable or religious purpose – Computation of income [S. 24(1)(i), (14)]**

Establishment of hospital being one of the objects of the assessee charitable trust, expenditure incurred by it on providing medical help is deductible in arriving at the income for the purpose of s. 11(1)(a).

For the purpose of s. 11(1)(a), income of the assessee trust has to be computed in the normal commercial manner without classification under various heads set out in s. 14 and, therefore, deduction under section 24(1)(i) is not allowable but depreciation on immovable property is allowable. (A.Y. 1996-97)

*Shrimad Vallabh Vishwa Dharma Sanstha v. Addl. CIT (2006) 102 TTJ 653 (Ahd.)(Trib.)*

### **S. 11 : Charitable or religious purposes – Market committee [S. 10(20)]**

Though exemption in the case of local bodies like market committees, etc., under section 10(20) has been withdrawn, there is nothing in the amendment to show that, they are precluded from raising an alternative claim under section 11/12; objections that committees collect fees and fine, their officers are public servants, etc., and therefore they cannot be charitable institutions has no merit; what is relevant is objects/ activities of the institutions and not above aspects.

*Market Committee v. CIT (2005) 3 SOT 98 / (2005) 94 TTJ 692 / 3 SOT 98 (Delhi)(Trib.)*

### **S. 11 : Charitable or religious purposes – Element of profit [S. 2(15)]**

After omission of words 'not involving the carrying on of the activity of profit' with effect from 1/4/1983 from definition of 'charitable purpose' in section 2(15) element of profit is not excluded from definition of 'charitable purpose' under section 2(15) for purpose of granting exemption under section 11.

*Aryan Educational Society v. CIT (2005) 93 ITD 546 / (2005) 94 TTJ 462 (Delhi)(Trib.)*

### **S. 11 : Charitable or religious purposes – Management of seminars [S. 2(15)]**

Management of seminars and class room programmes could clearly be construed to be for educational purposes within meaning of section 2(15) and it is no where laid down that to enable one to claim benefit of section 11, benefit must be provided to poor person only. (A.Ys. 1996-97 & 97-98)

*Indo-American Society v. ADIT (Exemption) (2005) 96 ITD 61 / 96 TTJ 578 (Mum.)(Trib.)*

### **S. 11 : Charitable or religious purposes – Musical programmes [S. 2(15)]**

Where music programmes as well within the trust's objects which were charitable in nature and assessee was conducting musical programmes to promote traditional classical music and no tickets were issued but free passes were issued, denial of exemption u/s. 11 on ground that musical shows conducted by assessee trust were not for object of trust but for giving publicity mileage to company in which trustees were interested as directors, was not justified. (A.Y. 2001-02)

*Ganjam Nagappa & Sons Trusts v. Dy. DIT (Exemption) (2005) 1 SOT 641 (Bang.)(Trib.)*

### **S. 11 : Charitable or religious purposes – Students of particular community [S. 2(15)]**

Where a clause in Trust deed provided for preference to students of a particular community, other things being equal, mere preference to a particular class would not disentitle assessee from benefit of charity if discretion to exercise such preference was exercised in consonance with trust deed.

*Vimalabai (Smt) (Jiji) Neelkanth Jatar Charitable Trust v. ITO (2005) 1 SOT 961 / 92 TTJ 327 (TM)(Pune)(Trib.)*

### **S. 11 : Charitable or religious purposes – Fees received from students [S. 2(15)]**

So long as provisions of sections 11, 12, and 12A were complied with, application for registration by assessee society having object of imparting education could not be rejected on the ground that assessee institution was engaged in profit making in name of education as it was generating surplus out of heavy fees received from students.

*Aryan Education Society v. CIT (2005) 93 ITD 546 / 94 TTJ 462 (Delhi)(Trib.)*

### **S. 11 : Charitable or religious purposes – Gujarat Maritime Board [S. 2(15)]**

Gujarat Maritime Board constituted by State Government for maintaining and developing ports in state being established for an object of public utility was entitled to registration under section 12A.

*Gujarat Maritime Board v. CIT (2005) 147 Taxman 31 (Mag.)(Ahd.)(Trib.)*

### **S. 11 : Charitable or religious purposes – Accumulation of income**

Exemptions provided under sub-section (1) and (2) of section 11 are independent of each other and non compliance of requirements of sub section (2) of section 11

does not disentitle assessee to basic exemption in respect of 25% of net total income. (A.Ys. 1996-97 to 2001-02)

*Bhubaneswar Stock Exchange v. ACIT (2005) 96 ITD 480 / 95 TTJ 1033 (Cuttack)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Accumulation of income – Form No. 10**

Benefit of section 11(2) cannot be denied merely for reason that in original Form No. 10 enclosed with return, purposes of accumulation had not been indicated. (A.Y. 1996-97)

*Shri Sanatan Dharam Sabha v. Dy. DIT (E) (2005) 1 SOT 498 (Delhi)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Accumulation of income**

Where specific purpose was evident from managing council's resolution which was on record, assessee could not be denied exemption on ground that specific purpose for which accumulated income was being set apart was not mentioned. (A.Y. 1993-94)

*Murlidhar Sohanlal Foundation v. ACIT (2005) 92 TTJ 1054 (Luck.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Acquisition of capital asset**

Where assessee-trust utilized capital gains derived by it, for making donation to a charitable trust and for Maintenance of trust property which was being utilized for charitable purposes, the Assessing officer was not justified in denying exemption to assessee in respect of capital gains. (A.Y. 1996-97)

*Gurparshad Trust (Regd.) v. Dy. CIT (2005) 93 TTJ 1103 (Chd.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Business held in Trust – Society charging**

Assessee was constituted for dissemination of knowledge and education and promotion of understanding between people of India and people of United States of America, its object could be construed as educational purposes and just because assessee-society was charging fee for conducting courses, assessee could not be put within ken of section 11(4A). (A.Ys. 1996-97-98)

*Indo-American Society v. ADIT (Exemption) (2005) 96 ITD 61 / 96 TTJ 578 (Mum.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Registration of trust – Revision [S. 12A, 263]**

Commissioner has no jurisdiction under section 12A to withdraw registration already granted to a trust under that section. (A.Y. 1995-96)

*Namra Mahila Avam Bal Kalyan Samiti v. CIT (2005) 1 SOT 224 / (2004) 89 TTJ 780 (Jab.)(Trib.)*

#### **S. 11 : Charitable or religious purposes – Registration of trust [S. 12A]**



Having regard to the fact that the assessee market committees / boards were constituted under statute and were compulsorily required to get their accounts audited and further IT returns must accompany audited accounts, their application for registration could not be rejected on ground that audited accounts were not submitted.

*Market Committee v. CIT (2005) 3 SOT 98 / 94 TTJ 692 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Procedure for registration – Application for registration – Limitation [S. 12AA]**

If object of trust are charitable, fact that no activity has been carried out by trust does not entitle Commissioner to hold that trust was not entitled to registration under section 12A.

Provisions of section 12AA (2) laying down limitation for deciding application under section 12A are mandatory; therefore, at very moment of expiry of limitation, application for registration u/s. 12A is deemed to have been accepted in case no order thereon was passed. (A.Y. 2001-02)

*Sardari Lal Oberai Memorial Charitable Trust v. ITO (2005) 3 SOT 229 / 106 TTJ 468 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Procedure for registration – Statutory bodies [S. 12AA]**

In case of Market committee/ boards which are statutory bodies and controlled by Governments, it is not easy for commissioner to record satisfaction that those are not genuine so as to disentitle them to registration under section 12AA.

*Market Committee v. CIT (2005) 3 SOT 98 / 94 TTJ 692 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Denial of exemption – Employees – Managing director [S. 13]**

It is true that an employee of society does not fall within the category of prohibited persons but a person who was not only employee of assessee society but heart and soul of the society and controlling its affairs as executive secretary / member and managing director, would fall within category of prohibited persons under section 13(3). (A.Y. 1998-99)

*Parivar Sewa Sanstha v. Dy. DIT (2005) 1 SOT 71 (Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Denial of exemption – Cash in hand [S. 13]**

Where trust amount is held by trustee as cash on hand and same is not utilized by trustee for his personal benefit, unless said amount is diverted in favour of trustee or other person, referred to in section 13(3), provision of section 13(2)(g) could not be invoked to disentitle assessee to benefit of section 11. (A.Y. 2001-02)

*Ganjam Nagappa & Sons Trust v. Dy. DIT(E) (2005) 1 SOT 641 (Bang.)(Trib.)*

**S. 11 : Charitable or religious purposes – Alternative claims – Assessing officer is duly**  
**[S. 10(22)]**

Held, Assessee having claimed exemption under section 10(22), and when there is no specific or alternative claim under section 11, Assessing Officer is still under an obligation to seek explanation for examining the case for the purposes of Sec. 11. (A.Y. 1997-98)

*Centre for Women's Development Studies v. Dy. DIT (2003) 78 TTJ 744 / 130 Taxman 174 (Mag.)(Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Accumulation of income**

The claim for accumulation disallowed by Assessing Officer, stating that the purposes mentioned for accumulation are not specific, was reversed on facts stating that same are specific and in line with the objects.

*Rishi Chaitanya Trust v. Dy. DIT (2003) 127 Taxman 89 (Mag.)(Delhi)(Trib.)*

**S. 11 : Charitable or religious purposes – Club**

The Assessee club operating like a stock exchange, having objects of a charitable nature within the meaning of Sec. 2(15), was denied exemption as it could not meet with other statutory conditions and stipulations as laid down in Sec. 11(4A), as it stood during the relevant period. (A.Ys. 1989-90 to 1991-92)

*Investor's Club v. ITO (2003) 84 ITD 273 / 90 TTJ 1009 (Cochin)(Trib.)*

**Section 12 : Income of trusts or institutions from contributions.**

**S. 12 : Trust or institution – Contributions – Exempt incomes – Charitable purpose – Voluntary contributions – Suspense account**

Donations received by assessee trust which were kept in suspense account would not be entitled for exemption.

*CIT v. Divine Light Mission (2005) 278 ITR 659 / 146 Taxman 653 / 196 CTR 135 (Delhi)(High Court)*

**S. 12 : Trust or institution – Contributions – Exempt incomes – Charitable purpose – Conditions of charitable – Religious purpose fulfilled – Exemption available [S. 2(15), 11]**

In the present case, even if the assessee did not render medical services in all cases to poor people, yet it would not fall out of the ambit of the definition of 'Charitable Purpose' under section 2(15) of the Act. The relief would be still available to the assessee and the exemption under sections 11 and 12 of the Act was rightly availed by them. (A.Y. 2003-04)

*ITO v. Kaushalya Medical Foundation (2009) 31 SOT 119 (Mum.)(Trib.)*

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

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Genuineness of Trust**

Registration under section 12A of the Act cannot be denied to a trust which is newly formed on the ground that it had not commenced any activity. While granting registration under section 12A of the Act only the objects of the trust is to be examined to ascertain the genuineness of the trust. (A. Y. 2004-05)

*DIT (E) v. Meenakshi Amma Endowment Trust (2011) 50 DTR 243 (Karn.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Telecasting and broad- casting programmes – Registration [S. 2(15)]**

The assessee company was formed with object of to telecast and broad cast programmes and to as an agent, broker etc., will not make the object clause charitable. Activities of the company are purely commercial activities not exclusively intended for advancement of any object of general public utility. Assessee is not entitled to be registered as charitable institution. Subsequent amendment to the constitution is not relevant for the registration of relevant year. Order of Tribunal was reversed and order of Commissioner confirming the refusal of registration was confirmed.

*CIT v. A. Y. Broadcast Foundation (2011) Tax L.R. 892 / (2011) 199 Taxman 376 / 58 DTR 167 / (2012) 340 ITR 166 / 246 CTR 301 (Ker.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Krishi Upaj Mandi Samitis**

The activities under taken by the Krishi Upaj Mandi Samitis established under the Rajasthan Agricultural Produce Market Act, 1961 were held to be charitable in the nature and therefore the Samitis were held to be eligible for registration under section 12 A of the Act and entitle for exemption under sections 11 and 12 of the Act.

*CIT v. Krishi Upaj Mandi Samiti, Gajsinghpur & Ors. (2009) 227 CTR 79 / 21 DTR 64 (Raj.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Educational activities**

Provision of teaching to students in preparation after admission to professional institutions. No evidence to show registration obtained by fraud or forgery. Cancellation of registration on ground of profit motive not permissible. (A.Ys. 2000-01, 2001-02)

*Oxford Academy for Career Development v. CCIT (2009) 315 ITR 382 / 226 CTR 606 / 29 DTR 160 (Cal.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Registration**

The institution of religious nature as well as for charitable purpose can claim registration under section 12A of the Act. Exemption under sections 11, 12 or section 80G of the Act, would come only when such exemptions are claimed by the assessee at the time when it is assessed to tax. Thus, if the assessee trust seeking registration under section 12A of the Act makes out a case for registration the same cannot be denied if the trust is not approved under section 80G of the Act. (A.Y. 2003-04)

*CIT v. Shri Digamber Jain Mindir Chaksu (2009) 29 DTR 65 / 189 Taxman 106 (Raj.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Application of funds to be examined at the time of assessment**

Where the main object of the trust is imparting education, it has to be accepted that the assessee trust was established for a charitable purpose and therefore the trust was entitled for registration under section 12A of the Act. The aspect of application of funds by the trust and the allowability of exemption under section 11 of the Act are to be examined by the Assessing Officer at the time of assessment and not the Director General of Income Tax (Exemption) while granting registration under section 12A of the Act. (A.Y. 2003-04)

*DIT (Exemption) v. Garden City Educational Trust (2009) 28 DTR 139 / (2011) 330 ITR 480 / (2010) 191 Taxman 238 (Karn.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Deemed grant of registration**

Non – consideration of application for registration of charitable trust under section 12A of the Act by the Income-tax authorities within the time fixed under section 12AA(2) of the Act would result in deemed grant of registration to the trust. The Court further, observed that the deemed registration granted to the trust may at worst cause loss of some revenue or tax payable by an assessee, on the other hand taking a contrary view and holding that not taking a decision within time fixed by section 12AA would mean leaving the assessee totally at the mercy of Income tax authorities as the Act does not provide any remedy for such non decision.

*Society for Promotion of Education Adventure Sport & Conservation of Environment v. CIT & Anr. (2008) 5 DTR 329 / 217 CTR 568 (All.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Development of trade and commerce**

The society established for development of trade and commerce between India and Japan, which also extended benefit to public in India was held to be a charitable institution eligible for registration under section 12A of the Act. (A.Ys. 2002-03-04)

*Japan Chamber of Commerce & Industries in India v. DIT (Exem) (2008) 7 DTR 277 / 116 TTJ 61 / 119 ITO 37 / 23 SOT 72 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Dominant object of general public utility**

So long as dominate object is of general public utility, it can be said that it is established for charitable purposes, even if there is some profit in the activity carried by the institution.

*CIT v. Agricultural Produce and Market Committee (2007) 210 CTR 386 / 291 ITR 419 / 163 Taxman 359 (Bom.)(High Court)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Cancellation of Registration – Exemption [S. 10(23C)]**

Rejection of application under section 10(23C)(vi) cannot be a reason to cancel registration under section 12A.

*Sunbeam English School Society v. CIT (2011) 129 ITD 299 / 56 DTR 52 / 139 TTJ 81 (All.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Activity of giving micro finance and earning interest [S. 2(15), 11]**

Where an assessee is registered under section 25 of Companies Act, 1956, it in itself shows that the company intends to apply its profit in promoting charity. And where the object of the assessee states that it shall promote micro finance services to poor person and help them rise out of poverty, mere surplus from such micro finance service cannot by itself be a ground to say that no charitable purpose exists. Followed *ACIT v. Thanthi Trust (2001) 247 ITR 785 / 165 CTR 681 / 115 Taxman 126 (SC)* and *Agricultural Produce and Market Committee (2007) 291 ITR 419 / 210 CTR 386 / 163 Taxman 359 (Bom.)*

*Dish India Micro Credit v. CIT ITA No. 1374/Del/2010 dated 28-1-2011 (Delhi)(Trib.)*  
Source: [www.itatonline.org](http://www.itatonline.org)

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration as Public Trust not necessary for S. 12A "Charity" registration**

Registration as a Public Trust is not a condition precedent for grant of registration under section 12A. There is no requirement in the Income-tax Act, 1961 that the institution constituted for advancement of charity must be registered as a trust under the Public Trusts Act.

*Agriculture Produce and Market Committee (2007) 291 ITR 419 / 210 CTR 386 / 163 Taxman 359 (Bom) & Dish India Micro Credit (Delhi), followed.*

*Grameen Initiative for Women v. DIT (E), ITA No. 1937/Mum/2009 dated 3-5-2011 (Mum.)(Trib.)* Source : [www.itatonline.org](http://www.itatonline.org)

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Stock exchange – Benefit to individual stock broker or members or employees – No exemption**

When a stock exchange carries out any activity for sole benefit of its members or ex members or employees or ex employees or their dependents and not for benefit of general public which is distinguished from class or community consisting of its members, ex-members, employees or ex-employees or their dependents and connections, it would not be entitled for exemption under section 11. Members of exchange being integral part of constitution of exchange are interested persons as per provisions of section 13(1)(c). They are precluded from taking any undue advantages from assessee exchange. Assessee being registered under section 12A, benefit of assessee–exchange would be for public at large and not for benefit of individual stock brokers or members of Governing body of stock exchange. Since the assessee incurred expenditure for benefit of its members and subsidiary company only, provisions of section 13(1)(c) read with sections 13(2)(b) and 13(3)(cc) was applicable to fact of case and consequently, assessee was not entitled for exemption under section 11. (A.Ys. 2001-02 to 2006-07).

*Hyderabad Stock Exchange Ltd. v. ADIT (2011) 46 SOT 1 (Hyd.)(Trib.)*

#### **S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration of Trust [S. 80G]**

Application for renewal of exemption certificate rejected for the reason that changes made in object clause of trust without following the required procedure made the trust invalid. The Tribunal observed that only one addition was made in the object clause, and even that remained charitable and did not cause any detriment to original object. There was no statutory requirement of intimating the changes except the one mentioned in the Form 10A, and even there was no time limit. Held that revenue was not justified in refusing to renew exemption certificate.

*Mehata Jivraj Makandas & Parekh Govindji Kalyani Modh Vanik Vidyarthi Public Trust v. DIT(E) (2011) 131 ITD 462 (Mum.)(Trib.)*

#### **S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Propagation of Vedas**

Assessee trust formed for propagation of Vedas was entitled to registration under section 12A. (A.Y. 2008-09).

*Kasyapa Veda Research Foundation v. CIT (2011) 131 ITD 370 / 139 TTJ 641 / 11 ITR 468 / 57 ITD 329 (Cochin)(Trib.)*

#### **S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Commercial activities**

Registration under section 12A was rightly refused to the trust where the trust has carried out commercial activity and did not apply the income to fulfil the object of the trust.

*Society for the Small & Medium Exporters v. DIT (Exemptions) (2011) 139 TTJ 218 / 131 ITD 561 / 57 DTR 154 (Delhi)(Trib.)*



**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration [S. 11(4A)]**

Assessee engaging manufacturing and trading activities. Assessee converting incidental objects as main objects. Assessee not satisfying first condition of section 11(4A). Cancellation of registration valid.

*Aurolab Trust v. CIT (2011) 12 ITR 74 / 46 SOT 125 (UO)(Chennai)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Cancellation [S. 12AA(3)]**

Objects of the assessee society having been considered and found to be charitable in nature when the registration under section 12A was granted, said registration could not be cancelled by Commissioner by invoking the provisions of section 12AA(3) in the absence of anything on record to show that there was any change in the objects of the society or that its activities were not in accordance with those objects. Proceedings under section 80G and proceedings under section 12A are separate distinct and independent of each other and therefore, proceedings under section 80G cannot form basis for initiation of proceedings under section 12AA(3).

*Maulana Mohammad Ali Jauhar Trust v. CIT (2011) 63 DTR 416 (Luck.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Registration [S. 80G]**

Assessee trust was formed with main object of establishing schools and colleges, which would be open to students of all communities for education – Granted approval under Section 80G & registration under 12A of the Act -- As the assessee trust was not carrying out the activities as mentioned in the main object for over 12 years the grant of approval was refused by the commissioner. Refusal upheld by Tribunal.

*Pearl Educational Institute v. CIT (2010) 36 SOT 218 / 132 TTJ 704 / 33 DTR 433 / 7 ITR 804 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Registration [S. 80G(5)(vi)]**

Only because no charitable activity is carried on for the relevant year, registration cannot be refused. The Tribunal directed the CIT to grant approval under section 80G(5)(vi).

*Jasoda Devi Charitable Trust v. CIT (2010) 4 ITR 457 (Jp.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Condonation of delay**

Since objects of trust and genuineness of its activities were not in doubt in as much as registration was granted with prospective effect from 1-4-2007 and reasons for delay for filing of application were not false or untrue delay was required to be condoned.

*Church of Our Lady of Grace v. CIT (2009) 34 SOT 315 / 134 TTJ 690 / 39 DTR 107 / (2011) 9 ITR 505 (Mum.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Registration**

CIT has to satisfy himself about the objects of the trust and the genuineness of its activities. If the trust has established that it is formed to run educational institutions, the trust is entitled to registration under section 12A.

*Reliable Educational Alliance Society v. CIT (2009) 126 TTJ 407 / 31 DTR 239 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Agriculture market committee**

Objects of applicant market committee are charitable in nature falling within the purview of “advancement of any other object of general public utility” within the meaning of section 2(15) and therefore, it is entitled to registration under section 12A.

*Krishi Upaj Mandi Samiti, Hindaun City v. CIT (2007) 107 TTJ 381 (Jp.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Registration**

Non-filing of return or non-filing of audited accounts along with return is no hurdle to registration under section 12A.

*Rajasthan State Agricultural Marketing Board v. CIT (2007) 106 TTJ 1109 (Jp.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Power of CIT – Time limit**

CIT was not justified in refusing registration on the conjecture that assessee-trust had no intention to carry out those activities. (A.Y. 2001-02)

*Sardari Lal Oberai Memorial Charitable Trust v. ITO (2007) 106 TTJ 468 / (2005) 3 SOT 229 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Power of CIT [S. 12AA]**

While disposing application under section 12A, Commissioner has to examine only two aspects viz., the genuineness of the activities of the trust/ institution, and “Object of the Institution”. Once there is no dispute about genuineness of activities, Commissioner cannot take shelter of any other outer source for refusing registration under section 12A.

*U.P. Awas Evam Vikas Parishad v. I.T.O. (2007) 162 Taxman 173 (Luck.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Public utility – Registration**

Industrial estates in the State of Gujarat is eligible for registration under s. 12A, the object being an object of general public utility.

*Gujarat Industrial Development Corporation v. ACIT (2006) 102 TTJ 928 (Ahd.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – Local authority**

Assessee, a local authority constituted for planned development of the State, acquiring land at nominal rates and selling the same after development to general public at higher rates is engaged in commercial activities of profit motive and cannot be said to be carrying on charitable activities and therefore, registration under section 12A could not be granted.

*Punjab Urban Planning & Development Authority v. CIT (2006) 103 TTJ 988 (Chd.)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration – delay in filling the application**

Having regard to the fact that the majority of the members and office-bearers of the assessee-trust are villagers and are illiterate, who do not have proper knowledge about the legal framework, the delay in filling the application in Form No. 10 is condoned, and CIT is directed to grant registration from the date of establishment of the trust.

*Kacchi Hast Kala Maha Mandal v. CIT (2006) 100 TTJ 1112 (Rajkot)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Charitable trust – Registration**

The Tribunal held that, at the time of processing the application seeking Registration, the Commissioner is not expected to go in detail, and prima facie if assessee is able to make out a case for registration, he is entitled to registration under section 12A.

Refusal of Registration on ground that genuineness of assessee's activities as being of charitable nature is in doubt, was held to be not justified.

*Jyoti Prabha Society v. CIT (2003) 87 ITD 126 / 81 TTJ 942 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Failure to file audit report**

The Tribunal held that Assessing Officer is not justified in denying the benefit of accumulation under section 11 for failure to furnish Audit Report under section 12A, when exemption was being allowed under section 11 in earlier years. (A.Y. 1990-91)

*ACIT v. Sindhi Panchayat (2003) SOT 575 (Delhi)(Trib.)*

**S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration application – Condonation of delay – Sufficient cause [S. 253(5)]**

The words sufficient cause in Sec 253(5), as well as in 12A(a) should receive liberal construction so as to advance substantial justice.

Condonation of delay in filing Registration application was granted on ground that trustees were uneducated, rustic & rural people, and were not aware of technicalities

of the relevant provisions, nor the consequences for non-registration. (A.Ys. 1997-98 to 2000-01)

*Dashnam Goswami Bawa Samaj Trust v. ITO (2003) 127 Taxman 54 (Mag.)(Rajkot)(Trib.)*

### **S. 12A : Trust or institution – Charitable purposes – Contributions – Exempt incomes – Registration**

The Assessee society registered on 1-9-2005. The Assessee applied for registration on 10-4-2007 before the CIT who granted registration *vide* order dt. 7-11-2007 w.e.f. 1-4-2007. The Tribunal held that once the CIT is satisfied about objects the trust and genuineness of activities, he is required to grant registration w.e.f. 1-9-2005. (A.Y. 2003-04)

*The Indus Entrepreneur v. The CIT – II, ITA No. 32/JP/2008, Bench – B, dt. 20-6-2008* – *BCAJ*

*P. 26, Vol. 40-B, Part 1, October 2008. (Jp.)(Trib.)*

*Editorial: - Section 12AA has been amended w.e.f. 1-6-2007*

### **Section 12AA : Procedure for registration.**

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes – Registration granted under section 12A cannot be withdrawn in section 12AA(3)**

Assessee trust got registration under 12A in December 1974 and on that basis got exemption of income tax for the A.Ys 1996-97 to 2005-06. DIT (Exemptions) denied exemption and cancelled registration under section 12AA(3) with effect from assessment year 2002-03. The Court held that registration granted under section 12A in December 1974 to assessee could not be withdrawn. (A.Ys. 2002-03 to 2006-07)

*DIT (Exemption) v. Mool Chand Khairati Ram Trust (2011) 339 ITR 622 / 199 Taxman 1 / 58 DTR 254 / 243 CTR 245 (Delhi)(High Court)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes –Condonation of delay – Advice of Chartered Accountant**

Assessee, a Charitable Trust, having acted on the advice of the Chartered accountant which resulted in delay making the application in form 10A, constituted “sufficient cause” for the delay. Delay was rightly condoned by the Tribunal.

*CIT v. Indian Gospel Fellowship Trust (2010) 45 DTR 1 / 236 CTR 424 / 331 ITR 283 / 194 Taxman 167 (Mad.)(High Court)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Educational activities**

Provision of teaching to students in preparation after admission to professional institutions. No evidence to show registration obtained by fraud or forgery. Cancellation of registration on ground of profit motive not permissible. (A.Ys. 2000-01, 2001-02)

*Oxford Academy for Career Development v. CCIT (2009) 315 ITR 382 / 226 CTR 606 / 29 DTR 160 (Cal.)(High Court)*

**S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes –Limitation – Deemed registration**

Order rejecting application under section 12A passed after the period of limitation prescribed has expired. The said impugned order refusing registration is nothing but a nullity, and application for grant of registration is deemed to have been allowed.

*Sambandh Organisation v. CIT (2006) 156 Taxman 183 (Delhi)(High Court)*

**S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes –Application of income outside India**

Section 12AA does not refer to activities in India or outside India, therefore, so far as income which is applied outside India is concerned, it is not relevant criterion rejecting the application for registration.

*M. K. Nabyar Sarra Law Charitable Trust v. UOI (2004) 269 ITR 556 / 140 Taxman 616 / 190 CTR 29 (Delhi)(High Court)*

**S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes –Educational institutions on commercial line [S. 2(15), 11, 12]**

Assessee trust was formed to run educational institutions. It applied for registration under section 12AA. DIT(E) rejected the application on ground that probable fees to be collected from students was having a component for future expansion of institution and same component was in nature of profit and thus ,objects of trust would also include profit motive. The Tribunal held that since the object of trust was to establish a number of educational institutions in a brand name and run those institutions on commercial line, it could not be regarded as charitable activity, therefore, DIT (Exemption) was justified in rejecting assessee's application seeking registration under section 12AA.

*Rajah Sir Annamali Chettiar Foundation v. DIT (2011) 48 SOT 502 / 10 ITR 424 (Chennai)(Trib.)*

**S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes**

The DIT refused to grant registration for the reason that the assessee was claiming exemption under section 11 even though it had not complied with the mandatory provisions of registration. According to it, the lapse by the assessee cannot be visited with the consequence of its being declined registration later also, which approach was not supported either by any specific legal provisions or plain logic or rationale. The DIT was only required to examine if the objects of the trust were charitable and the activities were bona fide.

*Sudhir Thackersey Charitable Trust v. Dy. CIT, ITAT 'H' Bench, dated 26-8-2011, ITA No. 5031/M/10, BCAJ, October – 2011, P. 26, Vol. 43-B, Part 1 (Mum.)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes**

While granting registration to a Charitable Trust or institution, the powers of the CIT are limited to examination as to whether or not the objects of the trust are charitable in nature and examination about the genuineness of the activities, when genuineness of the activities is not in doubt, the CIT was not justified in refusing the registration under section 12AA, on irrelevant grounds.

*Saint Kabir Educational Trust v. CIT (2010) 41 DTR 267 (Amritsar)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes**

Charitable or religious trust – perpetual succession in appointment of trustees – could not give it colour of a private trust, Hence was entitled to registration.

*NLB Charitable Trust v. CIT (2010) 38 SOT 291 (Delhi)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes**

Rejection of registration on grounds of (i) genuineness of appellant, and (ii) alleged violation of section 13(1)(b) is not sustainable. The compliance with the provisions of section 13(1)(b) were not relevant at the time of considering the application for registration.

*JITO Administrative Training Foundation v. DIT (Exemption), ITAT 'J' Bench, Mumbai, ITA No. 4126/M/09, dated 18-3-2010, (2010) BCAJ P. 49, Vol. 42-A, Part 3, June, 2010 (Mum.)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Effective Date**

CIT having initially granted registration under section 12AA to the assessee w.e.f. 1st April, 2007, and later passed an order on an application under section 154, granting registration w.e.f. 28th Feb., 2002, assessee was eligible to claim benefits under section 11/12 for the year under consideration i.e. Asst. Year 2006-07.

*Shree Mahadevi Tirath Sharada Ma Seva Sangh v. ITO (2010) 133 TTJ 57 (UO)(Chd.)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes –University – Artificial juristic person [S. 2 (15), 2(31)]**

University, incorporated under Haryana private Universities Act, 2006, is an artificial juristic person within the meaning of term "person" under section 2(31)(vii), hence, it is entitled to make an application for registration under section 12AA. The object of the university were granting fellowship, freeship, scholarship, etc. to students belonging to weaker sections of society, it could be concluded that assessee was a charitable institution.

*O. P. Jindal Global University v. CIT (2010) 127 ITD 164 / 136 TTJ 683 / 44 DTR 107 (Delhi)(Trib.)*



### **S. 12AA : Trust or institution – Registration – Charitable purposes – Cancellation**

As per section 12AA(3), registration granted to any trust or society under section 12AA(1)(b) can be cancelled only if the CIT is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects thereof; registration could not be cancelled under section 12AA(3) by merely re-examining the objects of the trust or society.

*Chaturvedi Har Prasad Education Society v. CIT (2010) 134 TTJ 781 / 46 DTR 121 (Luck.)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Mixed objects**

The objects of the society were of religious and charitable nature, it was still entitled to registration under section 12AA read with section 13(1)(b) of the Income Tax Act, 1961. (A.Y. 2010-11)

*Rehoboth Mission v. DIT (Exemption) (2010) 42 SOT 149 (Hyd.)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes – Power to cancel Registration – Prospective [S. 12A]**

Insertion of new clause in section 12AA(3) with effect from 1-6-2010, by which Commissioner has got power to cancel registration granted earlier to assessee–trust under section 12A, is not applicable retrospectively and its operation has to be effective from date it was introduced and onwards.

Merely by granting a registration under section 12A/12AA, a trust ipso facto is not entitled to exemption prescribed under sections 11 and 12. (A.Ys. 2000-01, 2001-02)

*Ajit Education Trust v. CIT (2010) 42 SOT 415 / 46 DTR 482 / 134 TTJ 483 (Ahd.)(Trib.)*

*Editorial: Bharati Vidyapeeth v. ITO (2008) 119 TTJ 261 / 14 DTR 454*

*Oxford Academy for Career Development v. CCIT (2009) 315 ITR 382 / 226 CTR 606 / 29 DTR 160 (All.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Genuineness (12A)**

It was held that for grant of Registration, Commissioner is only required to satisfy himself with regard to the objects and genuineness of the activities of the trust. If nothing offensive is found, and if objects are not outside the purview of section 2(15), and in absence of any dissatisfaction, the rejection of Registration is unjustified.

*Dream Land Educational Trust v. CIT (2008) 166 Taxman 27 (Mag.)(Amritsar)(Trib.)*

### **S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes – Hired a building owned by relative of trustee**

CIT having not doubted the aims and objects of the applicant society, registration could not be denied merely on the ground that it has hired a building owned by close relatives of one of its trustees.

*Modern Defence Shikshan Sansthan v. CIT (2007) 108 TTJ 732 (Jodh.)(Trib.)*

**S. 12AA : Trust or institution – Registration – Charitable purposes – Exempt incomes – Genuineness of activities**

While dealing with an application for registration under section 12AA jurisdiction of the CIT is confined to examination of the objects of the applicant trust and the genuineness of its activities.

*Acharya Sewa Niyas Uttaranchal v. CIT (2006) 105 TTJ 761 (Delhi)(Trib.)*

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

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Muslims – Income from Property held for Charitable or Religious Purpose – Education for Social and Economic Development of Muslims – Change of Clause [S. 11]**

Under the original trust deed benefit available to all Muslims from all over the world, except Muslims in Kerala, no Muslims enumerated in back ward classes. Assessee changing Trust deed and deleting clause of the trust being for Muslims and introducing the clause that benefits available to all persons irrespective of religion, caste or creed. The Court held that change in clause was an attempt to be covered by explanation 2 to section 13 and therefore, exemption was refused.

*CIT v. Palghat Shadi Mahal Trust (2003) 173 Taxation 105 / 172 CTR 453 / 254 ITR 212 / 120 Taxman 889 (SC)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Exemption – Founder [S. 11]**

The Court held that assessee in this case was not entitled to exemption under section 11. As assessee was covered under description of "Founder of institution" used in section 13(3)(a) r.w.s. 13(3)(c)(ii) by advancing substantial amount to one of the members for procurement of premises on lease without interest/security and said member being one of the subscriber of MOA. The contribution of money is not an inexorable test of a person being a "founder" within meaning of section 13(1)(a), though it might happen often that person who originates an institution might often also found it.

*DIT v. Bharat Diamond Bourse (2003) 1 SCC 741 / 259 ITR 280 / 173 Taxation 1 / 126 Taxman 365 / (2004) 192 CTR 506 / (2005) 142 Taxman 409 (SC)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Beneficiary – Society at large**

Where the object of the trust clearly revealed that the beneficiary of the trust was society at large and not confined only to a particular community, caste or religion, the provisions of section 13 were not attracted. (A.Y. 1998-99)

*CIT v. Bigabass Maheshwari Sewa Samiti (2008) 14 DTR 29 / 220 CTR 369 (Raj.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Religious – Propagation of Jainism**

The assessee Trust was denied exemption under section 11 of the Act on the ground that it is a religious trust. The Appellate Tribunal granted the relief. On further appeal Hon'ble Court observed that if Jainism is accepted to be a religion and from the covenants of the Trust Deed it can be spelt out that not only to propagate Jainism or help and assist maintenance of the Temple, Sadhus, Sadhvis, Shravikas and Shravaks, yet other goals are set in the Trust Deed, then the Trust would become a Charitable Trust, so also a Religious Trust or it can be addressed as a Charitable Religious Trust, and, if that be so, section 13(1)(b) would not be applicable.

*CIT v. Chandra Charitable Trust (2006) 156 Taxman 19 / 206 CTR 418 / 294 ITR 86 (Guj.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Letting of property**

Section 13 carves out an exception to general exemption granted under section 11 & 12 to incomes derived by trusts/ charitable institutions ; onus lies on revenue to bring on record, cogent material / evidence to establish that trust / charitable institution is hit by provision of section 13; where there was nothing on record to show that in institutions/companies to which land of assessee trust was let out or in which land of assessee trust was let out or in which funds were invested by assessee, voting power of not less than twenty per cent was held by beneficiaries, denial of exemption was not justified. (A.Ys. 1976-77 to 1978-79)

*CIT v. Kamla Town Trust (2005) 279 ITR 89 / 150 Taxman 107 / 201 CTR 281 (All.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Investment**

Assessee trust had received shares of a company in which trustees had substantial interest, by way of donation, it could not be said that trust had made investment of its funds in respect of aforesaid donation so as to attract provisions of section 13(1)(c) and section 13(2)(h). (A.Ys. 1973-74, 1976-77, 1978-79)

*CIT v. Shri Radha Krishna Temple Trust (2005) 277 ITR 158 / 143 Taxman 352 / 193 CTR 567 (All.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Personal surety**

Personal surety given by director of a company to which assessee trust had advanced loan could be considered to be "adequate security" for allowance of exemption under section 11. (A.Ys. 1979-80, 1980-81, 1981-82)

*CIT v. Shri Ram Samarak Nidhi (2004) 141 Taxman 297 (Delhi)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Business [S. 2(13), 11]**

Merely because assessee-trust had conducted stray activities, i.e., conducting races and inter-venue betting for purpose of achieving its primary objects, activities undertaken by assessee-trust could not be called 'business' within meaning of section 2(13) so as to deprive it of exemption under section 11. (A.Ys. 1978-79, 1980-81)

*CIT v. Hyderabad Race Club Charitable Trust (2003) 129 Taxman 788 / 262 ITR 194 / 183 CTR 454 (AP)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Fixed deposit**

Where fixed deposits in name of assessee-trust worth ` 16 lakhs were pledged as security with bank enabling one of members of the assessee, to avail loan without adequate security and consideration, and certain transaction of purchase of lands was routed through an AOP in which all members were directors and employees of assessee, it was a case of violation of section 13(1)(c)(ii). (A.Y. 1993-94)

*Action for Welfare & Awakening in Rural Environment v. Dy. CIT (2003) 130 Taxman 82 / 263 ITR 13 / 183 CTR 631 (AP)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose**

Investment held by the charitable trust contrary to the requirement of section 11(5) in years prior to March, 1993, would not disable it from claiming the benefit of section 11. (A.Ys. 1983-84, 1984-85)

*DIT v. Vasireddi Rajah Ramagopala Krishna Maheswara Prasad Bahadur Charitable Trust (2003) 263 ITR 144 / 186 CTR 205 / 138 Taxman 257 (Mad.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Interest free advance to Sister concern**

Advance given by assessee-trust interest-free to its sister concern, a private limited company of which the trustees of the assessee were also directors, would amount to violation of section 13(1)(d) read with section 11(5). (A.Y. 1987-88)

*CIT v. V.G.P. Foundation (2003) 262 ITR 187 / 183 CTR 330 / 134 Taxman 663 (Mad.)(High Court)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Religious trust – Benefit of Dawoodi Bohra community [S. 11]**

The assessee was religious trust for benefit of Dawoodi Bohra community. The Commissioner rejected registration of trust on ground that assessee trust was not established for benefit of general public and had violated the provisions of sections 13(1)(a) and 13(1)(b). The assessee contended that said section 13(1)(b) would not be applicable to religious trust. The Tribunal held that since the benefit of Trust was available to all persons of Dawoodi Bohra community i.e., benefit was available to a section of people and was not confined to some specific individuals, it could not be said that assessee trust was established for private religious purpose, therefore assessee is entitled for registration.

*Shiya Dawoodi Bohra Jamat v. CIT (2011) 133 ITD 271 (Ahd.)(Trib.)*

**S. 13 : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Religious purpose – Registration – Minorities and backward classes [S. 12A]**

The assessee trust were formed for charitable and religious purposes, the beneficiaries of the trust were the financially poor minorities and other back ward classes in Tellicherry Municipality and its suburbs. The Assessee applied for registration under section 12A. The Commissioner found that the trust was established for the benefit of a particular religious community or caste and thus hit by section 13(1)(b). It was further held that Explanation (2) below section 13(7), which provides an exception to section 13(1)(b) for schedule castes, backward class schedule tribes or women and children, would not be applicable in the instant case as the word "minority" cannot be categorized as either scheduled caste or backward community. He accordingly, rejected assessee's application for grant of registration. The Tribunal held that by reading the Trust deed as a whole the word 'Minority' to mean the religious minorities hence section 13(1)(b) would stand automatically attracted, hence the order of Commissioner was upheld.

*Tellicherry Minority Welfare Trust v. CIT (2011) 48 SOT 313 (Cochin)(Trib.)*

**Section 13A : Special provision relating to incomes of political parties**

**S. 13A : Trust or institution – Investment restrictions – Exempt incomes – Charitable purpose – Income by way of Voluntary contributions – Political parties**

Provisions of Sec. 13A are applicable only to actual voluntary contributions received, and there is no scope for estimating the voluntary contributions. Disallowance of expenditure out of voluntary contribution received by Political parties on ground that expenditure is not incurred for earning voluntary contribution is not justified, as both are intertwined. (A.Y. 1984-85)

*Indian National Congress v. ACIT (2003) 134 Taxman 34 (Mag.)(Delhi)(Trib.)*

## **HEADS OF INCOME**

### **Section 14 : Heads of income**

#### **S. 14 : Heads of income – Computation – Chargeable under particular head**

If a particular receipt resembles a particular head, then it is to be charged under that head; if it cannot be charged under that particular head, it cannot be charged under any other head including "Income from other sources".

*CIT v. Magnum Export (P.) Ltd. (2003) 130 Taxman 702 / 262 ITR 10 / 183 CTR 75 (Cal.)(High Court)*

#### **S. 14 : Heads of income – Estoppel against statute – Assessing Officer's duty**

The tribunal held, that it is the bounden duty of Assessing officer to assess income under correct head of Income, even if assessee has shown under wrong head, as it is the cardinal principle that there can be no estoppels against the statute. (A.Y. 1995-96)

*Pasumarthi Srikrishna v. ACIT (2003) SOT 407 (Hyd.)(Trib.)*

### **Section 14A : Expenditure incurred in relation to income not includible in total income**

#### **S. 14A : Expenditure disallowance – Exempt income [S. 10(33)]**

Proximity cause between expenditure and exempt income is condition precedent for disallowance of expenditure. A proximate cause shall mean that the amount disallowed has a relationship with the exempt income. In the given case it is decided that pay back or return of investment is not a proximate cause and thus section 14A is not attracted. (A.Y. 2000-01)

*CIT v. Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 1 / 233 CTR 42 / 41 DTR 233 / 192 Taxman 211 (SC)*

#### **S. 14A : Expenditure disallowance – Exempt income – Borrowed funds – Interest – Use of own funds for tax – Free investments invalid**

It was held by Hon'ble High Court that the assessee has sufficiently explained that a majority of the investment in the tax-free security was made before the borrowing. The assessee had demonstrated that it had other sources of investment and that no part of the borrowed fund could be stated to have been diverted to earn tax free income. As borrowed funds were not used for earning tax-free income, applying section 14A was not justified.

*CIT v. Gujarat Power Corporation Ltd. ITA No. 1587 of 2009 dated 28-3-2011 (Guj.)(High Court) Source: [www.itatonline.org](http://www.itatonline.org)*

#### **S. 14A : Expenditure disallowance – Exempt income – Apportionment of expenses – Rule 8D – Pre Asst. Year 2008-09**



For pre A.Y. 2008-09, the assessee earned tax free dividend income from investments in units, bonds, shares, etc. The assessee did not maintain separate books of account for tax free securities but claimed that the same had been invested from its own funds and no part of the interest paid by the assessee on its borrowings together with the administrative expenses could be disallowed. Assessing Officer took the view that the interest paid on borrowings and administrative expenses could be disallowed under section 14A. On appeal, the Tribunal held that as no rule had been made prescribed for computing the disallowance no disallowance under section 14A could be made. On appeal by the department, the Court held that in the absence of any precise formula for proportionate disallowance, no disallowance is called for in respect of administrative cost attributable to earning of tax free income until Rule 8D came in to force.

*CIT v. Catholic Syriyan Bank Ltd. & Ors. (2011) 237 CTR 164 / 49 DTR 57 (Ker.)(High Court)*

*Editorial: Dhanalakshmi Bank Ltd. v. ACIT (2007) 12 SOT 625 (Cochin)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Despite Proviso to section 14A, disallowance can be made for earlier years –Revision was held justified [S. 263]**

Partners of a firm, were assessed to tax in their individual capacity and the Assessing Officer gave deduction of interest paid on borrowings for investment in firm, the Court held that Commissioner was justified in holding that after insertion of section 14A, interest payable on amount invested in a partnership firm could not be allowed as deduction. The protection of proviso to section 14A w.r.t. A.Y. 2001-02 & earlier years was inserted w.e.f. 11/05/2001. Thus, where order of CIT under section 263 was passed earlier i.e. on 29/12/1999, proviso to section 14A could not be invoked against said order as on date of order of Commissioner passed under section 263 and proviso was not in existence. Decided in favour of revenue. (A. Y. 1995-96).

*Mahesh G. Shetty & Ors. v. CIT (2011) 51 DTR 104 / 238 CTR 440 / 198 Taxman 224 (Karn.)(High Court)*

*Editorial: SLP rejected. SLP (Civil) [Nos. 14660-14663 of 2011 dated 5-7-2011 (2012) 204 Taxman 189 (Mag.)]*

**S. 14A : Expenditure disallowance – Exempt income – Interest on borrowed capital – Direction of Tribunal**

During the course of assessment proceedings, the Assessing Officer made a query in respect of disallowance under section 14A of the Income-tax Act, 1961, however, no disallowance was made. Revenue had not challenged the non applicability of section 14A. Tribunal gave direction to consider applicability of section 14A. The direction of Tribunal was quashed.

*Topstar Mercantile P. Ltd. v. ACIT (2011) 334 ITR 374 / 225 CTR 351 / 28 DTR 215 (Bom.)(High Court)*

**S. 14A : Expenditure disallowance – Exempt income – Investment**

If the investment in tax free income yielding securities is made from interest free funds, no disallowance can be made under section 14A. (A.Y. 2001-02).

*CIT v. LubiSummersibles Ltd. (ACAJ Vol. 35 Part 5 August-2011 P. 319)(Guj.)(High Court)*

**S. 14A : Expenditure disallowance – Exempt income – Real expenditure – Only real expenditure can be disallowed [Rule 8D]**

The High Court had to consider two issues: (a) whether interest paid on funds borrowed to acquire “trading shares” is hit by section 14A given that the profits there from are assessable to tax as “business profits” and the dividend is incidental and (b) whether Rule 8D has retrospective operation. Held by the Court:

- (i) The argument that if the dominant and main objective of the expenditure was not the earning of ‘exempt’ income then, the expenditure cannot be disallowed under section 14A is not acceptable. The expression “in relation to” cannot be given a narrow meaning and simply means “in connection with” or “pertaining to”. If the expenditure has a relation or connection with or pertains to exempt income, it cannot be allowed as a deduction even if it otherwise qualifies under the other provisions of the Act;
- (ii) The expression “expenditure incurred” in section 14A refers to actual expenditure and not to some imagined expenditure. If no expenditure is incurred in relation to the exempt income, no disallowance can be made under section 14A (Hero Cycles Ltd. (2010) 323 ITR 518 referred).
- (iii) The Assessing Officer cannot proceed to determine the amount of expenditure incurred in relation to exempt income without recording a finding that he is not satisfied with the correctness of the claim of the assessee. This is a condition precedent. While rejecting the claim of the assessee with regard to the expenditure or no expenditure in relation to exempt income, the Assessing Officer will have to indicate cogent reasons for the same;
- (iv) Rule 8D comes into play only when the Assessing Officer records a finding that he is not satisfied with the assessee’s method. Though sections 14A(2) & (3) were inserted w.e.f. 1.4.1962, Rule 8D was inserted on 24.03.2008. Accordingly, Rule 8D would operate prospectively. (*Godrej and Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom)* followed);
- (v) For periods prior to Rule 8D, the Assessing Officer will have to adopt a reasonable method on the basis of objective criteria to determine the expenditure. However, here also, he will have to show why he is not satisfied with the correctness of the assessee’s claim (argument that Rule 8D exceeds the mandate of section 14A left open).

*Maxopp Investment Ltd. v. CIT (2011) 64 DTR 122 / 203 Taxman 364 / (2012) 247 CTR 162 (Delhi)(High Court)*

*CIT v. Escorts Finance Ltd. & Ors. (2011) 64 DTR 122 / 203 Taxman 364 / (2012) 247 CTR 162 (Delhi)(High Court)*

**S. 14A : Expenditure disallowance – Exempted income – Dividend – No expenditure incurred**

When no expenditure was in fact incurred in earning dividend income, no disallowance was permissible. (A. Y. 1997-98).

*CIT v. Reliance Industries Ltd. (2011) 339 ITR 632 (Bom.)(High Court)*

**S. 14A : Expenditure disallowance – Exempted income – Interest paid**

Assessee bank borrowed certain funds, which were invested in purchase of tax free bonds for meeting SLR requirement of RBI. Assessing Officer disallowed the interest under section 14A. The Tribunal deleted the disallowance. On appeal High Court held that the object or purpose of investment does not affect operation of section 14A in as much as any expenditure incurred for earning tax free income is not an allowable expenditure, therefore, even though purchase of tax free bonds was for meeting SLR requirements, interest and other expenses incurred on borrowals for investment in tax free bonds was to be disallowed.

*CIT v. State Bank of Travancore (2011) 203 Taxman 639 (Ker.)(High Court)*

**S. 14A : Expenditure disallowance – Exempted income – Share income from firm [S. 10(2A), 36(1)(iii)]**

Share income of assessee company from a firm in which it was partner did constitute share of income from firm was sale consideration for granting income of the assessee under section 10(2A) and section 14A applied interest free loan share of income being exempt, section 14A is attracted was justified in respect of interest free loans given to the firm. (A.Y. 2004-05)

*CIT v. Popular Vehicles & Services Ltd. (2010) 325 ITR 523 / 33 DTR 140 / 228 CTR 346 / 189 Taxman 14 (Ker.)(High Court)*

**S. 14A : Expenditure disallowance – Exempted income – Rule 8D – Not retrospective – Reasonable basis**

Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable but can be applied only if assessee's method not satisfactory. Rule 8D is not retrospective and applies from A.Y. 2008-09. For earlier years, disallowance has to be worked out on "reasonable basis" under section 14A(1). (A.Y. 2002-03)

*Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 / 43 DTR 177 / 234 CTR 1 / 194 Taxman 203 (Bom.) / (2010) Vol. 112 (7) Bom. L.R. 3421 / (2011) 224 Taxation 330 (High Court)*

**S. 14A : Expenditure disallowance – Exempted income – Investment in shares**

Assessee acquired the shares using its own funds, no interest expenditure incurred, disallowance under section 14A can not be made. Also assessee did not make any claim for exemption. (A.Y. 2004-05)

*CIT v. Winsome Textile Industries Ltd. (2009) 319 ITR 204 (P&H)(High Court)*

### **S. 14A : Expenditure disallowance – Exempted income – Interest**

Interest could be disallowed only to the extent of loan invested in shares and not on *ad hoc* basis.

*CIT v. Sushma Kapoor (Mrs.) (2009) 32 DTR 212 / 230 CTR 262 / 319 ITR 299 / 188 Taxman 24 (Delhi)(High Court)*

### **S. 14A : Expenditure disallowance – Exempted income – Remanding of matter**

Where the Assessing Officer had not invoked the provision of section 14 A of the Act to disallow the expenditure incurred by the assessee in relation to the earning of exempt income, the High Court held that tribunal was not justified in remanding the matter back to the file of the Assessing Officer with a direction to consider the applicability of section 14A.

*Topstar Mercantile (P) Ltd. v. ACIT (2009) 28 DTR 215 / 225 CTR 351 / 334 ITR 374 (Bom.) (High Court)*

### **S. 14A : Expenditure disallowance – Exempted income – Expenditure not incurred**

Where it is found that assessee had not incurred any expenditure for earning exempt income, no part of the expenditure can be disallowed under the provisions of section 14A of the Act. (A.Y. 2004-05)

*CIT v. Hero Cycles Ltd. (2009) 31 DTR 301 / 233 CTR 74 / 323 ITR 518 / 189 Taxman 50 (P&H) (High Court)*

### **S. 14A : Expenditure disallowance – Exempt income – No expenditure incurred**

When no expenditure is incurred for earning exempted income disallowance under section 14A cannot be made. (A.Y. 2005-06)

*ACIT v. Pradip N. Desai, ITA No. 2488/AHD/2008 Bench 'A' dt. 28/12/2010, ACAJ, Vol. 34 Part 10 January 2011, P. 478 (Ahd.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Appellate Tribunal – Power – Applicability of provision of section 14A for the first time before Tribunal [S. 254(1)]**

Issue of disallowance under section 14A cannot be raised for the first time before the Tribunal where the provision of section 14A was not invoked against the assessee by the Assessing Officer while making disallowance of interest expenditure under section 36(1)(iii) and CIT(A) also at no stage considered the application of section 14A. (A.Y. 2003-04)

*ACIT v. Delite Enterprises (P) Ltd. (2011) 135 TTJ 663 / 50 DTR 193 / 128 ITD 146 (Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Apportionment**

Assessee made investment for earning tax free income from mix funds and it is not possible to ascertain as to whether the investment in tax free was out of assessee's own funds and the Assessing having not established the nexus between the borrowed funds and investment in tax free funds disallowance on pro rata basis was not proper. (A.Y. 2003-04)

*Dy. CIT v. Maharashtra Seamless Ltd. (2011) 52 DTR 5 / 138 TTJ 244 / 48 SOT 160 (URO)(Delhi)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Interest – Trading**

In case of assessee engaged in trading and investment of shares and received tax-free dividend income of in A.Y. 2004-05, it was held by Tribunal that Rule 8D does not apply prior to A.Y. 2008-09 (Godrej & Boyce Mfg. Co. Ltd. (2010) 328 ITR 81 (Bom.) followed). It was further observed that the expression "in relation to" in section 14A means dominant and immediate connection or nexus with the exempt income. In order to disallow expenditure under section 14A, there must be a live nexus between the expenditure incurred and the tax-free income. Disallowance cannot be made on presumptions and estimation by the Assessing Officer. When it is possible to determine the actual expenditure "in relation to" the exempt income or where no expenditure is incurred "in relation to" the exempt income, the principle of apportionment embedded in section 14A has no application. (A.Y. 2004-05)

*Yatish Trading Co. Pvt. Ltd. v. ACIT (2011) 129 ITD 237 / 50 DTR 158 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – "Depreciation"**

It was held that section 14A permits disallowance of "expenditure incurred by the assessee" and not of "allowance admissible" to him. There is a distinction between "expenditure" and "allowance". The expression "expenditure" does not include allowances such as depreciation allowance. Accordingly, depreciation cannot be the subject matter of disallowance under section 14A (ratio of *Nectar Beverages P. Ltd. v. Dy. CIT (2009) 314 ITR 314 (SC)* followed);

Similarly, it was further held that the deduction under section 80D is not expenditure for earning tax-free income but is a permissible deduction from gross total income under Chapter VIA. (A.Y. 2003-04)

*Hoshang D. Nanavati v. ACIT ITA No. 3567/Mum/07 dated 18-3-2011 (Mum.)(Trib.)*  
Source: [www.itatonline.org](http://www.itatonline.org)

#### **S. 14A : Expenditure disallowance – Exempt income – Interest – Ought to have repaid borrowings instead of investing**

Where borrowed funds were utilized for business purposes and investment in shares is made out of own funds, then disallowance under section 14A of interest on borrowed fund was not permissible. *CIT v. Hero Cycles Ltd. (2010) 323 ITR 518 (P&H)* (A.Y. 2005-06)

*Godrej Industries Ltd. v. Dy. CIT ITA No. 1090/Mum/09 dated 8-10-2010 (Mum.)(Trib.)*

Source: [www.itatonline.org](http://www.itatonline.org)

### **S. 14A : Expenditure disallowance – Exempt income – Separate Books – Personal tax free investment**

The assessee is maintaining separate books of account for the purpose of business. The tax-free investments are in his personal capacity. As the Assessing Officer has not disallowed any expenditure of personal nature out of the business income, the expenditure claimed in the business of share dealings cannot be correlated to the incomes earned in personal capacity that too on dividend, PPF interest and tax free interest on RBI bonds. Accordingly, the estimation of expenditure of ` 20,000 out of business expenditure as being incurred for earning tax free income is not acceptable.

(A. Y. 2005-06)

*Pawan Kumar Parmeshwarlal v. ACIT, ITA No. 530/Mum/2009, dt. 11-1-2011, 'C' Bench,* BCAJ

*P. 27, Vol. 42-B, Part 5, February 2011 (Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Investment – Dividend**

For the applicability of section 14A there must be (i) income which is taxable under the Act, for the relevant assessment year and (2) there should also be income which does not form part of total income under the Act during relevant assessment year. If either one is absent, then section 14A has no applicability. (A.Y. 2006-07).

*Siva Industries & Holdings Ltd. v. ACIT (2011) 59 DTR 182 (Chennai)(Trib.)*

*Editorial:- CIT v. Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 1 (SC), Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 / 234 CTR 1 / 194 Taxman 203 / 43 DTR 177 (Bom.) CIT v. Winsome Textile Industries Ltd. (2009) 319 ITR 204 (P&H) referred*

### **S. 14A : Expenditure disallowance – Exempt income – Old investments – Own funds**

Investments in shares were made by the assessee from own funds, no disallowances were made in earlier years. No disallowance can be made for the relevant year. (A.Y. 2005-06).

*G. D. Metsteel (P) Ltd. v. ACIT ITA No. 548/Chd/2011 dated 30-9-2011 47 SOT 62 / 64* DTR

*161 / 142 TTJ 641 (Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – No nexus – No disallowance – Disallowance cannot exceed exempt income**

In A.Y. 2007-08, the assessee received dividend in respect of investment in shares made in earlier years. No investments were made during the year. It was claimed that the investment in the earlier years was made out of reserves & surplus and that there was no expenditure incurred during the year to earn the dividend. The Assessing Officer held that as in the earlier years, the assessee had borrowed funds, section 14A applied. It was held that if there is no nexus between borrowed funds and



investments made in purchase of shares, disallowance under section 14A is not warranted. (A.Y. 2007-08).

*ACIT v. Punjab State Co-op. & Mktg. ITA No. 548/Chd/2011 dated 30-9-2011 (Chd.)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

#### **S. 14A : Expenditure disallowance – Exempt income – Rule 8D to show how assessee's method is incorrect**

It is a pre-requisite that before invoking Rule 8D, the Assessing Officer must record his satisfaction on how the assessee's calculation is incorrect. The Assessing Officer cannot apply Rule 8D without pointing out any inaccuracy in the method of apportionment or allocation of expenses. Further, the onus is on the Assessing Officer to show that expenditure has been incurred by the assessee for earning tax-free income. Without discharging the onus, the Assessing Officer is not entitled to make an ad hoc disallowance. A clear finding of incurring of expenditure is necessary. No disallowance can be made on the basis of presumptions. (A.Y. 2008-09)

*Dy. CIT v. Jindal Photo Limited ITA No. 814/Del/2011 dated 23-9-2011, BCAJ Dec. 2011 P. 33 Vol. 43-B Part 3 (Delhi)(Trib.)* Source : [www.itatonline.org](http://www.itatonline.org)

#### **S. 14A : Expenditure disallowance – Exempt income – Proviso – First assessment – Reassessment [S. 143(1), 147]**

On facts of the assessee, assessment proceedings were initially completed under section 143(1). Subsequently Assessing Officer initiated reassessment proceedings in course of which he made certain disallowance under section 14A. Since notice under section 148 was issued to make an assessment at the first instance, Assessing Officer was justified in dealing with issue arising under section 14A. Bar stated in proviso to section 14A does not operate in a case of first assessment. (A. Y. 1999-2000).

*ACIT v. Tube Investments of India Ltd. (2011) 133 ITD 79 / (2012) 143 TTJ 658 / 13 ITR 619 / 66 DTR 153 (TM)(Chennai)(Trib.)*

#### **S. 14A : Business expenditure – Disallowance – Exempt income – Interest free funds**

If there were funds available, both interest free and interest bearing, then a presumption would arise that interest free funds have been utilised for investments and no disallowance of interest could be made under section 14A. (A.Y. 2004-05).

*Bunge Agribusiness (India) (P) Ltd. v. Dy. CIT (2011) 64 DTR 201 / 132 ITD 549 / 142 TTJ 817 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Dividend – Interest – UTI Bonds [Rule 8D]**

Assessee claimed that no expenditure was incurred for earning tax free income. Assessing Officer held that some expenditure must have been incurred to earn the

said income and he estimated 1 percent of tax free income and disallowed ₹ 42,130 under section 14A. Commissioner (Appeals) by applying Rule 8D retrospectively, disallowed ₹ 10.29 lakhs. Assessee before the Tribunal challenged applicability of Rule 8D. The Tribunal held that Rule 8D was not applicable, and upheld the estimation made by Assessing Officer. (A.Y. 2004-05).

*Dy. CIT v. Philips Carbon Black Ltd. (2011) 133 ITD 189 / (2012) 70 DTR 267 (TM)(Kol.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Basis of nexus not on *ad hoc* estimate basis**

Rule 8D does not apply to A.Y. 2006-07. The assessee has urged that no expenditure has been identified to have been incurred to exempt income. Neither the Assessing Officer nor the CIT(A) has rebutted this submission. The Assessing Officer made an *ad hoc* estimate which is not sustainable in the light of Hero Cycles. Accordingly, in view of Vegetable Products 88 ITR 192 where it was held that if two constructions are possible, one favouring the assessee should be adopted, the precedent laid down in Hero Cycles should be followed. (A.Y. 2006-07)

*Minda Investments v. Dy. CIT (2011) 52 DTR 1 / 138 TTJ 240 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Matters remanded back**

In the light of Godrej & Boyce Mfg. Co. Ltd. (2010) 328 ITR 81 (Bom.) it was held that the plea of the assessee based on Minda Investments Ltd. that the disallowance should be deleted cannot be accepted as in the later decisions similar matters have been restored to the file of the Assessing Officer and according to rule of precedence, later decision passed by similar strength of the Bench has to be followed in preference to the earlier decision.

*Continental Carriers Pvt. Ltd. v. ACIT (2011) 52 DTR 10 / 138 TTJ 249 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Insurance business**

Section 14A, is not applicable in the case of insurance business, which is governed by specific provisions of section 44. (A.Y. 2003-04)

*Bajaj Alliance General Insurance Co. Ltd. v. Addl. CIT (2010) 38 DTR 282 / 130 TTJ 398 (Pune)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Insurance business [S. 44]**

Section 44 provides for application of special provisions for computation of profits and gains of insurance business in accordance with Rule 5 of Sch. I and, therefore, it is not permissible to the Assessing Officer to travel beyond section 44 and Sch. I and make disallowance by applying section 14A. (A.Ys. 2000-01, 2001-02)

*Oriental Insurance Co. Ltd. v. ACIT (2010) 38 DTR 273 / 130 TTJ 388 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – A disallowance of interest – Used of own funds to repay loans & not invest in shares**

In view of Godrej Boyce Mfg. Co. 328 ITR 81 (Bom.) Rule 8D is applicable only prospectively i.e. from A.Y. 2008-09 and not for earlier years. The facts showed that the assessee had made the investment in shares out of its own funds and the borrowed funds were entirely utilized for the purpose of its business. The investment in shares in the current year was made from a separate bank account where the surplus funds generated in that year were deposited. The argument that the assessee could have utilized its surplus funds in repaying the borrowings instead of investing in shares and by not doing so, there was diversion of borrowed funds towards investment in shares to earn dividend income is not acceptable in view of *CIT v. Hero Cycles Ltd* 323 ITR 518 where it was held, distinguishing *Abhishek Industries* 286 ITR 1 (P&H), that if investment in shares is made by an assessee out of own funds and not out of borrowed funds, disallowance under section 14A is not sustainable. Accordingly, the disallowance of interest on borrowed funds was deleted. (A.Y. 2005-06)

*Godrej Agrovat Ltd. v. ACIT ITA No. 1629/Mum/09 dated 17-9-2010 (Mum.)(Trib.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

**S. 14A : Expenditure disallowance – Exempt income – No disallowance of interest – Assessing Officer to show nexus**

No disallowance can be made under section 14A of interest on borrowed funds where in case of mixed funds, it is not possible to ascertain whether the investment in tax free bonds is out of the assessee's own funds, the source of investment in the tax free bonds is identified, and the Assessing Officer failed to establish any nexus between the borrowed funds and the investments in the tax free bonds. As also the cash flow of the assessee was not seen.

Therefore, the apportionment on a *pro rata* basis was improper in the absence of anything brought by the Assessing Officer to rebut the assessee's stand that the investment in the tax free bonds had been made out of the funds of own funds (*Minda Investments*, *Hero Cycles* 323 ITR 518 (P&H) and *Winsome Textile Industries* 319 ITR 204 (P&H) followed). (A.Y. 2003-04)

*Dy. CIT v. Maharashtra Seamless Ltd. (2010) 52 DTR 5 / 138 TTJ 244 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Investment**

Section 14A has no application when the Investment is made, not for purpose of earning tax free income, but for meeting its statutory obligation of maintaining required SLR. The expenses incurred in investing in tax free bonds were held to be expenses for the purpose of business. (A.Y. 2003-04)

*State Bank of Travancore v. ACIT (2010) 195 Taxman 47 (Mag.)(Cochin)(Trib.)*

**S. 14A : Expenditure disallowance – Exempted income – Correlation**

In absence of correlation of any expenditure incurred in earning exempt income, there cannot be disallowance under section 14A. (A.Y. 2004-05)

**S. 14A : Expenditure disallowance – Exempt income – Absence of exempt income**

When the expenditure of interest is incurred in relation to income which does not form part of total income, it has to suffer the disallowance irrespective of the fact whether any income is earned by the assessee or not. Section 14A does not envisage any such exception. This is even if the interest paid on borrowings for the purchase of share were allowable under section 57 as an expenditure incurred for earning an income or under section 36(1)(iii) or under section 37 as an expenditure incurred wholly and exclusively, for the purposes of business. The term 'in relation to' is wide enough to include in its sweep the expenditure both "for making or earning income" and "incurred wholly and exclusively for the purposes of business carried on by the assessee." What one has to see is whether any expenditure were incurred by an assessee in relation to an income that does not form part of total income of the assessee under the Act, and if the answer is in affirmative then that expenditure cannot be allowed irrespective of the fact that it was allowable under different provisions of the Act. Further, disallowance has to be of the entire amount of the expenditure so related and cannot be reduced by the receipt of interest which has no relation to such expenditure. (A.Y. 2004-05)

*Cheminvest Ltd v. ITO (2009) 27 DTR 82 / 124 TTJ 577 / 121 TTD 318 (SB)(Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Shares – Income from firm**

It is not possible to hold the view that share income in the hands of partner of a partnership firm is altogether tax free. It is held that share of profit in the hands of a partner is income which has suffered tax in the hands of the firm and found that the share of profit from the firm is exempt from tax under section 10(2A) not in absolute sense but with a view to avoid double taxation. Accordingly, section 14A is not applicable to the facts of the case.

*Hitesh D. Gajaria v. ACIT, ITA No. 993/Mum/2007, Bench – H, A.Y. 2003-04, dt. 14-11-2008 (2008) BCAJ p. 519, Vol. 40-B, Part 4, January 2009. (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Interest – Borrowed capital**

Interest on borrowed fund could be disallowed under section 14A only when it is used for the purpose of investment in shares which are held as investment or as capital asset by the assessee. (A.Y. 2000-01)

*Mukund Global Finance Ltd. v. Dy. CIT (2009) 309 ITR 294 (AT) / 117 ITD 20 / 119 TTJ 467 / 20 SOT 82 / 15 DTR 337 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income**

It could not be assumed that assessee did not incur any expenditure in earning dividend and therefore disallowance under section 14A was restricted to 1 per cent of tax free dividend received by the assessee. (A.Ys. 2002-03, 2003-04)

*EIH Associated Hotels Ltd. v. Dy. CIT (2009) 126 TTJ 246 / 16 DTR 181 (Kol.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income**

Any expenditure incurred by the assessee bank for investing in the bonds, even tax free was expenditure incurred for carrying on its business, so as to maintain the required statutory liquidity ratio and tax free interest is just an incidence to it. Thus, section 14A had no application in the case of the assessee. (A.Y. 2003-04)

*State Bank of Travancore v. ACIT (2009) 318 ITR (AT) 171 (Cochin)(Trib.)*

#### **S. 14A : Expenditure disallowance – Reassessment – Proviso to S. 14A inserted w.e.f. 11-5-2001 – Not valid – Cases prior to Assessment Year on or before 1-4-2001**

It has been held that the Assessing officer, in view of the statutory embargo placed on his jurisdiction by virtue of the proviso to S. 14A of the Act, to make reassessment, in respect of specified assessment years has acted without jurisdiction in reopening the assessments for the A.Y. 1998-99 to bring to tax income described under substantive provisions of S. 14A. (A.Y. 1998-99).

*Jt. CIT v. Bombay Dyeing Mfg. Co. Ltd. (2009) 30 SOT 461 / 125 TTJ 263 / 123 ITD 1 / 28 DTR 190 / 2 ITR 733 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Share of partner [S. 14A]**

Income charged in the hands of partnership firm cannot be treated as a non exempt income in the hands of partner of such firm and, therefore, provisions of section 14A are applicable in computing the total income of such partner in respect of his share in the profits of the firm. In the instant case, assessee partner received salary from the partnership firm besides share of profit. Thus, the expenditure claimed by assessee can be considered to have been incurred for earning salary as well as share in the profits of the partnership firm and the disallowance under section 14A has to be worked out as per the provisions of Rule 8D same being retrospective. (A.Y. 2001-02)

*Dharmansingh M. Popat v. ACIT (2009) 31 DTR 295 / (2010) 127 TTJ 61 / 2 ITR 586 (Mum.) (Trib.)*

*Editorial:- This is no more good law in view of Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT & Another (2010) 328 ITR 81 / 234 CTR 1 / 194 Taxman 203 (Bom.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Proviso**

Proviso to section 14A excludes jurisdiction of the Assessing Officer to assess, reassess or to rectify assessments for years up to the A.Y. 2001-02. (A.Ys. 1997-98, 1998-99)

*Aquarius Travels P. Ltd. v. ITO (2008) 301 ITR (AT) 111 / 114 TTJ 584 / 111 ITD 53 / 4 DTR 280 (SB)(Delhi)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Nexus – Proportionate**

Proportionate expenditure could not be attributed to earning of dividend income without establishing nexus thereto, and therefore, same could not be disallowed under section 14A. (A.Y. 2000-01)

*Space Financial Services v. ACIT (2008) 115 TTJ 165 / 5 DTR 276 (Delhi)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Heads of income**

Section 14A applies to all heads of income which disallows expenditure incurred in relation to income not forming part of total income even though such expenditure is allowable under any other provision. Relation has to be seen between exempt income and expenditure incurred in relation to it and not vice versa. (A.Y. 2001-02)

*ITO v. Daga Capital Management (P) Ltd. (2008) 119 TTJ 289 / 117 ITD 169 / 26 SOT 603 / 15 DTR 68 (SB)(Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Quantification – Procedural**

(a) Provisions for quantification of amount of disallowance as per sections 14A(2) and 14A(3) are procedural and therefore, apply to all pending matters.

(b) Assessing Officer cannot disallow any expenditure at his own discretion or on *ad hoc* basis but he has to compute such disallowances in the manner as provided under sections 14A(2) and 14A(3). (A.Y. 2000-01)

*ACIT v. Citycorp Finance (India) Ltd. (2007) 108 ITD 457 / 111 TTJ 82 / 12 SOT 248 (Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Burden of proof**

For disallowing any expenditure under section 14A out of common expenditure on proportionate basis the Assessing Officer. has to prove the nexus between expenditure & income as to how such expenditure attributes to the earning tax free income. However, the burden of proof is on the Assessing Officer. (A.Y. 1994-95)

*Wimco Seedlings v. Dy. CIT (2007) 107 ITD 267 / 109 TTJ 462 (TM)(Delhi)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Dividend income**

It was clear that no part of the interest expenditure can be attributable to or can be said to have a nexus with the dividend income. In absence of nexus between such expenditure and the exempt income disallowance made by the Assessing Officer deleted. (A.Y. 2001-02,)

*Dy. CIT v. Falak Investments Pvt. Ltd., ITA No. 7901/Mum/2004, Bench – A, dt. 26-12-2007 – BCAJ P. 519, Vol. 39-E, Part 5, February 2008. (Mum.)(Trib.)*

### **S. 14A : Expenditure disallowance – Exempt income – Actual expenditure incurred**

Assessing Officer on the basis of material on record, should pinpoint the actual expenses incurred to earn the non taxable income, Assessing Officer cannot estimate



a part of expenditure on assumption that same must have been incurred to produce non-taxable income and disallow the same under section 14A. (A.Y. 1999-2000)

*ACIT v. Eicher Ltd. (2007) 160 Taxman 80 / (2006) 101 TTJ 369 (Delhi)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Evidence of expenses**

When the major part of investment came out of sale proceeds of assessee's one unit and there was no material on record to prove that any interest was paid for earning tax free income no disallowance could be made by invoking section 14A. (A.Y. 2001-02)

*Zuari Industries Ltd. v. ACIT (2007) 108 TTJ 140 / 105 ITD 569 / 9 SOT 569 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Interest**

Assessee doing business in financing and investment in shares, proportionate interest on money borrowed and invested in shares was disallowable under section 14A.

*Mohan T. Advani Finance (P) Ltd. v. ITO (2007) 108 TTJ 170 / 9 SOT 675 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Premium – Insurance policy**

Income from Keyman Insurance Policy not having been included in the total income by dividend of section 10(10D) expenditure incurred by way of premium on this policy cannot be allowed as deduction in view of prohibition in section 14A. (A.Y. 1997-98)

*Agarwal Packaging (P) Ltd. v. CIT (2007) 108 TTJ 787 / 112 ITD 240 (Pune)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Interest**

Dividend Income earned which was exempt under section 10(33) by the Assessee company carrying on business of dealing in shares and securities, is incidental to its business activity, and, action of Assessing Officer disallowing proportionate interest paid on the investments made out of borrowed funds invoking provisions of section 14A was held not justified.

It was further held that entire expense is allowable under section 36(1)(iii), as borrowed funds were utilized for purchase of shares which were kept as stock-in-trade. (A.Y. 1999-2000)

*Pankaj Piyush Trade & Investment Ltd. v. ACIT 174 Taxman 93 (Mag.)(Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Interest**

Investments in shares yielding tax-free income – Disallowance based on the proportion of interest bearing funds actually employed for the purpose of making investment in tax-free investments of that year only wherein the investments were made. (A.Y. 1999-2000)

*Garware Engineering Ltd. v. ITO, ITA No. 3402/Mum/2003, Bench-A, Dated 25-9-2006 – BCAJ P. 402, Vol. 39-C, Part 4, January 2007 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Interest on borrowed capital**

Interest on amount borrowed for capital investment in firm was rightly disallowed under section 14A where no interest on capital was paid and there was no nexus between amount borrowed and remuneration received from firm for services rendered.

*D. J. Mehta v. ITO (2007) 107 TTJ 12 / 104 ITD 527 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Interest**

Assessee having claimed deduction of interest on borrowed funds which were invested in purchase of shares of group companies under bona fide belief that such interest was deductible in entirety, penalty under section 271(1)(c) could not be levied on account of disallowance of *pro rata* interest expenditure by invoking the provisions of section 14A. (A.Y. 1998-99)

*Sunash Investment Co. v. ACIT (2007) 106 TTJ 855 / 14 SOT 80 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income**

Expenditure relatable to income not forming part of total income is disallowable under section 14A. (A.Y. 1999-2000)

*Punjab National Bank v. Dy. CIT (2006) 103 TTJ 908 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Investment in shares**

Expenditure incurred by the partner by way of interest on borrowed capital invested in the firm is not allowable as deduction. But where the partner is allotted salary, interest, etc. which would be assessable in the hands of the partner under section 28(iv), then in that case interest paid by the partner on borrowed capital invested in the firm can be claimed as deduction. (A.Ys. 1994-95 to 1997-98)

*A. H. Baldota v. ACIT (2006) 103 TTJ 517 / 10 SOT 757 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Investment in shares**

Expenditure towards dividend and interest income. Investment in shares and mutual funds was predominantly made by the assessee in earlier years and no investment was made out of borrowings in the relevant year. In the absence of separate accounts by which management and administrative expenses attributable to earning of dividend and interest income can be segregated, same are estimated at ` 2 lakhs on ad hoc basis on consideration of relevant facts. Thus for Investment made in earlier years no disallowance can be made.

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / 104 ITD 427 / 8 SOT 167 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income**

Determination of expenditure incurred to earn exempt income – nexus between the two is essential. (A.Y. 2001-02)

*Kaynet Capital Ltd. v. Dy. CIT, Mumbai ITAT, Bench 'D', ITA Nos. 3870, 3871 & 4871/Mum/2005, dated 16th March, 2006 – BCAJ P. 275, Vol. 39-C, Part 2, December 2006 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Acquire controlling interest**

There was indirect nexus between interest bearing loans and investment in equity shares to acquire controlling interest. It was not engaged in trading of shares either in the preceding year or in the relevant year. Merely because the assessee has shown the investment in shares as stock-in-trade in the balance sheet by itself would not prove that the assessee was doing business or trading activity of dealing in shares. Merely because assessee did not earn dividend out of investment in certain shares did not imply that S. 14A would not supply to that extent. S. 14A is applicable. Assessee company having utilized unsecured loans for investment in shares of group companies to acquire controlling interest, and did not enter into any transaction of trading or dealing of such shares, it could not be held that the investment was made for carrying on business, or trading of shares and therefore provisions of s. 14A are applicable and assessee is not entitled for deduction of interest under section 36(1)(iii). (A.Y. 2001-02)

*Everplus Securities & Finance Ltd. v. Dy. CIT (2006) 102 TTJ 120 / 101 ITD 151 (Delhi)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Income not included**

S. 14A is applicable only when any part of income is not to be included in total income of assessee and expenditure relating to that part of the income is claimed by assessee as deduction. (A.Y. 1995-96)

*Jt. CIT v. Holland Equipment Co. B.V. (2005) 3 SOT 810 (Mum.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Assessment [S. 143(1)]**

In view of proviso to section 14A, AO cannot invoke section 14A in respect of any assessment year beginning on or before 1-4-2001 in respect of cases where income returned by claiming deduction of expenditure mentioned in section 14A is accepted either by way of processing return under section 143(1) or by passing an order under section 154 or 143(3); thus language employed in proviso does not make a distinction between assessment completed under section 143(3) and return processed under section 143(1). (A.Ys. 1999-2000, 2000-01)

*V. Uppalaiah v. Dy. CIT (2005) 94 ITD 178 / 95 TTJ 706 (Hyd.)(Trib.)*

**S. 14A : Expenditure disallowance – Exempt income – Allocation of income**

Even where assessee has not allocated expenditure to exempt income, Assessing Officer has no option but to disallow expenditure relatable to exempt income on proportionate basis; where total income included dividend income which was exempt under section 10(33), Assessing Officer was required to disallow administrative

expenses and depreciation incurred in relation to earning of dividend income so exempt, on proportionate basis. (A.Ys. 1996-97, 1997-98)

*Rhythm Exports P. Ltd. v. ITO (2005) 97 TTJ 493 (Mum.)(Trib.)*

#### **S. 14A : Expenditure disallowance – Exempt income – Taxable Dividend income**

S. 14A comes into play only when income received or receivable does not form part of total income and not otherwise; since dividend income received or receivable on or before \_\_\_\_\_ on

1-6-1997 was includible in total income, section 14A would not apply to expenditure incurred in relation to such income. (A.Ys. 1998-99 & 1999-2000)

*V. C. Nannapaneni v. ACIT (2005) 94 ITD 309 / 95 TTJ 687 (Hyd.)(Trib.)*

#### **S. 14A : Business expenditure – Disallowance – Exempt income**

Provisions of section 14A do not impinge on provisions of section 10(33); there is no conflict between the chapter III and section 14A and even if there is one, meaning of provisions of section 14A being unmistakably clear, provisions have to be given effect to by way of harmonious construction. (A.Ys. 2000-01 & 2001-02)

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

#### **S. 14A : Business expenditure – Disallowance – Exempt income – Trading in shares**

Where assessee was engaged in trading of share, Assessing Officer was not justified in invoking section 14A to disallow proportionate expenses in respect of dividend income by assessee in return. (A.Y. 2001-02)

*Leo Industries Ltd. v. ITO (2005) 143 Taxman 23 (Mag.)(Delhi)(Trib.)*

#### **S. 14A : Business expenditure – Disallowance – Exempt income – Borrowed capital – Investment in firm – Share of profit**

Assessee is disentitled to claim expenditure, including interest on borrowed amount invested in firm as capital, against income earned from a firm as share of profit in capacity of a partner of firm, since such income is exempt under section 10(2A). (A.Y. 1998-99)

*Sudhir Dattaram Patil v. Dy. CIT (2005) 2 SOT 678 (Mum.)(Trib.)*

#### **S. 14A : Business expenditure – Disallowance – Exempt income – Borrowed money – Burden**

Where revenue wants to disallow expenditure by way of interest on borrowed moneys for purchase of shares, onus is on revenue to prove that interest paid by assessee on borrowed funds related to acquisition of shares yielding tax free income.

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 142 Taxman 57 (Mag.) / 92 TTJ 987 (Delhi)(Trib.)*

## **(A) Salaries**

### **Section 15 : Salaries.**

#### **S. 15 : Salaries – Overriding charge – Japanese Law**

The matter was remanded to the Tribunal for fresh consideration in terms of the clause in the letter of employment providing that the emoluments paid by the assessee were subject to deduction of tax as per applicable laws. Therefore, the Commissioner (Appeals) ought to have examined the provisions of the Citizens Individual Inhabitant Act, which was a Japanese law, and ought to have analysed the provisions of that law, particularly when the question as to the nature of the levy as being an overriding charge had to be decided. (A.Ys. 1988-99 to 1998-99)

*CIT v. NHK Japan Broadcasting Corporation (2009) 28 DTR 106 / 225 CTR 258 / (2010) 322 ITR 628 / 184 Taxman 39 (SC)*

#### **S. 15 : Salaries – Perquisites – Tax paid by employer in respect of salary [S. 17, Rule 3]**

Tax paid by employer in respect of salary paid to expatriate employees is salary under Rule 3 of the Income tax Rules, 1962, for purpose of computing value of perquisites in respect of rent free accommodation provided to said employees. (A.Ys. 1996-97 to 1998-99).

*Mitsubishi Corporation v. CIT (2011) 200 Taxman 372 / 337 ITR 498 / 62 DTR 265 (Delhi)(High Court)*

#### **S. 15 : Salaries – Perquisites – Profits in lieu of salary – Tips collected and paid to employees [S. 2(24), 17(1)(iv), 17(3)]**

Payment of banquet and restaurant tips to the employees of assessee in its capacity as employer constitutes salary with in the meaning of section 15 read with section 17(3). (A.Ys. 1999-2000 to 2005-06).

*CIT v. ITC Ltd. (2011) 338 ITR 598 / 59 DTR 312 / 243 CTR 114 / 199 Taxman 412 (Delhi)(High Court)*

#### **S. 15 : Salaries – Deduction – Perquisites – Non-competence agreement**

Assessee resigning from employment, Amount received after resigning from former employer for not accepting employment in rival concern, such amount is not assessable as salary since there is no relationship of employer and employee at the time of payment. It is a capital receipt (A.Y. 1980-81)

*B. K. Kotru v. CIT (2006) 282 ITR 1 / 199 CTR 388 (Bom.)(High Court)*

#### **S. 15 : Salaries – Whole time director – Remuneration – Income from other source [S. 56]**

Where board of directors of a company by a resolution appointed assessee as a whole time director for managing affairs of a company by fixing his remuneration in accordance with articles and memorandum of association of company, it could be said that there was an employer and employee relationship between company and

contract employment and not contract for employment assessee and therefore, remuneration received by assessee was assessable under section 15 and not under section 56. (A.Ys. 1993-94, 1995-96, 1996-97)

*Sajid Mowjee v. ITO (2005) 279 ITR 467 / 148 Taxman 502 / 198 CTR 558 (Cal.) (High Court)*

### **S. 15 : Salaries – Leave salary [S. 17(1)(va), 17(3)(ii)]**

Leave salary is specifically included in definition of 'salary' directly by virtue of section 17(1)(va) and indirectly when one considers provisions of section 17(3)(ii). (A.Y. 1984-85)

*CIT v. Alembic Glass Industries Ltd., (2005) 279 ITR 331 / 149 Taxman 15 / 197 CTR 514 (Guj.) (High Court)*

### **S. 15 : Salaries – Incentive bonus – LIC development officer**

Incentive bonus received by LIC Development Officer is salary and not business income and hence only deduction allowable therefrom is standard deduction. (A.Y. 1997-98)

*K.K. Kamal v. CIT (2004) 270 ITR 375 / 142 Taxman 24 / 191 CTR 106 (P&H) (High Court)*

### **S. 15 : Salaries – Offshore area outside the territorial waters of India [S. 1, 4. ]**

Salary earned by the employee for services rendered on the rig before 1-4-1983, in the offshore area outside the territorial waters of India was not chargeable to tax for the A.Y. 1983-84. (AY. 1983-84)

*CIT v. Atwood Oceanics International S.A. (2003) 264 ITR 761 / 136 Taxman 511 / 186 CTR 328 (Uttaranchal) (High Court)*

**Editorial:** SLP of revenue is dismissed . SLA NOS 14782 of 2014 dt 22-04-2014 *CIT v. Atwood Oceanics International (2014) 227 Taxman 366 (SC)*

### **S. 15 : Salaries – Standard deduction – LIC – Development officer**

No deduction in addition to standard deduction is allowable from incentive bonus received by Development Officer of LIC.

*CIT v. Anil Kumar Hazarika (2003) 127 Taxman 364 (Gau.) (High Court) / CIT v A. K. Ghosh (2003) 131 Taxman 124 / 263 ITR 536 / 184 CTR 420 (MP) (High Court)*

### **S. 15 : Salaries – MLA – MP – Income from other sources [S. 56]**

Remunerations received by the MLAs and MPs cannot be taxed under the head income from salary but can only be taxed under the head income from other sources. (A.Ys. 2000-01 to 2004-05)

*M. Venkata Subbaiah v. ITO (2010) 47 DTR 403 / 127 ITD 399 / 134 TTJ 763 (Visakha) (Trib.)*

### **S. 15 : Salaries – Commission – Accrual – Finalisation of accounts**



Where commission receivable by the assessee-joint managing director of company, as per terms of employment dependent on net profit of company on finalization of accounts of company, it could not be taxed on accrual basis in assessee's hands. (A.Y. 1997-98)

*Jt. CIT v. Rajat Lal (2005) 1 SOT 559 / 93 ITD 482 / 94 TTJ 714 (Delhi)(Trib.)*

#### **S. 15 : Salaries – Arrears of salary – Year of receipt**

Arrears of salary can be brought to charge of tax under section 15 in previous year in which such arrears are received.

*Rudolf Staudinger v. Dy. CIT (2005) 1 SOT 844 (Mum.)(Trib.)*

#### **S. 15 : Salaries – Perquisite – Electricity – Concessional rate**

Electricity provided at concessional rate by Electricity Board to its employees could not be treated as a perquisites. (A.Ys. 1991-92, 1993-94)

*A.D. Choubey v. ITO (2005) 148 Taxman 38 (Mag.) / 99 TTJ 1295 / 98 ITD 57 (Jab.)(Trib.)*

#### **S. 15 : Salaries – Profit in lieu of salary – Ex-gratia – Non-complete receipt**

Where on completion of his contract of service with company, assessee received certain amount as ex gratia payment from company on understanding that he would not engage himself directly or indirectly in business activities which were competitive to company and also would not join any service in similar type of trade. Thus amount received by assessee was not a profit in lieu of salary but capital receipt in lieu of profit earning source and, therefore, was not exigible to tax. (A.Y. 1996-97)

*ACIT v. Tarun Kumar Ghai (2005) 97 ITD 517 / (2006) 99 TTJ 1240 (Chd.)(Trib.)*

#### **S. 15 : Salaries – Remuneration to a director – Under other sources [S. 56]**

Assessee an whole-time working Director receiving remuneration not because of his shareholding, but on account of his rendering services to the company, was held to be taxed as salary, from which standard deduction was to be allowed, and not to be taxed under section 56. (A.Ys. 1989-90, 1990-91 & 1992-93 to 1994-95)

*ACIT v. Kamal Kumar (2003) 80 TTJ 356 / (2004) 2 SOT 299 (Jodh.)(Trib.)*

#### **S. 15 : Salaries – Remuneration to a director – Other sources [S. 56]**

Held, Standard deduction is allowable in respect of Salary received by Director, as Directors are employees of the company, which is owned by shareholders and as such a separate entity. (A.Y. 1992-93)

*ITO v. Praveen Chand (2003) SOT 292 (Cuttack)(Trib.)*

#### **S. 15 : Salaries – Deferred contingent payments – Share purchase agreement – Incentive remuneration – Capital gains [S. 28(va), 48]**

Capital gains on transfer of shares in Indian company accruing to non-resident shareholder. Indian company and all its shareholders, including non-resident applicant entered into an agreement to transfer its entire business and share capital

in favour a Netherlands company, consideration for which was payable partly as fixed amount referred to as 'closing amount' and balance as deferred contingent payments that were based on achieving EBITDA targets. AAR observed that a combined reading of the employment agreement, non-competition agreement and the share purchase agreement which are contemporaneous left it in no doubt to conclude that contingent payments payable under the share purchase agreement, are in substance and reality payments for ensuring performance under the employment agreement to achieve the desired object in exceeding EBITDA and have no real nexus to the consideration for the sale of the shares etc. under the purchase agreement – Hence held that closing payment under Share Purchase Agreement is the true and full value of consideration for ascertaining capital gains tax and Deferred Contingent payments under the Agreement were in the nature of incentive remuneration falling within the purview of Salary.

*Anurag Jain (2005) 145 Taxman 413 / 277 ITR 01 / 195 CTR 117 / 145 Taxman 413 (AAR)*

### **Section 16 : Deductions from salaries**

#### **S. 16 : Salaries – Deductions – Standard deduction – Incentive bonus**

Incentive bonus received by assessee, a Development Officer of LIC, forms part of salary and therefore, he is not entitled to claim deduction of 40% of an amount from incentive bonus over and above deduction permissible under section 16. (A.Ys. 1980-81, 81-82, 82-83)

*CIT v. Ganesh Chand Saxena (2005) 145 Taxman 17 / 198 CTR 620 / 280 ITR 372 (All.)(High Court)*

*CIT v. Shantilal Chhajed (2005) 142 Taxman 398 (MP)(High Court)*

#### **S. 16 : Salaries – Deductions – Standard deduction – LIC – Development Officer**

No deduction is allowable to LIC Development Officer out of incentive bonus received by him, on account of expenditure incurred on earning same, since incentive bonus is salary. (A.Y. 1986-87)

*CIT v. S.C. Wadhwa (2005) 148 Taxman 95 / 198 CTR 500 / 283 ITR 384 (P&H)(High Court)*

*SC Wadhwa, Development Officer, Life Insurance Corpn. of India v. CIT (2005) 148 Taxman 99 (P&H)(High Court)*

#### **S. 16 : Salaries – Deductions – Standard deduction – Incentive bonus – Development Officer**

Incentive bonus received by a Development Officer of LIC is assessable under head 'salary', and no deduction on account of expenditure is permissible other than deduction under section 16(i). (A.Y. 1989-90)

*CIT v. A.P. Gera (2005) 198 CTR 506 / 284 ITR 370 (P&H)(High Court)*

### **S. 16 : Salaries – Deductions – Standard deduction – Commission**

Commission received by assessee from his employer to promote sales is part of salary income and deduction of expenses out of commission income is not allowable. (A.Y. 1979-80)

*CIT v. Bashir Ahmad Bazaz (2005) 198 CTR 688 / 150 Taxman 473 (All.)(High Court)*

### **S. 16 : Salaries – Deductions – Standard deduction – Commission**

Commission was paid to the assessee who is an employee with reference to the volume of sales, commission so paid would also form part of salary and no deduction therefrom could be allowed. (A.Ys. 1975-76, 1977-78)

*CIT v. R. Rajendran (2003) 260 ITR 476 / 186 CTR 398 / 135 Taxman 95 (Mad.)(High Court)*

### **S. 16 : Salaries – Deductions – Standard deduction – Director – Employer – Employee**

Standard deduction on salary received by director, from an company can not be denied, when the salary paid was authorised in the resolution passed by board of directors, and which was filed with ROC and when board also had power to remove him. Disallowance of standard deduction on ground of failure to establish employer-employee relationship cannot upheld. (A.Y. 1979-80)

*Hukam Chand v. ITO (Amritsar) (2006) 152 Taxman 59 / 202 CTR 528 / 283 ITR 175 (Amritsar)(Trib.)*

### **S. 16 : Salaries – Deductions – Standard deduction – More than one employer**

In case of receipt of salary from more than one employer, standard deduction is to be computed with reference to aggregate salary due to him.

*CIT v. Vidya Ram Gupta (2004) 136 Taxman 325 / 189 CTR 49 (All.)(High Court)*

### **Section 17 : “Salary”, “perquisite” and “profits in lieu of salary” defined.**

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Restrictive covenant – Non-compete after retirement**

Assessee after retirement executed agreement to refrain from taking up any competitive employment/assignment in future. Receipt is capital in nature being a special compensation received after cessation of employment, the said receipt cannot be taxed as profit in lieu of salary. (A.Y. 2001-02)

*CIT v. Shyam Sundar Chhaparia (2008) 305 ITR 181 / 220 CTR 172 / 177 Taxman 154 / 14 DTR 309 (MP)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Unauthorised use of Company’s car – Personal use**

Unauthorized use of company’s car for personal use could not be added to the income of the assessee as the value of perquisite.

*CIT v. Shri Balbir Singh (2006) 190 Taxation 396 (P&H)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Reimbursement of medical expenses**

Cash reimbursement of medical expenses is not a perquisite in the hands of the employees but would constitute a part of the salary drawn by them. (A.Y. 1973-94)  
*CIT v. Taylor Instrument Co. (I) Ltd. (2006) 193 Taxation 339 (Delhi)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Free boarding**

Free boarding facility provided by employer at rig site cannot be construed to be 'perquisite'.

*CIT v. Reading & Bates Exploration & Co. (2005) 278 ITR 47 / 148 Taxman 457 / 198 CTR 670 (Uttaranchal)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Conveyance allowance**

Conveyance allowance granted to employees of Rajasthan State Electricity Board is not a perquisite. (A.Y. 1991-92)

*CIT v. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. & Ors (2005) 272 ITR 401 (Raj.)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Constitutional validity**

Provisions of section 17(2)(vi) as inserted by the Finance Act, 2001 as well as Rule 3 framed in pursuance of section 17(2)(vi) by CBDT are legal and valid.

*P. N. Tiwari v. Union of India (2003) 133 Taxman 482 / 185 CTR 1 / (2004) 265 ITR 224 (All.)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Incentive bonus – LIC – Development officer**

Incentive bonus received by LIC Development Officer is salary and no deduction there from as expenses is allowable.

*CIT v. G. Ramachandran, Development Officer, LIC of India (2003) 130 Taxman 467 (Ker.)(High Court).*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Conveyance allowance – LIC – Development officer**

Additional conveyance allowance paid to Development Officer of LIC cannot be allowed as deduction. (A.Y. 1986-87)

*CIT v. V. Sekar (2003) 129 Taxman 226 (Mad.)(High Court)*

**S. 17 : Salary – Perquisite – Profits in lieu of salary – Fringe benefit – Constitutional validity**

Words 'fringe benefit' or 'amenity' are well-understood, both in daily and in commercial use and in backdrop of provisions contained in sub-clauses (i) to (v) of section 17(2), power given to Board under sub-clause (vi) to identify 'fringe benefit'

and 'amenity' is not open to challenge on ground that it is ungraded, arbitrary and as such suffers from vice of excessive delegation.

*BHEL Employees' Association v. Union of India (2003) 128 Taxman 309 / 261 ITR 15 / 180 CTR 412 (Karn.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Constitutional validity – Rule 3**

Neither sub-clause (vi) inserted in section 17(2) *vide* the Finance Act, 2001, nor notification substituting rule 3 with effect from 1-4-2001 suffers from any invalidity and is not violative of any provision of the Constitution or any provision of the Act.

*Aditya Cement Staff Club v. Union of India (2003) 131 Taxman 609 / 264 ITR 70 / 182 CTR 554 (Raj.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Constitutional validity – Rule 3**

Rule 3 is not violative of right to equality guaranteed under article 14 of Constitution. There is no merit in submission that rule 3 which was substituted with effect from 1-4-2001 is illegal as section 17(2)(vi) came into effect only from 1-4-2002.

*BHEL Employees' Association v. Union of India (2003) 128 Taxman 309 / 261 ITR 15 / 180 CTR 412 (Karn.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Rent-free accommodation – Value**

Value of rent-free accommodation, in the assessee's case was to be limited to the value fixed by the prescribed authority under section 9 of the U.P. Urban Building (Regulations of Letting, Rent and Eviction) Act, 1972. (A.Y. 1980-81)

*CIT v. Krishan Kumar Modi (2003) 131 Taxman 229 (Delhi)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Free boarding – Food – Oil rig**

Free food, beverages and boarding provided to employee on the oil rig are not a perquisite under section 17(2)(iii). (A.Y. 1994-95)

*CIT v. Sedco Forex International Drilling Co. Ltd. (2003) 264 ITR 320 / 186 CTR 144 / 134 Taxman 109 (Uttaranchal)(High Court) / CIT v. Hyundai Heavy Industries Co. Ltd. (2003) 264 ITR 328 / 189 CTR 91 / 137 Taxman 399 (Uttaranchal)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Leave encashment – Post retirement**

Leave encashment received by the assessee after retirement is taxable under section 17(3)(ii). (A.Y. 1975-76)

*CIT v. Jai Prakash Vaish (2003) 131 Taxman 245 (All.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Loan at concessional rate – Fringe benefit**

Since advance of interest-free loan or loan at concessional rate of interest by employer to its employees reduces employee's financial liability which can be considered as an income saved, it can undoubtedly be treated as 'fringe benefit' or 'amenity' given to employee.

*BHEL Employees' Association v. Union of India (2003) 128 Taxman 309 / 261 ITR 15 / 180 CTR 412 (Karn.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Servant – Double taxation**

Employer provides servant to employee, servant is required to pay tax in respect of income he/she derives and employee is required to pay tax in respect of perquisite, which is equivalent to monetary benefit he receives and same would not result in any double taxation.

*BHEL Employees' Association v. Union of India (2003) 128 Taxman 309 / 261 ITR 15 / 180 CTR 412 (Karn.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Reimbursement of medical expenses**

Expenses incurred by assessee on his treatment abroad which are reimbursed by company would constitute perquisite. (A.Y. 1987-88)

*CIT v. Raghu Sinha (2003) 130 Taxman 254 / 263 ITR 378 / 183 CTR 523 (Raj.)(High Court)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Free electricity – ` 3600 p.a.**

Free electricity of ` 3,600 per annum to senior officers of electricity board is not taxable perquisite. (A.Y. 2000-01)

*A. D. Choubey & Ors. v. ITO (2006) 99 TTJ 1295 / 98 ITD 57 (Jab.)(Trib.)*

### **S. 17 : Salary – Perquisite – Profit in lieu of salary – Personal quality – Income**

Assessee received from the employer, a personal gift, as a token of personal esteem and veneration for personal qualities cannot be taxed as income out of business or vocation, and same cannot be added to the income as salary. (A.Y. 2000-01)

*Meena Rajagopal (Mrs.) v. ACIT (2006) 156 Taxman 40 (Mag.)(Mum.)(Trib.)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Shares – ESOP**

Shares issued under the ESOP to the employees cannot be treated as perquisite prior to insertion of clause (iia) to sub-section (2) of section 17. (A.Y. 1997-98 to 1999-2000).

*WIPRO Ltd. v. Dy. CIT (2003) 80 TTJ 106 (2004) 2 SOT 611 (Bang.)(Trib.)*

### **S. 17 : Salary – Perquisite – Profits in lieu of salary – Profit in view of salary – Restrictive covenant – Non compete fee – Value of shares**



Value of shares issued to the assessee-director by the employer company as consideration in terms of restrictive covenant whereby the assessee agreed to desist from participating in a similar or competitive business for a period of ten years after termination of his employment or association with the company assessable as "profit in lieu of salary." Receipt cannot be construed as capital receipt as the assessee was not receiving any income from his professional activity and thus there was no loss or impairment of income of Assessee company. (A.Y. 2001-02)

*Neville Tuli v. ITO (2010) 38 DTR 325 (Mum.)(Trib.)*

### **S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Employees Stock Option (ESOP) – Warrant**

Under a scheme, the warrants were issued to the employees and the employees had to retain the warrant for a minimum of 12 months and then the shares were allotted for a consideration which was again subject to the lock in period during which it was held in the trust only. The Supreme Court held that the issue of warrant was a mere right without an obligation to buy and therefore "perquisite" could not be said to have accrued at the time when warrants were granted. And as the shares were having a lock in period, the benefit which arose on the date when the option stood exercised was only a notional benefit whose value was unascertainable and therefore not taxable.

The Supreme Court further held that sub clause (iiia) of section 17(2) which was inserted w.e.f. April 1, 2000, was prospective and could not be held to be retrospective. (A.Ys. 1997-98 to 1999-2000)

*CIT v. Infosys Technology Ltd. (2008) 297 ITR 167 / 214 CTR 293 / 166 Taxman 204 / 204 Taxation 13 / 1 DTR 330 (SC)*

### **S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Deduction at source – Free education facilities towards of teachers and staff members – Rule 3(5) [S. 192]**

Assessee school was providing free educational facilities to wards of teachers/ staff members and cost of education was less than ₹ 1000 per month per child, assessee was entitled to benefit of proviso to Rule (3)(5) and consequently, could not be treated as assessee in default.

*CIT v. Delhi Public School (2011) 203 Taxman 81 / 63 DTR 325 (Delhi)(High Court)*

### **S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Loan – Concession rate of interest**

Where loan was granted by an employer at rate of interest less than lending rate of State Bank of India, such a loan is to be regarded as a concessional loan and consequently, value of perquisite thereon is to be calculated. (A.Y. 2008-09)

*All India Punjab National Bank Officers' Association v. Chairman-cum-Managing Director, Punjab National Bank (2010) 190 Taxman 221 / 321 ITR 324 / 34 DTR 289 / 229 CTR 257 (MP)(High Court).*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Allowance for attire and club membership – Perquisites**

Allowance for attire and club membership fees would fall under perquisites, if club membership is purchased in name of employee and fee payable to such a club is reimbursed by company for personal use of employee. But, if membership is standing in name of company and if any guest of company is entertained by employee for business promotion of company, same cannot be treated as perquisites to such an employee. (A.Y. 1994-95)

*CIT v. Wipro Systems (2010) 325 ITR 234 / 33 DTR 289 (Karn.)(High Court)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Standard rent – Rent free accommodation**

Standard rent has to be taken in to account for determining value of perquisite by way of rent free accommodation. Perquisite value to be restricted to value fixed by prescribed Authorities under U.P. Urban Building ( ) Act, 1972.

*CIT v. Mahesh Kumar Modi (2004) 266 ITR 192 / 138 Taxman 180 (Delhi)(High Court)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Residential accommodation – Valuation**

Relevance of section 9 of the U.P. Urban Buildings (Regulation of Letting Rent & Eviction) Act, 1972 for valuation of residential accommodation. (A.Y. 1977-78)

*CIT v. Umesh kumar Modi (2004) 140 Taxman 256 (All.)(High Court)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Furniture – Hiring by employer**

Furniture supplied at a particular hiring rate by employer to employee cannot be treated to be at concessional rate without proper comparable instances so as to treated as perquisite.

*Corporation Bank Officers' Organisation v. Corporation Bank (2004) 269 ITR 222 / 192 CTR 334 (Cal.)(High Court)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Medical treatment – Unapproved hospital**

The reimbursement of amount received for medical treatment, at the hospital not approved by CCIT or CGHS authorities, due to an accident in place of work during course of employment will not amount to perquisite, thus not liable to tax. (A.Y. 2005-06)

*Gururaj Mahuli v. ITO (2010) 187 Taxman 34 (Mag.) / (2009) 125 TTJ 861 / 29 DTR 533 (Bang.)(Trib.)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Salary from two employers – Fair rent – Rent Control Act – Notional interest on deposit [S. 15, Rule 3]**

Where the assessee has received salary from two employers entire salary has to be considered while determining value of perquisite.

As the paid-up capital of employer was more than ` 1 crore, accommodation in question was exempt from the provisions of Rent Control Act, and in such situation, fair rental value of accommodation could not be limited to standard rent, therefore in addition to monthly rent a sum equivalent to notional interest on deposits kept with landlord had to be taken in to account in computing fair rent in order to determine perquisite value of accommodation in hands of employee. (A.Y. 2001-02)

*Pratim B. Mukerjee v. ACIT (2010) 39 SOT 268 (Mum.)(Trib.)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Pick-up and drop facilities**

Pick-up and drop facility to employees between the specified points is not a perquisite. (A.Y. 2005-06)

*WNS Global Services (P) Ltd. v. ITO (2009) 33 SOT 445 (Mum.)(Trib.)*

**S. 17(2) : Salary – Perquisite – Profits in lieu of salary – Employees stock option (ESOP) – A.Ys. 1997-98 to 1999-2000**

Held, that no benefit arose to an employee by participating in an ESOP in the relevant years 1997-98 to 1999-2000.

*Infosys Technologies Ltd. v. Dy. CIT (2003) 130 Taxman 129 (Mag.) / 86 ITD 312 / 78 TTJ 598 (Bang.)(Trib.)*

**S. 17(2)(ii) : Salary – Perquisite – Profits in lieu of salary – Residential accommodation**

Even before the amendment of Rule 3 by IT (Twenty-second Amendment) Rules, 2001, section 17(2)(ii) was not to apply if it is established that there was no concession in the matter of accommodation provided by the employer to the employees. It is open to the petitioners to contend that there is no concession in the matter of accommodation provided by the employer and the case is not covered by section 17(2)(ii).

*All India Punjab National Bank Officers' Association & Anr. v. Union of India & Ors. (2007) 212 CTR 339 / 296 ITR 108 (MP)(High Court)*

**S. 17(2)(ii) : Salary – Perquisite – Profits in lieu of salary – Market rent – Assessing Officer to give finding fact**

The Assessing Officer has to first give a finding of fact that there is a concession provided to an employee in the matter of rent under section 17(2)(ii), then only he can apply the rules for calculation of value of the perquisites.

Rule 3 of the Income-tax Rules as it stood after the amendment in 2001 is constitutional and not ultra vires Article 14 of the Constitution.

*Arun Kumar & Others v. UOI (2006) 286 ITR 89 / 155 Taxman 659 / 205 CTR 193 / 7 RC 407 / (2007) 196 Taxation 353 (SC)*

*Editorial:- Please see Explanations 1 to 3 inserted by the Finance Act, 2007 w.e.f. 1-4-2002 and 4 by the Finance Act, 2007 w.e.f. 1-4-2006.*

**S. 17(2)(ii) : Salary – Perquisite – Profits in lieu of salary – Rent – Meaning**

Word “rent” used in section 17(2)(ii), would mean charges for using unfurnished accommodation provided by an employer to its employee, one should not read either fair rent or normal rent or standard rent in expression “rent” used in sub clause (ii) of clause (2) of section 17.

*Coal Mines Officers’ Association of India v. UOI (2004) 266 ITR 429 / 137 Taxman 92 / 187 CTR 348 (Cal.)(High Court)*

**S. 17(2)(ii) : Salary – Perquisite – Profits in lieu of salary – Stock options – Conversion of warrants into equity**

Conversion of warrants into equity shares under scheme is a benefit extended to assessee by virtue of employment and hence difference between price of shares at time of exercise of option and predetermined price is liable to tax as perquisite under section 17(2)(iiia) only in the previous year when the assessee chooses to exercise option to convert.

(A.Y. 2000-01)

*ACIT v. Tripti Sharma (Smt.) (2010) 1 ITR 471 / (2009) 31 DTR 478 (Mum.)(Trib.)*

**S. 17(2)(iiia) : Salary – Perquisite – Profits in lieu of salary – Employees stock option – Equity warrant certificates**

Warrant issued in February 1999 and assessee exercising option in April 1999.

Perquisites arise and taxable in financial year 1999-2000 relevant to assessment year 2000-2001. Date of exercise of option is date of acquisition of shares and not date of certificate. (A.Y. 2000-01).

*Dy. CIT v. Vijay Gopal Jindal (2008) 13 DTR 490 / 118 TTJ 676 / 27 SOT 175 / (2009) 120 ITD 589 / (2011) 11 ITR 451 (Delhi)(Trib.)*

**S. 17(2)(v) : Salary – Perquisite – Profits in lieu of salary – Health insurance policies – Actual amount received**

The amount actually received by the assessee out of policies taken out by employer for health insurance is taxable as perquisites under section 17(2)(v), and not the contributions made by the employer towards other insurance plans. (A.Y. 1996-97)

*Jt. CIT v. T. Adachi (2006) 100 TTJ 332 (Delhi)(Trib.)*

**S. 17(2)(vi) : Salary – Perquisite – Profits in lieu of salary – Constitutional validity – Rule 3 – Power of CBDT**

Neither section 17(2)(vi), is illegal or violative of articles 19(1)(g) and 246 of the Constitution of India nor is rule 3 of the 1962 Rules hit by excessive delegation of power nor is *ultra vires* rule making power of CBDT.

*Cochin Refineries Officer's Association & Ors. v. UOI (2004) 271 ITR 178 / 192 CTR 1 / 140 Taxman 173 / (2005) 143 Taxman 96 (Ker.)(High Court)*

**S. 17(2)(vi) : Salary – Perquisite – Profits in lieu of salary – Constitutional validity**

Neither section 17(2)(vi) can be struck down on the ground that it confers unguided or uncontrolled power on the rule making authority nor Rule 3 as substituted by notification dt 25th September, 2001 can be said to be illegal and unconstitutional on the ground of excessive delegation of power or violation off Article 14.

*Federal Bank Officers' Association v. UOI (2004) 140 Taxman 173 / 192 CTR 1 / 271 ITR 178 / 143 Taxman 96 (Ker.)(High Court)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Ex-gratia payment on resignation from service [S. 15]**

Ex-gratia payment received by assessee–employee on his resignation, at the discretion of his employer being a voluntary payment, cannot be termed as payment by way “compensation” and therefore, it is not covered by cl. (i) of section (3) of section 17 and is not exigible to tax as “profits” in lieu of salary. (A.Y. 2001-02)

*CIT v. Deepak Verma (2010) 47 DTR 87 / 236 CTR 213 / 194 Taxman 265 (Delhi)(High Court)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Voluntary retirement**

Amount received on account of voluntary retirement consequent upon termination by the employer is “profit in lieu of salary” within the meaning of sec. 17(3); therefore, covered under section 10(10C) (A.Y. 2002-03)

*CIT v. Nagesh Devidas Kulkarni & Ors. (2007) 210 CTR 471 / 291 ITR 407 (Bom.)(High Court)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Voluntary retirement**

‘Termination’ within meaning of section 17(3) (i) need not be at instance of employer only; it would cover cases of voluntary retirement of an employee under a scheme framed by employer. (A.Y. 2001-02)

*CIT v. P. Surendra Prabhu (2005) 279 ITR 402 / 149 Taxman 82 / 198 ITR 209 (Karn.)(High Court)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Resignation**

Where assessee resigned from a job and was negotiating assignment /employment with another party which asked him to make himself readily available for assignment in future and a sum was paid to assessee during assessment year 1982-83 by that party as a consideration for making himself readily available for employment, as there was no employer – employee relationship, such receipt was not taxable as profits in lieu of salary in his hands. (A.Y. 1982-83)

*Bhagwatilal G. Shah v. CIT (2005) 277 ITR 277 / 146 Taxman 412 / 196 CTR 8 (Guj.)(High Court)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Ex-gratia payment**

Assessee took up post retirement as secretary of a club for a period of three years. Club also provided accommodation to assessee. Disputes arose between club and assessee. Assessee filed a police complaint for forcibly removing him from club premises. Employment was terminated after end of first year. Termination provided withdrawal of premises allotted to assessee as service accommodation and club would pay ` 7.5 lakhs which was equivalent to salary for rest of period of three years. Assessee claimed said amount as exgratia as capital receipt. The Tribunal held that since the amount given to assessee for compensating loss of salary for 25 months. Same would fall with in the ambit of expression "any compensation" used in sub clause (i) of section 17(3) relating to "profits in lieu of salary" and taxable under said provisions. (A.Y. 2001-02).

*Yatinder Kumar v. ITO (2011) 133 ITD 237 (Pune)(Trib.)*

**S. 17(3) : Salary – Perquisite – Profits in lieu of salary – Compensation**

Compensation for agreeing to refrain from carrying on any competitive business and from joining similar type of employment or amount received against restrictive covenant is capital receipt and not taxable. (A.Y. 1997-98)

*ACIT v. Tarun Kumar Ghai, (2006) 282 ITR 79 (AT) / 99 TTJ 1240 / 97 ITD 517 (Chd.)(Trib.)*

**S. 17(3)(iii) : Salary – Perquisite – Profits in lieu of salary – Non-compete fee**

Non compete fee received by assessee from the employer company on his retirement for not to take up any employment is a capital receipt and it can not come under the term "profits in lieu of salary" Section 17(3)(iii) inserted by Finance Act 2001, w.e.f. 1st April 2002, is prospective and applicable only to A.Y. 2002-03 onwards. (A.Y. 2001-02)

*CIT v. A. K. Khosla (2010) 39 DTR 82 / 232 CTR 204 / 191 Taxman 439 / 327 ITR 406 (Mad.)(High Court)*

**B. Interest on securities**

**Section 20 : Deduction from interest on securities of a banking company**

**S. 20 : Banking company – Deductions – Interest on securities**

While apportioning the expenses deductible from 'Interest on securities' in the case of the banking company in terms of section 20(1)(i), the expenses admissible under the provisions of sections 30, 31, 35 and 37 will not be subject to restrictions imposed under sections 40A(3), 40A(5) and 44C. (A.Y. 1981-82)



*Citibank N. A. v. CIT (2003) 129 Taxman 674 / 262 ITR 47 / 183 CTR 294 (Bom.)(High Court)*

*Editorial: - Sections 18 to 21 omitted by the Finance Act, 1988, w.e.f. 1-4-1989.*

### ***C. Income from house property***

#### **Section 22 : Income from house property**

##### **S. 22 : Income from house property – Let out portion of property – Furniture and fixtures**

Where from agreement between two parties, it was clear that primary object was to let out portion of said property with additional right of using furniture and fixtures and other common facilities, the income derived from said activity should be assessed as income from house property and not as business income.

*Shambhu Investment (P.) Ltd. v. CIT (2003) 263 ITR 143 / 129 Taxman 70 / 184 CTR 91 (SC)*

##### **S. 22 : Income from house property – Ownership – Building on leased land – Deemed owner [S. 23, 27(iii)]**

Assessee having constructed the building on land taken on lease from NDMC, which is owner, in view of the provisions of section 27(iii) it is the sub licensee who would be “deemed owner” of those premises which the sub licensee transferred to the occupiers and those occupiers are paying rent/ license fee to the sub-licensees and assessee only collected interest free security deposits from sub licensees and no rent, therefore, provisions of section 23 are not applicable. (A.Y. 1999-2000)

*CIT v. C. J. International Hotels Ltd. (2011) 53 DTR 92 / 197 Taxman 230 (Delhi)(High Court)*

##### **S. 22 : Income from house property – Business income – Sub-let of Property [S. 28(i)]**

Where the assessee was engaged in business of manufacturing and sale of food items acquired property on lease for a long period and in turn sub let the same, the income therefrom was held to be taxable under the head income from house property and not business income as letting out property was not its business activity. Further the letting out was not temporary arrangement. (A. Y. 2003-04)

*Sheetal Khurana Foods P. Ltd. v. ITAT (2011) 335 ITR 1 / 51 DTR 129 (P&H)(High Court)*

##### **S. 22 : Income from house property – Business income – Rental income [S. 28(i)]**

Assessee letting out flats in a multi storeyed complex. Assessee was nether in possession of the property nor doing any business there. Income was rightly taxed as income from house property. (A.Y. 1996-97)

*CIT v. Saran Holdings (P) Ltd. (2011) 57 DTR 82 / 241 CTR 527 (Patna)(High Court)*

**S. 22 : Income from house property – Compensation – Expiry of lease period**

The assessee was assessed to tax under the head income from house property with respect to notional income of rent deemed to have earned by the assessee after the expiry of lease period, year after year. Thereafter, the compensation actually received by the assessee from the lessee under a settlement agreement for the occupation of the leased premise after lease period cannot be taxed under a different head than income from house property.

*Jasmine Commercials Ltd. v. CIT (2011) 56 DTR 159 / 200 Taxman 338 (Cal.)(High Court)*

**S. 22 : Income from house property – Ownership – Builder**

Where the builder had received full consideration against the sale of shops and flat the annual value of the property cannot be assessed in the hands of the builder even though the sale deed of the shops and flat were not registered. (A.Y. 1987-88)

*CIT v. Babu Khan Builders & Ors. (2011) 55 DTR 329 (AP)(High Court)*

**S. 22 : Income from house property – Business income – Partnership firm**

Exemption under section 22 in respect of a property now owned by the partnership firm cannot be availed of by an individual co-owner merely because he happens to be a partner of a firm in occupation of a part of the property; therefore, the assessee cannot pray for exclusion of income of the impugned portion in occupation of a partnership firm.

*Prodip Kumar Bothra v. CIT (2011) 62 DTR 47 / 244 CTR 366 / (2012) 205 Taxman 19 (Cal.)(High Court)*

**S. 22 : Income from house property – Business income – Leasing**

The assessee leased out one of its premises to Citibank and shifted its own office but continued its business. And it obtained an interest-free loan from Citibank i.e. a higher income resulted from exploiting its properties. And hence income from leasing ought to be assessed as 'business income'. (A.Ys. 1989-90 to 1993-94)

*Scientific Instrument Co. Ltd. v CIT (2011) 202 Taxman 536 (All.)(High Court)*

**S. 22 : Income from house property – Business Income – Renting of property [S. 28]**

The main business of the assessee was of development and sale of property and not renting of property. Hence, the rent received could be taxed under the head "Income from property" instead of "Income from business". (A.Y. 2003-04)

*CIT v. Haryana Urban Development Authority (2010) 322 ITR 61 (P&H)(High Court)*

**S. 22 : Income from house property – Business Income – Apportionment [S. 28]**

Rent from premises with fittings. Apportionment between business income and income from house property held to be justified. (A.Ys. 2004-05, 2005-06)

*CIT & Anr. v. Mysore Inter Continental Hotel P. Ltd. (2010) 322 ITR 116 / 198 Taxman 514 (Karn.)(High Court)*

**S. 22 : Income from house property – Ownership – Company – Shareholders [S. 27(iii)]**

When the structure of the building is construed by the company out of its own funds and not on behalf of the shareholders and even the title to the property also shows the company as owner and in the rental agreement the company has shown as owner and entitled to receive the rent, the rental income is assessable in the hands of the company and not shareholders. (A.Y. 2002-03)

*CIT v. Monarch Citadel (P) Ltd. (2010) 37 DTR 1 (Karn.)(High Court)*

**S. 22 : Income from house property – Rental income – Investment – Stock-in-trade**

Assessee company's main object being investment in properties, flats, shops, warehouses, commercial properties. Due to recession certain flats not sold & let out on licence basis for temporary period. The court held that the rental income is taxable as income from property, even though the said flats were held by the assessee as stock-in-trade.

*Mangla Homes (P) Ltd. v. ITO (2010) 325 ITR 281 / 215 Taxation 511 / (2009) 182 Taxman*

*55 / 15 DTR 110 (Bom.)(High Court)*

**S. 22 : Income from house property – Lift services charges – Tenancy Agreement**

Where lift service charges received, Assessing Officer taxing the lift charges as income from house property holding the lift as an integral part of the house. Matter remanded to the Assessing Officer to examine the terms of tenancy agreement & decide the matter.

*CIT v. Mohan Enterprise (2009) 182 Taxman 24 / (2010) 215 Taxation 575 (Ker.)(High Court)*

**S. 22 : Income from house property – Ownership – Sale of property**

Where the assessee had sold the flat, received entire sale consideration and handed over the possession of the flat to the purchaser however, registered sale deed was still not executed, under these circumstance, it was held that the assessee ceases to be the owner of the flat for the purpose of section 22 of the Act. (A.Ys. 1976-77 to 1980-81, 1984-85 & 1985-86)

*Pallonji M. Mistry (Decd.) v. CIT (2009) 19 DTR 286 / 178 Taxman 341 / 227 CTR 592 / 319 ITR 167 (Bom.)(High Court)*

**S. 22 : Income from house property – Annual Value – Rent Control Act**

Computation of annual value on basis of rent paid by other tenants in premises is not proper. Where fair rent not determined by Rent Controller Assessing Officer to

determine annual value and expected rent by following guidelines under Rent Control Act.

*CIT v. Shrimati Bhagwani Devi (2008) 298 ITR 413 / 219 CTR 373 / 175 Taxman 202 / 6 DTR 133 (Jharkhand)(High Court)*

## **S. 22 : Income from house property – Business income – Property held as stock-in-trade**

### **[S. 28]**

If the property is held as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock would be "income from the business", and not income from the property. In this case, the assessee was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee and it had shown one of the building properties in the closing stock in the balance sheet drawn for the business.

*CIT v. Neha Builders Pvt. Ltd. (2007) 164 Taxman 342 / 207 CTR 231 / (2008) 296 ITR 661 (Guj.)(High Court)*

## **S. 22 : Income from house property – Plot rent – Multi-storeyed building**

Rental income in respect of plot in multi-storeyed building would be assessable under head 'Income from house property.' (A.Ys. 1978-79, 1979-80)

*CIT v. Sardar Man Singh (2007) 164 Taxman 434 (Delhi)(High Court)*

## **S. 22 : Income from house property – Business income – Letting out commercial complex**

Income from letting out commercial complex – Income derived by assessee by mere letting out commercial complex is assessable under the head "Income from house property". Since the assessee is also providing certain ancillary services to the occupants against payment, Assessing Officer is directed to consider the details of the services provided as well as the amounts received for the same, and to consider the said amounts under the head "Income from other sources" or "Business income". (A.Y. 1999-2000)

*A. R. Complex v. ITO (2007) 212 CTR 328 / 292 ITR 615 / (2008) 167 Taxman 46 (Mad.)(High Court)*

## **S. 22 : Income from house property – Business income – Sub let – Ownership**

The assessee took on lease a property and sublet a portion of the property. The Assessing Officer treated the income derived as 'Income from House Property'. However, on appeal, CIT(A) treated it as income from business, which was confirmed by Income Tax Tribunal.

On further appeal to High Court it was held that under section 27(iib), the assessee by virtue of its right by way of a lease from month to month or for a period not

exceeding one year was excluded from the definition of owner of the House Property. (A.Y. 1998-99)

*CIT v. A. V. K. Construction P. Ltd. (2007) 292 ITR 512 (Mad.)(High Court)*

#### **S. 22 : Income from house property – Co-owner – Assessment of other co-owner**

The assessee, having 1/6th share in a theatre, offered income from the lease rent which the Assessing Officer found to be low. The same was enhanced while passing the Assessment Order. Hon'ble Court held that it would be travesty of justice if assessee, one of the co-owners, was solely picked out and the income is enhanced without disturbing the returned income from same property in the case of other five co-owners. (A.Ys. 1992-93, 1994-95, 1996-97)

*CIT v. S. Muthu Karupan (2006) 206 CTR 231 / (2007) 163 Taxman 45 / 290 ITR 154 (Mad.)(High Court)*

#### **S. 22 : Income from house property – Business income – Letting of guest house with furniture**

Income from letting of guest house–Income from leasing of property along with furniture and furnishing used as guest house in the past, to a bank to be used as training centre is assessable as Business Income. (A.Ys. 1983-84, 1984-85, 1985-86)

*Shri Pateshwari Electrical & Associated Industries (P) Ltd. v. CIT (2006) 206 CTR 420 / 287 ITR 165 / (2007) 158 Taxman 8 (All.)(High Court)*

#### **S. 22 : Income from house property – Business income – Owner – Possession**

Where assessee had purchased a property but it had not received possession thereof, considering fact that assessee was not in a position to exercise his right as an owner, at least for years under consideration, assessee could not be treated as owner of property for purpose of assessing income from house property as assessee's income. (A.Ys. 1979-80 to 1984-85)

*CIT v. Gaekwad & Company (2005) 277 ITR 553 / 198 CTR 258 (Guj.)(High Court)*

#### **S. 22 : Income from house property – Used by firm – Property of partner**

Assessee was entitled to exemption under section 22 with regard to income from his property in occupation of firm in which assessee was also a partner. (A.Y. 1981-82)

*CIT v. Mustafa Khan (2005) 276 ITR 601 / 145 Taxman 522 / 196 CTR 411 (All.)(High Court)*

#### **S. 22 : Income from house property – Rental income – Business income**

Rental Income from letting out property was assessable as property income and not as business income. (A.Y. 1987-88)

*CIT v. Chennai Properties & Investments Ltd. (2005) 274 ITR 117 / (2006) 153 Taxman 224 (Mad.)(High Court)*

## **S. 22 : Income from house property – Income from other sources – Flat in a building**

Income of assessee from flat in multi storeyed building is to be assessed as 'Income from House Property' and not as income from other sources.

*CIT v. Mala Goel (Mrs) (2005) 142 Taxman 315 (Delhi)(High Court)*

## **S. 22 : Income from house property – Annual value – Genuineness of monthly lease**

Where assessee leased out her property on monthly rent basis to 'P' who was an employee of a firm in which assessee was a partner and was getting a meagre amount as salary and P realized much higher rent from sub-letting such property to tenants and Tribunal found on facts that lease deed with P was not genuine. Tribunal was justified in upholding order of authorities working out income from property on basis of actual rent received by 'P'. (A.Ys. 1973-74 to 1977-78)

*Putli Bibi (Smt) v. CIT (2005) 279 ITR 294 / 145 Taxman 221 / 197 CTR 134 (All.)(High Court)*

## **S. 22 : Income from house property – Annual Value – Notional – Interest free loan [S. 23(1)]**

Assessing Officer should adopt gross rent received by assessee, being lessor, from let-out property for purpose of computing income from house property. For purpose of computing income from house property even if much higher rent is fetched by lessee by sub-letting same property; further notional interest on interest free loan received by lessor/ assessee from lessee would neither be a determining factor nor a component to be taken into consideration for determining annual value for assessing income from house property in terms of section 23(1)(b).

*CIT v. Hemraj Mahabir Prasad Ltd. (2005) 279 ITR 522 / 148 Taxman 623 / 199 CTR 105 (Cal.) (High Court)*

## **S. 22 : Income from house property – Annual value – Residential unit [S. 23(1)]**

In order to claim benefit of clause (c) of second proviso to section 23 (1) [as it stood prior to 1-4-2002] unit had to be a residential unit. (A.Y. 1979-80)

*P. N. Shukla v. CIT (2005) 276 ITR 642 / 142 Taxman 624 / 193 CTR 555 (All.)(High Court)*

## **S. 22 : Income from house property – Building dwelling house – Other purposes**

Application of section 22 is not confined only to house property but extends to all buildings whether such buildings are used as dwelling houses or for other purposes. (A.Ys. 1979-80, 1983-84, 1984-85)

*CIT v. Chennai Properties & Investments Ltd. (2004) 266 ITR 685 / 136 Taxman 202 / 186 CTR 409 (Mad.)(High Court)*



**S. 22 : Income from house property – Occupation by employees of sister concern – Business use**

Occupation of property by employees of sister concern can not be construed as an occupation by employees of assessee themselves for purpose of claiming exemption under section 22.

*CIT v. T. V. Sundarm Iyengar & Sons Ltd. (2004) 271 ITR 79 / (2005) 193 CTR 50 / 144 Taxman 192 / 145 Taxman 380 (Mad.)(High Court)*

**S. 22 : Income from house property – Business income – Letting out properties [S. 56]**

Income derived by company from letting out properties owned by it was assessable as property income and not business income. (A.Y. 1986-87)

*CIT v. Chennai Properties & Investments Ltd. (2004) 135 Taxman 509 / 186 CTR 680 (Mad.)(High Court)*

**S. 22 : Income from house property – Owner – Legal title**

Even though the assessee has not acquired legal title to ownership of flat in multi storeyed building through a registered sale deed in favour, rental income from the said property would be assessable in her hand as 'Income from House Property'.

*CIT v. Kamla Sondhi (Smt) (2004) 141 Taxman 278 (Delhi)(High Court)*

**S. 22 : Income from house property – Owner – Conditional gift**

Where conditions for transfer of immovable property by gift as contemplated under section 113 of Transfer of Property Act had been completed, income from gifted property could not be treated as assessee's income on ground that gift was conditional. (A.Ys. 1967-68, 1968-69, 1969-70)

*CIT v. Major General Sir Shahaji Chatrapati (2003) 128 Taxman 45 / 261 ITR 627 / 182 CTR 345 (Bom.)(High Court)*

**S. 22 : Income from house property – Commercial flat – Multistoreyed building – Owner**

Where assessee was owner of commercial flat in multistoreyed building, income enjoyed by assessee from commercial flats was to be assessed under head 'Income from house property' and not under 'Income from other sources.'

*Archna Luthansa v. CIT (2003) 130 Taxman 264 (Delhi)(High Court)*

**S. 22 : Income from house property – Building given on rent – Let out society**

Income derived by assessee-co-operative society, formed to promote trade of textiles of its members, from building given on rent for running restaurant and hotel was assessable as income from house property. (A.Ys. 1974 to 1995)

*CIT v. Surat Textile Market Co-op. Shops & Warehouse Society Ltd. (2003) 132 Taxman 146 / 264 ITR 289 / 183 CTR 556 (Guj.)(High Court)*

**S. 22 : Income from house property – Rental income – Long-term lease**

Where a director of assessee-company had taken certain land on a long-term lease and he executed a registered deed of transfer in favour of assessee transferring his leasehold rights and subsequently assessee built a commercial complex on aforesaid land, rental income derived by assessee was assessable as income from house property and not as business income even though one of the objects of assessee was to derive income by leasing sites and construction thereon. (A.Ys. 1985-86, 1986-87)

*CIT v. Bhoopalam Commercial Complex & Industries (P.) Ltd. (2003) 130 Taxman 338 / 262 ITR 517 / 183 CTR 275 (Karn.)(High Court)*

#### **S. 22 : Income from house property – Notable income – Business of construction and development of residential – Commercial unit [S. 28(i)]**

In case where assessee who is engaged in constructions and development of residential/commercial units and where there was no material on record to show that leasing of residential/commercial units was one of the principal objects of the company and that lease rent received by it was from exploitation of property by way of complex activities, the rent income derived as owner of property will be assessed as 'Income from House Property.' (A.Y. 2003-04)

*Roma Builders (P) Ltd. v. Jt. CIT (2011) 131 ITD 91 / 60 DTR 231 / 11 ITR 503 / (2012) 145 TTJ 631 (Mum.)(Trib.)*

#### **S. 22 : Income from house property – Annual value – Second property – Rent control Act**

Assessee having two self occupied properties. In case of the second property, relevant provisions of the Rent control Act were applicable. The Assessing Officer is bound to determine the standard rent of the premises in accordance with provisions of Act. However, where the standard rent has not been determined by the rent control authority, the Assessing Officer is duty bound to do the exercise himself and determine the standard rent as per the provisions of the relevant Rent Control Act.

*Jayantibhai Meghibhai v. Addl. CIT (ACAJ Vol 35 Part 5. August 2011 P. 320) (Ahd.)(Trib.)*

#### **S. 22 : Income from house property – Business income – Terrace rent**

Income received on lease of a portion of terrace of the building and a wall of the building for the purpose of fixing of hoarding, neon sign, etc, is assessable under the head 'Income from House property'

*Mahalaxmi Sheela Premises CHS Ltd v. ITO, ITAT "B" Bench Mumbai, ITA Nos. 784, 785 and 786/M/2010 dated 30-8-2011, BCAJ, October-2011, P.24, Vol. 43-B, Part 1 (Mum.)(Trib.)*

#### **S. 22 : Income from house property – Business income – Letting out premises**

Rental income for letting out premises, which are duly notified as IT Park and can be used only for a specific purpose along with provision of complex service facilities and

infrastructure for operation such business is chargeable to tax under the head 'income from business'.

*Krishna Land Developers P. Ltd. v. Dy. CIT, G Bench, ITA No. 1057/M/10, dated 12-8-11, BCAJ, October – 2011, P.25, Vol. 43-B, Part 1 (Mum.)(Trib.)*

## **S. 22 : Income from house property – Business income – Temporary let out [S. 28(i)]**

When income has been earned by mere exploitation of ownership of property, the same is assessable as income from house property. If immovable property has been temporarily let out with primary object to exploit same by way of complex commercial activity, then income is assessable as business income. (A.Y. 2003-04)

*Hiranandani Developers (P) Ltd. v. Jt. CIT (2010) 35 SOT 430 (Mum.)(Trib.)*

## **S. 22 : Income from house property – Principle of mutuality – Interest**

Income of the association of flat owners is not taxable on the principle of mutuality, despite the fact that most of the flats are let out and tenants are paying the contribution. Interest earned from bank on surplus funds deposited in the bank is not taxable on the principle of mutuality.

*Wellington Estate Condominium v. ITO, ITAT 'I' Bench Delhi, ITA No. 2846/Del./2007, dated on 16-10-2009 (BCAJ 42-A, June 2010 P. 346) (Delhi)(Trib.)*

## **S. 22 : Income from house property – Business income – leasing IT Park [S. 28]**

Income earned by a company from leasing information technology park, constructed by it on land belonging to the company (which land was initially taken on lease and was later on acquired) which construction was financed by borrowings from banks secured on immovable property of the company, and providing various amenities and services is chargeable to tax under the head 'Business income' and not 'Income from house property'. (A.Y. 2003-04)

*Global Teck Park Pvt. Ltd. v. ACIT, ITA No. 1021/Bang/2007, dt. 30-6-2008 (2008) BCAJ P. 392, Vol. 40-B, Part 3, December 2008/14 DTR 613 (Bang.)(Trib.)*

## **S. 22 : Income from house property – Annual value – Amenity charges**

In addition to the letting of premises, the assessee was also responsible to provide additional facilities and amenities to its tenants. Equipments required for such additional facilities and amenities given on rent to the party to whom the task relating to provision of additional facilities and amenities was outsourced. The amount received by the said party from the tenants also considered by the Assessing Officer while determining the annual value. The Tribunal held that the amount collected by the lessee from the tenants towards the amenity charges while determining the annual value was held as unjustified. (A.Y. 2001-02)

*Buharia Estate & Co. v. Dy. CIT, ITA No. 3247/Mds./2004, Bench-A, dt. 7-8-2007 - BCAJ P. 28, Vol. 39-E, Part 1, October, 2007. (Chennai)(Trib.)*

**S. 22 : Income from house property – Annual value – No water and power supply**

Flat allotted to assessee having no water and power supply could have no annual value. (A.Ys. 1998-99, 1999-2000)

*Shyam Sunder Behl v. Addl. CIT (2006) 99 TTJ 1147 (Amritsar)(Trib.)*

**S. 22 : Income from house property – Rental income**

Rental income derived by assessee-company by letting out a property simpliciter was chargeable to tax under the head income from house property and not as business income. (A.Ys. 1993-94 to 1998-99)

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

**S. 22 : Income from house property – Annual value – Property demolished**

As the property demolished during the year, property in question not capable of being let out or used for any purpose and having been demolished. Assessing Officer was not justified in making addition. (A.Y. 2001-02)

*ACIT v. Amrit Lal Adlakha (Dr) (2006) 105 TTJ 271 (Amritsar)(Trib.)*

**S. 22 : Income from house property – Business income – Letting out commercial complex**

Income derived by assessee from letting out of commercial complex owned by it, which was not utilized in its business, was assessable as property income and not as business income. (A.Ys. 1995-96 to 1998-99)

*ITO v. Somnath Naik & Sons (HUF) (2005) 93 TTJ 245 (Cuttack)(Trib.)*

**S. 22 : Income from house property – Business income – Depreciation [S. 32]**

Where assessee was owner of a property, rental income received by it was assessable as 'Income from House Property' and its claim that since it was engaged in business of construction and letting out properties, rental income should be assessed under head 'Profits and Gains of business and profession' so that it could also claim depreciation allowance under section 32, could not be allowed. (A.Y. 1993-94)

*Dy. CIT v. Godrej Properties & Investment Ltd. (2005) 93 ITD 308 / 94 TTJ 7 (Mum.)(Trib.)*

**S. 22 : Income from house property – Owner – Investment**

Where assessee, by general power of attorney authorized her co-owner of a property to do any act in connection with building thereon and also receive rent and deposit the same in her account, whereas the assessee's plea that she never made any investment in property and hence rental income from property was not assessable in her hands was not acceptable.

*Usha Bhardwaj (Smt) v. ITO (2005) 97 TTJ 790 (Chd.)(Trib.)*

**S. 22 : Income from house property – Annual value – Municipal valuation**

Determination of annual value in case of self occupied property has to be on basis municipal valuation. (A.Y. 1996-97)

*Balkrishna R. Naik (Dr) v. Jt. CIT (2005) 1 SOT 177 (Mum.)(Trib.)*

**S. 22 : Income from house property – Annual value – Rent actually paid**

Rent actually paid by a tenant and accepted by owner has to be taken as 'annual value' of a house property, and commission paid by assessee owner to property agent for his help in letting out property is not deductible in computing income chargeable under head 'Income from House Property'. (A.Y. 1998-99)

*Picadilly Holiday Resorts Ltd. v. Dy. CIT (2005) 94 ITD 267 / 97 TTJ 362 (Delhi)(Trib.)*

**S. 22 : Income from house property – Annual value – Commission – Broker**

Commission paid by assessee-owner of property to broker for rental income is not deductible while computing annual value. (A.Ys. 1995-96, 1996-97, 1998-99)

*ACIT v. Piccadilly Hotels P. Ltd. (2005) 97 ITD 564 / 97 TTJ 411 (Chd.)(Trib.)*

**S. 22 : Income from house property – Annual value – Genuineness of agreement – Sub-let**

Where genuineness of agreement is not suspected nor any case of collusion is made out, rent collected by assessee for properties let out by it should be adopted as annual letting value for purpose of computing income from house property, and not rent paid by ultimate user to whom those properties have been sub-let. (A.Y. 1997-98)

*Addl. CIT v. Cube Investment P. Ltd. (2005) 2 SOT 792 (Mum.)(Trib.)*

**S. 22 : Income from house property – Annual value – Sub-let – Sister concern**

Where assessee had let out property to sister concern which sub-let it at a substantially higher rent, as a sister concern was an independent entity, Assessing Officer could not take rent received by sister concern as annual value of property in assessee's hands. (A.Y. 1997-98)

*Dy. CIT v. Sardar Exhibitors (P.) Ltd. (2005) 1 SOT 918 (Delhi)(Trib.)*

**S. 22 : Income from house property – Annual value – Rent control Act – Let out to Director – Sub-let**

Where assessee company let out a building to its directors at a paltry sum and directors in turn let it out at a huge rent, by virtue of provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 standard rent in the instant case would be rent at which building was first let out; as such the amount received actually by assessee constituted annual value of building and not subsequent amount for which two directors rented it out to a third party. (A.Y. 2001-02)

*Marwah Steels P. Ltd. v. Dy. CIT (2005) 3 SOT 339 (Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual value – Notional interest**

Notional Interest on interest free security deposit received by assessee from tenant cannot be taken into consideration for determination of ALV.

*Jt. CIT v. Gita Mirchandani (Mrs.) (2005) 4 SOT 353 (Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual value – Interest free deposit [S. 23 (1)(a)]**

Where an assessee purchased an already tenanted property and, after reconstruction, let it out to same tenants and besides rent also received interest free deposit from tenant, amount of annual rent received or receivable being less than sum computed under section 23(1)(a), it could not exceed municipal ratable value already fixed by Rent Control Act and, as a consequence, notional interest on interest free deposits could not be taken into consideration while determining annual letting value of building under section 23. (A.Y. 1999-2000)

*Gagan Trading Company Ltd. v. ACIT (2005) 93 ITD 426 / 94 TTJ 343 (Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual value – Deduction – Brokerage**

Brokerage paid in connection with leasing out property is not deductible while determining annual letting value of let out property. (A.Y. 1996-97)

*Excellent Associates v. Jt. CIT (2005) 96 ITD 57 / 96 TTJ 1124 (Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual Value – Non occupancy charges – Maintenance**

Non occupancy charges levied by housing society where flat owner had let out his flat in such society instead of occupying it, would have to be deducted under section 23 even while arriving at estimate of annual letting value of property. Maintenance charges have to be deducted even while determining annual value. (A.Y. 1997-98)

*Sharmila Tagore v. Jt. CIT (2005) 93 TTJ 483 / (2006) 150 Taxman 4 (Mag.)(Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual value – Car parking – Water Charges**

Expenses on account of car parking, water charges and municipal and other charges paid by lessee from annual value would be deductible if these outgoings are liabilities of assessee. (A.Ys. 1997-98, 1998-99)

*ITO v. Gopichand P. Godhwani (2005) 1 SOT 374 (Mum.)(Trib.)*

### **S. 22 : Income from house property – Annual value – Enhanced ground rent**

Where because of increase in ground rent by original lessee, the assessee, a sub lessee claimed and was allowed deduction of enhanced ground rent, merely because there was some possibility of original lessee modifying its demand, it could not be said that as on dates when original assessment was made, liabilities claimed by assessee were merely contingent so as to be disallowed. (A.Y. 1988-89, 1989-90)



*B.R. Herman & Mohatta (India) P. Ltd. v. ACIT (2005) 143 Taxman 21 (Mag.)(Mum.)(Trib.)*

**S. 22 : Income from house property – Annual value – Self occupation – Constructive possession [S. 23(2)]**

Where assessee has retained exclusive control over possession of house owned by him, though he may not be actually present in house, when he is away from it, he is still in constructive possession of his residential house and as such he cannot be denied exemption under section 23(2). (A.Y. 1997-98)

*Dy. CIT v. Deepak Seth (2005) 1 SOT 35 (Delhi)(Trib.)*

**S. 22 : Income from house property – Interest on borrowed capital [S. 24]**

Merely because interest on borrowed monies is shown payable and is not paid, deduction cannot be disallowed. (A.Y. 1991-92)

*Prem Chadha v. ITO (2005) 92 TTJ 69 (Delhi)(Trib.)*

**S. 22 : Income from house property – Interest – Accrual basis [S. 24]**

Where as per terms of agreement under which assessee had availed house building advance from his employer, interest on such advance was payable in installments immediately after payment of principal sum in full and assessee repaid entire principal amount by January 1999 and thereafter started to pay interest, interest payable on house building advance could be claimed by assessee as deduction under section 24(1)(vi) in year in which it was actually paid as per terms of contract; assessee's claim could not be disallowed on ground that interest was deductible on accrual basis. (A.Y. 2001-02)

*Shanmugam Narayanaswamy v. ITO (2005) 97 ITD 1 / 98 TTJ 174 (Hyd.)(Trib.)*

**S. 22 : Income from house property – Arrears of rent, special provisions [S. 25B]**

Provisions of section 25B have come into force from 1/4/2001 and, therefore, they would apply only in relation to assessment year 2001-02 and subsequent assessment year. (A.Ys. 1991-92 to 1995-96)

*Shree Shyam Kamal Industries P. Ltd. v. ITO (2005) 4 SOT 146 (Delhi)(Trib.)*

**S. 22 : Income from house property – Business income – Activities**

The Rental Income earned by Assessee company, an owner of a house property was taxed as Income from House Property, and not as business income, since it was not a business activity of an assessee company. (A.Y. 1992-93)

*Atma Ram Properties (P.) Ltd. v. Dy. CIT (2003) 85 ITD 86 / 86 TTJ 88 (Delhi)(Trib.)*

**S. 22 : Income from house property – Let out portion of property – Furniture and Fixtures**

Income of business service centres, who provide various facilities, viz, receptionist & telephone operators, waiting room with tickets central air conditions etc., is assessable as business receipts and not under "House Property". (A.Y. 2002-03)

*Harvinder Pal Mehta (HUF) (2009) 122 TTJ 163 / (2010) 122 ITD 93 / 19 DTR 523 (Mum.)(Trib.)*

Editorial : Shambhu Investment (P) Ltd. v. CIT (2003) 263 ITR 143 (SC) is distinguished.

### **Section 23 : Annual value how determined**

#### **S. 23 : Income from house property – Annual value – Maintenance and other charges**

Maintenance and other charges are deductible from rent while calculating annual letting value. (A.Ys. 1996-97, 2000-01).

*CIT v. R. J. Wood P. Ltd. (2011) 334 ITR 358 (Delhi)(High Court)*

#### **S. 23 : Income from house property – Annual value – Interest free deposit**

Interest free security deposit taken by assessee was highly disproportionate to monthly rent charged. This being the device to circumvent liability to income tax, notional interest on security deposit to be treated as income from house property. (A.Y. 1995-96).

*CIT v. K. Streetlite Electric Corporation (2011) 336 ITR 348 / 62 DTR 141 / 244 CTR 647 (P&H)(High Court)*

#### **S. 23 : Income from house property – Annual value – Vacancy allowance**

Where property has not been let out at all during previous year under consideration assessee is not entitled for vacancy allowance as provided under section 23(1)(c). (A.Y 2002-03)

*Vivek Jain v. ACIT (2011) 202 Taxman 499 / 63 DTR 174 / 337 ITR 74 / 245 CTR 329 (AP)(High Court)*

#### **S. 23 : Income from house property – Annual value – Notional Interest – Deposit – Municipal ratable value – For annual value under section 23, notional interest on deposit not includible. Municipal value is ordinarily ALV for section 23 though Assessing Officer entitled to depart for sufficient cause**

Section 23(1)(a) requires determination of the "fair rent" being "the sum for which the property might reasonably be expected to let from year to year". If on inquiry Assessing Officer finds that the actual rent received is less than the "fair/market rent" because the assessee has received abnormally high interest free security deposit, he can undertake necessary exercise in that behalf. However, by no stretch of imagination, the notional interest on the interest free security can be taken as determinative factor to arrive at the "fair rent". The ALV fixed by the Municipal Authorities can be the basis of adopting the ALV for purposes of section 23. Also in

determining the reasonable/fair rent, extraneous circumstances may inflate/deflate the "fair rent." (A. Y. 2001-02)

*CIT v. Moni Kumar Subba (2011) 333 ITR 38 / 199 Taxman 301 / 53 DTR 289 / 240 CTR 97 (FB)(Delhi)(High Court)*

*Editorial:- Refer Dy. CIT v Reclamation Realty India Pvt. Ltd. ITA No. 1411/Mum/07 dated*

*26-11-2010 (Mum.)(Trib.) Source: www.itatonline.org*

### **S. 23 : Income from house property – Annual value – Property let to tenant – Sub-letting**

Property let out to tenant and tenant sub letting the property for higher rent. Amount paid by sub-lessees cannot be assessable as income of the assessee, unless there is evidence to show that the transaction was not genuine.

*CIT v. Akshay Textiles Trading and Agencies P. Ltd. (2008) 304 ITR 401 / 214 CTR 316 / 167 Taxman 324 / 1 DTR 261 (Bom.)(High Court)*

### **S. 23 : Income from house property – Annual value – Stamp duty and registration**

Expenditure on account of stamp duty and registration charges on lease deed, amount spent by the assessee towards stamp duty for drawing up the lease deed and the registration cannot be allowed to be deducted in determining the annual value under section 23(1)(b). (A.Y. 1985-86)

*CIT v. Premnath Motors (Raj.) (P) Ltd. (2007) 212 CTR 16 / 163 Taxman 383 / (2008) 297 ITR 83 (Raj.)(High Court)*

### **S. 23 : Income from house property – Annual value – Annual rateable value – Standard rent**

The assessee before the Hon'ble High Court contended that the Assessing Officer cannot treat the fair market rent as a notional figure under section 23(1). If actual rent is not accepted the standard rent should be adopted as rent. The Hon'ble Court observed that the Assessing Officer is duty bound to calculate the standard rent of a property under section 23.

*John Tinson & Co. (P) Ltd. v. CIT (2006) 157 Taxman 410 / (2007) 207 CTR 423 / (2008) 298 ITR 407 (Delhi)(High Court)*

### **S. 23 : Income from house property – Annual value – Arrears of rent**

Rent (arrears) not relating to relevant previous year can not form part of "annual rent" for previous year for determining annual value of property. (A.Y. 1996-97)

*CIT v. Sadhana Chadha (Smt) (2004) 270 ITR 534 / 135 Taxman 242 / 188 CTR 78 (Delhi)(High Court)*

### **S. 23 : Income from house property – Annual value – Sub-let – Actual rent received**

Where property let out by assessee was sub let by tenant and agreement between assessee and tenant was not disbelieved, amount actually received by assessee from tenant was not disbelieved, amount actually received by assessee from tenant was to be assessed as income from house property and not rent received by tenant from sub-tenant. (A.Y. 1992-93)

*CIT v. Indra Co. Ltd. (2004) 268 ITR 240 / 140 Taxman 690 / 190 CTR 625 (Cal.)(High Court)*

### **S. 23 : Income from house property – Annual value – Let out to higher rent**

Where building owned by assessee was leased out to a firm consisting of wife, daughter and an employee and subsequently, firm sub-leased to tenants at higher rent, such higher rent was to be taken as annual value.

*N. Natraj v. Dy. CIT (2004) 266 ITR 277 / 188 CTR 388 (Mad.)(High Court)*

### **S. 23 : Income from house property – Annual value – Annual letting value – Standard rent**

Annual letting value cannot be taken into account by Tribunal without considering the standard rent fixed by the Small Causes Court. (A.Ys. 1982-83 to 1985-86)

*Zenith Tin Works Ltd. v. CIT (2003) 259 ITR 238 / 191 CTR 206 (Bom.)(High Court)*

### **S. 23 : Income from house property – Annual value – Annual letting value – Rent Control**

Assessing Officer has to take into consideration the relevant provisions of Rent Control Legislation while determining the annual value order of tribunal is upheld as no question of Law. (A.Y. 1991-92)

*CIT v. Vinay Bharatram & Sons (2003) 261 ITR 632 / 179 CTR 31 / 134 Taxman 699 (Delhi)(High Court)*

### **S. 23 : Income from house property – Annual value – Annual letting value – Lease deed**

The assessee had given its property on lease by a registered deed and the lease deed was accepted as genuine by the revenue, the annual letting value of the property could not be taken at a figure higher than actual rent received and as the assessee was not receiving the higher standard rent, the expected rent of the property as per section 23(1)(a) was the rent actually received. (A.Ys. 1983-84 to 1986-87)

*CIT v. Kishanlal & Sons (Udyog) Pvt. Ltd. (2003) 260 ITR 481 / 181 CTR 297 / 134 Taxman 569 (Cal.)(High Court)*

### **S. 23 : Income from house property – Annual value – Property let-out – Licencee – Sub-let Higher value – Tax planning transaction not “Sham” if parties assessed – Double taxation**

The assessee let out its premises to Minicon pursuant to a leave and license agreement. Minicon thereafter let out the said premises to various third parties. One director was common between the assessee and Minicon. It was held that save and

except the fact that one of the directors of the assessee company was also a director in Minicon, there is nothing on record to show that the transaction between the assessee and Minicon is a sham transaction. Accordingly, the decision of the Tribunal that the amounts received by Minicon on account of letting out the premises is liable to be assessed in the hands of the assessee on the ground that the transaction between the assessee and Minicon is a sham and bogus transaction cannot be accepted. *CIT v. Akshay Textile Trading and Agencies P. Ltd. (2008) 304 ITR 401 (Bom.)*(High Court) followed. (A.Ys. 1998-99 to 2002-04)  
*Sahney Kirkwood Pvt. Ltd. v. Dy. CIT (2011) 140 TTJ 338 / 131 ITD 341 / 51 DTR 83 / 9 ITR 57 (Mum.)*(Trib.)

### **S. 23 : Income from house property – Annual value – Brokerage payment – Deduction [S. 24]**

Brokerage paid by assessee to different brokers for introducing parties for renting out premises is not a charge created on property and thus same can neither be deducted from rent under section 23 nor is it allowable as deduction under section 24. (A.Y. 2001-02)

*Tube Rose Estates (P) Ltd. v. ACIT (2010) 123 ITD 498 (Delhi)*(Trib.)

### **S. 23 : Income from house property – Annual value – Fair rental value – Interest free deposit**

Benefit derived by assessee from interest free deposit can be taken into consideration for determination of fair rental value under section 23(1)(a) but the benefit derived should not be more than market lending rate. Since, the property in question was not subject to Rent Control Act, annual letting value was not to be restricted to standard rent as per Rent Control Act. (A.Ys. 2000-01, 2002-03, 2003-04)

*ITO v. Baker Technical Services (P) Ltd. (2010) 125 ITD 1 / (2009) 31 DTR 1 / 126 TTJ 455 (TM) (Mum.)*(Trib.)

### **S. 23 : Income from house property – Annual value – Duplex Flat**

Annual value of a single duplex flat for self occupation to be taken as "nil". Merely because the assessee had entered into two separate agreements jointly to purchase the duplex flat having two separate door numbers would not mean that the assessee had acquired two residential flats.

S. 23 For determining ALV of property the adoption of municipal rateable value is the correct method, and where the actual rent received is higher than the municipal rateable value the rent so received is to be adopted as the ALV of property. (A.Ys. 1991-92 to 1993-94)

*Dy. CIT v. Shripal Morekhia (2006) 7 SDT 609 (Mum.)*(Trib.)

*Suresh C. Sadarangani v. ACIT (2009) 33 SOT 428 (Mum.)*(Trib.)

### **S. 23 : Income from house property – Annual value – Vacancy allowance**

Vacancy allowance can be claimed even if the property was let out only for a short period during the year and it was under renovation for the rest of the year. (A. Y. 1997-98)

*Cambridge Construction (Delhi) Ltd. v. Dy. CIT, 'A' Bench, ITA No. 3470/Del/2003, dt. 31-10-2006 — BCAJ P. 522, Vol. 39-C, Part 5, February 2007. (Delhi)(Trib.)*

### **S. 23 : Income from house property – Annual value – Notional interest**

Notional Interest on Interest free deposit can not be added to actual rent received in determining the annual value under section 23(1)(b). (A.Y. 1997-98)

*Madison Mercantile Ltd. v. Dy. CIT (2007) 164 Taxman 97 (Mag.)(Delhi)(Trib.)*

### **S. 23 : Income from house property – Annual value – Standard rent**

The Tribunal held that Standard Rent calculated with reference to Investment made in property, under Bombay Rent Control Act, being higher than municipal value or actual rent was to be taken as fair rent. (A.Ys. 1992-93, 1993-94)

*ACIT v. Omprakash & Co. (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

### **S. 23 : Income from house property – Partly leased by firm and partly by partners – Deduction**

Deduction under section 23(2) is not allowable, when Property owned by firm, is partially used for business by the firm, and partially used by Partners for their personal residence. Held, that the assessee firm could not be considered to be in occupation and user of property itself for the purpose of its business so as to entitle for deduction under section 23(2). (A.Ys. 1992-93, 1993-94)

*ACIT v. Omprakash & Co. (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

### **S. 23 : Income from house property – Annual value – Notional rent – Interest free deposit**

For applying provisions of section 23(1)(a) of the Act, municipal valuation/ ratable value should be the determining factor. Since the rent received by the assessee was more than the sum for which the property might reasonably be expected to be let from year to year, the actual rent received should be the annual value of the property under section 23(1)(b) of the Act. Notional interest on interest – free security deposit/rent received in advance should not be added to the same.

*Dy. CIT v. Reclamation Realty India Pvt. Ltd., ITA No. 1411/Mum./2007, dt. 26-11-2010, ITAT 'D' Bench, BCAJ P. 25, Vol. 42-B, Part 5, February 2011 (Mum.)(Trib.)*

Source: [www.itatonline.org](http://www.itatonline.org)

### **S. 23 : Income from house property – Annual value – Not bound by standard rent, rateable value & can adjust if interest-free deposit reason for low actual rent**

It was held that for purpose of determining the ALV under section 23(1)(a) the Assessing Officer has to determine the fair / reasonable rent expected to be fetched by the property. Various factors must be considered by Assessing Officer. Therefore,



Notional Interest on interest free security cannot be considered as determinative factor to arrive at fair rent. In the instant case, the matter was remanded back as no inquiry was made by Assessing Officer to determine fair rent under section 23(1)(a). (A.Ys. 1992-93, 1993-94)

*Tivoli Investment and Trading Co. P. Ltd. v. ACIT (2011) 130 ITD 521 / 58 DTR 84 / 139 TTJ 520 (Mum.)(Trib.)*

## **Section: 24 : Deductions from income from house property.**

### **S. 24 : Income from house property – Deductions – Brokerage**

Brokerage paid was not an admissible expenditure under section 24. (A.Y. 1997-98)  
*Aravali Engineers P. Ltd. v. CIT (2011) 335 ITR 508 / 237 CTR 312 / 49 DTR 68 (P&H)(High Court)*

### **S. 24 : Income from house property – Deductions – Interest – Borrowed capital**

Transaction of allotment of property to assessee on installment basis does give rise to relationship of borrower and lender between assessee and estate officer and as such interest paid by assessee on installments constitutes interest on borrowed capital deductible from income from house property under section 24(1)(iv). (A.Y. 1991-92)  
*CIT v. Master Sukhwant Singh (2006) 155 Taxman 153 / (2005) 196 CTR 122 (P&H)(High Court)*

### **S. 24 : Income from house property – Deductions – Annual charges – Voluntarily charge**

For Assessment year 1979-80, disallowance of interest on amount borrowed for property in question on ground that it was a charge created voluntarily, and therefore not allowable under section 24(1)(iv). (A.Y. 1979-80)  
*CIT v. Raghubir Saran (2005) 145 Taxman 364 (All.)(High Court)*

### **S. 24 : Income from house property – Deductions – Interest – Borrowed capital – Charge**

Where amount paid by assessee was nothing but interest paid on borrowed capital, it was allowable under section 24(1)(vi) and could not be disallowed treating it as voluntary charge. (A.Y. 1980-81)  
*CIT v. Raghubir Saran (2005) 145 Taxman 439 (All.)(High Court)*

### **S. 24 : Income from house property – Deductions – Interest by builder – Delay in possession of flat**

Interest paid by builder of flats for the day in delay of possession of flat to party which had book flat and paid advance is not allowable as deduction under Section 24(1)(vi). (A.Ys. 1985-86-87)  
*Akash & Amber Trust v. CIT (2004) 268 ITR 93 / 140 Taxman 505 / 190 CTR 629 (Cal.)(High Court)*

#### **S. 24 : Income from house property – Deductions – Repairs**

Expression 'cost of repairs' in section 24(1)(i)(a) has to be interpreted to mean substantial repairs. (A.Y. 1990-91)

*Magma Leasing Ltd. v. CIT (2003) 260 ITR 36 / 129 Taxman 651 / 180 CTR 513 (Cal.)(High Court).*

#### **S. 24 : Income from house property – Deductions – Interest on loans raised for repayment of original loan – Maintenance charges – Lift – Lighting – Sweeping charges [S. 22, 23]**

Loan raised for repayment of original loan taken to purchase house property partakes the character of original loan and therefore interest paid on such subsequent loan is deductible under section 24 from the rental income of property. Charges paid to the society for the facilities of generator, lift, lighting, etc. were deductible from the gross rent received by the assessee. (A. Y. 2004-05).

*ACIT v. Sunil Kumar Agarwal (2011) 8 ITR 304 / 139 TTJ 49 (UO)(Luck.)(Trib.)*

#### **S. 24 : Income from house property – Deductions – Interest – Original loan – Second loan**

If Interest paid on original loan is allowable as deduction, then interest paid on second loan for repayment of original loan is also allowable. (A.Y. 2001-02)

*K. S. Kamalakannan v. ACIT (2010) 126 ITD 231 / 130 TTJ 481 / 37 DTR 115 / 10 ITR 321 (Chennai)(Trib.)*

#### **S. 24 : Income from house property – Deductions – Interest – Fresh loan – For repaying loan**

Interest on fresh loan raised to repay original loan taken for constructing / buying property is deductible under section 24(1)(iv) if the Assessing Officer. is satisfied that the second loan was obtained for the purpose of repayment of the original loan which was obtained for acquiring of the property.

*ITO v. Karupa Chemicals P. Ltd. (2008) 298 ITR 189 (AT)(Mum.)(Trib.)*

#### **S. 24 : Income from house property – Deductions – Loan – Genuineness**

Deduction under section 24 could not be denied on the ground that Interest was shown as payable. Once the assessee has proved that loan was taken for the purpose of construction of house in earlier years, Assessing Officer cannot say that assessee could not prove the genuineness of loan taken in earlier years during the year under consideration. (A.Y. 1991-92)

*Prem Chadha v. ITO (2006) 150 Taxman 25 (Mag.)(Delhi)(Trib.)*

#### **S. 24 : Income from house property – Deductions – Trust – Depreciation**

For the purpose of s. 11(1)(a). Income of the assessee trust has to be computed in the normal commercial manner. Deduction under section 24(1)(i) is not allowable but depreciation on immovable property is allowable. (A.Y. 1996-97)

*Shrimad Vallabh Vishwa Dhamrma Sanstha v. ACIT (2006) 102 TTJ 653 (Ahd.)(Trib.)*

**S. 24 : Income from house property – Deductions – Interest on unpaid interest – Capital Charges**

Interest on unpaid interest payable on capital charge cannot be allowed as deduction under section 24. (A.Ys. 1997-98 to 2002-03)

*Late A. Y. Prabhakar (Indl.) v. ACIT (2006) 105 TTJ 391 / (2007) 12 SOT 1 (Chennai)(Trib.)*

**S. 24 : Income from house property – Deductions – Annual charge**

Remuneration payable to Shebait by the assessee deity does not amount to annual charge on the property and thus, no deduction under section 24(1)(iv) is permissible. (A.Y. 1997-98).

*Estate of Sree Sreeradha Kishan Jew v. CIT & Anr (2011) 58 DTR 131 / 243 CTR 137 (Cal.)(High Court)*

**S. 24 : Income from house property – Deductions – Interest – Construction of house**

Where the assessee filed returns of income for two consecutive years, each categorically stating that the construction of the assessee's residential house was yet to be completed, interest on house loan under section 24(b), could not be allowed. (A.Ys. 2003-04, 2004-05)

*Ashok Kumar Modi v. ITO (2010) 45 DTR 158 (Cuttack)(Trib.)*

**S. 24 : Income from house property – Deductions – Interest – Acquisition of plot**

Deduction under section 24(b) could not be denied on the ground that interest was paid on funds borrowed for acquisition of plot and not house property. (A.Y. 2001-02)  
*ACIT v. Amrit Lal Adlakha (Dr) (2006) 105 TTJ 271 / (2007) 11 SOT 674 (Amritsar)(Trib.)*

**Section: 25B : Special provision for arrears of rent received**

**S. 25B : Income from house property – Arrears of rent – Arrears of enhancement – Year of Chargeability**

Interpretation of section 25B made by the High Court being not called for on the facts and circumstances of the case, permission is granted to the assessee to move the High Court for recall / expungement of the observations pertaining to section 25B if the High Court so deems fit. (A.Ys. 1986-87 to 1996-97, 1998-99)

*Dowager Maharani Residential Accommodation Welfare Amen Trust v. CIT (2010) 230 CTR*

*18 / 35 DTR 241 (SC)*

### **S. 25B : Income from house property – Arrears of rent – Spread over previous years [S. 23]**

Arrears of rent received in subsequent year cannot be spread over previous years, it is taxable in the year of receipt. (A.Ys. 1996-97 to 2000-01).

*CIT v. R. J. Wood P. Ltd. (2011) 334 ITR 358 (Delhi)(High Court)*

### **Section 26 : Property owned by co-owners**

#### **S. 26 : Income from house property – Owned by co-owners – Co-owner – Assessment**

Quantification of annual value of co-owned property in course of assessment of AOP consisting of co-owners is not a condition precedent for taxability of individual share of such income in hands of co-owners. (A.Y. 2002-03).

*Sujeer Properties (AOP) v. ITO (2011) 131 ITD 377 / 138 TTJ 684 / 55 DTR 282 (Mum.)(Trib.)*

### **Section: 27 : “Owner of house property”. “annual charge”, etc., defined**

#### **S. 27 : Income from house property – Owner – Month to month lease**

The assessee took on lease a property and sublet a portion of the property. The Assessing Officer. treated the income derived as ‘Income from House Property’. However, on appeal, CIT(A) treated it as income from business, which was confirmed by Income Tax Tribunal.

On further appeal to High Court it was held that under section 27(iiiib), the assessee by virtue of its right by way of a lease from month to month or for a period not exceeding one year was excluded from the definition of owner of the House Property. (A.Y. 1998-99)

*CIT v. A. V. K. Construction P. Ltd. (2007) 292 ITR 512 (Mad.)(High Court)*

### **D. Profits and Gains of Business or Profession**

### **Section 28 : Profits and gains of business or profession**

#### **S. 28(i) : Business income – Income from other sources – Interest income [S. 56]**

In the absence of factual matrix to decide the question whether the interest income received by the assessee on short-term fixed deposits constituted ‘business income’ under section 28 or ‘income from other sources’ under section 56, the matter was remanded to the Appellate Tribunal for fresh consideration in accordance with law.

*CIT v. Producin P. Ltd. (2010) 322 ITR 270 / 191 Taxman 79 (SC)*

#### **S. 28(i) : Business income – Undisclosed income – Loose sheets**

The fact of the actual sale price of the property, the implication of the contradictory statement made by the seller of the property and whether reliance can be placed on

the loose sheet recovered in the course of raid are all questions of fact and therefore, no substantial question of law arises therefrom.

The Supreme Court incidentally held that quoting from an order of some authority, particularly a specialized one, cannot per se be faulted as this procedure can often help in making for brevity and precision. But to the extent that any borrowed words are used in a judgment, they must be acknowledged as such in the appropriate manner as a courtesy to the true authors.

*CIT v. P. V. Kalyanasundaram* (2007) 294 ITR 49 / 212 CTR 97 / 9 RC 577 / 164 Taxman 78 / (2008) 202 Taxation 206 (SC)

### **S. 28(i) : Business income – Business loss – Confiscation of stock-in-trade – Illegal business**

Explanation to section 37 has no relevance in case of allowability of business loss. The assessee was a medical practitioner. Some heroin was seized from him which formed part of his stock-in-trade. The Court held that once the heroin formed part of stock-in-trade, it follows that the seizure and confiscation of such stock-in-trade has to be allowed as a business loss. The Supreme Court further held that law is different from morality and a case is to be decided by courts on legal principles and not on one's own moral views. (A.Y. 1986-87)

*T. A. Quareshi (Dr.) v. CIT* (2006) 287 ITR 547 / 157 Taxman 514 / 206 CTR 489 / (2007) 196 Taxation 740 (SC)

### **S. 28(i) : Business income – Business loss – Speculative loss – Sale and purchase of units [S. 43(5), 70, 73]**

Loss from purchase and sale of units of UTI is not speculation loss and hence it can be set off against income from tea plantation in view of the Supreme Court decision in *Appollo Tyres Ltd. v CIT* (2002) 255 ITR 273 / 174 CTR 521 / 122 Taxman 562 (SC).

*CIT v. Periakaramalai Tea & Produce Co. Ltd.* (2011) 51 DTR 186 / 195 Taxman 185 / 238 CTR 449 (Ker.)(High Court)

### **S. 28(i) : Business income – Gifts from devotees on birthday – Vocation – Profession – Capital receipt**

Assessee as religious head was not performing any religious rituals for his devotees for consideration. He was doing charitable work and spiritualisation for benefit of mankind. Gift were received by assessee from devotees out of natural love and affection. Receipt cannot be taxed as income from any vocation or profession. (A.Y. 2004-05).

*CIT v. Gopala Naicker Bangarue* (2011) Tax L.R. 686 / (2010) 193 Taxman 71 (Mad.)(High Court)

Editorial: SLP rejected (SLP (Civil No.) 4732 of 2011 dated 14-2-2011 (2012) 204 Taxman 192 (Mag)

### **S. 28(i) : Business income – Income from other sources – Interest income [S. 56]**

The Tribunal has given finding that the borrowings, made by the assessee, were very much part and parcel of assessee's investment in acquiring the ship. Even the RBI's permission was obtained for the same and interest earned from the investment unutilised portion of the said borrowing will constitute business income.

*CIT v. Varun Shipping Co. Ltd. (2011) 334 ITR 263 / 203 Taxman 92 (Mag.)(Bom.)(High Court)*

*Editorial:- The Supreme Court has granted special leave to the department to appeal against this judgment. (2010) 325 ITR (ST) 5 (Bom).*

### **S. 28(i) : Business income – Business loss – Rent from leave and licence – Office premises**

Applying the test laid down in *Universal Plast Ltd. v. CIT* (1999) 237 ITR 454 (SC) as to when income from property is assessable as "business profits" and as "income from house property", it was held that rental income has to be assessed as "business profits" because (i) all assets of the business were not rented out by the assessee and it continued the main business of dealing in scientific apparatus, etc., (ii) the property was being used for the Regional Office and was let out by way of exploitation of business assets for making profit, (iii) the assessee had not sold away the properties or abandoned its business activities. The transaction was a "commercial venture" taken in order to exploit business assets and for receiving higher income from commercial assets.

*The Scientific Instrument Co. Ltd. v. CIT* (2011) 202 Taxman 536 (All.)(High Court)

### **S. 28(i) : Business income – Capital gains – Sale of land and building [S. 45]**

In the absence of any finding of the authorities as to the date of acquisition of the property in question by the assessee, matter was remanded to the Tribunal to determine the actual date of acquisition of the property and also to decide afresh the question as to whether the profit arising out of the sale was in the nature of business profit or capital gain. (A.Y. 1997-98).

*Ramachandra Estate Development & Investment Co. (P) Ltd. v. Jt. CIT* (2011) 244 CTR 573 / 48 DTR 321 (Bom.)(High Court)

### **S. 28(i) : Business income – Computation – Cost of land contributed by partner to the firm [S. 4]**

In computing the profits and gains of the firm on the sale of property in question, the value of the plot brought by one of the partners by way of capital contribution should be taken as per amount declared in revised returns as valuation of land in question which was accepted by the wealth tax authorities and not at value which was earlier shown in the books. (A.Ys. 1972-73 to 1979-1980)

*Hansallaya Properties v. CIT* (2011) 49 DTR 231 / 196 Taxman 496 / 336 ITR 83 (Delhi)(High Court)

### **S. 28(i) : Business income – Income from house property – Rule of consistency [S. 22]**



Commercial complex let out and the income was assessed as business income in earlier years, as the department has not got any new facts on record for departure from its earlier stand and in view of the principle of consistency, the rental income should be assessed as business income. (A.Ys. 1996-97 to 2000-01)

*CIT v. Goel Builders (2011) 331 ITR 344 / (2010) 192 Taxman 28 / 45 DTR 318 / 235 CTR 472 (All.)(High Court)*

**S. 28(i) : Business income – Capital gains – Shares – Investment [S. 45]**

Where the assessee had held shares of a particular company for fourteen years, without treating the same as stock in trade and in past the profit on sale of share was held as capital gain. Gain arising to the assessee on sale of such shares is assessable under the head capital gains and not business income. (A.Y. 2001-02)

*CIT v. Niraj Amidhar Surti (2011) 238 CTR 294 / (2010) 48 DTR 33 (Guj.)(High Court)*

**S. 28(i) : Business income – Ancestral property – Capital gains [S. 45]**

Where the assessee had sold its ancestral property without converting the same into stock-in-trade the gain arising on sale of such property was to be taxed as capital gain and not as business income. (A.Y. 2005-06)

*CIT v. Raja Malwinder Singh (2010) 40 DTR 273 (P&H)(High Court)*

**S. 28(i) : Business income – Business loss – Capital gains – Sale of land [S. 45]**

Profit on sale of land by the assessee which was received by him from the owner of the land in pursuance of a development agreement was taxable as 'capital gain', when there was no material to hold that the assessee was indulged in business activity. (A.Y. 1997-98)

*CIT & Anr. v. S. Rajamannar (2010) 40 DTR 282 / 329 ITR 626 / 241 CTR 372 (Karn.)(High Court)*

**S. 28(i) : Business income – Income from house property – Warehousing [S. 22]**

Income from warehousing would be business income if dominant purpose was commercial activity and it would be income from property if dominant object was to lease property. (A.Y. 2001-02)

*Nutan Warehousing Co. P. Ltd. v. Dy. CIT (2010) 326 ITR 94 / 47 DTR 140 / 236 CTR 394 (Bom.)(High Court)*

**S. 28(i) : Business income – License – Business premises [S. 56]**

For the A.Ys. 1993-94 to 2001-02, the assessments were completed under section 143(3), wherein licence fee was assessed as business income, no fresh facts were discovered in the Asst. Year 2003-04. Hence, the matter set-a-side to the Tribunal to decide considering the above observation. (A.Y. 2003-04)

*Ocean City Trading (India) P. Ltd. v. CIT (2010) 328 ITR 290 (Bom.)(High Court)*

**S. 28(i) : Business income – Income from other sources – Interest on short-term deposit**

**[S. 56]**

Interest earned on short term deposits with bank by assessee tea growing company by investing surplus fund of the business before they were utilised for actual business assessable as business income and not as income from other sources. (A.Ys. 1990-91, 1991-92)

*Eveready Industries India Ltd. v. CIT (2010) 235 CTR 263 / 323 ITR 312 / 43 DTR 82 (Cal.)(High Court)*

**S. 28(i) : Business income – Business loss – Sale of shares**

The loss incurred by the assessee on the sale of shares held by the assessee for promoting of entrepreneur should be treated as business loss of the assessee. (A.Y. 1991-92)

*CIT & Anr. v. Malabar Industrial Co. Ltd. (2010) 320 ITR 486 (Karn.)(High Court)*

**S. 28(i) : Business income – Business loss – Advance from customer – Exchange fluctuation**

Assessee received advance amount from overseas customer towards supply of particular commodity. Before the assessee could export the commodity, the Government imposed a ban on the export of that commodity and as a result of which the assessee could not supply and had to refund the advance amount. But due to exchange rate fluctuation, the assessee had to incur a higher amount and claimed the same as business loss. Held the loss is eligible for deduction as a business loss. (A.Y. 1989-90)

*Loksons Pvt. Ltd. v. ACIT (2010) 187 Taxman 55 / (2008) 11 DTR 206 (Bom.)(High Court)*

**S. 28(i) : Business income – Compensation – Infringement of copyright**

Amount received as compensation for infringement of copy right assessable as business income. (A.Ys. 1985-86, 1986-87)

*CIT v. Eastern Book Company (2010) 322 ITR 605 / 42 DTR 190 / 233 CTR 509 (All)(High Court)*

**S. 28(i) : Business income – Business loss – Renounce – Right to subscribe shares**

Where the assessee renounced the right to subscribe shares in favour of unknown persons (by foregoing the right to subscribe to right shares) for nil consideration, there is no transfer, hence the notional loss on account of diminution in the value of its shares cannot be allowed. (A.Y. 1993-94)

*CIT v. United Breweries Ltd. & Anr. (2010) 325 ITR 485 / 236 CTR 160 / 39 DTR 49 (Karn.)(High Court)*

**S. 28(i) : Business income – Capital gain – Transaction in shares – Stock-in-trade – Investment [S. 45]**

Assessee company having reflected its entire shareholding in various shares, including the shares in question, as stock-in-trade all along in the past and the revenue authorities having come to the finding of fact that the shares of the same company were purchased by the assessee by way of trading and not by way of investment, income derived from sale of shares is to be treated as business income and not as capital gains. (A.Ys. 1999-2000, 2001-02)

*Ankita Deposits & Advances (P) Ltd. v. CIT (2010) 43 DTR 92 / 193 Taxman 36 / 235 CTR 273 (HP)(High Court)*

**S. 28(i) : Business income – Capital gains – Sale of shares [S. 45]**

Assessee carrying on jewellery business invested in shares and treated shares as investment in the books. The Tribunal on the basis of facts found viz. that the investment is out of own fund and not borrowed fund, that investment is not rotated frequently, that the total number of transactions are very few, that all the shares purchased are not sold and rather held for quite number of days, held that the transactions are to be treated as giving rise to the capital gain and cannot be held as trading in shares. High Court in appeal confirmed the decision of Tribunal. (A.Y. 2006-07)

*CIT v. Rohit Anand (2010) 46 DTR 236 / 327 ITR 445 / 235 CTR 594 (Delhi)(High Court)*

*Editorial:- ITO v. Rohit Anand (2010) 127 TTJ 122 (Delhi)(UO) / (2009) 34 DTR 89 / 34 SOT 42 (Delhi)(Trib.) Affirmed*

**S. 28(i) : Business income – Capital gains – Transaction in shares [S. 45]**

Assessee company having not engaged itself in the business of buying and selling shares after 1st April 1997, though entitled to deal in shares as per the object incorporated in its memorandum of association, income earned by assessee from the sale of shares held by it as an investment for seven years was assessable as capital gains and not as business income. (A.Y. 2003-04)

*CIT v. PNB Finance & Industries Ltd. (2010) 46 DTR 345 / 236 CTR 1 (Delhi)(High Court)*

**S. 28(i) : Business income – Capital gains – Investment in shares [S. 45]**

Shares activity treated as investment in earlier years cannot be treated as business in subsequent years if facts are the same. (A.Y. 2005-06)

*CIT v. Gopal Purohit (2010) 34 DTR 52 / 228 CTR 582 / 188 Taxman 140 / (2011) 336 ITR 287 (Bom.)(High Court)*

*Editorial :- Gopal Purohit (2009) 20 DTR 99 / 122 TTJ 87 / 29 SOT 117 Affirmed. SLP of department rejected (2011) 334 ITR 308 (St).*

**S. 28(i) : Business income – Income from other sources – Rental income – Dealer [S. 56]**

Where the prominent object of the assessee company was, 'to deal in properties' and the rental income derived by the assessee from such business was assessed as business income in earlier years, the same cannot be treated as income from other sources in absence of any new facts / evidence brought on by the revenue authorities.

*CIT v. D.S. Promoters & Developers (P) Ltd. (2009) 25 DTR 8 / 183 Taxman 153 / (2011) 330 ITR 291 (Delhi)(High Court)*

**S: 28(i) : Business income – Income from other sources – Interest – Builder [S. 56]**

Builder/assessee collecting advance from prospective purchasers of flats and keeping the funds temporarily in fixed deposit. Interest on such deposit is chargeable as 'Business Income' and not as 'Income from other Sources'. (A.Y. 1992-93)

*CIT v. Lok Holdings (2009) 212 Taxation 159 / 308 ITR 356 / (2010) 189 Taxman 452 (Bom.) (High Court)*

**S. 28(i) : Business income – Business loss – Year in which deductible**

Assessee's goods which were stored in godowns owned by State Warehousing Corporation, were destroyed by fire in 1978. The assessee filed suit for recovery of loss against the insurance company and the State Warehousing Corporation but did not claim loss in its tax return. The suit was dismissed on 31-5-1982. Thereafter the assessee claimed the set-off of loss for year relevant to A.Y. 1983-84. The ITO as well as the CIT(A) and the Hon'ble ITAT held that the loss pertained to earlier years and hence could not be claimed in year relevant to A.Y. 1983-84. Reversing this decision the Hon'ble High Court held that since the assessee had recognized the loss after the suit was dismissed, it was entitled to claim the loss in year relevant to A.Y. 1983-84. (A.Y. 1983-84).

*New Diwan Oil Mills v. CIT (2009) 178 Taxman 461 / 20 DTR 124 / 328 ITR 432 (P&H)(High Court)*

**S 28(i) : Business income – Capital gains – Property held as investment [S. 45]**

Property held for several years in capital Account and shown in Balance Sheet as a capital asset, hence profit on sale of impugned property is to be assessed as capital gains and not as Business Income.

*CIT v. DCM Ltd. (2009) 221 CTR 513 / (2010) 320 ITR 307 / (2009) 179 Taxman 295 / 18 DTR 81 (Delhi)(High Court)*

**S. 28(i) : Business income – Speculation loss – Shares in stock-in-trade – Valuation of stock [S. 73]**

Even shares-in-stock on valuation at the close of accounting year resulting in profit or loss, such profit & loss under section 28(1) is speculation profit or loss by virtue of proviso to section 73. (A.Y. 2001-02)

*Prasad Agents (P) Ltd. v. ITO (2009) 213 Taxation 571 / 226 CTR 13 / 333 ITR 275 / 180 Taxman 178 (Bom.)(High Court)*

**S. 28(i) : Business income – Business loss – Confiscation of contraband gold**

Loss on account of confiscation of contraband gold. Assessee engaged in doing job work on gold received from clients – Income arising is only Labour charges. Hence loss cannot be allowed as business loss by setting off against addition under section 69A.

*Mahendra D. Jain v. ITO (2008) 220 CTR 81 / 173 Taxman 336 / 123 DTR 21 / (2010) 323 ITR 644 (Bom.)(High Court)*

**S. 28(i) : Business income – Physical delivery of shares**

Where the payments for purchase and sale of shares were made through proper banking channels and the assessee had produced the contract / delivery notes, purchase and sale bills of the broker, distinctive numbers of shares and also proof of physical delivery of shares, the loss incurred on sale of such shares was held to be genuine loss and was allowable. (A.Y. 1996-97)

*CIT v. Praveen Electronic Ltd. (2008) 16 DTR 321 / (2009) 312 ITR 170 / 178 Taxman 8 (Delhi) (High Court)*

**S. 28(i) : Business income – Income from other source – Interest income – Temporarily investment [S. 56]**

Where amount borrowed from bank for expansion of business was invested temporarily pending utilization of the same, interest earned on such investments by the assessee was assessable under the head, 'Business Income' and not under the head, 'Income from Other Source'.

*CIT & Anr. v. Jhunjhunwala Vanaspati Ltd. (2008) 11 DTR 21 (All.)(High Court)*

**S. 28(i) : Business income – Business loss – Fluctuation in foreign exchange rate on stock-in-trade**

The assessee had originally taken a foreign exchange loan for import of capital goods, but at the time when devaluation took place loan had undergone a change of character and had assumed a new character of stock-in-trade or circulating capital. Any loss suffered by assessee on account of foreign exchange rate fluctuation would have to be treated as a revenue loss and not as a capital loss.

*CIT v. Goyal M. G. Gases (P) Ltd. (2008) 173 Taxman 34 / (2010) 320 ITR 669 (Delhi)(High Court)*

**S. 28(i) : Business income – Business loss – Shares of subsidiary**

The subsidiary company had been ordered to wound up, so there was no question of any party dealing in the shares of that company. The Tribunal had come to the conclusion that the shares were stock-in-trade and therefore allowed the loss. The loss has to be treated as a trading loss. The mere fact that the shares were not sold

was of no significance, since the fact the shares could not have been sold and had become worthless. The departmental appeal was dismissed.

*CIT v. H. P. Mineral and Industrial Development Corporation Ltd. (2008) 305 ITR 111 / 16 DTR 152 (HP)(High Court)*

**S. 28(i) : Business income – Income from other source – Pre-operative income – Margin money for LC [S. 56]**

Where the assessee's business had not commenced, the interest income earned on fixed deposits kept as margin money with the bank to obtain letter of credit (L.C.) facilities for import of capital goods is required to be credited against the pre incorporation expenses and cannot be taxed under the head Income from other Sources. (A.Y. 1998-99)

*CIT v. L.G. Electronics India (P) Ltd. (2008) 12 DTR 263 / (2009) 309 ITR 265 (Delhi)(High Court)*

**S. 28(i) : Business income – Income from fixed deposit – Bank guarantee**

The investment of amount in fixed deposits by the assessee was only to secure a bank guarantee to be offered to M/s. KPTCL in order to acquire a contract work. It was held that it cannot be treated as an income from other sources and interest accrued on such fixed deposits has to be treated as business income only.

*CIT v. Chinna Machimuthu Constructions (2008) 297 ITR 70 / 170 Taxman 272 (Karn.)(High Court)*

**S. 28(i) : Business income – Miscellaneous receipts – Empty bags sale**

Income of the assessee from sale of empty bags, containers and drums used by it in its civil construction works was an income from business activity of assessee. (A.Ys. 1990-91, 92-93)

*Ferro Concrete Constructions (India) P. Ltd. v. CIT (2007) 290 ITR 713 / (2005) 144 Taxman 885 / (2005) 196 CTR 158 (MP)(High Court)*

**S. 28(i) : Business income – Business loss – Loan given to subsidiary company**

When the assessee had chosen to write off at that time merger had not taken place and hence the debts were available on the crucial date. The retrospective effect given to merger would not nullify the decision with regard to writing off. (A.Y. 1995-96)

*CIT v. United Breweries Ltd. and Another (2007) 292 ITR 188 / 209 CTR 385 / (2008) 166 Taxman 297 (Karn.)(High Court)*

**S. 28(i) : Business income – Business loss – Commencement of business – Steps**

Where the assessee had filed a return of income declaring a loss from software development/consultancy business and interest income. The Assessing Officer was of the view that the expenses claimed by the assessee were not allowable as the



assessee had not suffered any loss during the previous year as it had not commenced its business activities. The only receipt during the year was interest income. The loss as declared by the assessee during the year was only due to various administrative expenses debited by the assessee in its profit and loss account. On appeal the High Court held that it is possible that the assessee may not have earned any income during the year but the fact that the assessee had taken steps necessary to procure business itself shows that the assessee had commenced business during the previous year and the loss as declared by the assessee was allowable as business loss. (A.Y. 1998-99)

*CIT v. E funds International India (P) Ltd. (2007) 198 Taxation 218 / 162 Taxman 1 (Delhi) (High Court)*

### **S. 28(i) : Business income – Accounts – Waiver of interest**

The assessee changed its accounting system from mercantile to cash system. In assessment for subsequent year Assessing Officer did not allow the assessee's claim for waiver of interest, compounding and rebate arising as a result of agreement with its customers, as there was change in system of accounting. On appeal the High Court held that there is no provision in law that creates embargo against credit of amount to which an assessee is entitled to after a change in accounting system. The change of system of accounting does not divest the assessee from receiving the benefits which have already accrued to it in previous years. (A.Ys. 1997-98 to 2001-02)

*CIT v. M. P. Financial Corporation (2007) 201 Taxation 521 / 173 Taxman 44 / 299 ITR 297 (MP) (High Court)*

### **S. 28(i) : Business income – Income from other source – Interest on FDR – Netting not allowed [S. 56]**

Interest on FDR which was assessable under the head income from other sources and not as business income, netting of such interest against the interest paid by the assessee to the bank on bank overdraft was not allowable.

*CIT v. Indian Handicrafts (2007) 200 Taxation 342 (Delhi) (High Court)*

### **S. 28(i) : Business income – House property income – Property held as stock-in-trade [S. 22]**

If the property is used as 'stock-in-trade', then the said property would become or partake of the character of the stock, and any income derived from the stock would be 'income' from the business, and not income from the property. In this case, the assessee was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee and it had shown one of the building properties in the closing stock in the balance sheet drawn for the business.

*CIT v. Neha Builders Pvt. Ltd. (2007) 164 Taxman 342 / 207 CTR 231 / (2008) 296 ITR 661 (Guj.) (High Court)*

### **S. 28(i) : Business income – Business loss – Diminution in the value**

Diminution in the value of investments is an allowable business loss. (A.Ys. 1992-93, 1993-94)

*CIT v. Citi Union Bank Ltd. (2007) 213 CTR 113 / 291 ITR 144 / 163 Taxman 495 (Mad.)(High Court)*

#### **S. 28(i) : Business income – Notional income – Transfer deed**

No addition could be made in the absence of any material brought on the record to show that the consideration received was indeed more than what has been stated in the Transfer Deed.

*CIT v. Emerald Construction Pvt. Ltd. (2007) 212 CTR 20 / 291 ITR 59 (Raj.)(High Court)*

#### **S. 28(i) : Business income – Natural justice – Opportunity to examine**

The Assessing Officer on the basis of documents seized from the purchaser of land, made additions in the hands of the assessee who was the seller. The assessee was not confronted with the evidence relied upon by the Assessing Officer. The deletion of addition by the Appellate Tribunal was upheld relying on the decision of the Apex Court in the case of *Kishinchand Chellaram v. CIT* / 19 CTR 360 / 4 Taxman 29 (1980) 125 ITR 713 (SC). (A.Y. 1947-48)(1994-95)

*CIT v. Ram Kumar (2007) 163 Taxman 253 (P&H)(High Court)*

#### **S. 28(i) : Business income – Adventure in the nature of trade – Plotting of land**

Selling of own land after plotting it out in order to secure better price, is not an adventure in the nature of trade. An isolated transaction or activity of selling of land cannot be part of business. There must be regular activities of purchase and sale of land to treat the said activity as business.

*CIT v. Suresh Chand Goyal (2007) 163 Taxman 54 / 209 CTR 410 / (2008) 298 ITR 277 (MP) (High Court)*

#### **S. 28(i) : Business income – Property income – Lodge – Letting of**

Where assessee running a lodge in Nainital had let out all rooms of property to SBI for their trainees, income from such leasing was assessable as business income. (A.Ys. 1987-88, 1988-89)

*CIT v. Pateshwari Electrical & Associated Industries (P.) Ltd., (2006) 282 ITR 61 / (2005) 148 Taxman 240 / 197 CTR 353 (All.)(High Court)*

#### **S. 28(i) : Business income – Business loss – Property income – Temporary letting of property [S. 22]**

Where assessee a bidi manufacturer, due to labour problems and other circumstances, had to temporarily reduce its activities and consequently it let out some of the properties, which were not immediately required by it for purpose of its business, rental income derived by it from such letting was assessable as business income. (A.Ys. 1986-87 to 1988-89)

*CIT v. Kohinoor Tobacco Products (P.) Ltd. (2006) 283 ITR 162 / (2005) 149 Taxman 620 / 198 CTR 325 (MP)(High Court)*

**S. 28(i) : Business income – Sale and purchase of shares – Quoted or unquoted shares**

Where assessee was a company engaged in business of investment in shares/securities/ debentures, any income derived from sale / purchase of shares, whether quoted in stock exchange or unquoted, had to be held as a business income. (A.Y. 1994-95)

*CIT v. Motlay Finance (P.) Ltd. (2006) 150 Taxman 487 / (2005) 197 CTR 332 (MP)(High Court)*

**S. 28(i) : Business income – Sales tax collection – Free sugar quota**

Excess amount of sales tax collected by the assessee, following mercantile system of accounting, without there being corresponding liability, was income liable to tax in hands of assessee in years in which excess amount was so collected by the assessee. (A.Ys. 1978-79, 1979-80)

*Markanda Vanaspati Mills Ltd. v. CIT (2006) 280 ITR 503 / (2005) 146 Taxman 262 / 195 CTR 619 (P&H)(High Court)*

**S. 28(i) : Business income – Miscellaneous receipts – Trading receipt**

Where assessee, engaged in business of manufacture and sale of sugar, received incentive by way of additional free sugar quota wherein excise sugar quota was leviable at a reduced rate but sugar was available for being sold at market price, sum in question earned on account of additional sugar quota was a trading receipt and therefore was liable to taxed. (A.Y. 1990-91)

*CIT v. Kisan Sahkari Chini Mills Ltd. (2006) 284 ITR 418 / (2005) 148 Taxman 450 / 199 CTR 683 (All.)(High Court)*

**S. 28(i) : Business income – Business loss – Business loss – Confiscation of goods – Seizure of foreign currency – Smuggling activity**

loss on account of seizure of foreign currency was not allowed on ground that assessee was not a smuggler and not carrying any illegal business or smuggling, and, subsequently, assessee was detained under COFEPOSA and was declared as a member of a gang involved in smuggling activity, subsequent detention of assessee under COFEPOSA confirmed that business of assessee was that of smuggling and in view of said fact, it could be said that foreign currency recovered from assessee was amount involved in smuggling activity and, therefore confiscation of said amount was to be treated as a business loss suffered by assessee in conducting his business of smuggling and allowed as such. (A.Y. 1982-83)

*CIT v. Anil M. Geni (2006) 284 ITR 338 / (2005) 148 Taxman 645 / 200 CTR 172 (Bom.)(High Court)*

**S. 28(i) : Business income – Income from house property – Lease rentals of hotel building [S. 22]**

The lease rentals on lease of a building, which was fully equipped and ready to be used as a hotel, are business income under section 28 of the Act and the same cannot be treated as income from house property or income from other sources. In this case, all the necessary permissions and licences under various statutes were obtained in the name of the lessor. (A.Y. 1990-91)

*CIT v. Mohiddin Hotels (P.) Ltd. (2006) 152 Taxman 611 / 200 CTR 329 / 284 ITR 229 (Bom.) (High Court)*

**S. 28(i) : Business Income – Business loss – Government securities – Stock-in-trade**

Government securities held by the assessee bank was held to be treated as stock-in-trade and not as investment as treated by the Assessing Officer. As the assessee in past had shown the securities as stock-in-trade and the appreciation or depreciation in the value of securities was shown as income and loss which was accepted by the Assessing Officer there was no change in the method of accounting in the present year also. Thus, fall in market value of securities was narrowing the deduction. (A.Ys. 1985-86, 1986-87)

*The Lakshmi Vilas Bank Ltd. v. CIT (2006) 154 Taxman 301 / 284 ITR 93 / 202 ITR 560 (Mad.) (High Court)*

**S. 28(i) : Business income – Income from other sources – Monthly compensation for user of goodwill [S. 56]**

Fixed monthly compensation received by exporter for using name and goodwill of erstwhile business was assessable as Income from Other Sources and not business income. (A.Y. 1985-86)

*CIT v. Nijrang Specific Family Trust (2006) 205 CTR 144 / 287 ITR 148 / 155 Taxman 470 (Guj.) (High Court)*

**S. 28(i) : Business income – Income from house property – Guest house [S. 22]**

Income from leasing of property along with furniture and furnishing used as guest house in the past, to a bank to be used as training centre is assessable as business Income. (A.Ys. 1983-84 to 1985-86)

*Shri Pateshwari Electrical & Associated Industries (P) Ltd. v. CIT (2006) 206 CTR 420 / 287 ITR 165 / 158 Taxman 8 (All.) (High Court)*

**S. 28(i) : Business income – Capital or revenue receipt – Non-compete fees – Income from undisclosed sources**

Receipt under non-compete agreement cannot be strictly construed as restrictive covenant as understood in law and consideration received is not Capital Receipt but an income. Expenses incurred by assessee out of withdrawals made from his bank account cannot be treated as income. (A.Ys. 1992-93, 1994-95, 1995-96)

*Tam Tam Pedda Guruva Reddy v. Jt. CIT (2006) 206 CTR 97 / 291 ITR 44 / 165 Taxman 85 (Karn.)(High Court)*

**S. 28(i) : Business income – Addition – Survey**

Addition made by the assessing officer on the basis of survey by Excise and Sales Tax Department on estimated sales outside the books was held not justified, when the CIT(A) and Tribunal reduced the addition on the basis of trading result of earlier assessment year.

*Sangrur Vanaspati Mills Ltd. v. CIT (2006) 283 ITR 267 / 191 Taxation 64 / 158 Taxman 507 / 211 CTR 439 (P&H)(High Court)*

**S. 28(i) : Business income – Income from other source – Investment company [S. 56]**

Assessee company engaged in the business of a investment company as per the objects clause of the Memorandum of Association. The profit on sale of investment cannot be treated as income from other sources. The same is held to be business income of the assessee. (A.Y. 1994-95)

*CIT v. Motley Finance Pvt. Ltd. (2006) 150 Taxman 487 / 197 CTR 332 (MP)(High Court)*

**S. 28(i) : Business income – Interest income – Receipt from co-developer**

Assessee company was engaged in business of real estate. Pursuant to an agreement, assessee received certain sum from its co-developers. Said money was kept in fixed deposit with bank and interest was earned on said fixed deposit which was claimed by assessee as business income. The claim of the assessee was accepted by the Appellate Tribunal and it is further upheld by the Hon'ble High Court. (A.Y. 1993-94)

*CIT v. Dalmia Promoters Developers (P.) Ltd. (2006) 151 Taxman 202 / 281 ITR 346 / 200 CTR 426 (Delhi)(High Court)*

**S. 28(i) : Business income – Business loss – Fraud by foreign supplier**

Fraud by foreign supplier. Despite efforts, the assessee has failed to recover the money paid to supplier on the basis of false shipping documents lodged by the foreign supplier without loading or despatching the said quantity. The whole amount is allowable as business loss. (A.Y. 1986-87)

*CIT v. Mahendra N. Shah (2006) 200 CTR 18 / 280 ITR 462 / 155 Taxman 49 (Guj.)(High Court)*

**S. 28(i) : Business income – Capital gains – Purchase and sale of National Defuse gold bond – Sale within short time [S. 45]**

Transaction of purchase and sale of National Defense Gold Bond being isolated transaction did not form part of line of business purchased by assessee could not be regarded as adventure in nature of trade having regard to the fact that the delivery of bonds was taken by the assessee quite some time after entering into contract of purchase, even though the bonds were sold within short spam of time thereafter.

*Tushar Tanna & Ors. v. CIT (2006) 284 ITR 453 / 203 CTR 426 / 153 Taxman 345 / Tax L. R. 110 (Bom.)(High Court)*

**S. 28(i) : Business income – Capital or revenue – Free sugar quota**

Assessee is a co-operative society, engaged in the business of manufacture and sale of sugar. During previous year assessee received incentive earned from sale of sugar. The assessee got this incentive by way of additional free sugar quota wherein excise duty was leviable at a reduced rate but the sugar was available for being sold at the market rate. The resultant benefit was required to be used for repayment of term loan obtained from financial institutions for setting up the plant and other capital expenses in due time. After verifying the treatments in accounts, it was held that it was a taxable revenue receipt. (A.Y. 1990-91)

*CIT v. Kisan Sahkari Chini Mills Ltd (2006) 284 ITR 418 / 199 CTR 683 / 148 Taxman 450 (All.) (High Court)*

**S. 28(i) : Business income – Income from other source – Interest – Short term inter-corporate deposit [S. 56]**

The assessee company was engaged in the business of manufacture of industrial jewels – The assessee had kept funds aside for import of machinery. The said funds were invested in short-term inter-corporate deposits till it was required for import of machinery for assessee's business. Held, that interest income was business income & not income from other sources Deduction under sections 80HH and 80-I are allowable on such income. (A.Y. 1990-91)

*CIT v. Indo Swiss Jewels Ltd. (2006) 284 ITR 389 / 205 CTR 158 (Bom.)(High Court)*

**S. 28(i) : Business income – Income from other sources – Interest from deposits [S. 56]**

Deposits made with the bank for securing bank guarantee in favour of DOT for obtaining license held to be inextricably linked to the business of assessee, therefore, had to be treated as business income not Income from Other Sources. (A.Y. 1996-97)

*CIT v. Koshika Telecom Ltd. (2006) 203 CTR 99 / 286 ITR 479 (Delhi)(High Court)*

**S. 28(i) : Business income – Business loss – Loss on fall of market value**

The assessee bank purchased and sold government securities and held the same as stock-in-trade. Due to fall in market value there was a reduction in the value of the stock-in-trade. The loss suffered on valuation of stock trade at market value is allowable as deduction. (A.Ys. 1985-86, 1986-87)

*Lakshmi Vilas Bank Ltd. v. CIT (2006) 154 Taxman 301 / 202 CTR 560 / 284 ITR 93 (Mad.)(High Court)*

**S. 28(i) : Business income – Dealing in land – Adventure in nature of trade – Urban Land (Ceiling & Regulation) Act, 1976**

Where a plot was purchased by assessee in year 1958 and as after operation of law, namely, the Urban Land (Ceiling & Regulation) Act, 1976, it was not possible for the



assessee to retain the land. She obtained permission for purpose of construction of group housing scheme on said plot and entered into an agreement with a developer (builder), since assessee continued to be owner, amount received by her under agreement with the builder was not profit from adventure in nature of trade.

*CIT v. Radha Bai (Smt) (2005) 272 ITR 264 / 142 Taxman 595 / 193 CTR 5 (Delhi)(High Court)*

#### **S. 28(i) : Business income – Capital gain – Dealing in land – Adventure in the nature of trade [S. 45]**

Where assessee-firm held certain land as fixed asset of firm and it was neither treated as stock-in-trade but exploited for business of firm and it was eventually sold as a whole for a fixed amount, transaction could not be held as an adventure in nature of trade and profit arising there from was in nature of capital gain. (A.Y. 1986-87)

*CIT v. Mohakampur Ice & Cold Storage (2005) 149 Taxman 593 (All.)(High Court)*

#### **S. 28(i) : Business income – Purchase and sale of plant**

Where assessee-company purchased a plant and sold it four years later, since minutes of various meetings of Board of directors amply proved that intention of assessee from very beginning was to sell plant by treating it as one of its businesses, transaction had rightly been treated as adventure in nature of trade. (A.Y. 1974-75)

*CIT v. Amrit Food (P.) Ltd. (2005) 147 Taxman 289 / 199 CTR 28 (All.)(High Court)*

#### **S. 28(i) : Business income – Meaning of business – Maintenance contract**

Contract of Maintenance can itself be an occupation squarely covered by the expression 'business', and it will have to be construed as 'business' with all its consequential or incidental repercussions. Service charges to be considered Business Income notwithstanding that all the assets have been disposed.

*CIT v. Khosla Indair Ltd. (2005) 147 Taxman 602 / 197 CTR 191 (Delhi)(High Court)*

#### **S. 28(i) : Business income – Property income – Letting out of cinema hall**

Tribunal was right in holding that income from letting out of cinema hall together with machinery therein, was assessable as business income in light of fact that letting out of machinery was inseparable from letting out of cinema hall. (A.Y. 1981-82)

*CIT v. Sureshini Mittal (Smt.) (2005) 277 ITR 88 / 144 Taxman 569 (All.)(High Court)*

#### **S. 28(i) : Business income – Excess collection of sale price – State regulation**

Amount realized by assessee in excess of the sale price of levy of sugar fixed by the State Government and excise duty realized and not refunded by assessee on the excess amount of sale price are not trading receipts.

*CIT v. Shervani Sugar Syndicate Ltd. (2005) 145 Taxman 264 (All.)(High Court)*

#### **S. 28(i) : Business income – Government grant – Capital receipt**

Grant from government received by assessee-society for reorganization of society and to be utilized specifically as working capital and for no other purpose was capital receipt. (A.Y. 1978-79)

*CIT v. Kanpur Sahkari Milk Board Ltd. (2005) 144 Taxman 779 (All.)(High Court)*

**S. 28(i) : Business income – Sales tax collection – Trading receipt**

Where assessee had paid to sales tax department only a part of amount received from its customers, excess sales tax collection had to be treated as assessee's trading receipt. (A.Ys. 1974-75, 1975-76)

*CIT v. Sunder Printing Press (2005) 143 Taxman 49 (All.)(High Court)*

**S. 28(i) : Business income – Sales tax collection – Contingency Account**

Accretion in contingency account could be brought to tax as trading receipt. (A.Ys. 1978-79-80-81)

*CIT v. Motor & General Sales Ltd. (2005) 145 Taxman 540 (All.)(High Court)*

**S. 28(i) : Business income – Stock in trade – Silversmith**

Silversmith, engaged in manufacturing readymade silver chains and exchanging same for silver with other smiths, was profit arising from stock in trade and not profit arising from sale of capital asset. (A.Y. 1993-94)

*Ashok Kumar Goyal v. ITSC (2005) 274 ITR 264 / 142 Taxman 355 (All.)(High Court)*

**S. 28(i) : Business income – Confiscation of goods – Illegal business**

Finding recorded by Tribunal was that assessee was carrying on illegal business of smuggling, loss on account of confiscation of gold seized from assessee by Customs Authorities was to be allowed as deduction. (A.Y. 1979-80)

*CIT v. Hiranand (2005) 272 ITR 626 / 136 Taxman 66 / (2004) 187 CTR 32 (Raj.)(High Court)*

**S. 28(i) : Business income – Business loss – Embezzlement – Year of allowability**

Embezzlement loss is allowable in year in which exact loss is known and not in year in which it is noticed or suspected. (A.Y. 1978-79)

*Shiv Narain Karmendra Narain v. CIT (2005) 277 ITR 27 / 142 Taxman 167 / 193 CTR 561 (All.)(High Court)*

**S. 28(i) : Business income – Business loss – Year of allowability – Replacement of rejected material [S. 41]**

As per its contract with railway for supply of certain materials assessee had to replace rejected materials at its own cost, assessee was entitled to make entry on account of such liability in accounts maintained as per mercantile system as soon as he admitted liability, and therefore, he was entitled to deduction of loss in computing income of assessment year in which such entry was made, however subject to section 41. (A.Y. 1987-88)

*Jiwanram Sheoduttrai v. CIT (2005) 279 ITR 512 / 148 Taxman 555 / 199 CTR 98 (Cal.)(High Court)*

**S. 28(i) : Business income – Rental income – Temporarily on lease**

Where due to financial stringency mills given temporarily on lease and lessor had option to determine lease, lease rent was assessable as business income. (A.Ys. 1978-79 to 1981-82)

*Shree Hanuman Sugar & Industries Ltd. v. CIT (2004) 266 ITR 106 / 136 Taxman 617 / 187 CTR 455 (Cal.)(High Court)*

**S. 28(i) : Business income – Income from other source – Rental income – Temporarily on lease [S. 56]**

Where assessee took property on sub-lease, developed it as a business centre and provided various services to tenants of such centre, income from rent/ service charges earned by assessee was assessable as business income and not as income from other sources. (A.Ys. 1990-91 to 1994-95)

*ACIT v. Saptarshi Services Ltd. (2004) 265 ITR 379 (Guj.)(High Court)*

**S. 28(i) : Business income – Business loss – Rental income – Payment of stock-in-trade**

Payment by assessee to supplier for stock supplied to assessee's debtor from whom assessee had taken over such stock, was allowable as deduction.

*CIT v. Ganesh Stores (2004) 266 ITR 595 / 137 Taxman 261 (Mad.)(High Court)*

**S. 28(i) : Business income – Lease rent – Sister concern**

Assessee leased the property to sister concern, assessee contended that the same may be assessed as business income. Court held that the leasing is not the business of the assessee, the lease rent can not be assessed as business income. (A.Y. 1993-94 to 1995-96)

*Rani Paliwal v. CIT (2003) 185 CTR 333 / 268 ITR 220 / 136 Taxman 135 (P&H)(High Court)*

**S. 28(i) : Business income – Adventure in the nature of trade – Dealing in land [S. 2(13)]**

Profit from sale of land, after plotting it out to secure better price, is not taxable as profit from an adventure in nature of trade.

*CIT v. Shashi Kumar Agrawal (2003) 131 Taxman 823 (All.)(High Court)*

**S. 28(i) : Business income – Adventure in the nature of trade – Dealing in Land [S. 2(13)]**

Where assessee inherited certain land from her husband and sold it in parcels, such activity would not amount to business.

*CIT v. Sushila Devi Jain (2003) 130 Taxman 120 / 259 ITR 671 / 191 CTR 175 (P&H)(High Court)*

**S. 28(i) : Business income – Adventure in the nature of trade – Dealing in land [S. 2(13)]**

Where assessee inherited land and later sold plots received in lieu thereof, it was not a case of adventure in nature of trade. (A.Y. 1991-92)

*CIT v. Saraswati Jaiswal (Smt) (2003) 131 Taxman 306 / 184 CTR 432 / 264 ITR 358 / CIT v. Saraswati Bai Jaiswal (Smt) (2003) 264 ITR 366 / (2004) 138 Taxman 141 (MP)(High Court)*

**S. 28(i) : Business income – Commencement – Setting up**

Mere quarrying of limestone in the leased land *per se* would not amount to setting up of business of manufacture of cement. Although assessee had purchased plant for manufacturing, it could not be said that it had commenced business. (A.Y. 1983-84)

*CIT v. Coromandal Fertilizers Ltd. (2003) 128 Taxman 869 / 261 ITR 408 / 182 CTR 264 (AP)(High Court)*

**S. 28(i) : Business income – Horse race – Hobby – Business**

Where there was a regular and systematic activity carried on by assessee in maintenance of race horses and dominant intention of assessee in maintaining race horses was to earn income from horses either by allowing them to run in races or by way of sale or lease of horses, such income from horses was assessable as business income. (A.Y. 1980-81)

*Kamala Muthia (Mrs) v. CIT (2003) 259 ITR 184 / 129 Taxman 803 / 180 CTR 231 (Mad.)(High Court)*

**S. 28(i) : Business income – Co-operative Society – Renting shops**

Income derived by assessee-co-operative society, formed for promotion of trade of textiles of its members, from renting shops, provision of services and amenities for members and rent from post office, canteen, banks and auditorium was business income. (A.Ys. 1974-75 to 1994-95)

*CIT v. Surat Textile Market Co-op. Shops & Warehouse Society Ltd. (2003) 132 Taxman 146 / 183 CTR 556 / 264 ITR 289 (Guj.)(High Court)*

**S. 28(i) : Business income – Excise duty collection – Conditional**

Where excise duty amount was collected as a part of the sale price of the vehicles, the fact that it was collected at the time of sale with an undertaking to return the amount subject to fulfilment of certain conditions would not change the nature of the receipt, which was a trading receipt. (A.Y. 1985-86)

*CIT v. A. R. A. S. P. V. & PV. (2003) 129 Taxman 391 / 263 ITR 616 / 182 CTR 524 (Mad.)(High Court)*

**S. 28(i) : Business income – Interest – Short-term deposit**

Interest income on short-term deposit's is not business income. (A.Y. 1992-93)

*CIT v. G. Satheesh Nair (2003) 183 CTR 172 / 264 ITR 377 / 133 Taxman 601 (Ker.)(High Court)*

**S. 28(i) : Business income – Rendering numerous services – Lease income**

Where in addition to letting buildings or parts thereof, assessee was also rendering numerous services to tenants, income received by assessee towards rent would be treated as 'Income from house property' whereas income received towards different services rendered to tenants would be treated as 'Profits and gains of business or profession'. (A.Ys. 1974-75, 1975-76)

*CIT v. Sarabhai (P.) Ltd. (2003) 129 Taxman 43 / 263 ITR 197 / 182 CTR 447 (Guj.)(High Court)*

**S. 28(i) : Business income – Commercial asset – Lease income**

For treating rental income derived from leasing of property under head 'Profits and gains of business or profession', there must be some material to show that assessee has treated property as commercial asset and assessee must establish that property is a commercial asset apart from object clause. (A.Ys. 1984-85 to 1986-87)

*CIT v. Sanmar Holdings Ltd. (2003) 129 Taxman 25 / 272 ITR 341 / 183 CTR 346 (Mad.)(High Court)*

**S. 28(i) : Business income – Lease – Income from other sources [S. 56]**

Assessee had not carried out only business activities of manufacturing, it simply given Mill on lease, which was not its business, the amount received on account of lease is assessable as income from other sources, and not as business income (followed *CIT v. Gambhir Mal Pandiya (P) Ltd. (2003) 130 Taxman 807 (Raj.)*), hence, income of assessee from lease was not assessable under section 28, it is assessable as income from other sources.

*CIT v. Gambhir Mal Pandiya (P.) Ltd. (2003) 133 Taxman 398 (Raj.)(High Court)*

**S. 28(i) : Business income – Capital gains – Sale of horses – Leasing business [S. 45]**

Income from sale and lease of race horses maintained by assessee is business income and not capital gains. (A.Ys. 1978-79, 1979-80, 1981-82)

*M. Ct. Muthiah (HUF II) v. CIT (2003) 126 Taxman 63 / 259 ITR 194 / M.CT. Muthia v CIT (2003) 260 ITR 629 (Mad.)(High Court)*

**S. 28(i) : Business income – Commercial assets – Finding in wealth tax assessment – Lease income**

Finding of Tribunal in wealth-tax proceedings that the assets which were leased out were commercial assets would not mean that income from those commercial assets would always be treated as 'income from business' Though assessee was in manufacturing as well as leasing business, its manufacturing activity had stopped and on facts it appeared that it had no intention to resume same, lease income from lease

of its business premises was not assessable as business income. (A.Ys. 1989-90 & 1991-92)

*Madras Silk & Rayon Mills (P.) Ltd. v. ITO / ACIT (2003) 262 ITR 122 / 187 CTR 487 (Mad.)(High Court)*

**S. 28(i) : Business income – Sales tax collections – Disputed in writ petition**

Sales tax collected by assessee is trading receipt even where assessee has filed writ against levy of sales tax. (A.Ys. 1987-88 to 1990-91)

*CIT v. Paulson Litho Works (2003) 132 Taxman 57 (Mad.)(High Court)*

**S. 28(i) : Business income – Business loss – Damages – Year of deduction**

Supplies were made in earlier year, certain amount was deducted as damages by railways in the bills passed for payment in the previous year relevant to the assessment year in question, loss was allowable in assessment year in question. (A.Y. 1985-86)

*CIT v. Carbon Industries (P.) Ltd. (2003) 259 ITR 373 / 184 CTR 276 / 134 Taxman 368 (Mad.)(High Court)*

**S. 28(i) : Business income – Business loss – Deduction – Deferred discount – Purchase bonus**

Purchase bonus paid by assessee a co-operative society to its members who were manufacturers of bricks being deferred discount, is allowable as business deduction. (A.Ys. 1980-81 to 1987-88)

*Tamil Nadu Brick & Tile Mfrs. Industrial Service Co-operative Society Ltd. v. CIT (2003) 129 Taxman 343 / 265 ITR 332 / 182 CTR 158 (Mad.)(High Court)*

**S. 28(i) : Business income – Business loss – Embezzlement loss – Not proved**

No evidence had been led before ITO by assessee as to the date on which assessee detected embezzlement and no police complaint was filed, loss was not allowable. (A.Y. 1993-94)

*Chudgar & Co. (P.) Ltd. v. ACIT (2003) 263 ITR 324 / 183 CTR 289 / 133 Taxman 415 (Bom.)(High Court)*

**S. 28(i) : Business income – Business loss – Illegal activity – Speculation Losses**

Illegal business activity of smuggling is in nature of speculation and when smuggled goods is confiscated, it would be a speculation loss and cannot be allowed as business loss.

*Bimal Kumar Damani v. CIT (2003) 128 Taxman 723 / 261 ITR 635 / 181 CTR 494 (Cal.)(High Court)*

**S. 28(i) : Business income – Business loss – Depreciation on account in Value of investments**



Assessee-bank was entitled to deduction on account of depreciation in value of investments, where loss had been debited to profit and loss account which was reflected as provision for liability in balance sheet and shares and securities were valued at cost on assets side. (A.Y. 1982-83)

*CIT v. Bank of Baroda (2003) 129 Taxman 716 / 262 ITR 334 (Bom.)(High Court)*

**S. 28(i) : Business income – Notional loss – Government securities – Banking Regulation Act**

Notional loss suffered by bank in respect of Government securities held in compliance with provisions of Banking Regulation Act is an allowable deduction in computation of total income of bank. (A.Ys. 1981-82 to 1992-93)

*CIT v. Nedungadi Bank Ltd. (2003) 130 Taxman 93 / 264 ITR 545 / 182 CTR 403 (Ker.)(High Court)*

**S. 28(i) : Business income – Business loss – Deduction – Provision for warranty**

Provision for warranty is allowable notwithstanding the fact that amount provided before was contingent upon being quantified in the subsequent year and on goods becoming defective within terms of the warranty clause. (A.Ys. 1986-87, 1987-88)

*CIT v. Beema Mfrs. (P) Ltd. (2003) 130 Taxman 400 (Mad.)(High Court)*

**S. 28(i) : Business income – Business loss – Share dealing – Losses**

Mere fact that shares were sold at loss immediately after purchase and assessee produced all relevant documents, would not disentitle assessee from claiming loss on shares.

*CIT v. Kundan Investment Ltd. (2003) 130 Taxman 689 / 263 ITR 626 / 182 CTR 608 (Cal.)(High Court)*

**S. 28(i) : Business income – Business loss – Share dealing – Losses**

Assessee investment-company had entered into share transactions of various companies, there was no justification for picking up only two transactions and holding them as sham merely because said transactions were made at loss.

*CIT v. Janki Textile & Industries Ltd. (2003) 132 Taxman 231 / 186 CTR 84 / (2004) 264 ITR 579 (Gau.)(High Court)*

**S. 28(i) : Business income – Business Loss – Bad debt – Claim for “Business loss” maintainable – Website Development Expense is not Capital Expenditure [S. 37(1)]**

(i) Though the claim for write off of advance as a ‘bad debt’ is not allowable, the assessee was entitled under Rule 27 to support the CIT(A)’s order on the ground that the amount should be allowed as a ‘business loss’. The subject-matter of an appeal should be understood not in a narrow and unrealistic manner but should be so comprehended as to encompass the entire controversy between the parties which is to be adjudicated upon by the Tribunal. Such a claim can be considered

provided no new facts are needed (Edward Keventer 123 ITR 200 (Delhi) & Gilbert & Barker 111 ITR 529 (Bom.) followed);

- (ii) On merits, the department's argument that the amounts paid for development of websites cannot be allowed as business loss because if the websites had been successfully put up, the expenditure would have been capital expenditure is not acceptable. because (a) as the expenditure was abortive, no capital asset has in fact been acquired and (b) even if the website had materialized, it does not result in an advantage of an enduring nature or in the capital field as it is only for the day-to-day running of the business and provision of information.

*Dy. CIT v. Edelweiss Capital Ltd. ITA No. 3971/Mum/2009 dated 15-2-2011 (Mum.)(Trib.) Source: www.itatonline.org*

### **S. 28(i) : Business income – Development rights – Retirement – Value of flats to be allotted latter**

Assessee, a builder having constituted a partnership firm with four others by contributing his development rights in a plot and retired from the firm within 11 days. The Tribunal held that the firm is not genuine and entire consideration received was taxable as business income. Value of flats to be allotted to be treated as consideration received, though the flats are to be allotted in future. (A.Y. 2004-05)

*ACIT v. Dilip S. Hate (2011) 49 DTR 49 / 136 TTJ 40 / 131 ITD 348 (Mum.)(Trib.)*

### **S. 28(i) : Business income – Capital gains – Investment in shares [S. 45]**

Activity of frequent buying and selling of shares over a short span of period has to be treated as adventure in the nature of trade. The assessee had made only 37 transactions in 35 scripts. In the preceding year the Assessing Officer has accepted the short term gains and long term gains as investment. The Tribunal held that the principle of resjudicata cannot be applied to Income Tax proceedings and each assessment year is independent. The Tribunal also held that the treatment in the books of an assessee is not conclusive. (A.Y. 2005-06).

*Harsha N. Mehta (Smt.) v. Dy. CIT (2011) 43 SOT 332 (Mum.)(Trib.)*

### **S. 28(i) : Business income – Professional income – AIR Information**

In the absence of contrary material brought by the Revenue authorities, that the assessee had received professional fees more than what has been declared by him, no addition should be made by the Assessing Officer on account of non furnishing of partywise details of professional fees received during the year and non-reconciliation of professional fees received with AIR information.

*S. Ganesh v ACIT (2011) TIOL 87 ITAT-Mum. 701 / (2011) 42-B. BCAJ (March P. 33)(Mum.)(Trib.)*

### **S. 28(i) : Business income – Capital gains – Transactions in shares – Volume and frequency of the transactions [S. 45]**

Where the assessee had carried out about 800 transactions in shares of more than 200 listed companies with borrowed funds and the purchases and sale of shares was

the only activity of the assessee with a very short holdings period, and substantial time was devoted for such activity, in a regular and systematic manner, the profit from such transactions was rightly treated as business profit as against short-term capital gains claimed by the assessee. (A.Y. 2004-05)

*Jayshree Pradip Shah v. ACIT (2011) 51 DTR 344 / 131 ITD 326 / 137 TTJ 173 (Mum.)(Trib.)*

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

When a specific provision has been enshrined in the Act and the income is taxable under the head “Profits & Gains of Business or Profession”, then there is no question of treating the same as income from other sources. (A. Y. 2003-04)

*ACIT v. Delite Enterprises P. Ltd. (2011) 135 TTJ 663 / 128 ITD 146 / 50 DTR 193 (Mum.)(Trib.)*

**S. 28(i) : Business income – Subsidy – To meet the part of expenditure incurred – Revenue nature**

Subsidy received by Government to meet the part of the expenditure to be incurred for rectification and improvement of power line damaged due to cyclone will be revenue in nature. (A.Y. 1987-88).

*Dy. CIT v. A. P. State Electricity Board (2011) 130 ITD 1 / 138 TTJ 425 / 55 DTR 52 (TM)(Hyd.)(Trib.)*

**S. 28(i) : Business income – Valuation of closing stock – Firm dissolved – Business taken over by another concern [S. 45(4)]**

Where assessee firm was dissolved and its closing stock was taken over by another concern, same had to be valued in profit and loss account itself on date of dissolution on market price and excess of market price of closing stock over its book value had to be assessed as business profits of assessee firm. (A.Y. 1992-93).

*ACIT v. Goel Udyog (2011) 45 SOT 444 (Delhi)(Trib.)*

**S. 28(i) : Business income – Property rental – Commercial activities carried out**

Merely because income is attached to immovable property, it cannot be the sole factor for assessment of such income as income from property. Primary object of the assessee while exploiting the property has to be considered. If the main intention is to exploit the immovable property by way of complex commercial activities, the income is assessable as business income. (A.Y. 2006-07)

*ITO v. Shanaya Enterprises ITA No. 3648/Mum/2010/dated 30-6-2011 (Mum.)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

*Editorial: Sultan Brothers (P) Ltd. v. CIT (1964) 51 ITR 353 (SC) explained as not being in conflict with Shambhu Investments (P) Ltd. v. CIT (2003) 263 ITR 143 / 184 CTR 91 / 129 Taxman 70 (SC).*

**S. 28(i) : Business income – Capital gains – Purchase and sale of shares – Revision**

**[S. 45, 263]**

Assessee carried on the activity of buying and selling shares and units of mutual funds in a systematic and regular manner with high frequency and volumes and repetitive purchases and sales of the same scrip throughout the year, the Tribunal held it has to be assessed as business income and the revision order under section 263 directing the Assessing Officer to be assess the same as business income was held to be justified. (A. Y. 2006-07)

*Spectra Shares & Scrips (P) Ltd. v. Dy. CIT (2011) 62 DTR 411 / 142 TTJ 483 (Hyd.)(Trib.)*

**S. 28(i) : Business income – Method of accounting – Enhanced rate – Sale of flat [S. 4, 145]**

Assessing Officer having not brought any material on record to prove that the assessee has sold the flats at a price higher than the price recorded in the books of account, addition made by the assessing officer by enhancing the selling rates cannot be sustained. (A.Ys. 1998-99 to 1999-2000)

*ACIT v. Dharti Estate (2011) 51 DTR 28 / 129 ITD 1 / 136 TTJ 263 (TM)(Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Valuation of interest – Swap contract [S. 145]**

Loss on account of valuation of interest rate swap contract is allowable as deduction and it cannot be disallowed on the ground that it is a notional or imaginary loss. (A. Y. 2003-04).

*ABN Amro Securities India (P) Ltd. v. ITO (2011) 133 ITD 343 (Mum.)(Trib.)*

**S. 28(i) : Business income – Commission – Addition as undisclosed income**

In cases of suspicious transactions, despite of lack of direct evidence, tax evasion can be assessed on the basis of the material available on record, surrounding circumstances, human conduct and preponderance of probabilities. There is no presumption in law that the Assessing Officer is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings. (A.Ys. 1987-88 to 1993-94 & 1995-96 to 1999-2000)

*Hersh W. Chadha L/H. of Late W. N. Chadda v. Dy. DIT (2011) 135 TTJ 513 / 43 SOT 544 / 49 DTR 344 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Non-realisation of balance in FD and current accounts**

Non-realisation of balance lying with a bank in FD and current accounts held to be allowable as business loss.

*Mehul H. Mehta v. ITO ITA No. 8531/2004 Bench B dt. 15-6-2009. March BCAJ P. 17. 645 (2010) 41-B BCAJ (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Obsolete items – Diminution in value**

The assessee was entitled to write off the obsolete items out of inventories acquired by it under scheme of demerger in its books of account for the year ending 31st March 1998, even though the process of determination of diminution in the value of inventory was undertaken at a later date. (A.Y. 1998-99)

*Kopran Drugs Ltd. v. ACIT (2010) 35 DTR 380 / 2 ITR 515 (Mum.)(Trib.)*

**S. 28(i) : Business income – Capital gains – Sale of plots [S. 45]**

Assessee, his wife and son jointly purchased land on 2nd March, 1997, and soon thereafter applied for converting the same into housing plots though sanction was given by the concerned development authority in 2001. They sold all the eight plots during the financial year 2004-05. Co-owners of the assessee have no record of carrying on of agricultural operations. Two of the three co-owners are engaged in the business of automobile spare parts. Even though the conversion of land materialized in the year 2001 only, in the absence of any evidence to show that the land was used for some other purpose prior to seeking approval of the layout plan, the intention of purchase of land cannot be automatically inferred as an investment. Thus, the attendant circumstances of the case lead to the conclusion that the land was purchased with the intention to sell the same at a profit. Therefore, though an isolated transaction, it was an adventure in the nature of trade and the income therefrom has to be treated as business income. (A.Y. 2005-06)

*Cherukuri Ramesh v. ACIT (2010) 36 DTR 269 / 132 TTJ 426 (Visakha)(Trib.)*

**S. 28(i) : Business income – Capital gains – Sale of shares [S. 45]**

Assessee dealing in shares can also hold certain shares as investment. When shares are sold from investment portfolio which were purchased two three years back the same is chargeable to tax as capital gains and not as business income. (A.Y. 2004-05)

*Sarnath Infrastructure (P) Ltd. v. ACIT (2010) 124 ITD 71 / 16 DTR 97 / 120 TTJ 216 (Luck.)(Trib.)*

**S. 28(i) : Business income – Business loss – Loans advanced to subsidiaries [S. 45]**

Loans advanced to subsidiaries cannot be allowed as bad debt or business loss. The loss is capital loss.

*Jt. CIT v. Rallis India Ltd. (2010) 3 ITR 1 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Exchange fluctuation loss on pending forward contract is an “accrued” loss**

The assessee a foreign bank carrying on business in India, entered into forward contracts with its clients to buy or sell foreign exchange at an agreed price on a future date. On the date of maturity, the contract was executed which resulted in

either profits or losses to the assessee. There was no dispute that the loss was on revenue account and that loss arising on execution of the contracts in the same year were allowable as deduction. With respect to contracts where the date of maturity fell beyond the accounting period, the assessee valued the forward contracts on the last of the accounting period on the basis of rate of foreign exchange prevailing on that date and accounted for loss or profit as the case may be. The Assessing Officer taxed the profits on such contracts, though he disallowed the losses on the ground that they were "notional" or "contingent" loss or whether it was an "accrued" loss held deciding in favour of the assessee. (A.Ys. 1998-99, 1999-2000)

*Dy. CIT v. Bank of Bahrain and Kuwait (2010) 5 ITR 301 / 132 TTJ 505 / 41 SOT 290 / 43 DTR 505 (SB)(Mum.)(Trib.)*

### **S. 28(i) : Business income – Capital gains – Sale of shares – Large volume [S. 45]**

While volume of transactions is an important indicator of the intention of the assessee whether to deal in shares as trading asset or to hold the shares as investor, it is certainly not the sole criterion. The Assessing Officer's conclusion that since sale and purchase had been determined by the volatility in the market, the same is against the basic feature of investor is not based on sound rational reasoning. A prudent investor always keeps a watch on the market trends and, therefore, is not barred under law from liquidating his investments in shares. The law itself has recognized this fact by taxing these transactions under the head "Short Term Capital Gains". If the Assessing Officer's reasoning is accepted, then it would be against the legislative intent itself; Some part of the STCG had arisen out the earlier investment which had been accepted as being on investment account. As the modus operandi of the assessee remained the same in regard to other shares purchased during the year, the assessee's claim could not be negated only on the basis of frequency of the transaction. (A.Y. 2005-06)

*Dy. CIT v. SMK Shares & Stock Broking ITA No. 799/Mum/2009 dated 24-11-2010 (Mum.)(Trib.) [www.itatonline.org](http://www.itatonline.org)*

*Editorial:- CIT v. Gopal Purohit (2010) 228 CTR 582 / 336 ITR 287 / 188 Taxman 140 / 34 DTR 52 (Bom.), Smt. Sadhana Nabera v. ACIT (2010) 41 DTR 393 & Jayshree Pradip Shah v. ACIT 137 TTJ 173 / 131 ITD 326 / 51 DTR 344 considered.*

### **S. 28(i) : Business income – Deduction – Temporarily suspended – Interest to partners**

Interest paid to partners is allowable deduction when business is temporarily suspended. (A.Ys. 2001-02, 2005-06)

*ITO v. M. M. Textiles (2010) 122 ITD 435 / 125 TTJ 14 / 31 SOT 207 / 28 DTR 321 / 5 ITR 547 (Mum.)(Trib.)*

### **S. 28(i) : Business income – Business loss – Securities held by bank – Current Investment**



Securities held by bank in the nature of current investments automatically became the stock-in-trade of the bank and therefore, loss arising from the sale of "current investments" is a business loss. (A.Ys. 1997-98 to 2003-04)

*Dy. DIT v. Chohung Bank (2010) 40 DTR 75 / 4 ITR 627 / 126 ITD 448 / 133 TTJ 331 (Mum.)(Trib.)*

#### **S. 28(i) : Business income – Business loss – Fluctuation in foreign exchange – Group companies**

Group companies of assessee situated abroad incurred certain expenditure on its behalf, at time of repayment, due to fluctuation in exchange rate amount payable became more than what was accounted for in terms of dollar rate on date of incurring. Since transactions of assessee with group companies were on trading account loss incurred on account of fluctuation in foreign exchange rate is allowable deduction. (A.Y. 1998-99)

*C.B. Richard Ellis Mauritius Ltd. v. Dy. DIT (2009) 131 TTJ 736 / (2010) 38 SOT 236 / 42 DTR 386 (Delhi)(Trib.)*

#### **S. 28(i) : Business income – Business loss – Loss on revaluation of unquoted shares**

Loss on revaluation of unquoted shares was allowable as business loss. Disallow under the head loss on revaluation of unquoted shares is not justified. (A.Ys. 2000-01 to 2004-05)

*Catholic Syrian Bank Ltd. v. ACIT (2010) 38 SOT 553 (Cochin)(Trib.)*

#### **S. 28(i) : Business income – Trading receipts – Trade advances [S. 4]**

Assessee having admitted the liability in respect of outstanding trade advances received against exports which was enforceable under the law and eventually repaid the amount with RBI's permission, there was no cessation of liability and therefore, the same cannot be treated as assessee's income, even though the assessee had utilized the said money for other purposes i.e. investment in real estate during full period. (A.Y. 2005-06)

*ITO v. Eurostar Distilleries (P) Ltd. (2010) 42 DTR 1 / 41 SOT 434 / 131 TTJ 680 (TM)(Cochin)(Trib.)*

#### **S. 28(i) : Business income – Capital gains – Sale of shares – Multiple orders [S. 45]**

The Assessing Officer had not correctly calculated the number of transactions because sometimes a single transaction is split by the computers trading of the stock exchanges into many smaller transactions but that does not mean that assessee has carried so many transactions. If someone places an order for purchase of 1,000 shares and the same is executed by the electronic trading system of stock exchange into 100 smaller transactions, it does not mean that 100 transactions have been entered into. The assessee had carried out only 31 purchase and 25 sale transactions which cannot be said to be a great volume of transactions.

At the end of the year, the assessee was holding shares worth ` 11.56 crores with a market value of ` 17.69 crores. If assessee was a trader, he would have definitely realized the huge profit of almost ` 6 crores immediately and not carried out the stock to the next year.

The transactions in which no delivery was taken and it was settled in the same day appear to be cases where the particulars were wrongly carried out on behalf of the assessee by the broker & that's why assessee got them settled on the same day.

The assessee has not borrowed any money and he was occupied full time in the business of garments.

*Nehal V. Shah v. ACIT ITA No. 2733/Mum/2009 dated 15-12-2010 (Mum.)(Trib.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

### **S. 28(i) : Business income – Business loss – Non recovery of PF contribution – Prior period expenditure**

Loss suffered by the assessee on account of non-recovery of PF contributions of personnel who were deputed to other State Government concerns / departments which was recoverable from the said customers and written off by assessee is allowable as trading loss under section 28(i), even though the said amount has been debited in the Profit & Loss A/c. as prior period expenditure. (A.Y. 2004-05)

*Hartron Informatics Ltd. v. ACIT (2010) 41 DTR 489 (Chd.)(Trib.)*

### **S. 28(i) : Business income – Capital gains – Shares – Short period of holding – Share broker [S. 45]**

The intention with which an assessee starts his activity is the most important factor. If shares are purchased from own funds, with a view to keep the funds in equity shares to earn considerable return on account of enhancement in the value of share over a period then merely because the assessee liquidates its investment within six months or eight months would not lead to the conclusion that the assessee had no intention to keep the funds as invested in equity shares but was actually intended to trade in shares. Mere intention to liquidate the investment at higher value does not imply that the intention was only to trade in security. However, it cannot be held that in all circumstances if assessee has used its own funds for share activity then it would only lead to inference of investment being the sole intention. In such circumstances, frequency of transactions will have to be considered to arrive at proper conclusion regarding the true intention of the assessee. However, if the assessee, on the other hand, borrows funds for making investment in shares then definitely it is a very important indicator of its intention to trade in shares;

On facts, the Assessing Officer proceeded on the assumption that borrowed funds had been utilized for buying shares on the ground that funds were common and could not be segregated. However, it was categorically pointed out before the CIT(A) that no part of the borrowed funds was utilized for acquisition of shares on investment account. Nothing was brought on record by the department to controvert this fact. (A.Y. 2005-06)

*ACIT v. Vinod K. Nevatia (2011) 49 DTR 16 (Mum.)(Trib.)*

**S. 28(i) : Business income – Gifts – Profession – Vocational receipt [S. 56(2)(v)]**

Gift received by various donors by a prominent political figure cannot be taxed as amount received from profession or on occasion. As the CIT(A) held that the gift above was taxable under section 56(2)(v), gift below ` 25000 cannot be taxed as income from profession or occasion. (A.Ys. 2004-05 to 2006-07)

*Dy. CIT v. Mayawati (2010) 42 SOT 59 / 135 TTJ 167 / 48 DTR 233 (Delhi)(Trib.)*

**S. 28(i) : Business income – Capital gains – Transactions in shares [S. 45]**

Where the assessee had dealt in more than 300 scripts during the year and turnover of delivery based transactions is about ` 3,500 crores and the assessee had regularly dealt in purchase and sales of shares with high frequency and volume with repetitive purchases and sales in the same script, with no shares being held for more than one year, considering the entirety of facts and circumstances, profit earned from delivery based transactions in shares was rightly treated as business income as declared earlier as against short term capital gains claimed by the assessee. (A.Y. 2005-06)

*Wall Fort Financial Services Ltd. v. Addl. CIT (2010) 134 TTJ 656 / 48 DTR 138 / 41 SOT 200 / (2012) 14 DTR 349 (Mum.)(Trib.)*

**S. 28(i) : Business income – Services of Operating and Maintenance of power station – Permanent Establishment – DTAA – India-UK [S. 9, 44AD, Art. 5, 7 and 13]**

Assessee entered into a contract with Spectrum Ltd., for rendering services of operating and maintenance of power station owned by it. Activity of operating of power station was treated by assessee as its business activity carried on through a project office in India, which in turn, constituted its permanent establishment in India in terms of Article 5 of Indo-UK DTAA. According to assessee, income arising to it from said business activity was its business profit and was liable to tax on net basis. Income received by assessee for executing works contract did not fall within definition of "fees for technical services" (FTS) under explanation 2 to section 9(1)(vii) nor as defined in Art. 13(4) of DTAA between India and UK. Moreover, since assessee had not made available any technical knowledge, skill, etc., to spectrum within meaning assigned to FTS under Article 13(4)(c) of DTAA, it could not be taxed on gross basis and section 44AD had no application to facts of instant case. Further more Article 13(4)(c) read with Article 26 of DTAA would not permit revenue authorities to discriminate against, a UK registered company and accord it less favourable treatment than a domestic company and therefore section 44AD could not be invoked in assessee's case. (A.Ys. 1998-99 to 2004-05)

*Rolls Royce Industrial Power Ltd. v. ACIT (2010) 42 SOT 264 / 6 ITR 722 / 47 DTR 257 (Delhi)(Trib.)*

**S. 28(i) : Business income – Deduction – Cost of construction [S. 142A]**

Disallowance of expenditure as excess cost, by adopting cost of construction estimated by DVO was held to be not justified, as there are no powers under section 142A(1) to estimate an amount of expenditure claimed as revenue expenditure. (A.Y. 1988-89)

*Aar Pee Apartments (P) Ltd. v. ACIT (2010) 194 Taxman 66 (Mag.)(Delhi)(Trib.)*

**S. 28(i) : Business income – Non-refundable deposit – Stock broker – Trading in shares**

Deposit paid by Assessee stock broker, to acquire membership card from Calcutta Stock Exchange, to carry on business of Trading, which was w/off as Business Loss, was held to be allowed on the ground that said deposit was a part of the business, and it's a business loss. (A.Y. 2003-04).

*Parlight Securities Ltd, v. ACIT. (2010) 195 Taxman 15 (Mag.) / 3 ITR 628 (Ahd.)(Trib.)*

**S. 28(i) : Business income – Diminution in the value of the investment**

Assessee bank adopted NIL value in respect of Investment in UTI, as per the requirement of the Banking Regulations Act, the resultant diminution in the value of the Investment was held to be a business loss. (A.Y. 2003-04)

*State Bank of Travancore v. ACIT (2010) 195 Taxman 47 (Mag.)(Cochin)(Trib.)*

**S. 28(i) : Business income – Income from house property – Income from warehousing [S. 22]**

The assessee was not merely letting out property but also under obligation providing security, receiving and delivering goods and taking property inventory. It was held that, assessee was thus doing a complex commercial activity, hence receipts were taxable as business income and not income from house property. (A.Y. 1999-2000).

*ITO v. Rasiklal & Co. (P) Ltd. (2009) 23 DTR 134 / 123 TTJ 279 / 119 ITD 61 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Loss in respect of loan given to subsidiary**

Since, the loan was advanced to subsidiary for acquisition of shares, it was in respect of fixed capital. Therefore, the irrecoverable amount cannot be allowed as a business loss under section 28 r.w.s. 37(1). (A.Y. 2002-03).

*DCM Ltd. v. Dy. CIT (2009) 23 DTR 163 / 123 TTJ 114 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Speculation loss**

Payment made by assessee to bank for cancellation of forward foreign exchange contract being in the nature of damages for non performance of contract is allowable as business loss and it cannot be treated as a speculative loss as there is no settlement of contract and section 43(5) is not attracted. (A.Y. 1996-97)

*Voltas International Ltd. v. ACIT (2009) 126 TTJ 702 / 31 DTR 432 / 5 ITR 255 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Speculative transactions – Future and option [S. 43 (5)]**

Loss arising in future and option transactions carried out in a recognised stock exchange is to be treated as business loss and not as loss in speculation. (A.Y. 2006-07)

*G. K. Anand Bros. Build Well (P) Ltd. v. ITO (2009) 34 SOT 439 (Delhi)(Trib.)*

*Editorial:- Shree Capital Services Ltd. v ACIT (2009) 121 ITD 498 / 124 TTJ 740 / 28 DTR 1 (SB) (Kol.) considered.*

**S 28(i) : Business income – Business loss – Bad debts – Performance guarantee bond**

Amount paid by the assessee under Performance Guarantee Bond is allowable as a business loss/expenditure. Mere fact that the assessee has claimed the amount written off in the course of business as 'bad debt' does not preclude him from claiming the same as business loss/expenditure. (A. Y. 2003-04)

*Anang Tradevest Pvt. Ltd. v. ITO, ITA Nos. 10/Mum/2008, Bench 'A', dt. 10-8-2009 (2009) BCAJ P. 20, Vol. 41-B, November 2009 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Obsolete inventory**

Provision for obsolete inventory written off can be claimed only in the year in which the items were sold and disposed of. (A.Ys. 1997-98 to 2001-02)

*Deepak Fertilisers & Petrochemicals Corp. Ltd. v. Dy. CIT (2008) 117 TTJ 752 / 10 DTR 27 / (2009) 116 ITD 372 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Bad debts – Brokerage**

Irrecoverable brokerage due to the assessee share broker was allowable as deduction on being written off as irrecoverable. (A.Y. 2003-04)

*Angel Capital & Debt Market Ltd. v. ACIT (2008) 118 TTJ 351 / 12 DTR 433 (Mum.)(Trib.)*

**S. 28(i) : Business income – Income from house property – Revision [S. 22, 263]**

Taxability of income from immovable property is based upon the primary object of the assessee. If it is found to be exploiting by way of commercial activity then it must be assessed as income from business. Assessee developed a shopping mall/business centres and provided host of services/facilities/amenities then in that case basic intention was commercial exploitation of the immovable property and therefore, such income is to be assessed as business income. Revision is not valid. (A.Ys. 2001-02 to 2003-04)

*PFH Mall & Retail Management Ltd. v. ITO (2008) 110 ITD 337 / 298 ITR (AT) 371 / (2007) 112 TTJ 523 / 16 SOT 83 (Kol.)(Trib.)*

**S. 28(i) : Business income – Business loss – Non-convertible debenture**

Loss on sale of non-convertible debentures was allowable as business loss. (A.Y. 1996-97)

*Medicare Investment Ltd. v. Jt. CIT (2007) 112 TTJ 889 / 19 SOT 223 / 114 ITD 34 (SB)(Delhi)(Trib.)*

**S. 28(i) : Business income – Capital receipt – Non-compete fee**

Compensation received as non-compete fees, which was not in the course of its ordinary business operation, on facts of the case was treated as a capital receipt and not a revenue receipt. (A.Y. 98-99)

*Gomti Credits (P) Ltd. v. Dy. CIT (2007) 164 Taxman 69 (Mag.) / (2006) 100 TTJ 1132 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Crystallisation**

Loss on account of purchase of raw material and services is on the trading account crystallising on the last date of financial year and is an allowable deduction. (A.Y. 1997-98)

*Lucent Technologies Hindustan Ltd. v. Jt. CIT (2007) 106 TTJ 205 (Bang.)(Trib.)*

**S. 28(i) : Business income – Business loss – Fluctuation in foreign exchange rate**

Loss arising by way of increase in liability towards working capital loan as a result of fluctuation in foreign exchange rate is allowable as deduction in the very year of fluctuation. (A.Y. 1999-2000)

*Silicon Graphics Systems (I) (P) Ltd. v. Dy. CIT (2007) 106 TTJ 1153 (Delhi)(Trib.)*

**S. 28(i) : Business income – Promotion receipt – Value of car – Year of taxability**

The value of said car is chargeable to tax as part of professional income of the assessee in the year in question. (A.Y. 2002-03)

*Amitabh Bachchan v. Dy. CIT (2007) 106 TTJ 925 / 12 SOT 95 (Mum.)(Trib.)*

**S. 28(i) : Business income – Capital receipt – Restrictive covenant**

An assessee enters into a restrictive covenant and it does not carry out manufacture for certain period of time being a self imposed restriction and not transfer, the non-compete fee received by the assessee is not taxable as non-compete fees not liable to tax prior to A.Y. 2003-04). (A.Y. 1998-99)

*Dy. CIT v. Max India Ltd. (2007) 112 TTJ 726 (Amritsar)(Trib.)*

**S. 28(i) : Business income – Business loss or capital loss – Industrial building**

Building which was being used for construction of industrial galas could only be treated as a business assets and sale thereof gave rise to business loss allowable accordingly. (A.Y. 1999-2000)



*Magna Industries & Exports Ltd. v. ITO (2007) 108 TTJ 833 (Mum.)(Trib.)*

**S. 28(i) : Business income – Trading receipt – Sale of pledged jewellery**

Surplus amount realized by assessee bank on sale of pledged jewellery being refundable to respective borrowers could not be treated as trading receipt. (A.Ys. 1992-93 to 1996-97)

*Lakshmi Vilas Bank Ltd. v. Dy. CIT & Anr. (2007) 108 TTJ 256 / 105 ITD 502 (Chennai)(Trib.)*

**S. 28(i) : Business income – Business loss – Fluctuation loss**

Held that foreign exchange fluctuation loss is an allowable expenditure. (A.Ys. 1996-97-98)

*Indian Shaving Products Ltd. v. ACIT (2007) 161 Taxman 166 (Mag.) / 108 TTJ 1004 (Jp.)(Trib.)*

**S. 28(i) : Business income – Business loss – Capital loss – Contractor**

Amount advanced to contractor for construction of cold storage plant becoming irrecoverable, it was a capital loss, hence, could neither be allowed as business loss nor as bad debt. (A.Y. 1998-99)

*Kwality Fun Foods & Restaurants (P) Ltd. v. Dy. CIT (2007) 109 TTJ 112 / 108 ITD 274 (Chennai) (Trib.)*

**S. 28(i) : Business income – Business loss – Amalgamation**

In the original return filed, the loss of amalgamating company was claimed on estimated basis, since the amalgamation petition was pending before the High Court, as on the date of filing of the return and the accounts of amalgamating company could not be consolidated. On receipts of the order of the High Court approving the amalgamation, the assessee; i.e., the amalgamated company filed a revised return on the basis of consolidated accounts. (A.Y. 1990-91)

*Dy. CIT v. Metazinc (I) Ltd., ITA No. 3335/B/2004, Bench – A, dt. 30-3-2007, (2007) BCAJ P. 680, Vol. 39-D, September 2007 (Mum.)(Trib.)*

**S. 28(i) : Business income – Interest on bonds – Investment company**

Interest on Bonds earned by Investment Company was assessed as Business Income in assessment under section 143(3) in earlier years. During the year under consideration taxability of Interest as Business Income was denied on ground that there was no business in the year under consideration. Held, Assessing Officer. was not justified in holding that mere holding of Investment as Stock-in-Trade did not amount to carrying on business. (A.Y. 1998-99)

*J. R. Sharma Holdings (P) Ltd. v. Dy. CIT (2007) 165 Taxman 69 (Mag.)(Delhi)(Trib.)*

**S. 28(i) : Business income – Income from house property [S. 22]**

Where rental income had been taken as part of business income for past several years, same cannot be assessed as income from house property, in the year, without any new or distinguishing facts having been brought on record. (A.Y. 2002-03)  
*Diesel Engg. Co. (P) Ltd. v ITO (2007) 161 Taxman 129 (Mag.)(Delhi)(Trib.)*

**S. 28(i) : Business income – Purchase and sale of shares [S. 45]**

Looking into the volume, frequency, continuity and regularity of transactions of purchase and sale in shares it could not be said that the activity was not with a motive of profit & therefore, inference which could be drawn was that the income earned out of sale and purchase of the shares was an income under the head 'Profit and gains of business or profession'. (A.Ys. 1992-93 to 1995-96)

*Dy. CIT v. Deepaben Amitbhai Shah (Smt) (2006) 99 ITD 219 / 100 TTJ 1065 (Ahd.)(Trib.)*

**S. 28(i) : Business income – Dividend – Interest free lending**

Assessee, in terms of agreement, advanced interest-free loan to borrower at his request on the condition that advanced amount should be utilised for purchasing LML shares and that dividend income received on such shares should be paid by the borrower to assessee to extent of 50%. Thus, on the facts & circumstances, it was merely a loan transaction and consideration was 50% of dividend income instead of regular payment of interest. However, the dividend received by the borrower could not be treated as dividend income as the borrower was holding shares in the capacity of borrower and not as a beneficial owner of those shares, and therefore, it was held that the 50% retained by the assessee was assessable as Business Income. (A.Y. 1998-99)

*Rasoi Trading & Agencies (P.) Ltd. v. ITO, (2006) 101 ITD 399 / 8 SOT 426 (Mum.)(Trib.)*

**S. 28(i) : Business income – Adventure in nature of trade – Capital gains [S. 45]**

Assessee, the owner of land, entered into a development agreement with a developer for developing lands into building sites with a view to realise best price without anything more is consistent with realization of capital investment and in such a case surplus received by seller building sites would not be a trading or business profit but under the head Capital gains. (A.Y. 1998-99)

*ITO v. Sitaram Chamaria (2006) 6 SOT 594 (Mum.)(Trib.)*

**S. 28(i) : Business income – Accounts – Work-in-progress**

Addition on work in progress on account of contract receipt was justified where appellant failed to produce evidence to indicate date on which bill was submitted and the payment was received just after close of year. (A.Y. 1998-99)

*Om Prakash Nargotia v. ITO (2006) 100 TTJ 657 (Amritsar)(Trib.)*

**S. 28(i) : Business income – Business loss – Fluctuations in foreign currency rates**

Additional liability on account of fluctuations in foreign currency cannot be treated as a capital loss in the absence of any contrary material on record and it is allowable as revenue loss, on accrual basis. (A.Y. 1991-92)

*Dy. CIT v. Maruti Udyog Ltd. (2006) 101 TTJ 760 / 99 ITD 666 (Delhi)(Trib.)*

**S. 28(i) : Business income – Revaluation of obsolete stock – Non-moving parts**

Assessee company having revalued obsolete stocks/non-moving spare parts and provided for obsolescence loss at 20 per cent of historical cost on the basis of audit objections by C & AG. The claim of loss is *bona fide* and proper and hence allowable as deduction. (A.Ys. 1994-95 to 1998-99 & 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 28(i) : Business income – Business loss – Exchange loss**

Exchange loss on liability towards payment for purchase of raw materials was revenue loss. (A.Y. 1996-97)

*Jt. CIT v. Abbot Laboratories (I) Ltd. (2006) 102 TTJ 423 / 100 ITD 343 (Mum.)(Trib.)*

**S. 28(i) : Business income – Income from house property – Warehouse [S. 22]**

Income derived by assessee by letting out space in warehouse and providing ancillary service was assessable as business income and not as 'income from house property'. (A.Ys. 1999-2000 to 2001-02)

*ITO v. Tejmalbhai & Co. (2006) 100 TTJ 898 / 99 ITD 399 (Rajkot)(Trib.)*

**S 28(i) : Business income – Income from other sources – Business centre [S. 56]**

Assessee running Business centre income therefrom used to be assessed under the head "Business Income" since the business was set up 11 years before, Assessing Officer cannot assess the income under the head 'Income from other sources' contending that the activity was that of merely letting the property. (A.Y. 2001-02)

*Royal Business Centre Pvt. Ltd. v ITO, ITAT Mumbai Bench 'C', ITA No. 3901/Mum/2004, dated 6-10-2005 – BCAJ, April 2006 (39-B) P. 24 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business loss – Converted into stock-in-trade – Inherited by assessee**

Land having been inherited by assessee under will, when the assessee became owner, the resultant surplus on the date when he converted into stock-in-trade by taking the fair market value was shown as capital gain and further surplus was shown as business profit such a course of action was in conformity with the provisions of the Act. (A.Ys. 1990-91 to 1993-94)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 316 (Amritsar)(Trib.)*

**S. 28(i) : Business income – Deduction – Business expenditure – Receipt of service charges**

Once it has been accepted that service charges were assessable as 'profits and gains of business or profession' then Assessing Officer was bound to allow all expenses/deductions under Chapter IV-D. (A.Y. 2001-02)

*Al-Haz Amir Hasan Properties (P.) Ltd. v. ACIT (2006) 100 ITD 441 / 104 TTJ 108 (Kol.)(Trib.)*

**S. 28(i) : Business income – Investment in shares [S. 45, 73]**

Where assessee-company which was carrying on business of investment in shares had suffered loss on account of investment in shares and claimed the same as business loss, Assessing Officer could not disallow said claim by treating said loss as speculation loss in view of Explanation to section 73. (A.Y. 1996-97)

*A. N. Corpn Ltd. v. ITO (2006) 6 SOT 458 (Mum.)(Trib.)*

**S. 28(i) : Business income – Purchase and sale of cotton bales**

Loss incurred by assessee in certain transactions of purchase and sale of cotton bales could not be disallowed simply by doubting the transactions on the ground that in most cases the purchases and sales were made on the same date. Moreso when similar transactions with the same sister concern, where the assessee has shown profits has been accepted. (A.Y. 1996-97)

*ITO v. Madan Lal Singhal & Sons (2006) 100 TTJ 647 (Jodh.)(Trib.)*

**S 28(i) : Business income – Professional fees – Retired High Court Judge [S. 56, 176(4)]**

Outstanding professional fees received after appointment as High Court Judge, is not taxable under section 28 or section 56 or s. 176(4). (A.Y. 1999-2000)

*Dy. CIT v. Justice Dilip Kumar Seth (2006) 101 TTJ 90 / 98 ITD 241 (Kol.)(Trib.)*

**S. 28(i) : Business income – Business loss – Generation of power – Captive Consumption [S. 80JA]**

There shall be no restriction on deduction under section 80-IA, where the assessee is using power captive consumption. Assessing authority is directed to work out the profits on the basis of the price of the power generated by the assessee at the average of the annual landed cost of electricity purchased by the assessee from the State Electricity Board. (A.Ys. 1996-97, 1997-98)

*West Coast Paper Mills Ltd. v. Jt. CIT (2006) 100 TTJ 833 (Mum.)(Trib.)*

**S. 28(i) : Business income – Trading receipt – Dharmada receipt**

Amount collected by assessee from its customers which is clearly earmarked as 'Dharmada' in the sale bills cannot be charged to tax. (A.Y. 1996-97)

*Udaipur Distillery Co. Ltd. v. Jt. CIT (2006) 102 TTJ 495 / 100 ITD 422 (Jodh.)(Trib.)*

**S. 28(i) : Business income – Deduction – Exchange fluctuation**

Assessee is entitled to claim deduction of exchange fluctuation loss in respect of foreign currency loan taken by it, notwithstanding that no actual repayment of loan was made during the year. (A.Y. 2001-02)

*Silicon Graphics Systems (I) Ltd. v. ACIT (2006) 105 TTJ 591 (Delhi)(Trib.)*

**S. 28(i) : Business income – Deduction – Comparison – Purchased sale price**

In the absence of a finding that goods were sold by assessee below the prevalent market rate and without a comparison between the purchase price of a specific material with the sale price of that very kind of material, assessee's claim of loss on trading goods could not be disallowed. (A.Y. 2000-01)

*Shiv Cable & Wire Industries (India) v. Addl. CIT (2006) 99 TTJ 106 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Shareholding investment – Market value**

Assessee-firm having converted its shareholding investment into stock-in-trade by valuing the shares at market value after making amendment in the relevant clauses of partnership deed and later sold the shares mainly to its partners at market price at loss, same could not be treated as a colourable device on the facts of the case, and therefore, loss on sale of shares was allowable. (A.Y. 1991-92)

*Dy. CIT v. Raj Kumar Singh & Co. (2006) 99 TTJ 801 (Luck.)(Trib.)*

**S. 28(i) : Business income – Export incentive – National accounting**

Assessee, an exporter, having made a notional entry crediting its P & L a/c by export incentive by misunderstanding the Import and Export Policy of the Government, and later reversed the same, such notional/hypothetical income which has not materialized cannot be taxed as income of the assessee. (A.Y. 1989-90)

*ACIT v. Pratap Rajasthan Special Steels Ltd. (2006) 99 TTJ 67 (Jp.)(Trib.)*

**S. 28(i) : Business income – Bogus expenses – Not debited to account**

Assessee having surrendered certain amount as bogus expenses under some wrong impression which in fact do not relate to year under consideration and not debited to the P&L a/c of the year, addition thereof cannot be sustained. (A.Y. 1993-94)

*Madan Lal v. ITO (2006) 99 TTJ 538 (Jodh.)(Trib.)*

**S. 28(i) : Business income – Accounts rejection – Expert committee report [S. 145]**

Addition made only on account of fall in G.P rate without pointing out any adverse material against the assessee, and relying only on the Expert Committee report and following decisions of some other bench of Tribunal and rejecting the books on belief that GP rate was not genuine is not justified. (A.Y. 2001-02)

*Kashmir Steel Rolling Mills v. ACIT (2006) 155 Taxman 121 (Mag.)(Amritsar)(Trib.)*

**S. 28(i) : Business income – Business loss – Fluctuation in rate of foreign currency**

Loss incurred by the assessee on account of foreign exchange fluctuation not being a loss on capital account is allowable as deduction in the year of fluctuations. (A.Y. 2001-02)

*Herbalife International India (P) Ltd. v. ACIT (2006) 103 TTJ 78 / (2006) 101 ITD 450 (Delhi) (Trib.)*

**S. 28(i) : Business income – Trading receipt – Subsidy**

Subsidy claimed and received by assessee from the Government by declaring bogus production / sales of fertilizers is taxable as business income. Since, no liability to repay the amount had arisen till the end of the relevant year or even later, deduction could not be allowed. (A.Y. 1991-92)

*Harshavardhan Chemicals & Minerals Ltd. v. ACIT (2006) 102 TTJ 825 / 101 ITD 66 (Jodh.) (Trib.)*

**S. 28(i) : Business income – Computers and computer software**

Assessee being a multinational company dealing in computers and computer software etc., write off of obsolete and slow moving items was allowable in entirety. (A.Ys. 1992-93 to 1996-97)

*Digital Equipment India Ltd. v. Dy. CIT (2006) 103 TTJ 329 (Bang.) (Trib.)*

**S. 28(i) : Business income – Commencement of or carrying on business activities – Takeover**

If a new company has taken over or purchased an existing undertaking then in that case it means the company has commenced its business. If the new company has taken over the entrusted activities then in that case it is held that the company has commenced its entrusted activities. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corporation v. Jt. CIT (2006) 102 ITD 1 / 104 TTJ 524 / (2005) 4 SOT 551 (Mum.) (Trib.)*

**S. 28(i) : Business income – Purchase and sale of shares/units – Considerations [S. 45]**

In order to determine whether there was business or not, issue cannot be decided from narrow angle as to whether or not object was to sell commodity at enhanced price. In today's scenario it would be unrealistic to see a business operation only from narrow angle of difference between selling price and purchase price as there may be systematic and prolonged activity of loss making keeping in view overall business strategy and long-term – prospects. In a business transaction there could be various considerations. (A.Ys. 2000-01-02)

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



**S. 28(i) : Business income – Business expenditure – Business setting up of – Purchase of existing new business**

If an existing running business is taken over by a new company with an object to complete the same and the same new company undertakes new project then it has to be said that the business is already commenced. The tax authorities are wrong in holding that new company's business had not commenced till the entire expansion of the business is complete.

If an existing undertaking is purchased by a new assessee, it does not mean that the new assessee has not commenced its business. Thus where the assessee corporation was formed for completion of already existing projects or for further entrusted projects, and the assessee had commenced its entrusted activities, merely because the assessee had taken over entrusted activities it did not mean that assessee had not commenced business and, therefore, with commencement of entrusted activities, the assessee was held to have commenced its business. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corporation v. Jt. CIT (2005) 4 SOT 551 / (2006) 104 TTJ 524 / 102 ITD 001 (Mum.)(Trib.)*

**S. 28(i) : Business income – Business expenditure – Setting up and commencement – Construction of a dam**

Assessee corporation had project to construct a dam and generate revenue by selling water and electricity, by mere construction of infrastructure it could not be said to have commenced its business: only when infrastructure would be ready to be exploited, assessee could be said to have commenced its business. Certificate of incorporation and commencement of business only establishes that the assessee is permitted to commence its business. But whether it has commenced its business or not depends upon the activities carried on. Therefore expenditure cannot be allowed as deduction. (A.Ys. 1989-90 to 2000-01)

*Jt. CIT v. Sardar Sarovar Narmada Nigam Ltd. (2005) 93 ITD 321 / 93 TTJ 965 (Ahd.)(Trib.)*

**S. 28(i) : Business income – Business loss – Business expenditure – Discontinued business**

Assessee was engaged in manufacturing of cement, fact of cement plant not working during the year *per se* could not lead to conclusion that business of cement manufacturing was discontinued, assessee is entitled to deduction of various expenses and set off carried forward losses. (A.Y. 2001-02)

*Chunilal & Co (TM) (P) Ltd. v. ITO (2005) 4 SOT 309 (Mum.)(Trib.)*

**S. 28(i) : Business income – Capital gains – Purchase and sale of shares [S. 45]**

For deciding the nature of income no general principle can be laid down, but totality of the circumstances has to be considered. Considering the frequency of purchase and sale of shares, it was clear that assessee investment company held shares as

business assets but disclosed the same as Investment in the Balance sheet for complying RBI Guidelines, hence profits from their sales was assessable as business income and not as capital gain. Tribunal has considered the following factors (i) systematic and continuous activity of purchase and sale of shares in furtherance of object in memorandum of association (ii) it has been raising substantial loans and public deposits and has been utilizing it for purchase of shares (iii) Object of purchases and sale of shares was not to earn dividends (iv) Assessee was having substantial nature of purchase and sale of shares and turnover (v) Assessee was purchasing and selling the shares since incorporation. (vi) there was enormity and frequency of purchase and sales. (vii) Assessee was disclosing the purchases and sale of shares as business income in subsequent years which had been accepted by the Revenue. (A.Y. 2000-01)

*Dy. CIT v. A. T. N. International Ltd. (2005) 4 SOT 239 (Kol.)(Trib.)*

**S. 28(i) : Business income – Income from other sources – Let out of land – Plant and machinery – Limited period**

In this case, ITAT Cochin decided the main issue of validity of the re-assessment proceedings under section 147. However, they also decided issue on merits as under. If an assessee because of financial difficulties lets out land or plant and machinery to a third party for a limited period and is receiving rent such rent is to be treated as income from business and only limitation is that assessee should have present intention to revive industry/ activity on a future date when difficulties ceases to exist or assessee is in a position to overcome difficulties. (A.Ys. 1996-97-98)

*Premier Tyres Ltd v. ACIT (2005) 3 SOT 556 (Cochin)(Trib.)*

**S. 28(i) : Business income – Rent – Temporarily on leave and licence**

Income from letting out of business premises temporarily on leave and licence basis due to lull in business, is business income. (A.Y. 2001-02)

*Sewari Chemicals (P) Ltd. v. Dy. CIT (2005) 1 SOT 549 (Mum.)(Trib.)*

**S. 28(i) : Business income – Commercial complex – Lease rentals**

Assessee had constructed a commercial complex on land taken on lease for 30 Years and had exploited commercial asset by letting out same to various parties. Entire activity was carried on in an organised manner to earn profit out of investment, income earned by assessee from lease rentals and maintenance charges was nothing but business income. And not Income from House Property. (A.Ys. 1993-94 to 1995-96)

*Dy. CIT v. Manmit Arcade (P) Ltd. (2005) 93 TTJ 463 / 147 Taxman 25 (Mag.)(Bang.)(Trib.)*

**S. 28(i) : Business income – Business loss – Irrecoverable loan – Managing director**

Unrecovered interest free loan to erstwhile managing director of assessee company could not be allowed as business loss as the assessee could not prove the business exigency in advancing the loan to the MD. (A.Ys. 1995-96-97)

*Naveen Projects Ltd. v. Dy. CIT (2005) 1 SOT 232 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Loss of material – Inability to get material released from customs**

In a case of loss caused due to assessee's inability to get material released from customs office, loss was allowable and in such a case loss could not be disallowed on ground that assessee had not lodged FIR. (A.Y. 1996-97)

*Dy. CIT v. Nikko Auto (P) Ltd. (2005) 145 Taxman 42 (Mag.)(Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Loss on valuation of closing stock**

Assessee bank changed method of valuation of stock of securities to comply with provisions of Banking Regulations Act, loss arising on account of such change was allowable as business loss. (A.Ys. 1982-83 to 1984-85)

*ITO v. J&K Bank Ltd. (2005) 95 ITD 141 / 94 TTJ 836 (Amritsar)(Trib.)*

**S. 28(i) : Business income – Business loss – Loss of stock**

Discontinuance of part of business during the year does not disentitle the assessor from claiming the operational loss. Even if a business is discontinued during a year loss cannot be disallowed as there is no such prohibition under section 70. (A.Ys. 1998-99, 1999-2000)

*Wipro Ltd. v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

**S. 28(i) : Business income – Dealing in land – Adventure in the nature of trade [S. 2(13)]**

Land was acquired by assessee with a view to make profit by dividing big plots for profitable gains. Income from sale of plots was assessable as income from adventure in nature of trade and the assessee's version that he had purchased land to set up oil mills and as land could not be used for that purpose as per Master Plan, he sold it in plots could not be accepted. (A.Y. 1989-90)

*Vitta Kristappa v. ITO (2005) 92 ITD 1 / 92 TTJ 38 (TM)(Hyd.)(Trib.)*

**S. 28(i) : Business income – Agricultural land – Dividing it into plots – Capital gain [S. 2(13), 45]**

Assessee, engaged in business of trading in cloth, purchased land for agricultural purpose but without carrying out any agricultural operations sold land after dividing into plots after ten years of purchase. Merely because transaction earned profit, it could not be treated as business and resultant gain was assessable as capital gain as there was no intention to do business of purchase and sale of land/plots. (A.Y. 2001-02)

**S. 28(i) : Business income – Adventure in the nature of trade – Selling shops – Office [S. 13]**

Assessee purchased a property in 1985, and started selling shops – cum offices in 1994-95 and in balance sheet also the said property was shown as investment, and not as stock-in-trade. Transaction of sale of shops – cum offices could not be treated as adventure of trade, the same was assessable as capital gains as the dominant motive is only relevant factor to determine the character of the transaction. (A.Ys. 1995-96 to 1998-99)

*ACIT v. Piccadily Hotles (P) Ltd. (2005) 97 ITD 564 / 97 TTJ 411 (Chd.)(Trib.)*

**S. 28(i) : Business income – Commencement of business – Income from other sources**

Assessee company incorporated to undertake various activities including the running of steel plant, power plant, etc. The company started systematic activity of borrowing and lending of funds, bill discounting, leasing, etc. In the circumstances it was held that the company had commenced its business. Merely because the company had not commenced its steel manufacturing business it could not be held that the business was not commenced at all. (A.Y. 1995-96)

*Jindal Vijayanagar Steel Ltd. v. ACIT (2003) 87 ITD 630 / (2004) 86 TTJ 924 (Bang.)(Trib.)*

**S. 28(i) : Business income – Business loss – Adventure in the nature of trade – Personal effects – Paintings [S. 2(14)]**

Assessee connoisseur of art sold paintings out of her own collection, and claimed the same as exempt under section 2(14)(ii) by treating them as personal effects. Held, Assessing Officer's action in taxing the same as adventure in nature of trade was not justified, as the assessee had an aesthetic and therefore had sold the paintings after keeping them for 25 years. There was no element of business mere earning of surplus does not amount to adventure in nature of trade, and the onus to prove the same is on the department. (A.Y. 1992-93)

*ACIT v. Dilnavaz S. Variava (Mrs) (2003) 87 ITD 113 / (2004) 88 TTJ 1139 (Mum.)(Trib.)*

**S. 28(i) : Business income – Income from letting – Business income or Income from house property [S. 22]**

The Tribunal held that Income from letting out a commercial asset (Godown) of the assessee was to be taxed as Business Income, and not as Income from House Property as it amounts to commercial asset being exploited for business. (A.Y. 1992-93)

*ACIT v. Onkar Engineering (P.) Ltd. (2003) 78 TTJ 764 / 130 Taxman 184 (Mag.)(Delhi)(Trib.)*

**S. 28(i) : Business income – Income from letting – Business income or Income from house property [S. 22]**

The Tribunal held, that when a commercial property is let out, and the control remains with the owner, income from letting out has to be taxed as Business Income, as a systematic and regular activity is carried on with the intention of earning income from building. (A.Ys. 1992-93 to 1994-95)

*ACIT v. Sardar Davinder Singh Kohli (2003) 85 ITD 544 / 80 TTJ 791 (Gau.)(Trib.)*

**S. 28(i) : Business income – Business loss – Stock-in-Trade – Government securities**

Investments made by bank in Govt. securities to comply with the provisions of Banking Regulation Act and as per RBI guidelines of maintaining SLR, would be stock-in-trade, even though in the RBI circular words used is Investment. The claim for Depreciation on revaluation of securities made was upheld. (A.Ys. 1982-83 to 1984-85)

*Dy. CIT v. Nedungadi Bank Ltd. (2003) 85 ITD 1 / (2004) 89 TTJ 711 (Cochin)(Trib.)*

**S. 28(i) : Business income – Business loss – Damaged stock**

Assessee purchased partly fire damaged stock, and as damaged stock ratio worked out to be higher in quantity, assessee suffered loss. Held, Loss claimed is allowable as business loss, as Assessing Officer had not controverted assessee's contentions with any supportive material for disallowance of said loss. (A.Y. 1990-91)

*ACIT v. Dilip Kumar (2003) 81 TTJ 316 / (2004) 3 SOT 702 (Jodh.)(Trib.)*

**S. 28(i) : Business income – Business loss – Irrecoverable advances**

Advances given to parties for supply of goods, which remained outstanding due to failure of parties to supply goods, can be claimed as business Loss, as those advances were made during the course of carrying on the business activities. (A.Y. 1997-98)

*Salora International Ltd. v. Jt. CIT (2003) SOT 671 / 129 Taxman 68 (Mag.) / 88 TTJ 53 (Delhi)(Trib.)*

**S. 28(i) : Business income – Business loss – Price escalation**

Assessee's claim for price escalation, in respect of supply to Govt., raised by way of supplementary bill, was nothing but a contingent liability, not acknowledged by the Govt. The claim made being an unilateral claim, cannot be treated as debt, which cannot be allowed as Bad Debt under section 36(1)(vii). Held same be allowed as business loss, and that too in the year in which the claim was repudiated by Govt., even if no entry has been passed in the books of account. (A.Y. 1996-97)

*Dy. CIT v. Associated Alcohols & Breweries Ltd. (2003) 87 ITD 510 / 80 TTJ 837 (TM)(Kol.)(Trib.)*

**S. 28(i) : Business income – Business loss – Loss in chit business**

Loss in Chit transaction is nothing but a Business Loss as per CBDT's instruction No. 1175 dt 16-5-1978, inspite of contrary decision of P & H (HC), in case of Soda Cilicate & Chemical Works Ltd. (179 ITR 588). Wherein, under principle of Mutuality income/loss from chit transaction was held as not chargeable/allowable. (A.Y. 1990-91)

*ACIT v. K. S. Shetty & Co. (2003) 87 ITD 259 / 81 TTJ 158 (SB)(Chennai)(Trib.)*

#### **S. 28(i) : Business income – Business loss – Loss in share dealing**

The Tribunal held, that loss claimed on sale & purchase of shares as business loss was to be allowed, when such share transactions were found to be duly supported by contract notes and bills, and payments thereof were by a/c payee cheques, and when Assessing Officer had no material to prove that the transactions were rigged or were not genuine. (A.Y. 1991-92)

*ACIT v. Janki Textile & Industries Ltd. (2003) 126 Taxman 53 (Mag.)(Gau.)(Trib.)*

#### **S. 28(i) : Business income – Business loss – Investment – Long term capital loss**

Investment made in shares of a Company with an intention to merge, being an Capital Investment, Loss arising therefrom can neither be claimed as Business Loss nor as Revenue expenditure. Alternate contention to allow Long Term Capital Loss was accepted. (A.Y. 1991-92)

*APS-Star Industries Ltd. v. CIT (2003) 86 ITD 182 / (2004) 82 TTJ 596 (Ahd.)(Trib.)*

#### **S. 28(i) : Business income – Film manufacturer [Rule 9B]**

Rule 9B is not applicable to old films, and the claim for loss in respect of exploitation of such films is allowable. (A.Y. 1984-85)

*ACIT v. Valanadu Cine Release (2003) 128 Taxman 96 (Mag.)(Chennai)(Trib.)*

#### **S 28(i) : Business income – Capital gains – FII – Portofolio investments [S. 45]**

The Applicant Trust registered with SEBI as a sub-account of FII earned profits out of sale of portofolio investments. Looking into the fact of continuously carrying on trading in securities in India with greater magnitude of purchase and sales, the profits arising is business income and not Capital Gains.

*General Electric Pension Trust, In re (2006) 200 CTR 121 / 280 ITR 425 / 150 Taxman 545 (AAR)*

#### **S. 28(i) : Business income – Capital or revenue receipt – Liquidated damages**

Refund of liquidated damages collected from supplier for the latter's failure to supply equipment in time is Capital receipt – And the amount refunded to the supplier on account of part of waiver of such damages, not voluntarily but under the direction of Telecom Communication is not allowable as deduction either under section 37(1) or section 57(iii). (A.Y. 2002-03)

*MTNL In Re. (2006) 205 CTR 104 / 286 ITR 211 / 156 Taxman 105 (AAR)*



**S. 28(i) : Business income – Business profits – Capital gains – Transaction in exchange traded derivatives – Non-Resident – Business income as derivatives are in nature of stock in trade – India-UK DTAA [S. 2(29A), 2(42A), 2(42B), 2(47) (42, 45, Articles 5, 7 & 14]**

FII is trading in derivatives on Indian Stock exchanges and contends that the income derived from the derivatives trading should be treated as its business income – Authority examined whether it is in nature of revenue receipt or capital receipt. AAR observed that derivatives value is derived from underlying variables like asset, index or reference rate, they do not have either voting rights or right to control, there is no pride of possession of derivatives, they also do not involve initial investment; they are priced by reference to value derived from an underlying index, commodity or other asset and their value fluctuates with the market movement of the aforementioned items; also the applicant purchases and sells derivatives and sometimes first sells and then purchases them and this ordinarily does not happen in share and other securities; they have a short life of about 3 months, they do not yield any income like dividend, therefore, investment of money in them with a view to derive any income is not feasible; further details on record indicate substantial magnitude of transactions. On these facts, AAR stated that it cannot but be said that the income from transactions of trading in derivative is 'business income' and not 'capital gains'; further, to tax business income, there should be a PE in India as per Article 7, but it is clear that the broker, custodian and banker are acting in the ordinary course of business and their activities are not devoted wholly or almost wholly on behalf of applicant - Hence held to be business income as derivatives are in nature of stock in trade and not securities and hence not capital assets and not taxable in India as per provisions of DTAA.

*Morgan Stanley & Co. International Ltd., UK (2005) 272 ITR 416 / 142 Taxman 630 / 193 CTR 161 (AAR)*

**S. 28(ii) : Business income – Confiscation of value**

Where smuggled gold is confiscated and its value is taxed as assessee's unexplained investment, loss on account of confiscation has to be allowed. (A.Y. 1979-80)

*CIT v. Hiranand (2004) 136 Taxman 66 / 187 CTR 32 / (2005) 272 ITR 626 / 148 Taxman 281 (Raj.)(High Court)*

**S. 28(ii) : Business income – Capital or revenue receipt – Compensatory payments – Restrictive covenant**

Compensation for termination of sole selling agency/distributorship assessable as revenue receipt and amount received for restrictive covenant as capital receipt. (A.Ys. 1988-89, 1989-90)

*Parry & Co. Ltd .v. Dy. CIT (2004) 269 ITR 177 / 141 Taxman 398 / 191 CTR 408 (Mad.)(High Court)*

**S. 28(iia) : Business income – Accrual – Notional export benefits receivable – Advance licence [S. 5]**

It is now a settled law that if a particular income shown in the profit and loss is not taxable under the Act, it cannot be taxed on the basis of estoppels or any other equitable doctrine. Equity is outside the purview of tax laws; Under section 28(iia), only profit on sale of license should be chargeable but not the profit which may come in future on sale of the licence. (A. Y. 1997-98).

*GKW v. CIT (2011) 64 DTR 79 / 200 Taxman 396 (Cal.)(High Court)*

**S. 28(iia) : Business income – Benefit or perquisite – Sale of duty (DEPB)**

Amount equivalent to the face value of DEPB as well as the amount received in excess thereof constitutes profits of business under section 28(iid). Where the face value of the DEPB credit is offered to tax as business profits under section 28(iid) in the year in which credit accrued to the assessee, any further profit arising on transfer of DEPB credit is to be taxed as profits of business under section 28(iid) in the year in which the transfer of DEPB takes place, no part of credit that is available under DEPB scheme can fall for classification under cl. (iib) of section 28. (A.Y. 2003-04)

*CIT v. Kalpataru Colours & Chemicals (2010) 233 CTR 313 / 42 DTR 193 / 328 ITR 451 / 192 Taxman 435 (Bom.)(High Court)*

*Editorial : Reversed by Supreme Court in Topman Exports v. CIT (2012) 342 ITR 49 / 67 DTR 285 / 247 CTR 353 / 277 DIT 10 / 3 SCC 593.*

**S. 28(iia), (iib), (iic), (iid), (ie) : Business income – Profits on sale of licence**

Profit on sale of export licence granted under Export Control Order, 1977 cannot be brought within purview of section 28(iia). As 28(iia) specifically deals with the licence granted under Import Control Order 1955 only.

*CIT v. Magnum Export (P.) Ltd. (2003) 130 Taxman 702 / 262 ITR 10 / 183 CTR 75 (Cal.)(High Court)*

**S. 28(iia) : Business income – Import entitlement – Date of accrual**

In a case where assessee exporter by utilising import licence, actually imports goods at concessional rate of duty, imported goods become purchases and question of profit can arise only when they are actually sold and income is realized. But, where imports are not directly made by holder of import entitlement and licences are actually transferred to out side parties at premium, income accrues at time of transfer of import entitlement and not when such import entitlements are acquired or held by assessee. Thus mere holding of licence at year end without transfer does not amount to accrual of income. (A.Y. 1996-97)

*Jt. CIT v. Deva Singh Sham Singh (2005) 95 ITD 235 / 96 TTJ 914 (Amritsar)(Trib.)*

**S. 28(iib) : Business income – Cash assistance – Capital gains – Taking over business as going concern**

Assessee took over an entire undertaking as going concern for a lump sum consideration and later received claims of export incentives filed by erstwhile proprietor of said concern in form of excise duty drawback and cash assistance, as assessee purchased an actionable claim, income on that account could not be taxed as capital gain and not as business income. (A.Y. 1990-91)

*ACIT v. HYT Engg Co (P) Ltd. (2005) 92 ITD 202 / 143 Taxman 3 / 93 TTJ 0016 (TM)(Pune)(Trib.)*

**S. 28(iiib) : Business income – Cash incentive – Export promotion scheme**

Cash incentive received by assessee under Export Promotion Scheme is chargeable to tax under head 'Profit & Gains of business or profession under section 28(iiib). (A.Ys. 1975-76 to 1978-79)

*Cawnpore Textiles Ltd. v. CIT (2005) 276 ITR 612 / 144 Taxman 590 (All.)(High Court)*

**S. 28(iiic) : Business income – Duty drawback – Year of income**

Duty drawback credited as income on mercantile basis in books of account which were audited and shown as receivable in Balance Sheet, on basis of same being lodged with Government, but same was excluded from Computation of Income. Held Assessing Officer is not justified in adding duty drawback to income as right to receive would not be created in favour of the assessee unless an order is passed by appropriate authority as per the rules. (A.Y. 1990-91)

*Samtel Colour Ltd. v. Dy. CIT (2006) 157 Taxman 39 (Mag.)(Delhi)(Trib.)*

**S. 28(iiic) : Business income – Accrual – Duty draw back – Entry in book**

The fact that assessee effected exports in a year or it passed an entry in accounts recognizing amount of duty draw back does not entitle it to income to that extent: The right is translated into accrual of income only when a claim is lodged with competent authority. Thus the time of accrual of claim for duty draw back is to be determined. (A.Y. 1996-97)

*Jt. CIT v. Deva Singh Sham Singh (2005) 95 ITD 235 / 96 TTJ 914 (Amritsar)(Trib.)*

**S. 28(iv) : Business income – Business loss – Benefit or perquisite – Waiver of loan by bank [S. 2 (24), 41(1)]**

The assessee was not trading in money transactions. A grant of loan by a bank cannot be termed a trading transaction nor construed to be in the course of business. Indisputably, the assessee obtained the loan for the purpose of investing in capital assets. A part of this loan with interest was waived under agreement between the parties. The amount referable to the loans obtained by the assessee towards the purchase of its capital asset could not constitute a trading receipt. Therefore, the facts were totally different from the facts in *CIT v. T. V. Sundaram Iengar and Sons Ltd. (1996) 222 ITR 344 (SC)*. (A.Y. 2001-02).

*Iskaraemeco Regent Ltd. v. CIT (2011) 331 ITR 317 / 196 Taxation 103 / 49 DTR 185 / 237 CTR 239 (Mad.)(High Court)*

**S. 28(iv) : Business income – Benefit or perquisite – Waiver of loan – Capital or revenue receipt – Depends on whether loan was used for capital or revenue purposes**

It was held that income from waiver of loan depends on the purpose for which loan is taken. In case the loan was taken for acquiring a capital asset, the waiver thereof would not amount to any income exigible to tax under section 28(iv) or 41(1). Whereas, if the loan was taken for a trading purpose and was treated as such from the very beginning in the books of account, its waiver would result in income more so when it was transferred to the P&L A/c in view of *CIT v. Sundaram Iyengar and Sons Ltd. (1996) 222 ITR 344 (SC)*. (A. Y. 2004-05)

*Logitronics Pvt. Ltd. v. CIT (2011) 333 ITR 386 / 197 Taxman 394 / 53 DTR 50 / 240 CTR 20 (Delhi)(High Court)*

**S. 28(iv) : Business income – Benefit or perquisite – Waiver of loan**

Waiver or write off of part of principal amount of loan by sister concern is not taxable as benefits or perquisites under section 28(iv) as benefits should be of the nature other than cash. (A.Y. 2003-04)

*CIT v. Jindal Equipments and Leasing & Consultancy Services Ltd. (2010) 37 DTR 172 / 325 ITR 87 (Delhi)(High Court)*

**S. 28(iv) : Business income – Benefits or perquisites – Remission of loan**

Remission of unsecured loans by creditors could not be brought to tax under section 28(iv), read with section 41(1). Since the assessee was not engaged in business of obtaining loans. (A.Y. 1982-83)

*CIT v. Chetan Chemicals (P) Ltd. (2004) 267 ITR 770 / 139 Taxman 301 / 188 CTR 572 (Guj.)(High Court)*

**S. 28(iv) : Business income – Perquisite – Benefit – Value – Non-interest bearing deposits**

Assessee received interest free deposit for letting out the premises to sister concerns. Assessing officer had come to the conclusion that the assessee received lesser rent estimated at 60 per cent of amount of deposit as value of benefit under section 28(iv) by relying on comparable cases. The CIT (A) deleted the addition. Non-interest bearing deposit received by the assessee from letting out its premises to its sister concern, cannot be brought to tax under section 28(iv). Finding given by the Tribunal was confirmed. (A.Y. 1987-88)

*CIT v. Diners Business Services (P.) Ltd. (2003) 263 ITR 1 / 132 Taxman 758 / 185 CTR 623 (Bom.)(High Court)*

**S. 28(iv) : Business income – Purchase tax subsidy – Excise rebate**

Purchase tax subsidy received by the assessee would form part of the income from business; however, excise duty rebate or excise duty incentive would not form part of income from the business under section 28(iv). (A.Y. 1986-87)

*Chengalrayan Co-operative Sugar Mills Ltd. v. CIT (2003) 261 ITR 575 / 130 Taxman 389 (Mad.)(High Court)*

**S. 28(iv) : Business income – Waiver of loan – Purchase of capital asset**

Loan given to assessee by American company for purchase of toolings was waived by the latter. Since toolings in question were in nature of dies required for manufacturing heavy vehicles, their import was that of plant and machinery and consideration was paid for such import, therefore, section 28(iv) was not attracted to tax waiver of loan as part of assessee's business income. (A.Y. 1976-77)

*Mahindra & Mahindra Ltd. v. CIT (2003) 128 Taxman 394 / 261 ITR 501 / 182 CTR 34 (Bom.)(High Court)*

**S. 28(iv) : Business income – Need business – Transfer – Licence benefits**

Assessee carrying on business, obtained a licence for setting up a new manufacturing business of white cement and instead of setting up a business, assessee transferred licence to some other concern, benefit arising out of said licence could not be said to be a benefit arising out of business as licence was not an outcome of business carried on by assessee. Also licence is an capital asset and its sale would not attract provision of sec. 28(iv). (A.Y. 1986-87)

*CIT v. General Industrial Society Ltd. (2003) 129 Taxman 628 / 262 ITR 1 / 182 CTR 67 (Cal.)(High Court)*

**S. 28(iv) : Business income – Remission of loan liability [S. 41(1)]**

The Tribunal held that since loan received was utilized for acquiring capital assets, the amount remitted was not taxable under section 41(1). As it was remission of liability section 28(iv) was also not applicable. (A.Y. 2004-05)

*Terra Agro Technologies v. ACIT, ITA No.1503/Mds./2010, Dt. 9-6-2011, BCAJ September 2011, P. 23, Vol. 43-A, Part 6. (Chennai)(Trib.)*

**S. 28(iv) : Business income – Perquisite – Compensation on termination – Value of free room rent vouchers [S. 5]**

Assessee having received 150 free room night vouchers as part of compensation on termination of arrangement for operating the resort belonging to another party following a settlement made during the year under consideration. The value of free room night vouchers accrued to the assessee in the relevant year even though these vouchers could not be utilized. The loss on account of non user of vouchers can be considered only in subsequent year and not in the year under consideration. (A.Ys. 2004-05, 2005-06)

*Tulip Hotels (P) Ltd. v. Dy. CIT (2010) 132 TTJ 633 / 37 SOT 77 / 43 DTR 449 (TM)(Mum.)(Trib.)*

**S. 28(iv) : Business income – Family settlement – Dividend on shares in dispute**

In terms of family settlement certain shares held by the assessee were to be transferred to Walchand & Co. Pvt. Ltd. However due to certain reasons, the same could not be transferred, by the physical possession of share certificates were handed over to the solicitors. The dividend received during intervening period was shown as liability. The Assessing Officer treated the same as benefit or perquisite chargeable to tax under section 28(iv). Held that section 28(iv) could be applied only in case where benefit or perquisite was received in kind or when the assessee had credited such amount in P & L A/c. Sec. 28(iv) could be applied only in case where an actual income was received by the assessee in garb of some benefits which were not shown as chargeable to tax. (A.Y. 2001-02)

*ACIT v. Pal Enterprises Pvt. Ltd., ITA No. 1994/Mum/2005, Bench – 'H', dt. 20-10-2008 (2008) BCAJ p. 518, Vol. 40-B, Part 4, January 2009. (Mum.)(Trib.)*

### **S. 28(iv) : Business income – Business loss – Benefit – One time settlement scheme [S. 41(1)]**

Reduction of liability availed by the assessee on the basis of One Time Settlement Scheme framed by RBI in respect of its outstanding term loans is not to be treated as taxable under section 28(iv) or under section 41(1). (A.Y. 2005-06)

*Accelerated Freez & Drying Co. Ltd. v. Dy. CIT (2010) 1 ITR 226 / 31 SOT 442 (Cochin)(Trib.)*

### **S. 28(iv) : Business income – Business loss – Benefit or perquisite – Purchase and sale of shares – Difference in market price**

In absence of any finding by the Department that the purchase and sale transaction of shares was a part and parcel of a business transaction the difference in market price and purchase price cannot be brought to tax as benefit or perquisite under section 28(iv) merely because purchase of investments in shares, with a lock-in-period, made for a consideration less than market price. (A.Y. 2003-04)

*Rupee Finance & Management (P.) Ltd. v. ACIT (2009) 120 ITD 539 / (2008) 119 TTJ 643 / 2 SOT 174 / 15 DTR 466 (Mum.)(Trib.)*

*Editorial :- Affirmed by Bombay High Court in CIT v. Rupee Finance & Management (P) Ltd. ITA No. 1208 order dated 20-10-2008. Source : [www.itatonline.org](http://www.itatonline.org)*

### **S. 28(iv) : Business income – Gift – Benefit or perquisite**

Voluntary gifts received from followers as a mark of regard and respect could not be charged to tax as benefit or perquisite under section 28(iv). (A.Y. 2001-02)

*Nirmala P. Athavale v. ITO (2008) 117 TTJ 353 / (2009) 118 ITD 373 / 22 SOT 197 / 10 DTR 367 (Mum.)(Trib.)*

### **S. 28(iv) : Business income – Perquisite – Shareholder**

Where the assessee shareholder of a company received shares of another company, free of cost on account of take over of the unit belonging to the first company with the second company no benefit or perquisite chargeable to tax accrued to the assessee. As the shares were given to assessee only to compensate for decrease in



value of shares of first company based on valuation of unit disposed of. (A.Y. 1995-96)

*Dy. CIT v. Chand Merchant (P) Ltd. (2006) 99 TTJ 712 (Mum.)(Trib.)*

#### **S. 28(iv) : Business income – Perquisite – Film artist's family**

Expenses incurred by producer on assessee film director and his family being flown abroad to place of his work, which temporarily was shooting location, would not constitute perquisite in assessee's hands. (A.Y. 1997-98)

*David Dhawan v. Dy. CIT (2005) 2 SOT 311 / 92 TTJ 161 (Mum.)(Trib.)*

#### **S. 28(iv) : Business income – Detention charges – Agent – Non-resident**

No addition can be made in respect of liability for detention charges shown by the assessee non agent of a foreign shipping company. The detention charges are not retained for disbursement of any expenses and are allowed to be remitted to the principal by the RBI as per its guidelines. However, liabilities in regard to brokerage, terminal handling charges and forwarding agency commission are to be treated as assessee's income chargeable to tax under Section 28(iv).

*A.P.L. (India) Ltd. v. Dy. CIT (2005) 96 ITD 227 / 97 TTJ 187 (Mum.)(Trib.)*

#### **S. 28(v) : Business income – Income from other sources – Interest from partnership firm**

##### **[S. 56]**

When there is a specific provision for treating interest and salary, etc. earned by a partner of from a firm as taxable under the head "Profits and gains or business or profession" there is no question of categorizing it under the residual head of income. (A. Y. 2003-04).

*ACIT v. Delite Enterprises (P) Ltd. (2011) 135 TTJ 663 / 50 DTR 193 / 128 ITD 146 (Mum.)(Trib.)*

#### **S. 28(va) : Business income – Capital or revenue – Non-compete compensation – Prior to A. Y. 2002-03. Section 28(va) inserted w.e.f. A.Y. 2002-03 – Capital receipt [S. 4]**

The payment received as a non competition fee under a negative covenant was always treated as a capital receipt till A. Y. 2003-04. There is a dichotomy between receipt of compensation received for loss of agency, which is treated as revenue receipt and receipt of compensation attributable to negative / restrictive covenant which is treated as capital receipt. It should be noted that it is only by section 28(va) inserted by Finance Act, 2002 w.e.f. 1/4/2003, which is amendatory and not clarificatory that the said capital receipt is now made taxable. (A. Y. 1997-98)

*Guffic Chem P. Ltd. v. CIT (2011) 239 CTR 225 / 52 DTR 289 / 332 ITR 602 / 198 Taxman 78 / 225 Taxation 383 (SC)*

#### **S. 28(va) : Business income – Capital or revenue – Share transfer agreement – Non-compete covenant – No transfer of controlling interest**

It was held that a Share Transfer Agreement is merely agreement for sale of shares and is a non-compete covenant. It does not in any manner refer to transfer of any controlling interest. Thus, the amount assessable as business income. (A. Y. 2006-07) *ACIT v. R.K.B.K. Fiscal Services Ltd. (2011) 52 DTR 29 / 138 TTJ 1 (Kol.)(Trib.)*

**S. 28(va) : Business income – Non-compete fees – Compensation for not carrying on activity in relation to any business for a period of 11 years – Capital gains [S. 45]**

The assessee was one of the promoters of "TP Ltd." and together with other promoters held substantial shares in the company. By an agreement "I Ltd." (Acquirer) agreed to purchase share holding of the assessee along with other promoters of "TP Ltd". The Acquirer with a view to ensure that the promoters after sale of the shares did not indulge in competing business entered into a non compete agreement whereby the assessee was paid ` 2 crores for agreeing not to carry on or be engaged, concerned or interested in any competing business for a period of 11 years. The assessee treated the said receipts as capital receipt. The Assessing Officer held that the receipt in question was a fee received for not carrying out any activity in relation to any business and therefore, chargeable to tax under section 28(va). The Tribunal held that for proviso (i) to section 28(va)(a) to apply there must be transfer of the right to carry on any business. The assessee in the instant case was not carrying on any business on his own but was the promoter and director of the company whose shares were purchased by the acquirer. The provisions of section 45 would get attracted only when there is a capital gains arising as a result of transfer of a capital asset. The definition of transfer in given in section 2(47). In a agreement by which the assessee refrained from indulging in a business competing with the promoter, there cannot be transfer in any modes set out in section 2(47) therefore the payments on account of non-compete fee cannot be brought to tax under section 45 hence in the instant case the proviso (i) to section 28(va)(a) will not apply. Consequently the receipt in question would be chargeable to tax as business income and not capital gains, accordingly the order of Commissioner was upheld. (A. Y. 2007-08).

*Ramesh D. Tainwala v. ITO (2011) 48 SOT 324 (Mum.)(Trib.)*

**S. 28(va) : Business income – Non-compete fees – Not retrospective**

Lump sum amount received by assessee managing Director of a company from the collaborator of the company as non compete fee under an agreement forbidding the assessee from taking up any assignment with the competitor of that company in India was a capital receipt section 28(va), can not have a retrospective operation. (A.Y. 1997-98)

*ACIT v. Ashit M. Patel (2005) 96 TTJ 439 (Mum.)(Trib.)*

**S. 28(va) : Business income – Capital on revenue receipt [S. 5(2)(a)]**

Non-compete fee is neither taxable as revenue receipt nor as capital gains, as sec. 28(va) and sec. 55(2)(a) did not apply to the year in question; the receipt, therefore, being capital receipt was not chargeable to tax.

*CIT v. Narendra D. Desai (2008) 214 CTR 190 / 1 DTR 106 (Bom.)(High Court)*

**S. 28(va) : Business income – Non-compete fees – Not retrospective – Surrendering licence and source of income – Capital receipt**

Assessee a computer engineer, had obtained a licence of Asorbic Acid Technology (AAT) along with NATO and TIDO and he received certain amount from NATAO for surrendering rights jointly held and for not carrying on similar activity, by giving up his rights to be joint owner in proposed project, assessee was permanently deprived of source of income and therefore amount received by assessee was a capital receipt and not taxable in his hands.

Section 28(va), is a substantial provision and cannot be given retrospective operation, when Legislature has not specifically said so. (A.Y. 1999-2000)

*N. Sandeep Reddy v. ACIT (2005) 95 ITD 33 / 96 TTJ 315 (Hyd.)(Trib.)*

**S. 28(va) : Business income – Non-compete – Contingent payments**

Indian Company, and its shareholders, including applicant, had entered into an agreement to transfer its entire business and share capital in favour of some foreign companies and sale consideration under agreement comprised fixed amount (closing payment), payable in lumpsum and contingent payments payable in installments by 31-3-2004, 31-3-2005 and 31-03-2006 and contingent payments are not to be made unless aggregate Earnings Before Interest, Tax, Depreciation Allowance (EBITDA) of business for applicable period equal or exceed contingent cumulative threshold EBITDA, contingent payments receivable by applicant under share purchase agreement have nexus with the performance of applicant for achieving defined target and they have no direct connection with 'not carrying out any activity in relation to any business' and therefore it follows that contingent payments do not fall under section 28 (va).

*Anurag Jain, In re (2005) 277 ITR 1 / 145 Taxman 413 / 195 CTR 117 / 277 ITR 1 (AAR)*

**S. 28(vi) : Business income – Business loss – Keyman Insurance Policy – Amendment – Finance Act, 1996 [S. 10(10D)]**

Amount received on maturity of keyman insurance policy is liable to be taxed in hands of assessee for the Asst. Year 2005-06 in view of clarificatory amendment, by the Finance (No. 2) Act, 1996, w.e.f. 1st Oct., 1996, though policy was taken earlier. (A.Y. 2005-06)

*Binjrajka Steel Tubes Ltd. v. ACIT (2011) 50 DTR 89 / 136 TTJ 113 / 130 ITD 46 (Hyd.)(Trib.)*

**Section 29 : Income from profits and gains of business or profession, how computed**

**S. 29 : Business income – Computation – Film production – Musical rights [Rule 9A]**

A perusal of Rule 9A makes it amply clear that it amortises cost of production of feature film till the feature film is certified for release; there is nothing in rule 9A to suggest that it is applicable to the sale of musical rights; charge of tax arising on income following sale of music rights cannot be defeated on ground that rule 9A amortises cost of production of feature film. (A.Y. 2001-02)

*Suneel Darshan v. ITO (2005) 2 SOT 753 (Mum.)(Trib.)*

**Section 30 : Rent, rates, taxes, repairs and insurance for buildings.**

**S. 30 : Rent rates, taxes, repairs and insurance for buildings – Repairs for buildings – Tenant – Prorata basis [S. 38]**

Assessee was a tenant of a small portion of buildings. As the building was old considerable leakage was taking place from roof. During the relevant Asst. Year, assessee incurred expenditure on repairs of roof and claimed deduction of same. The Hon'ble Court held that considering the section 38, assessee would be entitled to deduction on pro-rata basis, i.e. *qua* premises occupied by assessee and not entire expenditure. (A.Y. 1998-99)

*Danesh A. Irani of Mumbai Indian Inhabitant v. CIT (2011) 331 ITR 291 / 240 CTR 47 / (2010) 195 Taxman 97 / 52 DTR 216 (Bom.)(High Court)*

**S. 30 : Rent rates, taxes, repairs and insurance for buildings – Repairs for buildings – Building tax – Kerala Building Tax Act – Capital asset**

Building tax paid under the Kerala Building Tax Act is an expenditure being one time liability to bring capital asset into existence hence, capital expenditure. It not being municipal tax is not allowable as business expenditure under section 30(b) or under section 37(1).

*CIT v. Hotel Shah & Co. (2005) 275 ITR 195 / 146 Taxman 86 / 196 CTR 314 (Ker.)(High Court)*

**S. 30 : Rent rates, taxes, repairs and insurance for buildings – Repairs for buildings – Current expenditure – Hotel at hill station**

Expenditure incurred by hotel at hill station at regular intervals on repair and maintenance of building due to weather conditions, etc. was allowable as "current expenditure".

*CIT v. Hotel Control Pvt. Ltd. (2004) 265 ITR 109 / 136 Taxman 312 (Uttaranchal)(High Court)*

**S. 30 : Rent rates, taxes, repairs and insurance for buildings – Repairs for buildings – Renovation – Leasehold premises**

Expenses incurred in connection with renovation of lease hold premises allowed as revenue expenditure provided it is not in form of extension or improvement of the lease hold building. (A.Ys. 2002-03 to 2006-07)

*Dy. CIT v. Lazard India (P) Ltd. (2010) 41 SOT 72 (Mum.)(Trib.)*

### **Section 31 : Repairs and insurance of machinery, plant and furniture.**

#### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Maintenance [S. 37(1)]**

Expenditure consisted of dismantling, cleaning and inspection of various parts, repairs and replacement of worn out parts, geometrical alignments of machines, painting of machines, overhauling and repair of power transmission unit and replacement of electric panel. Expenditure was on account of current repairs for which deduction would be allowable under section 31(1) as well as under section 37. (A.Ys. 1994-95, 2005-06 & 2006-07)

*Bharat Gears Ltd. v. CIT (2011) 337 ITR 368 / 62 DTR 219 / 201 Taxman 86 (Delhi)(High Court)*

#### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Capital or revenue – Replacement of turbine rotor**

Expenditure on replacement of turbine rotor is revenue expenditure. Since it is a current repair. (A.Y. 1979-80)

*CIT v. Renu Sagar Power Co. Ltd. (2008) 298 ITR 94 / 169 Taxman 175 (All.)(High Court)*

#### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Capital or revenue – Replacement of machinery**

Expenditure on replacement of machinery is revenue expenditure as all plants when put together make one spinning mill which would manufacture pore. Also there was no intermediate product manufactured in the process. (A.Ys. 2000-01 to 2002-03)

*CIT v. Kandagiri Spinning Mills Ltd. (2008) 298 ITR 306 / 216 CTR 1801 / 6 DTR 123 (Mad.)(High Court)*

#### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Capital or revenue – Replacement of parts**

Where entire plant and machinery was one common unit Expenditure towards replacement of parts of machinery would be revenue expenditure. (A.Ys. 1992-93 to 2000-01)

*CIT v. Metal Powder Co. Ltd. (2008) 174 Taxman 398 / 300 ITR 48 (Mad.)(High Court)*

#### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Insurance – Motor car**

Expenditure on repairs and insurance of cars used for business is allowable under section 31.

*CIT v. Upper India Steel manufacturing and Engineering Co. Ltd. (2005) 278 ITR 583 / 199 CTR 642 / 150 Taxman 235 (P&H)(High Court)*

### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Glass curtains – Hotel**

Expenditure incurred on construction of glass curtain wall for better look of hotel building was an allowable expenditure.

*Fition Hotel v. ITO, ITA No. 7035/Mum/2003, dt. 8-3-2007 - BCAJ P. 293, Vol. 40-A, Part 3, June 2008. (Mum.)(Trib.)*

### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Hotel – Replacement of worn-out equipment**

The assessee was in hotel business and had incurred expenditure on repairs and replacement of worn-out equipment in its bar and conference room. Assessing Officer disallowed the expenditure on the ground that the expenses resulted in acquiring of new assets, like furniture, cots, fridge, TV stand, etc. Held that Assessing Officer was not justified in disallowing the expenses on the ground that expense allowable are only those which are necessitated by the wear and tear of the relevant year, but not the accumulated repairs.

(A.Y. 1999-2000)

*Dy. CIT v. Southern Paper Products Pvt. Ltd., ITA No. 395/Coch./2005, dt. 24-9-2007 – BCAJ 635, Vol. 39-E, Part 6, March 2008. (Cochin)(Trib.)*

### **S. 31 : Repairs and insurance of machinery, plant and furniture – Repairs – Replacement of pumps – Part of machinery – Current repairs**

Expenditure on replacement of pumps forming part & parcel of existing machinery is allowable as current repairs as no new asset had come into existence. (A.Y. 1994-95)

*PSM Family Trust v. Dy. CIT (2003) 127 Taxman 95 (Mag.)(Jodh.)(Trib.)*

## **Section 32 : Depreciation**

### **S. 32 : Depreciation – BSE Membership Card – Intangible asset – Bombay Stock Exchange Rules, Rr. 5, 6, 7, 9, 11, 15 and 16A – Bombay Stock Exchange Bye-Laws [S. 2(14)]**

The Tribunal held that the Membership Card of the BSE was an intangible asset and the assessee was entitled to depreciation thereon under section 32(1)(ii). The High Court reversed the Tribunal's decision and held that it was only a personal privilege to trade on the floor of the exchange and that such a privilege was not a "licence" or "any other business or commercial right of a similar nature" under section 32(1)(ii). The Supreme Court reversed the decision of the High Court and held on a consideration of the BSE Rules, that the right of membership was a "business or



commercial right" and could be said to be owned by the assessee and used for business purposes in terms of section 32(1)(ii). The right of membership, which included the right of nomination, was a "license" or "akin to licence" which was one of the items under section 32(1)(ii). The right to participate in the market had an economic and money value. It was an expense incurred by the assessee, which satisfied the test of being a "licence" or "any other business or commercial right of similar nature". Hence depreciation is allowable. (A.Ys. 1999-2000 & 2002-03)

*Techno Shares and Stocks Ltd. v. CIT (2010) 327 ITR 323 / 193 Taxman 248 / 234 CTR 105 / 44 DTR 65 (SC)*

*Editorial:- CIT v. Techno Shares & Stocks Ltd. (2010) 323 ITR 69 (Bom.) / (2009) 225*

*337 / 184 Taxman 103 / 28 DTR 201 reversed. CIT v. Techno Shares & Stocks Ltd. (2006) 101 TTJ 349 (Mum.) upheld.*

### **S. 32 : Depreciation – Manufacture of tea – Proration [S. 43(6)(b), Rule 8D]**

In case of manufacturer of tea, by virtue of rule 8D, only 40% of the income is taxed and consequently in deciding liability only proportionate depreciation is required to be taken into account as that is the depreciation actually allowed for determining WDV of Block of Asset. (A.Y. 1988-89)

*CIT v. Doom Dooma India Ltd. / CIT v. Assam Co. Ltd. (2009) 310 ITR 392 / 178 Taxman 261 / 19 DTR 177 / 222 CTR 105 / 211 Taxation 162 (SC)*

*Editorial:- See Explanation 7 inserted by the Finance (No. 2) Act, 2009 w.e.f. 1-4-2010.*

### **S. 32 : Depreciation – Option to claim – Block of assets [S. 34 (1)]**

Section 34(1) of the Income-tax Act, 1961 (for short, "1961 Act") has been omitted w.e.f.

1-4-1988. The Supreme Court, remanded the matter back to the High Court after setting aside the impugned order of the High Court on the question referred to the Court, with the direction to the High Court to consider: Whether the assessee has an option in law to claim partial depreciation in respect of block of assets as in the case of Mahendra Mills 243 ITR 56 (SC), the concept of block of assets was not there and section 34(1) of the 1961 Act stood omitted w.e.f. 1-4-1988. The High Court is also asked to consider whether the judgment of the Supreme Court in the case of Mahendra Mills (supra) would apply to the assessment years under consideration also to take into account the scope of Explanation 5 to section 32(1) of the 1961 Act, inserted by the Finance Act, 2001.

*Jt. CIT v. United Phosphorus Ltd. (2008) 10 RC 365 / 299 ITR 9 / 167 Taxman 261 / 3 DTR 61 / 204 Taxation 114 / 215 CTR 13 (SC) / 2 SCC 478*

### **S. 32 : Depreciation – Temporary Lull – Passive user**

The High Court was directed to reconsider its dismissal of appeal of assessee claiming depreciation on assets forming part of a business suspended for temporary period.

The High Court was directed to consider afresh whether depreciation was allowable on the ground of passive user.

*Nirma Credit & Capital Ltd. v. ACIT (2008) 220 CTR 537 / 16 DTR 75 / (2009) 177 Taxman 416 (SC)*

### **S. 32 : Depreciation – Trucks on hire – Business of trading in timber – Question of law**

The assessee was using the trucks owned by it in its business of timber trading but also occasionally gave the trucks for hire. On the Tribunal deciding that the assessee was eligible for higher rate of deduction, the High Court in Revenue's appeal had held that it was a question of fact and therefore refused to interfere. The Supreme Court on a petition by Revenue held that a question of law arose and that the High Court would have to decide as to whether the assessee was in the business of running trucks on hire as use of trucks in business of transportation qualifies higher depreciation. (A.Y. 1998-99)

*CIT v. Gupta Global Exim (P.) Ltd. (2008) 305 ITR 132 / 171 Taxman 474 / 7 DTR 62/ 216 CTR 368 / (2009) 208 Taxation 26 (SC)*

### **S. 32 : Depreciation – Business – Profession**

The legislature intended to have different scope for "business" and "profession" in various clauses of section 32(1). Therefore, when in erstwhile clause (iv) (now deleted) the legislature has used only "business" then the clause would not apply to "profession". Thus assessee carrying on profession is not entitled to deduction under section 32(1)(iv) (A.Y. 1984-85)

*G. K. Choksi & Co. v. CIT (2007) 295 ITR 376 / 165 Taxman 299 / 213 CTR 431 / (2008) 203 Taxation 137 (SC)*

### **S. 32 : Depreciation – Gratuity liability – Plant [S. 43(3)]**

The assessee had purchased an undertaking and along with it, taken over the accrued and future liability of gratuity to the employees. The Court held that the gratuity liability taken over formed part of the purchase consideration and was a capital expenditure as it was incurred to acquire an asset of an enduring nature, hence no depreciation would be allowed under section 32 as gratuity liability is neither building, machinery, plant or furniture nor an intangible asset under section 32(1)(ii). The word 'plant' as defined under section 43(3) would also not include gratuity liability. Therefore, gratuity liability taken over by assessee along with acquisition of an industrial undertaking, though a capital expenditure, does not fall under any of the categories of assets specified in section 32, thus no depreciation allowable. (A.Y. 1989-90)

*CIT v. Hoogly Mills Co. Ltd. (2006) 287 ITR 333 / 206 CTR 301 / 157 Taxman 347 / (2007) 196 Taxation 734 (SC)*

### **S. 32 : Depreciation – Plant – Cinema theatre – Extra shift allowance [S. 43(3)]**

Cinema Theatres are premises and not "Plant" for the purpose of depreciation and also for the extra shift allowance under sections 32 and 43(3) of the Income-tax Act, 1961. The cinema building is not a tool or an apparatus for carrying on business activity. The assessee is not entitled to depreciation and extra shift allowance applicable to a plant in relation to the cinema theatre.

*CIT v. A.B.A. Sons (2003) 264 ITR 469 / (2004) 186 CTR 77 (SC)*

### **S. 32 : Depreciation – Owned – Exercise of dominion – Possession – Wider meaning**

The term 'owned' in section 32(1) must be assigned a wider meaning anyone in possession of property in his own title exercising such dominion over the property to exclude others, and having right to use and occupy the property in his own right would be the owner for the purpose of section 32(1) though in formal deed of title many not have been extend and registered. Denial of depreciation not justified. (A.Y. 1981-82)

*Mysore Minerals Ltd. v. CIT (1999) 156 CTR 1 / 239 ITR 775 / 106 Taxman 166 (SC)*

### **S. 32 : Depreciation – Plant – Construction industry – Shuttering material**

Each item of shuttering material does not form a plant hence not entitled to 100 per cent depreciation under first proviso to section 32(1)(ii).

*CIT v. Vijaya Enterprises (2011) 332 ITR 235 / 59 DTR 98 / 243 CTR 488 / 201 Taxman 324 / Tax L.R. 497 (AP)(High Court)*

### **S. 32 : Depreciation – Non user of asset – Block of assets [S. 2(11)]**

The assessee claimed depreciation under section 32 in respect of the assets at its Bhopal unit which was closed for six years. The claim was on the basis that (1) despite closure of the unit there was a "passive user" assets were part of the "Block of assets", and depreciation could not be disallowed. Assessing Officer and CIT(A) rejected the claim. Tribunal upheld the claim. On appeal to High Court, the Court held that despite non-user of assets, depreciation is allowable, if it is part of "Block of assets." (A. Y. 1998-99)

*CIT v. Oswal Agro Mills Ltd. (2011) 50 DTR 305 / 238 CTR 113 / 197 Taxman 25 (Delhi)(High Court)*

### **S. 32 : Depreciation – Asset used by the firm belong to partner – Insurance on building**

Assessee is not entitled to depreciation on factory building owned by it but used in business of firm in which assessee was partner. Insurance charges paid on said building also not allowable. (A. Y. 2005-2006).

*Karan Raghav Export (P) Ltd. v. CIT (2011) 196 Taxman 504 / 49 DTR 327 (Delhi)(High Court)*

### **S. 32 : Depreciation – Approach road – Inside factory – Building**

Approach road constructed by the assessee inside its factory premises should be treated as part of building as such, depreciation has to be allowed on the same.

*CIT v. Sunshine Glass Indus P. Ltd. (2011) 49 DTR 31 (Raj.)(High Court)*

### **S. 32 : Depreciation – Fluctuation in foreign exchange – Unpaid outstanding liability**

The Assessing Officer partly disallowed the claim for depreciation calculated on the basis of increased value of assets of the assessee on account of fluctuation of foreign exchange rates. The CIT(A) held that the assessee is following mercantile system of accounting and allowed the claim on the balance outstanding liability. The High Court and Tribunal affirmed the same and also referred to the judgments in the case of *CIT v Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC)* and *Oil and Natural Gas Corporation Ltd. (ONGC) v. CIT (2009) 322 ITR 180*, wherein it was held that increase and decrease in liability in the repayment of foreign loan should be taken into account to modify the figure of actual cost in the year in which the increase or decrease in liability arises on account of fluctuation in rate of exchange. (A. Y. 1998-99).

*CIT v. National Hydroelectric Power Corpn. Ltd. (2011) 332 ITR 322 (P&H)(High Court)*

### **S. 32 : Depreciation – Assets in the name of managing director – Exclusive use by company**

Depreciation under section 32 was allowable to the assessee company on the assets which were purchased in the name of the managing director of the assessee company and his wife but, used exclusively for the assessee's business. (A. Y. 2004-05).

*CIT v. Metalman Auto P. Ltd. (2011) 199 Taxman 149 (Mag.) / 52 DTR 385 / 336 ITR 434 (P&H)(High Court)*

### **S. 32 : Depreciation – Leasing of vehicles – Higher rate of depreciation**

Assessee company engaged in business of leasing of motor vehicles, etc. to its clients is not entitled to higher rate of depreciation. The basic requirement for being entitled to depreciation at higher rate of 50 percentage under Entry No. 111(2)(ii) of Appendix-I to Income Tax Rules is user of vehicles in business of transportation or business of hire. (A.Ys. 1989-90 to 1992-93).

*Bhagwati Appliances v. ITO (2011) 337 ITR 286 / 199 Taxman 131 (Guj.)(High Court)*

### **S. 32 : Depreciation – Actual cost – Customs duty under protest**

Where the assessee paid custom duty under protest on imported machinery, the assessee would be entitle to add the same to the cost of the plant and machinery for computing depreciation thereon. (A. Y. 2005-06)

*CIT v. Orient Ceramics & Industries Ltd. (2011) 200 Taxman 64 (Mag.) / 56 DTR 397 (Delhi)(High Court)*

### **S. 32 : Depreciation – User of asset – Kept ready for production**

Where the plant and machinery were kept ready for production, the assessee would be entitled to claim depreciation even though such plant and machinery were not actually put to use by the assessee during the year. (A. Y. 1995-96).

*CIT v. Shahbad Co-operative Sugar Mill Ltd. (2011) 56 DTR 414 (P&H)(High Court)*

### **S. 32 : Depreciation – Poultry shed – Not a ‘plant’**

Poultry shed is a building and not a ‘plant’, as such not eligible for higher rate depreciation as applicable to plant and machinery. (A.Ys. 1991-92 & 1992-93).

*CIT v. Padmavathi Hatcheries (P) Ltd. & Ors. (2011) 335 ITR 325 / 241 CTR 171 / 55 DTR 105 (AP)(High Court)*

### **S. 32 : Depreciation – Intangible asset – Goodwill – Depreciation allowable**

The assessee had purchased a hospital with its land, building, equipment, staff, name, trademark and goodwill as a going concern. Under the sale deed the value of the goodwill included the name of the hospital, its logo and trademark was 2 crores. The Assessing Officer disallowed the depreciation on the goodwill on the ground that it was not covered under section 32(1)(ii). The CIT(A) and Tribunal held in favour of the Department. On appeal to the High Court by the assessee, the High Court while allowing the appeal held that though goodwill is not specifically mentioned in section 32(1)(ii) of the Income-Tax Act, depreciation is allowable not only on tangible assets covered by clause (i) of section 32(1), but also on the intangible assets specifically enumerated in clause (ii) and such other business or commercial rights similar to the items specifically covered therein. The High Court held that, by transferring the right to use the name of the hospital itself, the previous owner had transferred the goodwill to the assessee and the benefit derived by the assessee was a retention of continued trust of the patients who were patients of the previous owner. The amount paid for the goodwill for ensuring retention and continued business to the hospital, was one for acquiring business and commercial rights and the same was comparable with trademark, franchise, copyright, etc., the High Court held that goodwill was covered by the provisions of section 32(1)(ii) entitling the assessee for depreciation. (A.Y. 2004-05).

*B. Raveendran Pillai v. CIT (2011) 332 ITR 531 / 237 CTR 80 / 194 Taxman 477 / 47 DTR 81 (Ker.)(High Court)*

### **S. 32 : Depreciation – Lease back – 100% depreciation on sale and lease back allowable**

Depreciation on asset purchased from and leased back to RSEB allowed.

*CIT v. Rajasthan State Electricity Board (2006) 204 CTR 415 / (2007) 160 Taxman 9 (Raj.)(High Court)*

### **S. 32 : Depreciation – Sale and lease back – Avoidance – Allowable**

The assessee purchased equipment from the Haryana State Electricity Board (“HSEB”) which was already installed at the Board’s Thermal Power Station at Faridabad and immediately leased the equipment back to the HSEB. The assessee



claimed 100% depreciation on the said equipment. The Assessing Officer disallowed depreciation on the ground that the transaction was not one of purchase and lease but was a pure financial and loan transaction.

The Hon'ble High Court held dismissing the department appeal that:

- (i) The real intention of the parties in entering into the sale and lease agreement has to be gathered from the words in the agreement in a tangible and in an objective manner and not upon a hypothetical assessment of the supposed motive of the assessee to avoid tax. (*Industrial Development Corporation of Orissa Ltd. v. CIT* (2004) 268 ITR 130 (Ori.), *CIT v. Rajasthan State Electricity Board* (2004) 204 CTR 415 (Raj.) and *CIT v. Gujarat Gas Company Ltd.* (2009) 308 ITR 243 (Guj.) followed);
- (ii) In order to deny the claim of depreciation, it would have to be held that the transaction was not genuine and that the same was a subterfuge. Merely because an assessee gets a commercial advantage because of the factoring in of a tax benefit, it cannot be said that the transaction is not genuine. There is no finding or evidence to indicate that the transaction was not genuine. The observations of *Chinappa Reddy, J in McDowell & Co Ltd. v. CTO* (1985) 154 ITR 148 is not good law in view of *UOI v. Azadi Bachao Andolan* (2003) 263 ITR 706 (SC) where it was held that "tax planning may be legitimate provided it is within the framework of law";
- (iii) The observations in *Asea Brown Boveri Ltd. v. Industrial Finance Corporation of India* (2004) 126 Comp. Cas. 332 (SC) with regard to the nature of a financial lease are not of much use to the revenue in view of the factual backdrop that the transaction has been found to be genuine. Once it is established that the ownership of the equipment is that of the assessee, it is clear that the assessee is entitled to claim depreciation. (A. Y. 1996-97)

*CIT v. Cosmo Films Ltd.* (2011) 338 ITR 266 / 59 DTR 153 / 200 Taxman 384 / 245 CTR 23 (Delhi)(High Court)

## **S. 32 : Depreciation – Gas cylinder – Rate – Mounted on a chassis of a truck – Appendix-1**

Liquefied gas cylinder mounted on the chassis of the truck is for all purposes a gas cylinder including valves and regulators as defined in Appendix 1 item III (ii) F (4) of the Income Tax Rules and therefore depreciation at 100 per cent was allowable, instead of 40 per cent applicable to transport vehicles.

*CIT v. Anantha Gas Suppliers* (2011) 335 ITR 334 / 59 DTR 116 / 242 CTR 488 (FB)(AP)(High Court)

## **S. 32 : Depreciation – Unabsorbed – Carry forward and set off**

Provisions of section 32(2) as amended w.e.f. 1st April, 1997 permit set off of brought forward unabsorbed depreciation firstly against the business profits and then against income under any other head in A.Y. 1997-98 and subsequent assessment years for a period of eight years, therefore unabsorbed depreciation for the period up



to assessment year 1996-97 could be brought forward and set off against income chargeable under the head income from other sources. (A.Ys. 1998-99 to 2002-03).

*CIT v. Kirti Resorts (P) Ltd. (2011) 60 DTR 138 / 243 CTR 341 (HP)(High Court)*

### **S. 32 : Depreciation – Unabsorbed depreciation – Exempt incomes – EOU [S. 10B]**

Deduction under section 10B, has to be granted with reference to the profit of the industrial unit computed under the provisions of the Act, which includes set off of unabsorbed depreciation carried forward from earlier years. (A.Ys. 2001-02 to 2005-06).

*CIT v. Patspin India Ltd. (2011) 62 DTR 364 / 245 CTR 97 / 203 Taxman 47 (Ker.)(High Court)*

### **S. 32 : Depreciation – Genuineness of purchase – Survey – Disclosure – Revised return – Retraction [S. 133A]**

During survey, assessee admitted that computer software and hardware were not purchased by it, and it filed a revised return withdrawing the claim of depreciation and offered to tax. Thereafter the assessee filed an affidavit retracting the statement made during the course of survey. The Tribunal recorded the finding of fact that during the course of survey neither the assets were found nor the assessee could establish names of the parties from whom computer software and computer hardware were purchased. High Court confirmed the order of Tribunal. (A. Y. 2001-02).

*B.D.P.S. Software Ltd. v. Dy. CIT (2011) 62 DTR 361 / 245 CTR 19 / (2012) 340 ITR 375 (Bom.)(High Court)*

### **S. 32 : Depreciation – Goodwill – Assignment**

Assessee company acquired cement plant from company C for ` 105.30 crores. Assessing Officer noted that 10 per cent of purchase price represented goodwill and on that basis he disallowed depreciation on ` 10.53 crores. On appeal, Commissioner (Appeals) held that no value could be assigned to good-will and entire sale consideration was to be reduced from value of block of assets on ground that transferor company was established five years ago and through this period it was a loss making unit and thus had no goodwill. The Court held that since cement plant purchased was a loss making unit from its commencement of business and no value was assigned in respect of brand name as well as goodwill. Assessing Officer was not justified in deducting 10 per cent towards estimated value of goodwill from total purchase consideration and disallowing proportionate depreciation. (A.Y. 1991-92).

*CIT v. India Cements Ltd. (2011) 203 Taxman 119 / 339 ITR 31 (Mad.)(High Court)*

### **S. 32 : Depreciation – Ownership – Hire purchase**

Hirer of an asset under hire purchase agreement is entitled to depreciation in view of the CBDT Circular No. 9 dt. 23-3-1943 (C & P Vol. 10. p. 537 -538 4th Edition). (A. Y. 1995-96)

*CIT v. Kaveri Engineering Industries Ltd. (2011) 53 DTR 102 (Mad.)(High Court)*

### **S. 32 : Depreciation – User for business – New aircraft ready for the use**

Assessee obtained delivery of the new aircraft purchased by it in the latter half of the relevant previous year and got the same insured, it was held that the aircraft was made ready to use in business, hence, depreciation was allowable. (A. Y. 1998-99) *Elh Ltd v. CIT (2011) 54 DTR 249 (Cal.)(High Court)*

### **S. 32 : Depreciation – Discontinuance of business – Hotel**

Assessee company did not do any hotel business after its hotel building was washed away in floods in September, 1995. However, assessee company being a juristic entity incorporated under the Companies Act, did not cease to exist. Since, it has to fulfil its obligations imposed by Companies Act till it is wound up some staff has to be maintained. Therefore, once the assessee company is in existence, it is entitled to depreciation though it has discontinued its business. (A.Ys. 1998-99 to 2002-03). *CIT v. Kirti Resorts (P) Ltd. (2011) 60 DTR 138 / 243 CTR 341 (HP)(High Court)*

### **S. 32 : Depreciation – Intangible asset – Abkari licence**

Abkari licence is a business right given to the party to carry on liquor trade, on which the assessee is entitled to depreciation at 25 percent. It falls within the definition of intangible asset as per section 32(1)(ii). (A.Y. 2004-05).

*Ambika (S) v. Dy. CIT (2011) 245 CTR 103 / 62 DTR 289 / 203 Taxman 2 (Mag.)(Ker.)(High Court)*

### **S. 32 : Depreciation – Charitable trust [S. 11]**

Assessee charitable trust is entitled claim for depreciation on the assets owned by it. If depreciation is not allowed as a necessary deduction in computing the income of a charitable trust, then there would be no way to preserve the corpus of trust. (A.Ys. 2004-05 to 2006-07).

*CIT v. Shri Gujarati Samaj (Regd.) (2011) 64 DTR 76 (MP)(High Court)*

### **S. 32 : Depreciation – Asset purchased in the name of Director – Company's funds**

Asset (Trucks) purchased in the name of director of the assessee (a company) just for convenience and the funds for purchase of trucks had been invested by assessee. Income from trucks was offered for tax by assessee company. Held depreciation cannot be denied.

*CIT v. Varanasi Auto Sales Pvt. Ltd. (2011) 238 CTR 107 / 221 Taxation 147 / (2010) 326 ITR 182 / 190 Taxman 60 / 43 DTR 115 (All.)(High Court)*

### **S. 32 : Depreciation – Financing of vehicles – User in business**

If the assessee have merely financed the vehicles and borrowers are registered owners of such vehicles it would be a loan transaction and in such case the assessee will not be entitled to depreciation on such vehicles, on the other hand, if the vehicles are purchased by the assessee and has retained their ownership with

registration in his name and the vehicles were either given on lease or given under hire purchase agreement giving an option to the hirer to purchase if after the payment of lease rentals or hire charges during the agreed period, then the assessee will be entitled to depreciation, matter remanded for reconsideration.

*CIT v. Manappuram Central Finance & Leasing Ltd. (2010) 46 DTR 323 / 236 CTR 518 / 191 Taxman 313 (Ker.)(High Court)*

### **S. 32 : Depreciation – Earth moving equipment – Higher rate**

Earth moving equipment namely JCB is eligible depreciation at 40% which rate is provided for “Motor Buses, Motor Lorries, Motor Taxis” which is used in the business of running them on hire.

*CIT v. Gaylord Constructions, Kachappilly House, Angamaly (2010) 40 TAX L.R. 85 (Ker.)(High Court)*

### **S. 32 : Depreciation – Ownership of asset – Complete owner – Beneficial owner**

Owner is a person who is entitled to receive income from the property in his own right. In order to claim benefit of section 32 it is not necessary that the assessee should be a complete owner. The buses on which the assessee had claimed depreciation were not registered in her name, however the assessee produced all the documents relating to loans obtained, insurance etc. relating to the business to establish that she was beneficial owner and received income. It was held she was entitled to depreciation. (A.Y. 2002-03)

*CIT v. A. Sivakami & Anr. (Smt.) (2010) 322 ITR 64 (Mad.)(High Court)*

### **S. 32 : Depreciation – Canteen – Factory building**

Canteen for workers inside factory premises, constitutes factory building. Entitled to higher rate of depreciation applicable to factory building.

*CIT v. Bajaj Auto Ltd. (2010) 322 ITR 29 / (2009) 20 DTR 241 / 182 Taxman 163 (Bom.)(High Court)*

### **S. 32 : Depreciation – Enhancement of cost – Foreign Currency – Investment Allowance**

Assessee is entitled to claim depreciation and investment allowance on increased cost of plant and machinery resulting from increase in liability to repay foreign currency loans taken for purchase of such plant and machinery. (A.Y. 1988-89)

*Century Enka Ltd. v. ACIT (2010) 323 ITR 86 / 188 Taxman 382 / 223 ITR 475 / (2009) 22 DTR 223 (Cal.)(High Court)*

### **S. 32 : Depreciation – Extra shift allowance – Entire plant**

Where extra shift allowance has to be calculated, it is not in respect of any particular item or machinery. If any portion of the plant has worked extra shift, then benefit would be available in respect of entire plant except items specifically marked N.E.S.A.

on excluded in Appendix I Part I of Income Tax Rule, 1962. (A.Ys. 1982-83 to 1985-86)

*CIT v. Shivalik Hatcheries (2010) 329 ITR 432 / 186 Taxman 79 / (2009) 222 CTR 299 / (2008) 9 DTR 154 (HP)(High Court)*

### **S. 32 : Depreciation – Investment allowance – Stand by spare parts [S. 32A]**

Depreciation and investment allowance are allowable on standby spare parts, even though they were not taken for use during the year. (A.Ys. 1989-90 to 1992-93)

*CIT v. SPIC Ltd. (2010) 37 DTR 177 (Mad.)(High Court)*

### **S. 32 : Depreciation – Lease of machinery – Business – Installation by lessee**

Assessee carrying on business of leasing is entitled to claim the depreciation, as soon as the machinery is leased and the lease rent is received, whether lessee has installed the machinery or not is immaterial. (A.Y. 1992-93)

*CIT v. Kotak Mahindra Finance Ltd. (2010) 191 Taxman 280 / 227 CTR 596 / 317 ITR 236 / 23 DTR 299 (Bom.)(High Court)*

### **S. 32 : Depreciation – Block of assets – Individual machinery [S. 2(11)]**

Once it is found that assets are used for business, it is not necessary that all the items falling within the block of assets have to be simultaneously used for being entitled to depreciation. In case of block of assets it is not possible to segregate items within the block for the purpose of allowing or prohibiting depreciation. (A.Y. 1988-89)

*CIT v. Sonal Gum Industries (2010) 42 DTR 159 / 322 ITR 542 / 233 CTR 516 (Guj.)(High Court)*

### **S. 32 : Depreciation – Foreign made cars used abroad – Admissible**

Depreciation is admissible on foreign cars used at foreign sites for assessee's business. (A.Ys. 1980-81, 1981-82)

*CIT v. Punjab Chemi. Plants Ltd. (2010) 43 DTR 322 / 235 CTR 204 (P&H)(High Court)*

### **S. 32 : Depreciation – Assets written off – Used for purpose of business**

Actual use of the machinery is not required with respect to discarded machinery as condition for eligibility for depreciation. The machinery "used for the purpose of the business" would mean that the discarded machinery was used for the purpose of the business in the earlier years for which depreciation has been allowed. Thus depreciation was allowed on discarded machinery after writing off of the scrap value of machines from the written down value of block of assets. (A.Ys. 2000-01, 2001-02)

*CIT v. Yamaha Motor India Pvt. Ltd. (2010) 328 ITR 297 / (2009) 226 CTR 304 / 28 DTR 237 / 183 Taxman 291 (Delhi)(High Court)*

*Editorial:- SLP of department rejected (2010) 328 ITR (St) 10*

### **S. 32 : Depreciation – Trial run – Plant and machinery**

Assessee is entitled to claim depreciation on plant and machinery even if it is used during the year for trial production. (A.Y. 1987-88)

*CIT v. Mentha & Allied Products (2010) 326 ITR 297 / 47 DTR 284 / 236 CTR 329 (All.)(High Court)*

### **S. 32 : Depreciation – Windmill – Discharging Loan**

Where the assessee had taken over the possession of the windmill from its sister concern, discharged the loan taken thereon by the sister concern against the windmill, the income from the windmill was assessed in assessee's hand, also the sister concern had declared capital gain on the sale of windmill which was accepted by Department, the assessing officer cannot deny the assessee's claim of depreciation on the windmills. (A.Ys. 1997-98, 1998-99)

*CIT v. Kences Constructions (P) Ltd. (2010) 47 DTR 198 / 236 CTR 503 (Mad.)(High Court)*

### **S. 32 : Depreciation – Block of assets – Individual user [S. 2(11)]**

As per section 32(1) the asset is to be owned and "used" for the purpose of business or profession. The expression "used for the purpose of business" when applied to block asset would mean use of block asset and not any specific items in the said block as individual assets have lost their identity after becoming inseparable part of the block asset.

*CIT v. Bharat Aluminium (2010) 187 Taxman 111 (Delhi)(High Court)*

### **S. 32 : Depreciation – Additional – Windmills**

Windmills installed for electricity generation which did not increase plant capacity and which was not the core business, additional depreciation is allowable. For 32(1)(ia) to be applicable the condition to be satisfied is that the asset should have been acquired or installed after 31-3-2002 by an assessee already engaged in business of manufacture or production of any article or thing. (A.Y. 2003-04)

*CIT v. Texmo Precision Castings (2010) Taxation 468 / 321 ITR 481 (Mad.)(High Court)*

### **S. 32 : Depreciation – Initial depreciation – Construction of new residential quarters**

Considering the dictionary meaning of the term "building" along with the purpose for which the provision of section 32(1)(iv) was enacted, namely, to afford incentives to business to construct building for housing lowly paid employees, the Tribunal was right in holding that the assessee was entitled to initial depreciation under section 32(1)(iv) in respect of new residential quarters.

*CIT v. Modi Industries Ltd. (2010) 48 DTR 364 / 327 ITR 570 (Delhi)(High Court)*

### **S. 32 : Depreciation – Workers quarters – Given on lease**

Workers quarters were leased out by the assessee along with the plant, the income from lease of plant was assessed as business income, the assessee was entitled to depreciation at the rate of forty per cent (40%) on the workers quarters leased out by the assessee along with the plant under section 32(1)(iv). (A.Ys. 1984-85, 1985-86) *CIT v. Rieta Biscuit Co. P. Ltd. (2009) 32 DTR 89 / 228 CTR 401 / 320 ITR 521 / 190 Taxman 188 (P&H)(High Court)*

### **S. 32 : Depreciation – Audit report – Revised return**

Assessee's claim for additional depreciation cannot be disallowed on the ground that the audit report in Form No. 3AA for claiming additional depreciation was not furnished along with the original return but the same was filed along with the revised return which was filed within time.

*CIT v. Sharda Motor Industrial Ltd. (2009) 30 DTR 260 / 227 CTR 606 / 319 ITR 109 / 189 Taxman 211 (Delhi)(High Court)*

### **S. 32 : Depreciation – Notional depreciation – Agricultural activities [S. 43(6)]**

Where certain assets were used by the assessee for its agricultural activities on which no depreciation was claimed or allowed to the assessee in earlier years, written down value of the assets is to be taken as original value of the assets without reducing notional depreciation deemed to be allowed in earlier years. (A.Ys. 2001-02, 2002-03)

*CIT v. Hybrid Rice International P. Ltd. (2009) 30 DTR 217 / 320 ITR 63 / 185 Taxman 25 (Delhi) (High Court)*

### **S. 32 : Depreciation – Condition precedent – Use of machinery – Defective machineries**

Machinery found defective during trial run. When the assessee *bona fide* installs machinery and it becomes defective and non-functional, it cannot be said that it is not put to use for the purpose of business. Depreciation is allowable. (A.Y. 1992-93)

*CIT v. Chamundeshwari Sugar Ltd. (2009) 309 ITR 326 / 223 CTR 423 / 183 Taxman 285 / 21 DTR 175 (Karn.)(High Court)*

### **S. 32 : Depreciation – Dumper – Higher rate**

Where a civil contractor was required to transport earth from one place to another and its business receipt includes charges for transportation of such earth, the assessee was entitled to higher rate of depreciation on trucks / dumper. (A.Ys. 1991-92, 1996-97)

*CIT v. S.C. Thakur & Bros. (2009) 18 DTR 271 / 221 CTR 779 / 322 ITR 463 / 180 Taxman 348 (Bom.)(High Court)*

### **S. 32 : Depreciation – Ready to use – Spare parts**

As per S. 32 the expression "used for purpose of business" also includes emergency spares related to fixed assets. In case of emergency spare parts the concept of passive



user comes into picture. Assessee is entitled to claim depreciation on emergency spare parts of machinery, which are kept ready for use but, were not actually used during the relevant year. (A.Y. 2000-01)

*CIT v. Insilco Ltd. (2009) 20 DTR 65 / 222 CTR 641 / 320 ITR 322 / 179 Taxman 55 (Delhi)(High Court)*

### **S. 32 : Depreciation – Expenses – Training fee before installation of plant to be capitalised**

The expenses incurred by assessee towards training fees of its personnel before setting up of plant were to be capitalized as part of plant and machinery and depreciation was to be allowed in respect of the same. (A.Y. 1996-97)

*CIT v. Gujarat Guardian Ltd. (2009) 177 Taxman 434 / 222 CTR 526 / 19 DTR 75 (Delhi)(High Court)*

### **S. 32 : Depreciation – Leasing – Motor trucks and lorries**

The assessee engaged in the business of leasing out motor trucks and lorries, is entitled to depreciation at the rate of 40 per cent on such leased out vehicles. (A.Y. 1996-97).

*Agarwal Finance Co. (P) Ltd. v. CIT (2009) 28 DTR 102 / 332 ITR 549 (Cal.)(High Court)*

### **S. 32 : Depreciation – Sale and lease back transaction – Tax avoidance**

Assessee having sold the machinery and then acquired the same on lease and lease rental was also paid, it could not be said that transaction was sham or a device, and therefore depreciation was allowable.

*CIT v. Punjab State Electricity Board (2009) 30 DTR 153 / 230 CTR 302 / 320 ITR 469 / 183 Taxman 419 (P&H)(High Court)*

### **S. 32 : Depreciation – Decoders given to cable operator on loan – Business**

The decoders given on loan to the cable operators formed part of business of the assessee engaged in distribution of satellite channels and signals relating to satellite channels. Hence, provisions of section 32 are applicable and entitled to depreciation. (A.Y. 2001-02)

*CIT v. Turner International India (P) Ltd. (2008) 166 Taxman 22 / 297 ITR 373 / 217 CTR 398 / 9 DTR 21 (Delhi)(High Court)*

### **S. 32 : Depreciation – Estimation of net profit – Statutory deduction**

Depreciation being a statutory deduction should be allowed as deduction even if the net profit rate was applied in assessee's case by the Assessing Officer.

*CIT v. Pran Nath Gupta (2008) 202 Taxation 439 (P&H)(High Court)*

### **S. 32 : Depreciation – Plant – 'Studio building' – Plant**

The Hon'ble Court after referring to the decisions *CIT v. Navodaya (2004) 271 ITR 173 (Ker.)* and *CIT v. Anand Theatres (2000) 244 ITR 192 (SC)* held that it can be

said that if building is a normal structure, it would not be entitled to depreciation as 'plant' irrespective of whether it is used for film shooting or not. But, if the building is flexible one and can be modified or adjusted to suit requirement of any film shooting or occasions then it can be called a plant.

*CIT v. M. Mani (2008) 174 Taxman 333 / 218 CTR 319 / 10 DTR 189 (Ker.)(High Court)*

### **S. 32 : Depreciation – Registration – Insured – Leased**

Where the tankers were duly registered, insured and leased out by the assessee depreciation cannot be disallowed on the tanker on the ground that the same were not put to use during the previous year. (A.Y. 1997-98)

*CIT v. K. K. Enterprises (2008) 13 DTR 289 / 178 Taxman 187 (Raj.)(High Court)*

### **S. 32 : Depreciation – Undivided – Shipping – Barge**

The assessee, engaged in shipping business, owned a barge which was included in the block of assets. The barge met with an accident and sank on 6.3.2000 (A.Y. 2000-01). As efforts to retrieve the barge were uneconomical, the barge was sold on as-is-where-is in May 2001 (A.Y. 2002-03). As the barge was non-operational and not used for business at all in A.Y. 2001-02, the Assessing Officer denied depreciation.

The Tribunal held that individual assets had lost their identity and only the "block of assets" had to be considered. It was held that the test of "user" had to be applied upon the block of assets as a whole and not on individual assets.

High Court dismissed the revenue's appeal.

*CIT v. G. R. Shipping, ITA No. 598 of 2009, dated 28th July, 2009 Source: www.itatonline.org (Bom.)(High Court)*

### **S. 32 : Depreciation – Less than ` 5,000/- – Part of machinery**

Where cost of individual part of machinery is less than ` 5,000/-, 100 per cent depreciation is allowable on each individual part.

*CIT & Anr. v. Jhunjhunwala Vanaspati Ltd. (2008) 11 DTR 21 (All.)(High Court)*

### **S. 32 : Depreciation – Poultry shed – Plant**

Poultry shed constitutes plant, which is eligible for depreciation @25 per cent. (A.Y. 1996-97)

*V. N. Dubey v. CIT (2008) 10 DTR 175 (MP)(High Court)*

### **S. 32 : Depreciation – Poultry shed – Investment allowance [S. 32A]**

Poultry shed specifically designed is a plant which is entitled to both depreciation and investment allowance. (A.Ys. 1982-83 to 1985-86)

*CIT v. Shivalik Hatcheries P. Ltd. (2008) 9 DTR 154 / (2009) 222 CTR 299 / (2010) 329*

*432 / 186 Taxman 79 (HP)(High Court)*

ITR

### **S. 32 : Depreciation – Building – Registered**

Depreciation under section 32 of the Act cannot be denied to the assessee on the building purchased by the assessee only on the ground that the building acquired by him was not registered as required under the Registration Act, when under the agreement for purchase of building the assessee had made substantial payment to the seller and also taken possession of the premises. (A.Y. 1989-90)

*Deepak Nitrite v. CIT (2008) 7 DTR 313 / 220 CTR 374 / 307 ITR 289 / 175 Taxman 230 (Guj.) (High Court)*

### **S. 32 : Depreciation – Higher rate – Commercial vehicles on hire purchase basis**

The assessee-company, which carried on the business of leasing out commercial vehicles on hire purchase basis, claimed depreciation at 40 per cent on all the leased out commercial vehicles. The Assessing Officer disallowed the claim and restricted the depreciation to 24 per cent on the ground that the assessee-company itself had not utilized the commercial vehicles on hire.

It was held, that the assessee was entitled to the higher rate of depreciation.

The Supreme Court has granted special leave to the Department to appeal against this judgment : see [2008] 299 ITR (St.) 92-Ed.] (A.Y. 2000-01)

*CIT v. Shiva Tex Yarn Ltd. (2008) 302 ITR 20 (Mad.) (High Court)*

### **S. 32 : Depreciation – Unabsorbed depreciation – Set off against capital gains**

Assessee company claimed set-off of capital gains against brought forward unabsorbed depreciation on ground that as per amended provisions of section 32(2) with effect from 1-4-1997, cumulated unabsorbed depreciation brought forward as on 1-4-1997 could be set off against income under any other head for assessment year 1997-98 and seven subsequent years. Assessing Officer rejected assessee's claim and brought capital gains to tax. In view of amendment to section 32 with effect from 1-4-1997, Tribunal held that assessee was entitled to set off of unabsorbed depreciation brought forward as on 1-4-1997 against capital gains of relevant assessment year. Tribunal also remitted case to the Assessing Officer to calculate the amount of depreciation available till 1-4-1997 that would be included in assessee's income, to give effect to Tribunal's finding. (A.Y. 2000-01)

*CIT v. Pioneer Asia Packing (P) Ltd. (2008) 170 Taxman 127 / 214 CTR 202 / (2009) 310*

*ITR*

*198 / (2008) 1 DTR 193 (Mad.) (High Court)*

### **S. 32 : Depreciation – Meaning of 'put to use' – 'to exploit'**

Sec. 32(1) of the I.T. Act 1961, uses the expression "put to use". If the expression "put to use" is given the meaning as defined in the dictionary, then the block of assets acquired by the assessee during the previous year is applied or employed for the purpose of business of the assessee in that previous year for 180 days would make the assessee eligible for full depreciation. Thus "put to use" does not mean "to exploit." (A.Y. 1993-94)

*SIV Inds. Ltd. v. Dy. CIT (2008) 306 ITR 114 / 178 Taxman 442 (Mad.) (High Court)*

### **S. 32 : Depreciation – Higher rate on vehicles run on hire – Hotel business**

The assessee a hotelier cannot be denied higher rate of depreciation on the cars given on hire to the customers using the assessee's hotel services on the ground that the dominant business of the assessee is of running hotels. He is also entitled to claim depreciation for cars manufactured outside India. (A.Ys. 1990-91, 1991-92 & 1995-96)

*CIT v. Lake Palace Hotels and Motels (P.) Ltd. (2007) 159 Taxman 320 / (2006) 206 CTR 620 / 286 ITR 589 (Raj.) (High Court)*

### **S. 32 : Depreciation – Transformers – Electric sub-station**

Transformers, electric sub-station, generators, weighing machine are eligible for extra shift allowance as the above machineries and equipments are part of plant and machinery and installed for the purpose of business of manufacture of an article or thing. (A.Y. 1982-83)

*CIT v. Mahavir Spinning Mills Ltd. (2007) 197 Taxation 540 / (2008) 171 Taxman 371 (P&H) (High Court)*

### **S. 32 : Depreciation – User of assets – Stand by vehicle**

Assessee is entitled to claim depreciation on vehicle kept as standby to be used in case of breakdown/emergency situation. (A.Y. 1990-91)

*CIT v. Raj Kumar Singh & Co. (2007) 210 CTR 483 / 295 ITR 81 / (2008) 167 Taxman 301 (All.) (High Court)*

### **S. 32 : Depreciation – Additional depreciation on computers in office premises – Industrial premises**

The assessee was held entitled to additional depreciation on computers installed in office premises used for industrial premises for the following functions :

- (a) data processing
- (b) system designing
- (c) software development and supply.

If office premises are used as "industrial premises" for carrying out either of the above activities, then the computers installed for either of such purposes would constitute plant and machinery and not just office equipments. (A.Ys. 1985-86 to 1987-88)

*CIT v. Statronics & Enterprises (P) Ltd. (2007) 165 Taxman 153 / 288 ITR 455 / 207 CTR 96 (Guj.) (High Court)*

### **S. 32 : Depreciation – Forex fluctuations on last day of previous year – Rate fluctuation**

The assessee was entitled to increased claim of depreciation on increased liability due to foreign exchange rate fluctuation on the last date of previous year.

*CIT v. Honda Sielpower Products Ltd. (2007) 164 Taxman 275 (Delhi) (High Court)*

### **S. 32 : Depreciation – Hotel building – Rate**

Even though a part of hotel building is used for residence of employees and another let out to bank and shops, the entire hotel building has to be treated as a composite building entitled to depreciation @ 20 per cent, as providing accommodation to officer and staff was part of service of functional character of hotel. Also letting out of shops would form part of hospitality service to its travellers. (A.Ys. 1990-91 to 1992-93)

*CIT v. Sangu Chakra Hotels (P) Ltd. (2007) 212 CTR 215 / 292 ITR 591 / 161 Taxman 257 (Mad.) (High Court)*

### **S. 32 : Depreciation – Leased assets – Gas cylinders**

Where assets leased out, namely gas cylinders and spindles, each gas cylinder and spindle be treated as plant and hence 100% depreciation on each of them is allowable. Under section 32(1)(ii), proviso on gas cylinder (A.Ys. 1994-95, 1997-98)

*CIT v. Synergy Financial Exchange Ltd. 2007 TLR 770 / (2007) 165 Taxman 67 / 288 ITR 366 / (2006) 205 CTR 481 (Mad.) (High Court)*

### **S. 32 : Depreciation – Roads – Culverts inside factory – Storage tank**

Roads and culverts in factory premises and pipelines are treated as building. Hence, higher rate of depreciation is not allowable. However, storage tank can not be treated as plant for purpose of depreciation (A.Y. 1978-79)

*CIT v. MICO Ltd. (2007) TLR (Oct.) 622 / 163 Taxman 510 / 209 CTR 377 (Karn.) (High Court)*

### **S. 32 : Depreciation – Trial production – Sugar factory**

Assessee having used the plant for manufacture of sugar during the relevant assessment year, was eligible for depreciation though production had commenced on 23rd February. (A.Y. 1996-97)

*CIT v. Piccadily Agro Industries Ltd. (2009) 311 ITR 24 / (2007) 212 CTR 505 / 164 Taxman 567 (P&H) (High Court)*

### **S. 32 : Depreciation – User for business – Active or Passive**

Lessee having failed to use the film roll due to strike in film industry, there was passive user and thus assessee, lessor was entitled to depreciation on the film roll. (A.Y. 1997-98)

*CIT v. Heera Financial Services Ltd. (2007) 212 CTR 532 / (2008) 298 ITR 245 / 169 Taxman 192 (Mad.) (High Court)*

### **S. 32 : Depreciation – Machinery – Kept ready for use**

Where the machinery is kept ready for use but could not be put to use for non-receipt of orders, the assessee would be entitled to depreciation. (A.Y. 1994-95)

*CIT v. Nahar Exports Ltd. (2008) 296 ITR 419 / (2007) 213 CTR 20 / 163 Taxman 518 (P&H) (High Court)*

### **S. 32 : Depreciation – Construction on leasehold land – Revenue expenditure**

Explanation 1 to S. 32(1) is not applicable where the assessee only puts up construction of building on leasehold land and building is not taken on lease and, therefore, entire construction cost is admissible as revenue expenditure. (A.Ys. 2001-02 & 2002-03)

*CIT v. TVS Lean Logistics Ltd. (2007) 212 CTR 536 / 293 ITR 432 (Mad.)(High Court)*

### **S. 32 : Depreciation – Owner – Any time during previous year**

Though the term 'owner by the assessee' is used in section 32(1), there is nothing to show that assessee should have remained owner of assets in question for entire previous year in question. Thus an assessee firm was entitled to full depreciation held by it up to date of dissolution in previous year although the partner taking over the business also claims full depreciation for the said assets. (A.Y. 1983-84)

*CIT v. Fluid Controls Mfg. Co. (2006) 280 ITR 86 / (2005) 147 Taxman 139 / 196 CTR 1 (Guj.) (High Court)*

### **S. 32 : Depreciation – Leasing – Put to use on lease**

In the case of an assessee who is engaged in the business of leasing the machinery, the asset is deemed to be put to use as soon as the machinery is leased out and, accordingly, depreciation was allowable on such machinery.

*Geeta Lease P. Ltd. v. CIT (2006) 194 Taxation 337 (Delhi)(High Court)*

### **S. 32 : Depreciation – Terraces – Building**

Terraces and other structures used as telecom site constitute 'building' entitling the assessee to depreciation.

*CIT v. Israni Telecom P. Ltd. (2006) 195 Taxation 294 (Delhi)(High Court)*

### **S. 32 : Depreciation – User – Leasing**

The assessee who is engaged in the business of leasing the machinery, the machineries are deemed to have been used for its business no sooner the same were leased out to the lessee.

*CIT v. Ritesh Finance P. Ltd. (2006) 194 Taxation 152 (Delhi)(High Court)*

### **S. 32 : Depreciation – Owner – Third party rights**

When a person acquires interest, title or ownership in a property subject to right of third party of which he has notice until such right is enforced, such person continues to be owner of property against whole world.

*S.B.I. Home Finance Ltd. v. CIT (2006) 280 ITR 6 / (2005) 148 Taxman 585 / 199 CTR 623 (Cal.) (High Court)*

### **S. 32 : Depreciation – Leasing business – Printing cylinders – Shipper – Plant**

Assessee is engaged in leasing business. Each asset costing less than ` 5,000, like printing cylinders, sintex shipper, ice box, etc., is a plant entitled to 100% depreciation. (A.Y. 1993-94)

*CIT v. Upasana Finance Ltd. (2006) 286 ITR 179 / 202 CTR 383 (Mad.)(High Court)*



### **S. 32 : Depreciation – Scaffolding material – Plant**

Scaffolding material is plant and each unit costing less than ` 5,000/- is eligible for 100% depreciation. (A.Y. 1989-90)

*Express Newspapers Ltd. v. Dy. CIT (2006) 280 ITR 452 / 202 CTR 246 / 152 Taxman 465 (Mad.)(High Court)*

### **S. 32 : Depreciation – Estimation of income – Books of account**

For claiming depreciation, maintenance of proper accounts by assessee is required; assessee cannot make estimation of net income and then claim depreciation therefrom.

*J.P. Raju v. ACIT (2005) 145 Taxman 500 (Ker.)(High Court)*

### **S. 32 : Depreciation – Effect of non-filing of return – Claim admissible**

There is no provision under Act which makes it mandatory for assessee to file return for carry forward and set-off of unabsorbed depreciation, as in case of unabsorbed business loss. (A.Y. 1987-88)

*CIT v. Haryana Hotels Ltd., (2005) 276 ITR 521 / 148 Taxman 373 / 197 CTR 449 (P&H)(High Court)*

### **S. 32 : Depreciation – Absolute Owner – Bottles – Plant**

Bottles used by liquor manufacturer are plant. Also one need not be an absolute owner of assets for claiming depreciation under Act. (A.Ys. 1978-79 to 1981-82)

*CIT v. Doongaji & Co. Distillery (2005) 276 ITR 402 / 196 CTR 574 / 146 Taxman 154 (MP)(High Court)*

### **S. 32 : Depreciation – Owner – Vehicle in the name of Director**

Where assessee company purchased a vehicle in name of one of its directors and findings of Commissioner (Appeals) and Tribunal were that assessee- company had no ownership or dominion over vehicle in question, and that real owner of vehicle was director, assessee's claim for depreciation on vehicle could not be allowed as there was no material to prove that vehicle was used for purpose of business.

*M.M. Fisheries (P.) Ltd. v. CIT (2005) 277 ITR 204 / 199 CTR 62 / (2006) 152 Taxman 247 (Delhi)(High Court)*

### **S. 32 : Depreciation – Owner – Firm converted in to company**

Where a firm was converted into company and under an agreement, firm allowed assessee-company to use its building for running business of company without transferring ownership rights, even though cost of construction was borne by assessee substantially and possession was also with assessee, since agreement did not provide for transfer of title to land and building to assessee and there was no clause in agreement operating against firm as having forfeited title over building in favour of the assessee company, assessee was not owner of buildings so as to be entitled to claim depreciation on building. (A.Ys. 1995-96, 1996-97)

*CIT v. Mother Hospital (P.) Ltd. (2005) 275 ITR 563 / 145 Taxman 444 / 195 CTR 269 (Ker.)(High Court)*

### **S. 32 : Depreciation – Owner – Temporary sheds**

For claiming depreciation in respect of temporary sheds transferred to assessee firm, it was not obligatory upon assessee to have a registered conveyance deed. (A.Y. 1978-79)

*CIT v. Guru Nanak Cane Crushing Factory (2005) 149 Taxman 159 (All.)(High Court)*

### **S. 32 : Depreciation – User of assets – Business of leasing**

Leasing is assessee's business. Giving of a vehicle on lease, even if it may not be used by lessee on date of agreement but from date of registration of vehicle or thereafter, would be user for purpose of leasing business of assessee (lessor) and, therefore, assessee would be entitled to depreciation on such vehicles though the vehicles were registered in assessee's name after giving on lease. (A.Y. 1986-87)

*Multican Builders Ltd. v. CIT (2005) 278 ITR 142 / 147 Taxman 103 / 199 CTR 124 (Cal.)(High Court)*

### **S. 32 : Depreciation – User of assets – Last day of year**

Oil tankers were actually plied on road on last date of accounting year challaned and also fined by CMM, presumption as to use of tankers during the relevant accounting year had to be drawn based on challans as evidence so as to entitle assessee to claim depreciation thereon although vehicles were registered in name of assessee on 1st day of next year. (A.Y. 1997-98)

*Anil Bulk Carriers (P.) Ltd. v. CIT (2005) 276 ITR 625 / 142 Taxman 673 / 194 CTR 226 (All.)(High Court)*

### **S. 32 : Depreciation – User of assets – Suspension of work**

Where assessee purchased plant and machinery for its vegetable ghee unit but it was not actually used for full year during relevant assessment year, as said unit remained suspended in spite of an efforts made to restore it. Since there was no intention on the part of the assessee to close said unit in relevant assessment year, but on account of adverse circumstances said unit remained suspended and could not be operated in year in question, Assessing Officer was not justified in disallowing assessee's claim for depreciation on ground that it was not actually used for full year. (A.Y. 1977-78)

*CIT v. Swarup Vegetable Products India Ltd. (2005) 277 ITR 60 / 145 Taxman 253 / 198 CTR 595 (All.)(High Court)*

### **S. 32 : Depreciation – User of assets – One day of previous year**

Allowability of depreciation where machinery forming part of block of assets had not been put to use even for a day in entire previous year.

*CIT v. Travancore Chemicals & Mfg. Co. Ltd. (2005) 142 Taxman 316 (Ker.)(High Court)*

### **S. 32 : Depreciation – Oxygen gas cylinders – Genuineness**

Where assessee purchased oxygen gas cylinders from 'P' Ltd. and leased out same to its sister concern, disallowance of assessee's claim for depreciation on cylinder and also lease rentals was not justified when various documents produced by assessee including bills and delivery challans of 'P' Ltd. and also statement of proprietor of 'P' Ltd. proved that transaction was not a bogus one. (A.Y. 1995-96)

*CIT v. Durant Refrigeration (P.) Ltd. (2005) 199 CTR 58 / 148 Taxman 322 (Delhi)(High Court)*

### **S. 32 : Depreciation – Rates of depreciation – Truck – Higher depreciation**

Notification dated 24-7-1980 providing for higher depreciation at rate of 40 % on truck used on hire would not apply for A.Y. 1980-81.

*Chief CIT v. Rama Shanker (2005) 277 ITR 69 / 144 Taxman 917 (All.)(High Court)*

### **S. 32 : Depreciation – Rates of depreciation – Electric furnace**

Electric furnace coming under category of "machine tools" are entitled to depreciation at 15%. (A.Y. 1981-82)

*CIT v. Kakkar Complex Steel (P) Ltd. (2005) 277 ITR 361 / 158 Taxman 14 (P&H)(High Court)*

### **S. 32 : Depreciation – Rates of depreciation – Ice factory machinery**

Machinery used in Ice factory is not entitled to higher rate of depreciation as there is no mention of it in "rates of depreciation" Appendix I part I to IT Rule. (A.Y. 1977-78)

*CIT v. J. K. Oil Mills Co. Ltd. (2005) 277 ITR 359 / 148 Taxman 482 (All.)(High Court)*

### **S. 32 : Depreciation – Rates of depreciation – Bottles – Commercial vehicles – Actual cost**

Assessee entitled 100 percent depreciation on bottles which had been purchased and leased back to the same party. In case of lease of steel rollers 100 percent depreciation is allowable. In case of business of leasing out of commercial vehicles the assessee is entitled to higher of depreciation. In case of sale and lease back of assets apparent consideration can be taken as cost of assets. (A.Ys. 1992-93 to 1994-95, 1998-99)

*CIT v. Annamalai Finance Ltd. (2005) 275 ITR 451 / 146 Taxman 627 / 197 CTR 86 / 197 CTR 86 (Mad.)(High Court)*

### **S. 32 : Depreciation – Unabsorbed depreciation – Set off – No valid return**

Assessee is entitled to get unabsorbed depreciation of earlier years, set-off in assessment year in question, even if no valid return for previous assessment year had been filed by assessee. (A.Y. 1987-88)

*CIT v. Haryana Hotels Ltd. (2005) 276 ITR 521 / 148 Taxman 373 / 197 CTR 449 (P&H)(High Court)*

### **S. 32 : Depreciation – 100% depreciation – Crates – Bottles**

The assessee a soft drink manufacturer was entitled to 100% depreciation on crates and bottles as each of the bottles had to be considered as an independent unit. (A.Y. 1990-91)

*CIT v. Madurai Soft Drinks (P.) Ltd. (2005) 276 ITR 607 / 146 Taxman 572 / 197 CTR 480 (Mad.)(High Court)*

### **S. 32 : Depreciation – 100% depreciation – Boiler**

100% depreciation on cost of high efficiency boiler was contemplated in case if thermal efficiency was higher than 75% in case of coal fire. The words 'higher than 75%' overrules any possibility of less than 75%.

Where as per the assessee's own claim, boiler efficiency was ranging from 72.5% to 77.5% which gave possibility of efficiency of less than 75%, the assessee's claim for 100% depreciation on such boiler was rightly disallowed. (A.Y. 1989-90)

*CIT v. Bazpur Co-operative Sugar Factory Ltd. (2005) 198 CTR 590 / (2008) 303 ITR 208 / (2006) 151 Taxman 167 / 157 Taxman 454 (All.)(High Court)*

### **S. 32 : Depreciation – Extra shift allowance – Number of days**

Extra shift allowance cannot be restricted to number of days during which new machinery or plant had actually worked, it is allowable on basis of number of days during which assessee company had actually worked double or triple shifts. (A.Ys. 1975-76 to 1978-79)

*Cawnpore Textiles Ltd. v. CIT (2005) 276 ITR 612 / 144 Taxman 590 / (2006) 200 CTR 203 (All.)(High Court)*

### **S. 32 : Depreciation – Extra shift allowance – Nursing home**

Extra shift depreciation allowance was to be allowed on equipment installed in the nursing home premises. (A.Y. 1983-84)

*CIT v. Kamala Selvaraj (2005) 273 ITR 154 / (2006) 203 CTR 242 (Mad.)(High Court)*

### **S. 32 : Depreciation – Extra shift allowance – Leasing of machinery**

The assessee is entitled to claim extra shift allowance on plant and machinery leased out. (A.Y. 1986-87)

*Parkside Explosives & Industries Ltd. v. CIT (2005) 278 ITR 561 / 200 CTR 324 (Mad.)(High Court)*

*Titanium Equipment & Anode Manufacturing Co. Ltd. v. Dy. CIT (2005) 278 ITR 565 (2006) 150 Taxman 188 (Mad.)(High Court)*

### **S. 32 : Depreciation – Initial depreciation – Water coolers**

Initial depreciation was not allowable in respect of expenditure on place where water coolers were kept but it was allowable on cycle sheds as specified in section 32(1)(iv). (A.Y. 1981-82)

*Industrial Cables (India) Ltd. v. CIT (2005) 272 ITR 314 (P&H)(High Court)*

### **S. 32 : Depreciation – Initial depreciation – Employee quarters**

Where the assessee claimed initial depreciation in respect of employee quarters on the ground that some employees who were drawing less than ₹ 10,000/- per annum were also staying in the quarters, but no details of such employees could be furnished. The Tribunal was justified in disallowing the claim of the assessee as it could not fulfil the conditions as per section 32(1)(iv) that the building should be 'solely' for purpose of residence of employees drawing ₹ 10,000 or less salary was not fulfilled. (A.Y. 1985-86)

*Raasi Cements Ltd. v. CIT (No. 2) (2005) 275 ITR 582 (AP)(High Court)*

### **S. 32 : Depreciation – Hire purchase – Owner**

In case of house acquired under hire purchase agreement, on the basis of the conditions mentioned in the hire-purchase agreement, the assessee was not the owner of the house acquired and as such was not entitled to depreciation. (A.Ys. 1976-77, 1977-78)

*Atlas Cycle Industries Ltd. v. CIT (2004) 270 ITR 108 / 192 CTR 354 / (2005) 142 Taxman 102 (P&H)(High Court)*

### **S. 32 : Depreciation – Buses – Name of director**

Assessee company was entitled for depreciation on buses where income from buses was shown and assessed in its hands even though buses were in name of directors who had raised finance for their purchase in their individual names. The balance sheet of assessee also reflected the cost of the buses and their liability towards the Bank (A.Y. 1989-90)

*CIT v. Fazilka Dabwali Tpt Co. Pvt. Ltd. (2004) 270 ITR 398 / (2005) 144 Taxman 376 (P&H)(High Court)*

### **S. 32 : Depreciation – User – Ready to use**

The word "used" as per S. 32 for purpose of claiming depreciation denotes actually used and not merely ready for use.

*Dineshkumar Gulabchand Agrawal v. CIT (2004) 267 ITR 768 / 141 Taxman 62 (Bom.)(High Court)*

### **S. 32 : Depreciation – Business closed part of year – R & D assets – Continuous on**

Assessee was entitled to depreciation on its R&D, division though part of assessee's business remained closed during relevant previous year. (A.Y. 1992-93)

*CIT v. Udaipur Distillery Co. Ltd. (No 3) (2004) 268 ITR 451 / 134 Taxman 616 / 186 CTR 39 (Raj.)(High Court)*

### **S. 32 : Depreciation – Leasing business – Boiler**

Assessee engaged in leasing business, would be entitled to depreciation on boiler leased out by it. (A.Y. 1992-93)

*CIT v. Pinnacle Finance Ltd. (2004) 268 ITR 395 / 139 Taxman 328 / 188 CTR 446 (Guj.)(High Court)*

### **S. 32 : Depreciation – Diesel generator set – Rate of depreciation**

Diesel generator sets would not fall under item 10A, so as to entitle the assessee to claim depreciation at the higher rate of 30 per cent allowed to renewable energy device but it would be allowable at the normal rate of 10 per cent. (A.Ys. 1982-83, 1983-84)

*CIT v. Anang Polyfil (P) Ltd. (2004) 267 ITR 266 / 136 Taxman 692 / 187 CTR 576 (Guj.)(High Court).*

### **S. 32 : Depreciation – Leased vehicles – Higher rate**

The question with regard to allowance of depreciation at the rate of 40% on leased vehicles is no more *res integra* in view of the decision of the High court in *CIT v. Bansal Credits Ltd. (2003)259 ITR 69* special leave petition against which has been dismissed by the Supreme Court. (A.Y. 1995-96)

*CIT v. Goodwill India Ltd. (2004) 141 Taxman 1 / 268 ITR 480 / 187 CTR 11 (Delhi)(High Court)*

### **S. 32 : Depreciation – Unabsorbed – Firm – Partner**

Partner of a registered firm is entitled to set off his share of unabsorbed depreciation of the firm in which he was a partner, against his income of the previous year even though the firm was not carrying on any business during the previous year. (A.Y. 1983-84)

*CIT v. A.J. Abraham Anthraper (2004) 268 ITR 417 / 139 Taxman 1 / 189 CTR 299 (Ker.)(High Court)*

### **S. 32 : Depreciation – Unabsorbed – Partner's share**

Unabsorbed depreciation of registered firm allocated in the hands of partners should revert back to the registered firm and it should be set off against the income of the firm. (A.Y.

1977-78)

*CIT v. Chaudhary Cotton Ginning & Presssing Factory (2004) 271 ITR 17 / (2005) 193 CTR 685 / 143 Taxman 252 (P&H)(High Court)*

### **S. 32 : Depreciation – 100 per cent depreciation – Shuttering**

Where the assessee was engaged in construction work, shuttering being a necessary component for construction work, and each shuttering being an independent unit, costing less than ` 5000, was entitled for 100 per cent depreciation.

*CIT v. Mohta Construction Co (2004) 190 CTR 131 / (2005) 273 ITR 276 (Raj.)(High Court)*

### **S. 32 : Depreciation – 100 percent depreciation – Energy saving devices**



Circuit breaker, transformer, isolator, arrestor, control panel, capacitor bank, etc. which are required for control and monitoring, flow of electricity would fall under item (a) of Category B of "Energy savings devices" mentioned in rule 5 Appendix 1, Part 111(3)(iii)(B) of the Income Tax Rules, 1962, and thus were eligible for 100 percent depreciation allowance. (A.Y. 1996-97)

*Industrial Development Corporation of Orissa Ltd v. CIT (2004) 137 Taxman 556 / 268 ITR 130 / 189 CTR 417 (Orissa)(High Court)*

### **S. 32 : Depreciation – Sale and lease back transaction – Question of fact**

Finding of Tribunal that sale and lease back transactions are genuine, involves finding of question of fact. (A.Y. 1996-97)

*CIT v. Zuari Finance Ltd. (2004) 271 ITR 538 / (2005) 193 CTR 625 / 144 Taxman 113 (Bom.)(High Court)*

### **S. 32 : Depreciation – Vehicle hire to tourists – Rate**

In order to get the benefit under section 32 it must be proved that vehicle is used for hire to tourists

*Sapna Tours Travels & Lease v. CIT (2004) 269 ITR 266 / 136 Taxman 631 / 187 CTR 477 (Delhi)(High Court)*

### **S. 32 : Depreciation – In case of change of previous year – Duty of AO**

Assessee-company which was following financial year as its accounting year up to assessment year 1981-82, made a request to change accounting period so as to end on 31st August, Assessing Officer was not justified in imposing condition that no depreciation claim would be allowed for five months, i.e., for assessment year 1982-83 as powers given to Assessing Officer are discretionary in nature and are to be exercised in a reasonable manner. (A.Y. 1982-83)

*CIT v. Electric Control Gear Ltd. (2004) 266 ITR 338 / (2003) 129 Taxman 722 / 183 CTR 540 (Guj.)(High Court)*

### **S. 32 : Depreciation – Depreciation not allowable [S. 37(4)]**

Section 32 is not to be regarded as a code with regard to depreciation, which is unaffected by what is provided in other provisions with regard to depreciation. The absence of reference to section 32 in section 37(4) is not of any materiality as the legislative intent to deal with depreciation is clear to the extent that section denies depreciation on the depreciable assets specified therein. The legislative prohibition must be given full effect and not defeated in its entirety by allowing what is prohibited under section 37(4) under section 32. (A.Y. 1989-90)

*CIT v. Ponni Sugars & Chemicals Ltd. (2003) 127 Taxman 188 / 260 ITR 605 / 179 CTR 477 (Mad.)(High Court)*

### **S. 32 : Depreciation – Charitable trust – Cost as application u/s. 11 – Eligible**

Depreciation is allowable to assessee-charitable trust on assets, the cost of which had been fully allowed as application of income under section 11 in the past years. Depreciation is also allowable on assets received on transfer, though assessee had not incurred cost of acquiring the asset.

*CIT v. Institute of Banking Personnel Selection (IBPS) (2003) 131 Taxman 386 / 264 ITR 110 / 185 CTR 492 (Bom.)(High Court)*

### **S. 32 : Depreciation – User of asset – Revised depreciation – W.e.f. 2-4-1983**

Depreciation on plant and machinery which was revised with effect from 2-4-1983, was not applicable for assessment year 1983-84 as law applicable for purpose of assessment is law in force as on 1st day of assessment year. (A.Y. 1983-84)

*CIT v. Thakurdas Choithram (2003) 259 ITR 340 / (2004) 135 Taxman 69 (Mad.)(High Court)*

### **S. 32 : Depreciation – Claim of depreciation – Explanation 5**

Explanation 5 to section 32(1) takes effect only on and from 1-4-2002. (A.Y. 1988-89)

*CIT v. Sree Senhavalli Textiles (P.) Ltd. (2003) 259 ITR 77 / 183 CTR 453 / (2004) 134 Taxman 725 (Mad.)(High Court)*

### **S. 32 : Depreciation – Claim of depreciation – Explanation 5**

Explanation 5 to section 32 inserted by Finance Act, 2001 with effect from 1-4-2002 does not have retrospective effect. (A.Ys. 1989-90, 1990-91)

*CIT v. Kerala Electric Lamp Works Ltd. (2003) 129 Taxman 549 / 261 ITR 721 / 183 CTR 182 (Ker.)(High Court)*

### **S. 32 : Depreciation – User of asset – Manufacturing**

Expression used in both sections 32(1) and 32A(1) is 'in relation to the business', viz., for the purpose of the business; it does not make out anything to the extent that such business has to be related to manufacturing purpose. (A.Y. 1985-86)

*CIT v. Birla Jute & Industries Ltd. (2003) 260 ITR 55 / 133 Taxman 337 / 180 CTR 339 (Cal.)(High Court)*

### **S. 32 : Depreciation – Quantum of depreciation – 131 days business**

Business was carried on by assessee for 131 days only in previous year, it was entitled to only 50 per cent of depreciation. (A.Y. 1995-96)

*CIT v. Mangalore Ganesh Beedi Works (2003) 128 Taxman 351 / 264 ITR 142 / 182 CTR 23 (Karn.)(High Court)*

### **S. 32 : Depreciation – Railway siding – Locomotive – Road transport**

Railway siding and locomotives are machinery & plant and not 'road transport vehicles' so as to be entitled to depreciation. There is no condition under section 32(1) that the plant must be directly related to manufacturing process. (A.Y. 1985-86)

*CIT v. Birla Jute & Industries Ltd. (2003) 260 ITR 55 / 133 Taxman 337 / 180 CTR 339 (Cal.)(High Court)*

### **S. 32 : Depreciation – Generator – Higher rate**

Depreciation on generator is admissible at rate of 30 per cent.

*CIT v. Abressive India (2003) 133 Taxman 389 (Raj.)(High Court)*

### **S. 32 : Depreciation – Hot mixing plant – Paver – Road building**

Hot mixing plant and paver finishing machine used in activity of road building are road-making machinery, and not earth-moving machinery, eligible for 15 per cent depreciation only and not 30 per cent. (A.Y. 1982-83)

*CIT v. Utkarsh Builders (2003) 184 CTR 293 / 264 ITR 697 / (2004) 134 Taxman 701 (Guj.)(High Court)*

### **S. 32 : Depreciation – Capitalisation of value of trade marks – Intangible asset – Goodwill**

Capitalisation of value of trademarks, copyrights and technical know how by splitting of value of goodwill cannot be allowed for grant of depreciation, where consideration is paid for acquisition of a going concern. (A.Y. 1995-96)

*CIT v. Mangalore Ganesh Beedi Works (2003) 128 Taxman 351 / 264 ITR 142 / 182 CTR 23 (Karn.)(High Court)*

### **S. 32 : Depreciation – Vehicles hired – Leased**

It is not mandatory that assessee should also use the vehicles "himself" for business of running them on hire. The rate of depreciation is based on end use of the specified asset. (A.Y. 1988-89)

*CIT v. Bansal Credits Ltd. (2003) 126 Taxman 149 / 259 ITR 69 / 179 CTR 23 (Delhi) / CIT v. Indocount Finance Ltd. (2003) 133 Taxman 399 (Delhi)(High Court)*

### **S. 32 : Depreciation – Vehicles hired – Leased**

Assessee in course of business leased out vehicles to its customers/ lessees and earned lease rent. If the lessees had used vehicles in the business of running them on hire, the assessee would be entitled to higher rate of depreciation. (A.Y. 1989-90)

*CIT v. Kotak Mahindra Finance Ltd. (2003) 130 Taxman 730 / (2004) 265 ITR 119 / (2003) 183 CTR 491 (Bom.) / CIT v. Suidu Trade Links (2003) 131 Taxman 302 (2004) 189 CTR 41 (Delhi) / CIT v. Vikas Leasing Ltd. (2003) 131 Taxman 303 (Delhi)(High Court)*

### **S. 32 : Depreciation – Vehicles hired – Leased**

In case of business of leasing to avail higher rate of depreciation what is mandatory is the user of the vehicle i.e. the lessee, whether he is using said vehicles in the business of running on hire.

*CIT v. Pearl Leasing Ltd. (2003) 179 CTR 30 (Delhi)(High Court)*

### **S. 32 : Depreciation – Furniture in hotel – 100% depreciation**

Furniture in hotel does not constitute plant and 100 per cent depreciation cannot be allowed thereon. (A.Y. 1988-89)

*CIT v. Vrindavan Hotels (P.) Ltd. (2003) 129 Taxman 829 / 262 ITR 402 / (2004) 186 CTR 638 (Ker.)(High Court)*

### **S. 32 : Depreciation – Extra-shift allowance – Number of days plant worked**

Extra shift allowance has to be calculated on the basis of the number of days during which the concerned plant worked double shift or triple shift and the said allowance is not to be calculated on the basis of the number of days a particular item of machinery or plant had worked double shift or triple shift. (A.Y. 1976-77)

*Jay Engineering Works Ltd. v. CIT (2003) 132 Taxman 69 / 183 CTR 326 (Delhi)(High Court)*

### **S. 32 : Depreciation – Rate – Hardware – Computer**

Assessee engaged in printing business, used certain hardware for execution of printing process, said hardware could not be categorized as 'computer' and would not be eligible for higher depreciation. It is only where machine is being used essentially and predominantly for computing capability and where it is not being harnessed for other specialized industrial uses, be it mechanical, electric or electronic (or a composite thereof) activity that it could be called as a computer. (A.Y. 2005-06).

*S. T. Reddiar & Sons v. Dy. CIT (2011) 129 ITD 475 / 135 TTJ 480 / 49 DTR 326 / 7 ITR 1 (Cochin)(Trib.)*

### **S. 32 : Depreciation – Actual cost – Registered valuation report – Slump sale [S. 43(1)]**

Where cost of fixed assets was adopted by assessee on basis of registered valuer's report and there was no evidence of transaction a collusive one, or to reduce tax liability and there being no clause for payment of goodwill, the assessee was entitled to depreciation on actual cost shown in the books of account. (A. Y. 2000-01)

*Dy. CIT v. Lafarge India Ltd. (2011) 9 ITR 118 / 49 DTR 289 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Toll road – Business of setting up of infrastructural facilities**

Assessee was entitled to depreciation on toll road which is constructed on "Build-own-operate-transfer" basis (A.Ys. 2003-04 & 2004-05).

*Gujarat Road & Infrastructure Co. Ltd. v. CIT (2011) 56 DTR 73 / 139 TTJ 718 / 7 ITR 730 / 48 SOT 145 (Ahd.)(Trib.)*

### **S. 32 : Depreciation – Block of assets – Sale of assets – Closure of one activity [S. 50]**

Assessee having closed down its manufacturing activities in one of Unit and sold all the assets of that unit except motor vehicles and software, block of assets, viz, building and plant and machinery, ceased to exist and thereafter these assets neither

belonged to the assessee nor were used for the purpose its business and therefore, assessee is not entitled to depreciation thereon. (A.Ys. 2005-06 and 2006-07).

*Sony India (P) Ltd. v. ACIT (2011) 56 DTR 156 / 141 TTJ 432 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Goodwill – Commercial rights – Commercial benefits**

Where the assessee has made the excess payment over and above the cost of intangible assets and that excess payment was claimed to have been made against goodwill, only the portion of goodwill representing cost of acquisition of the commercial rights shall be eligible for depreciation and not the portion relating to acquiring commercial benefits. On the facts Tribunal directed the Assessing Officer to divide the entire cost of goodwill in two parts and 50 per cent of the cost of the goodwill be treated as a cost of acquisition of the commercial rights and allow the depreciation thereon at a prescribed rate. (A.Ys. 2005-06 & 2006-07).

*Jeypore Sugar Company Ltd. v. ACIT (2011) 56 DTR 229 / 139 TTJ 475 / 44 SOT 625 (Visakha)(Trib.)*

### **S. 32 : Depreciation – Computer peripherals – Printers – Scanners – Servers – UPS**

Computer peripherals such as printers, scanners, servers, UPS, etc., form integral part of computer system on which higher depreciation of 60% is allowable. (A. Y. 2005-06).

*ITO v. Omni Globeinformation Technologies India (P) Ltd. (2011) 131 ITD 280 / 141 TTJ 86 / 60 DTR 374 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Trust – Cost of asset allowed as application of income**

Claim of depreciation by assessee trust in respect of assets, cost of which had been claimed as an application of income towards its objects, would amount to double deduction which is prohibited by law. (A. Y. 2005-06).

*Dy. DIT (Exemption) v. Adi Sankara Trust (2011) 46 SOT 230 / 64 DTR 449 / (2012) 143 TTJ 234 (Cochin)(Trib.)*

### **S. 32 : Depreciation – Building – Landscaping expenses – Hotel – Storage tank**

Since the assessee is in Hotel business its building is not merely a structure of four walls but includes all such things as are necessary to give the building better look and is a matter of attraction for the customers, therefore, Landscaping done by assessee in its hotel is to be treated as "building" and depreciation is allowable.

Payments made by assessee to NDMC for unauthorized occupation, construction of diesel storage tanks and fire fighting tanks and covering sanitary lines without approval in respect of the hotel acquired by it from the Central Government formed part of purchase consideration as these payments were made to perfect the title of the assessee in the property and the amount being capitalized the assessee is entitled for depreciation. (A. Ys. 2003-04 to 2007-08)

*Dy. CIT v. Hotel Excelsior Ltd. (2011) 60 DTR 450 / 141 TTJ 248 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Rate – Printers – UPS**

Printers and UPS fall within the class of computer peripherals and therefore, eligible for depreciation at the rate of 60%. (A. Y. 2006-07)

*Haworth (India) (P) Ltd. v. Dy. CIT (2011) 140 TTJ 446 / 11 ITR 757 / 131 ITD 215 / 58 DTR 36 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Computer system – Trial period – VSAT – Equipments located in members premises**

Computer system which stood installed and used for trial period would also constitute "user" for purpose of depreciation under section 32. Assessee is entitled to depreciation in respect of VSAT network equipment installed at the premises of members. (A.Ys. 1997-98, 1998-99 and 2001-02).

*ACIT v. National Stock Exchange of India Ltd. (2011) 133 ITD 27 / 62 DTR 329 / 142 TTJ 189 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Block of assets – Ownership – Purchase of shares – Right to occupy**

The assessee made total payment of ` 4.44 crores to WRPL which has been divided into two parts viz. consideration for shares at ` 2.76 crores and non-refundable consideration of

` 1.67 crores. Both these payments are aimed at acquiring, using and occupying the property. But for the purchase of shares it is not permissible to become member. The assessee is entitled to depreciation on the entire consideration. (A. Y. 2000-2001)

*Sri Adhikari Brothers Television Networks Ltd. v. ACIT (2011) 52 DTR 295 / 130 ITD 439 / 137 TTJ 424 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Website – Computer software**

In view of the amendment of Appendix I w.e.f. Asst. Year 2003-04 allowing depreciation @ 60 per cent on software, depreciation is allowable on expenditure for development of website @ 60 per cent. (A.Ys. 2003-04 & 2004-05)

*Dy. CIT v. C. M. Y. K. Printech Ltd. (2011) 53 DTR 59 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Intangible assets – Goodwill**

Depreciation is allowable on specified intangible assets like, licence or any other business or commercial rights of similar nature and not on Goodwill. (A. Ys. 2002-03 to 2004-05)

*Osram India (P) Ltd. v. Dy. CIT (2011) 51 DTR 297 / 137 TTJ 749 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Non-compete fee – Intangible asset**

Non-compete fee is not in the nature of knowhow, patents copy right, trade marks, licences or franchises within the meaning of section 32(1)(ii), depreciation is not allowable.



*Sharp Business Systems (India) Ltd. v. Dy. CIT (2011) 59 DTR 385 / 140 TTJ 607 (Delhi)(Trib.)*

**S. 32 : Depreciation – Intangible assets – Leasehold rights over land – User of brand name, trade mark, logo, design – Slump sale**

Leasehold rights cannot be considered as an intangible asset as per the provisions of section 32(1)(ii), hence not entitled to depreciation.

Where the assessee had purchased the user of brand name, trade mark, logo, design, drawings, manufacturing process and technical knowhow in respect of the products manufactured by unit which was acquired by assessee at a slump price, expenditure allocated by approved valuer is capital expenditure, assessee is entitled depreciation on the said amount.

(A. Y. 2006-07).

*Drilbits International (P) Ltd. v. Dy. CIT (2011) 62 DTR 171 / 142 TTJ 86 (Pune)(Trib.)*

**S. 32 : Depreciation – Unabsorbed – Business discontinued**

The business of assessee as carried on in earlier years had been discontinued, in view of provisions of section 32(2) as amended with effect from 1-4-2002, assessee's claim of set off of unabsorbed depreciation pertaining to those years against income of current year was to be rejected. (A.Ys. 2002-03 and 2006-07).

*Vidhyavihar Containers Ltd. v. Dy. CIT (2011) 133 ITD 363 (Mum.)(Trib.)*

**S. 32 : Depreciation – Amalgamation – Second proviso – Quantification**

The assets have been acquired and used from 29th August, 2003. In this case therefore proportion adopted by the assessee as fifty-fifty seems to be correct, however this apportionment has to be done out of total depreciation which was allowable at 100 per cent in view of second proviso i.e. Amalgamating company has rightly claimed the depreciation for the first six months because only depreciation of six months has been claimed in the case of amalgamated company. The Tribunal set aside the order of Commissioner (Appeals) and directed the Assessing Officer to allow the depreciation for six months. (A.Y. 2004-05).

*Bunge Agribusiness (India) (P) Ltd. v. Dy. CIT (2011) 64 DTR 201 / 132 ITD 549 / 142 TTJ 817 (Mum.)(Trib.)*

**S. 32 : Depreciation – Additional depreciation – Enhancement of installed capacity – Qua Business or Qua an Undertaking**

Assessing Officer held that enhancement of installed capacity had to be considered in respect of whole business and not with reference to one single unit and disallowed additional depreciation. Tribunal held that one should consider increase in capacity of an undertaking in which additional machinery was installed. Since concerned unit was an independent unit which had increased its capacity by more than 10 percent, said undertaking satisfied conditions prescribed in section 32, hence additional depreciation was to be allowed thereon. (A.Y. 2005-06).

*NRB Bearings Ltd. v. Dy. CIT (2011) 133 ITD 306 (Mum.)(Trib.)*

**S. 32 : Depreciation – Block of assets – Scrap written off [S. 2(11), 32, 43(6)]**

Scrap value of the assets which have been written off during the year is to be reduced from the WDV of the block of assets and not of the individual assets for the purpose of allowing depreciation. (A.Y. 2002-03)

*Xerox India Ltd v. ACIT (2010) 127 TTJ 84 / (2009) 32 DTR 441 (Delhi)(Trib.)*

**S. 32 : Depreciation – Motor vehicles on hire**

Assessee is entitled to higher rate of depreciation as per Appendix I, Income Tax Rules, 1961 Entry III(3)(ii) in respect of motor cars used in the business of running them on hire. (A.Y. 2006-07)

*Magma Fincorp Ltd. v. ACIT (2010) 35 DTR 76 / 128 TTJ 715 (Kol.)(Trib.)*

**S. 32 : Depreciation – Plant – Flyover, roads, bridges**

Assessee is engaged in building flyover, roads, bridges, express highways, ROB, etc. and carrying on its activities of developing and maintaining infrastructure facilities by permitting vehicles to ply over these structures. Thus, they are tools of the trade and essential adjuncts to the business and therefore, constitute plant entitled to depreciation at 25 per cent. (A.Y. 2001-02)

*Maharashtra State Road Development Corporation Ltd. v. ACIT (2010) 128 TTJ 32 / 34 DTR 389 / 126 ITD 279 (Mum.)(Trib.)*

**S. 32 : Depreciation – Block of assets – Use of individual assets [S. 2(11)]**

In case of block of assets, in order to allow assessee's claim under section 32(1), use of individual asset for purpose of its business can be examined only in first year when asset is purchased. Existence of an individual asset in block of assets itself amounts to use for purpose of business and therefore, depreciation is allowable on it, even though said asset is not actually used in course of business during relevant assessment year. (A.Y. 2001-02)

*Swati Synthetics Ltd. v. ITO (2010) 38 SOT 208 (Mum.)(Trib.)*

**S. 32 : Depreciation – Plant ready for use – Raw material unavailable**

Assessee company was entitled to claim depreciation in respect of gas sweetening plant which was kept ready for use but could not be actually used due to lack of availability of raw material during relevant assessment years. (A.Ys. 2000-01, 2003-04)

*ACIT v. Chennai Petroleum Corporation (2010) 125 ITD 396 / 2 ITR 325 / (2009) 126 TTJ 865 / 32 DTR 187 (TM)(Chennai)(Trib.)*

**S. 32 : Depreciation – Plant – Office interiors [S. 43(3)]**

Designs and interior decoration work carried out in its office by the assessee carrying on the business of interior designing for the purpose of demonstrating its work to the prospective clients and exhibition purpose cannot partake the character of "furniture and fittings" but is "Plant" and is entitled to depreciation applicable to plant. (A.Y. 1999-2000)

*ACIT v. Eskay Agencies (2010) 42 DTR 366 / 132 TTJ 114 (Chennai)(Trib.)*

### **S. 32 : Depreciation – Camera given on rent – Professional charges included hire charges**

The assessee, sports person has shown substantial amount as professional income. Assessee declared professional income inclusive of camera hire charges. Assessing Officer disallowed the claim for non production of agreement with company. The Tribunal held that as substantial amount of professional receipts were disclosed by assessee, thus depreciation claim was allowed. (A.Ys. 1996-97, 1997-98)

*Ajay Jadeja v. Dy. CIT (2010) 5 ITR 233 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Computer – Router – Switches**

Router and switches can be classified as a computer hardware when they are used along with a computer and when their functions are integrated with a computer. In such a situation, routers and switches are to be included in block of "computer" for purpose of determining rate of depreciation applicable to them i.e. 60%. (A.Ys. 2002-03, 2003-04)

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

### **S. 32 : Depreciation – Plinth – Plant**

Plinth is entitled to depreciation as plant and not as a building. (A.Y. 2000-01)

*Daljit Singh v. ITO (2010) 194 Taxman 16 (Mag.)(Chd.)(Trib.)*

### **S. 32 : Depreciation – Registration – User of boring machine**

Depreciation claim in respect of new boring machine with supporting truck was denied as vehicle was registered with RTO on 28-03-2003 and permits for use were issued on 31-3-2003, so observed that the vehicle was not ready for use.

On facts Depreciation was allowed, as Assessee brought on record that machine was assembled on 24-3-2009, and corresponding hiring income received from 25-3-2003 to 31-3-2003 were duly supported by bills, and amounts were received by cheques.

*Premkumari Bathla (Smt.) v. ACIT (2010) 195 Taxman 37 (Mag.)(Jp.)(Trib.)*

### **S. 32 : Depreciation – Intangible asset – Licence – Production sharing agreement – Intangible asset**

Commercial rights of exploration of mineral oils acquired by assessee by entering into production sharing agreement with the Russian Government fall under the expression 'any other business or commercial rights of similar nature' same being akin to

"licence" as stipulated in section 32(1)(ii) and therefore, they are in the nature of intangible assets eligible for depreciation. (A.Y. 2002-03)

*ONGC Videsh Ltd. v. Dy. CIT (2010) 33 DTR 22 / 37 SOT 97 / 127 TTJ 497 (Delhi)(Trib.)*

*Editorial:- See Bombay High Court CIT v. Techno Shares & Stocks Ltd. (2009) 184 Taxman 103 (Bom.) / (2010) 323 ITR 69 / 225 CTR 337 / 28 DTR 201 (Bom.)*

### **S. 32 : Depreciation – Intellectual property right (IPR) – Goodwill**

Where the assessee company had taken over the business of the firm with IPR at the value determined by the valuers and such value was made part of the agreement as the cost of consideration which passed on from the company to the firm and the cost so determined was the real amount then it is wrong to presume that there was a notional amount which was transacted between the parties; assessee was entitled to claim depreciation on the value of such Intellectual property right. (A.Ys. 2001-02, 2002-03, 2003-04)

Goodwill is not an intangible asset within the meaning of section 32(1)(ii), hence, not entitled to depreciation. (A.Ys. 2001-02, 2002-03, 2003-04)

*Modular Infotech (P) Ltd. v. Dy. CIT (2010) 40 DTR 172 / 131 TTJ 243 (Pune)(Trib.)*

### **S. 32 : Depreciation – Goodwill – Amalgamation – Intangible asset**

Assessee company having not acquired any special rights of business or commercial nature in the course of amalgamation of three group companies with it, the goodwill appearing in its books of account as a balancing figure for the assets acquired and the price paid is goodwill *simpliciter* and therefore, it is not eligible for depreciation. (A.Ys. 2001-02 to 2004-05)

*Borkar Packaging (P) Ltd. v. ACIT (2010) 40 DTR 29 / 131 TTJ 99 (Panaji)(Trib.)*

### **S. 32 : Depreciation – Lease of premises – Deposit – Intangible asset**

Assessee was not entitled to depreciation on the amount paid by it as deposit while renewing the agreement of lease of premises since by making such payment the assessee did not acquire any asset. The amount paid is not a licence or intangible asset nor a commercial rights of the nature specified in section 32(1)(ii). (A.Y. 2003-04)

*ACIT v. Malayala Manorama Co. Ltd. (2010) 41 DTR 93 / 4 ITR 513 / 131 TTJ 342 (Cochin)(Trib.)*

### **S. 32 : Depreciation – Brand name – Intellectual property – Scheme of arrangement**

Where assessee company received brand name under a scheme of arrangement under sections 391 to 394 of Companies Act, 1956, assessee was eligible for depreciation in respect of brand name under section 32(1)(ii) of the Income-tax Act. (A.Y. 2006-07)

*KEC International Ltd. v. Addl. CIT (2010) 41 SOT 43 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Additional depreciation – Production of ready mixed concrete**

Production of ready mixed concrete amounts to manufacture or production of goods and the assessee is entitled to claim additional depreciation under section 32(1)(ia) on RMC machinery. (A.Y. 2004-05)

*YFC Projects (P) Ltd. v. Dy. CIT (2010) 46 DTR 496 / 37 SOT 130 / 134 TTJ 167 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Goodwill – Slump price – Revision [S. 263]**

Even if an amount is termed as goodwill in book of account but it is in business or commercial right in the nature of know-how, copyright, etc. the claim of depreciation is admissible.

Business acquired by assessee on slump price and part of the price so paid allocated towards payment for the marketing and trading reputation, Trading style and name marketing and distribution territorial know-how etc. are shown under the head "Goodwill" was eligible for depreciation. Since it is a business or commercial right in nature of know-how, patent, copyright, trademark, etc. (A.Y. 2001-02)

*Hindustan Coca Cola Beverages (P) Ltd. v. Dy. CIT (2009) 34 SOT 171 / (2010) 132 TTJ 602 / 43 DTR 416 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Block of assets – Capital gains – Depreciable assets [S. 2(11), 50]**

Building owned by the assessee, is also deemed to be owned by assessee as per Expln. 1 to section 32(1) in respect of which same rate of depreciation is prescribed has to be taken for determining WDV of block of assets, no loss on account of any shortfall between the individual WDV of building of deemed ownership and any amount realised in respect thereof can be allowed as a capital loss under section 50. (A.Y. 2004-05)

*Anand and Anand v. ACIT (2009) 29 DTR 489 / 125 TTJ 794 / 33 SOT 148 / (2010) 1 ITR 788 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Restrictive covenant – Intangible asset**

Depreciation on restrictive covenant is not allowable. (A.Y. 2002-03)

*Srivatsan Surveyors (P) Ltd. v. ITO (2009) 32 SOT 268 / 125 TTJ 286 / 28 DTR 505 (Chennai) (Trib.)*

*Editorial:- See ITO v. Mediacorp Technologies India Ltd. (2009) 21 DTR 69 / 30 SOT 506 / 122 TTJ 394 / 2 ITR 367 (Chennai)(Trib.)*

### **S. 32 : Depreciation – Goodwill – Intangible assets**

Goodwill is a bundle of rights which include, *inter alia*, patents trade marks, licences, franchises, etc. and they assume importance in commercial world as they represent a particular benefit or advantages or reputation built by a person / company / business house over a period of time and customers associate themselves with such assets hence depreciation would be allowable on same. (A.Y. 2001-02)

*Kotak Forex Brokerage Ltd. v. ACIT (2009) 33 SOT 237 / (2010) 131 TTJ 404 / 41 DTR 387 (Mum.)(Trib.)*

**S. 32 : Depreciation – Plant or building – Road – Post 1-4-1989**

Road is not plant but after assessment year 1988-89, it is included in the category of building eligible for depreciation. (A.Ys. 2003-04, 2004-05)

*Tamil Nadu Road Development Co. Ltd. v. ACIT (2009) 123 TTJ 702 / 120 ITD 20 / 24 DTR 618 / (2010) 4 ITR 403 (Chennai)(Trib.)*

**S. 32 : Depreciation – Non-compete fee – Business – Commercial right – Intangible asset**

Non-compete right acquired by the assessee by paying the fee was eligible for depreciation under clause (ii) of Section 32(1) of the Act. (A.Y. 2002-03)

*ITO v. Mediacorp Technologies India Limited (2009) 30 SOT 506 / 21 DTR 69 / (2010) 2 ITR 367 / (2009) 122 TTJ 394 (Chennai)(Trib.)*

**S. 32 : Depreciation – Actual cost – Explanation 3 [S. 43(i)]**

In order to apply Expln. 3 to section 43(1), Assessing Officer has to determine the 'actual cost' of the assets to the assessee which can only mean arm's length value or real value or worth of assets transferred, burden to determine the 'actual cost', in accordance with the law is on the Assessing Officer and not on the assessee in question. Assessing Officer having cited no good ground for not accepting the cost of the assets in question as valued by registered valuer or shown in memorandum of transfer and made no attempt to undertake the exercise of finding out the actual cost of said assets acquired by assessee on takeover business of a firm, no case is made out for applying Expln. to section 43(1). (A.Ys. 2004-05, 2005-06)

*Chitra Publicity Company (P) Ltd. v. ACIT (2009) 32 DTR 227 / (2010) 127 TTJ 1 / 4 ITR 738 (TM)(Ahd.)(Trib.)*

**S. 32 : Depreciation – Goodwill – Business on commercial right**

Goodwill is not an intangible asset within meaning of S. 32(1)(ii). Goodwill acquired does not come under the expression "any other business or commercial rights" of similar nature to know-how, patents, copyrights, trade mark, licences, franchises under section 32(1)(ii). Therefore, no depreciation is allowable on Goodwill.

*R. G. Keswani v. ACIT (2009) 308 ITR 271 (AT) (Mum.)(Trib.)*

**S. 32 : Depreciation – Non-compete fee – Intangible**

Amounts paid by way of non-compete fees claimed as revenue expenditure, was treated as capital expenditure. Assessee's alternate plea to treat same as an intangible asset under section 32, and consequent grant of depreciation thereon was upheld. (A.Y. 2001-02)

*ACIT v. Real Image Tech (P) Ltd. (2009) 120 TTJ 983 / (2008) 14 DTR 138 (Chennai)(Trib.)*



### **S. 32 : Depreciation – Vehicle – HUF**

Vehicle was purchased by HUF of assessee, and on which no depreciation was claimed, nor, same was used for purpose of business. The vehicle was bought as business asset by assessee in his individual capacity after 3 years at original cost.

Assessing Officer invoked provisions of the explanation to section 43(1), and reduced the original cost of ` 3,86,607/- to ` 2,00,000/-, and computed depreciation accordingly. Held, that as statute does not give discretion for purpose of the Explanations 3 to section 43(1) to enforce depreciation, as two of the prescribed conditions needs to be fulfilled to justify and substitute the cost of WDV as claimed by the Assessee, and accordingly, assessee was entitled to depreciation on original cost of vehicle as claimed.

*Shashikant Janardan Kulkarni v. ITO (2008) 173 Taxman 116 (Mag.)(Pune)(Trib.)*

### **S. 32 : Depreciation – Unabsorbed depreciation – Law applicable**

Held that provision of section 32(2) as existed in the statute as on 1-4-2003, would be applicable for A.Y. 2003-04 to decide the treatment to be given to unabsorbed depreciation relating to A.Y. 1999-2000, as it is well settled that, law applicable to any assessment is the law that prevails as on the first day of April of the relevant assessment year, and it is the duty of Assessing Officer to apply the said law.

*Jain Ushin Ltd. v. Dy. CIT (2008) 171 Taxman 111 (Mag.)(Delhi)(Trib.)*

### **S. 32 : Depreciation – Computer software – Intangible asset**

Computer software was 'intangible asset' eligible for depreciation @ 25 per cent for asst. yr. 2001-02. (A.Y. 2000-01)

*Sudarshan Chemical Industries Ltd. v. ACIT (2007) 108 TTJ 28 / (2008) 110 ITD 171 / 114 TTJ 131 (Pune)(Trib.)*

### **S. 32 : Depreciation – Passive user – Actual use of dumper**

In the absence of actual user, depreciation was not allowable on the dumper. (A.Y. 1996-97)

*R. S. Nayyar v. Jt. CIT (2007) 108 TTJ 671 / 108 ITD 424 (Pune)(Trib.)*

### **S. 32 : Depreciation – Owner – Ship – Registration in next year**

Assessee is entitled to depreciation on ships acquired at end of the year even though registration took place in subsequent year as the assessee is regarded as owner on acquisition of ships.

*Jt. CIT v. Essar Shipping Ltd. (2007) 290 ITR 209 (At) / (2006) 104 TTJ 638 / 120 ITD 71 / 5 SOT 70 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Charitable trust – Allowable deduction**

Depreciation is a necessary deduction to arrive at the income of a charitable trust or institution available for application for charitable purposes and, therefore, depreciation is allowable even in the case of charitable institution. (A.Ys. 1995-96 & 2000-01)

*ACIT v. Jaipur Stock Exchange (2007) 108 TTJ 393 (Jp.)(Trib.)*

### **S. 32 : Depreciation – Car – Interest – Personal use**

Allowance of depreciation on car and interest on car loan cannot be disallowed on the ground of personal use. (A.Y. 2001-02)

*Mangat Ram Bhagwat Swarup v. I.T.O, ITA No. 2953/Del/2007, dt. 8-8-2007 - BCAJ P. 29, Vol. 39-E, Part 1, October, 2007. (Delhi)(Trib.)*

### **S. 32 : Depreciation – Ownership – Partners**

Expenditure on Construction of Strong Room in Rented premises was allowable as revenue expenditure, Depreciation claimed on office building was denied by the Assessing Officer, on the ground that the same was held in the name of the two partners of the firm and not in the name of the firm. Held that though partnership firm is assessed as a separate entity under the Income-tax Act, it is not distinct from its partners under the Partnership Act. Depreciation on said office was allowable. (A.Y. 2001-02)

*Muthoot Bankers v. Dy. CIT, (2007) 11 SOT 603 (Cochin)(Trib.)*

### **S. 32 : Depreciation – Copyrights and telecast rights – Intangible assets**

Assessee having purchased running business including tangible assets, goodwill, copyrights, telecast rights, licences, etc. it was entitled to depreciation on the cost representing value of intangible rights acquired. (A.Y. 2001-02)

*Guruji Entertainment Network Ltd. v. ACIT (2007) 108 TTJ 180 / 14 SOT 556 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Plant and machinery or building – Port – Wharves**

Assets like wharves, pavements, docks, etc. are necessary and critical apparatus/tools with which the port carries on its business – As such these are core assets for the business of the Port and the revenue is earned out of these assets hence treated as Plant & Machinery. The assessee is entitled to claim depreciation at higher rates. (A.Y. 2003-04)

*Kandla Port Trust v. ACIT, (2007) 104 ITD 1 / (2006) 8 SOT 429 / 104 TTJ 396 (Rajkot)(Trib.)*

### **S. 32 : Depreciation – Goodwill – Intangible asset**

Amount paid to retiring partner towards goodwill was not eligible for depreciation under section 32(1)(ii) as the payment did not result in acquisition of any know-how patents, copyrights, trademarks. (A.Y. 2000-01)

*Bharatbhai J. Vyas v. ITO (2006) 101 TTJ 1012 / 97 ITD 248 (Ahd.)(Trib.)*

### **S. 32 : Depreciation – Ownership – Possession – Conveyance**

Assessee having taken possession of the property purchased by it and used it, is entitled to depreciation notwithstanding that conveyance deed had not been executed in favour of assessee. Depreciation is not allowable in respect of new office premises

which was being made fit for occupation during the relevant year but was not ready for use by the assessee at the relevant time. (A.Ys. 1989-90 to 1993-94, 1995-96 & 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 TTD 119 / (2007) 15 SOT 392 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Right to use land – Compensation – Actual cost**

Compensation paid for acquiring right to use land for laying naphtha pipes is not eligible for depreciation. Compensation paid is capital in nature. (A.Ys. 1992-93 & 1993-94)

*Chembur Patalganga Pipelines Ltd. v. Jt. CIT (2006) 105 TTJ 788 / 98 ITD 143 / (2005) 3 SOT 286 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Foreign exchange rate fluctuation – Actual cost**

Addition to cost of machinery on account of liability arising out of foreign exchange rate fluctuation, will be eligible for depreciation. (A.Y. 1992-93)

*Forbes Gokak Ltd. v. Dy. CIT (2006) 156 Taxman 129 (Mag.)(Mum.)(Trib.)*

### **S. 32 : Depreciation – Truck – Ready for use**

Depreciation was allowable on truck 'kept ready for use' but not actually used in the year under consideration. Though there was no expenditure for petrol, diesel, etc. it cannot be said that the truck was not ready for use. (A.Y. 1989-90)

*Rajan H. Shinde v. Dy. CIT (2006) 103 ITD 360 / 104 TTJ 445 (TM)(Pune)(Trib.)*

### **S. 32 : Depreciation – Timing difference – Ownership**

- (i) Proviso to section 32 provides that if the asset acquired by the assessee was used for a period less than 180 days during the relevant previous year, half of the normal rate of depreciation would be granted. It is on the basis of the above statutory provision that the assessee-company claimed depreciation at half of the normal rate on the two ships acquired by it on 29-3-1996. One important factor to be borne in mind while deciding the admissibility of depreciation allowance on one side and the other expenses on the other is that in allowing depreciation, whether it is allowed in a particular assessment year or in the year succeeding that particular assessment year, is only that of a 'timing difference'. In the case of other expenses, the question is either allowed or disallowed, once for all. If an expenditure pertaining to a particular assessment year is not allowed in that particular assessment year, then ordinarily, it will not be allowed in any other assessment year. Therefore, the crucial difference of timing needs to be considered while deciding the issue of depreciation.
- (ii) For allowing depreciation *de facto* ownership is the crucial factor to be looked into and not the technicality of *de jure* ownership.
- (iii) Nexus between the assets used and the income earned need not be satisfied in the very same previous year of deployment of the assets. (A.Y. 1996-97)

*Jt. CIT v. Essar Shipping Ltd. (2006) 102 ITD 71 / 5 SOT 70 / 104 TTJ 638 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Boiler – Genuineness**

Boiler is a movable asset and assessee having made payment of sales tax on the invoice raised by the vendor, the sale and lease back transaction of boiler has to be accepted as genuine and, therefore, assessee was entitled to depreciation on the boiler. (A.Ys. 1991-92 to 1995-96)

*Jt. CIT v. Investment Trust of India Ltd. (2006) 103 TTJ 653 / 102 ITD 135 (TM)(Chennai)(Trib.)*

### **S. 32 : Depreciation – Expenses – Setting up business [S. 37(1)]**

Where business is established and is ready to commence its activities, it can be said that business is set up, and depreciation and all expenses incurred between setting up of business and commencement of business are to be allowed as permissible deduction. As the claim was rejected on conjectures without applying relevant test of setting up of business, the matter was restored back. (A.Y. 2001-02)

*Chakradhari Wheels (P) Ltd. v. ITO (2006) 154 Taxman 77 (Mag.) / 96 TTJ 517 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Used for the purpose of business – Purchases and leases back**

Assessee, a leasing company, having purchased machinery and leased back the same to the vendor, it must be considered as having used the machinery for the purpose of its business and is entitled to depreciation thereon notwithstanding the fact that the machinery was not put to use by the lessee. (A.Ys. 1991-92 to 1995-96)

*Jt. CIT v. Investment Trust of India Ltd. (2006) 103 TTJ 653 / 102 ITD 135 (TM)(Chennai)(Trib.)*

### **S. 32 : Depreciation – Lease transaction – Financial arrangement – Colourable device**

Alleged leasing of plant and machinery by the assessee which is engaged in the business of providing housing finance. Transaction not being a genuine lease transaction but a financing arrangement under a tripartite arrangement among the parties and a colourable device to avoid payment of legitimate tax, claim for depreciation could not be allowed. (A.Ys. 1991-92 & 1992-93)

*Dy. CIT v. Housing Development & Finance Corporation Ltd. (2006) 99 TTJ 1188 / 98 ITD 319 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Car – Purchased last day**

Car purchased by assessee on 31st March, 2001, insured in the name of assessee on 29th March, 2001 and having been taken to business premises is established, depreciation was allowable. (A.Y. 2001-02)

*Ajay Goyal v. ITO (2006) 99 TTJ 164 (Jodh.)(Trib.)*

**S. 32 : Depreciation – Amendment – Period of carry forward – FM's speech**

Effect of amendment of S. 32(2) by the Finance (No. 2) Act, 1996. In view of the speech of the then Finance Minister as also CBDT Circular No. 762 dt. 18th Feb., 1998, unabsorbed depreciation allowance pertaining to asst. yr. 1996-97 shall be added to the allowance of asst. yr. 1997-98 and shall be deemed to be the allowance of that year, hence entitled to be set off against short-term capital gains. (A.Y. 1997-98)

*Uttam Air Products (p) Ltd. v. Dy. CIT (2006) 99 TTJ 718 (Delhi)(Trib.)*

**S. 32 : Depreciation – Exchange rate difference [S. 43A]**

Enhanced liability even on account of intermediate rate fluctuation on loan taken for acquiring Fixed Asset and capitalised as per section 43A is eligible for depreciation. (A.Ys. 1994-95, 1995-96)

*Dy. CIT v. Gujarat Guardian Ltd. (2006) 152 Taxman 37 (Mag.)(Delhi)(Trib.)*

**S. 32 : Depreciation – Ownership – Lease**

If the lessor in terms of the agreement provides only the right to use to the lessee during the period of lease, retaining the rights as an owner with itself in such a case the lessor would be regarded as the owner for the purposes of claim of depreciation. (A.Y. 1995-96)

*Industrial Finance Corporation of India Ltd. v. Dy. CIT (2006) 101 TTJ 894 / (2005) 14 SOT 223 (Delhi)(Trib.)*

**S. 32 : Depreciation – Sale and lease-back – Genuineness**

There being no evidence or material to discredit the genuineness of transactions the sale and lease-back transactions could not be treated as sham, more so when three of the four lessees are State Government undertakings, and, therefore, assessee's claim for depreciation on the leased assets was allowable. (A.Ys. 1996-97, 1997-98)

*West Coast Paper Mills Ltd. v. Jt. CIT (2006) 100 TTJ 833 (Mum.)(Trib.)*

**S. 32 : Depreciation – Plant and machinery [S. 35AB]**

Expenditure incurred for setting up of P & M & capitalised is eligible for deduction u/s 32, and cannot be covered under provisions of 35AB as same was not for assisting in the manufacture or processing of the goods and cannot be held as an intangible asset covered under section 35AB. (A.Ys. 1994-95, 1995-96)

*Dy. CIT v. Gujarat Guardian Ltd. (2006) 152 Taxman 37 (Mag.)(Delhi)(Trib.)*

**S. 32 : Depreciation – Unabsorbed depreciation – Carry forward and set off**

Unabsorbed depreciation pertaining to assessed year 1996-97 and earlier period could be set off against income under other heads in assessed year 2002-03.

*ITO v. Keshwa Enterprises (P) Ltd. (2006) 102 TTJ 446 / 100 ITD 365 (Chd.)(Trib.)*

### **S. 32 : Depreciation – Lease – Genuineness**

The lease transactions, in the absence of any evidence to establish the genuineness of lease transactions, were sham transactions, and the assessee is not entitled to depreciation. (A.Y. 2001-02)

*Marg Constructions Ltd. v. Dy. CIT (2006) 102 TTJ 997 (Chennai)(Trib.)*

### **S. 32 : Depreciation – Boiler – Certificate from Director**

Assessee having proved that its boiler had started functioning in September, 1997, by producing certificate from the Director of Boilers, full claim of depreciation on the boiler was allowable. (A.Y. 1998-99)

*ACIT v. Protinkem (2006) 102 TTJ 604 (Amritsar)(Trib.)*

### **S. 32 : Depreciation – Functional test – Less than ` 5000**

Every node of electronic yarn cleaner system functions separately and is independent of others in its operation, and cost of each node being less than ` 5,000, assessee was entitled to 100 per cent depreciation. (A.Y. 1995-96)

*Bhilwara Spinners Ltd. v. CIT (2006) 102 TTJ 838 / 101 ITD 237 (Jodh.)(Trib.)*

### **S. 32 : Depreciation – Loss – Carry forward and set off [S. 72]**

Return of Income having been treated as non est and unabsorbed depreciation and business loss were not determined during the A.Y. 1987-88, it cannot be carried forward and set off against the income for the asst. yr. 1995-96. (A.Ys. 1995-96, 1996-97)

*P. L. Haulwel Trailers Ltd. v. Dy. CIT (2006) 103 TTJ 249 / 100 ITD 485 (Chennai)(Trib.)*

### **S. 32 : Depreciation – Explanation 5 – Finance Act, 2001**

Explanation 5, to section 32 inserted by the Finance Act, 2001, was not applicable to assessment year 1995-96. (A.Y. 1995-96)

*Morepen Laboratories Ltd. v. Jt. CIT (2005) 95 TTJ 404 (Chd.)(Trib.)*

### **S. 32 : Depreciation – Chapter VI-A – Disclaim of depreciation**

If the assessee claims a relief under the chapter VI-A, then it is not open to assessee to disclaim depreciation allowance. (A.Y. 1997-98)

*ITO v. Midas Touch Exports (2005) 1 SOT 553 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Owner – Gas cylinders – Lease**

Where assessee claimed depreciation on gas cylinders given on lease, but from whole lease agreement it was clear that the assessee had simply made finance available to lessee to purchase such cylinders and recovered amount higher than cost thereof from lessee, from the beginning assessee did not have any control over leased equipment. It was in fact a financial agreement and not being a regular activity of assessee income is to be treated as income from other sources. Thus it was not entitled to depreciation thereon. (A.Ys. 1988-89 to 1993-94)



*Dy. CIT v. John Tinson & Co. (2005) 1 SOT 47 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Owner – Wind mills – Possession**

Where assessee company entered into agreement with WPL to purchase wind farms, possession of project by WPL on account of obligation to operate and maintain plant as licensee could not result in ownership right of assessee being diminished in any manner so as to deny depreciation to assessee on ground that assessee was not owner of windmills. (A.Ys. 1996-97, 1997-98)

*Jt. CIT / Addl. CIT v. Goyal MG Gases Ltd. (2005) 1 SOT 477 / (2004) 90 TTJ 280 (Delhi)(Trib.)*

### **S. 32 : Depreciation – User of asset – Passive user**

Even for grant of depreciation on principle of passive user, assessee has to prove that passive user was also for business purposes. (A.Y. 1995-96)

*Hydel Construction Ltd. v. Dy. CIT (2005) 146 Taxman 80 (Mag.)(Delhi)(Trib.)*

### **S. 32 : Depreciation – User of asset – Passive user**

Where assessee was in business of civil engineering, it could claim depreciation on scaffolding material purchased by it and lying in its office site which was purchased before end of financial year relevant to assessment year, on ground of passive user, even if such material was not actually put to use in such year. (A.Ys. 1993-94, 1994-95)

*Skyline Engineering Contracts (I) (P.) Ltd. v. Dy. CIT (2005) 94 TTJ 201 (Delhi)(Trib.)*

### **S. 32 : Depreciation – User of asset – Single day**

Assessee would be entitled to 50% of normal depreciation even if asset is used for a single day in business carried on by assessee. (A.Y. 1995-96)

*Jt. CIT v. Holland Equipment Co. B.V. (2005) 3 SOT 810 (Mum.)(Trib.)*

### **S. 32 : Depreciation – User of asset – Trial production**

Depreciation should be allowed even if plant and machinery has been put to use for trial production. (A.Y. 1995-96)

*Aurofood Ltd. v. Dy. CIT (2005) 4 SOT 345 (Chennai)(Trib.)*

### **S. 32 : Depreciation – User of asset – Letting out of building – Business income**

Where assessee company had let out building owned by it to a bank wherein salaries of its employees were credited. The bank services and convenience so enjoyed by assessee employees did not make letting for purposes of business so as to assessee not entitled to claim depreciation on building. The income was to be assessed under the head Income from House Property. (A.Y. 2000-01)

*Southern Petro Chemical Industries v. Dy. CIT (2005) 3 SOT 157 / 93 TTJ 161 (Chennai)(Trib.)*

### **S. 32 : Depreciation – Capital expenditure – Compensation for right to use of land**

Where assessee paid an amount as compensation for acquisition of right to use land for laying pipelines, expenditure was capital expenditure to acquire a right in land and said amount paid to land owners did not perform part of block of plant and machinery so as to entitle assessee to depreciation. (A.Ys. 1992-93, 1993-94)

*Chembur Patalganga Pipelines Ltd. v. Jt. CIT (2005) 3 SOT 286 / (2006) 105 TTJ 788 / 98 ITD 143 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Stock-in-trade – Securities**

Where according to RBI's guidelines, assessee-bank was required to keep invested specified percentage of its demand and time liabilities in certain approved securities, as investment made by bank in securities was closely and intimately connected with assessee bank's business, assessee was justified in claiming depreciation on such securities treating them as stock-in-trade. (A.Y. 1996-97)

*State Bank of Saurashtra v. Dy. CIT (2005) 93 ITD 662 / 95 TTJ 225 / 3 SOT 869 (Ahd.)(Trib.)*

### **S. 32 : Depreciation – Pre-operative expenses – Failure to prove**

Where assessee failed to prove that pre-operative expenses in question were incurred for acquiring assets or plant or machinery, it was not entitled to depreciation on capitalization of such expenses. (A.Y. 1990-91)

*Ghaziabad Footwear (P.) Ltd. v. Dy. CIT (2005) 142 Taxman 18 (Mag.)(Delhi)(Trib.)*

### **S. 32 : Depreciation – Carry Forward and set off of unabsorbed depreciation [S. 80]**

Benefit of carry forward of unabsorbed depreciation cannot be denied merely on ground that loss return was filed after due date as section 80 is not applicable in case of unabsorbed depreciation. (A.Y. 1993-94)

*Jagdish Malpani v. ACIT (2005) 94 TTJ 321 (Indore)(Trib.)*

### **S. 32 : Depreciation – Presumptive taxation [S. 44AD]**

No question of Depreciation arises when net rate is applied as per Sec. 44AD. (A.Y. 1992-93)

*Rajendra & Co. v. ITO (2003) SOT 42 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Owner – Tripartite agreement**

Denial of Depreciation on ground that ownership was envisaged to be transferred after a period of 15 years as per tripartite agreement, was held to be unjustified, and more so when no depreciation was claimed by other parties. (A.Ys. 1991-92, 1992-93)

*Food Corporation of India v. Dy. CIT (2003) 79 TTJ 249 / 132 Taxman 60 (Mag.) / (2004) 1 SOT 813 (Delhi)(Trib.)*

### **S. 32 : Depreciation – Temporary break in use of machinery – Forced idleness**

Depreciation cannot be denied in case of temporary break, due to forced idleness in manufacturing activity. (A.Y. 1985-86)

*ACIT v. National Peroxide Ltd. (2003) SOT 321 (Mum.)(Trib.)*

### **S. 32 : Depreciation – Finance lease transactions – Not allowable – Ownership**

No depreciation is allowable in case of mere finance transaction, wherein assessee does not become owner of the assets in reality.

*Shaw Wallace & Co. Ltd. v. ACIT (2003) 86 ITD 315 (Kol.)(Trib.)*

### **S. 32 : Depreciation – Lease transactions – Service – Not allowable**

Depreciation cannot be granted when on facts it is proved that entire transaction of purchase and leasing was sham transaction, a dubious device adopted for tax planning. (A.Ys. 1994-95, 1995-96)

*G. K. Kabra v. ACIT (2003) 87 ITD 249 (Hyd.)(Trib.)*

### **S. 32 : Depreciation – Household items – Employees**

Held, depreciation is allowable on various household items like music system, refrigerators, etc. given to employees by the employer company for use by employees in their houses. (A.Y. 1993-94)

*Dy. CIT v. Eicher Tractors Ltd. (2003) 79 TTJ 158 / 132 Taxman 213 (Mag.)(Delhi)(Trib.)*

### **S. 32 : Depreciation – Tube well – Generator**

Held, depreciation on tubewell & generator installed at registered office of the company is to be allowed. (A.Y. 1989-90)

*Birla Jute & Industries Ltd. v. Dy. CIT (2003) 85 ITD 400 / 88 TTJ 335 (Kol.)(Trib.)*

### **S. 32 : Depreciation – Ships – Rate of depreciation**

Motors boats owned by assessee company being a hotel situated in middle of lake. The motors boats used as a mode of transport up to the hotel premises. Assessee claim of depreciation on boat considering the same as plant based on functionality test was rejected, and the rate applicable to ships was allowed. (A.Ys. 1990-91, 1991-92)

*Lake Palace Hotels & Motels (P.) Ltd. v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

### **S. 32 : Depreciation – Higher rate – Vehicles used in hiring business**

In case of contract undertaken for transportation of goods on behalf of consignors at agreed price, results into carrying of business of running vehicles on hire. Thus assessee is entitled to higher rate of depreciation on vehicles used in said business. (A.Y. 1995-96)

*Dy. CIT v. B. P. Agarwalla & Sons Ltd. (2003) 86 ITD 219 / 180 TTJ 719 / 132 Taxman 181 (TM) (Mag.)(Kol.)(Trib.)*

**S. 32 : Depreciation – Imported cars – Used as taxis**

Held, that full rate of depreciation is allowable on the Imported cars used by the assessee company in business of running them on hire for tourists. (A.Y. 1990-91 & 1991-92)

*Lake Palace Hotels & Motels (P.) Ltd. v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

**S. 32 : Depreciation – Block of assets – Single asset [S. 2(11)]**

Held, even a single asset would form a part of block of assets. (A.Y. 1988-89)

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

**S. 32 : Depreciation – Block of assets – User of asset [S. 2(11)]**

The user of asset is important for actual allowability of depreciation, and not for determining whether the asset falls within the block of asset or not. (A.Y. 1988-89)

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

**S. 32 : Depreciation – Block of assets – Discarded [S. 2(11)]**

Depreciation has to be allowed on that portion of WDV of the assets which remains after the reduction of scrap value, if any of the asset is scrapped, as long as the block continues to exist.

Depreciation cannot be denied on assets discarded without monetary benefits on grounds that they were not owned or used. (A.Ys. 1997-98, 1998-99)

*Natco Exports v. Dy. CIT (2003) 86 ITD 445 / (2004) 89 TTJ 503 (Hyd.)(Trib.)*

**S. 32 : Depreciation – Block of assets – Ponds [S. 2(11)]**

Depreciation on ponds constructed on leasehold lands which formed part of block of asset had to be allowed, inspite of said ponds being discarded and not used, since the block contained other assets. (A.Ys. 1997-98, 1998-99)

*Natco Exports v. Dy. CIT (2003) 86 ITD 445 / (2004) 89 TTJ 503 (Hyd.)(Trib.)*

**S. 32 : Depreciation – Change of previous year – Rules 5(1)**

Assessee is entitled to depreciation for full previous year consisting of 18 months, in case of change of previous year, as per rule 5(1). (A.Y. 1984-85)

*Dy. CIT v. ITC Hotels Ltd. (2003) 131 Taxman 139 (Mag.)(Bang.)(Trib.)*

**S. 32 : Depreciation – Unabsorbed depreciation – Current year depreciation**

Current year depreciation together with unabsorbed depreciation will be deducted first from Profits & Gains of Business while arriving at total income in absence of provision giving priority to unabsorbed Investment allowance over unabsorbed depreciation. (A.Y. 1991-92)

*Seshasayee Paper & Boards Ltd. v. Dy. CIT (2003) 84 ITD 707 / (2004) 82 TTJ 1018 (Mad.)(Trib.)*

### **S. 32 : Depreciation – Carry forward and set-off – Amendment w.e.f. 1-4-1997**

Unabsorbed brought forward depreciation from earlier years' up to asst. yr. 1996-97 could be set off against the income under the heads "income from house property" or "income from other sources". Unabsorbed depreciation for earlier years could be carried forward for further period of 8 years starting from the asst. yr. 1997-98. (A.Y. 1997-98)

*Jt. CIT v. India Steamship Co. Ltd. (2003) 78 TTJ 154 (Kol.)(Trib.)*

### **S. 32 : Depreciation – Search and Seizure – Block period – Allowability – Broken period [S. 158BC]**

Broken period of the last previous year falling in the block period is also referred to as previous year and one-half of the depreciation was allowable in respect of said broken period if the assets were used for less than 180 days during that period. The Act has no provision *pro rata* depreciation. (A.Ys. 1987-88 to 97-98)

*G.C. Associates v. Dy. CIT (2003) 80 TTJ 539 / (2004) 2 SOT 136 (Pune)(Trib.)*

### **S. 32 : Depreciation – Poultry shed – Plant**

Poultry sheds consist of three types of sheds each of them is constructed in a special manner so as to regulate the climate by providing proper insulation from moisture, toxic gases, etc. For this specification proper selection of the material and design is required. Accordingly, poultry sheds are constructed and designed for poultry farming. If such, basic, requirements to satisfy the functional test is satisfied then the poultry sheds can be constituted as plant for the purpose of depreciation. (A.Y. 1992-93)

*Venkateshwara Farms (P) Ltd. v. Dy. CIT (2003) 84 ITD 212 / 79 TTJ 74 (Pune)(Trib.)*

### **S. 32 : Depreciation – Actual cost – Foreign exchange fluctuation [S. 43(1), 43A]**

Additional liability due to fluctuation in foreign exchange rate arises when the assessee purchased assets at a price and therefore, it cannot be said that the liability did not exist or accrue till the installment become due or payable merely because the said liability was to be discharged in installments. However, the liability being the present one it was required to be added to the cost of plant and machinery acquired out of such foreign exchange loan in view of s. 43A. And, therefore, the actual cost defined in s. 43 (1) was to be increased by the additional liability due to fluctuation in the foreign exchange rate and the depreciation was allowable thereon. (A.Ys. 1992-93, 1993-94)

*Indo US Wire Casting Ltd. v. Dy. CIT (2003) 84 ITD 335 / 79 TTJ 996 (Bang.)(Trib.)*

*Dy. CIT v. I.C.I (India) Ltd. (2003) 85 ITD 85 / 80 TTJ 412 (TM)(Kol.)(Trib.)*

**S. 32(2) : Depreciation – Unabsorbed depreciation – Set off – Income from house property**

Unabsorbed depreciation could be set off against income from house property till the provision was amended w.e.f. 1st April, 2002. (A.Ys. 1989-90 to 1992-93)

*CIT v. Spic Ltd. (2010) 37 DTR 177 (Mad.)(High Court)*

**S. 32(2) : Depreciation – Unabsorbed – Carry forward and set off – Export Oriented Unit [S. 10B(6)]**

Assessee is a 100% EOU and eligible for exemption for period beginning from A.Ys. 1996-97 to 2006-07). In view of prohibition in section 10B(6) unabsorbed depreciation carried over for several years not allowed to be set off in the assessment year immediately following end of the period of tax exemption does not mean that the assessee cannot carry forward unabsorbed depreciation or business loss until such assessment year; S. 10B(6) has no application in A.Y. 2003-04 for the assessee which is enjoying exemption under section 10B from A.Y. 1996-97 to A.Y. 2006-07 and the assessee is entitled to carry forward unabsorbed depreciation from A.Y. 2002-03. (A.Ys. 2002-03, 2003-04)

*Akay Flavours & Aromatics (P) Ltd. v. Dy. CIT (2010) 48 DTR 382 / (2011) 239 CTR 432 (Ker.)(High Court)*

**S. 32(2) : Depreciation – Unabsorbed depreciation – Carry Forward and Set off**

The unabsorbed depreciation brought forward as on April 1, 1997 could be set off against the taxable business profit or income under any other head for the A.Y. 1997-98 and seven subsequent years. (A.Y. 1999-2000)

*CIT v. RPIL Signalling Systems Ltd. (2010) 328 ITR 283 (Mad.)(High Court)*

**S. 32(2) : Depreciation – Unabsorbed depreciation – Determination – Carry forward**

The assessee would be entitled to carry forward and set off unabsorbed depreciation under section 32(2) though the same has not been determined in the earlier year as per provision of S. 80. Provisions of section 80 are attracted to losses mentioned in section 72(1), section 73 (1) or (2) or section 74(1) or (3) or section 74A(3) and does not cover unabsorbed depreciation. (A.Y. 1986-87)

*CIT v. Brigadier Parmanand (2007) 208 CTR 255 / (2006) 152 Taxman 123 / 287 ITR 142 (All.)(High Court)*

**S. 32(2) : Depreciation – Unabsorbed – Carry forward and set off – Exempted income – Income from other sources [S. 10B(6), 56, 72(2)]**

Assessee being entitled to deduction under section 10B upto A.Y. 2005-06, provisions of section 10B(6) are not applicable in the relevant A.Y. i.e. 2004-05 and therefore, unabsorbed depreciation brought forward from assessment years prior to A.Y. 2000-01 can be set off against business income or against any other head of income including income from other sources. (A. Y. 2004-05).



*Dy. CIT v. Akay Flavours & Aromatics (P) Ltd. (2011) 55 DTR 1 / 130 ITD 41 / 138 TTJ 513 (TM) (Cochin)(Trib.)*

**S. 32(2) : Depreciation – Carry forward and set off – Effect of amendment – Period**

Unabsorbed depreciation relating to assessment years 1997-98 to 1999-2000, cannot be set off in 2003-04 and 2004-05 against income from other sources as per provision of S. 32(2). (A.Ys. 2003-04, 2004-05)

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

**S. 32(2) : Depreciation – Carry forward and set off unabsorbed depreciation – Other income**

The assessee could carry forward and set off of unabsorbed depreciation against income under other heads which was available to him up to assessment year 1996-97. (A.Y. 2002-03)

*ITO v. Keshwa Enterprises (2006) 100 ITD 365 / 102 TTJ 446 (Chd.)(Trib.)*

**S. 32(2) : Depreciation – Carry forward and set off – Circular No. 202**

In view of the Circular No. 202, dated 5-7-1976 – (1976) 105 ITR 51 (ST), unabsorbed depreciation has to be given priority over unabsorbed investment allowance while computing income for the relevant year. (A.Y. 1991-92)

*Seshasayee Paper & Boards Ltd. v. Dy. CIT (2003) 84 ITD 707 / (2004) 82 TTJ 1018 (Mad.)(Trib.)*

**Section 32A : Investment allowance**

**S. 32A : Investment allowance – Plant and machinery – Hospital – New industrial undertaking (S. 80HH)**

Assessee, a hospital which operated a nursing home, made investment in plant and machinery, but there was no identification by the Appellate Tribunal of the items installed in the hospital. The Court held that it was not possible to express any opinion as to whether the assessee was entitled to deduction under section 80HH. The decision of Gauhati High Court in *CIT v. Down Town Hospital Ltd. (2001) 251 ITR 683*, set aside and matter remanded to the Appellate Tribunal for deciding the same. (A.Y. 1994-95)

*Down Town Hospital Ltd. v. CIT (2009) 308 ITR 188 / 222 CTR 4 / 178 Taxman 221 (SC)*

**S. 32A : Investment allowance – Foreign exchange fluctuation [S. 41(1)(a), 43A(1)]**

In the relevant year, the assessee had claimed a deduction of Investment Allowance for the machineries purchased in the earlier year on account of foreign exchange fluctuation. The Supreme Court held that section 43A(1) was clearly applicable for

grant of the Investment Allowance. Any extra benefit taken was directed to be taxed in the year when the liability was reduced as provided in section 41(1)(a) and the Commissioner of Income Tax (A) was directed to examine this aspect of extra benefit. Please see substituted section 43A applicable w.e.f. 1-4-2003. (A.Y. 1993-94)  
*CIT v. Gujarat Siddhi Cement Ltd. (2009) 208 Taxation 363 / (2008) 307 ITR 393 / 174 Taxman 598 / 15 DTR 89 / 220 CTR 217 (SC)*

### **S. 32A : Investment allowance – Manufacture and production – Extraction and production of iron ore [S. 33(1)(b)(B)]**

Extraction and processing of iron ore amounts to “production” within the meaning of word in section 32A(2)(b)(iii) as ore is a “thing” which results on account of human activities. Provisions of section 33(1)(b)(B), r.w. item 3 of the Fifth Schedule and S. 35E, show that mining of ore is treated as “Production”, therefore, investment allowance in respect of machine used for mining purpose is allowed. (A.Y. 1986-87)  
*CIT v. Sesa Goa Ltd. (2005) 142 Taxman 16 / (2004) 271 ITR 331 / 192 CTR 577 / 185 Taxation 1 (SC)*

### **S. 32A : Investment allowance – X-ray machines – Ultrasound scanner – Hospital**

The assessee is a public limited company engaged in the business of running hospitals. The assessee had claimed investment allowance in respect of the equipments such as x-ray machines, ultrasound scanners, angiography, gamma camera, etc. The Assessing Officer was of the view that hospital is not engaged in manufactured production of any article or thing which is a prerequisite for grant of investment allowances, and therefore disallowed the investment allowance claim by the assessee. The CIT(A) and Tribunal held in favour of the assessee. On appeal to the High Court by the Department, the High Court while dismissing the appeal held that medical instruments provide a basic knowledge to diagnose and treat diseases and enable doctors to study how diseases progress in human bodies and compare how biological processes work in a healthy body. The High Court further held that speed and technology are improving human life and the progress of scientific and technical knowledge cannot be ignored and therefore held that medical equipment used by hospitals are entitled to investment allowance under section 32A of the Income-tax Act 1961. (A. Y. 1989-90)

*CIT v. Apollo Hospital Enterprises (2011) 338 ITR 68 / 242 CTR 229 / 56 DTR 297 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Leasing of machinery – Business of leasing**

Investment allowance under section 32A of the Act was allowable on the machinery leased out by the assessee, when the income from leasing out of machinery was assessed as business income by the assessing officer. (A.Ys. 1984-85, 1985-86)

*CIT v. Rieta Biscuit Co. P. Ltd. (2009) 32 DTR 89 / (2010) 320 ITR 521 / 228 CTR 401 / 190 Taxman 188 (P&H)(High Court)*

### **S. 32A : Investment allowance – Construction of building, bridge or quarters – Manufacturing**

Construction of building, bridges or quarters does not amount to manufacturing or production of any article or thing and investment allowance under section 32A of the Act is not allowable to the company engaged in business of construction.

*CIT v. Hans Builders Contractors Engineers (P) Ltd. (2008) 202 Taxation 327 (Delhi)(High Court)*

### **S 32A : Investment allowance – Interest – Deferred payment scheme [S. 43(1)]**

Interest paid by the assessee under deferred payment scheme for acquisition of machinery which is relatable to the period after the asset is first put to use should not be included in the actual cost of the asset under Explanation 8 to section 43(1) of the Act. Accordingly, investment allowance under section 32A of the Act was also not available to the assessee on such deferred interest. (A.Ys. 1982-83 & 1985-86)

*CIT v. Tractors & Farm Equipment Ltd. (2008) 202 Taxation 639 / 294 ITR 163 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Pathological Laboratory**

Assessee running Pathological Laboratory is entitled to investment allowance on expenditure incurred for pathological equipments as pathological equipment can be taken to be an industrial undertaking as the result obtained is different from its input. (A.Ys. 1983-84, 1984-85, 1985-86)

*CIT v. Suresh Amin Family Trust 2007 TLR 763 / (2006) 205 CTR 577 / (2007) 288 ITR 101 / 158 Taxman 105 (Guj.)(High Court)*

### **S. 32A : Option to claim investment allowance – Installation or put to use**

The High Court endorsing the conclusion of the Tribunal held that the assessee has option to claim the investment allowance in the year of installation, where the machinery is put to use in the immediately succeeding year of its installation.

*CIT v. Sukhjit Starch & Chemicals Ltd. (2007) 201 Taxation 612 (P&H)(High Court)*

### **S. 32A : Investment allowance – Refinery unit – Processing of oil – Vanspati**

Refinery unit for processing of oil and manufacturing of vanaspati ghee is eligible for investment allowance under section 32A of the Act.

*CIT v. Navbharat Banaspati & Allied Industries (2007) 200 Taxation 99 (P&H)(High Court)*

### **S. 32A : Investment allowance – Refinery – Manufacturing**

Refinery is a manufacturing process/ industrial undertaking and thus eligible for investment allowance under section 32A of the Act. (A.Ys. 1983-84, 1984-85)

*CIT v. Oswal Woollen Mills (2007) 199 Taxation 138 / (2006) 206 CTR 141 (P&H)(High Court)*

### **S. 32A : Investment allowance – Manufacture – Bleaching – Dyeing – Printing grey cloth**

Bleaching, dyeing and printing of grey cloth amounts to manufacture or production of an article or thing for purpose of sections 32A and 80J.

*CIT v. Shree Lalit Fabrics P. Ltd. (2007) 200 Taxation 133 (P&H)(High Court)*

### **S. 32A : Investment allowance – Mining – Excavation**

Mining and excavation of lignite amounts to production. The assessee was thus entitled to investment allowance under section 32A of the Act on plant and machinery owned by assessee and wholly used for the same. (A.Ys. 1986-87, 1987-88)

*General Contracts Co. v. CIT (2007) 197 Taxation 221 / (2006) 206 CTR 10 / 287 ITR 416 (Guj.) (High Court)*

### **S. 32A : Investment allowance – Plant and machinery – Calculators, water coolers, factory cleaning machines are 'plant'**

The Hon'ble Court was concerned with the phrase 'Plant & Machinery' in the Reference Application filed by the assessee with respect to the investment allowance. It is well settled that the word 'plant' must be given a wide meaning as held by the Supreme Court in *CIT v. Taj Mahal Hotel [1971] 82 ITR 44* and that 'plant' includes whatever apparatus is used by a person for carrying on his business. Data processing machines, computers, weighing scales and cranes and items of similar nature are held to be plant in *CIT v. IBM World Trade Corpn. [1981] 130 ITR 739 (Bom.)*, *CIT v. Emirates Commercial Bank Ltd. [2003] 262 ITR 55 (Bom.)*, and *CIT v. Mahindra Ugine Steel Co. Ltd. [1999] 232 ITR 204 (Bom.)*, respectively. (A.Ys. 1979-80, 1980-81)

*Associated Bearing Co. Ltd. v. CIT (2006) 157 Taxman 28 / 205 CTR 150 / 286 ITR 341 (Bom.) (High Court)*

### **S. 32A : Investment allowance – Job work – Eligibility**

The assessee, who is carrying on the manufacturing activity on job work basis is eligible to claim investment allowance on its plant and machinery. (A.Y. 1980-81)

*CIT v. Rohelkhand Foods (P.) Ltd. (2006) 157 Taxman 379 (All.)(High Court)*

### **S. 32A : Investment allowance – Ultrasound machine – Nursing home**

Assessee, who is running nursing and maternity home, is entitled to investment allowance with reference to ultrasound machine. (A.Y. 1984-85)

*CIT v. R. M. Malhotra (2006) 157 Taxman 37 / 203 CTR 498 / 283 ITR 181 (All.)(High Court)*

### **S. 32A : Investment allowance – Manufacture or production – Extraction of ore**

Extraction of ore is production and therefore, qualifies for investment allowance.

*CIT v. Sesa Goa (India) Ltd. & Anr. (2006) 282 ITR 197 / 202 CTR 302 / 153 Taxman 502 (Bom.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Data processing – Industrial undertaking**

Activity of data processing through use of computers is one which would amount to business manufacture or production of articles or things and units which undertakes such computer services for other concerns would be an industrial undertaking eligible for investment allowance. (A.Y. 1983-84)

*CIT v. Professional Information Systems & Management (2005) 274 ITR 242 / 146 Taxman*  
*673 / 195 CTR 14 (Guj.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Seasoning tree trunks – Industrial undertaking**

De-embarking and seasoning tree trunks and converting same into logs would amount to production of a new commercial articles or things under section 32A. (A.Ys. 1983-84, 1985-86)

*Andaman & Nicobar Islands Forest & Plantation Development Corpn. Ltd. v. CIT (2006) 280 ITR 118 / (2005) 147 Taxman 160 / 198 CTR 76 (Cal.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Civil contract works – Industrial undertaking**

An assessee, engaged in execution of civil contract jobs, is not an industrial undertaking and, therefore, cannot claim investment allowance. (A.Y. 1982-83)

*CIT v. Allied Construction Co. (2005) 146 Taxman 734 (All.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Construction of Dam – Industrial undertaking**

Assessee- firm, engaged in construction of dam would not be entitle to investment allowance as construction of tunnels, roads, etc. does not amount to manufacture or production of article. (A.Y. 1981-82)

*Jai Prakash Associates (P.) Ltd. v. CIT (2005) 277 ITR 193 / 146 Taxman 308 (All.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Construction company – Industrial undertaking**

Construction company being not an industrial undertaking, is not entitled to investment allowance. (A.Ys. 1978-79, 1979-80, 1985-86)

*CIT v. U.P. Rajkiya Nirman Nigam Ltd. (2005) 147 Taxman 622 (All.)(High Court)*

*CIT v. Ceekay Associates (P.) Ltd. (2005) 147 Taxman 624 (All.)(High Court)*

**S. 32A : Investment allowance – Manufacture – Production – Construction of tunnel – Civil contractor – Industrial undertaking**

The assessee was a firm and was engaged in the work relating to construction of tunnel and minor irrigation projects, it being a construction company was not entitled to investment allowance on tractors/ trolleys. (A.Y. 1980-81)

*CIT v. Harbhajan Sarbjit Associates (2005) 276 ITR 542 / 148 Taxman 484 (All.) (High Court)*

### **S. 32A : Investment allowance – Cold storage – Not processing**

Investment allowance is not admissible in respect of Cold Storage as there is no processing on manufacturing activity undertaken. (A.Ys. 1980-81, 1982-83)

*CIT v. S.R. Cold Storage (2005) 145 Taxman 220 / 197 CTR 504 (All.) (High Court)*

*R.K. Arya Cold Storage & General Mills v. CIT (2005) 148 Taxman 467 / (2006) 200 CTR 536 (All.) (High Court)*

### **S. 32A : Investment allowance – Computers – Use in manufacturing**

Assessee engaged in manufacturing machineries & equipment is entitled to investment allowance on computers. (A.Y. 1981-82)

*CIT v. Sayaji Iron & Engg. P. Ltd. (2005) Tax LR 251 / (2006) 281 ITR 438 / 200 CTR 115 (Guj.) (High Court)*

### **S. 32A : Investment allowance – Computer microprocessor – Entitlement to allowance**

The assessee is entitled to investment allowance on computer microprocessor. (A.Y. 1982-83)

*CIT v. Dinesh Mills Ltd. (2005) 148 Taxman 76 / 199 CTR 509 (Guj.) (High Court)*

### **S. 32A : Investment allowance – Generation or distribution of electricity – Industrial undertaking**

The benefit of investment allowance under section 32A can be claimed by assessee if he is running an industrial undertaking engaged in generation or distribution of electricity or any other form of power or involving manufacturing or production of articles or things. (A.Y. 1980-81)

*CIT v. Suraj Theatre (2005) 274 ITR 558 / 144 Taxman 431 / 193 CTR 552 (P&H) (High Court)*

### **S. 32A : Investment allowance – Generator – Use in manufacturing**

The generator which is used in the business of manufacture or production of any article or thing by the assessee is entitled to investment allowance. (A.Y. 1986-87)

*CIT v Raj Vijay Corpn. (2005) 278 ITR 348 / 196 CTR 641 (All.) (High Court)*

### **S. 32A : Investment allowance – Rectified spirit – Eleventh schedule**

Rectified spirit did not have mention in item No. 1 of the Eleventh Schedule and therefore, investment allowance on plant and machinery meant for manufacture of rectified spirit was admissible. (A.Y. 1980-81)



*CIT v. Rampur Distillery & Chemical Co. Ltd. (2005) 277 ITR 416 / 154 Taxman 274 (All.)(High Court)*

**S. 32A : Investment allowance – Telephone exchange at fertilizer plant – Not office appliance**

The telephone exchange installed in its fertilizer unit, it would be entitled to investment allowance as telephone exchange would not be an office appliance but would fall under the term 'plant'. (A.Y. 1990-91)

*CIT v. Radico Khaitan Ltd. (2005) 274 ITR 354 / 142 Taxman 681 / 194 CTR 451 (All.)(High Court)*

**S. 32A : Investment allowance – Eleventh Schedule – Explanation – Clarificatory**

Explanation added under item No. 5 of Eleventh Schedule with effect from 1-4-1988 is clarificatory and, thus, assessee a manufacturer of aerated waters containing blended flavouring concentrates, was not entitled to investment allowance even prior to insertion of said Explanation the blending flavouring concentrates were covered under the said explanation. (A.Y. 1983-84)

*CIT v. Soft Beverages Pvt. Ltd. (2005) 272 ITR 270 / 195 CTR 286 (Mad.)(High Court)*

**S. 32A : Investment allowance – Carry forward and set-off – Quantification**

Until investment allowance is quantified and determined in relevant assessment year after installation of the machinery, there cannot be any question of carrying forward of investment allowance. (A.Y. 1989-90)

*Salem District Co-operative Milk Producers Union Ltd. v. Dy. CIT (2005) 274 ITR 150 (Mad.) (High Court)*

**S. 32A : Investment allowance – Firm – Dissolved – Withdrawal of allowance u/s. 155(4A)**

Investment Allowance granted to firm cannot be withdrawn under section 155(4A) where firm is dissolved and assets are distributed to partner no transfer takes place, as for withdrawal thereof existence of assessee who was started investment allowance is a prerequisite condition for 32A(5)(b)/(c). (A.Ys. 1977-78, 1978-79)

*CIT v. Pratik Prints (2005) 274 ITR 289 / 144 Taxman 126 / 193 CTR 361 (Guj.)(High Court)*

**S. 32A : Investment allowance – Machinery installed in restaurant – Not manufacturing**

Assessee is not entitled to investment allowance on machineries installed in a restaurant as it does not involve any manufacturing activity such that a restaurant to be termed as an industrial undertaking. (A.Y. 1985-86)

*CIT v. Fiesta Restaurants Ltd. (2004) 136 Taxman 333 / 186 CTR 497 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Hotels – Foods – Cooking**

Investment allowance is not allowable for hotels as there is no activity of manufacture when food is cooked and served therein.

*South India Tourist Home (P) Ltd. v. CIT (2004) 136 Taxman 280 / 186 CTR 496 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Equipment – Hospital**

Investment allowance is allowable in respect of medical equipment air conditioners, lifts and other office equipment, to the hospital. (A.Ys. 1989-90, 1990-91)

*CIT v. Down Town Hospital Pvt. Ltd. (2004) 267 ITR 439 / 139 Taxman 247 (Gau.)(High Court)*

### **S. 32A : Investment allowance – Machinery installed in construction business – Not eligible**

Investment allowance is not allowable on machineries installed for purpose of its construction business. [The High Court has followed its previous decision for same assessee in 244 ITR 356 (Ker)] (A.Ys. 1987-88, 1989-90 1990-91)

*CIT v. Asian Techs Ltd. (2004) 136 Taxman 19 / 187 CTR 321 (Ker.)(High Court)*

### **S. 32A : Investment allowance – Cutting and polishing of slabs – manufacture**

Cutting and polishing of granite slabs before exporting them does not amount to "manufacture". (A.Ys. 1986-87 to 1988-89)

Conversion of marble blocks into polished slabs and tiles constitutes 'manufacture' or 'production' as it results in emergence of a new and distinct commodity. Assessee is entitled to deduction under section 80-IA. (A.Y. 2001-02) *ITO v. Arihant Tiles & Marbles P. Ltd. (2009) 227 CTR 513 (2010) 320 ITR 79 / 186 Taxman 439 / (2009) 32 DTR 161 (SC)*

*CIT v. Vijay Granites (P) Ltd (2004) 267 ITR 606 / 140 Taxman 371 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Activities of mining granite from quarries – manufacture or production**

Activities of mining granite from quarries and exporting them after cutting polishing, etc. would not come within the purview of manufacture or production. (A.Y. 1985-86)

*CIT v. Tamil Nadu Minerals Ltd. (2004) 189 CTR 72 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Blending of tea – Manufacture – Production**

Blending various categories of teas and selling them after packaging with new brand name does not amount to manufacture or production of a new commodity. (A.Y. 1984-85)

*Brooke Bond India Ltd v. CIT (2004) 137 Taxman 529 / 269 ITR 232 / 190 CTR 473 (Cal.)(High Court)*

### **S. 32A : Investment allowance – Processing of prawns – Eligible**

Assessee engaged in processing of prawns and shrimps and exporting them after various treatments like deveining, peeling, etc. is not entitled to investment allowance. (When raw prawns are subjected to the process of deveining and peeling do not cease to be prawns) (A.Y. 1985-86)

*CIT v. Premier Export International (2004) 271 ITR 308 / 134 Taxman 339 / 187 CTR 76 (Ker.)(High Court)*

### **S. 32A : Investment allowance – Cold storage – Industrial undertaking**

Cold storage is not industrial company, hence, it is not entitled for investment allowance. (Only engaged in processing of goods and not in manufacture or production of goods). (A.Y. 1978-79)

*Ram Prakash Agarwal (HUF) v. CIT (2004) 141 Taxman 562 / 191 CTR 272 (All.)(High Court)*

### **S. 32A : Investment allowance – Dissolution of firm – Withdrawal of investment allowance**

When a firm is dissolved and the rights of erstwhile partners are mutually adjusted, there is no transfer, so as to justify withdrawal of investment allowance. (Dissolution of a firm did not effect only transfer or sale. Hence there was no contravention of section 155(4A) or section 32A(5))

*Meenu Equipments v. CIT (2004) 266 ITR 33 / 135 Taxman 1 / 187 CTR 481 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Manufacture – Production – Marine products**

Machinery deployed in marine products division was not entitled to Investment Allowance as the activities of catching fish, processing the same, treating with chemicals, freezing the same and packing does not amount to manufacturing. (A.Y. 1982-83)

*CIT v. E.I.D. Parry (India) Ltd. (2004) 192 CTR 517 / (2005) 274 ITR 489 / 143 Taxman 93 (Mad.)(High Court)*

### **S. 32A : Investment allowance – In relation to business – Manufacturing**

The expression used in both sections 32(1) and 32A (1), is "in relation to the business" viz, for the purpose of business. It does not make out anything to the extent that such business has to be related to manufacturing purpose. The section does not make any such provision circumscribing the application only in respect of the plant required for manufacturing purpose. If it is related to the business of the assessee, namely, used for the purpose of the business, the provisions of sections 32 and 32A would be attracted. (A.Y. 1985-86)

*CIT v. Birla Jute & Industries Ltd. (2003) 260 ITR 55 / 180 CTR 339 / 133 Taxman 337 (Cal.)(High Court)*

### **S. 32A : Investment allowance – Computation – Fluctuation in rate of foreign exchange**

It is not correct to say that the amount of investment allowance under section 32A of the Act gets crystallized once and for all in the year of installation and first user and that any fluctuation in the rate of exchange in a subsequent year will not have any impact on the amount of investment allowance allowable to the assessee under section 32A. (A.Ys. 1977-78, to 1979-80)

*CIT v. Gujarat State Fertilizers Co. Ltd. (2003) 126 Taxman 572 / 259 ITR 526 / 179 CTR 266 / (2002) 125 Taxman 593 (FB)(Guj.)(High Court)*

### **S. 32A : Investment allowance – Fluctuation in exchange rate – Repayment of principal**

Investment allowance is allowable in respect of liability arising out of fluctuation in exchange rate is relatable to repayment of principal amount borrowed for purchase of capital equipment. (Followed 259 ITR 526 (FB) (Guj.)(High Court)

*Ahmedabad Kaiser-I-Hind Mills Co. Ltd. v. CIT (2003) 130 Taxman 262 / 264 ITR 666 (Guj.)(High Court)*

### **S. 32A : Investment allowance – Computers – Office premises**

Deduction under section 32A is allowable in respect of computers installed in office premises of assessee-bank.

*CIT v. Emirates Commercial Bank Ltd. (2003) 262 ITR 55 / 134 Taxman 682 (Bom.)(High Court)*

### **S. 32A : Investment allowance – Construction activity – Not eligible**

Construction Activity is not entitled to investment allowance. (Followed *CIT v. N. C. Budharaja & Co. (1993) 204 ITR 412 (SC)*)

*CIT v. Popular Automobiles Ltd. (2003) 131 Taxman 346 / (2004) 186 CTR 362 (Ker.)(High Court)*

### **S. 32A : Investment allowance – Construction of tunnels, bridges**

Assessee-firm, engaged in construction of tunnels, bridges, roads, etc., is not entitled to benefit of investment allowance. (A.Ys. 1978-79, 1979-80) [Followed *CIT v. N. C. Budharaja & Co. (1993) 204 ITR 412 (SC)*]

*CIT v. Jai Prakash Associates (2003) 130 Taxman 610 (All.)(High Court)*

### **S. 32A : Investment allowance – Data processing machines – Eligible**

Data processing machines are entitled to investment allowance. [Relied on *CIT v. IBM World Trade Corporation 130 ITR 739 (Bom)*]

*CIT v. Vinay Kumar Sigtia (2003) 262 ITR 686 / (2004) 134 Taxman 528 (Orissa)(High Court)*

### **S. 32A : Investment allowance – Data processing machines – Eligible**

Data processing division is a separate industrial undertaking and assessee would be entitled to investment allowance on computer installed in it. (A.Ys. 1984-85, 1985-86)

*CIT v. Southern Roadways Ltd. (2003) 181 CTR 340 / 133 Taxman 350 / (2004) 265 ITR 404 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Hospital – ECG-X-ray machine**

E.C.G. machine, X-ray, unit and other laboratory equipments installed in hospital, will be entitled to investment allowance. (A.Y. 1989-90)

*Mar Gregorious Memorial Muthoot Medical Centre v. CIT (2003) 129 Taxman 53 / 261 ITR 443 (Ker.)(High Court)*

### **S. 32A : Investment allowance – Diagnostic centre – ECG - X-Ray machine**

C. T. scan machine installed in a diagnostic centre, will not be entitled to investment allowance. Reports of patients coming out of CT scan machine do not amount to production or manufacture of articles. (A.Y. 1990-91)

*Insight Diagnostic & Oncological Research Institute (P.) Ltd. v. Dy. CIT (2003) 129 Taxman 510 / 262 ITR 41 / 182 CTR 632 (Bom.)(High Court)*

### **S. 32A : Investment allowance – Fork lift – Manufacturing granite**

Fork-lifts used in the process of manufacturing of granites would be entitled investment allowance. (A.Y. 1987-88) (It was held that Fork lift are the road transport vehicles. Hence, entitled to Addl. Depreciation. Further, ITAT had found that the machinery was used in the manufacture of articles and therefore entitled to investment allowance. Hence, the interference was called for.) (A.Y. 1987-88)

*CIT v. Gem Granites (2003) 130 Taxman 396 / 262 ITR 426 / 192 CTR 490 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Hotels – Industrial undertaking**

Hotel is not an industrial undertaking and, consequently, hotel is not entitled to investment allowance on furniture and electric fittings installed therein. (A.Y. 1983-84)

*CIT v. Geeta Devi Purohit (Smt.) (2003) 131 Taxman 54 / 260 ITR 231 / 179 CTR 203 (Raj.)(High Court)*

### **S. 32A : Investment allowance – Prawns processing – Not eligible**

Assessee, engaged in processing and export of prawns and allied products, is not entitled to investment allowance in respect of building used in his business. [Followed previous decision in assessee case in 250 ITR 440 (Mad.) (A.Y. 1983-84)

*CIT v. George Maijo (Cud) (2003) 129 Taxman 234 (Mad.)(High Court)*

### **S. 32A : Investment allowance – Mining business – Not eligible**

Assessee doing business of mining and quarrying of granite stones and exporting them as finished goods to various countries, would not be entitled to investment allowance. (A.Y. 1988-89)

*CIT v. Pooshya Exports (P.) Ltd. (2003) 127 Taxman 369 / 262 ITR 417 / 179 CTR 557 (Mad.)(High Court)*

**S. 32A : Investment allowance – Tractors are not road transport vehicles – Eligible**

Tractors are not road transport vehicles hence would be entitled to investment allowance. (A.Y. 1978-79)

*CIT v. U.P. Paschimi Kshetriya Vikas Nigam Ltd. (2003) 264 ITR 273 / (2004) 188 CTR 40 / 137 Taxman 378 (All.)(High Court)*

**S. 32A : Investment allowance – Water tanks**

Investment allowance is to be allowed on the ground water storage tank used for storing water required for cooling of plant and machinery.

*CIT v. Tube Investments of (India) Ltd. (2003) 261 ITR 753 / (2004) 141 Taxman 66 (Mad.)(High Court)*

**S. 32A : Investment allowance – Withdrawal – Machineries scrapped [S. 155 (4A)]**

Where machinery was scrapped which was utilized in manufacture of steel which was sold, section 155(4A)(a) was not attracted for withdrawal of investment allowance allowed on such machinery. (A.Y. 1977-78)

*CIT v. Star Steel (P.) Ltd. (2003) 264 ITR 263 / 184 CTR 521 / (2004) 138 Taxman 153 (Guj.)(High Court)*

**S. 32A : Investment allowance – Small scale industry – Recognised by DI**

Assessee having been recognized as SSI by the Director of Industries has to be treated as such for purpose of investment allowance irrespective of the value of plant and machinery and items manufactured by it. (A.Ys. 1986-87, 1987-88)

*Jaipur Bottling Co. v. ACIT (2006) 101 TTJ 192 (Jp.)(Trib.)*

**S. 32A : Investment allowance – Assets installed prior to 31st March, 1990 – Allowable in A.Y. 1994-95**

Assessee having installed the assets prior to 31st March, 1990, investment allowance was allowable for assessment year 1994-95 even though s. 32A was not on the statute book. (A.Y. 1994-95)

*Hero Honda Motors Ltd. v. Dy. CIT (2006) 100 TTJ 394 (Delhi)(Trib.)*

**S. 32A : Investment allowance – Fluctuation in rate of foreign currency – Eligible**



Investment allowance is allowable to the assessee on account of increased liability towards repayment of loan for the purchase of machinery in terms of fluctuation in the rate of foreign currency.

*Hero Honda Motors Ltd. v. Dy. CIT (2006) 100 TTJ 394 (Delhi)(Trib.)*

### **S. 32A : Investment allowance – Pathological laboratory**

Pathological Laboratory as an industrial undertaking, which produced an article or thing and was thus entitled to investment allowance under section 32A on the new machinery installed in the clinic. (A.Ys. 1983-84, 1984-85, 1985-86)

*CIT v. Suresh Amin Family Trust (2006) 205 CTR 577 / (2007) 288 ITR 108 / 158 Taxman 105 (Guj.)(High Court)*

### **S. 32A : Investment allowance – Depreciation – Small scale industrial undertaking**

For the purposes of claiming deduction under section 32A only authority to grant recognition as small scale industrial undertaking is the Director of Industries. (A.Ys. 1986-87, 1987-88)

*Jaipur Bottling Co. v. ACIT (2000) 101 TTJ 192 (Jp.)(Trib.)*

### **S. 32A : Investment allowance – Manufacture – Tyre retreading**

Tyre retreading does not amount to production of a new article entitling assessee to investment allowance. (A.Y. 1990-91)

*ITO v. Trimurthy Tyre Works (2005) 94 TTJ 443 (Pune)(Trib.)*

### **S. 32A : Investment allowance – Year of loss – Allowed in year statutory reserve is created**

Investment Allowance is required to be qualified in the year in which machinery is put to use, though assessee has not created reserve due to loss. The same has to be carried forward and allowed in the year in which assessee created reserve out of profits. (A.Ys. 1989-90, 1990-91)

*Dy. CIT v. Bifora Watch Co. Ltd. (2005) 94 ITD 203 / 96 TTJ 393 (TM)(Mum.)(Trib.)*

### **S. 32A : Investment allowance – Year of installation – Year of purchase not relevant**

Assessee is entitled to Investment allowance in the year in which it is installed, irrespective of the year in which it had been purchased. (A.Y. 1982-83)

*ACIT v. Angoor Wool Combers (P.) Ltd. (2003) 130 Taxman 221 (Mag.)(Chd.)(Trib.)*

### **S. 32A : Investment allowance – Exchange fluctuation – Non eligible**

Investment Allowance is not allowable on subsequent addition to the cost by operation of Sec. 43A, due to exchange fluctuation, as it does not alter the cost when the P & M were acquired or first put to use. (A.Y. 1992-93)

*Indo US Wire Casting Ltd. v. Dy. CIT (2003) 84 ITD 335 / 79 TTJ 996 (Bang.)(Trib.)*

### **S. 32A : Investment allowance – Mining – Loading and transporting**

Activity of mining, raising loading and transporting of gypsum from mines cannot be said as manufacture. Hence, not entitled to Investment Allowance.

The moment there is a transformation into a new commodity having its own character, use and name whether as a result of one process or several processes manufacture takes place. (A.Y. 1990-91)

*R.A.M. Earth Movers (P.) Ltd. v. ACIT (2003) 78 TTJ 398 / 130 Taxman 41 (Mag.)(Jodh.)(Trib.)*

### **S. 32A : Investment allowance – Dumpers – Quarrying stone rubble**

Assessee engaged in business of mining and quarrying of stone-rubble is entitled to Investment Allowance on the cost of Dumpers used in its business. (A.Y. 1990-91)

*Vasudev S. Dalwadi (HUF) v. ACIT (2002) 77 TTJ 1005 (Ahd.)(Trib.)*

### **S. 32A : Investment allowance – Unabsorbed investment allowance – Priority**

Held, that brought forward business loss and unabsorbed Depreciation get priority over unabsorbed Investment Allowance in matter of set-off, even after the decision of the S.C. in case of *CIT v. Mother India Refrigeration Industries (P) Ltd. (1985) 155 ITR 711*. (A.Y. 1991-92)

*Shri Rajasthan Syntex Ltd. v. Dy. CIT (2002) 77 TTJ 849 (Jodh.)(Trib.)*

## **Section 32AB : Investment deposit account.**

### **S. 32AB : Investment deposit account – Civil construction – Manufacturing**

The assessee is engaged in the business of civil construction. The Supreme Court affirmed the decision of the Tribunal and the High Court, wherein it was held that business of civil construction would not amount to carrying on manufacturing activity for the purpose of section 32AB. Therefore the claim for investment allowance was not allowed to the assessee. Further, the claim was raised before ITAT for the first time as an additional ground but the assessee did not place any material on record to substantiate its claim. (A.Y. 1989-90 & 1990-91))

*S. A. Builders Ltd. v. CIT (2007) / 289 ITR 26 / 208 CTR 207 (SC) / AIR 2007 SC 482*

### **S. 32AB : Investment deposit account – Business expenditure – Depreciation – Circular of company law board**

Assessee recomputed depreciation in accordance with the circular of Company law Board, amount credited to profit and loss account consequent on such recomputation amount not deductible from the profits eligible for relief under section 32AB. (A.Y. 1989-90)

*CIT v. Alfa Laval (India) Ltd. (2007) 295 ITR 451 / (2008) 170 Taxman 615 (SC)*

*Editorial: Affirmed Alfa Laval India Ltd. v. Dy. CIT (2004) 266 ITR 418 (Bom.)*

**S. 32AB : Investment deposit account – Advance for purchase – Eligible on payment**

Amount given in advance for purchase of plant and machinery amounts to utilization in the year for the purpose of section 32AB(1)(b). Installation of plant and machinery is not a condition precedent for availing the benefit of section 32AB. (A. Y. 1989-90). *CIT v. Vindhya Telelinks Ltd. (2011) 63 DTR 313 / 245 CTR 674 (MP)(High Court)*

**S. 32AB : Investment deposit account – Assembled machine – Drawing wire – Manufacturing**

Machine assembled by the assessee and used for the purpose of wire drawing was entitled to investment allowance under section 32AB of the Act. *CIT v. Hindustan Wire Product Ltd. (2007) 197 Taxation 536 (P&H)(High Court)*

**S. 32AB : Investment deposit account – Eligible business – All heads of income**

Under section 32AB once eligibility of business is established and it is found to be an eligible business, eligibility to deduction is not confined only to a particular income derived from particular head but extends to income under all heads derived from eligible business. (A.Ys. 1989-90 to 1991-92) *J. Thomas & Co. (P.) Ltd. v. CIT (2005) 275 ITR 467 / 195 CTR 230 / (2006) 151 Taxman 86 (Cal.)(High Court)*

**S. 32AB : Investment deposit account – Eligible business – Interest and dividend**

Interest and dividend income credited in profit & loss account will form part of eligible business income under section 32AB. (A.Y. 1989-90) *Dy. CIT v. United Nilgiris Tea Estate Co. Ltd. (2005) 273 ITR 470 / (2006) 203 CTR 336 (Mad.)(High Court)*

**S. 32AB : Investment deposit account – Eligible business – Interest on deposits**

Interest received on temporary deposits with scheduled banks, interest received on deposit for allotment of car, and dividend received from company are to be excluded while computing income from eligible business under section 32AB. (A.Y. 1988-89) *CIT v. Trichy Distilleries Chemicals Ltd. (2005) 272 ITR 227 / 145 Taxman 313 (Mad.)(High Court)*

**S. 32AB : Investment deposit account – Eligible business – Interest on surplus funds**

Assessee-sugar mill was entitled to deduction under section 32AB in respect of interest on deposits out of surplus funds even though such interest was shown as 'income from other sources'. *CIT v. Ambur Co-op. Sugar Mills Ltd. (2005) Tax LR 94 (Mad.)(High Court)*

### **S. 32AB : Investment deposit account – Profit of eligible business – Profit & loss account**

Income computed under Part II and III, of the schedule XI Companies Act, 1956, in respect of the income out of the eligible business would be the basis on which this deduction is allowed irrespective of the fact as to under what head a particular income will fall for the purpose of computation of income under the 1961 Act. (A.Ys. 1987-88, 1988-89)

*Britannia Industries Ltd. v. Jt CIT* (2004) 271 ITR 123 / (2005) 193 CTR 26 / 143 Taxman 325 (Cal.)(High Court)

*Carborandum Universal Ltd. v. CIT* (2004) 265 ITR 372 / 136 Taxman 352 / 187 CTR 48 (Mad.)(High Court)

### **S. 32AB : Investment deposit account – Eligible business – Companies Act – Profit**

While calculating income from “eligible business” under section 32A, every income which is computed under the Companies Act has to be taken into consideration. (A.Ys. 1988-89, 1989-90, 1990-91)

*CIT v. Kil Kothagiri Tea & Coffee Estate Co. Ltd.* (2004) 140 Taxman 89 / 141 Taxman 444 / 141 Taxman 218 / 190 CTR 405 / (2005) 273 ITR 278 (Ker.)(High Court)

### **S. 32AB : Investment deposit account – Eligible profits – Rent – Interest – Dividend**

Eligible profits would include rental income, interest dividend, profit on sale of assets, replantation subsidy along with other income included profit and loss account made as per the provisions of Companies Act, 1956. (A.Y. 1989-90)

*Assam Brook Ltd v. CIT* (2004) 267 ITR 121 / 139 Taxman 229 / 189 CTR 347 (Cal.)(High Court)

### **S. 32AB : Investment deposit account – Manufacturing machine on own – Capitalisation of assembled machinery – Amount need not be spent out of current years profits**

If an assessee manufactures a machine itself and transfers the same at cost to its business of manufacture and claims that it has purchased the machinery, it is entitled to relief under section 32AB(1)(b). (In the case of the assessee IT Department had accepted the said view in the earlier years.) Further it is not necessary that the amount should be spent out of current year's profits. (A.Y. 1988-89)

*CIT v. International Data Management Ltd.* (2003) 261 ITR 177 / 182 CTR 336 (Bom.)(High Court)

### **S. 32AB : Investment deposit account – Profits eligible for relief – Amounts written back**

Amount written back and credited to profit and loss account on account of reworking of depreciation as per circular of Company Law Board, could not be reduced from profits eligible for relief under section 32AB. (A.Y. 1989-90)

*Alfa Laval India Ltd. v. Dy. CIT (2003) 133 Taxman 740 / (2004) 186 CTR 390 (Bom.)(High Court)*

*Editorial: Approved by CIT v. Alfa Laval India Ltd. (2007) 295 ITR 451 (SC)*

### **S. 32AB : Investment deposit account – Firm – Partners**

Deduction having been granted to firm carrying on eligible business, claim for deduction once again by partners could not be granted.

*R. Jayachandran (Dr.) v. CIT (2003) 262 ITR 683 / (2004) 140 Taxman 262 (Mad.)(High Court)*

### **S. 32AB : Investment deposit account – Profits of business – Provision and Reserve**

Provision made for ascertained liability cannot be treated as a reserve or provision to be reduced as envisaged in sub-section (3) of s. 32AB and therefore, credit to P&L a/c by way of write back cannot be reduced. Under section 32AB(3) if such reserve or provision was in respect of an ascertained liability. (A.Y. 1987-88)

*Indian Plywood Mfg. Co. Ltd. v. Dy. CIT (2006) 102 TTJ 362 / 100 ITD 318 (SB)(Mum.)(Trib.)*

### **S. 32AB : Investment deposit account – Computation – Priority [S.80HH & I]**

Deduction under section 32AB has to be allowed before granting deduction under sections 80HH and 80-I. (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

### **S. 32AB : Investment deposit account – Computation – Withdrawal from Reserves**

If assessee has withdrawn any amount from any reserves or provisions and such amounts are credited to profit and loss account, then such amounts shall be reduced from profit of assessee for purposes of section 32AB; there is no condition that such amounts shall be reduced only if said amounts were considered for increasing profits of assessee in earlier assessment years for purpose of section 32AB. (A.Y. 1990-91)

*Glaxo India Ltd. v. Dy. CIT (2005) 97 ITD 98 / 98 TTJ 466 (Mum.)(Trib.)*

### **S. 32AB : Investment deposit account – Computation – Interest on fixed deposits**

Interest on fixed deposits, interest on surcharge deposit, interest on bonds (tax free), interest on PMs investments, interest on government securities, and dividend income, are not in nature of profits of eligible business for purpose of section 32AB. (A.Ys. 1986-87, 1987-88)

*Indian Oil Corpn. Ltd. v. Dy. CIT (2005) 4 SOT 1 (Mum.)(Trib.)*

### **S. 32AB : Investment deposit account – Utilised for repayment of term loan – Application**

When amount withdrawn from Investment Deposit Account is utilized for repayment of term loan, there is no such requirement that term loan was taken by the assessee for purchase of new ship, new aircraft, new machinery or new plant. (A.Y. 1992-93)  
*Nirma Industries Ltd. v. ACIT (2005) 95 ITD 199 / 146 Taxman 90 (Mag.) / 95 TTJ 867 (SB) (Ahd.)(Trib.)*

### **S. 32AB : Investment deposit account – Hire purchase eligible**

Deduction under section 32AB is allowable to assessee following mercantile system, in respect of machineries purchased under hire purchase agreement, as liability for future payment was created, which should be treated as utilization for the purpose of deduction under section 32AB. (A.Y. 1990-91)

*Beacon Rotork Controls Ltd. v. Dy. CIT (2003) 86 ITD 275 / (2004) 88 TTJ 702 (Chennai)(Trib.)*

### **S. 32AB : Investment deposit account – Eligible business – Other source**

If Income earned is in course of its eligible business, benefit under section 32AB has to be granted even though the Income is taxable under a different head or under the head Other sources. (A.Y. 1989-90)

*Dy. CIT v. Jindal Aluminium Ltd. (2003) 87 ITD 598 (Bang.)(Trib.)*

### **S. 32AB : Investment deposit account – Profit and loss account – Companies Act – AO's duty**

For computing relief under section 32AB, Assessing Officer has no authority to increase or reduce the Profit or Loss by those items which are not specifically mentioned in sub-section 3 of Sec. 32AB, so long as the profit & Loss a/c is prepared in accordance with the requirements of Companies Act. (A.Y. 1990-91)

*Dy. CIT v. Petron Civil Engg. Ltd. (2003) SOT 576 (Mum.)(Trib.)*

### **S. 32AB : Investment deposit account – Interest and dividend – Book profit**

Interest & Dividend Income has to be included in the book profit while computing the deduction under section 32AB, when Parts II & III of the Schedule VI of Companies Act has been followed for arriving at the profits. (A.Y. 1989-90)

*Stanes Amalgamated Estates Ltd. v. Dy. CIT (2003) 85 ITD 203 / (2004) 86 TTJ 893 (Mad.)(Trib.)*

### **S. 32AB : Investment deposit account – Treatment in accounts – Exclusion of other income**

Held that Dividend and Income from House Property has to be excluded from eligible profits. The treatment given by the assessee in the accounts cannot deprive or confer the entitlement to deduction, which is due under the provisions of Sec. 32AB. (A.Y. 1990-91)

*Humphrys & Glasgow Consultants (P) Ltd. v. Dy. CIT (2003) 87 ITD 344 / (2004) 86 TTJ 189 (Mum.)(Trib.)*



### **S. 32AB : Investment deposit account – Withdrawal of relief – Substitution of old asset**

Investment relief under section 32AB cannot be withdrawn on substitution of old and unserviceable asset with a new one within a period of eight years. (A.Y. 1992-993)

*Star Chemical (Bombay) Ltd. v. Dy. CIT (2003) 79 TTJ 1002 / 132 Taxman 180 (Mag.) / (2004) 2 SOT 498 (Mum.)(Trib.)*

### **Section 33 : Development rebate**

#### **S. 33 : Development rebate – Manufacture of plastic – Higher rate of rebate**

Manufacture of plastic is petrochemical within the meaning of item 18 of the Sixth Schedule. Hence, it is entitled to higher development rebate of 35 percent under section 33(1)(b)(i)(a). (A.Y. 1970-71)

*CIT v. Plastic Products Ltd. (2004) 191 CTR 23 (All.)(High Court)*

### **Section 33AB : Tea development account, coffee development account and rubber development account**

#### **S. 33AB : Tea development allowance – Profit of business – Income from tea business – Rule 8**

Tea development allowance must be in relation to the income of business of growing and manufacturing tea, rather than in relation to taxable portion of such income and in this context rule 8 has nothing to do with deduction under section 33AB(1). (A.Y. 1986-87)

*CIT v. Mahvir Plantations Ltd. (2004) 269 ITR 552 / 191 CTR 518 / (2005) 142 Taxman 538 (Ker.)(High Court)*

### **Section 33AC : Reserves for shipping business**

#### **S. 33AC : Reserves for shipping business – Operation of ships – Object of shipping**

It was clear from sec. 33AC(1) as applicable to the A.Y. 1994-95 that the only requirement prescribed was that the assessee must be a Govt. company or a company formed and registered in India with the main object of carrying on the business of operation of ships. There was no such requirement that the assessee in order to be eligible for deduction had to actually operate ships or that the amount in respect of which deduction was to be allowed and credited to the reserve account had to be the income earned from shipping business. It was further held that Amendment to section 33AC with effect from April 1, 1996 was not clarificatory or retrospective. Thus, ITAT decision *vide GAL offshore Services Ltd. v. ACIT (2005) 92 ITD 525 / 92 TTJ 719 (Mum.)(Trib.)* is reversed. (A.Y. 1994-95)

*Gal Offshore Services Ltd v. CIT (2009) 309 ITR 125 / 221 CTR 448 / (2008) 175 Taxman 485 / 17 DTR 342 (Bom.)(High Court)*

### **S. 33AC : Reserves for shipping business – Deduction – ‘Ship’ would include ‘Barge’**

Term ship includes Barge owning the ship or Barge is not a condition for availing benefits of S. 33AC. Profits derived from operating and maintaining barges belonging to another person would qualify for deduction under section 33AC. (A.Y. 2003-04)

*Dy. CIT v. Orion Agencies Ltd. (2010) 128 TTJ 524 / (2009) 32 SOT 527 / (2010) 35 DTR 300 (Mum.)(Trib.)*

### **S. 33AC : Reserves for shipping business – Tugs are ships – IT Rules**

In absence of the definition of “Ship” in the Act, the meaning assigned to the term “ship” under rules of the IT Rules should be considered. The assessee-enterprise being a public company under the Companies Act was entitled to deduction under section 33AC. (A.Ys. 2000-01 & 2001-02)

*Ocean Sparkle Ltd. v. Dy. CIT (2006) 99 TTJ 582 (Hyd.)(Trib.)*

### **S. 33AC : Reserves for shipping business – Creation of reserve – Book entries**

Following the ratio of Supreme Court in *Shri Shubhalaxmi Mills Ltd. v. Addl CIT (1989) 177 ITR 193*, the Tribunal held that mere book entries suffice for creating reserve fund. As assessee had created reserve to the extent of total income available before making any deduction under Chapter VI-A, conditions precedent for claiming the benefit were satisfied. (A.Y. 1994-95)

*Tolani Bulk Carriers Ltd. v. ACIT (2005) 96 ITD 170 / 96 TTJ 1012 (Mum.)(Trib.)*

### **S. 33AC : Reserves for shipping business – Profit derived – Conditional**

Mere claim of benefit under section 33AC does not allow an assessee without production of material evidence in support of it. An assessee is not entitled for the deduction as requisite conditions prescribed under section 33AC were not fulfilled.

On the facts of the case the Tribunal held that the assessee was not entitled for the benefit under section 33AC as –

- (i) the CIT(A) found that the appellant’s main object was not carrying on operation of ships but road transport.
- (ii) the records also showed that the assessee was deriving maximum revenue from business of road transport.
- (iii) the memorandum of association of the assessee contained many objects but as per the requirement of the provisions of sec. 33AC there is no mention about the main object of the assessee in it even though the assessee-company was registered prior to 1965 as per s. 13(1)(c) of the Companies Act.
- (iv) the assessee has not created the reserve as required under section 33AC and has not shown any evidence for its utilisation within the prescribed period under law. (A.Y. 1993-94)

*Transport Corporation of India Ltd. v. Dy. CIT (2003) 84 ITD 183 / 79 TTJ 761 (Hyd.)(Trib.)*

### **Section 33B : Rehabilitation allowance**

### **S. 33B : Rehabilitation allowance – Industrial undertaking – Manufacturing of tea [S. 32(1)(iii)]**

Rehabilitation allowance is admissible not only on amount of deduction allowable under section 32(1)(iii) in respect of assets destroyed but also in respect of other assets extensively damaged in flood, etc., worked out on basis of same formula as is provided for assets destroyed.

*Klin Industrial (P.) Ltd. v. CIT (2003) 129 Taxman 34 / 261 ITR 338 / 182 CTR 362 (Guj.)(High Court).*

### **Section 35 : Expenditure on scientific research**

#### **S. 35 : Expenditure on scientific research – Consultancy services – Business**

Consultancy services would be covered by term 'business' referred to in section 35 and as such where assessee had derived income from consultancy services, preparation of feasibility report and other connected activities, it was to be held that it had carried on business during assessment year in question and was entitled to allowance of expenditure incurred on scientific research which was related to its business. (A.Y. 1982-83)

*CIT v. U.P. Electronic Corpn. Ltd. (2005) 276 ITR 45 / 145 Taxman 494 / (2006) 201 CTR 331 (All.)(High Court)*

#### **S. 35 : Expenditure on scientific research – User of asset**

It would not be open to the revenue to deprive assessee of benefit of deduction under the provisions of section 35 on ground that asset was not used in previous year in which capital expenditure was incurred. The object behind the enactment of S. 35 is to give incentive so as to encourage Research and Development Activities. (A.Ys. 1981-82, 1982-83)

*CIT v. Gujarat Aluminium Extrusions (P.) Ltd, (2003) 263 ITR 453 / 184 CTR 297 / 133 Taxman 542 (Guj.)(High Court)*

#### **S. 35 : Expenditure on scientific research – Capital expenditure**

Where assessee incurred capital expenditure on scientific research related to the business of subsidiary companies and it did not have any active business carried on by itself. 'Related Business' carried on by Assessee does not extend to the case of business of subsidiary. (A.Ys. 2000-01, 2003-04)

*Ciba India (P) Ltd. v. ITO (2009) 121 ITD 94 / 126 TTJ 481 / 30 SOT 269 / 31 DTR 374 (Mum.)(Trib.)*

#### **S. 35 : Expenditure on scientific research for parent company – No deduction**

Assessee carrying on/doing no business for itself but only carrying out research and development work for its parent company, results of which were to be used by parent company for extension of parent company's business. It was held that there should be a business carried on by the assessee and the scientific research should relate to

that business which is carried on by the assessee. Scientific Research, *per se*, is not contemplated as a 'business' by the provisions of section 35(1)(iv) r.w.s. 43(3)(iii)(a). Assessee's activity was facilitating the extension of business of its parent company in USA and not that of its own and hence, CIT(A) was justified in holding that assessee was not entitled to deduction under section 35(1)(iv). (A.Ys. 2003-04, 2004-05)  
*Enem Nostrum Remedies (P) Ltd v. ACIT (2009) 28 DTR 43 / 125 TTJ 31 / 119 ITD 427 / (2008) 26 SOT 1 (Mum.)(Trib.)*

### **S. 35 : Expenditure on scientific research – Capital or revenue**

Expenditure incurred by assessee on developmental activities in its R & D division, whether capital or revenue is deductible under section 35(1)(iv). (A.Y. 2001-02)  
*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / (2007) 104 ITD 427 / (2006) 8 SOT 167 (Delhi)(Trib.)*

### **S. 35 : Expenditure on scientific research – Increased cost of assets**

Claim of deduction under section 35(1)(iv) on account of increased cost of assets used for research and development purposes to the extent such cost was on account of exchange fluctuation of foreign currency loan taken for purchase of such assets and remaining outstanding as on the last date of the previous year being covered by the provisions of section 43A was allowable. (ITAT has applied same ratio for deduction under section 32A also.) (A.Y. 1994-95)  
*Hero Honda Motors Ltd. v. Dy. CIT (2006) 100 TTJ 394 (Delhi)(Trib.)*

### **S. 35 : Expenditure on Scientific research – Business of assessee**

Allowability of expenditure under section 35 is not restricted to manufacturing activity alone but same is allowable if it is related to business of assessee.  
*Anjaleem Enterprises (P) Ltd. v. Dy. CIT (2005) 149 Taxman 9 (Mag.)(Ahd.)(Trib.)*

### **S. 35 : Expenditure on scientific research – Association – Institution**

In common parlance, terms "association" 'and' 'institution' may seem to be interchangeable, but in section 35(1)(ii), they are not, expression 'other institution' is meant to be an institution imparting education in any discipline which may in addition, carry out scientific research. (A.Ys. 1996-97 to 1998-99)  
*Shri Ram Scientific & Industrial Research Foundation v. Addl. DIT (2005) 93 ITD 223 / 92 TTJ 809 (Delhi)(Trib.)*

### **S. 35 : Expenditure on scientific research – Amount actually paid**

Under provisions of section 35, sub section (1)(iv), it is not necessary that the assessee must have actually paid amount expended as expenditure on scientific research before claiming deduction. Under the provision of section 35(2)(ia), the requirement is that the assessee should have incurred capital expenditure after requirement is that the assessee should have incurred capital expenditure after 31-3-1967. (A.Y. 1996-97)

*Hero Honda Motors Ltd v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi) (Trib.)*

**S. 35 : Expenditure on scientific research – Plant and machinery – Put to use**

As per provisions of section 35(1)(iv), it is not mandatory that the plant and machinery purchased must be put to use. It is enough if the expenditure is incurred on purchase of plant and machinery to be used in the R& D unit. (A.Ys. 1991-92, 1993-94 and 1994-95)

*Dy CIT v. Metallizing Equipment Co (P) Ltd. (2005) 149 Taxman 43 (Mag.) / 92 TTJ 95 (Jodh.) (Trib.)*

**S. 35 : Expenditure on scientific research – Referral to prescribed authority**

The question whether assessee is engaged in scientific research, and the allowability of deduction under section 35, particularly when the issue involved is contentious, should be referred to the prescribed authority as per Sec. 35(3), and also their decision would be final. (A.Ys. 1991-92, 1992-93)

*Sanghi Medical Centre v. CIT (2003) 126 Taxman 99 (Mag.)(Delhi)(Trib.)*

**S. 35 : Expenditure on scientific research – Rejection of claim**

Rejection of claim without obtaining the report from the prescribed authority as provided in sub-section (3) of Sec 35, by Commissioner (Appeals) on his own was held to be unjustified. (A.Y. 1992-93)

*Sona Steering Systems Ltd. v. Dy. CIT (2003) 78 TTJ 213 / 129 Taxman 152 (Mag.)(Delhi)(Trib.)*

**S. 35 : Expenditure on scientific research – Computer software – Business**

Expenditure incurred on development of software for telecommunication industry, by assessee company engaged in the business of development & sale of software & export of software services was held to be allowable under section 35. (A.Ys. 1990-91 to 1993-94, 1995-96)

*Dy. CIT v. TCIL Bellsouth Ltd. (2003) 130 Taxman 37 (Mag.) / 89 TTJ 851 (Delhi)(Trib.)*

**S. 35(1)(iv) : Expenditure on scientific research – Deductions [S. 80B(5), 80HH, 80-I]**

Deduction under section 35(1)(iv) read with section 35(2) has to be first allowed in computing of business income as a whole and thereafter deductions under sections 80HH and 80-I have to be granted only from net income attributable to the eligible industrial unit.

*CIT v. Duroflex Coir Industries (P) Ltd. (2011) 55 DTR 133 / 245 CTR 606 (Ker.)(High Court)*

**S. 35(1)(iv) : Expenditure on scientific research – Capital expenditure – Development of software**

Business of the assessee being development of software for its clients and not solely research and development, any expenditure in doing so cannot itself fall within the parameters of section 35(1)(iv) and cannot be allowed as deduction under that section. (A. Y. 2002-03).

*3i Infotech Ltd. v. Dy. CIT (2011) 51 DTR 385 / 136 TTJ 641 / 129 ITD 422 (Mum.)(Trib.)*

### **Section 35A : Expenditure on acquisition of patent rights or copyrights.**

#### **S. 35A : Expenditure on acquisition of patent rights and copyrights – Business expenditure – Patent – Copy right [S. 37(1)]**

Royalty paid by assessee for use of the brand names and trade marks, and not for acquiring the same, the provisions of section 35A cannot be applied, the expenditure allowable as business expenditure. (A. Ys. 1997-98 to 1999-2000).

*CIT v. V. R. V. Breweries & Bottling Industries Ltd. (2011) 62 DTR 121 / 244 CTR 576 (Delhi)(High Court)*

#### **S. 35A : Expenditure on acquisition of patent rights or copyrights – Meaning**

As per term 'patent', as defined under Patent Act, 1970, only inventions can be patented and Beedi rolling or manufacturing, being not an invention, cannot be patented nor any patent right can be created therein. Assessee was not entitled to claim any deduction of expenditure on acquisition of patent rights or copy rights in terms of section 35A. (A.Y. 1995-96)

*CIT v. Mangalore Ganesh Beedi Works (2003) 128 Taxman 351 / 264 ITR 142 / 182 CTR 23 (Karn.)(High Court)*

### **Section 35AB : Expenditure on know-how.**

#### **S. 35AB : Expenditure on know-how – Purchase of designs and drawings – Consultancy charges [S. 37(1)]**

Assessee has paid ` 11,39,195 for purchase of designs and drawings. Out of which 10,39,195 was paid for getting designs and drawings for manufacturing of opening roller, while remaining amount of ` 1,00,000 was paid as a consultancy charges. Assessee claimed entire deduction under section 37(1). Assessing Officer has allowed only 1/6th of expenditure under section 35AB. On appeal, Commissioner (Appeals) held that entire expenditure was allowable under section 37(1). Tribunal upheld the order of Commissioner (Appeals). On further appeal to High Court, the High Court held that the amount spent for acquiring technical knowhow for increasing its product range therefore it attract the provision of section 35AB, hence only 1/6th of the said amount would be deductible in relevant assessment year. In respect of consultancy charges provisions of section 35AB cannot be applied, the said amount will be allowable under section 37(1) of the Income-tax Act. (A. Y. 1990-91).

*CIT v. Lakshmi Card Clothing Manufacturing Co. Ltd. (2011) 203 Taxman 647 (Mad.)(High Court)*



### **S. 35AB : Expenditure on know-how – Know-how fees – Revenue expenditure**

The assessee had paid technical knowhow fees in pursuance to the agreement with NIIT Ltd. for technical assistance. The assessee treated the said expenditure as revenue expenditure. The Assessing Officer however, treated the fees as capital expenditure under section 35AB and allowed only one-sixth (1/6) of the expenditure. On appeal the High Court observed that, the assessee did not indulge in the activities of manufacturing and processing goods referred to in Explanation to section 35AB of the Act. Accordingly, it held that the expenditure incurred by the assessee was to be treated as revenue expenditure. (A.Y. 1996-97)

*CIT v. Frontline Software & Service Pvt. Ltd. (2007) 200 Taxation 185 / 210 CTR 407 / (2008) 301 ITR 396 / 167 Taxman 290 (MP)(High Court)*

### **S. 35AB : Expenditure on know-how – Capital or revenue**

To attract applicability of section 35A, whether capital or revenue is not decisive. What is material is whether or not payment made satisfies the requirement of section 35AB. Use of expression “acquiring” in S. 35AB has to be construed liberally for the purpose for the purpose of S. 35AB. It is not necessary that the assessee should become the absolute owner of the know-how. (A.Y. 1988-89)

*CIT v. Bright Automotives & Plastics Ltd. (2005) 273 ITR 59 / (2004) 141 Taxman 582 / 192 CTR 117 (MP)(High Court)*

### **S. 35AB : Expenditure on know-how [S. 37(1)]**

Irrespective of whether it is capital or revenue expenditure, expenditure incurred for the purpose of acquiring know-how is required to be treated only in accordance with section 35AB and not under section 37(1). (A.Y. 1993-94)

*CIT v. Drilcos (India) Pvt Ltd. (2004) 266 ITR 12 / 138 Taxman 177 / 192 CTR 383 (Mad.)(High Court)*

### **S. 35AB : Expenditure on know-how – Abandoned project**

Abandonment of project for which know-how was obtained would not affect assessee's claim for deduction under section 35AB for the year in which payment was made. Subsequent abandonment or obsolescence of the technical know-how does not affect the allowability in the year of Expenditure. (A.Y. 1991-92)

*CIT v. Tamil Nadu Chemical Products Ltd. (2003) 259 ITR 582 / 129 Taxman 559 / 180 CTR 557 (Mad.)(High Court)*

### **S. 35AB : Expenditure on know-how [S. 37(1)]**

Expenditure covered under section 35AB has to be in nature of capital expenditure as scheme of Act is that all revenue expenses are allowable while computing income from business or profession under section 37. In this case the payment of development expenditure was allowed under section 37(1) as the same was found to

be intimately linked up with manufacturing activities of the assessee and not with the capital values of the assets. (A.Y. 1997-98)

*Mahindra & Mahindra Ltd. v. Jt. CIT (2010) 36 SOT 348 (Mum.)(Trib.)*

### **S. 35AB : Expenditure on know-how [S. 43(2)]**

Assessee following mercantile system of accounting, lump sum consideration as per agreement for know-how is deductible, in view of the meaning of "paid" in section 43(2). (A.Y. 2003-04)

*Amco Power Systems Ltd. v. ITO (2010) 3 ITR 775 / (2009) 123 TTJ 238 / 23 DTR 361 (Bang.)(Trib.)*

### **S. 35AB : Expenditure on know-how – Know-how – Foreign exchange fluctuation – Year of allowability – Accrual**

Deduction under section 35AB in respect of increased liability on account of foreign exchange fluctuation would be allowable only in year when amount is actually paid to non-resident party outside India, subject to tax at source being deducted and paid to Government account. Liability on account of fluctuation in foreign exchange rate cannot be allowed on accrual basis and mere credit every year into account of non resident will not entitle assessee to claim deduction. (A.Y. 1992-93)

*Spaco Carburettors (I) Ltd. v. ACIT (2005) 3 SOT 798 (Mum.)(Trib.)*

### **S. 35AB : Expenditure on know-how – Six years**

Deduction under section 35AB is permissible for six years consequently and the mere fact that deduction for one intervening assessment year was not claimed by assessee, would not extend that period to more than six years. (A.Y. 1998-99)

*Swaraj Engineers Ltd. v. Jt CIT (2005) 97 ITD 45 / 98 TTJ 346 (Chd.)(Trib.)*

### **S. 35AB : Expenditure on know-how – Revenue expenditure**

Where assessee had paid a sum as technical know-how fee to Japanese company and assessee was merely entitled to use the know how manufacture of motor cycle and its parts without acquiring any right of ownership of know-how, provisions of section 35AB would not apply. Treatment of expenditure incurred for acquiring know-how is different from the expenditure incurred for obtaining the mere use of the know-how. Former is the capital expenditure whereas latter is Revenue Expenditure. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi) (Trib.)*

### **S. 35AB : Expenditure on know-how – Capital or revenue**

For the purpose of Sec. 35AB, there is no requirement as to nature of expenditure being Capital or Revenue.

Sec. 35AB is primarily intended to incorporate matching concept for arriving at profits in realistic manner, rather than on nature of expenditure. (Para 15) (A.Y. 1991-92)

*APS-Star Industries Ltd. v. Dy. CIT (2003) 86 ITD 182 / (2004) 82 TTJ 596 (Ahd.)(Trib.)*

### **Section 35AC : Expenditure on eligible projects or scheme**

#### **S. 35AC : Expenditure on eligible projects or Schemes – Contribution to basketball trust**

Under section 35AB, there is no necessity of carrying on any business by assessee and deduction can be allowed against any income earned by assessee and included in total income of assessee. Where basketball trust to which assessee had made donation in respect of which it claimed exemption under section 35AC, was enjoying approval by National Committee and thus, expenditure by way of payment was incurred in respect of eligible projects and schemes notified under section 35AC, assessee's claim for deduction could not be disallowed on the ground that basketball complex was being used by OTG Group for its business interests instead of preparing young basketball players for national and international levels. (A.Ys. 1995-96 to 1999-2000)

*Janak Gandhi v. CIT (2005) 4 SOT 436 (Indore)(Trib.)*

### **Section 35B : Export Market Development allowance. [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

#### **S. 35B : Export market development allowance – Manufacture – Tea – Grades – Brands**

When the assessee is engaged in the business of purchase of tea of diverse grades and brands and then blended them by mixing different kinds of tea, it was held not amounting to manufacture as required under section 35B. Therefore, the decision of the High Court allowing the deduction was reversed. [*CIT v. Tara Agencies 159 CTR 325 (Karn.)* set aside.] (A.Y. 1979-80)

*CIT v. Tara Agencies (2007) 292 ITR 444 / 210 CTR 454 / 162 Taxman 357 / 201 Taxation 359 (SC) / 6 SCC 429*

#### **S. 35B : Export market development allowance – Business expenditure – Interest**

The interest paid by the appellant bank's branch in Bangkok to its customers on deposits made by the customers would not qualify for weighted deduction under section 35B(1)(b)(iv). (A.Y. 1981-82)

*Indian Overseas Bank v. CIT (2004) 140 Taxman 454 / 190 CTR 105 / 179 Taxation 5 (SC)*

#### **S. 35B : Export market development allowance – Business expenditure – Stationery – Printing – Postage – Salary – Advertisement**

Expenses on stationery, printing and postage incurred in India, salary paid to directors/ managing directors for running the business and not for advertisement or

publicity outside India is also not eligible weighted deduction under section 35B. (A.Y. 1982-83)

*Wazir Chand & Co. (P.) Ltd. v. CIT (2007) 290 ITR 626 / (2005) 149 Taxman 144 (All.)(High Court)*

### **S. 35B : Export market development allowance – Allowance – Industrial undertaking**

In absence of any finding that the assessee-respondent owned any small scale industrial undertaking in terms of explanation to S. 35B(1A), the assessee would not be termed as "small scale exporter", and, therefore was not entitled to weighted deduction under section 35B. (A.Y. 1979-80)

*CIT v. J.C. Bhatia (2006) 287 ITR 356 / 153 Taxman 401 / (2005) 198 CTR 384 (All.)(High Court)*

### **S. 35B : Export market development allowance – Business expenditure – Small scale unit**

As government had issued a certificate registering the assessee as a small scale industrial unit during the year in question and export house certificate issued for the year 1978-79 would cover the period in question, even though its validity had been specified from the date of issue, the order of Tribunal could not be interfered with. (A.Y. 1979-80)

*CIT v. United Trading Corporation (2005) 275 ITR 248 / 145 Taxman 348 / 204 CTR 252 (All.)(High Court)*

### **S. 35B : Export market development allowance – Sales in India to foreign buyers**

Sales effected in India to foreign buyers against foreign currency received in India cannot be considered as export sales for purpose of allowing deduction under section 35B. (A.Ys. 1977-78, 1980-81 to 1983-84)

*CIT v. Marble Emporium (2005) 146 Taxman 70 (All.)(High Court)*

### **S. 35B : Export market development allowance – Expenditure in India – Counter sales to foreign tourists**

The assessee-firm was not entitled to weighted deduction in respect of expenditure incurred in India which was attributable to sales made by the firm to foreign tourists at counter/ showroom in India. (A.Y. 1979-80)

*CIT v. Kraft Palace (2005) 145 Taxman 209 (All.)(High Court)*

### **S. 35B : Export market development allowance – Manufacturer – Plant and machinery**

In view of section 35B(1A), a manufacturer or processor who does not own any plant and machinery up to prescribed limit would not be entitled to claim weighted deduction under section 35B. Thus in absence of material to establish that assessee has installed machinery and plant during the assessment year in question for the

purpose of its business within meaning of clause (2) of explanation below sec. 35A(2), the Tribunal was justified in disallowing the assessee's claim for weighted deduction under section 35B. (A.Y. 1979-80)

*Orient Arts & Crafts v. CIT (2005) 279 ITR 581 / 145 Taxman 73 / 198 CTR 378 (All.)(High Court)*

### **S. 35B : Export market development allowance – Carriage of goods – Insurance**

The assessee is not entitled to weighted deduction in respect of expenses incurred on export levy and on carriage of goods and insurance while in transit, which has been incurred in India. (A.Ys. 1975-76 to 1978-79)

*Cawnpore Textiles Ltd. v. CIT (2005) 276 ITR 612 / 144 Taxman 590 / (2006) 200 CTR 203 (All.)(High Court)*

### **S. 35B : Export market development allowance – Foreign telex and telephone, etc.**

Tribunal allowed weighted deduction on foreign telex and telephone expenses, *ad hoc* contribution to Sports Goods Export Promotion Council, foreign postages ECGC charges, samples, export promotion expenses, entertainment and travelling expenses on foreign visitors, postages on samples, foreign commission, establishment expenses, printing and stationery vehicle repair and maintenance, directors, meeting fee, foreign travelling expenses and advertisement and publicity expenses outside India, without undertaking the aforesaid exercise, the matter was remanded to the Tribunal to decide the issue afresh in the light of the law laid down by the Apex court in *CIT v. Stepwell Industries Ltd. (1997) 228 ITR 171(sc)* and *CIT v. Hero Cycles (P) Ltd. (1997) 228 ITR 463 (SC)* as no exercise was undertaken to examine whether the expenditure had been incurred wholly and exclusively in respect of the activities mentioned under various sub-clauses of S. 35B(1)(b). (A.Y. 1978-79)

*CIT v. F.C. Sondhi & Co (2004) 141 Taxman 8 / 190 CTR 589 (P&H)(High Court)*

### **S. 35B : Export market development allowance – Activities referred in section 35B**

If the assessee is able to establish that expenditure had been incurred wholly and exclusively in respect of activities mentioned under various clauses of section 35B(1)(b), and where no such exercise had been done, matter was to be restored to the Tribunal for fresh adjudication. (A.Y. 1979-80)

*CIT v. Material Dress Engineering Foundry (2005) 275 ITR 308 / (2004) 141 Taxman 164 (P&H)(High Court)*

### **S. 35B : Export market development allowance – Freight – Transport – Packing**

Weighted deduction is not allowable on freight, transport and packing expenses and in respect of salaries of only persons employed in export and design department is allowable. (A.Ys. 1976-77, 1977-78)

*Atlas Cycle Industries Ltd. v. CIT* (2004) 270 ITR 108 / 192 CTR 354 / (2005) 142 Taxman 102 (P&H)(High Court)

### **S. 35B : Export market development allowance – Sea freight**

Sea freight is not entitled to weighted deduction. (A.Y. 1975-76)

*CIT v. Roadmaster Industries of India (P) Ltd.* (2004) 271 ITR 247 / 191 CTR 242 / (2005) 144 Taxman 474 (P&H)(High Court)

### **S. 35B : Export market development allowance – Business expenditure – Counter sales**

Counter sales within India against foreign currency, cannot be treated as export sales for the purposes of weighted deduction.

*CIT v. Ganesh Lal & Sons* (2004) 266 ITR 203 / 138 Taxman 255 (All.)(High Court)

### **S. 35B : Export market development allowance – Prior to 1-4-89 – Expenditure in India**

In sub clause (viii) of clause (b) of sub-section (1) of S. 35B there is no prohibition against any expenditure, as is contemplated in sub-clause (iii) of an expenditure not being allowed as weighted deduction if incurred in India. (A.Y. 1972-73)

*CIT v. Shapoorji Pallonji & Co. (P.) Ltd.* (2003) 132 Taxman 788 / 185 CTR 479 / (2004) 266 ITR 209 (Bom.)(High Court)

### **S. 35B : Export market development allowance – Business expenditure – Technical director's salary**

Weighted deduction cannot be allowed on technical director's salary for services rendered in India and on amount spent on boarding and lodging of foreign buyers.

*CIT v. Registhan (P) Ltd.* (2003) 132 Taxman 32 / 180 CTR 380 (Raj.)(High Court)

### **S. 35B : Export market development allowance – Shipping and forwarding, audit fees**

The assessee is not entitled to weighted deduction in respect of, expenses incurred, on shipping and forwarding, audit fee, insurance, filing fee, legal and professional fees, charity and donation and miscellaneous expenses. (A.Ys. 1977-78, 1978-79)  
[Followed Supreme Court decisions in (1997) 228 ITR 171 and (1997) 228 ITR 463]

*Navin Chemicals Mfg. & Trading Co (P) Ltd. v. CIT* (2003) 259 ITR 111 / 179 CTR 216 (Delhi)(High Court)

### **S. 35B : Export market development allowance – Interest on packing credit**

Weighted deduction was not allowable in respect of the interest on packing credit.  
[Followed Supreme Court decisions in *CIT v. Stepwell Industries Ltd. etc.* (1997) 228 ITR 171 and *CIT v. Hero Cycles Pvt. Ltd. & Others* (1997) 228 ITR 463.]



*CIT v. Sudesh Mandhok (Smt.) (2003) 179 CTR 211 (Delhi)(High Court)*

**S. 35B : Export market development allowance – Guarantee commission – Administrative expenses**

The assessee was entitled to deduction under section 35B on the guarantee commission charges paid to ECGC and on commission paid to Tata Exports. Assessee was not entitled weighted deduction in respect of administrative expenses. (A.Y. 1978-79)

*CIT v. Walchandnagar Industries Ltd. (2003) 128 Taxman 649 / 262 ITR 212 / 180 CTR 118 (Bom.)(High Court)*

**S. 35B : Export market development allowance – Sale of goods to foreign tourists**

The expenditure on account of sale of goods to the foreign tourists against foreign exchange was not eligible for weighted deduction under section 35B. (A.Y. 1977-78)

*Kamal Silk Emporium v. CIT (2003) 180 CTR 65 / 264 ITR 520 / (2004) 136 Taxman 30 (Delhi) (High Court)*

**S. 35B : Export market development allowance – Sales made in India – Foreign Currency**

Weighted deduction is not allowable on sales made in India though against foreign currency. (A.Y. 1976-77)

*CIT v. Ivory Mart (2003) 179 CTR 613 / (2004) 265 ITR 409 (Delhi)(High Court)*

**S. 35B : Export market development allowance – Information in India**

Weighted deduction was not allowable on expenditure incurred to make available to the foreign buyer information regarding markets in India for the goods and services exported. (A.Ys. 1978-79, 1980-81)

*R. Y. Gaitonde & Co v. CIT (2003) 260 ITR 330 / 181 CTR 89 / (2004) 135 Taxman 170 (Mad.)(High Court)*

**S. 35B : Export market development allowance – Establishment charges – Freight and insurance**

Establishment charges is not eligible for weighted deduction. Steamer freight and insurance of CIF contract is eligible for weighted deduction under sub-clause (viii) of S. 35B(1)(b). (A.Y. 1980-81)

*P. Muttual Lalah & Sons v. CIT (No.1) (2003) 259 ITR 236 / (2004) 138 Taxman 233 (Mad.) (High Court)*

**S. 35B : Export market development allowance – Irrespective of profits**

The admissibility of export market development allowance is irrespective of question whether the assessee has exported any goods during the relevant year or whether he has earned any profits out of exports. The SBI has branches all over the world outside India. It facilitates and promotes export market, both in India and outside India,

therefore, SBI is eligible for deduction under section 35B in respect of specified amount.

*CIT v. State Bank of India (2003) 129 Taxman 683 / 261 ITR 82 / 181 CTR 59 (Bom.)(High Court).*

**S. 35B : Export market development allowance – Certificate fee – Stamp on export bills – Freight charges – Insurance-clearance agent commission – Port charges – Inspection charges – Octroi – Port charges – Service charges**

The assessee is not entitled to claim weighted deduction in respect of (i) Certificate of origin fee (ii) stamp charges on export bills (iii) freight charges (iv) insurance charges (v) clearing agent commission /port charges (vi) inspection charges (vii) octroi charges (viii) service charges (payments to shipping agents) (ix) port charges (x) coolie charges. (A.Y. 1976-77)

*Jay Engineering Works Ltd v. CIT (2003) 132 Taxman 69 / 183 CTR 326 (Delhi)(High Court)*

**Section 35CC : Rural Development allowance. [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

**S. 35CC : Rural development allowance – Filing of statement along with return is directory – Can be filed in the course of assessment**

The provisions of sec. 35CC which provide for filing of statement of expenses along with return for that particular assessment year is directory. The statement of expenses, which is required to be furnished under sub-section (3) of sec. 35CC along with return, can be furnished during the course of assessment. (A.Y. 1980-81)

*CIT v. K.C.A. Ltd. (2006) 283 ITR 65 / 151 Taxman 142 / (2005) 198 CTR 331 (Bom.)(High Court)*

**Section 35CCA : Expenditure by way of payment to associations and institutions for carrying out rural development programmes.**

**S. 35CCA : Rural development programmes – Payments to associations – Withdrawal of exemption**

The assessee had made donation to the Society for rural development. The institution had as its object of the undertaking to carry out approved programmes of rural development. The society had issued a certificate to the assessee which had also been approved by the prescribed authority. The Assessing Officer refused deduction on the ground that the certificate granted to the society was withdrawn retrospectively. The Court held that once it was found that the assessee had fulfilled all the conditions which had been laid down under section 35CCA of the Act for claiming deduction of the amount donated by it, there was no further obligation on the part of the assessee to see that the amount was utilized for the purpose for which it was donated. Further, the deduction was allowed on the certificate furnished and it was not for the assessee to show whether the institution to which the money had

been donated was carrying on rural development work as envisaged under section 35CCA of the Act. Accordingly the order of High Court was affirmed.

*CIT v. Chotingrai Tea & Others (2002) 258 ITR 529 / (2003) 126 Taxman 399 / 179 CTR 103 (SC)*

### **Section 35D : Amortisation of certain preliminary expenses**

#### **S. 35D : Amortisation of preliminary expenses – Public issue expenses**

Assessee company was incorporated in 1976, hence, public issue expenses relating to assessment year 1995-96 could not be claimed under section 35D. (A.Ys. 1999-2000 and 2001-02).

*CIT v. Shasun Chemicals & Drugs Ltd. (2011) 199 Taxman 107 (Mad.)(High Court)*

#### **S. 35D : Amortisation of preliminary expenses – Management fee – Amortisation**

Expenses on management fees and lease rent incurred before commencement of production does not fall under the list prescribed under section 35D. Hence, cannot be allowed to be amortised on basis of analogy of section 35D. (A.Ys. 1988-89, 1989-90)

*CIT v. Ennar Steel & Alloy (P.) Ltd. (2003) 261 ITR 347 / 181 CTR 329 / (2004) 137 Taxman 429 (Mad.)(High Court)*

#### **S. 35D : Amortisation of preliminary expenses – Amortisation – Public issue expenses**

Amortisation of public issue expenses for over a period of ten years, was proper. (A.Ys. 1993-94, 1994-95)

*Southern Herbals Ltd. v. Settlement Commission IT & WT (2003) 129 Taxman 831 / 261 ITR 681 / 180 CTR 536 (Karn.)(High Court)*

#### **S. 35D : Amortisation of preliminary expenses – Amortisation – Expenditure on public issue**

Even in respect of capital expenditure, the expenditure on public issue of shares or debentures of the company any payment made against commission brokerage and charges of drafting, typing, printing and advertisement of the prospectus, which are clearly referred to in sub clause (iv) of clause (c) of section (2) of section 35D. (A.Ys. 1987-88, 1988-89)

*Autolite India Ltd. v. CIT (2003) 264 ITR 117 / (2004) 186 CTR 548 (Raj.)(High Court)*

#### **S. 35D : Amortisation of preliminary expenses – Issue of shares capital base**

Expenditure incurred on issue of shares so as to increase its capital base did not qualify to be amortised under section 35D. (A. Y. 2006-07).

*Medreich Ltd. v. Dy. CIT (2011) 48 SOT 579 / 57 DTR 456 / 8 ITR 639 / 140 TTJ 7 (UO)(Bang.)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Debt restructuring [S. 37(1), 145(2)]**

Amount paid as premium on debt restructuring, where the benefit results to the assessee in reduction of interest on account of restructuring relates to ten assessment years, cannot be allowed in entirety, but needs to be spread over a period of ensuring years during which the assessee secures the benefit of that expenditure. (A.Y. 2002-03)

*ACIT v. Bihar Caustic & Chemicals Ltd. (2010) 41 DTR 377 / 131 TTJ 610 (Ranchi)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Fees – Registrar of companies**

Fees paid to Registrar of Companies for increasing share capital falls within the ambit of

S. 35D and allowable as deduction.

*ACIT v. Fascel Ltd. (2009) 120 TTJ 289 (Delhi)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Expansion of existing unit**

Expenditure incurred in connection with expansion of existing unit treated as deferred revenue expenditure in assessee's accounts was allowable in its entirety and section 35D was not attracted. (A.Ys. 1996-97, 1997-98)

*ITW Signode India Ltd. v. Dy. CIT (2007) 110 TTJ 170 (Hyd.)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Share issue expenses**

Share issue expenses could not be allowable as the same were incurred after the assessee had commenced its business and the assessee is not an industrial undertaking—alternative claim for deduction under section 37(1) is also not allowable as the share issue expenses represent capital expenditure. (A.Ys. 1995-96, 1996-97 & 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Capital employed**

While calculating capital employed for the purpose of section 35D the amount outstanding on account of share premium has to be treated as issued share capital, and not as other amounts credited under the head "Reserves and surplus." (A.Y. 1996-97)

*Jt. CIT v. Sirhind Steel Ltd. (2006) 99 TTJ 1141 / 97 ITD 502 (Ahd.)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Not mutually exclusive – Overriding [S. 37(1)]**

Section 35D could not be regarded as a specific provision, overriding the general provision of section 37(1). Both section 35D and section 37 (1) are enabling provisions and not mutually exclusive. (A.Ys. 1994-95 & 1995-96)

*Dy. CIT v. Modern Syntex (India) Ltd. (2005) 3 SOT 27 / 95 TTJ 161 (Jp.)(Trib.)*

### **S. 35D : Amortisation of preliminary expenses – Advertisement – Press announcement**

#### **[S. 37(3)]**

Expenditure incurred on advertisement and press announcement cannot be designated as expenditure in connection with printing and advertisement of prospectus as mentioned in section 35D(2)(c)(iv) but is allowable as per section 37(3). (A.Y. 1993-94)

*Arati Industries Ltd. v. Dy. CIT (2005) 95 TTJ 14 (Ahd.)(Trib.)*

### **S. 35D : Amortisation of preliminary expenses – Industrial undertaking**

Where assessee company, engaged in business of financing /leasing of plant and machinery to industrial undertakings, raised share capital through public issue for which certain expenditure was incurred which it claimed as deduction under section 35D, as assessee, being engaged in financial consultancy could not be treated as an 'industrial undertaking' with in meaning of section 35D, expenditure incurred was not allowable. (A.Y. 1996-97)

*Mefcom Capital Markets Ltd. v. Jt. CIT (2005) 145 Taxman 43 (Mag.)(Delhi)(Trib.)*

### **S. 35D : Amortisation of preliminary expenses – Debenture application**

Amount of debenture application money should be included in computing total capital employed for purpose of working out deduction under section 35D. (A.Y. 1992-93)

*ACIT v. Amtrex Appliances Ltd. (2005) 94 TTJ 396 (Ahd.)(Trib.)*

### **S. 35D : Amortisation of preliminary expenses – Fees to registrar – Travelling expenses – Postages – Out of pocket expenses – Stamp duty**

Issue expenses on account of fees to Registrar to Issue, fees to Mangers to Issue, travelling expenses, postage, out of pocket expenses, stamp duty for shares and debentures, trustees fees, listing fees, legal fees and courier, conveyance, Xerox, etc., qualify for being taken in to consideration for computing amortization allowable under section 35D. (A.Y. 1992-93)

*ACIT v. Amtrex Appliances Ltd. (2005) 94 TTJ 396 (All.)(Trib.)*

### **S. 35D : Amortisation of preliminary expenses – New industrial unit**

Assessee had neither incurred expenditure in question before commencement of his business nor had incurred the same in connection with extension of his industrial undertaking or in connection with its setting up a new industrial unit. Therefore, fees paid to Registrar of Companies for increase in authorized capital could not be treated as expenditure covered under section 35D. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi) (Trib.)*

**S. 35D : Amortisation of preliminary expenses – Financial services**

Assessee bank was engaged in providing financial services, it could not be said to be engaged in running or setting up an industrial undertaking. Hence, deduction, under section 35D was not admissible to assessee. (A.Y. 1997-98)

*Bank of Baroda v. Jt. CIT (2005) 2 SOT 804 (Mum.)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Allowability – No positive income [S. 43B]**

Held, there is no provision in the Act that deduction under section 35D/43B will be allowed only in case of positive Income. (A.Ys. 1991-92, 1992-93)

*Dy. CIT v. Adhinath Textile Ltd. (2003) SOT 565 (Chd.)(Trib.)*

**S. 35D : Amortisation of preliminary expenses – Business expenditure – Share issue expenses**

Fees paid to Registrar of Companies for increase in authorized capital is deductible under section 35D, and not as business expenditure. (A.Y. 1996-97)

*Neelu Textiles Ltd. v. Addl. CIT (2003) 128 Taxman 93 (Mag.)(Jodh.)(Trib.)*

**Section 35DDA : Amortisation of expenditure incurred under voluntary retirement scheme.**

**S. 35DDA : Amortisation of expenditure – Voluntary retirement scheme – Amalgamation or demerger [S. 10(10C), 37(1)]**

Section 35DDA would be attracted only when payment has been made to an employee in connection with his voluntary retirement, in accordance with the scheme or schemes of voluntary retirement. Since the payment reduces the burden on the assessee relatable to subsequent years, the legislature inserted this section in order to allow only 1/5th of total sum paid by the assessee to its employees. This amount in the hands of the employee has been exempted under section 10(10C) to the extent of ₹ 5 lakhs. Provisions of section 35DDA were not attracted in the matter of VRS compensation paid to the retiring employees as the conditions of Rule 2BA were not met and the said expenditure is allowable under section 37(1). (A. Y. 2003-04)

*Dy. CIT v. Warner Lambert (India) (P) Ltd. (2011) 56 DTR 121 / (2012) 143 TTJ 571 (Mum.)(Trib.)*

**S. 35DDA : Amortisation of expenditure – Voluntary retirement scheme – Amalgamation or demerger [S. 10(10C), read with Rule 2BA]**

The scheme floated by the assessee giving option to the employees of one unit to leave its employment without any qualifying condition regarding age or length of service against payment of compensation is to be treated as VRS though it is not conformity with Rule 2BA and assessee is entitled to deduction of one-fifth of the



expenditure incurred on the payments under then scheme in accordance with the provisions of section 35DDA. (A.Ys. 2005-06 & 2006-07).

*Sony India (P) Ltd. v. ACIT (2011) 56 DTR 156 / 141 TTJ 432 (Delhi)(Trib.)*

### **S. 35DDA : Amortisation of expenditure – Voluntary retirement scheme – Prospective**

Section 35DDA is inserted with effect from 1-4-2001 and therefore it is applicable prospectively and applicable from A.Y. 2002-03 and onwards. (A.Y. 2000-01)

*PI Industries Ltd. v. ACIT (2007) 106 ITD 401 / (2006) 104 TTJ 333 (Jodh.)(Trib.)*

### **Section 35E : Deduction for expenditure on prospecting, etc., for certain minerals**

#### **S. 35E : Deduction for expenditure on prospecting etc, for minerals**

Where the assessee incurred a loss, the deduction under section 35E is not available. (A. Ys. 1997-98 & 2000-01 to 2004-05).

*Singareni Collieries Company Ltd. v. ACIT (2011) 141 TTJ 593 / 133 ITD 213 / 57 DTR 28 (Hyd.)(Trib.)*

#### **S. 35E : Deduction for expenditure on prospecting etc. for Minerals**

Assessee which is engaged in prospecting and exploration of minerals, it also provided consultancy services in same field, expenditure incurred towards prospecting and exploring activities were capitalized and amortization of same was claimed under section 35E. Expenditure incurred to earn consultancy service were claimed as business expenditure under section 37(1). Assessing Officer held that all the expenditure were to be treated as eligible for amortisation under section 35E. The Tribunal held that only such expenses which are incurred wholly and exclusively on any operations relating to prospecting as envisaged under provisions of section 35E(2) read with section 35(E)(5)(a), and rest of unconnected expenses which may have been incurred by an assessee are eligible deduction in normal course of computation of business income. (A.Y. 2005-06).

*De Beers India (P) Ltd. v. Dy. CIT (2011) 48 SOT 506 (Mum.)(Trib.)*

### **Section. 36 : Other deductions**

#### **S. 36(1)(ii) : Deductions – Bonus – Ex-gratia payment**

Ex-gratia payment made in excess of the limit prescribed under the payment of Bonus Act 1965, is allowable business expenditure either under section 36(1)(ii) or section 37(1) of the Income-tax Act, 1961. (A.Y. 1993-94)

*CIT v. Maina Ore Transport P. Ltd. (2010) 324 ITR 100 / (2008) 218 CTR 653 / 175 Taxman*  
*494 / 12 DTR 122 (Bom.)(High Court)*

**S. 36(1)(ii) : Deductions – Year of loss – Excess bonus**

Bonus in excess of 8.33 per cent paid by the assessee, who has suffered loss in the relevant year was not an admissible deduction under section 36(ii) of the Act. Further, the Hon'ble Court held that as the bonus being expenditure covered by section 36 of the Act, it cannot be allowed under section 37(1) of the Act as expenditure incurred for the purpose of its business. (A.Y. 1985-86)

*Bhagwandas Shobhalal Jain v. Dy. CIT & Anr. (2011) 46 DTR 257 / 240 CTR 84 / 330 ITR 217 (MP)(High Court)*

**S. 36(1)(ii) : Deductions – Bonus – Set on liability**

Set on liability under section 15 of the Payment of Bonus Act, is a contingent liability and hence, not an allowable deduction under section 37 of the Income Tax Act, 1961.

*Ingersoll Rand (I) Ltd. v. CIT (2010) 320 ITR 513 / (2009) 226 CTR 555 / 183 Taxman 410 / 24 DTR 11 (Bom.)(High Court)*

**S. 36(1)(ii) : Deductions – Bonus [S. 37(1)]**

Assessee company's workers were allowed to put in extra time and increasing production by their labour, good attendance and efficiency for which extra single wages were paid, such incentive bonus did not fall within purview of Payment of Bonus Act, and thus, it was not covered under section 36 (1)(ii); however, since payment in question was wholly and exclusively for the purposes of business, it was an allowable deduction under section 37(1). (A.Y. 1981-82)

*CIT v. Raza Textiles Ltd. (2006) 281 ITR 229 / (2005) 199 CTR 694 / 148 Taxman 305 (All.) (High Court)*

**S. 36(1)(ii) : Deductions – Bonus – Senior employees – POB Act**

Bonus paid by the assessee to a senior employees who were not entitled to receive the bonus under provisions of Payment of Bonus Act, 1965, was not an admissible expenditure where there was no evidence that assessee was making such payment as general practice or there was any commercial expediency for it. (A.Y. 1976-77)

*CIT v. Champaran Sugar Co. Ltd. (2005) 276 ITR 112 / 147 Taxman 14 / 197 CTR 239 (All.) (High Court)*

**S. 36(1)(ii) : Deductions – Bonus – Ex gratia**

After omission of the proviso to section 36(1)(ii) from 1/4/1989, *ex gratia* payment towards bonus is an allowable deduction. (A.Y. 1990-91)

*CIT v. Radico Khaitan Ltd. (2005) 274 ITR 354 / 142 Taxman 681 / 194 CTR 451 (All.)(High Court)*

**S. 36(1)(ii) : Deductions – Bonus or commission – Position prior to 1-4-89**

Assessee was entitled to deduction in respect of Bonus paid to employees over and above the bonus payable under the payment of bonus Act, since conditions laid down in the second proviso to section 36(1)(ii) were not satisfied. There was nothing on record to show that the agreement was binding or the payment were in accordance with the practice prevailing at the relevant time. (A.Ys. 1978-79, 1979-80)

*CIT v. Mafatlal Fine Spinning & Manufacturing Co. Ltd. (2003) 263 ITR 140 / (2004) 187 CTR 64 / 138 Taxman 143 (Bom.)(High Court)*

**S. 36(1)(ii) : Deductions – Bonus or commission – Section bars tax avoidance scheme of paying commission instead of dividend**

- (i) The argument that Section 36(1)(ii) is applicable only to employees who are not shareholders is not acceptable because payment of dividend to shareholders is not compulsory. Section 36(1)(ii) applies to all employees including shareholder employees though the disallowability is restricted to partners and shareholders because it is only in those cases that payment can be said to be in lieu of profit or dividend;
- (ii) The argument that as no dividend was “payable”, section 36(1)(ii) does not apply is not acceptable because the word “payable” does not mean that dividend should be statutorily or legally payable. Since payment of dividend is discretionary and not compulsory, any such construction will lead to absurd results. The word “payable” means that dividend would have been declared by any reasonable management on the facts and circumstances of the case considering the profitability and other relevant factors and become payable to shareholders. If a reasonable conclusion can be drawn that the dividend ought to have been paid and that instead of paying dividend, commission was paid, section 36(1)(ii) would be attracted;
- (iii) On facts, there is no evidence to show that the directors had rendered any extra services for payment of huge commission in addition to services rendered as an employee for which salary was paid. Further, though the turnover and the profit was exceptionally high as compared to the earlier years, this was because of the stock market boom. The assessee being a share broker gets commission on sale/purchase of shares by investors/traders and its income is assured irrespective of whether the investor/ trader loses or gains in the transaction. The steady rise in performance was due to improved market conditions and not because of any extra service rendered by the directors. Also, no dividend was declared even though any reasonable management would have declared at least about 20% dividend in the years when there were substantial profits;
- (iv) The device adopted by the assessee was obviously with the intention to avoid payment of full taxes. There is obvious tax avoidance. Section 36(1)(ii) is intended to prevent escape from taxation by describing the payment as bonus or commission when in fact it should have reached the shareholders as profit or dividend (Loyal Motor 14 ITR 647 (Bom) referred) (A.Y. 2006-07)

*Dalal Broacha Stock Broking Pvt. Ltd. v. ACIT (2011) 10 ITR 357 / 131 ITD 36 / 59 DTR 41 / 140 TTJ 129 (SB)(Mum.)(Trib.)*

### **S. 36(1)(ii) : Deductions – Ex-gratia bonus**

Ex-gratia bonus paid as per general practice, and which is reasonable, and as per terms of agreement with workers' union is allowable. (A.Ys. 1986-87, 1988-89)

*Dy. CIT v. Vickers Systems International Ltd. (2003) 87 ITD 182 / 88 TTJ 284 (Mum.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Roll over charges [S. 43A]**

The Supreme Court on the facts of the case held that since the purpose of the loan was to finance the purchase of plant and machinery, the rollover premium charges would not be held to be 'interest' and be allowed as a deduction under section 36(1)(iii) and that Explanation 3 to section 43A, as it stood prior to the amendment in 2002, would be applicable. (A.Y. 1986-87)

*ACIT v. Elecon Engineering Co. Ltd. (2010) 322 ITR 20 / 189 Taxman 83 / 230 CTR 1 / 35 DTR 209 / 4 SCC 482 / (2011) 220 Taxation 269 (SC)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Proviso**

Proviso to section 36(1)(iii) inserted w.e.f. 1st April 2004, being a mandatory and not clarificatory in nature is operative prospectively and therefore, the same could not be applied to deny the claim for deduction of interest paid by the assessee in the relevant assessment year. (A.Y. 1989-90)

*L. K. Trust v. CIT (2009) 222 CTR 214 / 183 Taxman 80 / 19 DTR 284 (SC)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Borrowing for capital assets**

Interest paid in respect of borrowings for capital assets not put to use in the concerned financial year is allowable deduction under section 36(1)(iii) as covered by *Dy. CIT v. Core Health Care Ltd. (2008) 298 ITR 194 / 215 CTR 1 / 167 Taxman 206 / 3 DTR 49 (SC)*. (A.Y. 1989-90, 1992-93, 1997-98)

*CIT v. Ishwar Bhuvan Hotels Ltd. (2008) 215 CTR 14 / 167 Taxman 216 / 3 DTR 62 (SC) / 2 SCC 474*

*Editorial:- Proviso to section 36(1)(iii) inserted by the Finance Act, 2003 w.e.f. 1-4-2003.*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Borrowed for machinery**

Interest paid in respect of borrowings on capital asset not put to use in the concerned financial year is allowable as a deduction under section 36(1)(iii). Explanation 8 to section 43(1) has no relevancy to section 36(1)(iii). Proviso to section 36(1)(iii), inserted by the Finance Act, 2003, w.e.f. 1-4-2004 is only prospective. (A.Ys. 1992-93, 1993-94, 1995-96 and 1997-98)

*Dy. CIT v. Core Health Care Ltd. (2008) 298 ITR 194 / 215 CTR 1 / 167 Taxman 206 / 3 DTR 49 / 204 Taxation 107 / 2 SCC 465 (SC)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital asset – Not put to use**

Interest paid in respect of borrowings on capital assets not put to use in the concerned financial year can be permitted as allowable deduction under section 36(1)(iii) of the Income-tax Act, 1961 (Before amendment with effect from April 1, 2004).

*ACIT v. Arvind Polycot Ltd. (2008) 215 CTR 15 / 299 ITR 12 / 167 Taxman 216 / 3 DTR 63 (SC)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Borrowed from partner**

**[S. 40(b)(iv)]**

In order that interest paid on borrowings can be allowed as a deduction in computing the business profits, every assessee, including a firm has to establish, in the first instance, that it was allowable under section 36(1)(iii), and in the case of a firm, further that the amount does not exceed the limit prescribed under section 40(b)(iv). On the facts since the assessee had borrowed the moneys from its partners as early as 1991 and the Appellate Tribunal had held that the loans were given by the partners for business purpose and the interest did not exceed 18% per annum simple interest, the assessee firm was entitled to deduction of interest on the borrowings for the A.Ys. 1993-94 to 1997-98. The Court further held that since opening balance of the profits of the assessee-firm as on April 1st, 1994 was ` 1.91 crores, and the profits were sufficient to cover the loan given to a sister concern of ` 5 lakhs only, the appellate Tribunal ought to have held that the loan given was from the assessee's own funds. (A.Ys. 1993-94 to 1997-98)

*Munjal Sales Corporation v. CIT (2008) 298 ITR 298 / 204 Taxation 198 / 215 CTR 105 / 168 Taxman 43 / 3 DTR 217 (SC) / 3 SCC 185*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Acquisition of shares**

The assessee acquired shares of the AEC Ltd. with borrowed funds from the Torrent group (Sister Companies). The shares were sold at profit, and AFC Ltd. was taken over by the Torrent group (Sister companies). The Tribunal had allowed the interest under section 36(1)(iii) of the Income-tax Act. The High Court dismissed the Department's appeal on the ground that no substantial question of law arose. On appeal by the Department to the Supreme Court, the Court observed that the High Court had lost sight of facts which if proved and established would indicate a circular trading entered into solely with the idea of evading tax. The tax appeals were restored to the High Court for disposal according to law. (A.Ys. 1996-97, 1997-98)

*CIT v. Ashini Lease Finance (P.) Ltd. (2008) 217 CTR 17 / 7 DTR 68 / (2009) 309 ITR 320 (SC)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

Interest deduction can be claimed even when the monies borrowed have been given to a sister concern as an interest free loan if, it was commercially expedient to do so. The word commercial expediency includes such expenditure as a prudent businessman incurs for the purpose of its business. (A.Y. 1991-92)

*S. A. Builders Ltd. v. CIT (2007) 288 ITR 1 / 158 Taxman 230 / 206 CTR 631 (SC) / AIR 2007 SC 482*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – High Court – Remand**

Where High Court decision was based on incorrect facts, matter was remanded to High Court for fresh consideration.

*Motor General Finance Ltd. v. CIT (2004) 267 ITR 381 / 138 Taxman 235 / 189 CTR 297 / 183 Taxation 5 / 11 SCC 272 (SC)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – To settle dues of sister concern**

Interest on loan obtained by assessee to settle liability of its sister concern to retain business premises of assessee is allowable. (A. Y. 1997-98)

*CIT v. Neelkanth Synthetics and Chemicals P. Ltd. (2011) 330 ITR 463 (Bom.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest and penalty under Sales Tax Act**

Interest paid on funds borrowed for interest and penalty under Sales Tax Act for belated payment are allowable as business expenditure.

*CIT v. International Fisheries Ltd. (2011) 220 Taxation 11 (Bom.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Sufficient funds**

Where the assessee was having sufficient non-interest bearing fund by way of share capital and reserves and there was no nexus between the borrowings of the assessee and advances made by it, no disallowance under section 36(1)(iii) of the Act was called for. (A.Ys. 2001-02, 2003-04, 2004-05)

*CIT v. Bharti Televenture Ltd. (2011) 331 ITR 502 / 51 DTR 98 (Delhi)(High Court)*

*Editorial: SLP rejected SLP (Civil) No cc 12386 of 2011 dt 5-8-2011 (2012) 204 Taxman 188 (Mag.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Investment in sister concern – Shares of subsidiary – Control over the company**

Investment made by the assessee company out of bank overdraft in the shares of its subsidiary company to have control over that company being an integral part of its business, interest paid by the assessee which is attributable to said borrowings is allowable as deduction under section 36(1)(iii).



*CIT v. Phil Corporation Ltd. (2011) 61 DTR 15 / 244 CTR 226 / 202 Taxman 368 (Bom.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – On loans**

The assessee was in the business of trading in shares and had claimed interest on loans obtained for business. The shares had been shown under 'Investments' in its books and hence the Assessing Officer disallowed interest on borrowings. It was held that treatment in books was not conclusive and given the nature, volume of the assessee's business, it was clear that the assessee was trading in shares and hence interest could not be disallowed. (A.Y. 2000-01)

*CIT v. Aravind Prakash Malpani (2011) 53 DTR 174 / 200 Taxman 41 (Mag.)(Karn.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital assets – Expansion**

Interest was paid in respect of loans utilized for acquisition of new machinery for expansion of the existing business. Interest relating to the period prior to utilization of the machinery was rightly disallowed by the Tribunal by invoking proviso to section 36(1)(iii). (A. Y. 2005-06).

*Power Drugs Ltd. v. CIT (2011) 62 DTR 276 / 245 CTR 623 (P&H)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Year of allowability – Compromise decree**

Assessee could not repay the loan due to financial difficulty. Lender filed the suit and demanded the interest. After some time a consent decree was passed on 8-2-2001 on which the assessee has agreed to repay the loan with interest. The assessee claimed the interest as deduction on the ground that same was crystallised when the consent term was passed. Assessing Officer held that the interest cannot be allowed in the relevant year. The Court held that since compromise decree was passed on 8-2-2001, assessee was entitled to claim deduction of that liability in year in question. (A. Y. 2000-01).

*CIT v. Jain Studio Ltd. (2011) 203 Taxman 522 (Delhi)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Business expenditure – Shares – Stock-in-trade [S. 14A]**

Section 14A applies where shares are held as investment and the only benefit derived is dividend. Section 36(1)(iii) deduction allowable if shares held as stock-in-trade.

*CIT v. Leena Ramachandran (2011) 339 ITR 296 / (2010) 235 CTR 512 / 45 DTR 372 (Ker.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advances to sister concern**

Assessee failed to make out a case of commercial expediency in advancing interest free advances to its sister concern which were made from its CC account with a bank,

proportionate interest paid by assessee on borrowing was rightly disallowed. (A.Y. 2001-02)

*Punjab Stainless Steel Inds. v. CIT* (2010) 41 DTR 88 / 324 ITR 396 / (2011) 196 Taxman 404 (Delhi)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Owned fund – Profit**

Where there were sufficient funds of partners in the opening balance and sufficient profit has been earned during the year and no borrowed funds diverted as interest free funds to the sister / associate concerns. The Assessing Officer cannot disallow a part of the interest paid on the funds borrowed by the assessee.

*Jt. CIT v. Beekay Engineering Corporation* (2010) 38 DTR 289 / 325 ITR 384 (Chhattisgarh)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Own ample resources**

Merely because assessee has ample resources at its disposal could not negate deduction in respect of interest paid on borrowed funds. (A.Y. 2000-01)

*CIT v. Gautam Motors* (2010) 194 Taxman 21 / 45 DTR 89 / (2011) 334 ITR 326 (Delhi)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advance – Subsidiary**

Advance given to subsidiary as interest-free. There were sufficient free reserves funds which were used mainly for running expenses and in the absence of any material to establish that the money borrowed by the assessee were given to its subsidiary it was held that interest paid on borrowings could not be disallowed. (A.Ys. 1986-87 to 1993-94)

*CIT v. South India Corpn (Agencies) Ltd.* (2007) 209 CTR 233 / 290 ITR 217 / 164 Taxman 249 (Mad.)(High Court)

**S. 36(i)(iii) : Deductions – Interest on borrowed capital – Interest free advance – Subsidiary**

Interest paid on borrowed capital cannot be disallowed on the ground that the amount was advanced as interest free advance to its 100 percent subsidiary company. (A.Ys. 1976-77, 1977-78)

*CIT v. Dalmia Cement Ltd.* (2009) 183 Taxmann 422 / 29 DTR 138 / (2011) 330 ITR 595 (Delhi) (High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Owned funds**

The assessee company claimed deduction of interest on borrowed capital. The Assessing Officer noted that the sum of ` 213 crores was invested out of its own funds and ` 147 crores was invested out of borrowed funds. Accordingly, he disallowed interest amounting to ` 4.40 crores.

On appeal by the Department in High Court, the Hon'ble High Court held that if there were funds available both interest free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest free funds generated or available with the company, if the interest free funds were enough to meet the investments. Therefore, the appeal filed by the Department was dismissed. (A.Y. 2000-01)

*CIT v. Reliance Utilities and Power Ltd. (2009) 313 ITR 340 / 221 CTR 435 / 178 Taxman 135 / 18 DTR 1 (Bom.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Shares – Investment and stock**

Interest payable by the assessee on borrowed funds for purchasing shares both by way of investment as well as stock in trade is allowable as deduction under section 36(1)(iii) of the Act. The Court also held that for the purpose of claiming deduction under section 36(1)(iii) of the Act the object of the loan is irrelevant.

*CIT v. Srishti Securities (P) Ltd. (2009) 28 DTR 172 / 183 Taxman 159 / 226 CTR 551 / (2010) 321 ITR 498 (Bom.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Roll over premium [S. 43A]**

Roll over premium paid by the assessee to the bank with respect to foreign exchange forward contracts to obtain loans in foreign currency is allowable as deduction under section 36(1)(iii) of the Act. The High Court further held that even the provision of section 43A of the Act were not applicable as the payments made to the banks had nothing to do with the actual cost of the assets. (A.Ys. 1986-87 and 1994-95)

*Elecon Engineering Co. Ltd. v. ACIT (2008) 12 DTR 179 / 220 CTR 577 / 173 Taxman 107 / (2010) 322 ITR 11 (Guj.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Second plant**

Interest paid on capital borrowed for setting up a second plant in the existing line of business of the assessee was held to be an allowable expenditure under section 36(1)(iii) of the Act. (A.Y. 1992-93)

*Gujarat State Fertilizer & Chemicals Ltd. v. ACIT (2008) 15 DTR 108 / (2009) 313 ITR 244 (Guj.) (High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Setting up new plant**

The common board of directors of the assessee company controlled the existing plant as well as the newly set up plant, the funds used in both the plants were common and also the marketing of the product of both the division was under the control of same management. On these set of facts the High Court held that both the plants were in the same field of business and the interest paid by the assessee on capital borrowed for the purpose of setting up the new plant was allowable under section 36(1)(iii) of the Act. (A.Y. 1996-97)

*CIT v. Monnet Industries Ltd. (2008) 16 DTR 307 / (2009) 221 CTR 266 / 176 Taxman 81 / 332 ITR 627 (Delhi)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Substantial expansion**

Interest paid on loan taken for substantial expansion of existing business was held allowable as revenue expenditure.

*CIT v. Beekay Engineering & Casting (2006) 192 Taxation 187 (Delhi)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance free of interest – Purpose of business**

Interest - free advance given by the assessee-company to firm in which relatives of the directors of the assessee were partners, could not be disallowed since the assessee company had regular course of business with said firm and said advances were made for obtaining supply of raw materials and it could be said that advances were utilized for purpose of business. (A.Ys. 1985-86 to 1989-90)

*CIT v. Britannia Industries Ltd. (2006) 280 ITR 525 / (2005) 148 Taxman 654 / 198 CTR 426 (Cal.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

Before making disallowance of interest paid on borrowed capital in respect of alleged borrowed moneys advanced to sister concern by assessee, what is required to be examined by Assessing Officer is the extent to which the benefit of borrowed funds is granted by way of allowing advance to sister concern.

*CIT v. Motor General Finance Ltd. (2005) 272 ITR 550 / 142 Taxman 300 / 193 CTR 258 (Delhi) (High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advances – Owned funds**

Tribunal had recorded a finding that there was sufficient fund available with assessee-company in form of share capital, share application money, reserve and surplus, other than borrowed money, for diverting a sum to sister concern, it could not be said that amount of loan advanced to sister concern was out of borrowed fund. (A.Y. 1990-91)

*CIT v. Radico Khaitan Ltd. (2005) 274 ITR 354 / 142 Taxman 681 / 194 CTR 451 (All.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advances**

Tribunal considered in entirety all circumstances on record and noticed that the assessee, which itself had taken loans from market in same financial year, had given loan to the extent of ₹ 34 lakhs to its sister concern free of interest, no question of

law arose from its order disallowing assessee's claim for deduction of interest on borrowed capital. (A.Y. 1996-97)

*Elmer Havell Electrics v. CIT* (2005) 277 ITR 549 / 148 Taxman 57 / 197 CTR 316 (Delhi)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to holding company – Losses**

Interest was paid by assessee to holding company, necessary entries had been made in accounting year, no benefit was derived by assessee by claiming deduction of such interest as it was incurring losses and holding company had paid tax on interest received from assessee, disallowance of interest on ground that interest payment had been made by assessee for non-business considerations was not justified. (A.Y. 1984-85)

*CIT v. Nima Ltd.* (2005) 278 ITR 588 / 199 CTR 360 / (2006) 153 Taxman 212 (Guj.)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest forgone – Subsidiary – Commercial expediency**

Tribunal found that assessee had forgone interest on debit balance of the subsidiary on account of latter's weak financial position and commercial expediency, it was justified in deleting proportionate disallowance of interest paid by assessee. (A.Y. 1980-81)

Assessing authority disallowed proportionate amount of interest payment claimed by assessee as deduction on ground that no interest was charged by assessee on advance given to its subsidiaries, Tribunal was justified in deleting the disallowance. (A.Y. 1980-81)

*CIT v. Dhampur Sugar Mills Ltd.* (2005) 145 Taxman 533 (All.)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Not charged on debit balance of partner – Proportionate disallowance**

Assessee-firm had not charged any interest from one of its partners who was having debit balance although firm was running into losses and had to pay interest to its creditors, proportionate interest on borrowed moneys was rightly disallowed as not incidental to the business. (A.Ys. 1976-77, 1977-78)

*Laxmi Ice Factory v. CIT* (2005) 276 ITR 596 / 143 Taxman 314 / (2006) 203 CTR 263 (All.)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Bonafide claim**

Tribunal's finding that claim for deduction of interest was a bona fide and a genuine one and, hence, such expenses were deductible, is a finding of fact. (A.Ys. 1987-88 to 1989-90)

*CIT v. Ashok Pal Daga* (2005) 142 Taxman 27 (MP)(High Court)

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Rate of Interest**

Companies (Acceptance of Deposit) Amendment Rules, which came into operation only on 1-4-1981, could not be invoked to disallow interest paid by company in excess of 15% where company's accounting period ended on 30/09/1980 (A.Y. 1981-82)

*Jai Prakash Associates (P.) Ltd. v. CIT (2005) 277 ITR 193 / 146 Taxman 308 (All.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Realisation of dues**

The language of section 36(1)(iii), is very clear in that an assessee would be entitled to deduction of interest paid on capital borrowings for the purpose of business. Section does not contemplate a situation where an assessee is required to take positive steps for realizing its outstanding due in order to be eligible for claim of deduction. (A.Ys. 1993-94, 1994-95)

*Caldern Pharmaceuticals Ltd v. CIT (2004) 265 ITR 244 / 136 Taxman 531 / 187 CTR 365 (Cal.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

Where an amount is advanced by the assessee to its sister concern from out of the overdraft account with the bank in which there is already a debit balance, interest paid by assessee to bank on such amount has to be disallowed. (A.Ys. 1990-91, 1991-92)

*S.A. Builders Ltd. v. CIT (2004) 269 ITR 535 / (2005) 145 Taxman 107 (P&H)(High Court)*

*Editorial : Reversed by apex court in S.A. Builders v. CIT (2007) 288 ITR 1 (SC)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Loan to wife**

Where assessee gave loan to his wife without business purpose at negligible rate of interest, corresponding disallowance of interest on borrowings was justified. (A.Ys. 1993-94, 1994-95 and 1996-97)

*CIT v. Narendra Mohan Paliwal (2004) 271 ITR 347 / 140 Taxman 94 / 190 CTR 236 (Raj.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital assets**

Where capital is borrowed for the purpose of the business of the assessee, it is immaterial whether the same is in the nature of capital expenditure or revenue expenditure. Where assessee was in real estate business, interest paid on borrowed capital invested in immovable properties was allowable as deduction. (A.Y. 1989-90)

*Tetron Commercial Ltd. v. CIT (2003) 261 ITR 422 / 182 CTR 124 / 133 Taxman 781 (Cal.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Proviso – Not put to use**



The proviso which has been inserted to clause (iii) of section 36, has been made effective from 1-4-2004. This proviso is not applicable to the assessment year 1991-92. Thus for the assessment year 1991-92, interest paid on borrowed capital taken for the purposes of expansion was allowable irrespective of whether or not the asset was put to use. (A.Y. 1991-92)

*CIT v. Hindustan Zinc Ltd. (2003) 185 CTR 177 / (2004) 269 ITR 369 (Raj.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – For the purpose of business**

While adjudicating the claim for deduction under section 36(1)(iii), the nature of the expenses, whether the expenses are on capital account or revenue account is irrelevant. On the facts the assessee undertook two fold activities. It brought and sold flats. Secondly the assessee was also engaged in construction business. As the loan was taken for obtaining stock-in-trade the assessee was entitled to deduction under section 36(1)(iii). (A.Y. 1987-88)

*CIT v. Lokhandwala Construction Inds. Ltd. (2003) 131 Taxman 810 / 260 ITR 579 / 180 CTR 136 (Bom.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

Interest-free advance paid by assessee to sister concern for obtaining lease of land for setting up project in connection with existing business would not warrant disallowance of interest paid on borrowed capital simply on ground that lease deed was executed in subsequent year. (A.Y. 1990-91)

*CIT v. Chemcrown (India) Ltd. (2003) 262 ITR 177 / 182 CTR 133 / 133 Taxman 579 (Cal.)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance of money to sister concern**

Assessee had lent money to sister concern and capital of assessee and interest-free unsecured loans with assessee far exceeded the amounts advanced to the sister concern in all the years under appeal, no part of interest paid by assessee on borrowed capital was to be disallowed. (A.Ys. 1988-89, 1990-91 to 1992-93-93 and 1994-95)

*CIT v. Tin Box Co. (2003) 260 ITR 637 / 182 CTR 171 / (2004) 135 Taxman 145 (Delhi)(High Court)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Commercial expediency**

Assessee's claim that it was compelled to keep its application money for shares of joint venture blocked because its associate (in Russia) was being so compelled to keep its money blocked without conversion into share capital because of the State's

internal problems, assessee's claim for deduction of interest on borrowed capital could not be disallowed. (A.Ys. 1991-92 1993-94)

*Kejriwal Enterprises v. CIT (2003) 260 ITR 341 / 181 CTR 305 / 133 Taxman 749 (Cal.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest – Year in which deductible – Upfront payment of interest for five years on non-convertible debentures**

Upfront payment of interest in first year on 5-year non-convertible debentures could not be allowed in one year but would have to be allowed on a spread-over basis over life of debentures. (A.Ys. 1996-97, 1997-98)

*Taparia Tools Ltd. v. Jt. CIT (2003) 126 Taxman 544 / 260 ITR 102 / 180 CTR 256 (Bom.)(High Court)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital in partnership firm**

Interest paid on borrowed amount invested in as capital of partnership firm, interest expenditure allowable under section 36(1)(iii) and no disallowance can be made under section 14A. (A. Y. 2003-04)

*ACIT v. Delite Enterprises (P) Ltd. (2011) 135 TTJ 663 / 50 DTR 193 / 128 ITD 146 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern – Mutual accommodations – Commercial expediency**

When there is mutual accommodation by both parties in terms of lending and borrowing from each other, the assessee's claim of commercial expediency has to be accepted. (A. Y. 2004-05).

*Ramkishin Textiles P. Ltd. v. ITO (2011) 9 ITR 321 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital asset –**

**Amendment – Not retrospective**

Borrowings invested in acquisition of capital asset for purpose of business. Interest is allowable. Amendment in 2004 is not retrospective. (A.Y. 2003-04)

*Shruti Properties P. Ltd. v. ITO (2010) 4 ITR 186 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Business expenditure**

Interest paid on borrowed funds were disallowed on the ground that the amounts have been transferred to sister concerns. It was held that as the funds advanced were for purchases / service charges, and thus had the direct nexus with the business, and as also most of the amounts were transferred by journal entries and there was no actual transfer of cash, the proportionate disallowance can not be sustained. (A.Y. 2003-04)

*Accelerated Freeze Drying Co. Ltd. v. Dy. CIT (2009) 180 Taxman 68 (Mag.) / (2008) 5 DTR 285 (Cochin)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Diversion of fund**

Assessee was obliged to provide funds to the subsidiary company under a rehabilitation scheme sanctioned by BIFR. Funds put to use by the subsidiary for its business. It was held that it was a case where funds have been advanced by the assessee to its subsidiary company on grounds of commercial expediency. No part of interest was therefore disallowable. (A.Y. 2005-06)

*Industrial Cables (I) Ltd v. Addl. CIT (2009) 31 DTR 513 / (2010) 128 TTJ 344 / 124 ITD 322 / 1 ITR 156 (Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Deep Discount Bonds – Mercantile [S. 43B]**

Interest accrued on deep Discount Bonds, though payable on maturity on some later date was in view of mercantile system of accounting followed by assessee, there being no loan or advance or borrowing by assessee, section 43B, was not allowable. (A.Y. 2003-04)

*Gujarat Toll Road Investment Co. Ltd. v. ACIT (2009) 126 TTJ 262 / 30 DTR 66 / (2010) 125 ITD 159 / 1 ITR 146 (Ahd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Expansion – Capitalisation in books**

Interest on amount borrowed for expansion of business though capitalised in the books of account is allowable as deduction. (A.Ys. 1997-98, 1998-99)

*ACIT v. Ashima Syntex Ltd. (2009) 120 TTJ 721 / 117 ITD 1 / 18 DTR 91 (SB)(Ahd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Business of investment in shares**

Interest on Capital borrowed for business of investment in shares has to be allowed as deduction. (A.Y. 2003-04)

*Peninsular Investment Ltd. v. Dy. CIT (2009) 120 TTJ 96 / (2008) 15 DTR 170 (Hyd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest on borrowed capital – Investment in land**

Interest on funds borrowed for investment in land for business purposes is allowable business expenditure. (A.Y. 2004-05)

*Sarnath Infrastructure (P) Ltd. v. ACIT (2009) 120 TTJ 216 / (2008) 16 DTR 97 (Luck.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Nexus – Notional interest**

Advances, undisputedly, out of the cash credit account with the bank but the assessee claimed that these advances were made out of own funds and substantial profit for the year was disclosed. Assessing Officer, on the facts and circumstances did not make out a case that these advances were not made in the course of business for commercial expediency and for the purpose of business. In such circumstances notional interest not disallowable. (A.Y. 1997-98)

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

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Proportionate – Disallowance**

Proportionate interest can be disallowed where there is no business benefit by giving interest free loan to sister concern. (A.Ys. 2000-01, 2001-02)

*Mahindra Holdings & Finance Ltd. v. ITO (2008) 117 TTJ 721 / 115 ITD 69 / 23 SOT 215 / 11 DTR 481 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Business expediency**

Assessee made advances to related parties for business considerations and business expediency. No proportionate interest paid by assessee on borrowed capital can be disallowed. (A.Ys. 2000-01, 2001-02)

*Yamaha Motor India (P) Ltd. v. ACIT (2008) 118 TTJ 395 / 24 SOT 76 / 11 DTR 229 (Delhi)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital assets**

For purposes of allowability under section 36(1)(iii) it is immaterial whether the borrowing is utilised for acquisition of capital asset or for a revenue purpose. (A.Ys. 1992-93, 1993-94)

*ACIT v. Videocon VCR Ltd. (2007) 106 TTJ 474 (Pune)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

Advances to sister-concern having been given out of sale proceeds of its manufacturing division, interest paid by assessee on borrowed funds could not be disallowed. (A.Ys. 1995-96, 1996-97)

*Jt. CIT v. Steri Sheets Ltd. (2007) 106 TTJ 460 (Delhi)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Nexus – Burden on revenue**

Assessing Officer has to establish the nexus between interest-bearing funds and interest-free advances to justify disallowance of interest paid. (A.Y. 2001-02)

*Ravindra Kumar Sharma v. ITO, ITA No. 905/Jp/2005, dt. 27-10-2006 – BCAJ P. 524, Vol. 39-C, Part 5, February 2007 (Jp.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capitalisation in books**

Notwithstanding the fact that assessee has capitalized interest on capital borrowed for expansion of plant, the same is allowable business expenditure under section 36(1)(iii), as entries in book of accounts are not relevant for rejecting the claim of assessee if it is otherwise allowable. (A.Y. 2001-02)

*Zuari Industries Ltd. v. ACIT (2007) 108 TTJ 140 / 105 ITD 569 / (2006) 9 SOT 569 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Sister concern – Current account**

Interest paid on borrowings were partly disallowed on ground that assessee had advanced interest free sum to sister concern. Held, that as advance was not in nature of loans, but as amounts was debited for day-to-day transactions, addition on account of disallowance of interest was deleted.

*Triveni Engg. & Industries Ltd. v. Dy. CIT (2007) 164 Taxman 125 (Mag.)(Delhi)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Sister concern – Consistency**

Disallowance of interest on account of the fact that the assessee has advanced interest free loans to its sister concerns could not be sustained in view of the consistent view taken in the assessee's case in the earlier years on similar facts. (A.Y. 1998-99)

*Varindra Agro Chem. Ltd. v. Dy. CIT (2006) 100 TTJ 1114 (Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital expenditure**

As long as the borrowing has been made for the purposes of business, then even if it is used for incurring a capital expenditure, the claim of the assessee would be within the scope of s. 36(1)(iii). (A.Y. 1995-96)

*Industrial Finance Corporation of India Ltd. v. Dy. CIT (2006) 101 TTJ 894 / (2005) 4 SOT 223 (Delhi)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Same business**

Assessee-company having set up new plants which are interdependent of the existing ones and are supervised by the common management of the company, they are mere expansion of the existing business and, therefore, assessee is entitled to deduction of interest incurred on funds borrowed for financing the new projects. (A.Ys. 1989-90, 1991-92 to 1993-94 and 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Sister concerns**

Amount borrowed and invested in the shares of sister-concerns was for assessee's business, hence allowable deduction under S. 36(1)(iii), more so when internal accruals were sufficient to cover the investment and addition to fixed assets were made out of the amount borrowed. (A.Y. 1991-92)

*Dy. CIT v. Samtel Electron Devices Ltd. (2006) 100 TTJ 706 (Delhi)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Subsidiary companies**

No part of interest on borrowings could be disallowed on the ground that the borrowings were diverted towards non-business purposes. (A.Ys. 1993-94, 1994-95)

*Dy. CIT v. Industrial Cables (I) Ltd. (2006) 100 TTJ 748 (Chd.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Loan by amalgamating company**

No disallowance of interest on borrowings could be made on the ground that the erstwhile company which has amalgamated with the assessee-company has made interest free advances to its subsidiary company when it has been accepted in earlier years that the loan was advanced for business purposes. (A.Y. 2001-02)

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / 8 SOT 167 / (2007) 104 ITD 427 (Delhi)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Transfer of business**

No amount of interest to credit card holders could be allowed in the hands of assessee as business expenditure after transfer of credit card business to subsidiary. (A.Ys. 1988-89, 1989-90)

*Dy. CIT v. Reliable Hire Purchase Co. Ltd. (2006) 102 TTJ 959 (Chennai)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Money lending**

Interest paid by assessee engaged in money lending business and investment in shares, was disallowed by Assessing Officer on the ground that interest earned was not apportionable to interest paid, and also as dates of loans received did not coincide with loans advanced. It was held that for disallowance of interest, a clear finding be given that borrowed money has been utilized for non-business purpose, and as it was evident that money was borrowed and interest was paid, same is eligible for deduction.

*Kalpna Trading Corporation v. ITO (2006) 156 Taxman 78 (Mag.)(Mum.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Subsidiary company**

Assessee Company having made investments in the share capital of subsidiary companies as per its objects and such investments having been made from the



surplus of its own, no part of interest on borrowings could be disallowed. (A.Ys. 1993-94, 1994-95)

*Dy. CIT v. Industrial Cables (I) Ltd. (2006) 100 TTJ 748 (Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Onus on revenue**

No disallowance of interest on borrowings could be made on the ground that the assessee had diverted borrowed funds to the partners and the Revenue has not brought any material on record to show that there was increase in the borrowed funds in the relevant year which could be linked to the withdrawals by the partners. (A.Y. 2002-03)

*ITO v. J. M. P. Enterprises (2006) 99 TTJ 305 / 101 ITD 324 (Amritsar)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Firm to proprietor**

Interest payable on funds borrowed by assessee from the firm in which he is a partner for investment in own proprietorship business was allowable as deduction. (A.Y. 1997-98)

*ACIT v. Bhagwati Chandani (2006) 99 TTJ 1342 (Jodh.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Acquisition of shares [S. 37(1)]**

The act of borrowing money for the acquisition of shares was closely connected with or incidental to the carrying on of the business and the assessee is entitled to claim deduction of interest under section 36(1)(iii) / 37(1). (A.Ys. 1997-98, 1998-99)

*ATE Enterprises Ltd. v. Jt. CIT (2006) 103 TTJ 810 / 102 ITD 110 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Acquisition of capital [S. 57]**

Expression 'for the purpose of business' is much wider than the expression 'for the purpose of earning profits'. Therefore, for allowing deduction under section 36(1)(iii), it would be irrelevant to consider as to whether borrowed money was utilized for meeting day-to-day expenses or as to whether it was utilized for acquiring capital assets which is to be used in business. Therefore, interest for borrowing would be allowed even if borrowed fund is utilized for acquiring plant and machinery or land and building for use in business. (A.Ys. 1997-98, 1998-99)

*ATE Enterprise Ltd. v. Jt. CIT, (2006) 102 ITD 110 / 103 TTJ 810 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Assessing Officer establish nexus**

As Assessing Officer had not established any nexus between interest bearing borrowed funds and interest free advances given, and as interest free funds available were in excess of interest free advances given, the disallowance of interest was deleted.

*Dy. CIT v. Kukreja Development Corp 161 Taxman 199 (Mag.)(Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advances to employee**

Interest-free advances to employees for purchase of shares was a prudent decision backed by business considerations and, therefore, interest paid on borrowings attributable to such interest-free advances could not be disallowed even if it is assumed that the assessee has utilized the borrowed money for providing advances to the employees. (A.Y. 1995-96)

*ACIT v. Nahar International Ltd. (2006) 99 TTJ 1320 / 98 ITD 96 (TM)(Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – No nexus – Subsidiary company**

In the absence of any nexus between the loan obtained and the loans advanced to subsidiary companies, no disallowance could be made. (A.Y. 1998-99)

*Industrial Cables (I) Ltd. v. ACIT (2006) 99 TTJ 673 / (2005) 97 ITD 267 (Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest on partners debit balance**

The assessee being the partner paid interest for debit balance in his partnership firm. Such interest is allowable as deduction. (A.Y. 1998-99)

*Pratap V. Padode v. ACIT, Mumbai ITAT, Bench 'F', ITA No. 1741/Mum/2003, dated 30th May, 2006 – BCAJ P. 277, Vol. 39-C, Part 2, December 2006 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Residential use**

Interest paid on capital borrowed for acquiring premises in a residential apartment was disallowed based on ruling out its use as office premises. It was held that the residential nature of any premises does not preclude its use for the purpose of its business, and there may be a practical compulsion, but there is no legal compulsion to have an office in prime commercial area, and Assessing Officer is not justified in disallowing Interest.

*ITO v. Beekay Fintech Ltd. 158 Taxman 145 (Mag.)(Kol.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Proviso – Position up to 1-4-2004**

Position prior to 1-4-2004, where interest is paid for borrowings, whether it is utilised for acquisition of capital asset or it is utilized for revenue purposes loses its distinction. (A.Ys. 1993-94, 1995-96, 2000-01)

*Shri Rama Multi Tech Ltd. v. ACIT (2005) 92 TTJ 568 (Ahd.)(Trib.)*

*Munjal Showa Ltd. v. Dy CIT (2005) 147 Taxman 69 (Mag.)(Delhi)(Trib.)*

*Aarti Industries Ltd. v. Dy CIT (2005) 95 TTJ 14 (Ahd.)(Trib.)*

*SKF Bearing India Ltd v. Jt CIT (2005) 4 SOT 534 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Proviso – Prospective**

Proviso to section 36(1)(iii), inserted with effect from 1-4-2004, is applicable prospectively and not retrospectively. (A.Y. 1998-99)

*Swaraj Engineers Ltd v. Jt. CIT (2005) 97 ITD 45 / (2005) 98 TTJ 346 (Chd.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – “For purpose of business”**

Expression “for purpose of business ‘occurring in section 36 (1) (iii) is wider in scope than expression ‘for the purpose of making or earning... income’ occurring in section 57 (iii), therefore, scope for allowing a deduction under section 36(1)(iii) would be much wider than one available under section 57 (iii), purpose of borrowing money may be to acquire a capital asset or stock- in-trade, as also to pay off a trading debt or loss. (A.Y. 2000-01)

*Dy. CIT v. A.T.N. International Ltd. (2005) 4 SOT 239 (Kol.)(Trib.)*

*Industrial Finance Corporation of India v. Dy CIT (2005) 4 SOT 223 / (2006) 101 TTJ 894 (Delhi) (Trib)*

*State Bank of Saurashtra v. Dy. CIT (2005) 93 ITD 662 / 95 TTJ 225 / 3 SOT 869 (Ahd)(Trib.)*

*Srishti Securities (P) Ltd. v. Jt CIT (2005) 148 Taxman 49 (Mag.)(Mum.)(Trib.)*

*Maina Devi (Smt) v. ITO (2005) 98 TTJ 21 (Jodh.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Capital Assets**

Assessing Officer had disallowed interest payment on borrowings made for capital assets merely because in the assessee's books of account, the said interest payment had been capitalized and depreciation claimed in return of income, such disallowance of interest was not justified because during assessment proceedings, assessee had withdrawn its claim for depreciation and claimed deduction for interest only. (A.Ys. 1995-96, 1996-97)

*Dy. CIT v. Uttam Steel Ltd. (2005) 2 SOT 777 (Mum.)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Surplus funds – Irrelevant**

Fact that company had surplus funds and loans in question could have been repaid, is not a relevant consideration while considering allowability of interest paid on loan.

*Vijai Shri (P) Ltd v. ACIT (2005) 145 Taxman 23 (Mag.)(Delhi)(Trib.)*

### **S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest on borrowed capital – Investment in companies**

Assessee company claimed deduction of interest on borrowed capital, which was invested in two new companies, since assessee had made investment in a company which was to produce basic raw material required by assessee, it had to be held to be a case of expansion of business and therefore, funds were utilised for business purpose and interest paid on borrowed capital was allowable as deduction. (A.Y. 2000-01)

*Southern Petro Chemical Industries v. Dy. CIT (2005) 3 SOT 157 / 93 TTJ 161 (Chennai)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Invested in firm – Salary from firm – Business income [S. 28(v)]**

Salary from firm in which assessee is a partner has to be considered as income from business or profession under section 28(v) and, hence, interest paid on money borrowed for making capital contribution to firm has to be fully allowed in hands of assessee / partner against such income. (A.Y. 1998-99)

*Sudhir Dattaram Patil v. Dy. CIT (2005) 2 SOT 678 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Expansion of business**

Assessee manufacturing cement, set up factory at about 25 yards from its earlier factory to enhance its production capacity, it being a case of expansion of business and not a case of setting up of new business, interest paid by it on borrowed capital was allowable as revenue deduction under section 36(1)(iii). (A.Y. 1993-94)

*Dy. CIT v. Mangalam Cement Ltd. (2005) 92 ITD 44 / 92 TTJ 0001 (TM)(Jp.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Debentures – Investment in shares – Cost of acquisition**

Assessee firm earned interest on debentures as also profit on sale of shares, since assessee was able to establish nexus between interest bearing borrowed funds and investments in debentures on which interest had been earned by the assessee, to that extent interest should be allowed against said income ; as regards shares, if assessee was able to establish direct nexus between interest bearing borrowed funds and investments in shares, which had been sold during year, said interest should be added to cost of acquisition. (A.Y. 2001-02)

*Hemraj Canji v. ITO (2005) 2 SOT 689 (Mum.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advances**

In absence of any nexus or finding that borrowed capital or part thereof was diverted towards interest free advances, Interest paid on loans cannot be disallowed, on ground that no Interest has been charged on loans given. (A.Y. 1991-92)

*Meenakshi Synthetics (P.) Ltd. v. ACIT (2003) 84 ITD 563 / 79 TTJ 423 (Luck.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Interest free advances to subsidiary company**

In absence of nexus between borrowed funds and interest free advances to subsidiary company, Interest paid on loans cannot be disallowed.

*Ram Swarup Electricals Ltd. v. ACIT (2003) SOT 509 (Luck.)(Trib.)*

*Also refer:*

*ACIT v. East India Supply Centre (2003) SOT 646 (Gauhati)(Trib.)*

*Neelu Textiles Ltd. v. Addl. CIT (2003) 128 Taxman 93 (Mag.)(Jodh.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Own funds**

The Tribunal held, that the primary burden is on the assessee to establish that there were sufficient non interest bearing funds available to advance the money without charging Interest. Merely if the overall interest free funds are more than the interest free loans given, it cannot be said that the interest free loans given are out of its own funds. (A.Ys. 1986-87 to 1989-90, 1990-91, 1996-97)

*Sanghvi Swiss Refills (P.) Ltd. v. ITO (2003) 85 ITD 59 / (2004) 88 TTJ 213 (Mum.)(Trib.)*

*Also refer:*

*ACIT v. Arun Kumar Gupta (2003) 78 TTJ 288 / 129 Taxman 157 (Mag.)(Jodh.)(Trib.)*

*Arjunlal Nebhumal & Co. v. Dy. CIT (2003) 80 TTJ 67 / (2004) 2 SOT 82 (Ahd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Borrowed funds advanced to sister concern**

The Tribunal held, on facts, that Interest paid on amounts advanced to sister concern, out of interest bearing business funds, can not be allowed. (A.Y. 1989-90, 1990-91)

*S. A Builders Ltd v. ACIT (2003) 86 ITD 58 / (2004) 86 TTJ 865 (Chd.)(Trib.)*

*Editorial : Reversed by Supreme Court (2007) 288 ITR 1*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

The Tribunal held, that the Interest expenditure is allowable when there was no finding that borrowed capital was not utilised for the purpose of business, and interest free advance made to sister concern was for the purposes of business.

*Raymon Gelatine v. ACIT (2004) 2 SOT 274 / (2003) 133 Taxman 198 (Mag.)(Ahd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Advance to sister concern**

The Tribunal held, when Interest free advances made to sister concerns were very old, and most of borrowings were subsequent, no disallowance can be made on Interest paid on such borrowed funds. (A.Y. 1995-96)

*G. R. Agencies v. ITO (2003) 79 TTJ 416 / 131 Taxman 230 (Mag.) / (2004) 1 SOT 635 (Luck.)(Trib.)*

*Also refer : ACIT v. Bhim Sain Garg (Dr.) (2003) SOT 492 (Chd.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Existing business**

Interest paid on funds borrowed for purchase of Machinery, to be used for business in existence, was held to be allowable though the Interest was capitalized in the books and partly in WIP. (A.Y. 1994-95)

*ITC Ltd. v. Dy. CIT (2003) 86 ITD 135 / 80 TTJ 15 (TM)(Kol.)(Trib.)*

**S. 36(1)(iii) : Deductions – Interest on borrowed capital – Controlling interest**

Interest paid on borrowings done for taking over the controlling Interest and management of sick company is not deductible as Revenue expenditure, as same was for capital Investment.

*ITO v. Ratnesh Enterprises (P.) Ltd. (2003) SOT 78 (Jp.)(Trib.)*

**S. 36(1)(iv) : Deductions – Contribution for provident fund – Non statutory**

Amount paid on contribution to provident fund maintained by assessee which had not been by framed under Provident Funds Act, 1952, is not allowable. (A.Y. 1976-77)

*CIT v. Kattabomman Transport Corpn. Ltd. (2004) 268 ITR 507 / 192 CTR 168 / (2005) 142 Taxman 375 (Mad.)(High Court)*

**S. 36(1)(iv) : Deductions – Provident Fund – Deposit in PO**

Contribution towards recognised Provident Fund not paid to the Provident Fund Commissioner but kept in Post Office, is not allowable as deduction. (A.Ys. 1974-75 to 1976-77)

*Hindustan Salts Ltd. v. CIT (2003) 127 Taxman 379 / 185 CTR 542 (Raj.)(High Court)*

**S. 36(1)(iv) : Deductions – Superannuation Fund – Allowable**

Initial contribution to superannuation fund for assessment year 1978-79 was allowable. (A.Ys. 1978-79, 1979-80)

*CIT v. Mafatlal Fine Spinning & Manufacturing Co. Ltd. (2003) 263 ITR 140 / (2004) 187 CTR 64 / 138 Taxman 143 (Bom.)(High Court)*

*Mahindra & Mahindra Ltd. v. CIT (2003) 128 Taxman 394 / 261 ITR 501 / 182 CTR 34 (Bom.)(High Court)*

**S. 36(1)(iv) : Deductions – Pension Fund contribution – Actuarial valuation**

Contributions made to approved employees pension fund account based on actuarial valuation is allowable deduction. (A.Ys. 2000-01 to 2004-05)

*Catholic Syrian Bank Ltd. v. ACIT (2010) 38 SOT 553 (Cochin)(Trib.)*

**S. 36(1)(v) : Deductions – Approved gratuity fund – Adjustment of past surplus**

Adjustment of surplus in earlier year against contribution to gratuity fund in subsequent year is permissible. (A.Y. 1974-75)

*Udaipur Mineral Development Syndicate (P.) Ltd. v. CIT (2003) 179 CTR 206 (Raj.)(High Court)*

**S. 36(1)(va) : Deductions – Employees' contribution to certain funds [S. 43B]**

The employees contribution received by the employer would be income in his hands and would be allowed as permissible deduction under clause (va) of section 36 (1), in computing the business income under section 28 provided the assessee credits the



same to the relevant fund. Section 43B read with proviso thereto provides that there should be actual payment and further the actual payment payments are to be made with in the due date as prescribed under the Act. If the payments are not made with in the due date, there is contravention of the provisions of the Provident Fund Act under the income tax Act and the defaulting assesseees are not entitled to the benefits of deduction, which are otherwise allowable to them under the scheme of the provisions of the Act. That is to ensure that the beneficial legislations are complied with strictly. Thus the tribunal was not right in holding that section 36(1)(va) yields to section 43B when second proviso to section 43B is to be reckoned as defined in Explanation to section 36 (1) (va). Employer has to remit contribution to provident fund within 15 days from close of month for which employees earned their salary and 'close of 15th day' is not to be calculated from end of month in which wages are paid. (A.Y. 1991-92)

*CIT v. Madras Radiators & Pressings Ltd. (2003) 129 Taxman 709 / 264 ITR 620 / 183 CTR 332 (Mad.)(High Court)*

### **S. 36(1)(va) : Deductions – Contribution towards Provident Fund – Before year end**

Employer's contribution towards provident fund though paid beyond the due date but before the end of the relevant financial year is allowable deduction. (A.Y. 2004-05)

*Polyplex Corporation Ltd. v. ITO (2009) 122 TTJ 949 / (2008) 12 DTR 289 (Delhi)(Trib.)*

### **S. 36(1)(vi) : Deductions – Loss of Birds – Loss of**

Assessee is entitled to deduction under section 36(1)(vi) in respect of parent and grandparent birds destroyed by it which had been used for its business purpose. (A.Y. 1996-97)

*India Poultry (P) Ltd. v. Jt. CIT (2006) 105 TTJ 312 / (2007) 104 ITD 299 (Hyd.)(Trib.)*

### **S. 36(1)(vii) : Deductions – Bad debt – Bad debts – Mere write-off sufficient**

After 1st April, 1989, it is not necessary for the assessee to establish that the debts in fact have become irrecoverable. It is sufficient if they are written off as irrecoverable in the accounts of the assessee. (A.Ys. 1990-91 1993-94 and 1994-95)

*T. R. F. Ltd. v. CIT (2011) 220 Taxation 88 / (2010) 35 DTR 156 / 230 CTR 14 / 323 ITR 397 / 190 Taxman 391 (SC)*

### **S. 36(1)(vii) : Deductions – Bad debt – Provision for NPA – RBI directions**

Provision for NPA made under NBFCs Prudential Norms (Reserve Bank) Directions, 1998 is not an "expense".

Provision for NPA made under NBFCs Prudential Norms (Reserve Bank) Directions, 1998 has to be added back in computing profits and gains and is not an "expense". Said provision is not deductible under section 36(1)(vii) and is expressly disallowed

by section 36(1)(vii) Expln. (inserted by Act 14 of 2001 w.e.f. 1-4-1989). Having been so disallowed it cannot be allowed under section 37 either.

Scope and applicability of section 37 – It applies only to item not falling under sections 30 to 36. Hence, an item not falling under sections 30 to 36 but excluded by section 36(1)(vii) Expln. Cannot be covered by section 37. Therefore, the provision for doubtful debt made by NBFC having been kept outside the scope of “written off” by the said Expln. then the deduction cannot be claimed under section 37.

Exclusion of NBFCs from the benefit of deductions available to banking companies does not violate Articles 14 and 19 as it satisfies the test of “intelligible differentia” and the principle of “reasonable restriction”, respectively.

Court’s acceptance of NBFCs’ plea to include NBFCs in section 36(1)(vii-a) would amount to judicial legislation, which is impermissible. (A.Y. 1998-99)

*Southern Technologies Ltd. v. Jt. CIT, Coimbatore (2010) 2 SCC 548 / 320 ITR 577 / 228 CTR*

*440 / 187 Taxman 346 / 34 DTR 11 (SC)*

### **S. 36(1)(vii) : Deductions – Bad debt – Bank – Bad and doubtful debts**

The assessee debiting profit and loss account and creating provision for bad and doubtful debts reducing by corresponding amount from loans and advances debiting the said amount in the profit and loss account and reducing on the asset side of the balance sheet. The assessee was entitled to deduction under section 36(1)(vii), and it was not necessary to close the individual account of each debtor in the books. (A.Ys. 1993-94, 1994-95)

*Vijaya Bank v. CIT (2010) 231 CTR 209 / 37 DTR 401 / 323 ITR 166 / 190 Taxman 257 (SC)*

### **S. 36(1)(vii) : Deductions – Bad debt – Unilateral writing off sufficient after change of law**

Departmental SLP rejected against the Bombay High Court order. The High Court dismissed the departmental appeal in ITA Nos. 383 and 437 of 2008. When it is written in the books as bad debt, the same is in compliance with the requirement of section 36(1)(vii).

*CIT v. Nelco Ltd. (2009) 317 ITR 6 (ST) (SC)*

### **S. 36(1)(vii) : Deductions – Bad debt – Interest on doubtful advances**

Interest on doubtful advances credited to the interest suspense account will not be liable to be taxed under the Income-tax Act, 1961 in accordance with the Circular issued on 6th October, 1952. (A.Y. 1978-79)

*Mercantile Bank Ltd. v. CIT (2006) 153 Taxman 97 / 283 ITR 84 / 202 CTR 457 / 193 Taxation 563 (SC) / 5 SCC 221*

### **S. 36(1)(vii) : Deductions – Bad debt – Non financial company – Bank guarantee**

Assessee being a non banking financial company, its activity of giving guarantee on behalf of another company was part of its money lending business and, therefore, the security amount adjusted by the bank against the dues of the said company following default on the part of the latter which has become irrecoverable is allowable as bad debt. (A.Ys. 1998-99, 1999-2000 & 2003-04).

*CIT v. Tulip Star Hotels Ltd. (2011) 57 DTR 210 / 339 ITR 91 (Delhi)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off in the books**

Where the assessee had written off certain debts as bad in its books of account, there is no further requirement to prove that the debts were trade debts or that they were irrecoverable. (A.Ys. 1996-97 & 1998-99)

*CIT & Anr. v. Krone Communication Ltd. (2011) 333 ITR 497 / 53 DTR 120 (Karn.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Proprietorship taken over by a Private limited company [S. 36(2)]**

When assessee succeeded the business of predecessors taking over all assets and liabilities including the debt, when the income represented such debtors was taken into consideration in assessment of proprietorship concern, bad debt is allowable in the hands of successor private limited company under section 36(2), r.w. 36(1)(vii). The Court followed the judgment of Apex Court in *CIT v. T. Veerabhadra Rao, K. Koteswara Rao & Co. (1985) 155 ITR 152 (SC)*.

*A-I Acid Private Limited v. Dy. CIT (2011) October ACAJ P. 463 (Vol. 35 Part 7-8 P. 463) (Guj.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Alternative claim – If “bad debt” not allowable under section 36(1)(vii), claim for deduction under section 37(1) can be raised for first time even before High Court [S. 37(1)]**

If loss of debt does not come within section 36(1)(vii), a claim can be made under section 37(1). Merely because claim was made under one provision of Act and not under another provision, it does not debar the assessee from claiming deduction under section 37(1) even if it was not raised before lower authorities. (A. Y. 1986-87) *Mohan Meakin Ltd. v. CIT (2011) 59 DTR 401 (Delhi)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Assessee’s judgment – Decree**

Assessee having valid reason for judging that amount was not recoverable though assessee had obtained a decree to recover debt. Assessee entitled to deduction of bad debt. (A.Y. 1984-85)

*CIT v. Punjab Tractors Ltd. (2010) 320 ITR 153 / 187 Taxman 323 / (2009) 31 DTR 245 (P&H)(High Court)*

### **S. 36(1)(vii), (2) : Deductions – Bad debt – Share broker**

Where share broker purchasing shares for its clients and paying money against purchase and money receivable from client becoming bad and treated as bad debt.

Held that brokerage payable by client is part of bad debt to be taken into account. (A.Y. 2001-02)

*CIT v. Bonanza Portfolio Ltd. (2010) 320 ITR 178 / (2009) 226 CTR 468 / 29 DTR 280 (Delhi)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt – Discontinuance of business**

Debt taken in to account in computing the income from money lending business. Money lending business discontinued, bad debt is allowable. (A.Y. 1998-99)

*CIT v. Rajini Investment Pvt. Ltd. (2010) 216 Taxation 553 / (2009) 319 ITR 433 / 30 DTR 257 (Mad.)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt**

Where the conditions mentioned in sections 36(1)(vii) and 36(2) are satisfied by the assessee, its claim of bad debts cannot be disallowed on the ground that the debtors had not become insolvent and they had resource to pay the debts or the assessee had not initiated any civil or criminal action against the debtors to recover the dues. (A.Y. 2001-02)

*CIT & Anr. v. K. Raheja Development Corporation (2010) 47 DTR 212 / 195 Taxman 412 (Karn.)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt – Share broker**

Amount paid by assessee (a stock broker) on behalf of sub-broker, which could not be recovered, is eligible for being claimed as bad debt. However the deduction was to be reduced by the amount of shares which were purchased and withheld by the assessee. (A.Y. 2001-02)

*CIT v. DB (India) Securities Ltd. (2010) 187 Taxman 161 / (2009) 318 ITR 26 / 226 CTR 466 (Delhi)(High Court)*

*Editorial:- SLP rejected (2010) 325 ITR 5 (St.) / (SLP No. 13553 of 2010 dt. 30-4-2010)*

**S. 36(1)(vii) : Deductions – Bad debt – Burden lies on assessee to prove**

Writing off of bad debt in the books of account is not conclusive and the Assessing Officer is not precluded from making inquiries as to whether the entries are genuine and not imaginary or fanciful. The Assessing Officer has the power under section 143(2) to see that the entries are not mere paper work or fake and at the same time, the wisdom of the assessee cannot be questioned and no demonstrative or infallible proof of bad debt having become bad should be required. Commercial expediency is to be seen from the point of view of assessee depending on nature of transaction, capacity of debtor etc. (A.Y. 2002-03)

*CIT v. Kohli Brothers Color Lab (P) Ltd. (2010) 329 ITR 80 / 228 CTR 84 / 186 Taxman 62 / 33 DTR 35 (All.)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt – Export – Exempted income [S. 14A, 80HHC]**

Under section 80HHC and section 14A, the expenditure incurred from the export income could not be held to be for earning income which did not form part of the total income, which concept was dealt with under section 10 of the Act. Section 80HHC deals with deduction of the element of profit from export from taxable income. Therefore, the claim of bad debt could not be disallowed. (A.Y. 2005-06)

*CIT v. Kings Exports (2009) 318 ITR 100 (P&H)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off year**

Assessee would be entitled to deduction under section 36(1)(vii) of the Act of the amount of any bad debts which has been written off as irrecoverable in the accounts during the previous year. (A.Y. 1990-91)

*Lawlys Enterprises (P) Ltd. v. CIT (2009) 28 DTR 150 / 314 ITR 297 (Patna)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Money lending business**

Where the assessee's claim for bad debts was found to be genuine by the assessing officer, merely because the assessee had discontinued the money lending business during the relevant assessment year, its claim of bad debt cannot be disallowed. (A.Y. 1998-99)

*CIT v. Rajini Investment P. Ltd. (2009) 30 DTR 257 / 319 ITR 433 (Mad.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Continues efforts for recovery**

Where the assessee had written off the debts in its books as bad and irrecoverable, the assessee's claim of bad debts cannot be disallowed merely because the assessee had continued its efforts to recover the debts and obtained the decree, which could not be executed in the subsequent year. (A.Y. 1984-85)

*CIT v. Punjab Tractors Ltd. (2009) 31 DTR 245 / (2010) 320 ITR 153 / 187 Taxman 323 (P&H) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Share broker**

Where the assessee (a share broker) purchased share on behalf of its sub-broker and received only a part payment against the full consideration, the unrealised amount was to be treated as debt and was allowable as bad debt under section 36(1)(vii) of the Act. However, the Hon'ble High Court remanded the matter back to the Tribunal to consider the aspect, that as the share remained with the assessee the sale proceeds realized on sale of shares in the market should be adjusted against the balance due from the defaulting broker and only the net irrecoverable balance is to be allowed a bad debt. (A.Y. 2001-02)

*CIT v. D.B. (India) Securities Ltd. (2009) 29 DTR 277 / 226 CTR 466 / 318 ITR 26 / (2010) 187 Taxman 161 (Delhi)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off in books**

The Assessing Officer disallowed the claim of bad debt which was written off by the assessee. But the learned CIT(A) deleted the said disallowance. Further, the Hon'ble ITAT confirmed the said deletion.

On appeal by the Department in High Court, the Court held that the provisions of section 36(1)(vii) of the Income-tax Act, 1961 were to be read with the Board Circular No. 551 dt. 23-1-1990 and if the assessee had written off the debt as a bad debt, that would satisfy the purpose of the section. The High Court dismissed the appeal.

*CIT v. Star Chemicals (Bombay) P. Ltd. (2009) 313 ITR 126 / 11 DTR 311 / 220 CTR 319 (Bom.) (High Court)*

*DIT (International Taxation) v. Oman International Bank SAOG (2009) 313 ITR 128 / 223 CTR 382 / 184 Taxman 314 / 21 DTR 193 (Bom.) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Sale consideration received partly [S. 36(2)]**

Profit on sale of shares of various companies have been shown under the head "other income". When assessee received part of sale consideration, balance wrote off as irrecoverable bad debt, the condition of section 36(1), read with 36(2) was satisfied. Hence amount written off allowable as bad debts. (A.Y. 2001-02)

*CIT v. Dalmia (Bros.) (P.) Ltd. (2009) 184 Taxman 240 (Delhi) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off bad has to be accepted**

No prudent businessman would write off a debt which he has a hope of recovering. Thus, where assessee has written off debt as irrecoverable in relevant previous year, it must be presumed, unless contrary was shown, to be bad debt. (A.Y. 1995-96)

*CIT v. DCM Ltd. (2008) 167 Taxman 160 (Delhi) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off in books**

Once the assessee has written off the debt as bad debt, requirement of section 36(1)(vii) is complied with, and the claim of deduction of bad debts is allowable. (A.Y. 1993-94 and

2001-02)

*Suresh Gaggal v. ITO (2008) 11 DTR 345 / (2009) 222 CTR 96 / 180 Taxman 90 (HP) (High Court)*

*CIT v. Tusker Dye Chem (2008) 9 DTR 298 / 173 Taxman 104 (Delhi) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off in books**

From A.Y. 1989-90, if the amount is written off in the books of account by the assessee as bad debts it is enough for the assessee to claim deduction and the assessee is not required to prove that the debt has actually become bad.

*CIT v. IFCI Venture Capital Funds Ltd. (2008) 208 Taxation 329 (Delhi) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Prudent judgment**



Once it was accepted by the department that the transactions actually took place, then the decision to write-off the loan as bad debt was a consequence of an honest judgment. Any prudent man on learning that an unsecured loan had become perilously irrecoverable would immediately initiate each and every legal remedy available to him as had been manifested itself in the case of the assessee. Therefore, the Tribunal was right in deleting the disallowance of the balance sum. (A.Y. 2003-04) *CIT v. Morgan Securities & Credits P. Ltd. (2007) 292 ITR 339 / 210 CTR 336 / 162 Taxman 124 (Delhi)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off**

After the amendment to sec. 36(1)(vii) w.e.f. 1-4-1989, the assessee has only to write off the debt as irrecoverable in order to make the claim of Bad Debt as allowable deduction. As debts were written off in the accounts, the same is allowable. (A.Y. 1994-95)

*CIT v. Autometers Ltd. (2007) 210 CTR 339 / 292 ITR 345 / (2008) 167 Taxman 286 (Delhi) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Provision – Non-Performing Assets**

Provision for non-performing assets debited to P & L a/c as per RBI directions cannot be allowed as bad debt in view of mandatory provisions of Explanation to section 36(1)(vii). (A.Y. 1998-99)

*T. N. Power Finance & Infrastructure Development Corporation Ltd. v. Jt. CIT (2007) 213 CTR 610 / (2006) 280 ITR 491 / 153 Taxman 466 (Mad.)(High Court)*

### **S. 36(i)(vii) : Deductions – Bad debt – Winding up petition**

Winding up petition against debtor company, once the assessee has filed winding up petition against the debtor company for its inability to pay the debts and the latter has also been declared a sick company by BIFR, assessee is entitled to claim deduction of bad debts. (A.Y. 1998-99)

*CIT v. Goyal M. G. Gases (P) Ltd. (2007) 212 CTR 305 / (2009) 303 ITR 159 / (2007) 163 Taxman 541 (Delhi)(High Court)*

### **S. 36(i)(vii) : Deductions – Bad debt – Export incentive**

The assessee had claimed bad debt on account of export incentive which had become irrecoverable. On appeal the High Court held that the assessee had taken the amount of export incentive as part of its income in earlier year and this amount was written off by the assessee only when it become irrecoverable. In such case as the essential condition of section 36(1) (vii) were fulfilled the assessee was eligible for deduction of the amount as bad debt.

*CIT v. Excel Fashion P. Ltd. (2007) 201 Taxation 216 (Delhi)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Business loss [S. 36(2)]**

Assessee was engaged in Transportation of goods. Goods got damaged in transit. As per Audit Report damage to goods occurred in 1983 but the matter settled in 1986. Loss cannot be allowed as bad debt. (A.Y. 1988-89)

*Kerala Transport Co. v. CIT (2007) 294 ITR 91 / (2006) 206 CTR 33 / 156 Taxman 327 (Ker.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Franchise**

Claimed on closure of franchisees. As the franchisees was closed due to steep fall in the receipts, the claim made by assessee under section 36(1)(vii) is allowable. (A.Y. 2002-03)

*CIT v. Brilliant Tutorials Pvt. Ltd. (2007) 210 CTR 49 / 292 ITR 399 / (2008) 170 Taxman 537 (Mad)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off in books**

Where the assessee has written-off a debt in its books of account the same cannot be disallowed unless the Assessing Officer had rejected the entire books of account to be totally unreliable and give a finding of extreme perversity in declaration of debt to be bad debt.

*CIT v. Nai Duniya (2006) 154 Taxman 493 / 203 CTR 70 / (2007) 295 ITR 346 (MP)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Unilateral write off – Acknowledgment of debt**

Unilateral write off of debts is not allowable specially when the alleged well known debtors have acknowledged the debts and have not refused to pay the dues and no case is made out that these debt, had become bad. (A.Y. 1996-97)

*South India Surgical Co. Ltd. v. ACIT (2006) 201 CTR 289 / 287 ITR 62 / 153 Taxman 491 (Mad.) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Provision**

Unless and until a debt is written off in the books as irrecoverable as provided under section 36(2)(i)(b), the Assessee cannot claim any deduction on account of bad debt. Mere provision for bad & doubtful debts in the Profit & Loss A/c. does not satisfy the requirement of section 36(2)(i)(b). (A.Y. 1988-89)

*Kerala State Industrial Development Corporation Ltd. v. CIT (2006) 201 CTR 144 / 281 ITR 413 / 151 Taxman 127 (Ker.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Credit in debtor's account**

If debt is written off and no credit is simultaneously made in debtor's account, in view of Explanation, bad debt is not allowable. (A.Y. 1993-94)

*Jubilant Organos v. CIT (2004) 265 ITR 420 / 137 Taxman 515 / 187 CTR 574 (All.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Condition precedent**

After 1/4/1989, it is mandatory condition that deduction can be allowed as bad debt only when it is actually written off as irrecoverable in accounts, and not on basis of a mere provision; even if omission to write off debt is inadvertent debt will not be allowable; further making a provision is not same thing as writing off debt as irrecoverable. (A.Y. 1997-98)

*CIT v. Micromax Systems (P.) Ltd. (2005) 277 ITR 409 / 148 Taxman 486 / 198 CTR 578 (Mad.) (High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – BIFR**

Debt of debtor company, declared by BIFR as a sick company, and written off by assessee company in relevant year is allowable as bad debt. (A.Y. 1990-91)

*Gita Sanghi (Mrs) v. CIT (2005) 277 ITR 388 / 144 Taxman 807 / 193 CTR 513 (MP)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Total income**

Deduction under section 36(1)(vii), is with reference to total income computed before making any deduction under section 36(1)(vii). (A.Ys. 1975-76, 1976-77)

*CIT v. U.P. Financial Corporation (2004) 191 CTR 135 / (2005) 143 Taxman 47 (All)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Financial condition of debtor**

If financial condition of debtor is not good and assessee treats the loan as bad, it is to be allowed as bad debt. (A. Y. 1994-95)

*CIT v. Vallabh Leasing & Finance (P) Ltd. (2004) 265 ITR 1 / 134 Taxman 770 / 187 CTR 20 (MP)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Recovery action is not requirement [S. 36(2)]**

A creditor is likely to have taken recovery action in most cases before a deduction for a bad debt is claimed, although it is not a requirement that such action be taken before a decision is made that a debt is bad. (A.Ys. 1983-84, 1984-85)

*CIT v. Ahmedabad Electricity Co. Ltd. (2003) 129 Taxman 190 / 262 ITR 97 / 181 CTR 222 (Guj.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Write off of investment – Not stock-in-trade [S. 36(2)]**

Writing off of investment in shares by assessee – Financial Corporation could not be allowed where Tribunal's finding was that shares were held as investments and not as stock-in-trade. (A.Y. 1992-93)

*West Bengal Financial Corporation and Ann. v. Dy. CIT (2003) 263 ITR 332 / (2004) 140 Taxman 254 (Cal.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Provision [S. 36(2)]**

Scope of proviso to section 36(1)(vii) is only to deny deduction to extent of bad debt written off in books with respect to which provision is made under section 36(1)(viiia). (A.Ys. 1985-86, 1987-88, 1989-90 and 1992-93)

*South Indian Bank Ltd. v. CIT (2003) 130 Taxman 749 / 262 ITR 579 / 183 CTR 21 / 131 Taxman 774 (Ker.)(High Court)*

*Dhanlaxmi Bank Ltd. v. CIT (2003) 130 Taxman 749 / 262 ITR 579 / 183 CTR 21 / 131 Taxman 774 (Ker.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Debts of mills taken over by Government [S. 36(2)]**

Debt due from mills taken over by Government was allowable. One has to look at the problem from the point of a prudent business man. (A.Y. 1988-89)

*Jhunjhunwala Co. v. ACIT (2003) 259 ITR 178 / 129 Taxman 453 / 180 CTR 464 (Bom.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Sick undertaking [S. 36(2)]**

Where assessee's bad debts related to the textile mills which had fallen sick and were unable to discharge their liabilities and these mills were admittedly taken over under the provisions of Gujarat Closed Textile Undertakings (Nationalisation) Act, 1986, assessee's claim for bad debt was allowable. (A.Ys. 1983-84, 1984-85)

*CIT v. Ahmedabad Electricity Co. Ltd. (2003) 129 Taxman 190 / 262 ITR 97 / 181 CTR 222 (Guj.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – Business loss – If not 'Bad Debt', – Claim sans specific ground invalid [S. 28(i), Income Tax (Appellate Tribunal) Rules, 1963 – Rule 27]**

Before the Tribunal, the assessee raised a ground only on "bad debt" (and not "business loss"). At the hearing, it conceded the claim for "bad debt" and pressed for the claim for "business loss". The Tribunal held that the claim regarding "business loss" cannot be entertained because, though the CIT(A) has dealt with the issue, there is no specific ground. The claim is also not maintainable under Rule 27 since that applies only to a Respondent in the appeal. (A. Y. 2003-04).

*Manori Properties Pvt. Ltd. v. ITO ITA No. 5950/Mum/2008 dated 20-5-2011 (Mum.)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

Editorial : A contra view, in the same fact-situation, was taken in *Mohan Meakin v Dy. CIT (2011) 59 DTR 401 (Delhi)(High Court)*. The High Court held that if grant of relief on another ground is justified, the Tribunal would be under a duty to grant that relief.

### **S. 36(1)(vii) : Deductions – Bad debt – Assessee only to write it off as bad debt – Not required to prove that debts had become bad**

A mere write-off of bad debt was sufficient under section 36(1)(vii) and that it was not necessary for the assessee to establish that debt had actually become bad. The law settled by the Supreme Court was binding on all including the Assessing Officer,

under Article 141 of the Constitution of India. [*T.R.F. Ltd. v CIT* (2010) 323 ITR 397 (SC)]. (A. Y. 2005-06).

*ACIT v. Safe Enterprises* (2011) 9 ITR 553 / 128 ITD 459 / 137 TTJ 573 / 53 DTR 322 (Mum.)(Trib.)

**S. 36(1)(vii) : Deductions – Bad debt – Write off – Accounted income for the relevant year or in earlier years**

As per the amended provisions if debt has been written off as irrecoverable in accounts of assessee, it would be sufficient for claiming it as bad debts subject to condition that amount so written off has already been accounted for as income in relevant year or in earlier years. (A.Y. 1989-99)

*C. B. Richard Ellis Mauritius Ltd. v. Dy. DIT* (2010) 38 SOT 236 / 131 TTJ 736 / 42 DTR 386 (Delhi)(Trib.)

**S. 36(1)(vii) : Deductions – Bad debt – Share broker**

Once brokerage income is taken into account, the principal amount of debt is considered as the full amount of debt for claim of deduction as bad debts. (A.Y. 1998-99)

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

*Editorial : Approved by Bombay High Court in CIT v. Shreyas S. Morakhia* (2012) 342 ITR 285 (Bom.)(High Court)

**S. 36(1)(vii) : Deductions – Bad debt – Money advanced to subsidiary [S. 36(2), 37(1)]**

Money advanced to the subsidiary was not a trading debt emerging from trading activity of assessee hence could not be allowed as deduction either under section 36(2) or under section 37(1). (A.Y. 2000-01)

*VST Industries Ltd. v. ACIT* (2010) 41 SOT 415 / 46 DTR 265 / 134 TTJ 361 (Hyd.)(Trib.)

**S. 36(i)(vii) : Deductions – Bad debt – Whether two deductions possible**

Whether two deductions permissible in respect of assessee to whom clause (vii) of section 36(1) applies, there can be two deductions allowed, one on account of provision for bad debts and the second, on account of bad debts actually written off, but in any case deduction to such assessee cannot exceed bad debts actually written off in books of account of previous year. (A.Y. 2000-01)

*Addl. DIT v. CITIBANK NA* (2009) 34 SOT 311 (Mum.)(Trib.)

**S. 36(1)(vii) : Deductions – Bad debt – Recovery proceedings – Pending**

The assessee was engaged in the business of trading, investment, financing and bill discounting. The assessee had claimed some debts as bad. The proceedings for its recovery were pending before the courts. Held that Assessing Officer was not justified

in rejecting the claim of bad debts on the ground that it was premature for the assessee to write off the amount as bad debts. (A.Y. 2000-01)

*Space Financial Services v. ACIT (2008) 115 TTJ 165 / 5 DTR 276 (Delhi)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Provision for NPA of NBFC (45A of the RBI Act)**

Amount debited to profit and loss account as a provision for NPA by an NBFC on the basis of provisioning requirement of prudential norms by the RBI in exercise of powers conferred under section 45JA of the RBI Act is not allowable as bad debt. (A.Y. 2001-02)

*New India Industries Ltd v. ACIT (2008) 1 DTR 247 / (2007) 112 TTJ 917 / 18 SOT 51 (SB) (Delhi)(Trib.)*

**S. 36(i)(vii) : Deductions – Bad debt – Business expenditure**

As the accrual of income was based on condition of completion of certain work, and which on facts, could not be done due to other factors, leads to inference that income did not accrue to the assessee. Also till the time legally enforceable right comes into existence income does not accrue, and the assessee is entitled to deduction under section 36(i)(vii) of an amount shown as income in the books.

*Iyshvakoo Radhu v. ACIT (2008) 169 Taxman 38 (Mag.)(Delhi)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Sharebroker**

The assessee was a share broker. Payments made towards purchase price of shares on behalf of client turned bad. The same was allowable as bad debts. (A.Y. 1997-98)

*ACIT v. Olympia Securities Ltd., ITA No. 4053/Mum/2002, Bench – 'G', dt. 21-12-2006 – BCAJ P. 147, Vol. 40-A, Part 2, May 2008 (Mum.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Write off – Sufficient**

The writing off a bad debt is a prime evidence and is sufficient requirement of law, and it is not obligatory to prove that debt w/off is indeed a bad debt, for purpose of allowance under section 36(1)(vii).

*Triveni Engg. & Industries Ltd. v. Dy. CIT (2007) 164 Taxman 125 (Mag.)(Delhi)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Write off – Bonafide**

Debt written off in the books. Assessee having *bona fide* written off the bad debt, same was allowable. (A.Y. 1998-99)

*Kanoria Securities & Financial Services (P) Ltd. v. ACIT (2007) 108 TTJ 473 / 15 SOT 191 (Mum.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Provision for bad debts**



In view of proviso to s. 36(1) (vii) the amount of deduction under section 36(1)(vii) has to be limited to the amount by which the bad debt or any part thereof exceeds the credit balance in the provision for bad and doubtful debt made under section 36(1)(viiia). (A.Ys. 1995-96, 1996-97, 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

### **S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Burden of proof**

When the statute has provided the mode of discharging the onus of proof by writing off the debt as bad debt it is not incumbent on the Revenue to call for further evidence. Therefore, after the amendment there is no need to insist further evidence to prove that the debt has become bad statutory rule itself declares the rule of deduction of bad debt. (A.Y. 1994-95)

*Dy. CIT v. Oman International Bank SAOG (2006) 100 ITD 285 / 102 TTJ 207 (SB)(Mum.)(Trib.)*

*Editorial : Affirmed by the Bombay High Court in DIT (International Taxation) v. Oman International Bank SAOG (2009) 313 ITR 128 / 223 CTR 382 / 184 Taxman 314 / 21 DTR 193 (Bom.)(High Court)*

### **S. 36(1)(vii) : Deductions – Bad debt – No money lending licence**

In the absence of money-lending licence debts on account of non recovery of loans during share business cannot be allowed as deduction. (A.Y. 1997-98)

*ACIT v. B. N. Khandelwal (2006) 101 TTJ 717 (Mum.)(Trib.)*

### **S. 36(1)(vii) : Deductions – Bad debt – Writing off the debts in books**

Assessee having created the reserve and not passed entries in the accounts of the debtors claim for bad debts was rightly disallowed in view of Expln. to S. 36(1)(vii). (A.Y. 1990-91)

*Kiran Corpn. v. ACIT (2006) 102 TTJ 375 / 98 ITD 119 (TM)(Ahd.)(Trib.)*

### **S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Relevance of books of account**

Deduction under section 36(1)(vii) cannot be allowed in respect of loans which were not recorded in the proper books of account nor written off therein.

*Jagmohan Singh Arora & Ors. v. Dy. CIT & Anr. (2006) 101 TTJ 682 (Mum.)(Trib.)*

### **S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Block assessment**

Block assessment is not meant for allowing any claim for deduction in respect of items not recorded in the regular books of account.

*Jagmohan Singh Arora & Ors. v. Dy. CIT & Anr. (2006) 101 TTJ 682 (Mum.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Irrecoverable advances**

Provision for irrecoverable advances though made by the assessee in accordance with NBFC guidelines issued by the RBI cannot be allowed as deduction either under section 36(1)(vii) or as business loss. (A.Y. 1998-99)

*Concepts Cables Ltd v. ACIT (2006) 103 TTJ 48 / 101 ITD 143 (Mum.)(Trib.)*

**S. 36(i)(vii) : Deductions – Bad debt – Business expenditure – Debit in P&L account**

Once the amount has been debited in P & L Account under head "Bad Debts", and debtors balance having been reduced to that extent, there is no requirement to establish that debt has become bad.

*Gillette India Ltd. v. Jt. CIT (2006) 156 Taxman 236 (Mag.)(Jp.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Business expenditure – Government agencies**

Debts due to assessee from Government agencies could not be claimed as bad debts merely by writing off the same when there is a ray of hope and the assessee is continuing business transaction with those agencies and is receiving money for other transactions. (A.Y. 1998-99)

*Industrial Cables (I) Ltd. v. ACIT (2006) 99 TTJ 673 / (2005) 97 ITD 267 (Chd.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Commission agent – Net amount of commission**

**[S. 36(2)]**

Assessee, acting as a commission agent for transport activity, was crediting, only net amount of commission to profit and loss account and not gross receipts, its claim for bad debt in commission business could not be allowed as conditions in section 36(2)(i) were not satisfied. (A.Y. 1997-98)

*Corrosion Roadlines v. Dy. CIT (2005) 92 TTJ 625 / 146 Taxman 29 (Mag.)(Pune)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Supply of goods [S. 36(2)]**

Assessee had written off bad debt in respect of party as goods supplied to such party by assessee were defective and there were defective and there was no scope of recovery of such debt, said debt was allowable. (A.Y. 1994-95)

*ACIT v. Jain Metal Components (2005) 95 TTJ 626 (Jodh.)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Write off in books**

After the amendment of Sec 36(1)(vii) w.e.f. 1.4.1989, Claim for Bad Debt is admissible if the same is w/off during the year in which it is claimed, and it is not necessary to prove that amount has become bad. (A.Y. 1991-92)

*Shoban Lala Jain v. ACIT (2003) 79 TTJ 446 (Delhi)(Trib.)*

*Also Refer :*

*ITO v Anil H. Rastogi (2003) 86 ITD 193 (TM)(Mum.)(Trib.)*

*East Coast Breweries Distilleries Ltd. v. ACIT (2003) SOT 263 (Cuttack)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Sister concern**

Held, in the specific & peculiar facts of the case, claim for debt due from sister concern is not allowable, as it was found as an inter corporate transaction to reduce incidence of tax. (A.Y. 1998-99)

*TEDCO Investment & Financial Services (P.) Ltd. v. Dy. CIT (2003) 87 ITD 298 / (2004) 82 TTJ 259 (Delhi)(Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – NBFC**

Assessee NBFC is entitled to deduction for the provision made for doubtful loans as prescribed by RBI and as applicable to NBFCs, notwithstanding the fact that Section 36 does not contain such contingency. (A.Ys. 1995-96 & 1996-97)

*Overseas Sanmar Financial Ltd. v. Jt. CIT (2003) 86 ITD 602 / (2004) 87 TTJ 556 (Chennai) (Trib.)*

**S. 36(1)(vii) : Deductions – Bad debt – Provision – Banks**

Banks which are entitled to claim deduction of provision for bad debts in terms of clause (vii) of section 36(1), are covered by the proviso to clause (vii) irrespective of the nature of advances with respect to which the bad debt written off is claimed as deduction. Bad debt is allowable as deduction under section 36(1)(vii), and the excess provision is allowable under section 36(1)(vii).

*CIT v. South Indian Bank Ltd. (2010) 326 ITR 174 / 42 DTR 109 / 191 Taxman 272 / 233 CTR 214 (FB)(Ker.)(High Court)*

*Editorial : Catholic Syrian Bank Ltd. v. CIT (2012) 68 DTR 1 / 24 CTR 1 / 3 SCC 784.*

**S. 36(1)(vii) : Deductions – Bad debt – Non-rural branches of bank**

Claim of bad debts in relation to non-rural branches of the assessee bank is allowable without first setting off against the provision already allowed under section 36(1)(vii) when no distinction between advances relating to non-rural and rural has been made in section 36(1)(vii). (A.Ys. 1992-93, 1993-94)

*CIT v. City Union Bank Ltd. (2007) 213 CTR 113 / 291 ITR 144 / 163 Taxman 495 (Mad.)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt – Banks**

Making of provision equal to amount claimed as deduction in account books is necessary for claiming deduction under section 36(1)(vii). (A.Y. 1985-86)

*State Bank of Patiala v. CIT (2005) 272 ITR 54 / 143 Taxman 196 / 198 CTR 407 (P&H)(High Court)*

**S. 36(1)(vii) : Deductions – Bad debt – Banks**

For determining assessee-bank's claim for deduction under section 36(1)(vii)/(viiia), manner and extent of deduction should be examined in the light of method of computing such deduction given by way of illustrations in Taxmann's Student Guide to Income Tax (for assessment year 2003-04), on page 321, para 81.28 – 3PI, which is recognized as a standard treaty by IICA, or any other method suggested by IICA. (A.Y. 1994-95)

*CIT v. State Bank of Indore (2005) 146 Taxman 65 / 196 CTR 153 / 143 Taxman 47 (MP)(High Court)*

### **S. 36(1)(viiia) : Deductions – Bad debt – Business expenditure – Priority if claim [S. 36(1)(viii)]**

Deduction under section 36(1)(viiia) has to be allowed before making any deduction under section 36(1)(viii). (A.Ys. 1995-96, 1997-98, 2000-01 to 2002-03)

*Tourism Finance Corp. of India v. Jt. CIT (2010) 128 TTJ 43 (UO) / (2009) 31 SOT 495 (Delhi)(Trib.)*

### **S. 36(1)(viiia)(c) : Deductions – Bad debt – Business expenditure – Cash system of accounting**

As per the plain reading of the provisions of section 36(1)(viiia)(c), no condition of any specific system of accounting to be followed by the assessee had been provided. Therefore, the deduction being a statutory deduction, had to be allowed on the basis of the provisions made in the books of account, notwithstanding the fact that the assessee was following the cash system of accounting. It further noted that in the assessee's case, the debts also included the amount of loans/advances, which were not affected by the method of accounting being followed by the assessee. (A.Y. 2002-03)

*Dy. CIT v. Delhi Financial Corporation, ITA No. 4566/Del/2005, Bench – H, dt. 7-9-2007 – BCAJ P. 396, Vol. 39-E, Part 4, January 2008. (Delhi)(Trib.)*

### **S. 36(1)(viii) : Deductions – Bad debt – Special reserve – Financial Corporations**

Deduction allowable under section 36(1)(viii), should be given on the total income, which should be worked out before making any deduction, under chapter VIA, to that effect there is clarificatory circular dt. 15-4-1971. (A.Ys. 1989-90, 1991-92)

*CIT v. Madhya Pradesh Audyogik Vikas Nigam Ltd. (2005) 274 ITR 625 / (2004) 140 Taxman*

*388 / 192 CTR 423 (MP)(High Court)*

*Editorial: Position prior to 1-4-1989.*

### **S. 36(1)(viii) : Deductions – Bad debt – Special reserve – Financial Corporation – Position Prior to 1-4-98**

Creation of a special reserve was sufficient to entitle the assessee to claim the benefit under section 36(1)(viii) and the words "and maintained" were inserted only with

effect from 1-4-1998 and it was not given any retrospective effect either expressly or impliedly. (A.Y. 1994-95)

*Kerala Financial Corpn. v. CIT (2003) 129 Taxman 365 / 261 ITR 708 / 182 CTR 502 (Ker.)(High Court)*

**S. 36(1)(viii) : Deductions – Bad debt – Financial institutions – Notification**

Assessee a Banking Company, though indulging in different types of business of advancing loans including long term finances, cannot *per se* be treated as financial institution, for purpose of availing special deduction under section 36(1)(viii). Further, also as the notification for being recognized as financial corporation was not with assessee bank, the deduction cannot be availed.

*ACIT v. Federal Bank Ltd. (2008) 175 Taxman 102 (Mag.)(Cochin)(Trib.)*

**S. 36(1)(viii) : Deductions – Bad debt – Income from other sources – Business income**

SLR investment is made only in terms of statutory requirement and therefore, income from SLR investment is to be treated as business income and consequently deduction under section 36(1) (viii) is allowable on such income. (A.Ys. 1996-97 and 1997-98)

*Canfin Homes Ltd. v. Jt. CIT (2006) 103 TTJ 108 / 7 SOT 916 (Bang.)(Trib.)*

**S. 36(1)(viii) : Deductions – Bad debt – Interest – Guarantee obligation**

Applicant is entitled to deduction under section 36(1)(viii) in respect of interest income derived by it from the bonds issued by the State Government in discharge of the guarantee obligation undertaken by it in respect of loans given by the applicant to the State Electricity Board. Payment premium received by the applicant on repayment of loan before maturity is income from long-term finance for the purpose of deduction under section 36(1)(viii).

*Rural Electrification Corporation Ltd. In Re. (2010) 42 DTR 219 / 326 ITR 267 / 192 Taxman 412 / 233 CTR 417 (AAR)*

**S. 36(1)(viii) : Deductions – Bad debt – Special reserve – Financial corporation**

Rural Electrification Corporation, a PSU and NBFC lowered interest rates rates in consideration of Swapping Premium that it accounted in its books as 'other income' and claimed that Swapping Premium earned had a direct and immediate nexus with the business operations and as such qualified for deduction — AAR ruled that long-term loans advanced in the beginning have not been tampered with on the event of rescheduling of the interest and no fresh agreements have been drawn; also buyers of loan and nature of transaction remaining the same, swapping premium earned has got immediate nexus with the long-term loans given and it does not tantamount to compensation for breach of contract because neither party has breached the terms of the contract; Further, entries in the books of account are not determinative of true character of the receipt which is in nature of profit derived from business of providing

long-term finance and specified percentage thereof is eligible for deduction. (A.Y. 2004-05)

*Rural Electrification Corporation Ltd. (2009) 221 CTR 210 / 308 ITR 321 / 17 DTR 173 (AAR)*

### **S. 36(1)(xii) : Deductions – Disbursement of grants and royalty – PSU**

Disbursement of grants and royalty by corporation or body corporate constituted or established by Central, State or Province Act for the objects and purpose authorized by Act would be allowable as deduction under section 36(1)(xii). (A.Ys. 2003-04, 2004-05)

*Oil Industry Development Board v. ACIT (2010) 123 ITD 67 / (2009) 124 TTJ 614 / 27 DTR 107 / 31 SOT 226 (Delhi)(Trib.)*

### **S. 36(2)(i) : Deductions – Bad debt – Written off – Amended law**

Amendment to section 36(1)(vii) of the Income-tax Act, 1961. Whether obligatory for the assessee to prove that debt has become bad as long as writing off was *bona fide*. The High Court held that for the treatment of a debt as a bad debt had to be a commercial or business decision of the assessee depending on the relevant material in possession of the assessee. After the amendment, it was neither obligatory nor the onus on the assessee to prove that the debt written off by it was in reality a bad debt as long as it was *bona fide* and based on commercial wisdom or expediency.

The Hon'ble High Court affirmed the view of the Special Bench decision in *Dy. CIT v. Oman International Bank Saog.* (A.Ys. 1994-95)

*DIT (International Taxation) v. Oman International Bank SAOG (2009) 313 ITR 128 / 223 CTR 382 / 21 DTR 193 / 184 Taxman 314 (Bom.)(High Court)*

### **S. 36(2)(i) : Deductions – Bad debt – Share broker – Amount of debt**

In the present case following the Special Bench decision in the case of *Shreyas Morakhia* (40 SOT 432), it was held that in order to satisfy the conditions stipulated in section 36(2)(i), it is not necessary that the entire amount of debt has to be taken into account in computing the income of the assessee and it will be sufficient even if part of such debt is taken into account in computing the income of the assessee. This principle applies to a share broker. The amount receivable on account of brokerage is a part of debt receivable by the share broker from his client against purchase of shares and once such brokerage is credited to the profit and loss account and taken into account in computing his income, the condition stipulated in section 36(2)(i) of the Act gets satisfied. The bad debt therefore, claimed by the broker was allowed. (A.Y. 2003-04).

*Dy. CIT v. IIT Investrust Ltd. (2011) 45 SOT 1 (Mum.)(Trib.)*

### **S. 36(2)(ii) : Deductions – Bad debt – Not required to prove that debt was bad**

Assessee is not required to prove that the debt has become bad. Assessee only to write off the debt as bad in its books. Law with effect from Assessment Year 1990-91.



*Lawlys Enterprises Pvt. Ltd. v. CIT (2010) 214 Taxation 256 / (2009) 314 ITR 297 / 28 DTR 150 (Patna)(High Court)*

### **Section 37 : General – Business expenditure**

#### **S. 37(1) : Business expenditure – Exchange rate fluctuation – Year of allowability – Mercantile system of accounting**

Assessee having maintained accounts on mercantile system of accounting, loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance sheet in respect of loans taken for revenue purposes is allowable as business expenditure under section 37(1), notwithstanding the fact that the liability has not been discharged in the year in which the fluctuation in the rate of foreign exchange has occurred. (A.Ys. 1991-92 to 1994-95 and 1997-98)

*Oil & Natural Gas Corporation Ltd. v. CIT (2011) 220 Taxation 102 / (2010) 36 DTR 345 / 322 ITR 180 / 189 Taxman 292 / 230 CTR 313 / 5 SCC 468 (SC)*

#### **S. 37(1) : Business expenditure – Depreciation – Enhanced cost [S. 32]**

The Supreme Court relying on its earlier decision in the case of *CIT v. Woodward Governor India P. Ltd.* 312 ITR 254 (SC) held that the claim for depreciation on account of enhanced cost due to fluctuation in the foreign exchange rate is admissible as a deduction under section 37 of the Act.

*CIT v. Maruti Udyog Ltd. (2010) 320 ITR 729 / 186 Taxman 407 / 186 Taxman 49 / 34 DTR 84 / 229 CTR 5 (SC)*

#### **S. 37(1) : Business expenditure – Capital or Revenue – Royalty [S. 33AB]**

Matter is remitted to the High Court to carry out an indepth exercise to understand the actual expenses undertaken by the assessee in “duplication” of software provided by it by the American company and then answer the question as to whether the royalty paid by the assessee to the American Company is allowable in its entirety under section 37 or only one-sixth thereof is allowable under section 35AB. (A.Y. 1996-97)

*CIT v. Mastek Ltd. (2010) 35 DTR 106 / 229 CTR 313 / 188 Taxman 396 (SC)*

#### **S. 37(1) : Business expenditure – Foreign exchange fluctuation loss – Deductible**

The loss claimed by the appellant on account of fluctuation in the rate of foreign exchange as on the date of the balance sheet was allowable as expenditure under section 37(1). The Supreme Court further held that when the imported asset is acquired in foreign currency then fluctuation in the rate of foreign exchange pending actual payment has to be adjusted against the cost under section 43A, prior to the amendment by the Finance Act, 2002. (A.Y. 2001-02)

*Liberty India v. CIT (2009) 317 ITR 218 / 28 DTR 73 / 225 CTR 233 / 183 Taxman 349 (SC)*

**S. 37(1) : Business expenditure – Extra payment of sugarcane price to cane growers**

Matter is remanded to CIT(A) to decide whether the differential payment made by the assessee to cane growers after the close of the financial year / balance sheet date constitute an expenditure or distribution of profit, after taking into account the resolution of the State Government modalities and the manner in which SAP and SMP are decided, the timing difference which will arise on account of the difference in the accounting years, etc. (A.Y 1992-93)

*Dy. CIT v. Shri Satpuda Tapi Parisar SSK Ltd. (2010) 231 CTR 224 / 38 DTR 89 / 326 ITR 42 / 189 Taxman 81 (SC)*

**S. 37(1) : Business expenditure – Fluctuation rate of foreign exchange [S. 43A]**

The loss claimed by the appellant on account of fluctuation in the rate of foreign exchange as on the date of the balance-sheet was allowable as expenditure under section 37(1). Further, the appellant was entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange at each of the relevant balance-sheet dates, pending actual payment of the liability under section 43A prior to its amendment by the Finance Act, 2002. (A.Ys. 1991-92 to 1994-95 and 1997-98)

*Oil and Natural Gas Corporation Ltd. v. CIT (2010) 322 ITR 180 / 230 CTR 313 / 5 SCC 468 / 189 Taxman 292 / 36 DTR 345 (SC)*

**S. 37(1) : Business expenditure – Capital or revenue – Replacement of machinery**

Matter remitted back to High Court to consider as to whether assessee was entitled to deduction in respect of replacement of machinery in light of judgment in case of *CIT v. Sri Mangayarkarasi Mills (P) Ltd. (2009) 315 ITR 114 / 182 Taxman 141 (SC)*, and considering tests laid down in case of *CIT v. Saravana Spg. Mills (P) Ltd. (2007) 293 ITR 201 / 163 Taxman 201 (SC)*, and *CIT v. Ramaraju Surgical Cotton Mills (2007) 294 ITR 328 / 212 CTR 345 / (2008) 166 Taxman 356 (SC)*.

*CIT v. Sugavaneeshwara Spg. Mills Ltd. (2010) 190 Taxman 277 / (2009) 227 CTR 439 / 32 DTR 88 (SC)*

**S. 37(1) : Business expenditure – Replacement of machinery – Fresh Consideration**

Replacement of old worn out machinery. The matter was set aside to Commissioner of Income Tax (Appeals), to decide in the light of Judgment in the *CIT v. Ramaraju Surgical Cotton Mills (2007) 294 ITR 328 / 212 CTR 345 / (2008) 203 Taxation 117 (SC)*. (A.Ys. 1995-96 to 1997-98)

*CIT v. T.V.S. Sewing Needles Ltd. (2009) 182 Taxman 16 / 226 CTR 685 / 30 DTR 81 (SC)*

### **S. 37(1) : Business expenditure – Foreign exchange fluctuation loss**

Loss suffered by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance sheet is an item of expenditure under section 37(1) of the Act. (A.Y. 1998-99)

*CIT v. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254 / 179 Taxman 326 / 21 DTR 106 / 223 CTR 1 / 213 Taxation 195 (SC) / 13 SCC 1*

### **S. 37(1) : Business expenditure – Issue management expenses – Principle of consistency**

The issue was of deduction of certain expenditure debited and claimed as “issue management expenses” and the assessee succeeded before the High Court only on the ground of consistency. Without going into the merits, the Supreme Court remitted back the matter to the High Court holding that the High Court should have examined the nature of the said expenditure.

*CIT v. Oswal Agro Mills Ltd. (2009) 313 ITR 24 / 183 Taxman 241 / 24 DTR 265 / 224 CTR 363 / 213 Taxation 513 (SC)*

### **S. 37(1) : Business expenditure – Warranty expenses – Integral to sales**

Warranty is an integral part of the sale price and if the warranty expenses are properly ascertainable and discounted on actuarial basis deduction is allowable under section 37 of the Act. (A.Ys. 1991-92 to 1994-95)

*Rotork Controls India P. Ltd. v. CIT / CIT v. Wipro GE Medical Systems Ltd. / Hewlett Packard India Ltd. / Compaq Computer (I) Pvt. Ltd. (2009) 180 Taxman 422 / 23 DTR 79 / 223 CTR 425 / 314 ITR 62 / 213 Taxation 412 (SC) / 13 SCC 283*

### **S. 37(1) : Business expenditure – Capital or revenue – Replacement of machinery**

Although each machine is dependent on other machines in the mill for production of the final product, replacement of machinery in a textile mill neither amounts to a current repairs nor revenue expenditure as each separate machine is an independent entity which brings an enduring benefit to the assessee. (A.Y. 1995-96)

*CIT v. Sri Mangayarkarsi Mills (P) Ltd. (2009) 26 DTR 58 / 315 ITR 114 / 224 CTR 513 / 182 Taxman 141 / (2010) 214 Taxation 142 (SC)*

### **S. 37(1) : Business expenditure – Capital or revenue – Prospecting of Minerals [S. 35E(2)]**

The Assessing Officer disallowed the expenditure towards development and prospecting charges as capital expenditure. The CIT(A) confirmed the disallowance on the ground that assessee was not able to prove that the expenditure fell within the provision of the section 35E(2). The Tribunal also rejected the claim treating the same as corporate plan. The High Court considered the claim for allowance under

section 37(1) and dismissed the appeal on the ground that no substantial question of law arose for consideration. On appeal to the Supreme Court remitted the matter to the High Court for fresh consideration on the merits on the ground that if the High Court had considered the claim of the assessee under section 35E(3) it might have arrived at a different conclusion. (A.Ys. 1998-99, 1999-2000)

*Rajasthan State Mines & Minerals Ltd. v. CIT (2008) 219 CTR 6 / 174 Taxman 499 / 12 DTR 225 / (2009) 313 ITR 366 (SC)*

**S. 37(1) : Business expenditure – Capital or revenue – Construction of drainage [S. 260A]**

The assessee which ran a paper mill at Ahmedgarh, applied to the Pollution Control Board and the Forest Department to allow it to discharge its effluent matter from its mill to the village Tallewal drain. The Forest department granted permission with certain conditions. The question was whether expenses incurred on the construction of open drain of about 14 kilometres for disposal of its effluents would be revenue expenditure. According to the Department it was a capital expenditure. The CIT(A) and Tribunal held that it was revenue expenditure. The High Court in Appeal reversed the concurrent finding of the CIT(A) and the Tribunal. On appeal to the Supreme Court, the Supreme Court set aside the order of High Court for fresh consideration. The Supreme Court observed that framing of a proper substantial question of law was mandatory requirement under section 260A, and without framing or reframing of such a question High Court Could not have reversed the concurrent finding given by the CIT(A) and Tribunal. (A.Y. 1996-97)

*Shreyans Industries Ltd. v. CIT (2008) 219 CTR 320 / 175 Taxman 239 / 13 DTR 225 / (2009) 314 ITR 302 / 210 Taxation 72 (SC)*

**S. 37(1) : Business expenditure – Finance charges – Extension of business**

Assessee established phosphoric acid project as an extension to its present business activities and for that purpose obtained foreign currency loan from IDBI which in turn was refinanced by COFACE subject to the assessee paying finance charges to COFACE which according to the assessee was similar to payment of interest. The Department disallowed the said item on the ground that finance charges paid to COFACE on foreign currency loan was in the nature of interest and commitment charges and since the charges have been paid in relation to the project of manufacturing phosphoric acid which did not commence production during the assessment year under consideration, the expenses incurred were capital in nature. Apex Court held the expenses were allowable as business expenditure.

*Dy. CIT v. Gujarat Alkalies & Chemicals Ltd. (2008) 10 RC 374 / 167 Taxman 203 / 299*

*ITR*

*85 / 215 CTR 10 / 3 DTR 58 / 204 Taxation 51 (SC)*

**S. 37(1) : Business expenditure – Commitment charges – Refinance of loan – Upfront payment**

Assessee had borrowed ` 30 crores (approximately) from IDBI which in turn was refinanced by COFACE which foreign company had charged interest, commitment charges and insurance charges payable by the assessee. The said "commitment charges" was upfront payment. The Apex Court following its earlier decision in the case of *Addl. CIT v. Akkamamba Textiles Ltd. (1997) 227 ITR 464*, and *CIT v. Sivakami Mills Ltd. (1997) 227 ITR 465 (SC)* held that "commitment charges" should be allowed as a deduction under section 37(1).

*Jt. CIT v. United Phosphorus Ltd. (2008) 10 RC 365 / 299 ITR 9 / 167 Taxman 261 / 3 DTR 61 / 204 Taxation 114 / 215 CTR 13 (SC) / 2 SCC 478*

### **S. 37(1) : Business expenditure – Interest – Scrap sale – Business income**

Where the assessee had purchased land and building and demolished the building and sold the scrap and offered it as business income, the Supreme Court held that interest paid for delay in paying the consideration would be allowed as business expenditure in view of the fact that the Department itself has taxed the income as business income.

*Kerala Road Lines v. CIT (2008) 299 ITR 343 / 168 Taxman 308 / 215 CTR 401 / 4 DTR 305 (SC)*

### **S. 37(1) : Business expenditure – Aid given to residents living in vicinity of factory**

As the Tribunal and High Court had not recorded any finding on the aspect of whether aid given to the residents living in the vicinity of the factory of the assessee was business expenditure under section 37 of the Income Tax Act, 1961, the matter were remitted to the Appellate Tribunal for de novo examination of the point according to law by the Supreme Court. The decision of the High Court was set aside.

*CIT v. Madras Refineries Ltd. / Chennai Petroleum Corporation Ltd. (2008) 220 CTR 733 / 16 DTR 318 (SC) / (2009) 313 ITR 334 / 177 Taxman 8 (SC)*

### **S. 37(1) : Business expenditure – Penalty for not complying the time limit – Allowable [S. 43B]**

The Commissioner of Excise as per the provision of rule 14(3) levied a penalty for not complying with the aforesaid time limit. The Supreme Court held the amount so payable is an allowable expenditure not in the nature of penalty. It was further held that it is not a tax on manufacture and therefore provisions of section 43B would not be attracted.

*CIT v. Distillers Co. Ltd. (2007) 290 ITR 419 / 209 CTR 177 / 160 Taxman 252 / 15 SCC 353 (SC)*

### **S. 37(1) : Business expenditure – Capital or revenue – Replacement of asset**

It was contended by the assessee that replacement of assets without increasing the production capacity would amount to revenue expenditure and by the Department that expenditure for replacing an old machine by a new machine constituted an advantage of an enduring nature and would be capital in nature. Without expressing

any opinion on the merits, the Supreme Court remanded the matter to the Commissioner (Appeals) to decide the same. (A.Y. 1986-87)

*CIT v. Ramaraju Surgical Cotton Mills (2007) 9 RC 584 / 294 ITR 328 / 212 CTR 345 / (2008) 202 Taxation 674 / 166 Taxman 356 (SC)*

### **S. 37(1) : Business expenditure – Lease – Capital or revenue**

Where a royalty or rent is payable for the lease it would be a revenue expenditure, but where entire amount of the lease is paid either at the time of the lease or in instalments, then it would be a capital expenditure. (A.Y. 1991-92)

*Enterprising Enterprises v. Dy. CIT (2007) 293 ITR 437 / 160 Taxman 188 / 208 CTR 433 (SC)*

### **S. 37(1) : Business expenditure – Expenditure incurred on third person – Nexus**

The Bombay High Court held that in assessee's case that the expenditure incurred on a third person who had no connection with the assessee's business cannot be allowed under section 37(1) as the expenditure was not incurred for the purpose of business. Special leave petition filed by the assessee was rejected by the Supreme Court in view of above facts.

*Bureau Veritas India Division v. Dy. CIT (2007) 199 Taxation 166 (SC)*

### **S. 37(1) : Business expenditure – Capital or revenue – Bonus share**

The expenditure incurred on account of stamp duty and registration fees for issue of bonus shares is allowable expenditure as the issue of bonus shares is merely reallocation of company's fund and does not result in expansion of the capital base, it can not be held that company acquires a benefit or an advantage of an enduring nature. (A.Y. 1991-92)

*CIT v. General Insurance Corporation (2006) 286 ITR 232 / 156 Taxman 96 / 205 CTR 280 / 8 SCC 117 / (2007) 196 Taxation 345 (SC)*

### **S. 37(1) : Business expenditure – Issuance of bonus shares**

Issuance of bonus shares does not result in any inflow of fresh funds or increase in the capital employed; the capital employed remains the same. Issuance of bonus shares by capitalization of reserves is merely a reallocation of company's fund. If that be so, then it cannot be held that the company has acquired a benefit or advantage of enduring nature. The total funds available with the company will remain the same and the issue of bonus shares will not result in any change in the capital structure of the company. Issue of bonus shares does not result in the expansion of capital base of the company. Thus, the expenditure incurred in connection with issuance of bonus shares is revenue expenditure. (A.Y. 1991-92)

*CIT v. General Insurance Corporation (2006) 156 Taxman 96 / 205 CTR 280 / 286 ITR 232 (SC)*

### **S. 37(1) : Business expenditure – Replacement expenditure – Current repairs**



Where on appeal to High Court two questions were framed and High Court, while answering the question that expenditure on replacement of electric control panels was not in nature of current repairs, remanded matter to Tribunal to decide question as to whether it was capital in nature, in view of paucity of material, remand was proper and High Court's remand order was to be upheld; there was no merit in revenue's plea that the High Court having taken the view that expenditure was not one within the contemplation of section 31(1) ought to have as a consequence, answered second question in favour of the revenue holding expenditure to be a capital expenditure. (A.Y. 1991-92)

*Dy. CIT v. S. T. N. Textile Ltd. (2005) 279 ITR 209 / 149 Taxman 348 / 199 CTR 209 (SC) / 12 SCC 714*

### **S. 37(1) : Business expenditure – Capital or revenue – Study report**

Consultancy charges paid for obtaining study reports in Bitumen is revenue expenditure.

(A. Y. 2005-06)

*CIT v. Shell Bitumen India (P) Ltd. (2011) 221 Taxation 44 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Replacement of moulds – Revenue expenditure**

Replacement of moulds did not result in creation of new capital asset or benefit of enduring nature, mere fact that moulds were used in production process could not be conclusive as to the nature of expenditure, hence, expenditure on replacement of moulds was revenue expenditure.

*CIT v. Malerkotla Steels & Alloys (P) Ltd. (2011) 336 ITR 49 / 237 CTR 201 / 49 DTR 1 (P&H)(High Court)*

### **S. 37(1) : Business expenditure – Share of profit from firm – Exempt income – Interest**

#### **[S. 10(2A)]**

Interest expenditure incurred on amount borrowed for purpose of contributing funds in form of capital in partnership firm can be allowed against interest income received from partnership firm on credit balance of capital. (A.Y. 2005-06).

*Karan Raghav Export (P) Ltd. v. CIT (2011) 196 Taxman 504 / 49 DTR 327 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Capital or revenue – Production of film for advertisement**

Expenditure incurred by assessee on production of films by way of advertisement for promoting marketing of products manufactured by it being in respect of ongoing business of assessee is allowable as revenue expenditure. (A.Ys. 1996-97 & 2001-02)

*CIT v. Geoffrey Manners & Co. Ltd. (2011) 238 CTR 49 / (2009) 315 ITR 134 / 180 Taxman 87 / 19 DTR 249 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Foreign education of managing director's son – Allowable**

Amount spent towards educational expenses of a student, in which the assessee is carrying on its business was allowable expenditure under section 37(1) notwithstanding the fact that the student was son of managing director. (A.Ys. 1997-98 & 1998-99).

*CIT v. Ras Information Technologies (P) Ltd. (2011) 238 CTR 76 / 50 DTR 93 / 200 Taxman 305 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Voluntary Retirement Scheme**

**[S. 35DDA]**

Even for the period prior to the introduction of section 35DDA, w.e.f. 1st April, 2001, the assessee was entitled to claim deduction of expenditure incurred under VRS only in a phased manner; however, in view of consistent views of various High Courts, the assessee had to be allowed deduction of entire expenditure, as revenue expenditure in respect of A.Y. 1999-2000

*CIT v. O.E.N. India Ltd. (2011) 238 CTR 340 / 196 Taxman 131 / 49 DTR 94 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Part of larger machines**

Where parts of larger machines are purchased by the assessee, expenditure on such parts is allowable as revenue expenditure. (A. Y. 1982-83)

*CIT v. Modi Industries Ltd. (2011) 197 Taxman 76 / 339 ITR 467 / (2010) 46 DTR 241 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Warranty – Scientific method**

Provision for warranty claim made by the assessee based on a scientific method and worked on the average of earlier year's warranty settlement claims was held to be allowable business expenditure. (A. Ys. 1999-2000, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05)

*CIT v. Luk India P. Ltd. (2011) 52 DTR 117 / 239 CTR 440 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Ad-hoc expenditure – Precedent**

Ad-hoc expenditure out of cartage, labour and sealing expenses cannot be made by the assessing authority when similar expenses are allowed in totality by Appellate Authority in earlier years. (A. Y. 1992-93)

*Friends Clearing Agency P. Ltd. v. CIT (2011) 332 ITR 269 / 49 DTR 297 / 58 DTR 109 / 237 CTR 464 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Contingent liability – Suit filed by bank**

Interest payable to the bank on the loan with respect to which the bank had filed suit for recovery cannot be disallowed treating the same as contingent liability merely for the reason that the bank had not shown the accrued interest in its books. (A. Y. 1992-93)

*Friends Clearing Agency P. Ltd. v. CIT (2011) 332 ITR 269 / 49 DTR 297 / 58 DTR 109 / 237 CTR 464 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Real estate business – Income from house property – Brokerage – Commission**

Where the assessee derived income from real estate business and also income from house property, the assessee's claim for deduction of brokerage and commission cannot be disallowed against the business income on the ground that the assessee is not entitled to any further deduction other than those provided under section 24 of the Act. (A. Y. 2003-04)

*Mukti Properties P. Ltd. v. CIT (2011) 50 DTR 273 / 238 CTR 174 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Convertible debentures – Capital or revenue**

Expenses incurred on the issue of convertible debentures has to be treated as Revenue expenditure. (A. Y. 1993-94)

*CIT v. ITC Hotels Ltd. (2011) 334 ITR 109 / 238 CTR 447 / (2009) 32 DTR 215 / (2010) 190 Taxman 430 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Setting up new sugar units – Expansion**

Expenses incurred by assessee, a sugar manufacturer, by way of salaries, wages, bonus, provident fund contribution, workmen welfare expenses, power, fuel and water, manufacture expenses rent for office building, etc. on setting up new sugar units were expenses for the purpose of manufacture of sugar in respective factories and therefore, the same are allowable as revenue expenditure. (A.Y. 1992-93).

*CIT v. Sakhti Sugars Ltd. (2010) 194 Taxman 91 / 45 DTR 134 / (2011) 339 ITR 400 / 237 CTR 51 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Retrenchment of workers – Closure of a unit**

The assessee carried manufacturing from various units and they were interdependent and unity of control between the units established by the existence of common management, a common business organization, administration and fund. The closure of one unit did not involve the closure of the business. Therefore, the expenses towards retrenchment of workers was an allowable deduction within the meaning of section 37(1) since there was no closure of business. (A. Y. 2001-02).

*CIT v. Pfizer Ltd. (2010) 42 DTR 32 / 233 CTR 521 / (2011) 330 ITR 62 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Closure of one branch – Amortisation of expenses – Claim in the year of closure**

The assessee had incurred expenditure for opening branches, the cost of which were to be amortised by spreading it over 10 years in equal instalments. One branch was closed, the assessee claimed the unabsorbed expenditure of the closed branch. The High Court held that the business of the assessee continue after the closure of the branch, and the deduction of amortised expenditure need not be denied due to the closure of the branch. (A. Y. 2003-04)

*Victoria Gold Gallery v. CIT (2011) 330 ITR 330 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Feasibility study – Study abandoned**

Feasibility studies conducted by the assessee for the existing business with a common administration and common fund and the studies were abandoned without creating any new asset, therefore, expenses were of revenue expenditure.

*CIT v. Priya Village Roadshows Ltd. (2009) 185 Taxman 44 / 32 DTR 316 / (2010) 228*

CTR

*271 / (2011) 332 ITR 594 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Abandoned expansion plans**

The assessee had incurred expenditure on engaging services of consultants for improving operational efficiencies inextricably linked to the existing business. The project was abandoned, with no new asset to be created. The expenditure held to be revenue expenditure. (A. Y. 2000-2001).

*Indo Rama Synthetics India Ltd. v. CIT (2009) 185 Taxman 227 / 32 DTR 322 / (2010) 228 CTR 278 / (2011) 333 ITR 18 (Delhi)(High Court)*

*Editorial: SLP rejected (2010) 328 ITR (St) 9 (SC).*

**S. 37(1) : Business expenditure – Professional's heart surgery – Repairs [S. 31]**

Expenditure incurred on heart operation was not deductible under section 31 as also 37(1) because of following reasons:

- 1) Heart cannot be considered plant as it did not have any mention in assessee's balance sheet under assets and its cost of acquisition could not be determined.
- 2) Deduction under service 37(1) cannot be granted as the expenditure incurred does not have any immediate or direct nexus between the expenses incurred on surgery and his efficiency in the professional field per se.
- 3) Before expenses on repair of plant are admitted as a deduction, plant would necessarily have to be reflected as an asset in books of account. (A. Y. 1983-84).

*Shanti Bhushan v. CIT (2011) 199 Taxman 280 / 57 DTR 233 / 242 CTR 375 / 336 ITR 26 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Payment by guarantor – Loan of subsidiary**

As per the development agreement the assessee was obliged to convey marketable title to the purchasers of the flats to be built on a property. Assessee paid money to the bank as surety to discharge the loan obtained by its sister concern so as to secure release of the aforesaid property which was mortgaged with the bank. The payment was to avoid breach of terms of the development agreement. The said payment is allowable as business expenditure. (A.Y. 1993-94).

*CIT v. Rudra Industrial Commercial Corporation (2011) 55 DTR 5 / 244 CTR 304 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Tractor charges – To issue summons [S. 131]**

Assessee made payments of tractor charges to parties partly in cheque and partly in cash. Assessee requested the Assessing Officer to summon person to whom cash payments were made. Assessing Officer made addition without summoning person. The Court held that addition was not proper.

*CIT v. Brij Pal Sharma (2009) 20 DTR 146 / 178 Taxman 467 / (2011) 333 ITR 229 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Expenditure on glow sign board**

Expenditure on glow sign boards is allowable as revenue expenditure. (A.Y. 2005-06)  
*CIT v. Orient Ceramics & Industries Ltd. (2011) 200 Taxman 64 (Mag.) / 56 DTR 397 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Key man insurance premium [S. 10(10D)]**

Assessee a Chartered Accountant had debited an amount of ` 50 Lakhs towards Keyman Insurance Premium, which was taken on one of the his employees who was the head of the financial consultancy division and looking after the financial consultancy for corporate finance. The claim for deduction of the assessee was allowed by the Tribunal. On appeal by the revenue the Court held that it is the prerogative of the businessman to consider and decide as to which of the employees is important for the business and it is for him to take life insurance policy for such an employee keeping in mind various factors and circumstances. The High Court confirmed the order of Tribunal.

*CIT v. Kamlesh M. Solanki – Tax Appeal No. 2421 of 2009 dt. 26-4-2011 (ACAJ Vol. 35 Part 03 June 2011 P. 165) (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Foreign studies of person appointed as trainee in company – Son of president**

Fact that trainee happens to be son of President does not make the expenditure personal in nature. Since son of President was appointed by resolution and an agreement as been entered into, that the trainee after completion of the education from abroad will be obliged to resume service in the company as a technical executive

at least for ten years. Expenses incurred on foreign studies of person appointed as trainee in company are business expenditure.

*Gournitye Tea & Industries Ltd. v. CIT (2011) Tax L.R. 315 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Foreign travelling of managing director and wife – Resolution**

When the board of directors of the assessee had thought it fit to spend on foreign tour of the accompanying wife of the managing director for commercial expediency for reasons reflected in its resolution, it was not within the province of the income tax authority to disallow such expenditure. There was resolution of company authorizing foreign travel of managing director and his wife for business purposes. The Court applied the ratio of *CIT v Walchand and Co. P. Ltd. (1967) 65 ITR 381 (SC)*. However, as there was no resolution authorizing the wife of the deputy managing director, the expenditure on such travel were rightly disallowed. (A.Y. 2000-01).

*J. K. Industries Ltd. v. CIT (2011) 335 ITR 170 / 241 CTR 166 / 54 DTR 179 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Parties not found – Income from undisclosed source [S. 69]**

Where the assessee took care to purchase materials for his business by way of account payee cheque from third party and subsequently the parties do not appear before the assessing authorities as they had discontinued their business, the assessee's claim of genuine business expenditure cannot be disallowed for their non existence after three years of transactions. (A. Y. 1998-99)

*Diagnostics v. CIT (2011) 334 ITR 111 / 56 DTR 317 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Company – Personal use**

In case of company there cannot be disallowance of car expense for personal use of car.

(A. Y. 1988-89)

*CIT v. Nuchem Ltd. (2011) 55 DTR 14 (P&H)(High Court)*

### **S: 37(1) : Business Loss – Abandoned project – Capital asset**

Amount paid as advance for acquisition of a capital asset for a project which was abandoned, did not qualify for deduction as a business loss since the amount spent was in relation to acquisition of a capital asset.

*CIT v. Southern Gas Ltd. (2011) 198 Taxman 165 (Mag.)(Ker.)(High Court)*

### **S. 37(1) : Business expenditure – Protection money – Goons – Police – Illegal**

Where the assessee paid sums to local goons and the police for maintenance of law & order, it was held that such expenditure being prohibited by law, did not qualify for



deduction.

(A. Y. 1992-93).

*CIT v. Swaminathan (M.N.) (2010) 236 CTR 59 / (2011) 198 Taxman 140 (Mag.)(Karn.)(High Court)*

### **S. 37(1) : Business expenditure – Capital or revenue – ERP software package**

The assessee, engaged in manufacturing of telecommunication and power cable accessories and trading in oil retracing system and other products, incurred expenditure of ₹ 23 lakhs on purchase of "Enterprises Resources Planning (ERP) package". The AO treated the expenditure as capital in nature. The Tribunal applied the functional test laid down by the Special Bench (*Amway India Enterprise v. Dy. CIT (2008) 111 ITD 112 (Delhi)(SB)(Trib.)*) and held that the expenditure was allowable as a deduction on the basis that the software facilitated the assessee's trading operations or enabling the management to conduct the assessee's business more efficiently or more profitably but it is not in the nature of profit making apparatus. The department filed an appeal before the High Court. Held dismissing the appeal:

"In our view, no fault can be found in the aforesaid order of ITAT holding that software expenditure was allowable as revenue expenditure."

*CIT v. Raychem RPG Ltd. (2011) 64 DTR 57 / 245 CTR 515 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Royalty – Holding company**

Payment of royalty by assessee company to its US based holding company which has been incurred wholly and exclusively for the purpose of business of the assessee is allowable as business expenditure. (A.Ys. 1999-2000 to 2001-02).

*CIT v. Oracle India (P) Ltd. (2011) 59 DTR 222 / 243 CTR 103 / (2011) Tax L.R. 905 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Demolition of structure – Capital or revenue**

Amount spent by assessee on demolition of structure which had caught fire and major repair of premises during the period when the business was in existence are admissible as revenue expenditure. (A. Y. 1995-96).

*CIT v. Bhupindera Flour Mills (P) Ltd. (2011) 59 DTR 307 (P&H)(High Court)*

### **S. 37(1) : Business expenditure – Capital or revenue – Reconditioning of machinery**

Assessee incurred huge expenditure on total reconditioning and overhauling of machinery. Since reconditioning had resulted in imparting useful life to hitherto old and unfit machinery and thus, resulting in a benefit of enduring nature expenditure was capital in nature. (A.Ys. 1994-95, 2005-06, 2006-07).

*Bharat Gears Ltd. v. CIT (2011) 337 ITR 368 / 62 DTR 219 / 201 Taxman 86 / (2012) 247 CTR 395 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Ransom money – While kidnapping is an offence, paying ransom is not; Bar in Explanation 1 to section 37(1) not attracted**

Where payment is made by assessee as a ransom to secure the release of a kidnapped director, it was held that such a payment is not prohibited. The Explanation of section 37(1) provides that expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business. It has to be seen whether the expenditure is incurred for any purpose which is an offence or prohibited by law. Accordingly, the Explanation to section 37(1) is not applicable and the ransom is deductible as business expenditure.

*CIT v. Khemchand Motilal Jain Tobacco Products (P) Ltd. (2011) 243 CTR 270 / 60 DTR 113 / 201 Taxman 292 / (2012) 340 ITR 99 (MP)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – ‘Application Software’ – Revenue in nature**

The expenditure incurred for the purpose of installation of “Oracle” software for financial accounting, inventory and purchase was held to be revenue in nature as it did not result in creation of new asset or a new source of income. The test of enduring benefit is not a certain or a conclusive test. What is required to be seen is the real intent and purpose of the expenditure and whether the expenditure results in creation of fixed capital for the assessee. Expenditure incurred which enables the profit making structure to work more efficiently leaving the source of the profit making structure untouched is expense in the nature of revenue expenditure. Test of enduring benefit or advantage breaks down especially in cases which deal with technology and software application which do not in any manner supplant the source of income or added to the fixed capital of the assessee. (A.Ys. 1997-98 and 1998-99) Followed : *Alembic Chemical Works Co. Ltd. v CIT (1989) 177 ITR 377 (SC).*

*CIT v. Asahi India Safety Glass Ltd. (2011) 64 DTR 63 / 203 Taxman 277 / 245 CTR 529 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Benefit to other person – No written agreement**

If the expenditure is incurred for the purpose of assessee's business then no part of the same can be disallowed merely because some other person has benefited out of the same, and there is no written agreement with the payee/recipient.

*CIT v. Agra Beverages Corporation Pvt. Ltd. (2011) 200 Taxman 43 (Mag.)(Delhi)(High Court)*

**S. 37(1) : Business expenditure – Foreign tours – Expansion of existing project**

Expenditure incurred by the assessee on foreign tours of its personnel, in connection with expansion of existing project is eligible for deduction as revenue expenditure.

*CIT v. J. K. Synthetics Ltd. (2011) 200 Taxman 101 (Mag.)(Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Lease rent of 99 years**

Lease rent of ₹ 48,02,616/- paid to G.I.D.C for period of 99 years held to be revenue in nature. Registration of lease deed is not relevant for deciding the issue of capital or revenue. High Court confirmed the order of Tribunal. (A.Y. 1994-95)

*Dy. CIT v. Sun Pharmaceuticals Ind. Ltd. (2009) 227 CTR 206 / 24 DTR 262 / (2010) 329 ITR 479 / (2011) 224 Taxation 456 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Penalty – SEBI regulations – Procedural law – Explanation to section 37(1)**

The assessee paid penalty/fine to BSE/NSE for infringement of procedural rules such as failure to maintain margins, trading beyond exposure limits, late submission of margin certificates, delay in making payment & deliveries etc. The Assessing Officer disallowed the claim for deduction on the ground that there was an infringement of statutory law laid down by SEBI and the Explanation to section 37(1) was attracted. The High Court held that, as the payments made by the assessee to the Stock Exchange for violation of their regulation was not an account of an offence or which is prohibited by law, the invocation of the Explanation to section 37 of the Act was not justified.

*CIT v. The Stock and Bond Trading Company ITA No. 4117 of 2010 order dt 14-10-2011 (Bom.)(High Court) [www.itatonline.org](http://www.itatonline.org)*

**S. 37(1) : Business expenditure – Penalty – Fine – Settlement of dispute – Infringement of patent – Explanation**

Paramount and governing consideration behind settlement in question was to avoid the expenses and uncertainty of further litigation and there was no violation of patent laws. Expenditure incurred towards settlement of dispute for infringement of patent was not hit by Explanation to sub-section (1) of section 37 and the same is allowable as business expenditure. (A.Y. 2005-06).

*CIT v. Desiccant Rotors International (P) Ltd. (2011) 63 DTR 214 / 245 CTR 572 / 201 Taxman 144 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Recovery of lesser amount than incurred – Fees**

If an Asset Management Company of Mutual Funds due to business exigencies claims and recovers from Mutual Funds lesser amount than the amount of expenditure, fees, etc., actually incurred during course of its business as allowed under SEBI Regulation, then unless it is established that there was no business exigencies or claim was not genuine, expenditure on the same cannot be disallowed. (A. Y. 2003-04).

*CIT v. Templeton Asset Management (India) (P) Ltd. (2011) 202 Taxman 496 / 63 DTR 59 / 245 CTR 386 / (2012) 340 ITR 279 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Ad films – Advertisements**

Assessee who was engaged in business of stock broking and share transactions expenditure incurred on ad films by way of advertisements for promotion and marketing of its products would be allowable as revenue expenditure.

*CIT v. Bonaza Portfolio Ltd. (2011) 202 Taxman 545 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Patent – Copyright [S. 35A]**

Royalty paid by assessee for use of the brand names and trade marks, and not for acquiring the same, the provisions of section 35A cannot be applied, the expenditure allowable as business expenditure. (A.Ys. 1997-98 to 1999-2000).

*CIT v. V. R. V. Breweries & Bottling Industries Ltd. (2011) 244 CTR 576 / 62 DTR 121 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Capital or revenue – Payment of royalty – Yearly basis – Know how – Non exclusive**

The assessee had claimed a deduction being an amount paid by way of Royalty for technical know-how and use of trademark. The Assessing Officer held that such payment of Royalty in lieu of technical know-how in the nature of enduring advantage for exclusive use and therefore held that 25% of such payments have to be construed as capital expenditure. The CIT(A) and Tribunal held that the entire expenditure is deductible. On appeal to the High Court by the Department, the High Court well dismissing the appeal held that the ownership rights of the trademark and know-how always vested with a foreign company and on the expiration or termination of the agreement thus as he was to return all the know-how obtained by it under that agreement, and also the payment of Royalty was also to be on year to year basis on the net sales of the assessee and at no point of time the assessee was entitled to become the exclusive owner of the know-how and trademark and therefore held that the expenditure incurred by the assessee on Royalty was deductible in whole. (A.Ys. 2002-03, 2003-04, 2005-06)

*CIT v. G4S Securities Systems (India) P. Ltd. (2011) 338 ITR 46 / 62 DTR 84 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Ad hoc disallowance – Audited books**

Disallowance of telephone expenses, maintenance expenses on *ad hoc* basis not justified when audited books & vouchers produced by assessee.

*CIT v. S.S.P. (P.) Ltd. (2011) 202 Taxman 386 (P&H)(High Court)*

### **S. 37(1) : Business expenditure – Retrenchment compensation – Closure of business**

When there was interdependence and a unity of control between the three units established by the existence of common management, a common business organization, administration and fund; closure of one unit did not involve the closure of the business and retrenchment compensation paid to workmen was therefore an allowable deduction. (A.Y. 2001-02)

*CIT v. Pfizer Ltd. (2011) 330 ITR 62 / (2010) 233 CTR 521 / 42 DTR 32 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Education of Director's son – Not allowable on facts**

As there was no documentary evidence with respect to appointment of trainee was produced before the Tribunal or before the Assessing Officer, expenditure was not allowed. (A.Y. 1998-99)

*Echjay Forgings Ltd. v. ACIT (2011) 197 Taxman 47 / (2010) 328 ITR 286 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Load extension**

Expenditure incurred by assessee in connection with load extension and on purchase of distribution panel was allowable as revenue expenditure incurred in ordinary course of assessee's business. (A.Y. 2003-04)

*CIT v. Lakhani Rubber Works (2010) 326 ITR 415 / 232 CTR 350 / 40 DTR 46 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Contribution for Treating effluent**

The contribution made by the assessee due to various business reasons, to participate in a scheme framed by High Court, as a remedy to a perpetual public hazard, i.e. social cause, hence, the expenditure incurred allowable as revenue expenditure.

*CIT v. Jayendrakumar Hiralal (2010) 327 ITR 147 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Technical know-how – Replacement**

The assessee, a manufacturer of automobile components, had acquired know-how from a Japanese company and payment for the same was capitalized. But whenever its' customers (i.e. the automobile manufacturers) modified their models, the assessee also had to modify its' designs to suit the customers' needs. The assessee, for this purpose acquired fresh know-how from the Japanese company and made payments which were claimed as revenue expenditure. It was held that the payment was an allowable revenue expenditure since it was expended only for modification of an asset already acquired by the assessee. (A.Y. 2001-02)

*CIT v. Denso (I) Pvt. Ltd. (2010) 195 Taxman 434 / 238 CTR 423 / 49 DTR 171 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Replacement of pumping set – Capital or revenue**

Expenditure incurred by the assessee on replacement of pumping set and mono block pump with H.P. motors and transformers which were not stand alone equipments but part of bigger plant was allowable as revenue expenditure. However, the expenditure

incurred on construction / erection of new cell room after demolition of old room was held to be capital expenditure. (A.Y. 1982-83)

*CIT v. Modi Industries Ltd. (2010) 46 DTR 241 (2011) 197 Taxman 76 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Restructuring and viability study**

Expenditure for restructuring and viability study and preparation of restructuring proposal is a revenue expenditure. (A.Y. 2004-05)

*CIT v. JCT Electronics Ltd. (2010) 188 Taxman 191 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Amalgamation – Discharge of guarantee obligation**

Payment made by the assessee company to discharge the guarantee obligations vis-à-vis certain companies undertaken by two subsidiaries of the assessee company which amalgamated with the latter had no direct proximity or relationship to the business of the assessee and therefore, the same was not allowable as deduction. (A.Ys. 1996-97, 1997-98)

*CIT v. United Breweries Ltd. (2010) 36 DTR 80 / 190 Taxman 92 / 321 ITR 546 / 231 CTR 28 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Contribution for development of model village – Deductible**

Amount paid by assessee financial corporation for the development of model village in Mysore District under AG's Mysore Zilla Panchayath was to promote the business of the assessee and therefore deduction was allowable. (A.Y. 1998-99)

*CIT & Anr. v. Karnataka Financial Corporation (2010) 326 ITR 355 / 33 DTR 145 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Closure – Retrenchment compensation – Provident fund**

Where one of the four units of the assessee was closed down. As per Tribunal findings the units was continuing to carry on business. Expenditure incurred on payment of retrenchment compensation, interest on monies borrowed for making such payment and for payment of provident fund was allowable.

*CIT v. D.C.M. Ltd. (2010) 320 ITR 307 / (2009) 221 CTR 513 / 179 Taxman 295 / 18 DTR 81 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Dormancy and lull of business – Allowable**

Assessee maintaining office, retaining staff for export business though export sales substantially gone down. It was a case of lull in business activities and not closure of business. Hence, the expenditure was allowable.

*CIT v. Anita Jain (2010) 214 Taxation 180 (Delhi)(High Court)*



**S. 37(1) : Business expenditure – Capital or revenue – Consultancy Fees**

Consultancy fee paid by assessee for carrying out detailed operational efficiency and profitability study of the assessee was allowable as revenue expenditure even though the said assignment was terminated before conclusion of the study, though there was no written agreement. (A.Y. 2000-01)

*Indo Rama Synthetics (I) Ltd. v. CIT* (2011) 333 ITR 18 / (2010) 228 CTR 278 / (2009) 185 Taxman 277 / 32 DTR 322 (Delhi)(High Court)

**S. 37(1) : Business expenditure – Capital or revenue – Upgrading computers**

Expenditure on upgrading computers is revenue expenditure. (A.Y. 2001-02)

*CIT v. Sundarm Clayton Ltd.* (2010) 321 ITR 69 / (2008) 10 DTR 134 (Mad.)(High Court)

**S. 37(1) : Business Expenditure – Advisory Services – Buy back of shares**

Expenditure towards payment of advisory services for regulatory compliance in relation to buy-back of Shares is allowable as revenue expenditure. (A.Y. 2002-03)

*CIT v. Selan Exploration Technology Ltd.* (2010) 188 Taxman 1 / (2009) 32 DTR 155 (Delhi)(High Court)

**S. 37(1) : Business expenditure – Gifts – Government department – Commission agent**

A commission agent, incurred expenditure towards gifts to officials and customers for sale of various products, free samples, prize distribution for the purpose of sales promotion in army/navy/CSD canteens. Held the amounts are deductible as being incurred for the purpose of business and out of business expediency. (A.Y. 2000-01)

*CIT v. C. B. K. R. Enterprises* (2010) 37 DTR 148 / 186 Taxman 14 / 232 CTR 109 / 219 Taxation 1 (Delhi)(High Court)

**S. 37(1) : Business expenditure – Discount on bonds – Proportionate over period**

The discount on bonds has to be spread proportionately for the number of years for which the bonds are issued. (A.Y. 1978-79)

*CIT v. Himachal Pradesh Finance Corporation* (2010) 186 Taxman 105 / (2008) 8 DTR 161 (HP)(High Court)

**S. 37(1) : Business expenditure – Diversification – New product range**

Expenditure incurred by the assessee on diversification and expansion of new product range which included expenditure on acquisition of machinery to aid such expansion is allowable as revenue expenditure. (A.Ys. 2001-02, 2002-03)

*CIT v. Escorts Auto Components Ltd.* (2010) 323 ITR 11 / 34 DTR 280 / 231 CTR 386 / (2011) 197 Taxman 42 (P&H)(High Court)

**S. 37(1) : Business expenditure – Setting up – Commencement [S. 2(13)]**

A finance company having purchased computers and peripherals on 4th Sept 1995, appointed staff, in September and October 1995, and salaries including allowances, bonus, gratuity and contribution to provident fund and other funds from November 1995, its business can be said to be set up on 1st November, 1995, when it was in a position to commence its business and not when its bank account was opened. Expenditure incurred thereafter is allowable as deduction. (A.Y. 1996-97)

*CIT v. Whirlpool of India Ltd. (2010) 229 CTR 435 / (2009) 185 Taxman 387 / 28 DTR 164 / 318 ITR 347 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Penalty – Fine – Regulation fee to municipality corporation**

Regulation fee is an amount paid for compounding of the offence in terms of section 483 of Karnataka, Municipal Corporation Act, 1976, which is a penalty and therefore not allowable under section 37(1). (A.Y. 2005-06)

*Millennia Developers (P) Ltd. v. Dy. CIT (2010) 37 DTR 16 / 322 ITR 401 / 188 Taxman 388 / 231 CTR 401 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Keyman insurance policy of partner – Premium**

Keyman insurance policy is not confined to a situation where there is a contract on employment. Premium on the keyman insurance policy of a partner of the firm is wholly and exclusively for the purpose of business and is allowable as business expenditure. (A.Y. 2004-05)

*CIT v. B. N. Exports (2010) 37 DTR 381 / 231 CTR 227 / 323 ITR 178 / 190 Taxman 325 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Payment to police and rowdies for security – Illegal**

Payment to police personnel and rowdies to ensure security of business premises as the payment being not legal not allowable as deduction. (A.Y. 1992-93)

*CIT v. Neelavathi and others (2010) 322 ITR 643 / 47 DTR 359 / 218 Taxation 612 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Premium on redemption on Non convertible debenture**

Assessee is entitled to the proportionate deduction, of premium on redemption of non-convertible debenture. (A.Ys. 1991-92, 1992-93)

*CIT v. Indian Rayon & Industries Ltd. (2010) 38 DTR 313 / 236 CTR 279 / (2011) 336 ITR 479 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Year of allowability – Cash System – Spare parts**

Where assessee following cash system of accounting, the expenditure incurred for purchase of second hand machinery for using its spare parts is revenue expenditure

and the same is deductible in the year in which the sale consideration was paid even though the machinery was received in India after the end of relevant year. (A.Y. 2001-02)

*Aswath N. Rao (Dr.) v. ACIT (2010) 326 ITR 188 / 38 DTR 205 / 191 Taxman 136 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Technical know how fees – Non-exclusive licence**

Assessee did not acquire an asset of a capital nature by obtaining a non exclusive licence for five years restricted to the territory of India to manufacture and use tube making machines as the proprietary rights in the patents continued to vest in the licensor and therefore the technical know how fees paid by the assessee under the terms of the agreement is allowable as revenue expenditure. (A.Y. 1999-2000)

*CIT v. Essel Propack Ltd. (2011) 220 Taxation 288 / 237 CTR 395 / (2010) 40 DTR 26 / 325 ITR 185 / 191 Taxman 244 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Issue of convertible debentures – Revenue**

Expenditure incurred on issue of convertible debentures is to be allowed as revenue expenditure. (A.Y. 1993-94)

*CIT v. ITC Hotels Ltd. (2010) 190 Taxman 430 / (2009) 32 DTR 215 / (2011) 334 ITR 109 / 238 CTR 447 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Corporate membership fee to club**

Corporate membership fee to club, allowable as revenue expenditure. Expenditure wholly and exclusively for purposes of business and not towards capital account. (A.Y. 1996-97)

*CIT v. Samtel Color Ltd. (2010) 326 ITR 425 / (2009) 19 DTR 295 / 180 Taxman 82 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Takeover of business**

Amount paid to transfer for deprivation of business is revenue expenditure.

*CIT v. Hindustan Zinc Ltd. (2010) 326 ITR 474 / (2009) 221 CTR 639 / (2008) 171 Taxman 159 / 5 DTR 31 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Reimbursement to father – Hindu law**

Agreement entered into between the father and son wherein the son has agreed to reimburse the amount spent by his father towards his maintenance and education is unheard of under the provisions of the Hindu Law and therefore, son cannot claim for such payments.

(A.Ys. 1996-97 to 2002-03)

*CIT v. Mahesh Bhupathi (2010) 43 DTR 163 / 235 CTR 304 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Expenses relating to fans associations – Promotion**

The Tribunal was justified in granting deduction to the extent of 80 percentage of the expenses claimed to have been incurred by cine actor on Rasigar Manrams (fans club/association). It is well known fact that popular cine artists promote their Rasigar Manrams for the purpose of promoting their films among the public at large and for that purpose, when it is claimed that substantial amount was spent towards dress, food, etc. at the time of release of the new films as well as the regular maintenance of the Rasigar Manram activities, it cannot be said that it was not part of their professional activities namely acting in cine field. (A.Y. 2004-05.)

*CIT v. A. Vijaykant (2010) 43 DTR 175 / 234 CTR 103 / 320 ITR 496 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Second-hand equipment for use as spare parts for existing equipment**

Assessee is a cardiologist purchased the second hand machines for use as spare parts to existing equipments is allowable as revenue expenditure. (A.Y. 2001-02)

*Aswath N. Rao (Dr.) v. ACIT (2010) 326 ITR 188 / 38 DTR 205 / 191 Taxman 136 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Design and drawing fee**

Expenditure incurred by the assessee on account of design and drawing fees paid to foreign technician for imparting training to Indian technicians, relates to the process of manufacturing and for a tenure and the documents, designs and specifications which have been supplied by the licensor are only for facilitating the said purpose of manufacturing and therefore constitute revenue expenditure. (A.Y. 1994-95)

*CIT v. Manjal Showa Ltd. (2010) 46 DTR 1 / 329 ITR 449 / 194 Taxman 149 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Royalty – Quarry**

Paying royalty for excavating granite from the quarry, the assessee did not acquire any permanent advantage hence the amount paid by the assessee was allowable as revenue expenditure. (A.Ys. 1986-87, 1988-89, 1989-90)

*CIT v. Obli Spinning Mills (P) Ltd. (2010) 46 DTR 44 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Lease rental for dozers – Part user**

As long as an expenditure is incurred *bona fide* in pursuit of business and not by way of diversions of funds, it has to be allowed as a deduction. Entire lease rent paid by the assessee for hiring the dozers for using them in its business was allowable as a business expenditure even though assessee did not actually use 3 out of the hired dozers. (A.Y. 1989-90)

*CIT v. Salitho Ores Ltd. (2010) 236 CTR 53 / 46 DTR 377 / 194 Taxman 410 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Compounding fees paid by Builder & Developer – Not deductible**

Compounding fees being in nature of penalty & fine in terms of section 483 of Karnataka Municipal Corporation Act, 1976 is not allowable. (A.Y. 2000-01)

*CIT v. C. B. K. R. Enterprises (2010) 37 DTR 148 / 186 Taxman 14 / 232 CTR 109 / 219 Taxation 1 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Commencement – Setting up of Construction business**

Where the assessee had incurred expenditure towards soil testing, submission of tenders, payment of architect's fees, etc. in construction business, it would be integral part of the business of the assessee and the CIT(A) was justified in allowing the deduction of such expenditure by holding that the assessee had commencement its business. (A.Y. 1997-98)

*CIT v. Mfar Construction Ltd. (2010) 48 DTR 360 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Illegal gratification – Dealership**

Amount paid by the assessee as illegal gratification for procuring car dealership which was not recorded in the books cannot be allowed as business loss or business expenditure as any illegal payment made which is an offence is not a permissible as deduction under section 37 of the Act. (A.Y. 1989-90)

*CIT v. Jagdish Chand Gupta (2010) 329 ITR 583 / 47 DTR 156 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Trade fair – Gift of tractor**

Where the assessee had sent tractors to a foreign country for participating in a trade fair which were later gifted the same to the foreign Government as it was not economical for the assessee company to recall the tractors back, the cost of tractor was held allowable as business deduction under section 37(1) of the Act. (A.Y. 1980-81)

*CIT v. Punjab Tractors Ltd. (2010) 48 DTR 30 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Production of Soft Beverage – Repair of wooden crates**

In case of assessee engaged in business of production of soft beverages, bottle brakeage charges are to be allowed as deduction under section 37(1) of the Act. Expenditure incurred on repair of wooden crates used in business of soft beverages is to be treated as revenue expenditure and not capital expenditure. (A.Y. 1997-98)

*CIT & Anr. v. Brindavan Beverages Ltd. (2010) 228 CTR 1 / 321 ITR 197 / 32 DTR 257 / 186 Taxman 233 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Advance rent for lease for 99 Years**

Advance lease rental (` 48 crores) paid by the assessee for acquiring land on lease for ninety nine (99) years was allowable as revenue expenditure. (A.Y. 1994-95)  
*Dy. CIT v. Sun Pharmaceutical Ind. Ltd. (2009) 24 DTR 262 / 227 CTR 206 / (2010) 329 ITR 479 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Consultation charges**

Consultation charges paid by the assessee in connection with the expansion of assessee's existing project were held to be allowable as revenue expenditure. (A.Y. 1985-86)

*Jyoti Ltd. v. CIT (2009) 24 DTR 177 / 224 CTR 399 / 180 Taxman 455 / (2010) 321 ITR 135 / 24 DTR 177 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Computer software**

Where there is no finding that the assessee acquired any enduring benefit or that the software will not become outdated due to passage of time, expenditure incurred by the assessee on computer software was allowable as revenue expenditure. (A.Y. 2002-03)

*CIT v. Varinder Agro Chemicals Ltd. (2009) 22 DTR 127 / 224 CTR 326 / 309 ITR 272 (P&H) (High Court)*

**S. 37(1) : Business expenditure – Purchases – Genuineness**

Where the assessee had made payments for purchase of raw material by account payee cheques and the same were found to be credited into the bank accounts of respective parties, the payments made to these parties cannot be disallowed merely because summons issued upon these parties after the lapse of a considerable time could not be served upon them at the given address. The Court further observed that as the bank statements of the parties to whom the payments were made by the assessee were available with the assessing officer, he could have made endeavour to serve summons to these parties on the address given to the banks and verified the fact of payments. (A.Y. 1996-97)

*CIT v. Hi Lux Automotive (P) Ltd. (2009) 23 DTR 385 / 183 Taxman 260 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Corporate guarantee – Deductible payment**

Allowability of corporate guarantee obligation. Amount paid by Assessee company towards discharge of corporate guarantee on behalf of various borrowers is allowable as deduction. (A.Y. 1995-96)

*CIT v. United Breweries Ltd. & Anr. 209 CTR 385 / 292 ITR 188 / (2008) 166 Taxman 297 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Termination of lease – Commercial expediency**



Amount paid to landlord for premature termination of lease is an expenditure on account of commercial expediency and hence entitled for deduction under section 37. (A.Y. 2000-01).

*CIT v. Microsoft Corporation of India (2009) 210 Taxation 161 / 176 Taxman 395 / (2008) 220 CTR 410 / 13 DTR 67 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Labourers or workers – Trade practice**

Payments made to workers through labourers or worker's union. The said expenses incurred during the course of business as per trade practice. Allowable as business expenditure. (A.Y. 1996-97)

*CIT v. Konkan Marine Agencies (2009) 313 ITR 308 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Advertisement expenses – Promotion films**

Expenses on advertisement for promotion films, slides, Expenditure being with respect to an ongoing business, involving no enduring benefit is a revenue expenditure. (A.Ys. 1996-97 and 2001-02)

*CIT v. Geoffrey Manners & Co. Ltd. (2009) 212 Taxation 300 / 315 ITR 134 / 180 Taxman 87 / 19 DTR 249 / (2011) 238 CTR 49 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Advance lease rent**

Assessee acquiring land on lease for a period of 99 years, making payment of advance rent in the sum of ` 48 crores, and paying monthly rent of ` 40 per month, advance rent paid was allowable revenue expenditure. (A.Y. 1994-95)

*Dy. CIT v. Sun Pharmaceutical Ind. Ltd. (2009) 227 CTR 206 / (2010) 329 ITR 479 / (2009) 24 DTR 262 (Guj.)(High Court)*

*Editorial.:- See Jt. CIT v. Mukund Ltd. (2007) 291 ITR (AT) 249 (Mum.)(SB) Lump sum paid as premium for securing lease hold right held as capital expenditure.*

**S. 37(1) : Business expenditure – Contingent liability – Excise duty – Pendency**

Where the assessee had challenged the order of the High Court directing the assessee to refund the excess levy of price of sugar along with interest before the Supreme Court, the amount was held to be not allowable under the provisions of the Act as the assessee was hopeful in succeeding in the Special leave Petition filed before the Apex Court. As such the same was contingent in nature. (A.Y. 1991-92)

*Triveni Engineering & Industries Ltd. v. CIT (2009) 226 CTR 526 / 184 Taxman 179 / 29 DTR 305 / (2010) 320 ITR 430 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Convertible debentures – Allowable**

Expenditure incurred on issue of convertible debentures is to be treated as revenue expenditure, even though the debentures issued were later on converted in to shares. (A.Y. 1993-94)

*CIT & Anr. v. ITC Hotels Ltd. (2009) 32 DTR 215 / (2010) 190 Taxman 430 / (2011) 334 ITR 109 / 238 CTR 447 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Expenses on issue of debentures – Allowable**

Expenditure incurred on issue of debentures, whether convertible or non convertible is allowable as revenue expenditure. (A.Y. 1996-97)

S.L.P. CC No. 10548/2009 dt. 11-08-2009 filed by the department was rejected.

*CIT v. Secure Meters Ltd. (2009) 221 CTR 405 / (2010) 321 ITR 611 / (2008) 175 Taxman 567 / 16 DTR 53 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Feasibility report of new project – Expansion**

If expenditure incurred for preparation of feasibility report of a new project, is in respect of same business which is already carried on by assessee, even if it is for expansion of business, namely to start a new unit which is same as earlier business, and there is unity of control and a common fund such expenditure is to be treated as revenue expenditure.

*CIT v. Priya Village Road Shows Ltd. (2009) 185 Taxman 44 / 32 DTR 316 / (2010) 228 CTR 271 / (2011) 332 ITR 594 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Puja expenses – Not allowable**

Expenditure incurred on Vishwakarma Puja by a company cannot be treated as expenditure wholly and exclusively for the purposes of business of the company, and it cannot be allowed any deduction under section 37(1) towards such expenditure. (A.Y. 1992-93)

*Hira Ferro Alloys Ltd. v. Dy. CIT (2009) 31 DTR 20 / 227 CTR 508 / (2010) 326 ITR 261 (Chhattisgarh)(High Court)*

**S. 37(1) : Business expenditure – Royalty – Percentage of sales**

Royalty paid by the assessee to its foreign collaborator at a specified percentage of its production / sale for using such technology provided by the foreign collaborator under the technical collaboration agreement is allowable as revenue expenditure.

*CIT v. Sharda Motor Industrial Ltd. (2009) 30 DTR 260 / 227 CTR 606 / 319 ITR 109 / (2010) 189 Taxman 211 (Delhi)(High Court)*

*Climate System India Ltd. v. CIT (2009) 30 DTR 263 / 319 ITR 113 / 227 CTR 609 / 185 Taxman 139 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Setting up of business – Software company**

Where a software company started its business activities by pursuing companies to get orders, all activities carried out by the assessee to procure the orders being incidental to the business activities, would be regarded as for the purpose of business

and not for setting up of the business. Therefore, substantial expenditure incurred against the minimal revenue earned by the assessee during the year could not be capitalized as pre – operative expenses. (A.Y. 2003-04)

*CIT v. Aspentech India (P) Ltd. (2009) 32 DTR 173 / (2010) 229 CTR 172 / 187 Taxman 25 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Convertible debenture**

Even if the debenture has to be converted in to a share at a latter date, the expenditure incurred in connection with issue of debentures has to be treated as revenue expenditure. (A.Y. 1993-94)

*CIT v. ITC Hotels Ltd. (2009) 32 DTR 215 / (2010) 190 Taxman 430 / (2011) 334 ITR 109 / 238 CTR 447 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Royalty**

Payment made to an American company (holder of patent) for use of patent by the assessee, as a percentage of domestic / export sales, is a revenue expenditure. (A.Y. 2002-03)

*Climate Systems India Ltd. v. CIT (2009) 185 Taxman 139 / 227 CTR 609 / 319 ITR 113 / 30 DTR 263 (Delhi.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Royalty**

Payment of royalty at rate calculated, per piece of production is revenue expenditure.

*CIT v. Sharada Motor Industries Ltd. (2009) 319 ITR 109 / 30 DTR 260 / 227 CTR 606 / (2010) 189 Taxman 211 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Explanation – Reimbursement of expenses**

Where the assessee instead of distributing free sample of liquor for promoting its sale to the defence establishment used to reimburse the payment made by the defence establishment to the CSD stores for the purchase of liquor, the amount of such reimbursement was held to be a deductible expenditure as the same was neither against the public policy nor prohibited under the law. (A.Y. 1990-91)

*Brihan Maharashtra Sugar Syndicate Ltd. v. Dy. CIT (2009) 28 DTR 265 / 182 Taxman 236 / 226 CTR 160 / (2010) 320 ITR 658 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Rented premises**

Repair expenses incurred by the assessee on the rented premises is allowable under section 37(1) of the Act, even though some may not be allowable under section 40(a)(i). (A.Y. 1983-84, 1984-85)

*CIT v. Alkem Laboratories (P) Ltd. (2009) 28 DTR 111 / 225 CTR 323 / 314 ITR 329 (Patna)(High Court)*

**S. 37(1) : Business expenditure – Allowed in earlier years – Contrary stand**

The assessee's claim of deduction of certain expenses was allowed by the Tribunal in earlier years and the revenue authorities accepted the order of the Tribunal. In

subsequent year where the Tribunal allowed the claim of the assessee on identical facts, it is not open for the Revenue authorities to take a contrary stand in the year under consideration. (A.Y. 1983-84)

*Dipti Textile Industries v. CIT* (2009) 25 DTR 46 / (2010) 323 ITR 638 (Bom.)(High Court)

### **S. 37(1) : Business expenditure – Market survey [S. 35D]**

Expenditure on study of organizational set-up, Report on reorganization of core business and for improving profitability/market share. Expenditure is not covered by section 35D as no technical know-how is obtained. Expenditure is deductible under section 37. It is not covered under sub-section (2)(a)(iii) of 35D since the said sub-section covers only those expenses which are for conducting market survey or any other survey necessary for the business of the assessee.

*CIT v. Majestic Auto Ltd.* (2009) 212 Taxation 97 (P&H)(High Court)

### **S. 37(1) : Business expenditure – Administrative expenses – Modernization**

Administrative Expenses incurred in connection with the modernization and expansion of the assessee's existing units is allowable as revenue expenditure even though the assessee had capitalised these expenses in its books of account. (A.Ys. 1994-95, 1995-96, 1997-98)

*CIT v. Triveni Engineering & Industries Ltd.* (2009) 19 DTR 274 / 181 Taxman 5 (Delhi)(High Court)

### **S. 37(1) : Business expenditure – Capital or revenue – Development of website**

The Assessee engaged in travel business, incurred certain expenditure towards development of website for the purposes of its business. The Hon'ble High Court held that merely because a particular expenditure may result in an enduring benefit would not make such an expenditure of capital nature as what is to be seen is real intent and purpose of expenditure and as to whether there is accretion of fixed capital of Assessee. As expenditure on website would not change the fixed capital of an Assessee, even though website might provide enduring benefit to Assessee, expenditure incurred has to be regarded as revenue expenditure. (A.Y. 2001-02)

*CIT v. Indian Visit.com (P) Ltd.* (2009) 176 Taxman 164 / (2008) 219 CTR 603 / 13 DTR 258 (Delhi)(High Court)

### **S. 37(1) : Business expenditure – Corporate membership fee – Admission fees**

Admission fees paid towards corporate membership of a club is allowable as expenditure for the purpose of assessee's business. (A.Y. 1996-97)

*CIT v. Samtel Color Ltd.* (2009) 19 DTR 295 / 180 Taxman 82 / (2010) 326 ITR 425 (Delhi)(High Court)

### **S. 37(1) : Business expenditure – Incentive bonus – On payment allowable**

The production incentive bonus is liable to be deducted while computing business income, but it would be allowed only when payment of bonus is made in assessment year in question. (A.Y. 1998-99)

*CIT v. Kisan Sahkari Chini Mills Ltd. (2009) 176 Taxman 265 / 318 ITR 218 (Uttarakhand)(High Court)*

### **S. 37(1) : Business expenditure – Penalty – Fine**

Penalty, fines, etc. paid by the assessee to State Electricity Board for violating power regulation (drawing extra load in peak hours) was allowable deduction under section 37(1) of the Act. The Court further observed that if penalty is not for deliberate violation of law the same should be allowed as deduction. (A.Y. 1999-2000)

*CIT v. Hero Cycles Ltd. (2009) 17 DTR 281 / 178 Taxman 484 (P&H)(High Court)*

### **S. 37(1) : Business expenditure – Production of advertisement film – Allowable**

Expenditure incurred on production of an advertisement film for promoting / marketing the assessee's products was allowable as revenue expenditure. (A.Ys. 1996-97, 2001-02)

*CIT v. Geoffrey Manners & Co. Ltd. (2009) 19 DTR 249 / 315 ITR 134 / 180 Taxman 87 / (2011) 238 CTR 49 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Excessive and unreasonable payments [S. 40A(2)]**

Assessee apart from paying handling charges at the rate of 9.5 per cent to its sister concerns the Assessee had paid handling charges at the same rate to other agents also.

Revenue had allowed similar rate in earlier years. Sister concerns paying tax at a higher rate. Hence it is not a case of evasion of tax. Under Board Cir. No. 6-P dated July 1968, no disallowance was to be made under sec. 40A(2) in respect of payment made to the relatives and sister concern where there was no attempt to evade tax. (A.Ys. 1991-92, 1992-93)

*CIT v. Indo Saudi Services (Travel) P. Ltd. (2009) 310 ITR 306 / (2008) 219 CTR 562 / 12 DTR 304 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Capital or revenue – Foreign exchange rate fluctuation**

It was held that loss on account of foreign exchange rate fluctuation allowable as revenue expenditure. (A.Y. 1998-99)

*CIT v. L. G. Electronics India P. Ltd. (2009) 309 ITR 265 / (2008) 12 DTR 263 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Advertisement – Brand image**

Expenditure incurred on advertisement by the assessee in order to create the brand image was to be treated as revenue expenditure, even if the same was shown as deferred revenue expenditure in the books of account maintained by it.

*Dy. CIT v. Core Healthcare Ltd. (2008) 14 DTR 332 / (2009) 308 ITR 263 / 221 CTR 580 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Convertible or non-convertible debentures – Allowable**

Expenditure incurred on issue of convertible or non-convertible debenture by the assessee company is revenue expenditure. (A.Y. 1996-97)

*CIT v. Secure Meters Ltd. (2008) 16 DTR 53 / 175 Taxman 567 / (2009) 221 CTR 405 / (2010) 321 ITR 611 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Advertisement expenses – Sister concern**

Advertisement expenditure incurred on products of sister concern. Assessee is sole distributor and marketing agent of products of sister concern. Amount spent wholly and exclusively for the purpose of the company's business and allowable as deduction. (A.Y. 1996-97)

*CIT v. Sabena Detergents P. Ltd. (2008) 303 ITR 320 / 214 CTR 167 / (2007) 164 Taxman 17 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Disputed liability – Reasonable certainty**

Deduction on account of disputed liability towards purchases made by the assessee in earlier year could be allowed in the year when the supplier filed a suit for recovery of sale consideration, as the assessee was capable of estimating the loss with reasonable certainty at that time. (A.Y. 1979-80)

*R. C. Gupta v. CIT (2008) 9 DTR 150 / 218 CTR 315 / 298 ITR 161 / 166 Taxman 191 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Exchange loss – Refund of advance**

Exchange loss incurred by the assessee on refund of advance from a foreign buyer upon the cancellation of contract was held to be a payment made on account of commercial expediency, accordingly the same was incurred wholly and exclusively for the purpose of business and the same was allowable as deduction. (A.Y. 1989-90)

*Loksons P. Ltd. v. ACIT (2008) 11 DTR 206 / (2010) 187 Taxman 55 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Television film – Advertisement**

Expenditure incurred on production of television film for advertising the product manufactured by the assessee is allowable as revenue expenditure. (A.Y. 1989-90)

*CIT v. Liberty Group Marketing Division (2008) 8 DTR 28 / 220 CTR 194 / 173 Taxman 439 / (2009) 315 ITR 125 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Provision for warranty**



The assessee, claimed deduction of the sum provided in the books towards warranty expenses. The assessee provides warranty to its customers for replacement of defective parts within period of warranty. The same was disallowed on the grounds that amount did not represent an accrued liability. The Hon'ble court confirmed the views of the Appellate Tribunal that warranty liability could not be construed to be a contingent liability. (A.Y. 2001-02)

*CIT v. Hewlett Packard India (P) Ltd. (2008) 171 Taxman 13 / 5 DTR 220 / (2009) 222 CTR 378 / 314 ITR 55 / 173 Taxman 163 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Software – Revenue expenditure**

Expenditure incurred on purchase of software is revenue expenditure. (A.Y. 2001-02)  
*CIT v. Sundaram Clayton Ltd. (2008) 10 DTR 134 / (2010) 321 ITR 69 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Stamp Duty – Registration charges – Lease**

Stamp duty and registration charges incurred at the time of execution of lease agreement were allowable as revenue expenditure. (A.Y. 1994-95)

*CIT v. Gopal Associates (2008) 12 DTR 20 / (2009) 222 CTR 307 / (2010) 326 ITR 413 (HP) (High Court)*

### **S. 37(1) : Business expenditure – Software, Replacement of UPS System and Printer – Allowable**

The court held that the concept of enduring benefit must respond to the changing economic realities of the business. The expenses incurred by installation of software packages in the present computer world, which improves the modern communication technology, enables the assessee to carry on business operation effectively, efficiently, smoothly and profitably. However, such software itself does not work on a stand alone basis. It has to be fitted to a computer system to work. Such software enhance efficiency of the operation. It is an aid in the manufacturing process rather than tool itself. Therefore the payment for such application of software, though there is an enduring benefit, does not result in acquisition of any capital asset hence has to be treated as revenue expenditure.

The court also held that expenditure incurred on replacement of printer was also revenue expenditure. (A.Ys. 1995-96, 1997-98)

*CIT v. Southern Roadways Ltd. (2008) 304 ITR 84 / 220 CTR 298 / (2009) 183 Taxman 234 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Expenses on issue of debentures – Allowable**

The expenses incurred for the issue of debentures are allowable deduction as revenue expenditure. (A.Ys. 1989-90, 1992-93)

*CIT v. First Leasing Co. of India Ltd. (2008) 304 ITR 67 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Replacing fence with compound wall – Allowable**

The expenditure incurred on construction of compound wall in the place of barbed wire fencing was a revenue expenditure. (A.Ys. 1995-96 and 1997-98)

*CIT v. Southern Roadways Ltd. (2008) 304 ITR 84 / 220 CTR 298 / (2009) 183 Taxman 234 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Replacement of machinery**

Expenditure on repairs and replacement of machinery having been incurred for the purpose of running existing machinery more efficiently was held to be revenue in nature.

*CIT v. Mihir Textiles Ltd. (2008) 8 DTR 156 / 219 CTR 35 / (2009) 316 ITR 403 / 176 Taxman 428 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Penalty or Fine – Arbitration award**

Payment made for failure to honour the contract by virtue of arbitration award is not a liability incurred for contravention of any law – Allowable as business expenditure. (A.Y. 1975-76)

*Jamna Auto Industries v. CIT (2008) 214 CTR 649 / 299 ITR 92 / 167 Taxman 192 / 2 DTR 209 (FB)(P&H)(High Court)*

**S. 37(1) : Business expenditure – Premium on Redemption – Debentures – Proportionate**

The premium payable on redemption of debentures in future years was to be spread over and part of it allowed as a deduction in this year. (A.Y. 1991-92)

*CIT v. Ashok Leyland Ltd. (2008) 297 ITR 107 / 215 CTR 187 / 170 Taxman 185 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Compensation on shipment – Contingent liability**

That the assessee under the earlier contract was liable to make payment of a certain amount on compensation. However, that liability stood modified by a subsequent contract between the parties, which provided that the compensation under the earlier contract would be paid and payable by reimbursement by the assessee to the foreign company only if orders were placed by that foreign company with the assessee. Further, clause 2 of the second contract contemplated reimbursement by the assessee to the foreign company at 50 cents per ounce. Thus, the liability to pay compensation was contingent upon shipping per ounce. If for any reason in future the shipping was stopped, abandoned or could not take place, the liability to pay compensation to the extent of the goods not shipped would not arise. Thus, the liability which the assessee was claiming was not a fixed liability, but was a contingent liability and, therefore, the deduction sought by the assessee was not permissible under section 37 of the Act.

*Mentha and Allied Products P. Ltd. v. CIT (2008) 302 ITR 144 (All.)(High Court)*

**S. 37(1) : Business expenditure – Replacement of machinery – Allowable**

Expenditure incurred by assessee on replacement of machinery was allowable as revenue expenditure. (A.Y. 1996-97)

*CIT v. Fenner (India) Ltd. (2008) 169 Taxman 62 / (2007) 292 ITR 605 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Reconstruction of boundary wall – Allowable**

Amount spent on reconstruction of boundary wall is revenue in nature. (A.Y. 1984-85)

*CIT v. Mewar Oil & General Mills Ltd. (2008) 5 DTR 40 / 216 CTR 65 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Replacement of old sound system – Cinema theatre**

Replacement of old worn out mono-sound system with a new stereo system in a cinema theatre which, did not result in increase in the capacity of the theatre was allowable as revenue expenditure. (A.Y. 1996-97)

*CIT & Anr. v. Sagar Talkies (2008) 7 DTR 81 / 217 CTR 74 / 173 Taxman 12 / (2010) 325 ITR 133 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Replacement of machine**

It was held that expenditure on replacement of independent complete machinery is revenue expenditure entitled to deduction under section 37. (A.Ys. 1995-96, 1996-97, 1997-98)

*CIT v. T.V.S. Sewing Needles Ltd. (2008) 302 ITR 13 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Repairs and renovation – Revenue expenditure**

Assessee, an advocate, occupied a rented premises for office use. During relevant assessment year, he carried out certain repairs and renovations in office premises in order to see that said premises was kept in a proper condition and professional activities were carried out effectively and smoothly. Since expenditure incurred by assessee was in connection with profession / business and for smooth working thereof, leaving fixed capital untouched, expenditure in question was revenue expenditure and, hence, allowable under section 37(1). (A.Y. 1996-97)

*CIT v. A. M. Singhvi (Dr.) (2008) 168 Taxman 136 / 302 ITR 26 / (2007) 212 CTR 1 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Lump sum amount paid to land lord – Settlement for exit**

The assessee paid a lump sum amount to the landlord of the premises as a settlement for premature exit from the licensed premises. By making such payment the assessee avoided payment of user charges for unexpired period and also avoided long drawn litigation expenses. The High Court held that the payments made by the assessee were allowable under section 37 (1) of the Act, as the same fell squarely within the meaning of expression 'commercial expediency'. (A.Y. 2000-01)

*CIT v. Microsoft Corporation of India (P) Ltd. (2008) 13 DTR 67 / 220 CTR 410 / (2009) 176 Taxman 395 (Delhi)(High Court)*

### **S. 37 (1) : Business expenditure – Issue of debenture – Fixed deposit**

Expenditure on issue of debenture and collection of fixed deposit are revenue expenditure. (A.Ys. 1993-94 to 1996-97)

*CIT v. Southern Petrochemical Industries Corporation Ltd. (2008) 5 DTR 70 / (2009) 311 ITR 202 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Good work reward – Not a bonus**

The good work reward given by the assessee to its employee had no relation to profit that assessee might or might not make and it had relation to only good work that was done by the employees during the course of their employment. Thus, the payment made by assessee to its employees under the nomenclature 'Good Work Reward' did not constitute bonus within the meaning of section 36(1)(ii) and was allowable as normal business expenditure under section 37(1).

*Shriram Pistons & Rings Ltd. v. CIT (2008) 171 Taxman 81 / 219 CTR 228 / 307 ITR 363 / 8 DTR 242 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Shifting machinery within the premises – Productivity**

Assessee-company had readjusted its plant and machinery within same factory shed for better productivity. Assessing Officer disallowed claim on ground that expenditure was capital expenditure. Assessee by moving its plant within the premises to a location so that plant could work better resulting in better output was only providing better facilities for manufacture, expenditure on relocation of plant and machinery was allowable as revenue expenditure.

*CIT v. Breakes India Ltd. (2007) 161 Taxman 47 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Irrespective of nomenclature – Nature of compensation**

Assessee claimed deduction of certain sum paid as fine, to excise department, for belated payment of excise duty instalment — Assessing Officer disallowed same. It was found that though sum paid was termed as fine, payment was not in nature of punishment but was by way of compensation. Amount was deductible. (A.Y. 1976-77)

*CIT v. Hoshiari Lal Kewal Krishan (2007) 160 Taxman 96 / (2009) 311 ITR 336 (P&H)(High Court)*

### **S. 37(1) : Business expenditure – Lease rent – Sale-cum-lease back**

Assessee, a State Electricity Board, had sold various electrical equipments to various companies and after sale, Board had taken back some equipments on lease basis and paid lease rent. The Board filed return and claimed deduction of lease rent. Assessing Officer disallowed same and made addition holding that sale-cum-lease back agreements were sham or colourable device of tax evasion. The Tribunal allowed the claim. Hon'ble Court upheld the order of the Tribunal observing that by entering into these transactions, tax liability of the Board has not been reduced, thus the transaction in question could not be termed as sham transaction.

*CIT v. Rajasthan State Electricity Board (2007) 160 Taxman 19 (Mag.)(Raj.)(High Court)*

### **S. 37(1) : Business expenditure – Reasonableness – Businessman's view**

When there is nexus between the expenditure incurred and purpose of business, the Assessing Officer cannot substitute his opinion about the reasonableness or not of the expenditure as if the Assessing Officer was the businessman.

*CIT v. Devaghi Beverages Ltd. (2007) 197 Taxation 444 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Not able to produce parties – Particulars of service rendered**

The Assessing Officer disallowed commission paid by the assessee to agents on the ground that the assessee was not able to produce parties to whom commission was paid. Even though the copies of accounts at the parties and the particulars of services rendered were produced before the Assessing Officer The Tribunal allowed the claim. On appeal at the instance of revenue the High Court confirming the findings of the Tribunal held that the commission paid was allowable as business expenditure as, the assessee had produced all the material that it could possibly produce. If the Assessing Officer was not inclined to believe the material so produced, he could have used coercive powers available to him which he failed to exercise. (A.Y. 2001-02)

*CIT v. Genesis Commet P. Ltd. (2007) 197 Taxation 248 / 163 Taxman 482 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Business loss [S. 28]**

The assessee was a sole selling agent of a principal for sale of liquor. Assessee was also engaged in the business as a recovery agent. The principal modified the terms of agreement to the effect that the assessee, henceforth, will also be responsible for recovery of outstanding dues from liquor sold through his agency. Thereafter the principal debited the assessee's account with an amount outstanding against one of the persons to whom liquor was sold by the assessee. The assessee claimed the amount so deducted by the principal as bad debts under section 36(2) of the Act. Assessing Officer negated the claim of the assessee. The High Court on this set of facts held that as there was a valid agreement between the parties and the assessee had agreed to share responsibility of bad debts on account of non recovery as one of the obligations in lieu of the commission earned by him. The bad debts so incurred on

account of non recovery of such dues from buyer of liquor from the assessee cannot be said to be not related to the business of the assessee and the same should be allowable as bad debts/ business loss.

*CIT v. Amrik Singh Surendra Singh (2007) 200 Taxation 524 (P&H)(High Court)*

**S. 37(1) : Revenue expenditure – Commercial expediency – Compensation on cancellation**

Compensation paid for premature cancellation of sole distributor's agreement is allowable deduction being paid for commercial expediency.

*CIT v. MICO Ltd. (2007) TLR (Oct.) 622 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Route permit fee – Rule of consistency**

Before the High Court it was contended by the revenue that in the immediately preceding year the assessee himself had treated the route permit fee expenses as capital expenditure. The High Court observed that as the revenue had not challenged the order of the Tribunal for A.Y. 1981-82 before the High Court. Further, no pleading with regard to change in circumstances was raised before the Tribunal in the revenue's appeal. Therefore, the High Court following the Apex Court decision in the case of *Radha Soami Satsang vs. CIT (1992) 193 ITR 321*, dismissed the revenue's appeal.

*CIT v. Pepsu Road Transport Corporation (2007) 196 Taxation 125 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Admission fee – Member of stock exchange**

Admission fees paid to become member of Stock Exchange and contribution made to infrastructure development fund floated by Stock Exchange. Payments made in order to exclusively carry on the business on the floor of stock exchange. The court held, the same is to be treated as Revenue Expenditure and hence, allowable. (A.Ys. 1993-94 to 1996-97)

*CIT v. Venkatasubramanian (2007) 207 CTR 88 / 291 ITR 193 / 165 Taxman 163 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Prior to formation of partnership – Matching concept**

Where prior to formation of partnership, the parties mutually agreed to take up a works contract and thereafter, the partnership was formed to execute the same. The payments for work done before the formation of partnership, were made after the firm came into existence. On these set of facts the High Court held that the sales have to be equated with receipts for the work done and it was an admitted fact that receipts against the work done prior to formation of firm was received after formation of the firm. Accordingly, till the receipt, the expenses incurred could not be claimed and therefore, the same had to be carried forward and allowed in the year in which the receipts are received.



*CIT v. Guru Nanak Construction Co. (2007) 294 ITR 294 / 200 Taxation 113 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Loss on account of embezzlement [S. 29]**

Loss on account of embezzlement by the representative of the assessee who was authorized to collect the sale proceeds from the customers was allowable as deduction. The loss so incurred was incidental to carrying on of the business of the assessee and there was a direct and proximate connection / nexus between the loss and business operation of the assessee.

*CIT v. Pubhraj Wati Bubber (Smt) (2007) 199 Taxation 107 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Factory shifting expenses – Compelling circumstances**

The expenditure incurred on shifting the factory premises under compelling circumstances, viz., for very survival of the factory itself, expenditure so incurred could be allowed as revenue expenditure. (A.Y. 1992-93)

*C.I.T. v. Loyal Super Fabrics (2007) 163 Taxman 136 / 207 CTR 436 / (2008) 304 ITR 78 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Setting up a new unit**

The expenditure incurred for setting up a new unit to manufacture raw material for the existing manufacturing unit is revenue expenditure. (A.Ys. 1995-96 to 1997-98)

*CIT v. Usha Iron & Ferro Metal Corp. Ltd. (2007) 163 Taxman 256 / (2008) 296 ITR 140 (Delhi) (High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – False ceiling**

Expenditure incurred on erecting false ceiling and partitions in leasehold premises is to be treated as revenue expenditure. (A.Ys. 1987-88 to 1993-94)

*CIT v. Shakti Finance Ltd. (2007) 210 CTR 300 / 291 ITR 83 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Contribution towards building fund – Chamber of commerce**

The contribution made by the company towards the construction of building of the Chamber of Commerce satisfied the commercial expediency test since their activities are closely linked with the welfare of the corporate entities who are its members and whose interests are taken care of by the Chamber of Commerce. (A.Y. 1988-99)

*CIT v. Chemicals & Plastics India Ltd. (2007) 165 Taxman 158 / 292 ITR 115 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Issue of partly convertible debenture – Allowable**

The expenditure incurred was on the issue of debentures, hence, the expense incurred on obtaining a loan was a revenue expenditure. (A.Ys. 1986-87 to 1993-94)

*CIT v. South India Corpn. (Agencies) Ltd. (2007) 164 Taxman 249 / 209 CTR 233 / 290 ITR 217 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – MS office software**

Expenditure incurred on MS office software which is not customized software and which software requires frequent upgradation is an allowable business expenditure. (A.Y. 1995-96 to 1997-98)

*CIT v. G. E. Capital Services Ltd. (2007) 164 Taxman 46 / (2008) 214 CTR 551 / 300 ITR 420 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Penalty – Fine – Excess load – State Electricity Board**

Payment to State Electricity Board for using excess load, amount paid by the assessee to the State Electricity Board as a kind of surcharge for drawal of excess load as per rules not being a penalty, is allowable as deduction. (A.Y. 1992-93)

*CIT v. Industrial Cables (India) Ltd. (2007) 212 CTR 513 / 162 Taxman 423 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Preoperative expenditure of new project – Same management**

New project undertaken by the assessee company being under the control of same management and administration and managed from common funds, was only an extension of the existing business and therefore, expenditure incurred on the new project constituted revenue expenditure. (A.Y. 1979-80)

*Jay Engineering Works Ltd. v. CIT (2007) 212 CTR 562 / (2009) 311 ITR 405 / (2008) 166 Taxman 115 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Upgrading computers – Efficiency**

The assessee only claimed the expenditure for upgradation of existing computers. The said expenditure was incurred for improving the efficiency of the existing system with a view to keep pace with improvement of technology and no machinery was brought into existence. Such expenses incurred by the assessee for enhancement of efficiency. (A.Y. 1999-2000)

*CIT v. Southern Roadways Ltd. (2007) 288 ITR 15 / 158 Taxman 1 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Market Fee**

Enhanced liability on account of market fee relating to an earlier year was allowable in subsequent year when dispute as to its rate was decided by Supreme Court in subsequent year and that resulted in enhanced liability. (A.Y. 1980-81)

*CIT v. Sohan Lal Kharait Ram (2007) 290 ITR 694 / (2005) 198 CTR 403 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Allowance of education expenses – Son of Director**

Son of Director of company sent abroad for education, training that was availed by son has nothing to do with business of company. Expenses incurred by company was for benefit of personal gain and not for benefit of company. Fact that on his return the son took over management and responsibility of company immaterial. Expenditure cannot be included by way of business expenditure.

*Mac Exploree (P) Ltd. v. CIT 2007 TLR 626 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Manufacture – Trading – Retrenchment compensation – Temporary staff of manufacturing unit**

Assessee carrying on two lines of business; i.e., manufacturing and trading. Manufacturing activity stopped temporarily. Employees of manufacturing unit retrenched by assessee. Manufacturing unit leased out and rental income derived by assessee constitutes business income. Business activity cannot be said to have been closed after closure of manufacturing activity. Deduction of retrenchment compensation paid by assessee can be allowed as business expenditure. (A.Y. 1983-84)

*CIT v. Margarine and Refined Oils Co. Ltd. (2006) 282 ITR 576 / 202 CTR 376 / 154 Taxman 95 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Commission [S. 37(3A)]**

Commission paid for local as well as export sales cannot be treated as sales promotion expenses for making disallowance under section 37(3A). Commission is paid for services rendered and does not fall within the provision of section 37(3B). (A.Y. 1985-86)

*CIT v. Zippers India (2006) 203 CTR 52 / 284 ITR 142 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Retrenchment compensation – Trading continued**

The assessee's trading activity in the same articles continued and the manufacturing unit was leased to another person. Retrenchment compensation paid to employees was allowable deduction. (A.Y. 1991-92)

*CIT v. Swaraj Engines Ltd. (2006) 154 Taxman 243 / 203 CTR 310 / (2008) 301 ITR 284 (P&H)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Upgradation of Computer**

The assessee incurred expenditure towards wooden partition, painting, glass work and other petty works in a leased premises. There is no enduring benefit. The expenditure incurred is allowable as deduction being in the nature of revenue expenditure.

*CIT v. Escorts Finance Ltd. (2006) 155 Taxman 559 / 205 CTR 574 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Production bonus – Agreement – Wages**

The Assessing Officer disallowed the claim for production bonus holding that the same was not in the nature of normal bonus covered by payment of Bonus Act.

The High Court held that the payment was in pursuance to agreement with employees; it was for achieving production over and above normally expected production, production bonus was treated as part and parcel of regular wages. (A.Y. 1985-86)

*CIT v. P.M. Diesel P. Ltd. (2006) 284 ITR 146 / 204 CTR 328 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Businessman's point of view – Genuineness**

Once it is found that there was a nexus between the expenditure incurred by the assessee and his business and genuineness of the expenditure was not disputed, the Assessing Officer could not sit in the arm chair of the businessman to determine as to what amount of the expenses he ought to incur for doing his business.

*CIT v. Padmini Packaging P. Ltd. (2006) 193 Taxation 558 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Sales tax penalty – Infraction of law**

Sales tax penalty paid by the assessee under section 17(3) of the Madhya Pradesh General Sales Tax Act is for infraction of law and cannot be said to be business expenditure and as such not allowable under section 37(1) of the Act.

*Neeta Medicos v. CIT (2006) 194 Taxation 180 (MP)(High Court)*

**S. 37(1) : Business expenditure – Prepaid rent – Telephone – Telex – Allowable**

Prepaid expenditure incurred by the assessee in respect of telex rent, telephone rent, postal franking machine rent and amount paid towards rates and taxes were allowable as a deduction. (A.Y. 1994-95)

*CIT v. Southern Roadways Ltd. (2006) 155 Taxman 493 / 202 CTR 279 / 282 ITR 379 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Legal – Foreign travelling – Merger**

Expenditure incurred during merger of companies. Legal and foreign travelling expenses incurred in connection with the merger is revenue expenditure. (A.Y. 1977-78)

*CIT v. Mahindra & Mahindra Ltd. (2006) 200 CTR 28 / 284 ITR 679 / 150 Taxman 451 (Bom.) (High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Right to reproduce popular film songs**

Payments made for right to reproduce popular film songs – Held, ascertained amount paid at the time of agreement for acquiring copyright of film songs is capital

expenditure while royalty payable thereafter is revenue expenditure. (A.Ys. 1986-87, 1987-88)

*CIT v. M. Subramaniam (2006) 200 CTR 678 / (2005) 272 ITR 525 / 144 Taxman 728 (Mad.) (High Court)*

**S. 37(1) : Business expenditure – Foreign tour expenses – President’s wife**

Foreign tour expenses of President’s wife. Allowable as deduction since the said expenses wholly and exclusively incurred for business of the assessee.

*CIT v. Alfa Lavel (India) Ltd. (2006) 282 ITR 445 / 200 CTR 240 / (2005) 149 Taxman 29 (Bom.) (High Court)*

**S. 37(1) : Business expenditure – Travelling expenses – Each trip**

Expenditure u/r. 6D should not be computed on the basis of total expenditure of each employee for the whole year but should be computed on the basis of expenditure incurred in each trip. (A.Ys. 1983-84, 1984-85)

*CIT v. Express Hotel Pvt. Ltd. (2006) 200 CTR 476 / 281 ITR 160 / 153 Taxman 156 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Expenditure prohibited by law – Chit fund**

Expenditure incurred which is prohibited by law is not allowable under section 37(1) read with its Explanation. Assessee accepting interest for deposits from subscribers and giving free presents to them which is banned as per the definition of money circulation scheme under the provision of Prize Chits and Money Circulation Schemes (Banning) Act, 1978. (A.Ys. 1985-86 to 1989-90)

*CIT v. Amarjeet Kaur (Smt) & Ors (2006) 201 CTR 134 / 283 ITR 71 / (2007) 159 Taxman 178 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Renovation expenditure of leased premises**

Assessee engaged in the business of exhibiting films in leased premises. The assessee incurred certain expenditure for renovation and repair of cinema hall. It also incurred expenditure on account of stamp duty, interest. The expenditure was incurred with an intention to generate more revenue by inviting greater flow of customers to cinema hall without bringing into existence any new asset or an advantage of enduring nature. Expenditure incurred was held to be revenue expenditure. (A.Y. 1976-77)

*CIT v. Laxmi Talkies (2006) 151 Taxman 99 / (2005) 194 CTR 334 / 275 ITR 125 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Capital or revenue – Membership of OTC Exchange**

The assessee incurred expenditure on payment of one time non refundable fee for membership of OTC Exchange of India. The same is allowable as revenue expenditure.

*Neset Holdings (P.) Ltd. v. CIT (Delhi) (2006) 151 Taxman 309 / 200 CTR 7 / 282 ITR 601 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Redemption fine – Central Excise department**

Violation of law not to be taken advantage of by an assessee for claiming deduction under section 37 of the Income-tax Act. Redemption fine paid to Central Excise Department for release of confiscated goods not allowable as business expenditure. (A.Y. 1977-78)

*CIT v. Jayaram Metal Industries (2006) 286 ITR 403 / 204 CTR 447 / (2007) 158 Taxman 493 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Prepaid – Telx rental – Mercantile system of accounting.**

Assessee following mercantile system of accounting, Telex Rent, Telephone Rent, Postal franking machine rent, rates and taxes, prepaid is allowable expenditure. (A.Y. 1994-95)

*CIT v. Southern Roadways Ltd. (2006) 282 ITR 379 / 202 CTR 279 / 155 Taxman 493 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Advertisement – Films – Commercial expediency**

Expenditure of ` 15,12,150/- on film production for advertisement which was not in dispute as being for commercial expediency was allowable as business expenditure.

*CIT v. Interface Communications Ltd. (2006) 192 Taxation 270 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Liability Scientifically determined – Allowable**

Liability which was scientifically and accurately determined. Allowable as deduction under section 37.

*Protos Engineering Co. P. Ltd. v. Dy. CIT (2006) 282 ITR 550 / 203 CTR 445 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Hotel receipt tax – Statutory liability – Challenge before Court**

Assessee was engaged in business of running a chain of five star hotels. During relevant accounting period, though assessee collected Hotel Receipts Tax, it did not pay the tax collected and payable under Hotel Receipt Tax Act but chose to challenge constitutional validity of the said legislation before Supreme Court. Supreme Court stayed operation of the said Act during pendency of writ petition subject to condition that in event of assessee failing in petition, it would be liable to pay irrespective of fact whether or not it had collected the tax from its customers. Assessing Officer rejected assessee's claim for deduction of amount on ground that no legally enforceable liability had arisen since operation of Act itself had been stayed by Apex



Court. The Assessee's contention was upheld by the High Court by allowing the deduction as statutory liability to pay was inbuilt in interim order granted by Apex Court. (A.Y. 1982-83)

*Piem Hotels Ltd. v. CIT (2006) 151 Taxman 265 / 201 CTR 537 / 283 ITR 204 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Warranty – Allowable**

The assessee had set apart different amounts in different assessment year to provide for claim of warranty. The Assessing Officer disallowed the claim of the assessee by holding it to be contingent liability, on appeal the High Court held that the assessee's claim of warranty clause formed part of the sale and as such the same was allowable expenditure.

*CIT v. Sony India P. Ltd. (2006) 194 Taxation 344 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Deposit linked incentive scheme – Retrospective amendment**

Expenditure incurred on deposit linked incentive scheme. Expenditure prohibited by law by explanation to sec. 37(1) w.e.f. 1-4-1962, retrospective amendment not deductible. (A.Ys. 1985-86 to 1989-90)

*CIT v. Amarjeet Kaur (Smt) (2006) 283 ITR 71 / 201 CTR 134 / (2007) 159 Taxman 178 (Karn.)(High Court)*

### **S. 37(1) : Business expenditure — Gifts to dealers – Business need**

Amount spent on distribution of gift articles to dealers by assessee, promotes goodwill and enhances its business interests, and therefore, said expenditure would certainly fall within ambit of expenditure for business consideration and same is allowable. (A.Y. 1993-94)

*CIT v. Avery Cycle Inds. Ltd. (2006) 157 Taxman 382 / 206 CTR 347 / (2008) 298 ITR 393 (P&H)High Court)*

### **S. 37(1) : Business expenditure – Consulting service – No agreement – Allowable**

The Assessing Officer disallowed the claim for deduction of consultancy and service charges paid, as there was no agreement between the assessee and payee for the services provided. On appeal the High Court endorsed the finding of the Tribunal which after going through the correspondence, accounts, payments made and T.D.S. held that payee had performed the work contract. (A.Y. 1996-97)

*CIT v. Galaxy Power Cables Ltd. (2007) 294 ITR 493 / (2006) 195 Taxation 215 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Interest – Paid to creditors – Debtors not charged**

Merely, because the assessee had not charged interest from its debtors it does not mean that interest paid by it to its creditors should be disallowed, especially, when

there is no dispute about the genuineness of the payment made by the assessee and more so, when the Assessing Officer had not established linkage between the interest paid to creditors and debts receivable.

*CIT v. Indo Kopp Ltd. (2006) 94 Taxation 321 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Incentive bonus [S. 36(1)(ii)]**

Incentive bonus, though not deductible under section 36(1)(ii), can be claimed under section 37(1). (A.Y. 1981-82)

*CIT v. Raza Textiles Ltd. (2006) 281 ITR 229 / (2005) 148 Taxman 305 / 199 CTR 694 (All.) (High Court)*

**S. 37(1) : Business expenditure – Seminars – Sales promotion expenses**

Expenditure on seminar/ conference of distributors/ agents for sales promotion, is business expenditure. (A.Y. 1988-89)

*Ravi Marketing (P) Ltd. v. CIT (2006) 280 ITR 519 / (2005) 147 Taxman 299 / 198 CTR 354 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Interest – Dealer in shares – Proportionate**

Tribunal, holding that assessee was a dealer in shares, directed apportionment of dividend income and held that a portion of interest and expenditure was attributable to business income, there was no merit in appeal against its order. (A.Y. 1988-89)

*CIT v. Golden Investments Ltd. (2006) 281 ITR 287 / (2005) 143 Taxman 227 / 193 CTR 47 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Technical Know-how expenses – Non exclusive right**

Assessee-company was manufacturing cigarettes under franchise paid royalty on cigarettes manufactured to that company for acquiring know how, technical assistance and for use of trademark of that company, royalty so paid was allowable as revenue expenditure as right acquired by assessee was not exclusive and was for limited period and payment was dependent upon quantum of items manufactured. (A.Y. 1986-87)

*CIT v. Kanpur Cigarettes (P.) Ltd. (2006) 287 ITR 485 / (2005) 147 Taxman 428 / 198 CTR 414 (All.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Damages**

Liability for damages claimed by a customer from assessee, which was disputed by assessee and had not been discharged by assessee in relevant year, could not be allowed as deduction. (A.Y. 1982-83)

*CIT v. Ashwin Vanaspati Industrial (P.) Ltd. (2006) 283 ITR 439 / 151 Taxman 94 / (2005) 196 CTR 117 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Disputed Liability**

Assessee – liquor contractor, liable to pay ‘issue price’ to Government under liquor license claimed rebate therefrom on the ground that liquor shops had to remain closed for certain period on account of curfew during the relevant year, assessee was entitled to deduction of liability even though assessee had not accepted it and was not contesting the same. (A.Y. 1987-88)

*CIT v. Mohinder Kumar & Party (2006) 284 ITR 250 / 151 Taxman 253 / (2005) 195 CTR 335 (Raj.)(High Court)*

#### **S. 37(1) : Business expenditure – Year in which deductible – Sales Tax**

Additional demand representing sales tax liability and penal interest relating to earlier years would be deductible in year in which demand was raised by an order. (A.Y. 1978-79)

*CIT v. Appollo Textiles Agency (2006) 283 ITR 591 / (2005) 142 Taxman 396 (All.)(High Court)*

#### **S. 37(1) : Business expenditure – Employees’ Welfare expenses – Donation of school bus**

Assessee-company donated bus to an institute where children of company’s employees were receiving education, such expenses being a part of employees’ welfare expenses were allowable.

*CIT v. Rajasthan Spg. & Wvg. Mills Ltd. (2006) 281 ITR 408 / (2005) 147 Taxman 131 / 198 CTR 96 (Raj.)(High Court)*

#### **S. 37(1) : Business expenditure – Legitimate – Necessary**

Once condition laid down in section 37(1) are found satisfied, then it is not proper on part of taxing authorities to probe into question as to whether expenditure was legitimate or necessary. (A.Ys. 1989-90, 1990-91)

*Hemraj Nebhomal Sons v. CIT (2005) 278 ITR 345 / 146 Taxman 345 / 197 CTR 329 (MP)(High Court)*

#### **S. 37(1) : Business expenditure – Burden of proof – Assessee**

Burden is on assessee to prove transactions in respect of which expenditure is claimed; mere fact that payment has been made under contract or agreement is not conclusive that expenditure is wholly and exclusively for the purpose of business.

*CIT v. Premier Breweries Ltd. (2005) 279 ITR 51 / 147 Taxman 340 / 196 CTR 496 (Ker.)(High Court)*

#### **S. 37(1) : Business expenditure – Compensation for retrenchment – Many units**

Tests to determine whether two or more lines of business could be regarded as same or different businesses

*Jayshree Tea & Industries Ltd. v. CIT (2005) 272 ITR 193 / 143 Taxman 143 / 194 CTR 244 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Contingent liabilities – Own your cycle scheme**

Where under a scheme called 'own-your-vehicle' run by assessee supplying motor vehicles, subscribers to scheme were to get vehicle on successful draw and stop paying further installment and unsuccessful subscribers were to get back contribution at the end of scheme whose duration was 40 months, till end of the scheme liability towards unsuccessful member was contingent in nature and, hence, not allowable as deduction. (A.Y. 1988-89)

*Kanakateegala Enterprises v. CIT (2005) 275 ITR 448 / 147 Taxman 293 / 197 CTR 587 (AP)(High Court)*

**S. 37(1) : Business expenditure – Bonus – Festive occasion**

Bonus payment made on festive occasion even if such payment is in excess of 8.33% of salaries cannot be disallowed. (A.Y. 1979-80)

*CIT v. Srikrishna Bottlers (P.) Ltd. (2005) 274 ITR 11 / 144 Taxman 23 / 193 CTR 681 (AP)(High Court)*

**S. 37(1) : Business expenditure – Commission – Related concern**

Payment of commission made by assessee - company to selling agent firms whose partners were related to directors of assessee were hit by section 314 of the Companies Act, 1956 and, hence, such payments were not allowable. (A.Y. 1973-74)

*CIT v. Arkay Wires (P.) Ltd. (2005) 277 ITR 225 / 148 Taxman 383 / 193 CTR 697 (All.)(High Court)*

**S. 37(1) : Business expenditure – Commission – Refund of duty drawback**

Amount paid to commission agent by assessee to get duty drawback from Government, which was 10% of amount of duty drawback received, being not excessive or uncalled for, was allowable as business expenditure. (A.Y. 1986-87)

*Dy. CIT v. Super Tannery (India) Ltd. (2005) 274 ITR 338 (All.)(High Court)*

**S. 37(1) : Business expenditure – Compensation – Termination of agency**

Compensation paid by assessee to its marketing agents on termination of marketing agency agreements was capital expenditure where it was not a case of mere termination of distributorship agreements, but assessee had acquired a large sales organization and a marketing network belonging to distributing agents and entire profit making apparatus of the distributors was taken over by assessee along with well trained manpower. (A.Y. 1985-86)

*TI Diamond Chain Ltd. v. CIT (2005) 274 ITR 59 / (2006) 202 CTR 272 / 151 Taxman 69 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Retrenchment compensation – Winding up of unit**

Where a unit of assessee was being wound up, retrenchment compensation paid to workers of such unit was allowable. (A.Y. 1980-81)

*CIT v. J.K. Cotton Spg. Mills Co. Ltd. (2005) 149 Taxman 23 / (2006) 202 CTR 150 (All.)(High Court)*

**S. 37(1) : Business expenditure – Consultancy fee – Industrial, etc. matters**

Getting advice on industrial, financial and legal matters cannot be said to be not laid out for purpose of business and therefore expenditure incurred on getting advice would be allowable.

*CIT v. South India Sugars Ltd. (2005) 275 ITR 491 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Membership of stock exchange – Development expenses**

Assessee paid a sum of ` 25 lakhs for development purposes for purposes of becoming a member of Calcutta Stock Exchange, no doubt a very enduring benefit accrued to assessee on payment of development charges and that would render such expenditure as a capital one. (A.Y. 1992-93, 1993-94)

*Rajendra Kumar Bachhawat v. CIT (2005) 276 ITR 567 / 197 CTR 489 / (2007) 158 Taxman 54 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Employees' welfare expenses – Transit quarters**

Expenditure incurred by assessee-company on Maintenance of transit quarter at Bombay, for accommodating its employees visiting Bombay from outstation for purposes of business, was allowable. (A.Y. 1986-87)

*Greaves Cotton & Co. Ltd. v. CIT (2005) 279 ITR 42 / 149 Taxman 180 / (2006) 201 CTR 544 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Allowability of excess price payment – Interest**

Interest payable on excess realization of levy on sugar price was allowable on accrual basis. (A.Y. 1978-79)

Interest on excess realization of levy of sugar price not relating to assessment year in question was not allowable; interest on arrears of cane price and commission relating to assessment year in question was allowable. (A.Y. 1978-79)

*CIT v. Swadeshi Mining & Mfg. & Co. Ltd. (2005) 147 Taxman 614 (All.)(High Court)*

**S. 37(1) : Business expenditure – Expenditure against public policy – Doctor – Heroin**

Assessee, a doctor by profession, was found in possession of heroin, a contraband item, and it was seized, in view of Explanation to section 37(1) assessee was not entitled to deduction of value of such seized heroin while computing profit of his business or profession. (A.Y. 1986-87)

*CIT v. T.A. Qureshi (Dr) (2005) 275 ITR 352 / 146 Taxman 251 / 197 CTR 683 (MP)(High Court)*

**S. 37(1) : Business expenditure – Gratuity – Current year's liability**

Liability for payment of gratuity which has accrued during the assessment year in question but has not been paid to employees, being a liability praesenti, is to be allowed as a deduction while computing profits and gains from business of assessee but amount of gratuity which relates to earlier assessment year cannot be so allowed. (A.Y. 1972-73)

*CIT v. Kanpur Textiles Ltd. (2005) 276 ITR 140 / 143 Taxman 274 / 198 CTR 293 (All.)(High Court)*

**S. 37(1) : Business expenditure – Gratuity – Employee of holding company**

Under an agreement a unit of assessee company's holding company was transferred to assessee and agreement provided for continuity of service of workmen of such unit, gratuity paid by assessee to retiring employees for period of service rendered to the transferor-company, was a capital expenditure. (A.Ys. 1988-89, 1989-90)

*Sree Akilandeswari Mills (P.) Ltd. v. Dy. CIT (2005) 274 ITR 1 / 145 Taxman 474 / (2006) 200 CTR 315 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Interest – Payment in future – Sister concern**

Interest paid by assessee on account of moneys due to its sister concern but retained by it and utilized for business purpose, was allowable as business expenditure, even though it was payable in future.

*Shree Annapurna Financing Co. (Pvt.) Ltd. v. CIT (2005) 273 ITR 284 / 146 Taxman 187 / 194 CTR 501 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Motor car expenses – Company – Personal use**

No disallowance of motor car expenses can be made in the hands of company on the ground of personal use. (A.Y. 1982-83)

*CIT v. Dinesh Mills Ltd. (2005) 148 Taxman 76 / 199 CTR 509 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Remuneration – Sanction obtained – Relates back**

Assessee's application for sanction of director's remuneration was pending before Government, sanction of Government for remuneration paid to director, even though obtained subsequent to assessment year, would relate back to date of application and, hence, payment of said remuneration during such year could not be disallowed.

*Mahindra & Mahindra Ltd. v. CIT (2005) 278 ITR 138 / 199 CTR 602 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Renovation**

Assessee, engaged in business of exhibiting films in rented premises, was entitled to deduction of expenditure on account of renovation of theatre, etc., as it would enable the assessee to generate more revenue by inviting great inflow of customers without



bringing into existence any new asset or advantage of enduring nature. (A.Y. 1984-85)

*CIT v. Laxmi Talkies (2005) 275 ITR 125 / 194 CTR 334 / 151 Taxman 99 (Guj.)(High Court)*

### **S. 37(1) : Business expenditure – Repairs – Renovation**

Claim that replacement of parts of textile mill is revenue expenditure is justified; thus expenditure on replacement of cards/ blow room machinery / combing machinery, etc. in assessee mills was to be considered as revenue expenditure; can be considered under 'current repairs' or as an expenditure laid out or expended wholly and exclusively for purpose of business. (A.Y. 1986-87)

*CIT v. Janakiram Mills Ltd. (2005) 275 ITR 403 / 146 Taxman 40 / 196 CTR 551 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Retrenchment compensation – Notice u/s. 25FF of IDA**

Mere serving of notice u/s 25FF of Industrial Disputes Act, 1947 is not sufficient to claim deduction of retrenchment compensation; termination of employment, as a fact, of employees and actual payment to each of worker under head 'retrenchment compensation' is necessary. (A.Ys. 1978-79 to 1981-82)

*CIT v. Doongaji & Co. Distillery (2005) 276 ITR 402 / 146 Taxman 154 / 196 CTR 574 (MP)(High Court)*

### **S. 37(1) : Business expenditure – Retrenchment compensation – Loss making unit**

Assessee in its business wisdom attempted to avoid incurring loss by reducing workforce on one of the units running at loss, for earning profit from other units, compensation paid to such laid-off work force was allowable as deduction.

*Jayashree Tea & Industries Ltd. v. CIT (2005) 272 ITR 193 / 143 Taxman 143 / 194 CTR 244 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Royalty – Based on sales – Allowable**

Assessee engaged in manufacture of pre-recorded cassettes, entered into an agreement with producers of films for obtaining rights to produce film songs, variable royalty payable by him on sales was allowable as revenue expenditure. (A.Ys. 1986-87, 1987-88)

*CIT v. M. Subramaniam (2005) 272 ITR 525 / 144 Taxman 728 / (2006) 200 CTR 678 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Taxes – Building tax – Not allowable**

Building tax paid under the Kerela Building Tax Act is not allowable.

*CIT v. Hotel Shah & Co. (2005) 275 ITR 195 / 146 Taxman 86 / 196 CTR 314 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – VRS payments – CBDT Circular – *Ultra vires***

CBDT circulars directing that *ex-gratia* amount paid by the assessee is for gaining enduring benefit or advantage under Voluntary Retirement Scheme (VRS) is *ultra vires* the scope of section 119(2).

*Madura Coats v. Dy. CIT (2005) 273 ITR 32 / 145 Taxman 226 / 195 CTR 138 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – ESI payment – Sales Tax**

Assessee's factory remained closed in 1968-69 and as such it had not provided in its books for ESI liability, as assessee was following mercantile system of accounting, merely because the assessee had been disputing liability and it was finally settled during accounting period relevant to the assessment year 1976-77, it could not be said that the liability had accrued when final order had been passed; it could not be allowed in the assessment year 1976-77. (A.Ys. 1976-77 to 1979-80)

Additional sales tax liability for earlier years created in assessment year in question for first time because of demand raised by Sales Tax Authority, was allowable even though assessee had been following mercantile system of accounting. (A.Ys. 1976-77 to 1979-80)

*CIT v. Ganga Glass Works (P.) Ltd. (2005) 276 ITR 394 / 144 Taxman 496 (All.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Excise duty**

Liability of excise duty, even if not paid to department is allowable, where assessee is following mercantile system of accounting. (A.Ys. 1978-79, 1979-80)

*CIT v. Krishi Disc. (P.) Ltd. (2005) 277 ITR 113 / 145 Taxman 485 (All.)(High Court)*

**S.37(1) : Business expenditure – Year in which deductible – Interest**

Assessee had realized excess levy sugar price, only that much amount of interest which accrued during the Previous Year relevant to the assessment year in question on such excess collection of sugar price, was to be allowed as deduction. (A.Y. 1981-82)

*CIT v. Swadeshi Mining Mfg. Co. Ltd. (2005) 146 Taxman 619 (All.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Statutory liability**

Assessee follows mercantile system of accounting, statutory liability is allowable as deduction the moment it accrues and not when it is paid. (A.Y. 1980-81)

*CIT v. Rampur Distilleries & Chemicals Co. Ltd. (2005) 277 ITR 416 / (2006) 154 Taxman 274 (All.)(High Court)*

**S. 37(1) : Business expenditure – Year in which deductible – Warranty expenses**

Provision for future warranty expense was not a contingent liability and same was allowable under section 37(1) where warranty clause was part of sale document and imposed a liability upon assessee to discharge its obligations under that clause for period of warranty. (A.Y. 2000-01)

*CIT v. Vinitec Corpn. (P) Ltd. (2005) 278 ITR 337 / 146 Taxman 313 / 196 CTR 369 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Pre-commencement expenses – Not revenue**

Expenses incurred before commencement of business cannot be allowed as revenue under section 37 (1). (A.Y. 1977-78)

*CIT v. Mohan Steel Ltd. (2005) 273 ITR 479 / (2004) 191 CTR 279 (All.)(High Court)*

**S. 37(1) : Business expenditure – Maintenance of garden – Not allowable**

Maintenance of garden has hardly anything to do with business or profit from business and hence expenditure thereon is not allowable. (A.Y. 1971-72)

*CIT v. Jaipur Udyog Ltd. (2005) 272 ITR 349 / (2004) 140 Taxman 703 / 190 CTR 511 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Retirement compensation – Other business continued**

Retirement compensation paid to workmen would be admissible as business expenditure when there was a closure of one type of business of assessee and accounts were common for all businesses.

*CIT v. MGF India Ltd. (2005) 272 ITR 191 / (2004) 187 CTR 511 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Statutory contributions – Development fund**

Contributions made by assessee mills to Bhilwara Export Development Fund was allowable as business expenditure. (A.Y. 1987-88)

*Addl CIT v. Rajasthan Spinning & Weaving Mills Ltd. (2005) 274 ITR 463 / (2004) 137 Taxman 367 / 186 CTR 117 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – “wholly and exclusively” – Donations for public cause**

Any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on of the assessee's business or which results in benefit to the assessee's business has to be regarded as an allowable deduction under section 37(1), Whether such donations are voluntary or at the instance of the authorities are immaterial. Concept of “wholly and exclusively” is not that nobody else is to be benefited. (A.Y. 1987-88)

*Addl. CIT v. Rajasthan Spinning & Weaving Mills Ltd. (2005) 274 ITR 463 / (2004) 137 Taxman 367 / 186 CTR 117 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – No business carried on during relevant year – Allowable**

Where no business was carried on by assessee during relevant year as its sole selling agency had been terminated, deduction of expenses claimed by it could not be disallowed. (A.Y. 1975-76)

*J.K. Traders Ltd. v. CIT (2004) 271 ITR 69 / (2005) 143 Taxman 222 (All.)(High Court)*

**S. 37(1) : Business expenditure – Commercial expediency – Contractual obligation – Sharing of marketing expenses**

Payments made having regard to commercial expediency, need not necessarily have their origin in contractual obligations. Sharing of market expenses held to be allowable. (A.Y. 1992-93)

*CIT v. Associated Electrical Agencies (2004) 266 ITR 63 / 135 Taxman 12 / 187 CTR 640 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Club expenses – Remote place**

Contribution made by assessee company to club where its employees were members and assessee was situated in a remote place, was allowable. (A.Y. 1989-90)

*Assam Brook Ltd v. CIT (2004) 267 ITR 121 / 139 Taxman 229 / 189 CTR 347 (Cal.)(High Court).*

**S. 37(1) : Business expenditure – Commission – Sole selling agent**

Commission paid to sole selling agent held to be allowable. (A.Ys. 1969-70, 1970-71)

*CIT v. Ishwari Khetan Sugar Mills (P) Ltd. (2004) 191 CTR 184 / (2005) 272 ITR 224 (All.)(High Court)*

**S. 37(1) : Business expenditure – Commission – Rate of commission**

Commission paid to brokers for sale of space held to be allowable. It is for the assessee to decide what rate of commission he should pay. Disallowances could not be made on surmises, conjectures and suspicion.

*CIT v. Gopal Das Estate Housing (P) Ltd. (2004) 267 ITR 149 / 139 Taxman 182 / 187 CTR 1 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Contribution – Construction of building – Training institute**

Contribution made for construction of training institute of State Government, held to be revenue in nature. Merely because Money was used for construction of building, expenditure cannot be said to be capital in nature. (A.Y. 1990-91)

*CIT v. Rajasthan Spinning & Weaving Mills Ltd. (2004) 137 Taxman 249 / 189 CTR 539 / 272 ITR 487 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Landscaping expenses – Capital in nature**

Landscaping expenses incurred for development of land for making it fit for business are in nature of capital expenses and are not allowable as revenue expenses. (A.Y. 1988-89)

*CIT v. Udaipur Distillery Co Ltd. (No. 1) (2004) 268 ITR 305 / 134 Taxman 398 / 186 CTR 1 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Directors – Payment to wives of directors**

Salaries paid to two ladies who were looking after sales and liaisons officers held to be allowable as business expenditure. Because they happen to be directors' wives the expenditure cannot be disallowed.

*CIT v. S. J. Knitting & Finishing Mills (P) Ltd. (2004) 266 ITR 582 / 136 Taxman 13 / 190 CTR 269 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Donations – Chief Minister's Drought Relief Fund**

Payment to the Chief Minister's Drought Relief Fund is an allowable deduction. (A.Y. 1976-77)

*CIT v. Kattabomman Transport Corporation Ltd. (2004) 268 ITR 507 / 192 CTR 168 / (2005) 142 Taxman 375 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Exchange fluctuation loss – Capital expenditure**

Exchange fluctuation loss *qua* repayment of foreign currency loan is a capital expenditure. (A.Ys. 1976-77, 1977-78)

*Atlas Cycle Industries Ltd v. CIT (2004) 270 ITR 108 / 142 Taxman 102 / 192 CTR 354 (P&H)(High Court)*

*Editorial: Refer CIT v. Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC), the expenditure held as revenue expenditure.*

**S. 37(1) : Business expenditure – Illegal payment – Bribe – Not allowable**

Bribe paid to earn amount cannot be allowed as business expenditure. (A.Ys. 1994-95, 1995-96 and 1996-97)

*Indraprastha Agencies v. CIT (2004) 266 ITR 320 / 137 Taxman 283 / 187 CTR 632 (Jharkhand)(High Court)*

**S. 37(1) : Business expenditure – Interest – Cost of construction project**

Interest paid by assessee builder on deposits obtained for financing part of cost of project, being part of cost of construction of project would not be allowable as revenue expenditure. (A.Y. 1984-85)

*CIT v. S.I. Property Development (P) Ltd. (2004) 266 ITR 41 / 135 Taxman 235 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Interest delayed payment of provident fund – Allowable**

Interest on delayed payment of provident fund is an allowable deduction. (A.Ys. 1969-70, 1970-71)

*CIT v. Iswari Khetan Sugar Mills (P) Ltd. (2004) 191 CTR 184 / (2005) 272 ITR 224 (All.)(High Court)*

**S. 37(1) : Business expenditure – Lease expenses – Closure of one division**

Lease expenses in respect of assessee's R&D division were allowable even where one division had been closed. (A.Y. 1995-96)

*CIT v. Udaipur Distillery Co. Ltd. (2004) 137 Taxman 351 / 186 CTR 34 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Quarry lease rent – Capital expenditure**

Quarry lease rent paid by assessee for acquiring right to excavate granite on lease for ten years was capital expenditure. (A.Y. 1991-92)

*Enterprising Enterprises v. Dy. CIT (2004) 268 ITR 95 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Leave encashment – Provision**

Provision for payment to employees towards accumulated privilege leave is allowable as business expenditure.

*CIT v. National Cereals Products (2004) 136 Taxman 445 / 192 CTR 192 (Delhi)(High Court)*

*Editorial: Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC), followed.*

**S. 37(1) : Business expenditure – Legal expenses – Amalgamation**

Legal expenses incurred by transferor company in respect of its amalgamation with another company are revenue nature. (A.Y. 1983-84)

*CIT v. Akme Electronics & Control (P) Ltd. (2004) 267 ITR 396 / 137 Taxman 263 / 187 CTR 606 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Repairs and maintenance – Replacement of transformer**

Expenditure incurred by assessee on purchase of new transformer for replacement of old transformer of existing plant and machinery for efficient and smooth running of business was allowable as revenue expenditure. (A.Y. 1992-93)

*CIT v. Udaipur Distillery Co. Ltd. (No. 3) (2004) 268 ITR 451 / 134 Taxman / 186 CTR 39 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Repair and maintenance – Replacement of draw frames**

Expenditure on replacement of draw frames by assessee engaged in manufacture of yarn is revenue expenditure. (A.Y. 1987-88)

*CIT v. Sri Karthikeya Spinning and Weaving Mills Ltd. (2004) 265 ITR 285 / 136 Taxman 433 / 186 CTR 754 (Mad.)(High Court)*



**S. 37(1) : Business expenditure – Repair and maintenance – Replacement of ring frames**

Expenditure on replacement of ring frames by assessee mill was allowable. (A.Y. 1990-91)

*CIT v. Gitanjali Mills Ltd. (2004) 265 ITR 681 / 136 Taxman 21 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Route permit – Capital expenditure**

Amount paid towards unexpired portion of the route permit is not a revenue expenditure. (A.Ys. 1991-92 to 1993-94)

*CIT v. Indian Transformers Ltd. (2004) 270 ITR 259 / 192 CTR 216 / (2005) 142 Taxman 429 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Sales expenses – Provision**

Provision for after sales services as per warranty, based on ascertained liability is deductible. (A.Ys. 1991-92 to 1993-94)

*CIT v. Indian Transformers Ltd. (2004) 270 ITR 259 / 192 CTR 216 / 142 Taxman 429 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Losses on revaluation of shares – Capital loss**

Loss on revaluation of shares held by assessee public sector underrating which it had no right to disinvest, could not be allowed either as business expenditure or as capital loss. (A.Y. 1983-84)

*Kerala Small Industries Development Corporation Ltd. v. CIT (2004) 270 ITR 452 / 140 Taxman 509 / 190 CTR 281 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Share issue expenses – Public issue – Capital in nature**

Expenses incurred by a company for public issue of equity shares in order to raise funds for increased working capital requirement are capital expenditure. [Followed *Punjab State Industrial Development Corporation Ltd. v. CIT (1997) 225 ITR 792 (SC)* and *Broke Bond India Ltd v. CIT (1997) 225 ITR 798 (SC)*]. (A.Y. 1987-88)

*B.S.L. Ltd v. CIT (2004) 267 ITR 754 / 140 Taxman 401 / 191 CTR 121 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Bonus issue expenses – Capital in nature**

Expenditure incurred in connection with issue of bonus shares is not deductible as revenue expenditure. (A.Y. 1982-83)

*CIT v. Autometer Ltd. (2004) 136 Taxman 562 / 187 CTR 547 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Debenture redemption – Excess over receipt**

Amount undertaken to be paid over and above the amount received on issue of debentures at the time of redemption, is revenue expenditure. (A.Y. 1992-93)

*CIT v. Shree Rajasthan Syntex Ltd. (2004) 269 ITR 461 / 134 Taxman 577 / 186 CTR 59 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Contribution to export promotion Fund – Allowable**

Contribution by assessee mills to export Promotion Fund was an allowable deduction. (A.Y. 1988-89)

*Addl. CIT v. Rajasthan Spinning & Weaving Mills (2004) 190 CTR 448 (Raj.)(High Court).*

**S. 37(1) : Business expenditure – Contribution towards provident fund maintained by Govt – Government employees**

Provision made for contribution towards the provident fund maintained by the Government for Govt. employees sent on deputation to the assessee corporation is deductible as business expenditure. (A.Y. 1976-77)

*CIT v. Kattabomman Transport Corporation Ltd. (2004) 268 ITR 507 / 192 CTR 168 / 142 Taxman 375 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Contribution to insurance fund – Third party claim**

Contribution made by assessee to insurance fund for meeting third party liability that may arise out of use of motor vehicle, is a contingent liability and is not deductible. (A.Ys. 1984-85, 1985-86)

*CIT v. Tamil Nadu State Transport Corporation Ltd. (2004) 139 Taxman 330 / 187 CTR 671 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Profit transferred to reserve fund – Not allowable**

Portion of net profits transferred by assessee co-operative society to a reserve fund as per requirement of Co-operative Societies Act, to be applied in assessee's business only could not be allowed as deduction. (A.Y. 1989-90)

*CIT v. Jodhpur Co-operative Marketing Society (2004) 140 Taxman 541 / 189 CTR 576 / (2005) 275 ITR 372 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Transportation expenses – Not related to capital asset**

Transportation expenses incurred in connection with business of assessee amount to revenue expenditure, unless it can be shown that transportation charges are incurred for procuring an asset of enduring nature. (A.Y. 1988-89)

*CIT v. Udaipur Distillery Co. Ltd. (No. 1) (2004) 268 ITR 305 / 134 Taxman 398 / 186 CTR 1 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Travelling expenditure of wife of managing director**

In order to claim deduction in respect of foreign travel expenses incurred in relation to wife of Managing Director of assessee-company, it is for assessee to place and prove that said expenses were incurred wholly and exclusively for purpose of business of assessee. On the facts, as the amount involved was small the finding of tribunal was confirmed. (A.Y. 1982-83)

*CIT v. Autometer Ltd. (2004) 136 Taxman 562 / 187 CTR 547 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Welfare payments – Drinking water – Improvement of school**

Amount spent by assessee – refinery for bringing drinking water as also for establishment or improving the school for the residents of the locality in which the refinery business was situated, was business expenditure especially as assessee's undertaking was to some extent a polluting industry. (A.Y. 1992-93)

*CIT v. Madras Refineries Ltd. (2004) 266 ITR 170 / 138 Taxman 261 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Debenture premium – Year in which deductible**

Proportionate liability to pay debenture premium can be allowed as deduction in the period during which money borrowed through issue of debentures is to be utilized, that is to say, up to date of redemption. (A.Y. 1992-93)

*CIT v. Shree Rajasthan Syntex Ltd. (2004) 269 ITR 461 / 134 Taxman 577 / 186 CTR 59 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Electricity charges – Disputed liability**

Disputed dues demanded by Electricity Board, expenditure can be claimed in the year in which liability is ascertained. (A.Y. 1976-77)

*CIT v. Kishore Chand Shivcharan Lal (2004) 266 ITR 37 / 138 Taxman 256 (All.)(High Court)*

**S. 37(1) : Business expenditure – Penalty – Fine – Compounding fee**

Compounding fee paid by assessee for putting up unauthorized construction is not deductible. (A.Y. 1984-85)

*CIT v. Mamta Enterprises (2004) 266 ITR 356 / 135 Taxman 393 / 187 CTR 414 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Construction of temple – Welfare expenses**

Expenditure on construction of temple allowable as deduction.

*CIT v. Renusagar Power Co. Ltd. (2004) 141 Taxman 357 (All.)(High Court)*

**S. 37(1) : Business expenditure – Medical treatment of managing director – Justification**

Assessee has not produced on record to establish that expenditure incurred on medical treatment of its managing director was for purpose business, such expenditure was not allowable. (A.Y. 1995-96)

*Udaipur Mineral Development Syndicate (P) Ltd. v. ACIT (2004) 139 Taxman 171 / 189 CTR 343 / 269 ITR 279 (Raj.)(High Court)*

### **S. 37(1) : Business expenditure – Education of relatives – Employees – Welfare expenses**

Expenses incurred by assessee company on education of relative of director of company who was not in employee of company, was not allowable. (A.Y. 1993-94)

Expenditure incurred on education of children of directors of assessee-company even where they joined company after end of relevant accounting year, was not allowable. (A.Y. 1993-94)

*Enkay (India) Rubber Co. (P) Ltd. v. CIT (2003) 132 Taxman 35 / 263 ITR 521 / 185 CTR 527 (Delhi)(High Court)*

### **S. 37(1) : Business expenditure – Six broad principles – Not exhaustive**

(i) Expenditure should not be the nature described in sections 30 to 36, (ii) It should have been incurred in the accounting year. (iii) It should be in respect of a business which is carried by assessee and the profits of which are to be computed and assessed. (iv) It should not be the personal expenses of the assessee. (v) It should have been laid out or expended wholly and exclusively for the purpose of business (vi) It should not be in the nature of capital expenditure.

These principles are not exhaustive and the application of these principles may vary from case to case and will depend on the facts and circumstances of each case. (A.Y. 1990-91)

*Ram Bahadur Thakur Ltd. v. CIT (2003) 128 Taxman 599 / 261 ITR 390 / 181 CTR 193 (FB) (Ker.)(High Court)*

### **S. 37(1) : Business expenditure – Business point of view – Commercial expediency**

Whenever a claim is made by assessee before ITO for allowing an expenditure as a legitimate business expenditure, ITO must try to put himself in shoes of a prudent businessman and try to look at matter from that point of view. A businessman may make an expenditure which he is under no legal obligation to make, but if he does so as a measure of commercial expediency, it must be allowed under section 37 as a legitimate business expenditure. (A.Y. 1978-79)

*Abbas Wazir (P.) Ltd. v. CIT (2003) 133 Taxman 702 / 185 CTR 152 / (2004) 265 ITR 77 (All.)(High Court)*

### **S. 37(1) : Business expenditure – Loss on undisclosed income [S. 69A]**

If undisclosed income or unexplained income under section 69A is treated as income from other sources, loss on such income will not be deductible under section 37(1).

*Bimal Kumar Damani v. CIT (2003) 128 Taxman 723 / 261 ITR 635 / 181 CTR 494 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Advertisement expenses – Statutory compliance**

Expenditure incurred by assessee on advertisements in newspaper in compliance with statutory provisions under the Companies Act, 1956 for inviting fixed deposits from public is allowable as revenue expenditure. (A.Y. 1984-85)

*CIT v. Investment Trust of India Ltd. (2003) 127 Taxman 168 / 264 ITR 506 / 182 CTR 70 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Advertisement expenses – Customer failed to pay**

Claim of assessee-advertising agency for deduction of payment made to newspapers on behalf of customers on ground that customers had failed to pay it to assessee was not allowable in absence of evidence of non-payment by customers. (A.Y. 1992-93)

*K.P.B. Advertising (P.) Ltd. v. CIT (2003) 129 Taxman 388 / 261 ITR 760 / 181 CTR 492 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Bonus – Buy industrial peace**

Bonus paid in excess of amount legally due under Payment of Bonus Act to buy industrial peace, is allowable as business expenditure.

*CIT v. Hind Lamps Ltd. (2003) 130 Taxman 586 / 185 CTR 342 (All.)(High Court)*

**S. 37(1) : Business expenditure – Car expenses – Vouchers – Books not rejected**

When books of account was not rejected no disallowance of expenditure in diesel and oil account was justified, when expenditure was supported by vouchers. (A.Y. 1990-91)

*CIT v. Girnar Construction Co. (2003) 129 Taxman 691 / 261 ITR 463 / 181 CTR 248 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Compensation – Retiring partners**

Compensation paid to retiring partners in lieu of their forgoing right, interest and title in assets and liabilities in firm's name and other rights in firm, was not allowable as business expenditure.

*CIT v. Shree Laxmi Textiles & Allied Corpn. (2003) 128 Taxman 176 / 183 CTR 44 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Consultancy charges – Partners relatives of Directors**

Simply because some of partners of firm are close relatives of directors of consultancy company, consultancy charges paid to such company by firm cannot be disallowed.

*Shree Construction & Investment Co. v. ACIT (2003) 262 ITR 73 / 184 CTR 78 / 133 Taxman 573 (Gau.)(High Court)*

**S. 37(1) : Business expenditure – Construction expenses – Capital expenditure**

Expenditure incurred by assessee-hotel, following courts order, on reconstruction of swimming pool and boundary wall which had been demolished by District Authorities, was capital expenditure. (A.Y. 1988-89)

*CIT v. Hotel Lake End (2003) 182 CTR 478 / (2004) 267 ITR 62 / 139 Taxman 112 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Development expenses – Present liability**

Estimated liability of development expenses is not contingent liability, but liability in praesenti and, an allowable deduction.

*CIT v. Development Trust (P.) Ltd. (2003) 131 Taxman 824 (All.)(High Court)*

**S. 37(1) : Business expenditure – Development expenses – Only possessory right**

Where assessee had only possessory right over land, claim for deduction of alleged development charges on such land was not allowable.

*Shree Construction & Investment Co, v. ACIT (2003) 262 ITR 73 / 184 CTR 78 / 133 Taxman 573 (Gau.)(High Court)*

**S. 37(1) : Business expenditure – Employees – Salary**

Where Tribunal held that *ex-gratia* payment was made for the purpose of the business, it was right in allowing assessee's claim. (A.Y. 1985-86)

*CIT v. Rajasthan State Mineral Development Corporation (2003) 261 ITR 479 / 131 Taxman 502 / 182 CTR 440 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Employees – Welfare expenses**

Entire amount of expenditure on voluntary retirement scheme is allowable and it is not to be spread over life of such scheme. (A.Ys. 1994-95, 1996-97)

*Bhor Industries Ltd. v. ACIT (2003) 183 CTR 292 / (2004) 136 Taxman 632 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Employees – Welfare expenses**

Voluntary payments made by an employer for general welfare and benefit of employees on grounds of commercial expediency are revenue expenditure, deductible under section 37(1). (A.Y. 1978-79)

*CIT v. B.G. Shirke & Co. (2003) 127 Taxman 245 / 264 ITR 83 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Exchange fluctuation – Losses due**

Difference in foreign exchange rate is capital expenditure. (A.Y. 1976-77)



*Jay Engineering Works Ltd. v. CIT (2003) 132 Taxman 69 / 183 CTR 326 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Feasibility report – Expenses**

Expenditure incurred by assessee for preparation of feasibility and technical report of proposed mini cement plant, which did not come into existence, to supply cement to existing plant would be revenue expenditure.

*Dy. CIT v. Assam Asbestos Ltd. (2003) 263 ITR 357 / 132 Taxman 808 / 185 CTR 223 (Gauhati)(High Court)*

**S. 37(1) : Business expenditure – Gratuity – Not customary or statutory**

Where there was no practice of payment of gratuity to employees nor was there any statute under which gratuity was payable, disallowance of gratuity paid by assessee to employee was justified.

*Rajasthan Central Stores Pvt. Ltd. v. CIT (2003) 260 ITR 195 / (2002) 176 CTR 616 / 124 Taxman 485 / (2004) 143 Taxman 753 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Gratuity – Approved gratuity fund**

Provision for gratuity without material to show that such provision was made towards an approved gratuity fund, was not allowable. (A.Ys. 1974-75 to 1976-77)

*Hindustan Salts Ltd. v. CIT (2003) 127 Taxman 379 / 185 CTR 542 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Interest – Expansion – Modernisation**

Interest paid to financial institutions on borrowings for modernisation and expansion of existing business is allowable as revenue expenditure. (A.Y. 1987-88)

*CIT v. Orissa Cement Ltd. (2003) 260 ITR 626 / 179 CTR 354 / (2004) 135 Taxman 64 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Interest – Borrowed for paying income tax – Not allowable**

Interest paid on amount borrowed for purpose of paying income-tax, is not allowable.

*Packart (P.) Ltd. v. CIT (2003) 131 Taxman 239 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Interest – Payment by AOP – Loan by members**

Interest and service charges paid by assessee-AOP to bank on loan taken by its members jointly to purchase assets of a dissolved firm are allowable. (A.Y. 1995-96)

*CIT v. Mangalore Ganesh Beedi Works (2003) 128 Taxman 351 / 264 ITR 142 / 182 CTR 23 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – Interest – Purchase tax arrears**

Interest paid on sugar cane purchase tax arrears under provisions of U.P. Act is allowable as business expenditure. (A.Y. 1975-76)

*Dhampur Sugar Mills Ltd. v. CIT (2003) 133 Taxman 656 (All.)(High Court)*

**S. 37(1) : Business expenditure – Lease rent – Trucks – Option to purchase**

Where assessee had taken trucks on lease, assessee's claim for deduction of lease rent as revenue expenditure could not be disallowed even though at end of period of lease assessee had option to purchase trucks. (A.Ys. 1991-92, 1993-94)

*Rajshree Roadways v. UOI (2003) 129 Taxman 663 / 263 ITR 206 / 181 CTR 467 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Lease rent – Plantation research**

Expenses incurred by assessee-company which had taken forests on lease for regeneration and plantation and research related thereto, were in nature of revenue expenditure. (A.Y. 1987-88)

*CIT v. Arunachal Pradesh Forest Corporation Ltd. (2003) 264 ITR 279 / (2004) 186 CTR 78 / 135 Taxman 263 (Gau.)(High Court)*

**S. 37(1) : Business expenditure – Legal expenses – Amalgamation**

Legal expenses in respect of amalgamation of sister concern with assessee were allowable as revenue expenditure.

*Dinesh Mills Ltd. v. CIT (2003) 130 Taxman 260 / (2004) 268 ITR 502 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Legal expenses – Report for obtaining loan**

Expenses incurred on payment to consultant/solicitors and as fee for scrutiny and preparing a report in connection with obtaining a loan, are allowable. (A.Y. 1984-85)

*Patel Filters Ltd. v. CIT (2003) 132 Taxman 116 / 264 ITR 21 / 183 CTR 608 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Legal expenses – Allegation of fraud – Personal in nature – Not allowable**

Expenditure incurred by members of assessee-AOP on defending allegations of fraud, being personal in nature, could not be allowed as deduction. (A.Y. 1995-96)

*CIT v. Mangalore Ganesh Beedi Works (2003) 128 Taxman 351 / 264 ITR 142 / 182 CTR 23 (Karn.)(High Court)*

**S. 37(1) : Business expenditure – LIC agent – Expenses**

Where commission earned by LIC agent is in excess of ` 60,000, circular restricting rebate on such commission to 50 per cent of ` 60,000 is not applicable. (A.Y. 1989-90)

*Madhu Maheshwari (Smt) v. CIT (2003) 131 Taxman 457 / 267 ITR 176 / 183 CTR 429 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Marketing – Sharing of expenses**

Amount shared by assessee-selling agent of manufacturer of IMFL, with manufacturing company as marketing overheads for running its business was allowable under section 37(1). (A.Y. 1985-86)

*CIT v. Udaipur Distillery Co. Ltd. (2003) 132 Taxman 267 / 183 CTR 614 / (2004) 266 ITR 667 (Raj.) (High Court)*

### **S. 37(1) : Business expenditure – Mining – Liability to fill up pits**

Assessee-company is engaged in open cast mining of soapstone crude, liability to fill up pits arose as soon as assessee dug up pits in view of mercantile system of accounting followed by assessee. (A.Ys. 1990-91, 1991-92)

*Udaipur Mineral Development Syndicate (P.) Ltd. v. Dy. CIT (2003) 129 Taxman 728 / 261 ITR 706 / 181 CTR 251 (Raj.) (High Court)*

### **S. 37(1) : Business expenditure – Penalty – Penal interest**

Penal interest payable by assessee-bank under sections 24(4)(a) and 24(4)(b) of the Banking Regulation Act, 1949 cannot be treated as deductible expenditure for purpose of section 37(1). (A.Y. 1987-88)

*CIT v. Syndicate Bank (2003) 127 Taxman 287 / 261 ITR 528 / 180 CTR 1 (Karn.) (High Court)*

### **S. 37(1) : Business expenditure – Penalty – Penal interest**

Question of allowability of redemption fine payable under Excise Act has to be decided in light of decision in case of *Swadeshi Cotton Mills Co. Ltd. v. CIT (1998) 150 (SC) 616 / (1998) 233 ITR 199 (SC)* and with reference to Excise Rules. (A.Y. 1989-90)

*CIT v. P. Soman (2003) 185 CTR 126 / (2004) 265 ITR 197 / 134 Taxman 127 (Ker.) (High Court)*

### **S. 37(1) : Business expenditure – Penal interest to RBI – Shortfall of daily balance**

Payment of penal interest made by a bank to RBI relating to first default for not maintaining prescribed minimum of average daily balance during any fortnight, is not to be treated as penalty for infraction of law; however, if payment is by way of penal interest for second default, it is to be treated as penalty for infraction of law. (A.Ys. 1988-89, 1990-91)

*CIT v. Catholic Syrian Bank Ltd. (2003) 130 Taxman 447 / 183 CTR 1 / (2004) 265 ITR 117 (Ker.) (High Court)*

### **S. 37(1) : Business expenditure – Pension – Interest – Gratuity – PF**

Expenditure on pension, interest on pension fund, interest paid on gratuity fund and amount pertaining to provident fund which had not been paid nor contributed in the fund would not be allowable. Amount received by assessee from Government as contribution for amount of pension payable to ex-employees of Government absorbed by assessee, could not be allowed as deduction where it was neither paid to employees nor actually deposited in fund. (A.Ys. 1974-75 to 1976-77)

*Hindustan Salts Ltd. v. CIT (2003) 127 Taxman 379 / 185 CTR 542 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Expenditure incurred by textile mill on over-head cleaner and replacement of speed frames and humidification plant is revenue expenditure while expenditure on new blow-room machinery is capital expenditure. (A.Y. 1986-87)

*CIT v. Sakthi Textiles Ltd. (2003) 262 ITR 375 / (2004) 187 CTR 560 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Modernisation expenditure relating to replacement of parts and repairs is allowable. (A.Y. 1988-89)

*CIT v. Madurai District Co-operative Spinning Mills Ltd. (2003) 131 Taxman 513 / (2004) 186 CTR 402 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Allowability of expenditure incurred on replacement of manually operated crane by an electrically operated crane as revenue expenditure would depend on finding as to whether crane was an integral part in process of manufacture of end-product. (A.Y. 1993-94)

*Co-operative Sugars Ltd. v. CIT (2003) 128 Taxman 717 / 262 ITR 252 / 182 CTR 187 (Ker.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Expenditure on maintenance of computer is revenue expenditure.

*CIT v. K & Co. (2003) 181 CTR 378 (Delhi)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Maintenance expenses incurred by the assessee on flat owned by it and provided to its employees were not allowable.

*CIT v. Emirates Commercial Bank Ltd. (2003) 262 ITR 55 / (2004) 134 Taxman 682 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Repairs – Maintenance**

Amount spent by spinning mill on installing splicer and stripping roller on existing machines was allowable as revenue expenditure. (A.Y. 1990-91)

*Tuticorin Spinning Mills Ltd. v. CIT (2003) 261 ITR 291 / (2004) 139 Taxman 274 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Seminar – Allowable**

Expenses on seminar for business promotion are definitely business expenditure. (A.Y. 1990-91)

*CIT v. Chemcrown (India) Ltd. (2003) 262 ITR 177 / 182 CTR 133 / 133 Taxman 579 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Rights Share Issue**

Expenses in connection with issue of right shares are capital in nature. (A.Y. 1987-88)  
*CIT v. Sri Ramakrishna Steel Industries Ltd. (2003) 130 Taxman 58 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Premium on redemption of debenture**

Premium payable on redemption of debenture is allowable on *pro rata* basis.  
*CIT v. Tube Investments of (India) Ltd. (2003) 261 ITR 753 / (2004) 141 Taxman 66 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Subsidiary – Subsidy**

Amount paid by SBI to its subsidiaries as subsidy towards opening of new branches was allowable. (A.Ys. 1979-80 and 1980-81)  
*CIT v. State Bank of India (2003) 129 Taxman 683 / 261 ITR 82 / 181 CTR 59 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Taxes – Sur tax**

Sur Tax is not deductible in computing income under the head "profits and gains of business or profession" (followed the supreme court in *Smith Kline & French (India) Ltd. v. CIT (1996) 219 ITR 581 (SC.)*) (A.Ys. 1979-80, 1980-81)  
*Ethnor Ltd. v. CIT (2003) 126 Taxman 408 / 260 ITR 401 / 181 CTR 550 (Bom.)(High Court)*

### **S. 37(1) : Business expenditure – Valuation of closing stock – Customs and excise duty component**

Assessee is not entitled to a revenue deduction in respect of customs and excise duty component of the value of closing stock. (A.Ys. 1985-86, 1987-88)  
*Southern Asbestos Cement Ltd. v. CIT (2003) 259 ITR 631 / 179 CTR 516 / (2004) 134 Taxman 89 (Mad.)(High Court)*

### **S. 37(1) : Business expenditure – Tea company – Maintenance of nursery**

Where assessee, a manufacturer of tea, incurred expenditure on maintenance of nursery within plantation area, for replacement of plants which became dead or useless, the expenditure incurred by assessee was allowable as revenue expenditure.  
*CIT v. Tasati Tea Ltd. (2003) 129 Taxman 647 / 262 ITR 388 / 183 CTR 64 (Cal.)(High Court)*

### **S. 37(1) : Business expenditure – Travelling – Director and wife**

Expenditure claimed by assessee-company on foreign travel of a director and his wife cannot be allowed/disallowed in a mechanical manner; he has to consider such claim meticulously keeping in view legal principles, after affording reasonable opportunity to assessee.  
(A.Y. 1990-91)

*Ram Bahadur Thakur Ltd. v. CIT (2003) 128 Taxman 599 / 261 ITR 390 / 181 CTR 193 (Ker.) (FB)(High Court)*

**S. 37(1) : Business expenditure – Travelling – Managing director**

Foreign tour expenses of assessee's managing director to discuss a project were allowable, though assessee did not own project but was only to manage it. (A.Y. 1984-85)

*Patel Filters Ltd. v. CIT (2003) 132 Taxman 116 / 264 ITR 21 / 183 CTR 608 (Guj.)(High Court)*

**S. 37(1) : Business expenditure – Travelling – Managing director and wife – Gratuities payment by company**

Gratuitous payment by company, like payment of expenses on bypass surgery in USA and travelling thereof to managing director and his wife cannot be allowed. (A.Y. 1987-88)

*CIT v. Sambandam Spg. Mills (P.) Ltd. (2003) 263 ITR 115 / 185 CTR 666 / 133 Taxman 667 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Trust – Contribution**

Where assessee-company claimed deduction of a contribution made to a trust of which assessee was settlor and all its dealers were beneficiaries but trustees were given unfettered discretion in matter of application of funds to incur or not to incur expenditure for objects of trust, expenditure incurred by assessee was not allowable as business expenditure. (A.Y. 1985-86)

*CIT v. Dynavision Ltd. (2003) 128 Taxman 406 / 182 CTR 85 / (2004) 265 ITR 289 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Provision for damages – Breach of obligation**

Deduction under section 37(1) of the provision created towards breach of certain export obligation was not allowable where it did not relate to current year. (A.Y. 1990-91)

*Tuticorin Spinning Mills Ltd. v. CIT (2003) 261 ITR 291 / (2004) 139 Taxman 274 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Debentures redemption premium – Proportionate**

Where assessee-company had issued zero-interest unsecured redeemable convertible debentures of ₹ 100 each redeemable after 10 years at a premium of 100 per cent, 10 per cent of the total premium payable by assessee after 10 years was deductible in assessment year in question. (A.Ys. 1995-96, 1996-97)

*CIT v. S.M. Holding & Finance (P.) Ltd. (2003) 264 ITR 370 / 180 CTR 312 / (2004) 134 Taxman 328 (Bom.)(High Court)*



**S. 37(1) : Business expenditure – Interest – Purchase cost**

Interest for the broken period should not be considered as part of the purchase price but should be allowed as revenue expenditure in year of purchase of securities. (A.Y. 1978-79)

*CIT v. Citibank N.A. (2003) 130 Taxman 334 / 264 ITR 18 / 184 CTR 228 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Local cess – No liability to pay**

Where there was no liability for payment of local cess and surcharge on local cess under the Tamil Nadu Panchayat Act so as to entitle assessee to claim deduction of these amounts as a liability. (A.Y. 1983-84)

*Chettinad Cement Corpn. Ltd. v. CIT (2003) 180 CTR 470 / (2004) 135 Taxman 99 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Postal – Telephone**

Actual payments made in pursuance of demand raised by postal, telephone and telegraph Departments were allowable as deduction. (A.Ys. 1984-85, 1985-86)

*CIT v. Southern Roadways Ltd. (2003) 133 Taxman 350 / 181 CTR 340 / (2004) 265 ITR 404 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Sales tax demand raised in relevant year – Allowable**

Demand for sales tax, though pertaining to earlier year but raised in relevant assessment year is allowable. (A.Y. 1983-84)

*CIT v. Associated Stone Industries (Kotah) Ltd. (2003) 129 Taxman 668 / 182 CTR 539 / (2004) 266 ITR 414 (Raj.)(High Court)*

**S. 37(1) : Business expenditure – Vehicle tax – RTO's demand – Dispute**

In case of assessee following mercantile system of accounting, vehicle tax demanded by the Regional Transport Office is an admissible deduction in assessment year in which it is demanded though assessee had disputed same. (A.Y. 1981-82)

*CIT v. K.R. Ganesh (2003) 259 ITR 174 / 179 CTR 42 (Mad.)(High Court)*

**S. 37(1) : Business expenditure – Voluntary retirement payments – Allowable**

Expenses relating to Voluntary Retirement Scheme are allowable in full and are not to be spread over by taking into consideration the years for which the scheme is to be implemented. (A.Y. 1996-97)

*CIT v. Bhor Industries Ltd. (2003) 128 Taxman 626 / 264 ITR 180 / 180 CTR 508 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Tea plantation – Nursery – Replantation – Capital or revenue**

Maintenance of nursery for purpose of raising bushes to be utilized for replantation of dead or useless bushes within plantation area does not come under rule 8(2). This cannot be extended to a stage prior to actual replacement or replantation, revenue expenditure.

*CIT v. Tasati Tea Ltd. (2003) 129 Taxman 647 / 262 ITR 388 / 183 CTR 64 (Cal.)(High Court)*

**S. 37(1) : Business expenditure – Film production – Upfront payment [Rule 9B]**

From a reading of sub-rule (4) and sub-rule (5) of rule 9B, intention of CBDT is very clear, viz., that upfront payment cannot be allowed as deduction in entirety and that in cases where distributor makes such up-front payment/advance, expenditure needs to be amortized / spread over in order to match with receipts on credit side of profit and loss account. (A.Y. 1979-80)

*CIT v. Prakash Pictures (2003) 127 Taxman 654 / 260 ITR 456 / 182 CTR 44 (Bom.)(High Court)*

**S. 37(1) : Business expenditure – Corporate guarantee – Subsidiary – One time settlement**

Giving corporate guarantee was not only one of the objects of the assessee company but the same was given for its subsidiary company and it was in the interest of the assessee company and hence, the commercially expedient decision, hence, one time settlement with bank was allowable as business loss. (A. Y. 2004-05).

*ACIT v. W. S. Industries (India) Ltd. (2011) 128 ITD 98 / 9 ITR 596 / (2010) 40 DTR 106 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Keyman Insurance – Hospital – Consultancy fees – Software maintenance**

Keyman Insurance premium paid by the company on the lives of chief cardiac surgeon, chairman, and managing director of company was qualified for deduction under section 37(1). Consultancy fees paid for maintenance of software were to be allowed as revenue expenditure. (A.Y. 2005-06).

*Escorts Heart Institute & Research Centre Ltd. v. ACIT (2011) 128 ITD 108 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Rectification and improvement of power line – Revenue expenditure**

Expenditure incurred by assessee on rectification and improvement of power line was a revenue expenditure, even if it was spent out of subsidy amount received from Government. (A. Y. 1987-88).

*Dy. CIT v. A. P. State Electricity Board (2011) 130 ITD 1 / 138 TTJ 425 / 55 DTR 52 (TM)(Hyd.)(Trib.)*

**S. 37(1) : Business expenditure – Company – Disallowance – Vehicles and telephone expenses of directors**

There is no personal usage by the company, hence, no disallowance can be made on account of personal use of the vehicles /telephone by the directors / officials of the company.

(A. Y. 2004-05).

*Ramkishin Textiles P. Ltd. v. ITO (2011) 9 ITR 321 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Royalty for use of logo**

Payment made by the assessee for non exclusive user of logo based on turnover and not lump sum payment is allowable as revenue expenditure. (A. Y. 2006-07).

*ACIT v. Shriram Transport Finance Co. Ltd. (2011) 9 ITR 543 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Service charges to Government – Directive**

Service charges paid to Government as per directives of State Government allowable as deduction. (A. Y. 1998-99).

*Dy. CIT v. Travancore Titanium Products Ltd. (2011) 130 ITD 161 / 138 TTJ 276 / 54 DTR 308 (TM)(Cochin)(Trib.)*

**S. 37(1) : Business expenditure – Repair of lease building – Foreign travelling – Chief Editor and staff**

The assessee company was engaged in the business of printing and publication of various periodicals. The assessee company took on lease a building and got an empty derelict hall repaired, which was converted into a recreation room and was used by the assessee's staff. The assessee company claimed a deduction of the same and the same was allowed under section 37(1) of the Act on the ground that the assessee had not acquired a capital asset but put up a construction of building only for the purpose of business. The foreign travel expenses claimed by the assessee also for the travelling of the Chief Editor, Assistant Editor and other staff was also allowed as a business expenditure as the same was necessitated to grow business of the assessee's magazines, periodicals, etc. (A. Y. 2005-06).

*ACIT v. M. M. Publications Ltd. (2011) 43 SOT 59 (Cochin)(Trib.)*

**S. 37(1) : Business expenditure – Licence fee – Parent company**

Licence fee paid by the assessee-company to its parent company under technical assistance agreement is an allowable business expenditure. (A. Y. 2005-06)

*Dy. CIT v. Nestle India Ltd. (2011) 7 ITR 758 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Upgradation of computer software – Depreciation [S. 32]**

Assessee engaged in the business of development of computer software having followed the method of accounting whereby it is treating the expenditure on development of computer software as part of work in progress during the period of

development and capitalization of the same when the software attains technically feasibility and is ready for sale, the expenditure incurred on development, upgradation of software products has to be treated as capital expenditure. However, depreciation would be allowable thereon in the year of capitalization. (A. Y. 2002-03). *3i Infotech Ltd. v. Dy. CIT (2011) 51 DTR 385 / 136 TTJ 641 / 129 ITD 422 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Litigation expenses – Criminal proceedings – Actor**

The assessee an actor incurred expenditure in defending himself against criminal proceedings which arose out of a shooting incident. The Tribunal held that the criminal proceedings were filed against the individual. This has nothing to do with the assessee's profession. The expenditure was purely of a personal nature and not allowable. (A.Ys. 2003-04 and 2004-05)

*Dy. CIT v. Salman Khan (2011) 8 ITR 150 / 52 DTR 137 / 137 TTJ 15 / 130 ITD 81 (Mum.)(Trib.)*

**S. 37(1): Business expenditure – Capital or revenue – Entrance fees to a club – Corporate membership**

Entrance fees paid towards corporate membership of the club is an expenditure incurred wholly and exclusively for the purpose of business and not towards capital account as it only facilitates smooth and efficient running of a business enterprise and does not add to the profit earning apparatus of a business enterprises and accordingly CIT(A) was justified in deleting the disallowances of entrances fee made by the Assessing Officer. (A. Y. 2004-05)

*Dy. CIT v. Bank of America Securities (India) (P) Ltd. (2011) 136 TTJ 441 / 128 ITD 386 / 50 DTR 521 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Secret commission – Directors – Explanation 1**

Secret commission paid by the assessee to directors of the company giving construction contract to the assessee cannot be allowed as expenditure in view of Explanation 1 to section 37(1). (A.Ys. 1983-84 & 1984-85).

*J. K. Panthaki & Co. v. ITO (2011) 57 DTR 233 / 139 TTJ 337 / 48 SOT 179 (URO)(Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue expenditure – Entrance fee to a club – Membership of its director**

The company had taken membership in the name of the director of the assessee company and none of the executives of the company appeared to have been made members of the club. The expenditure incurred for club membership was disallowed on the ground that the assessee failed to produce any evidence and prove that the benefit of membership was utilized wholly or exclusively for the purpose of business. (A.Y. 2004-05).

**S. 37(1) : Business expenditure – Payment of compensation – Vacant possession**

Payment made by the assessee to close family members for getting vacant and peaceful possession of premises was held capital expenditure as there was no dispute going on between the parties to show that the payment was necessary for taking peaceful possession. (A. Y. 2003-04).

*ITO v. Pritam Juice (2010) 124 ITD 237 / 37 DTR 398 / 5 ITR 664 / (2011) 138 TTJ 294 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Convertible debentures**

Expenditure in connection with issue of 4 per cent fully convertible debentures which were later converted into equity shares of the assessee company was of revenue nature. (A.Y. 2005-06).

*Havells India Ltd. v. Addl. CIT (2011) 59 DTR 118 / 140 TTJ 283 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Pre-operative expenses – Expansion of existing business**

Where there is complete interlacing and intermixing of the funds of the assessee, in all its units, besides there being a common management assessee is justified in claiming pre-operative expenses incurred for new project as deductible as revenue expenditure. (A.Y. 2005-06).

*Havells India Ltd. v. Addl. CIT (2011) 59 DTR 118 / 140 TTJ 283 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Royalty to foreign associated enterprise – Allowable**

Royalty paid to foreign associated enterprise under foreign technology collaboration agreement is allowable as revenue expenditure. (A.Y. 2005-06).

*Cabot India Ltd. v. Dy. CIT (2011) 46 SOT 402 / 61 DTR 408 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Non-compete fees – Deferred revenue expenditure**

Expenditure incurred by the assessee to ward off the competition for a period of seven years during which any company could have set up its products and reputation in the market, expenditure cannot be allowed as revenue expenditure. As non-compete fee is held to be capital expenditure, claim for treating it as revenue expenditure entitled to deduction for seven years is also not allowable. (A.Y. 2001-02).

*Sharp Business Systems (India) Ltd. v. Dy. CIT (2011) 59 DTR 385 / 133 ITD 275 / 140 TTJ 607 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Expenditure on software**

Expenses incurred by the assessee for obtaining licence to use software are to be treated as revenue expenditure. (A.Ys. 2003-04, 2004-05 & 2006-07)

*ST Microelectronics (P) Ltd. v. CIT (2011) 61 DTR 1 / (2012) 145 TTJ 553 / 15 ITR 410 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Expenditure to procure raw material – Allowable**

Expenditure incurred for the purpose of procuring the raw material in thermal power station is allowable expenditure. (A. Ys. 1999-2000, 2004-05)

*ACIT v. Chettinad Cement Corporation Ltd. (2011) 140 TTJ 100 / 133 ITD 317 / 58 DTR 225 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Broken period interest – Security held as current assets**

Broken period interest has to be allowed if the securities were held as current assets. (A. Y. 1996-97)

*Jt. CIT v. Dena Bank (2011) 139 TTJ 81 (UO) / 9 ITR 327 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Software usage**

Software usage and product development expenses incurred by the assessee company engaged in internet related services are allowable as revenue expenditure to the extent the same are routine and periodic expenses not resulting in creation of new assets. (A.Y. 2005-06).

*Dy. CIT v. Rediff Com India Ltd. (2011) 61 DTR 426 / 47 SOT 310 / 141 TTJ 679 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign tour expenses – Doctor partner**

Foreign travel expenses of doctor partner for obtaining the latest information on the technological advancements, concerning dental implants are allowable as business expenditure. (A.Y 2004-05)

*Dy. CIT v. B2C Implants (2011) 141 TTJ 638 / 130 ITD 184 / 52 DTR 192 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign education of director – Son of shareholder**

Where the assessee company was not able to substantiate that sending of the director for training abroad was for the benefit of the business of the assessee, the expenses incurred for foreign training were not allowable in the hands of assessee company. (A. Y. 2004-05)

*Vishesh Entertainment Ltd. v. ACIT (2011) 60 DTR 284 / 12 ITR 337 / 131 ITD 187 / 141 TTJ 340 (Mum.)(Trib.)*



**S. 37(1) : Business expenditure – Loss – Irrecoverable – Advance to farmers**

Assessee advanced amounts to farmers as a measure to ensure continuous supply of raw materials, which was essential in nature of business of assessee, when raw materials were not received on such advances, it would be a loss in revenue field. Following the ratio of Apex court in *CIT v Woodward Governor India (P) Ltd. (2009) 312 ITR 254 (SC)*, wherein the court held that the expression 'any expenditure' used in section 37 cover both 'expression incurred' as well as even if 'loss' amount had gone out of pocket of assessee, therefore the advances written off was allowable as business expenditure. (A. Ys. 2005-06 to 2007-08)

*Sterling Agro Processing (P) Ltd. v. ACIT (2011) 48 SOT 80 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Alleged bogus purchases – Cash purchase**

Assessee contended that cash received by it against the cheque payments of ` 30,80,730/- from two parties was utilized to purchase cloth from the grey market which was found recorded in the inventory of closing stock, the Tribunal has accepted that the assessee did make cash purchases of ` 30,80,730/- and the said purchases cannot be treated as bogus purchases. (A.Ys. 2001-02 to 2004-05).

*Free India Assurance Services Ltd. v. Dy. CIT (2011) 62 DTR 349 / 132 ITD 60 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Renovation of office premises – Leasehold premises – Depreciation [S. 32(1)]**

The assessee has incurred huge expenditure on purchase of ply wood, furniture, etc. for making wooden partitions, cabins, cubicles, desks, etc. in its leasehold office premises, the Tribunal held that the expenditure was capital in nature, however, the assessee will be entitled to depreciation in terms of explanation 1 to section 32. (A.Ys. 2001-02 to 2004-05).

*Free India Assurance Services Ltd. v. Dy. CIT (2011) 62 DTR 349 / 132 ITD 60 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Compensation – Drivers – Labour court**

As per the settlement arrived in the labour Court giving an undertaking to provide employment to drivers whose employment was terminated by the hire operators which were rendering services to the assessee, compensation paid by assessee to said drivers for giving up their rights in full and settlement of their claims is allowable as deduction, as the assessee got apparent advantage in the form of reduced car hire charges as a result of impugned payment. (A.Y. 2003-04).

*ITO v. Taj Services (P) Ltd. (2011) 64 DTR 105 / (2012) 143 TTJ 70 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Interest – Loans from its holding company**

Assessee obtained loan from its holding company in year for its business of manufacturing. The business was discontinued in year 1998-99 and there was no activity relating to said business in year under consideration. Since loan borrowed by assessee from its holding company was not utilized for business carried on by it in

year under consideration, Interest on same could not be allowed as deduction. (A.Ys. 2002-03 and 2006-07).

*Vidhyavihar Containers Ltd. v. Dy. CIT (2011) 133 ITD 363 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Lease premises – Renovation expenses – Depreciation [S. 32]**

Expenditure incurred towards renovation of premises taken on lease will be capital in nature and assessee would be entitled to depreciation on it. (A. Y. 2006-07).

*ACIT v. Efftronics Systems (P) Ltd. (2011) 133 ITD 460 / (2012) 143 TTJ 484 / 65 DTR 322 (Visakha.)(Trib.)*

**S. 37(1) : Business expenditure – Provision for doubtful debts – Notional loss on valuation of shares – Provision for premium on debenture – Business loss [S. 28(1)]**

Provision for doubtful debt was not allowable as bad debt, and the same can not be allowed as business loss as the said amount was not crystallized during the year. Notional loss on revaluation of shares was not allowable. Option was given to convert debentures into equity shares after six months on payment of premium. Assessee company made 'provision for premium debenture' and claimed loss. Since the event of redemption had not yet occurred, there was no crystallization of liability and loss could not be allowed. (A.Y. 2000-01).

*Mahindra Intertrade Ltd. v. Dy. CIT (2011) 133 ITD 597 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Promotion of new products – Brands – Year of allowability**

During relevant assessment year assessee incurred expenses on promotion of new products and brands which had been treated as deferred revenue expenditure in books and amortized for a period of six years, however, while computing the taxable income entire expenditure was claimed as revenue expenditure. Tribunal held that revenue expenditure is allowable in year in which liability had crystallized and accounting treatment given by assessee is not relevant for purpose of determining whether or not expenditure was allowable as deduction. (A.Ys. 2003-04 and 2004-05).

*ACIT v. Kopran Ltd. (2011) 48 SOT 225 / 137 TTJ 35 (UO)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Bank services – Issue of shares to increase capital**

Amount paid by assessee company for bank services rendered in connection with issue to increase capital base of company, could not be allowed as revenue expenditure under section 37(1). (A.Y. 2006-07).

*Medreich Ltd. v. Dy. CIT (2011) 48 SOT 579 / 57 DTR 456 / 8 ITR 639 / 140 TTJ 7 (UO)(Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Deduction – Prospecting, etc. – Minerals**

Assessee which is engaged in prospecting and exploration of minerals, also provided consultancy services in same field. Expenditure incurred towards prospecting and exploring activities were capitalized and amortization of same was claimed under section 35E. Expenditure incurred to earn consultancy service were claimed as business expenditure under section 37(1). Assessing Officer held that all the expenditure were to treated as eligible for amortization under section 35E. The Tribunal held that only such expenses which are incurred wholly and exclusively on any operations relating to prospecting as envisaged under provisions of section 35E(2) read with section 35(E)(5)(a), and rest unconnected expenses which may have been incurred by an assessee are eligible deduction in normal course of computation of business income. (A.Y. 2005-06).

*De Beers India (P) Ltd. v. Dy. CIT (2011) 48 SOT 506 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Notional loss on revaluation of shares – Not allowable**

Notional loss on revaluation of shares was held to be not allowable as there was, *prima-facie*, no transfer of shares. (A.Y. 2001-02)

*Mahindra Intertrade Ltd. v. Dy. CIT (2011) 133 ITD 597 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Construction on Government land**

Expenditure on construction of approach road to a plant which was not operational during the year constituted capital expenditure. (A.Y. 1995-96)

*Aditya Birla Nuvo Ltd. v. ACIT (2011) 141 TTJ 702 / 131 ITD 511 / 61 DTR 343 / (2012) 13 ITR 128 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign tour expenses – Latest information**

Foreign tour expenses for obtaining latest information concerning dental implants are allowable as business expenditure. (A.Y. 2004-05)

*Dy. CIT v. B2C Implants (2011) 141 TTJ 638 / 130 ITD 184 / 52 DTR 192 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign income – Foreign Taxes – DTAA – Credit for State taxes u/s. 91 in addition to Federal Taxes – India-USA [S. 40a(ii)]**

The claim of the assessee that it is entitled to tax credit under sections 90 & 91 in respect of the foreign taxes as well as a deduction under section 37(1) is not justified and results in a double unintended benefit.

The argument that if deduction under section 37(1) is not granted, credit for foreign taxes should be granted under section 90 even in respect of income eligible for deduction under section 80HHE is not acceptable because this would be contrary to the language of the DTAA and result in an assessee getting refund of US taxes if he had no tax liability in India.

The argument that sections 90 & 91 are confined to USA Federal taxes and not to USA State taxes and that therefore the bar in section 40(a)(ii) does not apply to USA State taxes is not acceptable because any payment of Income-tax is an application of income as held in *Inder Singh Gill* 47 ITR 284. Further, the scheme of sections 90 & 91 does not discriminate between Federal taxes and State taxes and though the India-USA DTAA confines the credit only to Federal taxes, the assessee will be entitled to relief under section 91 in respect of both taxes as that will be more beneficial to the assessee vis-à-vis tax credit under DTAA. Consequently, the bar against deduction in section 40(a)(ii) will apply to USA State taxes as well though the assessee will be entitled to credit in respect of USA State taxes. (A.Y. 2000-01)

*Dy. CIT v. Tata Sons Ltd.* (2011) 43 SOT 27 / 135 TTJ 1 / 9 ITR 154 / (2010) 48 DTR 321 (Mum.)(Trib.)

### **S. 37(1) : Business expenditure – Penalty – Fine – National Stock Exchange**

Though every member of National Stock Exchange is obliged to abide by its rules and regulations, fine imposed on the assessee a member of NSE for violation of regulations of NSE cannot be disallowed. (A.Ys. 2002-03, 2003-04)

*Gold Crest Capital Markets Ltd. v. ITO* (2010) 36 DTR 177 / 130 TTJ 446 / 2 ITR 355 / 130 TTJ 446 (Mum.)(Trib.)

### **S. 37(1) : Business expenditure – Refundable deposit with Stock Exchange**

Refundable deposit with stock exchange is not a deductible expenditure. (A.Y. 1995-96)

*Dy. CIT v. Khandwala Finance Ltd.* (2010) 122 ITD 111 / (2008) 16 DTR 359 / 22 SOT 1 / (2009) 121 TTJ 66 (Mum.)

### **S. 37(1) : Business expenditure – Improving performance – Utility vehicles**

Amount paid to foreign company, for improving performance of its existing utility vehicles, and for purpose of development of concept of clay model for its utility vehicles, since the expenditure was incurred for improving performance of existing product, same was allowable under section 37(1). (A.Y. 1997-98)

*Mahindra & Mahindra Ltd. v. Jt. CIT* (2010) 36 SOT 348 (Mum.)(Trib.)

### **S. 37(1) : Business expenditure – Exempted – Income – Agricultural operation [S. 10]**

The expenses relating to agricultural operations could not be allowed as expenditures in computing the business incomes for the simple reason that agricultural income did not form part of the total income under the Act. (A.Y. 1994-95, 1996-97)

*Kancor Flavours & Extracts Ltd. v. Dy. CIT* (2010) 123 ITD 97 / (2009) 29 DTR 147 / 125 TTJ 422 (Cochin)(Trib.)

### **S. 37(1) : Business expenditure – Contribution as per direction of State Government – Commercial expediency – Donation to certain funds – Charitable institutions**

Payment made by assessee on the direction of the State Government to suppliers who supplied fodder to various cattle camps in the wake of drought conditions, for maintaining smooth relations with the Government, satisfies the test of commercial expediency and therefore allowable under section 37. (A.Y. 2001-02)

*Surat Electricity Co. Ltd. v. ACIT (2010) 35 DTR 272 / 128 TTJ 696 / 125 ITD 277 / 5 ITR 280 (Ahd.)(Trib.)*

### **S. 37(1) : Business expenditure – Offence – Penalty – SEBI**

Any payment made for the purpose of compliance with the provisions of law would be incidental to carrying on the business. Payments made by the assessee under the 2002 scheme cannot for the purpose of disallowance under the Explanation be treated as penalty or akin to penalty under section 37 of the Income-tax Act, 1961. (A.Ys. 2001-02, 2003-04)

*Kaira Can Co. Ltd. v. Dy. CIT (2010) 2 ITR 20 / 127 TTJ 514 / (2009) 32 DTR 485 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Advertisement – Sales promotion – Brand lab building**

By incurring expenditure on advertisement and sales promotion, assessee had not acquired any fixed capital asset, but these expenditure were incurred for earning better profits and for facilitating assessee's operation of providing cellular mobile services hence, allowable as business expenditure. (A.Ys. 2003-04 to 2005-06)

*ITO v. Spice Communications Ltd. (2010) 35 SOT 78 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Abandoned project – Exploration of oil**

Assessee engaged in the business of exploration and production of oil is entitled to deduction of expenditure pertaining to abandoned project. (A.Y. 2002-03)

*ONGC Videsh Ltd. v. Dy. CIT (2010) 33 DTR 22 / 37 SOT 97 / 127 TTJ 497 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Refundable deposits with stock exchange – Non deductible**

Refundable deposits placed with stock exchange cannot be allowed as deduction under section 37. (A.Y. 1995-96)

*Dy. CIT v. Khandwala Finance Ltd. (2010) 122 ITD 111 / (2008) 16 DTR 359 / 22 SOT 1 / (2009) 121 TTJ 66 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Membership Card of Stock Exchange [S. 2(14)]**

Membership card of stock exchange is a capital asset and therefore any expenditure incurred to acquire said card is capital in nature. (A.Y. 1995-96)

*Dy. CIT v. Khandwala Finance Ltd. (2010) 122 ITD 111 / (2008) 16 DTR 359 / 22 SOT 1 / (2009) 121 TTJ 66 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Repairs – Removal of defect**

Expenditure incurred for restoring roof to original condition is not a capital expenditure. Expenditure on removal of defect in design of car, relates to stock-in-trade of assessee is not a capital expenditure. (A.Y. 2003-04)

*Honda Siel Cars India Ltd. v. ACIT (2010) 1 ITR 497 / 38 SOT 471 / (2008) 9 DTR 14 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Revenue or capital – Technical know-how**

In collaboration agreement assessee obtained only right to use technical know-how. Payment of lump sum fees and royalty is allowable as revenue expenditure. (A.Y. 2004-05)

*Honda Siel Cars India Ltd. v. ACIT (2010) 1 ITR 497 / 38 SOT 471 / (2008) 9 DTR 14 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Business loss – Capital loss [S. 28(1)]**

Advance payment made for purchase of machinery written off as business loss. Hon'ble Tribunal allowed the Appeal by relying on the Hon'ble High Court of Rajasthan in the case of *CIT v. Anjani Kumar Co. Ltd. (2003) 259 ITR 114 (Raj.)*. (A.Y. 2005-06)

*Pik Pen Pvt. Ltd. v. ITO ITA No. 6847/Mum/2008 dated 28-1-2010 (Mum.)(Trib.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

**S. 37(1) : Business expenditure – Advertisement – Sales promotion**

Assessee company was in business of providing mobile telephone services since 1997 under brand name "Spice" – Expenditure incurred on advertisement and sales promotion was held to be revenue expenditure as the assessee had not acquired any fixed capital asset, but these expenditures were incurred for earning better profits and for facilitating assessee's operation of providing mobile services. Expenses incurred for up gradation of software also held to be revenue in nature. In the event of composite payments made by assessee for supply of technical know-how services and for use of Intellectual Property Rights for setting up cellular telecom network or business, and also for operating and carrying on efficiently and profitably its business of providing telecom services – 25% expenditure capital in nature and 75% revenue in nature. (A.Ys. 2003-04 to 2005-06)

*ITO v. Spice Communications Ltd. (2010) 35 SOT 78 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Renovation – Capital or revenue**

Expenditure incurred on construction and renovation for a new shop in the leased premises was held to be allowable as revenue expenditure.

*Viswams v. ACIT (2010) 186 Taxman 25 (Mag.)(Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Performance incentive – Carriage and equipment charges**



Amounts paid to speed up the operations in ports were allowable as business expenditure. (A.Y. 2004-05)

*ACIT v. Kin Ship Services (India) (P) Ltd. (2010) 2 ITR 29 / 128 TTJ 108 / (2009) 31 SOT 375 (Cochin)(Trib.)*

### **S. 37(1) : Business expenditure – Suspension of business activities**

SEBI had barred the assessee from doing business till further orders and thus not doing business activity was on account of forced circumstances and not voluntarily and therefore assessee was entitled to deduction for business expenditure, interest etc. (A.Ys. 2003-04, 2004-05)

*KNP Securities (P) Ltd. v. ACIT (2010) 33 DTR 210 / 127 TTJ 338 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Deferred revenue – Year of allowance**

Whether where an assessee writes off certain expenditure in its books of account over a period of say five years, it must be allowed in its entirety in year in which it was incurred, if it is revenue expenditure, and is wholly exclusively incurred for purpose of business. (A.Ys. 1996-97, 1997-98)

*ACIT v. Core Healthcare Ltd. (2010) 37 SOT 383 (Ahd.)(Trib.)*

### **S. 37(1) : Business expenditure – Foreign tour – Not employees**

Disallowance of foreign tour expenses in respect of certain persons cannot be made simply for the reason that such persons are not the employees of the assessee in a case wherein assessee establishes business connection with such persons.

*Dy. CIT v. Gems Paradise, ITA No. 700/JP/2009, Bench 'A', dt. 18th December, 2009 / Tax World, Volume – XLIII – Part 3 – March, 2010 – Page 80 (86).(Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Administrative charges for obtaining loan – Revenue**

Administrative charges paid for obtaining loan are allowable as revenue expenditure in the year of payment, notwithstanding the fact that the assessee has treated this expenditure as deferred revenue expenditure in its books of account and benefit of loan would accrue over a long period. (A.Ys. 1997-98 to 1999-2000)

*ACIT v. Tata Housing Development Co. Ltd. (2010) 48 DTR 452 / (2011) 139 TTJ 8 / 45 SOT 9 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Contingent expenditure – Fulfilment of conditions**

A liability dependant on fulfilment of a condition cannot be allowed as deduction unless the dependent condition is fulfilled during the relevant previous year.

On the facts of the case a mandatory provision for expenses, like for overhauling and hot section inspection charges for engine of aircraft in accordance with the provision of Aircraft Act, 1934 and Aircraft Rules, 1937 after the aircraft flew the required number of hours, was made and claimed as deduction under section 37(1) but the Assessing Officer disallowed on the ground that it was contingent. On the fact and

circumstances, the Hon'ble bench held that the said expenses were allowable as the liability was in praesenti though it had to be discharged at a future date. It was further held that even if the date on which it was to be discharged was not certain that would not have any bearing. (A.Y. 2001-02)

*Asia Aviation Ltd. v. ACIT (2010) 126 ITD 406 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Sales promotion – Foreign tours and conference expenses**

Expenses incurred by the assessee for the foreign trip of Doctors have to be allowed under section 37(1) as it was directly connected with the business activity of the assessee. (A.Y. 2004-05)

*Life Sight Surgicals (P) Ltd. v. Dy. CIT (2010) 133 TTJ 27 (UO)(Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Licence to operate Telecommunication services [S. 35AB]**

Payment made by the assessee for obtaining licence for providing telecommunication services though for a period of 10 years, the licence fee was payable on yearly basis with right to licensor to terminate the licence and the licence is non-exclusive, non-transferable and it is open to the Government of India to grant similar licences to other persons as well and therefore, the benefit of licence fee paid during the year endures only till the end of relevant financial year and does not extend to the subsequent year and hence, the licence fee is not in the nature of capital expenditure falling under section 35ABB, but the same is revenue in nature allowable under section 37(1). (A.Ys. 2002-03 to 2004-05)

*Bharati Airtel Ltd. v. ACIT (2010) 48 DTR 416 / 41 SOT 175 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Purchase of anti-virus software**

Expenditure incurred on purchase of anti-virus software is revenue expenditure.

*Chambal Fertilisers & Chemicals Ltd. v. ACIT (2010) Tax World. December Vol. XLIV. Part*

6.

*P. 195 (Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Payment to trust for a school – Company premises**

Payment made to a trust for opening a school in the assessee company's premises will be allowable as deduction since the amount was paid with the object of providing education to the children of employees of assessee company within the company premises itself and was necessitated for business purpose.

*Chambal Fertilisers & Chemicals Ltd. v. ACIT (2010) Tax World. December Vol. XLIV. Part*

6.

*P. 195 (Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Non-compete fees**

Non-compete fee paid by the assessee on acquisition of pharmaceutical business which constituted a new line of products for the assessee is not allowable as a revenue expenditure in one go. The outgo is to be treated as a deferred revenue expenditure and is allowable over a period of four years *pro rata* starting from the relevant assessment year. (A.Y. 2003-04)

*Orchid Chemicals & Pharmaceuticals Ltd. v. ACIT (2010) 48 DTR 441 / (2011) 131 ITD 385 / 137 TTJ 373 / 7 ITR 601 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – Fine – Settlement of dispute – Infringement of patent – Explanation**

Payment made by the assessee on settlement of dispute with a company of USA being neither a fine or a penalty for a proved offence nor an amount of compensation of an offence but is merely a sum in settlement of an action charging the assessee was denied and not proved the same cannot be rendered to be inadmissible deduction while determining the assessee's income from business. (A.Y. 2005-06)

*Desiccant Rotors International (P) Ltd. v. Dy. CIT (2010) 47 DTR 193 / 134 TTJ 582 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Retrenchment compensation – Suspension of manufacturing**

Assessee having suspended only its manufacturing activity and not closed down its trading activity, it is not a case of closure of business and therefore, expenses incurred by it towards severance cost of employees is allowable as revenue expenditure. (A.Y. 2003-04)

*KJS India (P) Ltd. v. Dy. CIT (2010) 134 TTJ 697 / 46 DTR 369 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Market research expenses – Existing product**

Assessee a manufacturer of a soft drink having conducted a market research by using the services of a professional agency to determine its brand performance with price, gauge the consumer demand at the current price or a lower price and to know whether its brand can adopt a different pricing between the base flavours and the new flavours, the expenses were incurred for exploring the circumstances as to how assessee can carry on its business more potentially and not exploring the market of a new product and therefore, same is allowable as revenue expenditure. (A.Y. 2003-04)

*KJS India (P) Ltd. v. Dy. CIT (2010) 134 TTJ 697 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Termination of agreement**

Assessee entered into an agreement for purchase of property for infrastructural facilities for business, assessee terminated the agreement and paid compensation, payment to be treated as capital in nature and not allowable as revenue expenditure. (A.Y. 2003-04)

*Sap Labs India Pvt. Ltd. v. ACIT (2010) 6 ITR 81 / (2011) 44 SOT 156 (Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Expenditure onsite development**

Expenses incurred onsite development of portal is revenue expenditure. (A.Y. 2001-02)

*ACIT v. Jupiter Corporate Services Ltd. (2010) 6 ITR 264 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travelling – No business in that country**

Merely because there was no business activity of assessee in foreign countries during assessment year in question, it could not be said that the claim of assessee for foreign travel expenses had to be disallowed. (A.Y. 2004-05)

*Scindia Investments (P) Ltd. v. ACIT (2010) 40 SOT 239 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Closure of manufacturing business – Severance pay**

Payment of severance pay on closure of manufacturing business and expenditure incurred on market research is allowable as business expenditure. (A.Y. 2003-04)

*KJS India (P) Ltd. v. Dy. CIT (2010) 134 TTJ 697 / 46 DTR 369 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Payment to ex-employees – Settlement dues – PF**

Amount paid by assessee to an ex-employee at the time of leaving the service as per settlement is allowable as deduction but not the amount which has already been claimed as deduction on account of provident fund in the year to which it relates. (A.Ys. 2004-05, 2005-06)

*Tulip Hotels (P) Ltd. v. Dy. CIT (2010) 132 TTJ 633 / 37 SOT 77 / 43 DTR 449 (TM)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – No defects in account – Rate of GP maintained**

Held, disallowance of expenditure without pointing out any specific defect, and that too when Gross Profit rate was higher than the rate in immediately preceding previous year, on ground that proper linkage of expenses was not established, cannot be sustained.

*ACIT v. Poddar Associates (2010) 189 Taxman 39 (Mag.)(Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Developing and designing substitute technology – Revenue**

Expenditure incurred on developing and designing of the technology for substituting the existing one, to meet the ever changing needs on technological fronts, without any exclusive right, was held to be of revenue nature, despite the enduring benefit attached to the expenditure.

**S. 37(1) : Business expenditure – Interest paid on late deposit of Service Tax – Compensatory**

Interest paid for delayed payment of Service Tax is compensatory and has the same character as service tax and, therefore, it is allowable as deduction. (A.Y. 2004-05)

*Dy. CIT v. Messee Dusseldorf India (P) Ltd. (2010) 129 TTJ 81 (UO)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Travelling and Incidental expenses**

Travelling and incidental expenditure in finalization of project for existing business allowable as revenue expenditure.

*Jt. CIT v. Rallies India Ltd. (2010) 3 ITR 1 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Exchange fluctuation Loss**

Exchange Fluctuation loss on pending forward contracts is an “accrued” loss. (A.Ys. 1998-99, 1999-2000)

*Dy. CIT v. Bank of Bahrain and Kuwait (2010) 5 ITR 301 / 132 TTJ 505 / 41 SOT 290 / 43 DTR 505 (SB)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Brand image – Entry in the books**

Expenditure on advertisement to create brand image, partly debited in profit and loss account and balance deferred over a period of three years, expenditure allowable as revenue expenditure, entry or absence of entry does not determine allowability of expenditure. (A.Ys. 2003-04 and 2004-05)

*Dy. CIT v. Godrej Tea Ltd. (2010) 4 ITR 649 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Commission on production / sales**

Commission payable to another company based on the quantity specified products sold by assessee, for various services rendered by that company to the assessee to enable it to upgrade its machineries and to use better methods of production is revenue expenditure. (A.Y. 2002-03)

*Crystal Chemie (P) Ltd. v. ACIT (2010) 42 DTR 197 / 131 TTJ 718 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Commission – Evidence**

Commission was paid by account payee cheques, independent evidence were also produced such as service tax challans, and details of parties in respect of services were rendered. Commission was held to be allowable. (A.Y. 2005-06)

*Mobile Communication (India) (P) Ltd. v. Dy. CIT (2010) 125 ITD 309 / 128 TTJ 666 / 33 DTR 398 / (2011) 7 ITR 219 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital expenditure – Non-competence Rights – ROC fees – Authorized capital**

Amount paid for non-compete rights while acquiring business is capital expenditure. Fees paid to ROC for increasing authorized share capital is capital expenditure. (A.Y. 1998-99)

*Tecumseh India (P) Ltd. v. ACIT (2010) 132 TTJ 129 / 43 DTR 41 / 5 ITR 150 / 127 ITD 1 (SB)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Renovation of premises on lease**

Assessee firm acquired a premises on lease from PHPL. It paid certain amount to PHPL towards renovation and alterations carried out in premises on its behalf. The expenditure being capital in nature not allowable. The PHPL has offered the said amount as income is immaterial consideration for the assessee. (A.Y. 2003-04)

*ITO v. Pritam Juice (2010) 124 ITD 237 / 37 DTR 398 / 5 ITR 664 / (2011) 138 TTJ 294 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Mobile talktime and handset charges**

The amount paid for handsets and for talktime charges were not capital in nature.

*Radical Marketing Pvt. Ltd. v. ITO, 'SMC' Bench, ITA No. 3868/Mum/2008, decided on 19-5-2009 (BCAJ 42-A, May 2010 P. 171)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Allowability – Foreign education of partner**

Unless the commercial expediency of the firm is demonstrated, expenditure incurred by the firm on foreign education of a partner cannot be treated as incurred wholly and exclusively for the purposes of the business of the firm but is to be treated as personal expenditure and not allowable under section 37(1). (A.Y. 2003-04)

*Kohinoor Cloth Stores v. ACIT (2010) 40 DTR 60 / 131 TTJ 367 / (2011) 9 ITR 585 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Licence fee – Telecom – Use of licence**

Fees paid by assessee telecom company to department of telecommunication for use of licence was to be allowed as revenue expenditure. (A.Y. 2006-07)

*ACIT v. Vodafone Essar Gujarat (2010) 38 SOT 51 / 41 DTR 146 / 131 TTJ 544 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Keyman insurance – Partner**

Premium paid by firm in respect of Keyman insurance policies on the lives of working partners is allowable as business expenditure. Employer–employee relationship is not essential for allowing deduction. (A.Y. 2003-04)

*ITO v. Modi Motors (2009) 126 TTJ 495 / 27 SOT 476 / 31 DTR 347 / (2010) 1 ITR 106 (Mum.)(Trib.)*



**S. 37(1) : Business expenditure – Capital or revenue – Replacement of part of machinery**

Expenditure on replacement of parts of machinery is allowable revenue expenditure. (A.Ys. 2000-01, 2001-02)

*Comsat Max Ltd v. Dy. CIT (2009) 124 TTJ 86 / 29 SOT 436 / 25 DTR 417 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Brand promotion – DRE – Treatment in books**

Expenditure on brand promotion and brand building classified in the books of account as deferred revenue expenditure was allowed as revenue expenditure. (A.Y. 2003-04)

*ACIT v. Raj Oil Mills Ltd., ITA No. 5781/M/2007, dt. 27-5-2009 – BCAJ P. 31, Vol. 41-A, Part 5, August, 2009. (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreseeable losses – Method of accounting – AS-7**

In case of an assessee following mercantile system and “percentage completion method” deduction is allowable in respect of “foreseeable losses” on incomplete projects in respect of which a major part of the work was not completed provided that the same is calculated in accordance with Accounting Standard-7. (A.Ys. 2002-03 and 2003-04)

*Jacobs Engineering India Pvt. Ltd. v. ACIT (2009) 30 DTR 614 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – New model car – Launching expenditure**

Expenditure incurred on launching of a new model of car is a revenue expenditure.

*Premier Ltd. v. Dy. CIT, ITA No. 2091/Mum/2008, dt. 30-6-2009 BCAJ P. 42, Vol. 41A, Part 6, September, 2009 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Violation of Rules & Regulations of National Stock Exchange**

Violation of Rules & Regulations of National Stock Exchange by its members could not be termed as an offence or as an act prohibited by law. Amount paid as fine by a member of National Stock Exchange to NSE cannot be disallowed u/s Explanation to section 37(1).

(A.Ys. (2002-03, 2003-04)

*Goldcrest Capital Markets Ltd. v. ITO (2010) 130 TTJ 446 / 36 DTR 177 / 2 ITR 355 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Non-compete fee – Capital**

Payment towards non-compete fee is not revenue expenditure. (A.Y. 2001-02)

*ACIT v. Real Image Tech. Pvt. Ltd. (2009) 120 TTJ 983 / (2008) 14 DTR 138 (Chennai)(Trib.)*

### **S. 37(1) : Business expenditure – Luxury Tax – Allowable**

Payments made towards luxury tax and not penalty, is allowable as deduction. (A.Y. 2002-03)

*RDB Industries Ltd. v. Dy. CIT (2009) 120 TTJ 107 / (2008) 16 DTR 43 (Kol.)(Trib.)*

### **S. 37(1) : Business expenditure – Donation – Corpus – Business need**

Deduction in respect of donation to a charitable trust with a specific direction that the amount should be treated as corpus and it should be invested in a manner that interest earned on the investment would be utilized for purpose of purchase of books and magazines and to provide other library facilities to practising advocates.

But it was, on the facts and circumstances, held that such expenditure could not be allowed for the reasons that, the assessee could not bring any evidence or material on record to prove as to what business purpose was served in the business by making such donation and no commercial expediency was established. (A.Y. 1999-2000)

*A. N. Mathur v. Dy. CIT (2009) 117 ITD 274 / (2008) 117 TTJ 953 / 7 DTR 466 (Indore)(Trib.)*

### **S. 37(1) : Business expenditure – Computer software – Capital expenditure**

Expenditure on computer software is capital expenditure. (A.Y. 2002-03)

*Avaya Global Connect Ltd. v. ACIT (2009) 122 TTJ 300 / (2008) 26 SOT 397 / 13 DTR 309 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Development of website – Allowable**

Expenditure on development of website is allowable as business expenditure. (A.Y. 2004-05)

*Polyplex Corporation Ltd. v. ITO (2009) 122 TTJ 949 / (2008) 12 DTR 289 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Tender fee and consultancy charges – Revenue**

Where assessee is already in business, payments made for tender fee and consultancy charges for establishing captive power plant are allowable revenue expenditure. (A.Y. 2004-05)

*Polyplex Corporation Ltd. v. ITO (2009) 122 TTJ 949 / (2008) 12 DTR 289 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Royalty – Non-assignable licence**

Royalty paid for getting non-assignable licence, right and privilege to manufacture on the licensed mark, and distribute the licensed product in India and use expression "Benetton", without becoming owner or acquiring any right in licensed trade mark, was held to be a revenue expenditure. (A.Ys. 2002-03 & 2003-04)

*Dy. CIT v. DCM Benetton India Ltd. (2008) 9 DTR 587 / (2009) 178 Taxman 52 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Agricultural income – Agricultural expenditure**

Assessee engaged in business of manufacturing extracts from spices, cannot claim net farming expenses even when there was direct nexus with its business, as Agricultural Income and Agricultural Expenses are outside the purview of the Act.

Held, that the principles of business expediency and prudence comes into play only when an expense is otherwise allowable under the Act.

*Kancour Flavours and Extracts Ltd. v. Dy. CIT (2009) 185 Taxman 100 (Mag.)(Cochin)(Trib.)*

**S. 37(1) : Business expenditure – Liability of interest on court order – Ascertained**

Liability for payment of interest arising out of court order is an ascertained liability and, therefore, it is allowable as deduction. (A.Y. 2001-02)

*Dy. CIT v. Dune Leasing & Finance Ltd. (2009) 125 TTJ 87 / 26 DTR 449 / (2010) 126 ITD 255 / 4 ITR 65 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – Fine – SEBI**

Payment, made under SEBI Regulation Scheme, 2002 for failure to make disclosure as required under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 could not be treated as penalty as it is a payment for regularizing the default committed hence such payment can not be disallowed by invoking Explanation to section 37(1). (A.Ys. 2001-02 and 2003-04)

*Kaira Can Company Ltd. v. Dy. CIT (2009) 32 DTR 485 / (2010) 127 TTJ 514 / 2 ITR 20 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – Not illegal or unlawful – Allowable**

Penalty which is not of nature of illegal/unlawful expenditure is not covered by Explanation to section 37(1). (A.Ys. 2002-03 & 2003-04)

*Western Coalfields Ltd. v. ACIT, (2009) 124 TTJ 659 / 27 DTR 226 (Nagpur)(Trib.)*

**S. 37(1) : Business expenditure – Reimbursement – Running school**

Reimbursement of expenditure incurred in running the school is allowable as business expenditure.

*Tata International Ltd. v. ACIT, 'I' Bench, ITA No. 5591/M/2005 dt. 11-9-2009, Source: BCAJ Vol. 41-B Part 2 Nov. 2009 P. 21 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Year in deductible – Club house – Home for aged**

Since the assessee has completed more than 95 per cent of project and offered income therefrom on year-to-year basis, expenses incurred on home for aged and on club house were allowable as business expenditures. (A.Y. 2003-04)

*ACIT v. Sheth Developers (P.) Ltd. (2009) 33 SOT 277 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Renovation expenses**

Since expenditure incurred on renovation had given assessee an enduring benefit and ownership of renovated items would not *per se* become property of lessor and moreover assessee had not placed any material on record to show that lump sum payment in form of renovation expenses had benefited it in form of rentals or otherwise, expenditure in question was rightly considered as capital expenditure.

*Living Room Designers v. ITO (2009) 34 SOT 34 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Purchase of tools**

Amount spent on purchase of tools viz. specific gauges, for special purpose machines manufactured based on specific order and quality, which were non-repetitive, was held to be revenue expenditure.

*Gallium Industries Ltd. v. Dy. CIT (2009) 185 Taxman 17 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Interest prior period [S. 145]**

Assessee company engaged in business of land development paid interest as per resolution dt. 8-9-2002 in the year of non-materialisation of terms of Agreement dt. 13-6-1997. Held Assessing Officer's action denying deduction of interest as prior period expenses was not justified, and assessee's claim was admissible under section 145, as the claim of deduction of interest had actually accrued / capitalised and ascertained in the year under consideration on non-materialisation of terms viz. approval being rejected.

*Urban Improvement Co. (P) Ltd. v. ITO (2009) 177 Taxman 104 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Provision for pay revision – Trade unions**

Provision for pay revision based on negotiations with trade unions, as per directions by State Government is allowable as deduction, as liability for pay revision arose, at that point of time though the actual quantification was after approval of MOU by Government of Kerala.

*Dy. CIT v. Travancore Titanium Products Ltd. (2009) 176 Taxman 124 (Mag.)(Cochin)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – New technology**

Expenditure incurred in acquiring new technology to replace existing technology is allowable as revenue expenditure. (A.Y. 2001-02)

*Unidyne Energy Env System Pvt. Ltd. v. ITO, ITA No. 4007/Mum/2005, Bench – G, A.Y. 2001-02, dt. 10-9-2008, BCAJ P. 796, Vol. 40-B, Part 6, March 2009.(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Provision for excess bills – Not deductible**

If the assessee does not accept the excess bills raised by supplier, he is not entitled to the deduction of provision for excess bills. (A.Y. 2002-03)

*ITO v. Sicgil India (P) Ltd. (2009) 123 TTJ 462 / 119 ITD 184 / 24 DTR 337 / (2010) 1 ITR 749 (TM)(Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Residential facility to engineers – Work site**

Expenditure in providing residential facility to engineers at work site is wholly for the purposes of business and allowable as business expenditure in toto. (A.Y. 2001-02)

*ACIT v. Niko Resources Ltd. (2009) 123 TTJ 310 / 22 DTR 225 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Business not set up – Receipts and expenses – Set-off – Income from other sources [S. 56]**

Receipts up to the stage of setting up of business would go to reduce the cost of setting up of business. It would be travesty of justice if the assessee's expenditure up to the stage of setting up is treated as capital in nature but not the receipts during the same period. (A.Ys. 2002-03, 2003-04)

*Shapoorji Pallonji Tower Co. Ltd. v. ITO (2009) 28 DTR 12 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Setting up of a new unit**

Mere fact that the assessee company was taking steps to set up a new unit for manufacturing a product which is authorized by its Memorandum and Articles of Association does not prove that the proposed unit was inextricably linked with the existing business of the assessee or that it was an expansion thereof and, therefore, expenditure incurred by the assessee in relation to setting up of the proposed unit is not allowable as revenue expenditure, more so as the project was ultimately cancelled by the assessee. (A.Ys. 2000-01 to 2002-03)

*Indo Ram Synthetics (I) Ltd. v. Dy. CIT (2009) 31 DTR 42 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Cost of production of TV serial [Rule 9A]**

Feature film which was exclusively for telecast on TV Rule 9A will be applicable as the film was released for exhibition for less than 90 days. (A.Ys. 1999-2000, 2000-01)

*Vieshesh Films (P) Ltd. v. Dy. CIT (2009) 126 TTJ 271 / 29 DTR 225 / (2008) 26 SOT 64 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Transaction confirmed by payee – Allowable**

Once the genuineness of the transactions are confirmed by payee, and it is proved that payments made were wholly and exclusively for the business, same are allowable under section 37(1).

*Ram Manohar Singh v. ACIT (2008) 170 Taxman 79 (Mag.)(Jab.)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Souvenir**

Expenditure incurred for advertisement in souvenir is allowable business expenditure. (A.Y. 1997-98)

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

**S. 37(1) : Business expenditure – Personal nature – Air travel**

In the absence of any evidence on record that the air travel expenses were personal in nature, same are allowable as deduction. (A.Y. 2004-05)

*Dy. CIT v. Gujarat NRE Coke Ltd. (2008) 115 TTJ 822 / 5 DTR 154 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Brokerage – Commission – Sponsorship of sport – Compensation – Research unit – Salary – Hotel under repair – Beautification of city – Shifting of machinery – Capital expenditure – Music and CCTV**

Brokerage and commission paid to agents for obtaining houses for employees are allowable as deduction.

Expenditure incurred for sponsorship of sport is revenue expenditure.

Compensation paid for routine issues like quality of food, etc. to hotel guests is allowable business expenditure.

Expenditure incurred for research unit, existence of which is not in dispute is allowable as business expenditure. (A.Y. 1997-98)

Expenditure incurred on salary by a hotel could not be disallowed on the ground that the hotel was under repair and non operational during one year. (A.Y. 1997-98)

Expenditure incurred on beautification of city is allowable revenue expenditure.

Expenditure incurred for shifting of machinery from one factory premises to another factory premises cannot be treated as capital in nature. (A.Y. 1997-98)

Expenditure on providing music and CCTV in rooms of hotel is capital in nature.

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

**S. 37(1) : Business expenditure – Use of vehicles by directors – Directors**

Directors authorized to use the vehicle of the company, vehicle expenses were allowable business expenditure. (A.Y. 1995-96)

*Omkar Textile Mills P. Ltd. v. ITO (2008) 115 TTJ 716 / 5 DTR 187 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Non-compete Fee – Short period cover**

Sum paid as non-compete charges, restraining the recipient for a short or limited period is not a capital expenditure, as it is for increasing the profitability.

*Premier Opticals (Pvt.) Ltd. v. ACIT (2008) 170 Taxman 167 (Mag.)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Modernization and replacement – Automation**

Replacement cost of old manual cone winders with auto cone winders, debited as revenue expenditure under the head "Modernization & Replacement" was held to be allowable. It was observed that nature of expenditure has to be determined in an individual case depending upon surrounding circumstances, after considering developments in business and scientific field.

*ACIT v. Prabhu Spinning Mills (P) Ltd. (2008) 172 Taxman 136 (Mag.)(Chennai)(Trib.)*



**S. 37(1) : Business expenditure – Advertisement – Sales promotion**

Expenditure on advertisement was for earning better profit and facilitating sales operation, and same cannot be said to be of enduring nature in present day scenario, and by incurring such expenses assessee had not got any fixed capital asset which justifies 1/3rd disallowance as being of capital nature.

*Salora International Ltd. v. ACIT (2008) 166 Taxman 54 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Sales promotion – Export**

Sales promotion expenses incurred by assessee firm engaged in business of export of goods on account of travelling, boarding and lodging of foreign buyers who were instrumental in promoting the sales, were held to be allowable under section 37(1).

*ACIT v. Sahib Forge (2008) 168 Taxman 83 (Mag.)(Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Development of website – Business promotion**

Business expenses incurred for development of website to promote business activities, and display information and products is allowable as Revenue Expenditure.

*Polyplex Corp. Ltd. v. ITO (2008) 12 DTR 289 / (2009) 122 TTJ 949 / 176 Taxman 57 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Training**

Training expenses incurred on personnel in relation to operation and maintenance of plant to be set up, was held to be capital expenses as training was given before plant was set up, though claimed during relevant previous year on ground that invoice was received during relevant previous year and TDS was deducted and paid in said year. (A.Y. 1996-97)

*Gujarat Guardian Ltd. v. Jt. CIT (2008) 114 TTJ 565 / 1 DTR 328 / 174 Taxman 151 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Trade delegates – Foreign tour**

Expenses on foreign tour by assessee as a trade delegate of Bengal National Chamber of Commerce and Industries (BNCCI), which was supported by a certificate issued by the BNCCI that he was a member of delegation which visited China to promote trade & business co-operation between India and China, was held to be an allowable as business expenditure.

It was further held that, for allowing expenditure of a foreign trip it is not necessary that it should result in introduction of new methodology or an increase in production must result because of foreign tour undertaken.

*Ajit Kumar Ganguly v. ACIT (2008) 175 Taxman 38 (Mag.)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Loss on foreign exchange fluctuations – Provision for warranty**

Loss on foreign exchange fluctuation is not a notional loss and therefore, it is allowable as deduction. Provision for warranty is an ascertained liability and therefore it is allowable as deduction. (A.Ys. 2001-02 to 2003-04)

*Sony India (P) Ltd. v. Dy. CIT (2008) 118 TTJ 865 / 114 ITD 448 / 14 DTR 228 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – National Stock Exchange – Trading**

Payment for accessing National Stock Exchange for controlling trading functions was for business purpose and allowable as business expenditure. (A.Y. 2002-03)

*Angel Capital & Debt Market Ltd. v. ACIT (2008) 118 TTJ 351 / 12 DTR 433 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Ad-hoc disallowance – Foreign agents**

*Ad hoc* disallowance of 10% out of commission payment to foreign agents, without pointing out any discrepancy, and which was remitted after RBI clearance, was held to be unjustified.

*Malwa Industries Ltd. v. ACIT (2008) 175 Taxman 40 (Mag)(Chd.)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Advantage – Facilities – Royalty**

Expenditure incurred the advantage of which merely facilitates assessee's trading operations and in effectively carrying on business and enabling better management and better profitability, leaving the fixed capital untouched would be of revenue nature, even though the advantage may endure for indefinite future.

Royalty payment attributable to training, support service and other technical assistance as part of agreement, payment of which was linked to the quantum of production and sales, cannot be treated as capital expenditure, and same was allowed as revenue expenses.

*Salora International Ltd. v. ACIT (2008) 166 Taxman 54 (Mag.)(Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Community development – Allowable**

Expenditure incurred towards community development is allowable as business expenditure. (A.Ys. 1998-99 to 2000-01)

*Dy. CIT v. B. S. E. S. Ltd. (2008) 113 TTJ 227 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Survival of business – Revenue**

Expenditure incurred for survival in the business was revenue expenditure. (A.Y. 2002-03)

*ACIT v. Prabhu Spg. Mills (P) Ltd. (2008) 113 TTJ 372 / 2 DTR 77 (Chennai)(Trib.)*

### **S. 37(1) : Business expenditure – Services rendered – Commission**

Once the services rendered had been established, there was no basis to restrict the commission from 12.5% to 5%. Expenditure on training of personnel prior to setting up of plant is to be capitalized and depreciation to be allowed thereon. (A.Y. 1996-97)

*Gujarat Guardian Ltd. v. Jt. CIT (2008) 114 TTJ 565 / 1 DTR 328 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Repair of road**

1. Expenditure incurred on advertisement for recruitment of staff cannot be disallowed.
2. Expenditure on repair of roads within factory premises is allowable as revenue expenditure. (A.Y. 1985-86)

*Finolex Pipes (P) Ltd. v. Dy. CIT (2008) 114 TTJ 664 / 3 DTR 353 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Prepaid lease rent – Allowable in next year**

Prepaid lease rental which is pertaining to the next financial year/s is not allowable in the year of payment. (A.Ys. 1999-2000 & 2000-01)

*Dy. CIT v. FAG Bearings India Ltd. (2008) 115 ITD 53 / 306 ITR (At) 60 / 13 DTR 298 / 118 TTJ 433 (SB)(Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Prizes given under lottery system – Allowable**

Amount spent on the prizes given under the lottery system allowed as business expenditure. (A.Y. 2001-02)

*Eyeteck Industries v. ACIT, ITA No. 1799/Mum/2005, dt. 31-7-2008 – BCAJ P. 273, Vol. 40-B, Part 2, November 2008. (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Fine or penalty – For accident**

Assessee's tanker had hit one person which resulted in death, and compensation was paid as per Motor Accident Claims Tribunal's Award to victims family. Held that expenditure is not for paying fine or penalty, or for an offence prohibited by law, and so the Explanation to section 37(1) would not be attracted and sum paid would be an allowable expenditure.

*ITO v. Triputi International (2007) 158 Taxman 65 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – User of shop for business – Third party vouchers**

Expenditure on shop rent is allowable as deduction, although the vouchers were issued in the name of another concern, same being defunct. (A.Y. 2001-02)

*ITO v. Rajendra Kumar Taparia (2007) 106 TTJ 712 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Stop manufacturing – Capital or revenue alteration to leasehold premises**

Payment made in consideration of another company agreeing to stop manufacturing permanently the equipments manufactured by assessee constituted capital expenditure.

New office expenses and compensation paid to lessor for making alteration of leasehold premises for new office are allowable revenue expenses. (A.Y. 1997-98)

*Lucent Technologies Hindustan Ltd. v. Jt. CIT (2007) 106 TTJ 205 (Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Advertisement – Trade show**

Expenditure on advertisement, publicity, trade shows, etc. Expenditure on advertisement, publicity, trade shows, etc. does not bring into existence any capital asset and, therefore, it is allowable as revenue expenditure. (A.Y. 1999-2000)

CIT (A) was not justified in mechanically disallowing certain expenses for want of vouchers without asking the assessee to furnish the same.

Expenses incurred on tradeshow recoverable from client. Expenses incurred by assessee on organizing a meeting in a hotel during the trade show in the course of its business are allowable as deduction. (A.Y. 1999-2000)

*Silicon Graphics Systems (I) (P) Ltd. v. Dy. CIT (2007) 106 TTJ 1153 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Commission – Software – Ex gratia**

Assessee having furnished all primary details of commission and brokerage paid by it to certain parties. Deduction of full amount is allowable to the assessee. (A.Ys. 1995-96 to 1997-98)

Expenditure on software is allowable as revenue expenditure.

Assessee having supplied all the relevant details, it could not be held that the expenditure was not verifiable and, therefore, the payments are allowable as deduction.

*GE Capital Services India v. Dy. CIT (2007) 106 TTJ 65 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Labour – Ad hoc disallowance**

Ad hoc disallowance of labour expenses could not be made simply on the basis that the vouchers were self made and not reliable without making any test check and pinpointing which item of expenditure is not verifiable. (A.Y. 1996-97)

*ACIT v. Allied Construction (2007) 106 TTJ 616 (Delhi)(Trib.)*

**S. 37(1): Business expenditure – Settlement of dispute – Capital or revenue – Marketing information**

Payment made by assessee to settle the continuing dispute between two groups of family members which had adversely affected the reputation and business of the company was allowable as business expenditure. (A.Y. 1998-99)

Payment for obtaining scientific and market information is allowable as revenue expenditure. (A.Y. 1998-99)

*USV Ltd. v. Jt. CIT (2007) 106 TTJ 535 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Rent – Godown – Passive user**

For purpose of allowability of rent of godown, passive user is sufficient and rent could not be disallowed. (A.Ys. 1991-92, 1993-94, 1994-95)

*Sanat Products Ltd. v. Dy. CIT (2007) 107 TTJ 238 / (2006) 5 SOT 510 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – National Stock Exchange – Stock broker**

Assessee stock broker, member of Delhi Stock Exchange, paid various amounts as penalty on account of late delivery, short delivery, short margin, etc. to National Stock Exchange. Held, that said payments were not for infraction law, same were allowable as revenue expenditure.

*Arch Finance Ltd. v. CIT (2007) 165 Taxman 189 (Mag.)(Delhi)(Trib.)*

**S. 37(1) Business expenditure – Raising funds – Preference shares**

Expenses incurred for raising funds by way of preference shares are capital expenditure. (A.Y. 2001-02)

*Amtek Auto Ltd. v. Addl. CIT (2007) 112 TTJ 464 / (2008) 19 SOT 625 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travelling – Relation to profit**

Foreign travel expense could not be disallowed on the ground that they did not result in earning of profits immediately. (A.Y. 1998-99)

*ACIT v. Amtek Auto Ltd. (2007) 112 TTJ 455 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Redemption fine – Gold control**

Payment of redemption fine in lieu of confiscation under Gold Control Act is not allowable as deduction. (A.Y. 1989-90)

*P. Soman v. ITO (2007) 112 TTJ 513 / (2008) 111 ITD 24 (Cochin)(Trib.)*

**S. 37(1) : Business expenditure – Warranty – Capital or revenue – Application software**

Provision for warranty liability is not contingent liability, hence allowable deduction in the year of sale. Expenditure on purchase of application software is allowable revenue expenditure. (A.Y. 1998-99)

*IBM India Ltd. v. CIT (2007) 108 TTJ 531 / 105 ITD 1 (Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign tour expenses – Son and daughter in-law**

Foreign tour expenses of assessee's employee son and daughter-in-law. Foreign tour expenses of Assessee having furnished details supported with vouchers showing that foreign visit was for business purposes, expenditure incurred on such foreign visit was allowable business expenditure. (A.Y. 2001-02)

*Mahesh Chand Jain v. ACIT (2007) 108 TTJ 190 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Licence for use of computer software**

Expenditure on acquisition of licence for use of computer software is capital expenditure. (A.Y. 2000-01)

*Sudarshan Chemical Industries Ltd. v. ACIT (2007) 108 TTJ 28 / (2008) 110 ITD 171 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Fees paid to SEBI**

Fee paid by assessee bank to SEBI for registering as merchant banker is revenue expenditure. (A.Ys. 1992-93 and 1994-95 to 1996-97)

*Lakshmi Vilas Bank Ltd. v. Dy. CIT & Anr. (2007) 108 TTJ 256 / 105 ITD 502 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Percentage to directors – In addition to salary**

Payment of a percentage out of total receipts of business to the directors of assessee company who were also paid salary, was not deductible as business expenditure.

(A.Ys. 1992-93, 1994-95)

*I. D. O. R. I. (P) Ltd. v. Dy. CIT (2007) 108 TTJ 433 / (2008) 112 ITD 149 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Fine and penalties – NSE**

Fines and penalties paid by assessee to NSE for trading beyond exposé limit are payments made in regular course of business and not for infraction of law, hence allowable. (A.Y. 2002-03)

*Master Capital Services Ltd. v. Dy. CIT (2007) 108 TTJ 389 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Premium on leasehold land – Capital expenditure**

Amount paid by assessee as premium on leasehold land, in addition to annual rent, which premium amount was not refundable in case lease was terminated, was capital expenditure. (A.Y. 1992-93)

*Jt. CIT v. Mukund Ltd. (2007) 109 TTJ 172 / 106 ITD 231 / 13 SOT 558 (SB)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Deferred revenue – Method of accounting**

Assessee, though claiming entire revenue expenditure under the head "Deferred revenue expenditure" in accordance with its method of accounting consistently followed, Assessing Officer was not justified in disallowing such expenditure. (A.Y. 2001-02)

*Guruji Entertainment Network Ltd. v. ACIT (2007) 108 TTJ 180 / 14 SOT 556 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Services rendered – Payees' confirmation**

Once the evidence proved that services were rendered, and when payees confirmed that commission was received, Assessing Officer was not justified in disallowing assessee's claim.

*ACIT v. Pushpsons International (2007) 162 Taxman 42 (Mag.)(Delhi)(Trib.)*



**S. 37(1) : Business expenditure – Disputed liability – Mercantile system of accounting**

Assessee followed mercantile system of accounting claimed as business expenditure liability to the extent admitted by it – Assessing Officer treated as contingent liability. On appeal, CIT(A) allowed only amount actually paid. Tribunal noted that assessee followed mercantile system and expenditure to be allowed on accrual basis. To the extent as provided by the assessee, there was no dispute and it was ascertained liability. Hence deduction allowed. (A.Y. 1997-98)

*Hemchand & Co. v. ITO, Bench – I, ITA No. 5146/Mum/2002, dated 6-10-2006, – BCAJ P. 658, Vol. 39-C, Part 6, March 2007. (Mum.) (Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Rented premises – Construction of strong room**

Expenditure incurred on construction of a strong room in a rented premises was allowable as revenue expenditure. (A.Y. 2001-02)

*Muthoot Bankers v. Dy. CIT, (2007) 11 SOT 603 (Cochin) (Trib.)*

**S. 37(1) : Business expenditure – Expansion of business – Same products**

Assessee dealing in Pharmaceutical product, was in process of setting up manufacturing facilities in respect of very same items. Held, manufacturing activity of same product be regarded as expansion of existing trading activity, and same satisfies the condition for claiming the expenses under section 37(1).

*Baxter (India) (P) Ltd. v. Dy. CIT (2007) 165 Taxman 190 (Mag.) (Delhi) (Trib.)*

**S. 37(1) : Business expenditure – Royalty – Arm's length**

Transaction being at arm's length and for commercial consideration, royalty payment to foreign company under licensing agreement for use of know-how was allowable in entirety under section 37(1). (A.Y. 1998-99)

*Dy. CIT v. Vinarom Limited (2007) 108 TTJ 51 / 104 ITD 234 (Bang.) (Trib.)*

**S. 37(1) : Business expenditure – Sum paid on VRS – Allowable**

Sum paid on Voluntary Retirement Scheme (VRS) was allowable under section 37(1) as it was introduced with an intention to carry on its business more efficiently and profitably. However, such payment could not be regarded as capital expenditure but the same could be allowed as revenue expenditure as it did not give any advantage in capital field. (A.Y. 2000-01)

*PI Industries Ltd. v. ACIT (2007) 106 ITD 401 / (2006) 104 TTJ 333 (Jodh.) (Trib.)*

**S. 37(1) : Business expenditure – Accounting software – Changing technology**

Assessee had purchased accounting software for ` 3 lakhs and claimed as revenue expenditure. Held that, in view of the fast changing technology in the field of software, need for its replacement at short interval was essential. Relying on the Supreme Court decision in case of Empire Jute Co. Ltd., it observed that if the

expenditure was in the revenue field, then the same could not be disallowed merely on the ground of acquiring benefit of enduring nature. (A.Y. 1995-96)

*Dy. CIT v. Express Airotronics Pvt. Ltd., Mumbai ITAT Bench 'G', ITA No. 7105/Mum/2002, dated 23-2-2006 – BCAJ P. 657, Vol. 39-C, Part 6, March 2007.(Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Advertisement – Benefit to principal**

Advertisement expenditure incurred had a direct nexus with its earning of income could be allowed even if it might have also benefited the principal of the assessee. (A.Ys. 1997-98, 1999-2000)

*Star India P. Ltd v. Addl. CIT. (2006) 103 ITD 73 / 104 TTJ 1 (TM)(Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Replacement of old machinery – Revenue expense**

Expenses on replacement of old machinery is revenue expenditure. (A.Y. 1993-94)

*CIT v. Loyal Textile Mills Ltd. (2006) 6 SOT 97 (Chennai)(Trib.)*

### **S. 37(1) : Business expenditure – Deductibility of period cost – Completed contract method [S. 145]**

Finance cost in the nature of interest is a period cost and therefore deductible in the year in which it is incurred or accrued. Such claim is in conformity with the Accounting Standard-7 of the ICAI. In the Accounting Standard it is suggested that where expenditure cannot be attributed to a particular project then in that case such expenditure may be allowed as a period cost. (A.Y. 1996-97)

*Jt. CIT v. K. Raheja P. Ltd. (2006) 102 ITD 414 / (2007) 106 TTJ 874 / (2005) 3 SOT 617 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Year of allowability – Permission of RBI**

RBI's permission was not required on or after 1st June, 2000, and therefore, assessee's claim for the period from 1st Jan., 2001 to 31st March, 2001 could not be disallowed on the ground that the liability did not accrue since the assessee did not apply for permission of RBI. (A.Y. 2001-02)

*Herbalife International India (P) Ltd. v. ACIT (2006) 103 TTJ 78 / 101 ITD 450 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Interest – Late payment of electricity [S. 43A]**

- i) Interest on late payment of electricity duty is compensatory in nature and is an business expenditure. Also it was held that provision of section 43B is not applicable for such interest.
- ii) Water charges are in the nature of statutory liability, and unpaid water charges are to be disallowed under section 43B. Whereas unpaid interest on water charges is compensatory in nature and same is allowable under section 37(1). (A.Y. 1994-95)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 10 TTJ 948 / 153 Taxman 18 (Mag.)(Cuttack)(Trib.)*

**S. 37(1) : Business expenditure – Purchase of ERP software – Findings of authorities**

Expenditure incurred by assessee on acquisition of ERP business software by way of outright purchase is to be treated as a capital expenditure in the absence of any finding of the lower authorities to the effect that it was a case of mere upgradation of an existing software. (A.Y. 2001-02)

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / (2007) 104 ITD 427 / (2006) 8 SOT 167 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Assistance – Industries**

Contribution made by the assessee-company towards running “Udyog Sahayak” cell for providing assistance/guidance to entrepreneurs for setting up industries was expenditure incurred by the assessee for furtherance of its objective and therefore, same is allowable as revenue expenditure. (A.Ys. 1994-95, 1995-96 and 1997-98)

*Punjab State Industrial Development Corporation Ltd. v. Dy. CIT (2006) 103 TTJ 364 / 102 ITD 1 (SB)(Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Leasehold properties**

Expenditure on electrical works, civil works, air conditioning, wooden partitions and fixtures, etc., on the leasehold properties is allowable revenue expenditure. (A.Ys. 1992-93, 1995-96 and 1996-97)

*Digital Equipment India Ltd. v. Dy. CIT (2006) 103 TTJ 329 (Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Premium on redemption of secured premium notes – Commission – Discount – Brokerage – Capital or revenue – Purchase of software – Rental premises – Commission on sales**

Assessee having raised funds by issuance of SPNs which are redeemable at a premium, utilized the funds so raised for the purposes of its business, it is entitled to deduction in respect of proportionate premium relatable to the year in question. (A.Y. 2001-02)

Commission, discount and brokerage on sales. Assessee having made payments by way of incentives and commission on sales and filed the details of recipient parties, the expenditure stood verified and same could not be disallowed.

Expenditure incurred by assessee on acquisition of ERP business software by way of outright purchase is to be treated as a capital expenditure.

Expenditure incurred by assessee on renovation of the rented building on concrete work, graniting work, etc. relating to the exterior of the building and also interior work relating to structural steel reinforcement resulted in a benefit of enduring nature and is to be treated as capital expenditure. However, expenditure incurred on interior

work, painting and polishing work, dismantling of old false ceiling, fees for interior designing, electrical and lift maintenance, etc. was revenue expenditure.

Assessee having made payments by way of incentives and commission on sales and filed the details of recipient parties which have not been contradicted by the Assessing Officer the expenditure stood verified and same could not be disallowed. (A.Y. 2001-02)

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / 8 SOT 167 / (2007) 104 ITD 427 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Business development expenses – Commission**

Business development expenses/ commission paid to agent is allowable even though there is no written agreement or the agent avoided to appear before the tax authorities for any reason. (A.Y. 1998-99)

*Anupam Synthetics Pvt. Ltd. v. Jt. CIT, (2006) 104 TTJ 119 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Replacement of cards**

Expenditure incurred on replacement of cards/blow room machinery / combing machinery of the textile mill was revenue expenditure. (A.Y. 2000-01)

*Dy. CIT v. Bhilwara Spinners Ltd. (2006) 99 TTJ 180 (Jodh.)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Launch of new product – No benefit**

Expenditure incurred on launching of a new product by a pharmaceutical company was revenue expenditure as no benefit accrued therefrom in the capital field. (A.Y. 1997-98)

*ACIT v. Medicamen Biotech Ltd. (2006) 99 TTJ 873 / (2005) 1 SOT 347 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Project appraisal – Capital Loan**

Payment made to the bank as project appraisal fees in connection with working capital loan was revenue expenditure. However, all other expenses clearly connected with the public issue of shares constituted capital expenditure. (A.Y. 2000-01)

*Dy. CIT v. Bhilwara Spinners Ltd. (2006) 99 TTJ 180 (Jodh.)(Trib.)*

### **S. 37(1) : Business expenditure – Sale and lease back transaction – Interest free loan**

Assessee having sold its fixed assets to its sister concern and immediately taken back the same on lease and also advanced interest free loan to the said concern after receiving the consideration, it was a colourable device and, therefore, the payment of lease rent could not be allowed as deduction. (A.Ys. 1993-94 and 1994-95)

*Dy. CIT v. Industrial Cables (I) Ltd. (2006) 100 TTJ 748 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Contribution – Renovation – Basket Ball Association**

Contribution towards renovation of noon-meal centres and contribution to Basket Ball Association in connection with SAF Games had no nexus with assessee's business, and therefore, deduction was not allowable. (A.Y. 1996-97)

*Tamil Nadu Minerals Ltd. v. Jt. CIT (2006) 100 TTJ 738 / (2005) 95 ITD 294 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Accounts – Completion of project – Year of allowability**

**[S. 145]**

Assessee following project-completion method of accounting the interest identifiable with that project should be allowed only in the year when the project is completed and the income from that project is offered for taxation. (A.Ys. 1993-94, 1996-97, 1997-98)

*Wall Street Construction Ltd. & Anr. v. Jt. CIT (2006) 102 TTJ 505 / 101 ITD 156 / 5 SOT 103 (SB)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Year of allowability**

In the absence of any material on record to show that benefit of expenses on advertisement and publicity, foreign tours and travels and exhibition incurred by assessee in the earlier years is available in the year under consideration, part of such expenditure could not be allowed as deduction in the relevant year irrespective of the fact that the assessee has not claimed entire amount of such expenditure in the earlier years and the Assessing Officer has summarily allowed spread over of claim of deduction in earlier assessment. (A.Y. 1998-99)

*M. Plast (India) Ltd. v. Dy. CIT (2006) 101 TTJ 311 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Leave salary – Provision**

Provision for encashment of leave salary is allowable as deduction. (A.Ys. 1989-90 to 1993-94, 1995-96 and 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 ITD 119 / (2007) 15 SOT 392 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Club membership – Corporate entity**

Club Membership Fees in name of corporate entity allowable as business expenditure. (A.Ys. 1998-99, 1991-92 to 1993-94 and 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 6 SOT 497 / 102 TTJ 53 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Adjustment of prior period expenditure**

Assessee having itself correctly added back the amount of prior-period expenses. Assessing Officer was not justified in making further disallowance by assuming that the assessee has reduced the figure of prior-period expenses. (A.Ys. 1998-99 to 2000-01, 2002-03)

*Mahanagar Telephone Nigam Ltd. v. ACIT (2006) 100 TTJ 1 / 8 SOT 376 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Commission – Supporting evidences**

Commission payment which was duly substantiated by supporting evidences cannot be disallowed.

*Shankar Trading Co. (P) Ltd. v. ACIT (2006) 152 Taxman 49 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Commission – Dealers**

Disallowance of commission paid to dealers on basis of statement recorded of managing director, which was subsequently retracted, and also on the basis of statement of dealers, which were also proved otherwise on cross-examination and re-examination, cannot be upheld, in absence of contrary evidence being brought on record.

*SRMT Ltd. v. Dy. CIT (2006) 152 Taxman 8 (Mag.)(Visakha.)(Trib.)*

**S. 37(1) : Business expenditure – Convertible debenture – Not allowable**

Expenses incurred on issuing wholly convertible debenture are not allowable as revenue expenditure. (A.Y. 1994-95)

*Ashima Syntex Ltd. v. ACIT (2006) 100 ITD 247 / 102 TTJ 177 (SB)(Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign tour – Acquiring know-how**

Expenditure incurred upon foreign tour in connection with acquiring know-how for manufacturing of a particular type of machinery does not bring into existence an asset of enduring nature and is deductible under section 37(1). Further foreign expenditure for exploring the possibility of establishing a new industrial undertaking or foreign expenditure to discuss proposed collaboration with foreign parties in view to expand business activity is normal business expenditure allowable under section 37(1). (A.Y. 1996-97)

*Sunil Synchem Ltd. v. ACIT, Bench "A" (ITA No. 5/JP/2000) (ITA No. 7/JP/2000) dated 25th January, 2006 (Tax World – April 2006 – Vol XXXV – P. 105)(Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign tour expenses – Wife – Proportionate**

In the absence of vouchers and other documentary evidence to show the purpose of the foreign tour undertaken by the director of the assessee-company and his wife, 25 per cent of total expenses is allowed as deduction, in the foreign visit of the director but not in the case of his wife. (A.Y. 1997-98)

*Parkar Securities Ltd. v. Dy. CIT (2006) 102 TTJ 235 / 8 SOT 257 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Annual licence fee – Telecom**

Annual licence fee paid by assessee corporation to Department of Telecommunication as per the terms of licence granted to it was allowable as deduction under section 37(1). (A.Ys. 1998-99 to 2000-01 and 2002-03)



*Mahanagar Telephone Nigam Ltd. v. ACIT (2006) 100 TTJ 1 / 8 SOT 376 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Presentation articles – Rule 6B**

In the absence of any finding by the Assessing Officer that presentation article, though valuing more than ₹ 50 each carried the logo of assessee, same could not be disallowed. (A.Y. 1989-90)

*ACIT v. Hinditron Services (P) Ltd. (2006) 101 TTJ 860 / 99 ITD 479 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Prior period adjustments – Advertisement**

Consumption of nitric acid short charged during an earlier year which was detected during inventory verification in the relevant year was rightly debited to P&L a/c as prior period expenses and is allowable as deduction. (A.Ys. 1994-95 to 1998-99 and 2000-01)

Advertisement on banners during tournaments and advertisement in souvenirs gave publicity to the name of the assessee-company and the products marketed by it, and therefore, expenditure was an admissible deduction. (A.Ys. 1994-95 to 1998-99 and 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travelling – Partners expenses**

Foreign travelling expenses of the partners could not be disallowed, when there is no material or evidence on record to show that the visit was personal in nature. (A.Ys. 1994-95 to 1996-97 and 2001-02)

*Cascade Enterprises v. ACIT (2006) 101 TTJ 277 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Sales promotion expenses – Allowance in other years**

Assessee incurring sales promotion expenses and such expenses having been allowed by the Assessing Officer in assessments under section 143(3) for earlier as well subsequent assessment years, CIT(A) was justified in deleting the disallowance. (A.Ys. 1990-91 and 1991-92)

*Indian Herbs Research & Supply Co. v. ACIT (2006) 101 TTJ 786 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Premium on non-convertible debentures – Proportionate**

Premium payable on non-convertible debentures redeemable after 10 years should be spread over the entire period in which the debentures have been issued and *pro rata* allowance should be given. (A.Ys. 1991-92 and 1992-93)

*Finolex Industries Ltd. v. Dy. CIT (2006) 101 TTJ 463 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Commission – Kacha Arhatia – Sister concerns**

In the absence of any written agreement between the assessee, a Kacha Arhatia, and two sister-concerns for payment of any commission, or any evidence or material on record regarding the services said to have been rendered by the said concerns to the assessee by introducing customers the alleged payment of 75 per cent of commission receipts by the assessee to said concerns could not be allowed as deduction. (A.Y. 2001-02)

*Dalvinder Singh v. ACIT (2006) 101 TTJ 505 / 104 ITD 325 (Amritsar)(Trib.)*

**S. 37(1) : Business expenditure – Prior period expenses – Receipt of bills during the year**

Assessee having received bill/vouchers for some prior period expenses only in the relevant previous year, it is entitled to deduction of such expenditure irrespective of the fact that the assessee has been following mercantile system of accounting. (A.Ys. 1989-90, 1991-92 to 1993-94 and 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

**S. 37 (1) : Business expenditure – Commission – Evidence behind back**

Assessing Officer having treated commission payments to two parties as non-genuine on the basis of evidence collected at the back of the assessee without confronting it with such evidence, disallowance cannot be sustained, more so, when the assessee has furnished confirmations acknowledging the receipt of commission from both the parties. (A.Ys. 1990-91 and 1996-97)

*Kiran Corpn. v. ACIT (2006) 102 TTJ 375 / 98 ITD 119 (Ahd.)(Trib.)*

*Jt. CIT v. Abbot Laboratories (I) Ltd. (2006) 102 TTJ 423 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Secret commission – Trade practice**

Assessee having satisfactorily explained the payment of secret commission made by it to procure business as per trade practice, giving full details of such transactions, such payments could not be disallowed. (A.Ys. 1994-95 and 1995-96)

*ITO v. Mugatlal B & Sons (2006) 100 TTJ 1042 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Secret Commission – No details – Explanation 1**

Assessee having refused to furnish the details of payments of secret commission and also in view of Explanation to s. 37(1) same was rightly disallowed. (A.Y. 1990-91)

*Kiran Corpn. v. ACIT (2006) 102 TTJ 375 / 98 ITD 119 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – User of trademark – Lump sum payment – 10 years**

An agreement entered into for use of trade mark for a period of 10 years against lump sum consideration, without having any clause about its renewal after lapse of initial period of 10 years, would lead to inference that the use of trademark is for an unlimited period and for procuring enduring benefits for the business and expenditure incurred is a capital expenditure not allowable under section 37(1).

*Jt. CIT v. Hilton Roulunds Ltd. (2006) 152 Taxman 6 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Voluntary retirement – Closure of one unit**

Payments made to the employees on Voluntary Retirement on closure of one of the units or activities of the same business are allowed provided it is proved that the closed unit or activities and remaining continued business activities constituted the same business. (A.Y. 1996-97)

*Jt. CIT v. Abbot Laboratories (I) Ltd. (2006) 100 ITD 343 / 102 TTJ 423 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Vouchers – Ad hoc**

An *ad hoc* disallowances without pointing out defects in the vouchers produced, merely on suspicion and surmises is not justified.

*Shankar Trading Co. (P) Ltd. v. ACIT (2006) 152 Taxman 49 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Business loss – Advance of money in the course of carrying on business**

Where assessee has advanced money to any trader in the course of carrying on his business and amount has become irrecoverable, assessee would be entitled to deduction in respect of such irrecoverable amount as a business loss under section 37(1). (A.Y. 1997-98)

*Dy. CIT v. Pasupati New Tec. Ltd. (2006) 7 SOT 107 (TM)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Chartered Accountant – Study – MBA – USA**

Assessee, a chartered accountant, while carrying out his profession, proceeded to USA for doing MBA. There was no break in carrying on profession all throughout period. That degree of MBA would help assessee in his profession, and that degree of CA and MBA could not be separately placed. Since there was a nexus of CA degree of assessee with MBA degree, expenditure in question was to be allowed as business expenditure.

*ITO v. Apurva P. Patel (2006) 7 SOT 755 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Diminution in the value – Stores and spares**

Loss on account of diminution in the value of non moving stores and spares is a revenue loss.

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 153 Taxman 18 (Mag.)(Cuttack)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Issue of bonds**

Expenditure in connection with issue of bonds is allowable as revenue expenditure. (A.Ys. 1995-96, 1996-97 and 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Repair and maintenance – Ad hoc disallowance**

Repairs and maintenance expenses which are fully supported by bills and vouchers could not be partly disallowed by the Assessing Officer on ad hoc basis simply on the basis that 50 per cent of the expenses are beyond the genuine needs of the assessee. (A.Y. 1998-99)

*ACIT v. Punjab Bone Mills (2006) 103 TTJ 564 (Amritsar)(Trib.)*

**S. 37(1) : Business expenditure – Rehabilitation of employees – Other persons**

Expenditure incurred on rehabilitation of its employees and other persons and other expenses incurred on peripheral development works are allowable as business expenditure. (A.Ys. 1994-95 to 1998-99 and 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 37(1) : Business expenditure – Ad hoc disallowance – No cogent reasons**

AO having not given cogent reasons for making *ad hoc* disallowances out of staff welfare expenses, telephone expenses and miscellaneous expenses on account of non-business use and for want of verification, disallowances cannot be sustained. (A.Y. 1998-99)

*Lavrids Khudsen Maskinfabrik (India) Ltd. v. ACIT (2006) 102 TTJ 882 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Publicity**

Expenditure on advertisement, publicity, trade shows, etc. could not be treated as deferred revenue expenditure and no part thereof could be disallowed in the absence of any adverse finding by the Department. (A.Y. 1997-98)

*Silicon Graphics Systems India (P) Ltd. v. Jt. CIT (2006) 103 TTJ 220 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Company – Personal expenditure – Foreign education**

Company being an artificial juridical person, no part of vehicle expenses could be disallowed as personal expenditure. (A.Y. 1997-98)

Expenditure incurred on the foreign education of son of the managing director cannot be allowed as deduction in computing business income of the assessee company, when he was neither an employee of the assessee nor he rendered any services to assessee. (A.Y. 1997-98)

*Intersil India Ltd. v. ACIT (2006) 103 TTJ 345 / 101 ITD 85 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Gifts to employees – Farewell party**

Expenditure incurred by assessee-company on making gifts to employees and hosting dinner at a farewell party was purely on commercial consideration and therefore, same is allowable as deduction. (A.Ys. 1994-95 and 1997-98)

*Punjab State Industrial Development Corporation Ltd. v. Dy. CIT (2006) 103 TTJ 364 / 102 ITD 1 (SB)(Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Legal practitioner – Donation – Entertainment – Club**

Donations by a legal practitioner, to Counsel Clerks' association and a club being for furtherance of his professional activities are allowable as deduction. (A.Y. 1996-97)

When the car upkeep expenses were not included in the car lease rent and the assessee himself has added back part of car upkeep expenses for his personal use, disallowance on account of personal use was not justified. (A.Y. 1996-97)

Payments made to clubs and other related expenses incurred by the assessee, a legal practitioner, are allowable as business expenditure while remaining expenses incurred on other programmes are to be treated as entertainment expenditure.

*Sudipto Sarkar v. Dy. CIT (2006) 103 TTJ 297 / 101 ITD 229 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – New unit – Interest on term loan – Capital or revenue**

New unit set up by the assessee being a separate and distinct business and not an extension of the existing business, pre-operative expenses, interest on term-loan and financial consultancy charges incurred in connection with setting up new unit cannot be allowed as revenue expenditure. (A.Ys. 1994-95, 1995-96)

Interest paid to development authority for allotment of land on instalment basis being an expenditure incurred for acquisition of an asset of permanent nature is not allowable as revenue expenditure but, to be capitalized and considered for allowing depreciation.

*MAC Industrial Products Ltd. v. ACIT (2006) 103 TTJ 644 / 101 ITD 191 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Business loss – Advances for raw materials [S. 28(1)]**

Advances given for procuring raw material becoming irrecoverable, same were allowable trading loss under section 37(1). (A.Y. 1997-98)

*Minda HUF Ltd. v. Jt. CIT (2006) 103 TTJ 239 / 101 ITD 191 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Alterations in the leasehold premises**

Expenditure incurred by assessee for carrying out alterations in the leasehold premises did not create a benefit of enduring nature and, therefore same cannot be treated as capital expenditure. (A.Y. 2001-02)

*Herbalife International India (P) Ltd. v. ACIT (2006) 103 TTJ 78 / 101 ITD 450 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Office establishment expenses – Temporary suspension**

Only due to business exigency and in order to minimize the business loss, the manufacturing activity were temporarily suspended, it was held, that the claim of

business expenses on minimum electricity and other office establishment expenses along with depreciation could not be disallowed.

*Shingar Lamps Ltd. v. Addl. CIT (2006) 150 Taxman 17 (Mag.)(Amritsar)(Trib.)*

### **S. 37(1) : Business expenditure – Licence fee – Telecom**

Annual licence fee paid by assessee-corporation to Department of Telecommunication as per the terms of licence granted to it under section 4 of Indian Telegraph Act, 1885 was an allowable expenditure. (A.Ys. 1998-99 to 2000-01 and 2002-03)

*Mahanagar Telephone Nigam Ltd. v. Addl. CIT (2006) 100 TTJ 1 / 8 SOT 376 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Foreign travelling expenses – Partner**

Assessee having filed copies of letters showing that its partner was on tour abroad in connection with the business of the assessee, travelling expenses of the foreign tour could not be disallowed merely because some business could not be transacted at that time. (A.Y. 1997-98)

*ITO v. Dhiman Systems (2006) 100 TTJ 466 (Amritsar)(Trib.)*

### **S. 37(1) : Business expenditure – Prior period expenses – Details received after year end**

Details of expenses having been received by the assessee at head office only after the close of the accounting year, though technically treated as prior period expenses, are allowable in the assessment year in which they were normally eligible for deduction. (A.Y. 1999-2000)

*Toyo Engg. India Ltd. v. Jt. CIT (2006) 100 TTJ 373 / 5 SOT 616 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Bus shelter – Advertisement – Presentation articles**

Assessee having constructed a bus shelter as it was permitted to advertise its product on the structure of the shelter, the expenditure could not be disallowed on the ground that the construction was not on assessee's own property nor it could be treated as capital expenditure since it was not assessee's own property. (A.Ys. 1993-94 and 1996-97)

Assessee having not established that the expenditure on presentation articles has been incurred wholly and exclusively for the purpose of business, disallowance was sustained to the extent of 10 per cent.

*Jt. CIT v. Dalmia Cement (Bharat) Ltd. (2006) 99 TTJ 1109 / 97 ITD 78 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Holiday resort – Employees – Picnic tours – Employees**

Cost of time share in a holiday resort for employees could not be treated as capital expenditure. However, matter remanded for reconsideration as no evidence showing actual utilization of facility was produced. (A.Y. 1995-96)



Assessee-firm having organized picnic tours for its employees and partners in order to enhance the rapport between the assessee and its employees with a view to promote its business interest, no part of the expenditure can be treated as personal expenditure and same was allowable as deduction. (A.Y. 1995-96)

*Sahni Natarajan & Bahl v. ACIT (2006) 99 TTJ 1099 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Personal use – Vehicles – Directors**

No part of vehicle expenses and depreciation can be disallowed on account of personal use of vehicles by the directors of the assessee-company. (A.Y. 1995-96)

*Keystone India (P) Ltd. v. Dy. CIT (2006) 99 TTJ 386 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Processing of cloth – Denial by processor**

Assessee having clearly established by producing uncontroverted records that the processing of cloth was done by a particular concern and that he has made payment to said concern by cheque, claim for deduction of processing charges could not be rejected despite denial by that party. (A.Y. 1993-94)

*Madan Lal v. ITO (2006) 99 TTJ 538 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Prior period expenses – Year of allowability [S. 145]**

Details of expenses having been received by the assessee at head office only after the close of the accounting year, though technically treated as prior period expenses, are allowable in the assessment year in which they were normally eligible for deduction. (A.Y. 1999-2000)

*Toyo Engg. India Ltd. v. Jt. CIT (2006) 100 TTJ 373 / 5 SOT 616 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign currency funds expenses – Year of allowability**

Expenditure incurred in connection with swapping of foreign currency funds for augmenting the rupee funds is to be allowed in the year of incurrence itself. (A.Y. 1995-96)

*Industrial Finance Corporation of India Ltd. v. Dy. CIT (2006) 101 TTJ 894 / 4 SOT 223 (Delhi)(Trib.)*

**S. 37(1) : Business expenses – Bottling fee – Mercantile system – Disputes pending in Supreme Court – Year of allowability**

Assessee having not accepted the decision of the High Court upholding liability for bottling fee liability cannot be said to have been finally settled and therefore assessee following mercantile system of accounting cannot claim deduction of bottling fee pertaining to earlier years paid by it in the relevant year. (A.Y. 1996-97)

*Udaipur Distillery Co. Ltd. v. Jt. CIT (2006) 102 TTJ 495 / 100 ITD 422 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travel expenses – Reconsideration afresh**

Order of the Commissioner (Appeals) giving relief was set aside, on failure to establish business expediency of foreign travel expenses before Assessing Officer, despite sufficient opportunity given by Assessing Officer and matter was restored back to the Assessing Officer to decide the matter afresh.

*ITO v. Israni Telecom (P) Ltd. (2006) 153 Taxman 7 (Mag.)(Delhi)Trib.)*

**S. 37(1) : Business expenditure – Lease rent more than cost of assets – Subsidiary company**

Annual lease rent paid by assessee to its subsidiary company being much more than the WDV of the assets acquired on lease from the latter, same cannot be said to wholly and exclusively for the purpose of the business and therefore deduction allowed by Assessing Officer was fair and reasonable. (A.Ys. 1993-94 and 1994-95)

*Dy. CIT v. Industrial Cables (I) Ltd. (2006) 100 TTJ 748 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Mineral exploration fund – Statutory fund**

Payment to Mineral Exploration Fund was a statutory requirement and an expenditure incurred wholly and exclusively for the purpose of business, and the same was allowable as deduction under section 37(1). (A.Ys. 1994-95 to 1998-99 and 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Debenture issue expenses**

Debenture issue expenses incurred in connection with expansion of existing business were allowable as revenue expenditure. (A.Ys. 1991-92 and 1992-93)

*Finolex Industries Ltd. v. Dy. CIT (2006) 101 TTJ 463 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Capital or revenue – Convertible debentures**

Expenditure on issue of convertible debentures — Expenditure incurred on issuance of convertible debentures is retained as capital by conversion into equity shares and it is not a case of borrowings — Even if the debenture are to be converted into shares after expiry of certain period no proportionate deduction can be allowed. (A.Y. 1994-95)

*Ashima Syntex Ltd. v. ACIT (2006) 102 TTJ 177 / 100 ITD 247 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Compensation – Right to use land**

Compensation paid for right to use land for laying of pipeline is capital in nature. (A.Ys. 1992-93 and 1993-94)

*Chembur Patalganga Pipelines Ltd. v. Jt. CIT (2006) 105 TTJ 788 / 98 ITD 143 / 3 SOT 286 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Commission payment – Confirmation of payee**

Assessee having filed confirmation of the recipient of the commission payment the same cannot be disallowed on the ground that the confirmation was not supported by details of working of the quantum of the commission amount. (A.Y. 1998-99)

*Supreme Rayons (P) Ltd. v. Dy. CIT (2006) 104 TTJ 896 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Communication system – Setting up business**

Date of placing an order for purchasing the equipment necessary for its business, is an activity which was necessary before assessee could render service of providing satellite based business communication system, held to be date on which business had been set up, and expenses incurred after placing purchase order held to be revenue expenditure.

*Hughes Escorts Communications Ltd. v. Jt. CIT (2006) 157 Taxman 46 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Foreign trips of wives – Capital or revenue – Upgradation of software – Interior maintenance**

Expenditure incurred on foreign trips of wives is not allowable as deduction. (A.Ys. 1989-90 to 1993-94, 1995-96 and 1997-98)

Expenses incurred on upgradation of software is allowable as revenue expenditure.

Interior maintenance expenses incurred by assessee being expenditure on repair of flat are allowable as revenue expenditure.

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 ITD 119 / 15 SOT 392 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Pooja – Construction of temple – Nexus**

For the purpose of allowing expenses on performing poojas throughout the year and constructing a temple in business premises it is necessary to establish the business nexus. (A.Y. 2002-03)

*ACIT v. Maharashtra Metal Powers Ltd. (2006) 102 ITD 214 / 105 TTJ 361 (Nagpur)(Trib.)*

**S. 37(1) : Business expenditure – Dies and Moulds to vendors – Continuous supply**

Expenses on providing dies and moulds to vendors, to assure supply of components suitable to its requirement on continuous basis was held to be revenue expenses.

*Honda Siel Power Products Ltd. v. Dy. CIT (2006) 157 Taxman 128 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Software development – Treatment in books**

Software development charges shown under "Deferred Revenue Expenses" was claimed as revenue expenses as same was spent for computer management and control of business activities, held same is allowable as revenue expenditure.

*Samtel Colour Ltd. v. Dy. CIT (2006) 157 Taxman 39 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Technical know-how – Use of knowledge**

Payment made for exclusive acquisition of technical know-how or information would be capital expenditure but if payment is made only to secure use of technical know-how or knowledge and not for acquiring ownership of technical know-how or knowledge would be allowable as revenue expenditure. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2006) 103 ITD 157 / 95 TTJ 782 / (2005) 3 SOT 572 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Warranty – New model**

Cars sold were covered under warranty and after sale services for period of 1 year. Provision made for warranty, as liability was incurred on date when sales were made, and same being an ascertained and accrued liability is an allowable expenses.

Expenses incurred in respect of on-going business, but related to launching of a new model towards its marketability can not be said to have acquired advantage of enduring nature, and disallowance of expenses as capital expenditure is not justified.

*Honda Siel Cars India Ltd. v. ACIT (2006) 157 Taxman 76 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Fluctuation in foreign exchange – AS 11**

Loss arising as a result of fluctuation in foreign exchange rate on closing day of year, on the basis of mercantile system of accounting followed on consistent basis in accordance with AS 11 issued by ICAI, is allowable.

*Gillette India Ltd. v. Jt. CIT (2006) 156 Taxman 236 (Mag.)(Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Licence fee for software – Revenue**

Payments made for licence fee for use of software is revenue expenditure. (A.Y. 2001-02)

*Kaynet Capital Ltd. v Dy. CIT, Bench 'D', ITA Nos. 3870, 3871 & 4871/Mum/2005, dated 16th March, 2006 – BCAJ P. 275, Vol. 39-C, Part 2, December 2006 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Miscellaneous expenses – Ad hoc disallowance**

Items debited in miscellaneous expenses were part and parcel of expenses in connection with business, and Assessing Officer having not pointed out any item of expenses which was of a disallowable nature order deleting the addition was sustained.

*Hughes Escorts Communications Ltd. v. Jt. CIT (2006) 157 Taxman 46 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Legal practitioner – Entertaining clients – Lease of car**

Assessee, legal practitioner incurring expenses for entertaining clients and customers. Payment of club-fees and other related expenses are allowable as business expenditure and not partially disallowable as entertainment expenditure.

Motor car taken on lease by professional, disallowance of 20% rental is improper. (A.Y. 1996-97)

*Sudipto Sarkar v. Dy. CIT (2006) 101 ITD 229/ 103 TTJ 297 (SB)(Kol.)(Trib.)*

### **S. 37(1) : Business Expenditure – Gift [Rule 6B]**

No disallowance under rule 6B can be made where the gift articles do not carry the logo of the assessee company. (A.Ys. 1989-90 to 1993-94, 1995-96 & 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 103 ITD 119 / 105 TTJ 317 / (2007) 15 SOT 392 (Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Foreign travelling expenses – Correspondence**

In the absence of evidence in form of correspondence or otherwise with the foreign party, and mere statement that it is a business trip, the matter was remanded to Assessing Officer.

*Anand Automobiles v. Dy. CIT (2005) 156 Taxman 75 (Mag.)(Mum.)(Trib.)*

### **S. 37(1) : Business expenditure – Capital or revenue – Relevant consideration**

Special bench has laid down various considerations, such as, enduring benefit is not a certain or conclusive test and it can not be blindly and mechanically applied, expenses for facilitating trading operations or enabling the management or conduct of the business for more efficiently though advantage may endure for the indefinite future, will be revenue nature, there cannot be single test for determining capital or revenue in nature. An amount spent by the assessee may be deductible as the revenue expenditure even if it results in the acquisition of a capital asset by a third party. (A.Y. 1996-97)

*Peerless Securities Ltd. v. Jt. CIT (2005) 94 ITD 89 / 93 TTJ 325 (SB)(Kol.)(Trib.)*

### **S. 37(1) : Business expenditure – Commencement of business – Purchase**

Purchase of land by assessee for purpose of division in to plots would amount to commencement of business so as to entitle assessee to claim administrative expenses. (A.Y. 2001-02)

*Superlight Mktg (P) Ltd. v. ITO (2005) 4 SOT 348 (Delhi)(Trib.)*

### **S. 37(1) : Business expenditure – Administrative – Allocation of expenses**

In the absence of its own infrastructure for marketing, etc., assessee made payment of administrative expenses to another company for its services in fields of marketing, selling, distribution and administration, on the basis of allocation of expenses between assessee and such company as worked out by a professional Chartered Accountant

firm, disallowance made by Assessing Officer out of such expenses was not justified. (A.Ys. 2000-01 and 2001-02)

*GlaxoSmithKline Asia (P) Ltd. v. ACIT (2005) 97 TTJ 108 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Subsidiary**

Assessee was not entitled to claim expenditure on advertisement and publicity of a product which was solely manufactured and marketed by its subsidiary. (A.Y. 1991-92 to 1993-94)

*Acqua Minerals (P) Ltd. v. Dy CIT (2005) 96 ITD 417 / 97 TTJ 658 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Audio rights acquisition – Recording company**

Expenditure incurred by assessee recording company for acquisition of audio rights was allowable as a revenue expenditure.

*Tips Cassetes & Records Co. Ltd v. ACIT (2005) 147 Taxman 8 (Mag.)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Sub-brokerage – HUF**

Sub-brokerage paid by assessee, a stock broker, to HUF for rendering services by its karta and members in introducing, clients could not be disallowed where Assessing Officer did not examine any parties whose confirmations had been filed and thus services rendered stood proved.

*Paresh B. Gandhi v. ACIT (2005) 142 Taxman 33 (Mag.)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Club fee – Golf club – Corporate membership**

The fees paid by the assessee company for corporate membership of a golf club was allowable as business expenditure. (A.Ys. 1997-98, 1999-2000 and 2000-01)

*Jt CIT v. Sony India (P) Ltd. (2005) 4 SOT 30 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Guarantee commission – Directors – Loan**

Guarantee commission expenses on account of personnel guarantee given by its director, and his relatives for loans obtained from the bank, the payment of guarantee commission was an allowable deduction. (A.Ys. 1991-92, 1993-94 and 1994-95)

*Dy. CIT v. Metallizing Equipment Co Ltd. (P) Ltd. (2005) 92 TTJ 95 / 149 Taxman 43 (Mag.) (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Contribution to biological laboratory – Sugar mill**

Contribution made by assessee sugar mill for running of biological laboratory which was being set up for benefit of all sugar mills was allowable.

*Karnal Co-operative Sugar Mills Ltd. v. Dy CIT (2005) 148 Taxman 13 (Mag.)(Delhi)(Trib.)*



**S. 37(1) : Business expenditure – Deferred revenue expenditure – Entries in the books**

If nature of expenses is such that they are allowable as incurred for business purposes, such expenses should be allowed in toto irrespective of fact that they were claimed to be deferred revenue expenditure for purpose of Companies Act, to show higher book profit to share holders. (A.Y. 1996-97)

*Charak Pharmaceuticals v. Jt. CIT (2005) 4 SOT 393 / (2006) 99 TTJ 1217 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Deferred revenue – Marketing of newly launched product**

Expenditure incurred on marketing of newly launched products is revenue expenditure, even though it is treated as deferred revenue expenditure by assessee in its books. (A.Y. 1997-98)

*ACIT v. Medicamen Biotech Ltd. (2005) 1 SOT 347 / (2006) 99 TTJ 873 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Site development – Soil trips – Levelling**

Site development expenses incurred by assessee relating to soil trips, levelling, labour charges, etc were allowable as revenue expenditure. (A.Y. 1994-95)

*ACIT v. Supreme Rayons (P) Ltd. (2005) 95 TTJ 182 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Education – Daughter of director of company**

Expenditure incurred on MBA education abroad of daughter of director of assessee company was allowable where she returned to work for assessee company, after obtaining degree, as per terms of agreement entered in to by her with company before leaving India. (A.Y. 1997-98)

*J.B. Advani & Co Ltd. v. Jt. CIT (2005) 1 SOT 830 / 92 TTJ 175 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Payment to relative of deceased employees – Agreement**

Payment made to relative of deceased employees not under an agreement, but with a view to get best out of workers was allowable as business expenditure. (A.Y. 1992-93)

*Sapco Carburettors (I) Ltd v. ACIT (2005) 3 SOT 798 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Welfare expenses towards general village – Plant location**

Village welfare expenses incurred by assessee towards general village welfare in the vicinity of plant were allowable as business expenditure. (A.Y. 1988-89)

*Gujarat Ambuja Cements Ltd. v. ACIT (2005) 4 SOT 59 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Establishment – Money lending business – RBI**

Assessee company, engaged in running money lending business had not been granted certificate by RBI for running finance activities, expenses incurred by it to maintain establishment were allowable against interest income and profit on sale of shares. (A.Y. 2001-02)

*Sanchay Finance Co. Ltd. v. ITO (2005) 93 TTJ 153 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Interest liability to deduct tax at source [S. 201(IA)]**

Liability to deduct tax and pay same to Government is personnel one imposed under the Act on payer of salary and therefore interest paid by payer under section 201 (IA) for delayed payment of tax deducted at source would also be its personal liability and failure to discharge that liability in time would disentitle it to claim deduction for such interest payment. (A.Ys. 1992-93 to 1995-96)

*ABN AMRO Bank N.V. v. Jt CIT (2005) 4 SOT 643 / 97 ITD 1 / 96 TTJ 1041 (TM)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – New unit – Interest on loan**

Assessee started a new unit and both units had a common balance sheet and common management, new unit had to be treated as part of same business and as such interest on loan and other expenditure was allowable as revenue expenditure. (A.Ys. 1994-95 and 1995-96)

*Dy CIT v. Modern Syntex (India) Ltd. (2005) 3 SOT 27 / 95 TTJ 161 (Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Interest – Builder – Completed contract method – AS-7**

Assessee builder /developer was following completed contract method for recognizing, its income /loss, but claimed finance cost in nature of interest as a period cost, deductible in year in which it was incurred or accrued, since Accounting Standard-7 also did not prohibit treatment of such expenditure as period cost where expenditure was general in nature, following judgments of co-ordinate Benches, assessee's claim was allowed. (A.Y. 1996-97)

*Jt. CIT v K. Raheja (P) Ltd. (2005) 3 SOT 617 / (2006) 102 ITD 414 / (2007) 106 TTJ 874 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Incremental amounts – Payable on Deep Discount Bonds**

Provision made by assessee for meeting liability incurred by it under terms of issue of DD bonds was not contingent but was accrued liability of assessee and hence, expenditure was allowable as business expenditure. (A.Ys. 1996-97 to 1999-2000)

*Dy CIT v. Insotex (India) Ltd. (2005) 4 SOT 612 / (2006) 104 TTJ 1022 / 103 ITD 211 (Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Lease hold rights – Expenses for acquisition of**

The assessee had obtained certain land on 99 year lease after payment of certain amount. The assessee claimed deduction of said amount as revenue expenses considering the same as advance rent. The Assessing Officer rejected the claim of the assessee. On appeal, the Commissioner (Appeals) held that the amount represented advance rent was allowable as deduction. As the entire consideration was required to be paid even before entering in to agreement which itself showed that the payment of the consideration was condition precedent for acquiring the lease hold rights. The lease agreement itself showed that entire premium was paid by the assessee before entering in the agreement. Considering the facts the tribunal held that consideration was nothing but a price for obtaining the lease hold rights by the assessee, therefore the said amount being capital in nature, the same is not allowable as deduction. (A.Y. 1993-94)

*Dy. CIT v. Sudarshan Chemicals Ltd. (2005) 95 ITD 131 / (2005) 95 TTJ 710 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Lease hold right – Capital asset – Capital expenditure**

Lease hold right in a property is a capital asset and payment made for acquisition of such right with renewal clause would amount to capital expenditure. (A.Y. 1993-94)

*Dy CIT v. Tata Honey Well Ltd. (2005) 93 ITD 507 / (2005) 94 TTJ 178 (Pune)(Trib.)*

**S. 37(1) : Business expenditure – Premium paid for 95 years lease – Advance rent**

Premium paid for 95 years lease of land over which assessee constructed a factory, for which annual rent fixed was ` 1 only, could not be treated as advance rent so as to be allowed as deduction. (A.Y. 1997-98)

*Govik Electricals (P) Ltd. v. Jt. CIT (2005) 96 ITD 70 / 97 TTJ 75 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Leased assets – Civil work and management fee**

Assessee had taken certain assets on lease, expenditure on civil work on leased assets and management fee paid by assessee for arranging lease transaction were revenue expenditure, entire expenditure, was allowable even if it was treated as deferred revenue expenditure in its books. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / (2005) 95 TTJ 782 / (2006) 103 ITD 157 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Litigation expenses – Defending employee – Criminal proceedings**

Expenditure incurred for defending an employee from criminal proceeding/prosecution for activities which were violative of or in contravention of provisions of law, is not allowable. (A.Ys. 1982-83 and 1983-84)

*I.C.B. Ltd. v. ITO (2005) 93 ITD 418 / (2005) 94 TTJ 241 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Litigation expenses – Defending employee – Goodwill**

Expenditure incurred by assessee company to safeguard its goodwill and image by defending its employees who had acted in good faith on behalf of company in CBI cases against them, was allowable. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy CIT (2005) 92 ITD 119 / 142 Taxman 57 (Mag.) / (2005) 92 TTJ 987 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Licence fee – SEBI**

Licence fee paid by assessee foreign bank's merchant division to SEBI is allowable as business expenditure. (A.Y. 1991-92)

*Credit Lyonnais v. Dy. CIT (2005) 94 ITD 401 / (2005) 94 TTJ 1074 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Loan expenses – Stamp duty and professional fees – Term loan – Public issue – Debenture issue – Stock-in-trade – Account payee cheque – Bogus purchases – Quantity tally – Upfront fee – Financial charges – Legal and professional charges [S. 35D]**

Stamp duty for term loan and professional fee for term loan, are allowable as revenue expenditure. (A.Y. 2000-01)

Public issue expenses has to be considered with reference to provisions of section 37 first and thereafter if expenditure is found to be capital expenditure, it should be required to be amortised under section 35D. (A.Y. 2000-01)

Debenture issue expenses are allowable as business expenditure.

Financial charges, legal and professional charges and upfront fees incurred in connection with obtaining loan, are allowable business expenditure. (A.Y. 2000-01)

Where quantitative details of goods purchased were available and payments were made by account payee cheques, disallowance of payments for goods treating as bogus purchases was not justified, though the Sales tax authorities have given the information that the party was bogus entity and only supplying bills and just giving truck numbers. (A.Y. 2000-01)

*Shri Rama Multi Tech Ltd. v. ACIT (2005) 92 TTJ 568 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Market research – Advertisement**

Marketing, research expenses and advertisement expenses for promoting corporate image are allowable as revenue expenditure. (A.Y. 1988-89)

*Gujarat Ambuja Cements Ltd. v. ACIT (2005) 4 SOT 59 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Non-compete fee – Allowable deduction**

Assessee company had paid a non compete fee of ` 6 crores to a company whose business it had acquired, in addition to purchase consideration, and benefit to be derived by assessee in consequence upon incurring expenditure of ` 6 crores by entering in to a non-competition agreement was directly related to enhancement of assessee's profitability in business of manufacturing and trading in chemicals, the payment of non-compete fee was held to be revenue nature, carrying on of same

business prior to entering in to a non compete agreement was not necessary to appreciate as to whether non-compete agreement was to enhance assessee's profitability or not, because stage, when increase in profitability is to be seen has to be subsequent to entering in to such an agreement and not before that. (A.Ys. 2001-02 and 2002-03)

*Smartchem Technologies Ltd. v. ITO (2005) 97 TTJ 818 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Provident fund – ESI – Predecessor firm**

Assessee company, which had taken over its predecessor firm as a running concern, made PF and ESI payments, in name of its predecessor firm as code number had not been allotted to assessee firm, assessee was entitled to deduction of such PF and ESI payments. (A.Y. 1994-95)

*ACIT v. Supreme Rayons (P) Ltd. (2005) 95 TTJ 182 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – Fine – Compounding fees of erstwhile partners**

Assessee company had taken over business of a partnership firm, and department had launched prosecution proceedings against partners of erstwhile firm who were thereafter.

Directors of assessee and assessee paid compounding fees to CBDT. Such expenditure was not allowable under section 37(1). (A.Y. 2000-01)

*Garden Silk Mills Ltd. v. ACIT (2005) 2 SOT 856 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Penalty – Fine – Excise duty – Excess loss**

Amount paid by assessee representing excise duty charged by State Excise Department for excess loss of spirit in course of production of liquor estimated by them and amount representing liquidation of damages paid by assessee on account of short supply could not be treated as infraction of law and was allowable as deduction under section 37(1). (A.Y. 1995-96)

*Jt. CIT v. Swarup Vegetable Products Industries Ltd. (2005) 96 ITD 468 / 98 TTJ 420 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Poultry farm expenses – Feed and medicines**

Expenditure incurred by assessee, engaged in business of poultry farm, in providing feed and medicines for chicks till they attained their egg laying stage, would be revenue expenditure. The Tribunal referred the Judgment of Supreme Court in case of *Assam Bengal Cement Co Ltd v. CIT (1955) 27 ITR 34 (SC)*, wherein the court held that the expenditure incurred by the assessee in acquisition of an income earning asset is capital expenditure and the expenditure incurred in the process of earning of income is a revenue expenditure. (A.Y. 1992-93)

*Vasu Farms (P) Ltd. v. Dy. CIT (2005) 95 ITD 125 / 95 TTJ 1051 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Replacement of carpets and linen – Hotel**

Expenditure on replacement of carpets and linen in hotel business is allowable as revenue expenditure. (A.Y. 1996-97)

*Jt. CIT v. Piem Hotels Ltd. (2005) 1 SOT 382 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Extensive repair of Hotel – Licence to ITC**

Entire running of its hotel was entrusted by assessee to ITC for a Licence fee and following damage to hotel in a bomb blast, as ITC refused to undertake repairs, in business interest assessee volunteered to undertake work of repairs, expenditure for repairs was allowable even if not paid or exactly quantified during relevant year. The assessee got done evaluation of the cost of repairs at ` 14.87 crores, and made insurance claim of ` 5 crores. The balance of ` 9.78 crores was claimed as deduction being cost of repairs. (A.Y. 1993-94)

*Ele Hotels & Investments Ltd. v. Jt. CIT (2005) 2 SOT 659 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Salary wages – Accrued liability**

Where assessee could reasonably estimate its accrued liability on account of wages revision, during financial year 2000-01 as process for revision of wages had started in January 1999, deduction on account of such liability was allowable even though quantification of same took place in subsequent year. (A.Y. 2001-02)

*Neyveli Lignite Corporation Ltd. v. ACIT (2005) 93 TTJ 685 / 2 SOT 863 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Fees paid to Registrar – Increase in authorized capital**

Expenditure incurred towards increase in capital is capital expenditure. Thus fees paid to Registrar of Companies for increase in authorized capital in connection with issue of bonus shares is capital expenditure. (A.Y. 1995-96)

*Auroford Ltd. v. Dy. CIT (2005) 4 SOT 345 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Bonus issue – No expansion of capital base**

Since issue of bonus shares does not lead to expansion of capital base of a company, the expenditure incurred by the assessee company in connection with the said issue is allowable as revenue expenditure. (A.Y. 1994-95)

*Technova Imaging Systems Ltd v. Dy. CIT (2005) 2 SOT 116 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Convertible – Debentures – Compulsory**

Expenditure incurred on issue of debentures compulsorily convertible into shares is allowable as revenue expenditure notwithstanding the provision of section 35D. (A.Ys. 1994-95 & 1995-96)

*Dy. CIT v. Modern Syntex (India) Ltd. (2005) 3 SOT 27 / 95 TTJ 161 (Jp.)(Trib.)*

**S. 37(1) : Business expenditure – Share broker – Development fee – VSAT charges**



Assessee company which was engaged in business of share trading and stock brokerage claimed deduction as revenue expenditure on account of payment towards development fee, and fee for operating on the floor, to Calcutta Stock exchange Association, payment of admission fee and technology cost paid to OTC Exchange of India (OTCEI), and payment towards non adjustable deposit for membership subscription and also deposit made for very Small Aperture Terminal (VSAT) paid to National stock Exchange of India Ltd. (NSEIL) under the head deferred revenue expenditure shown in the balance sheet, expenditure towards development fee paid to Calcutta Stock Exchange Association was of capital nature, and following expenses are revenue in nature (1). Fee for operating on the floor (ii). Admission fee as a dealer on OTCEI and payment of technology cost (iii). Expenditure towards non adjustable deposit for admission as trading member of the WDM of NSEIL and the expenditure towards (VSATs) paid to NSEIL. (A.Y. 1996-97)

*Peerless Securities Ltd v Jt. CIT (2005) 94 ITD 89 / 93 TTJ 325 (SB)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Misappropriation by broker – Refund to clients – Year of allowability**

Assessee bank acted as intermediary for investment in securities by a client and because of misappropriation of investment involved by broker concerned, had to refund amount to client and thus suffered loss, such loss was allowable in year broker diverted amounts and not in which assessee refunded amount to client. (A.Ys. 1992-93 to 1995-96)

*ABN AMRO Bank N.V. v. Jt. CIT (2005) 4 SOT 643 / 97 ITD 1 / 96 TTJ 1041 (TM)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Software – Upgradation**

Expenditure on software and its upgradation is allowable. (A.Ys. 1995-96, 1996-97)

*Naveen Projects Ltd. v. Dy. CIT (2005) 1 SOT 232 (Delhi)(Trib.)*

*Sumitomo Corporation India (P) Ltd v. Addl CIT (2005) 1 SOT 91 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Software – Anti virus programme – Upgradation of software**

Expenditure on antivirus programme and upgradation of software is allowable as revenue expenditure. (A.Y. 1996-97)

*Ajitkumar C. Kamdar v. Dy. CIT (2005) 1 SOT 183 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Software – Acquisition**

Software is a capital asset and expenditure incurred on acquisition of software is a capital expenditure and, hence not allowable as business expenditure. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 142 Taxman 57 (Mag.) / 92 TTJ 987 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Stock exchange membership – Revenue**

Membership fee paid to stock exchange as admission fee is revenue expenditure, because the assessee could not carry on its business without becoming member as a stock broker.

*Paresh B. Gandhi v. ACIT (2005) 142 Taxman 33 (Mag.)(Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Payment made to purchaser for late delivery of goods**

Payment made by assessee on account of late delivery of goods to purchaser was allowable as deduction. (A.Ys. 1991-92, 1993-94, 1994-95)

*Dy. CIT v. Metallizing Equipment Co (P) Ltd. (2005) 92 TTJ 95 / 149 Taxman 43 (Mag.)(Jodh.) (Trib.)*

**S. 37(1) : Business expenditure – Technical know-how fee – Colourable device – Burden**

Assessee made substantial payments to group holding companies as “royalty for technical assistance” under agreements approved by RBI and in past such payments had been allowed, the Tribunal held that Assessing Officer was not justified in disallowing such payment by holding that such payments were a colourable device to avoid tax when no material had been brought on record by revenue to hold so except disbelieving assessee’s explanation and is subjective opinion. Burden to prove that a claim of expenditure is colourable device or camouflage for diversion of profits rests on revenue. (A.Y. 1997-98)

*Addl. CIT v. Nestle India Ltd. (2005) 94 TTJ 53 / 147 Taxman 20 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Technical know-how – Travelling expenses of wife [S. 35AB]**

Where assessee had paid a sum as technical know how fee to a Japanese company and assessee was merely entitled to use know how for manufacture of motor cycles and its parts without acquiring any right of ownership of know how, provisions of section 35AB did not apply and entire amount was allowable as revenue expenditure. (A.Y. 1996-97)

Assessee company’s CMD visited Mauritius at invitation of CII along with his wife, expenditure incurred on his wife’s visit was allowable. (A.Y. 1996-97)

*Hero Honda Motors Ltd v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi) (Trib.)*

**S. 37(1) : Business expenditure – Technical know-how – Lump sum payment [S. 35AB]**

Lump sum payment by assessee, engaged in business of manufacturing of air conditioners, to Japanese company for technical know how used for improvisation of products was allowable as revenue expenditure and section 35AB has no application. (A.Y. 1992-93)

*ACIT v. Amtrex Appliances Ltd. (2005) 94 TTJ 396 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Mobile phone – 50% disallowance confirmed**

It was not in dispute that the use of mobile telephone by the public at large has increased substantially and it has now become a part of one's life. As the assessee is not able to give details of call made by mobile phone, disallowance of 50 % of expenses was confirmed.

(A.Y. 2001-02)

*Jayasree Roychowdhury (Smt) v. ACIT (2005) 92 ITD 400 / 93 TTJ 714 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Trade mark payment – 10 years period**

Where assessee was allowed to use trade mark for 10 years by paying consideration of ` 1 crore. The assessee claimed the expenditure as revenue in nature. Assessing Officer held that the expenditure was capital in nature as enduring benefit was obtained by the assessee. The Tribunal held that there was no clause inserted as to how agreement could be renewed after period of 10 years and what could be further consideration for use of trade mark, it would mean that trade mark was finally sold or transferred to assessee through agreement permanently and assessee was not required to get renewal of license and as such payment for use of trade mark made by assessee was capital in nature as the assessee procured enduring benefit for his business. (A.Y. 1996-97)

*Jt. CIT v. Hilton Rounds Ltd. (2005) 97 TTJ 479 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Tips – Speed money – Dock workers**

Payment of "speed money" to dock workers of port Trust for expediting process of loading, unloading of ships is legitimate business expenditure and as such payment is not illegal payment or payment opposed to public policy, as dock workers are not Government employees. Expenditure allowable as deduction. (A.Y. 1999-2000)

*A.P.L. (India) (P) Ltd. v. Dy. CIT (2005) 96 ITD 227 / 97 TTJ 187 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Professional tour – International symposium**

Expenditure incurred by assessee on account of professional tour to Yugoslavia for attending International Symposium was allowable. (A.Ys. 1992-93, 1994-95, 1995-96)

*ACIT v. Arvind Mathur (Dr.) (2005) 95 TTJ 975 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travelling – Prospective suppliers**

Director of company had contacted various prospective suppliers abroad with whom assessee had business dealings in subsequent years, expenditure on foreign travel is allowable as business expenditure. (A.Ys. 1990-91 and 1991-92)

*ACIT v. Mercury Metals (P) Ltd. (2005) 1 SOT 435 / (2004) 90 TTJ 156 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign Travelling – Wife of managing director**

Foreign travel expenses of wife of MD were not allowable as the assessee has not established the business need of the company. (A.Ys. 1995-96, 1996-97)

*Naveen Projects Ltd. v. Dy. CIT (2005) 1 SOT 232 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travelling – Wife of CMD – Participating in pooja – Warranty – Mercantile system of accounting**

Foreign travel expenses of wife of CMD to South Africa were in connection with visit apparently to participate in Poojas carried out in South Africa and there was no reference to any meeting with any foreign business associates, explanation given was not sufficient to conclude that visit by wife of CMD was necessary and consequently, to that extent, expenditure on such visit was not allowable as business expenditure. (A.Y. 1996-97)

Assessee following mercantile system of accounting and expenses on account of warranty in each year were not less than what was provided by assessee as warranty expenses in its account, assessee's claim on account of provision for warranty claims expenses for free maintenance and replacement of parts during period was to be allowed as business expenditure.

*Here Honda Motors Ltd v. Jt CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi) (Trib.)*

**S. 37(1) : Business expenditure – Warranty – Mercantile system of accounting**

Once liability arising on account of warranty claims is in built in sale mechanism, it self, it can not be said that it is contingent in nature, the provision for warranty was allowable as business expenditure. Warranty was offered of one year in all its products. (A.Ys. 1997-98, 1999-2000 and 2000-01)

*Jt. CIT v. Sony India (P) Ltd. (2005) 4 SOT 30 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Year in which deductible – Bills for services rendered**

Bills for services rendered to assessee had not been received in year of account, it could not be said that liability had arisen in year of account. (A.Y. 1994-95)

*Technova Imaging Systems Ltd. v. Dy. CIT (2005) 2 SOT 116 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Year in which deductible – Deferred revenue expenditure**

Assessee holiday resort was selling time share to members and time period of lease membership receipts were to be treated as income spread over total period of lease, when advance subscription received by assessee was spread over a number of years, there was no reason why expenditure incurred in respect of same venture should be allowed in first year itself. (A.Y. 1998-99)

*ACIT v. Asia Resorts Ltd. (2005) 96 TTJ 909 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Year of deduction – Disputed contractual liability**

A contractual liability where a dispute is raised by parties, would be allowable only on final outcome of dispute either in year of amicable settlement by parties or in year of final determination of judicial process. (A.Y. 1996-97)

*State Bank of Saurashtra v. Dy. CIT (2005) 93 ITD 662 / 95 TTJ 225 / 3 SOT 869 (Ahd.)(Trib.)*

**S. 37(1) : Business expenditure – Year of deduction – Forward contracts in foreign exchange**

A liability arising on account of contractual obligation is to be allowed in entirety in year in which same is incurred having regard to terms of contract. (A.Y. 1995-96)

*Industrial Finance Corporation of India v. Dy. CIT (2005) 4 SOT 223 / (2006) 101 TTJ 894 (Delhi) (Trib.)*

**S. 37(1) : Business expenditure – Year in which deductible – Loss due to embezzlement**

Loss due to embezzlement by employees should be allowed as deduction in year in which it is discovered. (A.Ys. 1982-83 to 1984-85)

*ITO v. J & K Bank Ltd. (2005) 95 ITD 141 / 94 TTJ 836 (Amritsar)(Trib.)*

**S. 37(1) : Business expenditure – Year in which deductible – Prior period expenses – Mercantile system of accounting – Consistent practice**

Assessee travelling agent was following mercantile system of accounting its liability to make payment to airlines arose when tickets were actually sold and not when assessee made payments to airlines, which were in next financial year, however since a consistent practice had been followed by assessee and accepted by department and there was no loss of revenue involved, assessee's claim for on payment was to be allowed. (A.Y. 1998-99)

*Annamaria Travels & Tours (P) Ltd. v. Dy. CIT (2005) 95 TTJ 71 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Year in which deductible – Provision for warranty**

Assessee following mercantile system of accounting, provision made for expenses for warranty for providing free services for maintenance of electronic machines sold by it for one year, could not be disallowed on ground that claim was made on estimate basis and actual quantification could not be ascertained during that year.

*Hamilton Research & Technology (P) Ltd. v. ACIT (2005) 142 Taxman 79 (Mag.)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Distribution of free samples – Tooth paste**

Distribution of free samples of tooth paste /medicines was normal business activity of assessee, there could be no basis for making an estimate of sample distribution expenses or restricting its allowance if claim was verifiable. (A.Y. 1991-92)

*Warren Laboratories (P) Ltd. v. Dy. CIT (2004) 3 SOT 638 / (2003) 81 TTJ 809 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Special provisions [S. 30 to 36]**

In case of any expenditure having been described in Sec. 30 to Sec 36, same cannot be considered under section 37, which is an residuary provision.

It was laid down that special provision will prevail over the general provision. (A.Ys. 1986-87 to 1988-89)

*Dy. CIT v. Vickers Systems International Ltd. (2003) 87 ITD 182 / 88 TTJ 284 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Personal – Company**

In case of Company there cannot be any disallowance on account of personal use of telephone, postage, car expenses and car depreciation.

*Space Capital Services Ltd. v. ACIT (2003) SOT 17 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Burden of proof – Payment by cheque**

It was held that burden is upon the assessee to establish that expenditure claimed is laid out or incurred for the purposes of business, irrespective of the fact that payments were made by cheque. (A.Y. 1992-93)

*Parasmani Investment Co. (P.) Ltd. v. ACIT (2003) 85 ITD 133 / 79 TTJ 725 (TM)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Stamp duty – Lease transaction**

Expenditure incurred on production of Advertisement Film was held to be of revenue nature. Stamp duty paid on transaction of Lease is an revenue expenditure.

*Dy. CIT v. Metro Shoes P. Ltd. (2002) 258 ITR (At) 106 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Advertisement – Nature of burden [S. 68]**

For the purpose of claiming deduction under section 37, assessee has only to prove that the expenditure was laid out or expended wholly & exclusively for the purposes of business, and it is not the case like in Sec. 68 where the onus is on the assessee to prove the genuinity of loans. It was also held that department cannot sit over the judgement of the assessee as regards satisfaction, whether the job had been accomplished.

*S.S. Associates v. Jt. CIT (2003) SOT 250 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Compensation taking over of an agency – Retrenchment**

Payments made while taking over an agency, to erstwhile agent and to retrenched employees was held on facts as allowable business expenditure. (A.Ys. 1991-92 to 1997-98)

*Wipro Ge Medical Systems Ltd. v. Dy. CIT (2003) 81 TTJ 455 (Bang.)(Trib.)*



**S. 37(1) : Business expenditure – Expenses to ward off monopoly – Enduring benefit**

Payment made to ensure monopoly status, and to eliminate competition was held to be capital in nature, as enduring benefit was obtained not for two years but also for succeeding years. (A.Y. 1990-91)

*Hewlett Packard India Ltd. v. Dy. CIT (2003) 85 ITD 455 / 80 TTJ 208 (Delhi)(Trib.)*

*Also refer: Shaw Wallace & Co. Ltd. v. ACIT (2003) 86 ITD 315 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Professional fees to architect – Not linked to extension**

Fees paid to architect, which is not linked to actual cost incurred by the assessee on building expansion and extension, then same has to be allowed as Revenue expenditure. (A.Ys. 1990-91 and 1991-92)

*Lake Palace Hotels & Motels (P.) Ltd. v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Excessive and unreasonable – AO's burden**

Disallowance of part of the cultivation expenses, as excessive and unreasonable as compared to previous year by Assessing Officer, was held to be not justified on grounds that i) Assessing Officer can not disallow the expenses on his whims and fancies, ii) Assessing Officer must clearly show which of the expenses were not for the purpose of the business, and iii) Assessing Officer cannot sit upon the judgement about the reasonableness of the said expenditure.

*ACIT v. Durgapur Tea Co. (2003) 131 Taxman 39 (Mag.)(Gau.)(Trib.)*

**S. 37(1) : Business expenditure – Foreign education and travelling expenses – Relative**

In absence of employer – employee relationship the expenses incurred by the assessee firm on foreign Travelling and Education expenses of the relative of the partner was disallowed. (A.Ys. 1989-90 and 1990-91)

*K.B. Mehta v. Dy. CIT (2003) 131 Taxman 227 (Mag.) / 86 ITD 256 / 79 TTJ 527 / (2004) 1 SOT 677 (TM)(Pune)(Trib.)*

**S. 37(1) : Business expenditure – Gratuity – Retrenchment compensation – Transfer**

The Tribunal held, Liability on account of Gratuity and retrenchment compensation arising from the transfer of business cannot be deductible as Revenue outgoing, since same did not arise in the course of the business, nor for the purpose of carrying on the business.

*Heena v. ACIT (Inv.) (2003) SOT 369 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Interest – Dispute with bank**

In case of assessee following mercantile system of accounting, disallowance of accrued Interest on bank loan, on ground that assessee had no intention to pay and that bank had filed suit for repayment, is not justified.

*Jt. CIT v. General Fibre Dealers (P.) Ltd. (2003) 127 Taxman 161 (Mag.)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Litigation – Suit against trespasser**

Litigation expenses incurred for suit instituted against trespasser on disputed business property was held to be allowable, as same was for the purpose of securing its title, and not for the purpose of creating or completing the assessee's title as regards said capital asset.

*Prince Rubber & Plastics v. Dy. CIT (2003) 131 Taxman 130 (Mag.)(Amritsar)(Trib.)*

**S. 37(1) : Business expenditure – Litigation – Lease hold rights**

Legal expenses incurred in defending the lease hold rights for carrying on the business of hotel, is an business expenditure.

*Dy. CIT v. ITC Hotels Ltd. (2003) 131 Taxman 139 (Mag.)(Bang.)(Trib.)*

**S. 37(1) : Business expenditure – Foreclosure premium – Repayment of business loan**

Foreclosure premium paid to repay the fixed term loans, was held as allowable as same was on account of well judged business decision, and the advantage it got was laid out to be wholly for the purposes of its business. (A.Ys. 1995-96 and 1996-97)

*Overseas Sanmar Financial Ltd. v. Jt. CIT (2003) 86 ITD 602 / 87 TTJ 556 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Pooja – Sweets – Allowable**

Sums spent on Pooja and purchase of sweets for pooja was held to be allowable. (A.Y. 1996-97)

*Jt. CIT v. Pankaj Oxygen Ltd. (2003) 78 TTJ 119 / 130 Taxman 120 (Mag.)(Nagpur)(Trib.)*

**S. 37(1) : Business expenditure – Premium on Redemption of NCDs – Proportionate**

Proportionate deduction on account of premium payable on redemption of Non convertible debentures was held as allowable. (A.Y. 1989-90)

*Birla Jute & Industries Ltd. v. Dy. CIT (2003) 85 ITD 400 / 88 TTJ 335 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Reimbursement of an Agent's expenses – MOU**

Reimbursement of expenses to agent as per MOU, disallowed, as being unverifiable without understanding the structure of the business, was held to be unjustifiable. (A.Y. 1996-97)

*Dy. CIT v. Sahara India Financial Corpn. Ltd. (2003) 81 TTJ 389 / 2 SOT 733 (Luck.)(Trib.)*

**S. 37(1) : Business expenditure – Ad-hoc disallowance – Tests for disallowance**

Ad-hoc disallowance made by Assessing Officer was deleted on grounds that i) Assessing Officer could not bring on record any single instance of expenditure not supported by bill or voucher, ii) expenses were neither excessive nor unreasonable, and iii) that disallowance for car expenses can not be made in assessee company, and if cars are used for personal use then value thereof has to be added to income of director.

*ACIT v. Bateli Tea Co. Ltd. (2003) SOT 72 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Repairs and maintenance – Hotel**

Expenditure incurred by assessee hotel of international repute on repairs & maintenance of furniture and fixtures was allowed as revenue expenditure. (A.Ys. 1990-91 and 1991-92)

*Lake Palace Hotels & Motels (P.) Ltd. v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Replacement – Parts VSAT**

Expenses incurred on replacement of some parts of VSATs which made extra bandwidth available to assessee was held to be an revenue expenditure, as benefit derived was on revenue account. (A.Y. 1999-2000)

*Huges Escorts Communications Ltd. v. Dy. CIT (2003) 81 TTJ 729 / 2 SOT 404 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Salary – Wages – Provision for increment**

Deduction claimed by fully owned govt. company on account of provision for increase in salaries & wages, for which the approval by the government was pending, was held to be allowable as it being a real liability, as in principle decision for increase was already in existence. (A.Y. 1989-90)

*IBP Co. Ltd. v. ACIT (2003) 78 TTJ 158 / 129 Taxman 26 (Mag.)(Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Security deposits – Refundable**

Security deposits which were refundable on completion of contract, was not allowable as deduction. (A.Ys. 1989-90 and 1990-91)

*S.A. Builders Ltd. v. ACIT (2003) 86 ITD 58 / 86 TTJ 865 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Partly convertible debentures – Partial allowance**

Expenses incurred on issue of partly convertible Debentures, was held to be partly of capital nature being related to issue of share capital, to be bifurcated on *pro rata* basis. (A.Y. 1992-93)

*Network Ltd. v. Dy. CIT (2003) 84 ITD 67 / 78 TTJ 192 (TM)(Delhi)(Trib.)*

*Also refer :*

*Sona Steering Systems Ltd. v. Dy. CIT (2003) 78 TTJ 213 / 129 Taxman 152 (Mag.)(Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Public issue – Abandoned**

Expenditure incurred in relation to public issue which ultimately did not materialize was disallowed as capital expenditure, on ground that ultimate result does not change the character of expenditure, at the point of time when it was incurred, and the entire expenditure was of nature of abortive capital expenditure. (A.Y. 1995-96)

*Abhishek Steels Ltd. v. Addl. CIT (2003) 85 ITD 106 / 80 TTJ 788 (Hyd.)(Trib.)*

**S. 37(1) : Business expenditure – Fees for increase in authorised capital – Not allowable**

Fees paid to ROC for increase in authorized share capital is not allowable.

*Neelu Textiles Ltd. v. Addl. CIT (2003) 128 Taxman 93 (Mag.)(Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Fees for issue of bonus shares – Allowable**

Fees paid to ROC for issue of Bonus shares is allowable as revenue expenditure.

*Laxmi Drilling Rig Equipments (P.) Ltd. v. ACIT (2003) SOT 290 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Sponsorship – Cricket match – Evidence**

In absence of evidence to prove that expenses incurred was for sponsoring a cricket match, same was disallowed. (A.Ys. 1990-91 and 1991-92)

*Lake Palace Hotels & Motels (P.) Ltd. v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

**S. 37(1) : Business expenditure – Technical know-how – Drawings and designs**

Expenditure incurred on purchase of drawings and designs for manufacture of a specific order of a machinery, was held to be of revenue in nature as it was good only for that purpose, and it did not result in acquiring an asset or advantage of a permanent or enduring nature. (A.Y. 1991-92)

*Usha Martin Industries Ltd. v. Dy. CIT (2003) 86 ITD 261 / 79 TTJ 23 (Kol.)(Trib.)*

**S. 37(1) : Business expenditure – Ad hoc disallowance – Travelling**

*Ad hoc* disallowance made from travelling expenses when all details were provided, without placing any material or evidence or cogent reason, was held as unjustifiable.

*Continental Seeds & Chemicals Ltd. v. ACIT (2003) SOT 393 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Travelling expenses of wives of employees**

Expenditure incurred on travel of employees' wives was disallowed as it was not for the purpose of carrying on business or during the course of the business.

*VST Industries Ltd. v. Dy. CIT (2003) SOT 380 (Hyd.)(Trib.)*

**S. 37(1) : Business expenditure – Ad hoc disallowance – Foreign Travelling expenses**

It was held, that ad-hoc disallowance from travelling expenses on visit of partners abroad which resulted in increase in gross profit, was not justified.

*Fairways Trading Co. v. ITO (2003) 133 Taxman 76 (Mag.)(Amritsar)(Trib.)*

**S. 37(1) : Business expenditure – Foreign travel of son of company's Managing Director**

Expenses on training fees and travelling expenses of son of assessee company's managing director, was disallowed on ground that there was no agreement about future employment, and financing was unconditional, and more of personal benefit to M.D. (A.Ys. 1997-98 to 1998-99)

*Infotech Enterprises Ltd. v. Jt. CIT (2003) 85 ITD 325 / 80 TTJ 589 (Hyd.)(Trib.)*

**S. 37(1) : Business expenditure – Warranty expenses – Provision**

Provision for warranty expenses based on past experience is allowable. (A.Ys. 1991-92 to 1997-98)

*Wipro Ge Medical Systems Ltd. v. Dy. CIT (2003) 81 TTJ 455 (Bang.)(Trib.)*

**S. 37(1) : Business expenses – Year of allowability – Debenture redemption premium**

Premium payable on redemption of Debentures is to be spread over all years between date of issue and date of redemption. (A.Y. 1988-89)

*IOL Ltd v. Dy. CIT (2003) 81 TTJ 525 (Kol.)(Trib.)*

**S. 37(1) : Business expenses – Year of allowability – Disputed liability under a contract**

Contractual liabilities which are disputed, would be allowed in the assessment year in which dispute is settled either by adjudication or compromise.

Whereas statutory liabilities arise according to the provisions of law. (A.Ys. 1987-88 to 1989-90)

*Dy. CIT v. Aggarwal & Modi Enterprises (Cinema Project) Co (P) Ltd. (2003) 86 ITD 214 (Delhi)(Trib.)*

**S. 37(1) : Business expenditure – Irrecoverable advance – Year of allowability**

Advance paid to an advocate with a condition that same would be refunded if arbitration award was not in favour. On receipt of the unfavourable arbitration award in the subsequent year, and on advocates refusing to refund the advance, assessee claimed the same as deduction. Held the deduction is admissible in the year in which issue was decided, as liability to refund accrued in that year. Further the fact that assessee filed a suit against advocate did not mean that liability had not accrued, and assessee can not claim the same. (A.Ys. 1989-90 and 1990-91)

*S.A. Builders Ltd v. ACIT (2003) 86 ITD 58 / (2004) 86 TTJ 865 (Chd.)(Trib.)*

**S. 37(1) : Business expenditure – Loose papers – Allowability of expenses vis-a-vis addition as unexplained expenditure [S. 69C]**

Loose papers found during the course of search clearly showed large payment in cash outside books as interest on excess advance and discount against expected order for machines to be placed on assessee and papers clearly state that assessee had incurred unaccounted expenditure for the purpose of business. On the facts it was held that even if such amount was added as deemed income under section 69C, it was allowable as a business expenditure under section 37(1). This finding was based upon the prevailing provision of sec. 69C. In the relevant period proviso debarring to claim such addition on account of unexplained expenditure under section 69C as deduction was inserted by the Finance (No.2) Act, 1998, wef 1/4/1999 and therefore, it was not retrospective. In this regard the Circular No. 772, dated 23rd Dec., 1998, clarifies that amendment would take effect from 1st April, 1999, and would accordingly apply in relation to A.Y. 1999-2000 and subsequent years.

*DGP Windsor (India) Ltd. v. Dy. CIT (2003) 84 ITD 641 / (2002) 74 TTJ 291 (Mum.)(Trib.)*

**S. 37(1) : Business expenditure – Foreclosure premium – Premature repayment**

Foreclosure premium paid to financial company on account of premature payment of loan is allowable as it was advantageous to the assessee. (A.Y. 1996-97)

*Overseas Sanmar Financial Ltd. v. Jt. CIT (2003) 86 ITD 602 (2004) 87 TTJ 556 (Chennai)(Trib.)*

**S. 37(1) : Business expenditure – Liquidated damages on late supply of capital assets is in nature of capital receipt – Refund thereof not allowable as business expenses [S. 56, 57(iii)]**

Applicant recovered liquidated damages for late receipt of plant & machinery as per terms of purchase agreement; it adjusted such amounts against cost of assets in some years but in some years it was shown as income and tax paid thereon; subsequently it refunded certain amounts recovered earlier as liquidated damages – Issue is whether the amount refunded on account of waiver of liquidated damages is an allowable deduction from its business income – AAR observed that main issue to be resolved is whether nature of the LD is capital or revenue. Damages recovered on account of late supply of capital assets have been held to be capital in nature and not allowable as revenue expenditure by Hon'ble Supreme Court in *Swadeshi Cotton Mills Co. Ltd. v. CIT (No. 2)(1967) 63 ITR 65*. Following this principle, Authority held that damages recovered by the applicant were in the nature of capital receipt and did not come within the purview of sub-clause (iv) of section 28 of the Act, which deals with profits and gains of business or profession - Hence ruled that refund of such LD subsequently is not allowable as deduction from business income. (A.Y. 2002-03)

*Mahanagr Telephone Nigam Ltd. (2006) 286 ITR 211 / 156 Taxman 105 / 205 CTR 104 (AAR)*



**S. 37(2) : Business expenditure – Entertainment – Guest house [S. 37 (4)]**

In view of the Allahabad High Court's decision in *CIT v. Rampur Distillery & Chemicals Co. Ltd. (2003) 131 Taxman 508 (All.)*, it was to be held that guest house expenses were allowable under section 37(4) in the relevant assessment year.

*Radio Khaitan Ltd. v. CIT (2005) 142 Taxman 87 (All.) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Travelling and other expenses [Rule 6D]**

The expression "any other person" in rule 6D (2) is broad enough to include professionals within its ambit and thus it is applicable to professional retainers. (A.Y. 1981-82)

*Industrial Cables (India) Ltd. v. CIT (2005) 272 ITR 314 (P&H) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Travelling and other expenses [Rule 6D]**

The disallowance out of travelling expenses under the provision of Rule 6D should be worked out by taking into consideration not year-wise details of such travelling expenses but trip-wise expenses.

*CIT v. Sayaji Iron & Engg. (P.) Ltd. 2005 Tax LR 251 (Guj.) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Other expenses [S. 37(3A)]**

The provisions of sub-section (3A) of section 37 cannot be invoked for disallowance under that provision of expenditure incurred by the assessee - pharmaceutical company on medical literature and journals distributed by the company to the medical professionals. (A.Ys. 1984-85, 1985-86)

*Farichem Laboratories (P.) Ltd. v. CIT (2005) 273 ITR 133 / 148 Taxman 70 / (2006) 203 CTR 377 (Cal.) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Other expenses [37(3B)]**

Expenditure on car repairs and insurance is allowable under section 31 and it has to be excluded for the purpose of working out disallowance under section 37(3B).

*CIT v. Upper India Steel Manufacturing & Engineering Co. (P.) Ltd. (2005) 278 ITR 583 / 199 CTR 642 / (2006) 150 Taxman 235 (P&H) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Employees**

The court held that the Tribunal was correct in law in deleting the disallowance representing expenditure which was partly for payment of entertainment allowance to the employees and partly for offering customary hospitality to constituents. (A.Ys. 1974-75, 1975-76)

*Oriental Fire & General Insurance Co Ltd v. CIT (2005) 278 ITR 312 / (2004) 140 Taxman 446 / 190 CTR 553 (Delhi) (High Court)*

**S. 37(2) : Business expenditure – Entertainment – Food and drinks – Employees – Seminar**

Food and drinks provided to the employees in course of a seminar is an expenses which the assessee is entitled to exclude from entertainment expenditure as explained in Explanation 2. The phrase "other place of work" does not indicate place of work other than office factory, to mean normal place of the work where the employees work regularly or normally. It would include anyplace where any of the employees of the assessee is asked to perform his work in connection with the employer's business. (A.Y. 1990-91)

*CIT v. Chemcrown (India) Ltd. (2003) 262 ITR 177 / 182 CTR 133 / 133 Taxman 579 (Cal.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Gifts and presents – Diwali**

Gifts and presents are based on contracts or customs or usage of trade, are also to be treated as entertainment expenditure for the purpose of sub-section (2A), thus expenditure on presents at the time of Diwali is in the nature of expenditure on entertainment. (A.Ys. 1989-90, 1990-91)

*CIT v. Mangalam Cement Ltd. (2003) 130 Taxman 835 / 180 CTR 482 / (2004) 266 ITR 385 / (Raj.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Boarding and lodging**

Expenditure on boarding and lodging of foreign buyers is entertainment expenditure with in the meaning of section 37(2A), in view of Explanation (iii).

*CIT v. Rajasthan (P) Ltd. (2003) 132 Taxman 32 / 180 CTR 380 (Raj.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Boarding and lodging – Auditors**

Expenses incurred by the assessee on boarding and lodging facilities given to auditors and other Government and semi Government servants visiting factory form part of entertainment expenditure. (A.Y. 1976-77)

*CIT v. Bazpur Co-operative Sugar Factory (2003) 129 Taxman 672 / 262 ITR 45 / (2004) 186 CTR 573 (All.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Export market allowance [S. 35B]**

ITO found that the assessee was entitled to deduction under section 35B for entertainment expenditure, however the ITO invoked the provision of section 37 (2A) to limit the expenditure. Assessee went in appeal only in respect of limiting the entertainment expenses. CIT (A) and Tribunal allowed the claim of assessee. Before the High Court it was urged by the Department that entertainment expenditure can never come under section 35B and therefore, the Tribunal erred in deleting the addition under section 37 (2A). High Court held that no such question had been referred to High Court. In the circumstances the High Court could not now permit the

department to raise a new ground for the first time before the Court on the scope of section 35B vis-a-vis entertainment expenditure. However, it was clear that section 37 (2A) can apply if section 37(1) is applicable. In the circumstances the assessee's claim was upheld. (A.Y. 1978-79)

*CIT v. Walchandnagar Industries Ltd. (2003) 128 Taxman 649 / 262 ITR 212 / 180 CTR 118 (Bom.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Sales promotion expenses**

Sale of a product at discount or commission paid to dealer does not amount to sales promotion. (A.Y. 1985-86)

*CIT v. Tuticorin Alkali Chemicals & Fertilizers (2003) 261 ITR 80 / (2004) 136 Taxman 625 (Mad.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Sales promotion – Commission**

Sales commission is not sales promotion expenditure and therefore, could not be subjected to disallowance under section 37(3A). (A.Y. 1984-85)

*CIT v. Sitaklashmi Mills Ltd. (2003) 131 Taxman 509 (Mad.)(High Court)*

**S. 37(2) : Business expenditure – Entertainment – Employees participation**

1/3rd of the entertainment expenses can reasonably be attributed towards employees participation and the same are not to be disallowed under section 37(2). (A.Y. 1995-96)

*Hughes Escorts Communications Ltd. v. Jt. CIT (2007) 106 TTJ 1065 (Delhi)(Trib.)*

**S. 37(2) : Business expenditure – Advertisement – Souvenirs**

Payments made by the assessee towards advertisements in souvenirs could not be treated as donations and, therefore, *ad hoc* disallowance could not be made. (A.Ys. 1994-95 to 1998-99, 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 37(2) : Business expenditure – Entertainment – Conference**

Expenditure on digital day celebration, conference and clubs are allowable as business expenditure entirely. (A.Ys. 1992-93, 1995-96, 1996-97)

*Digital Equipment India Ltd. v. Dy. CIT (2006) 103 TTJ 329 (Bang.)(Trib.)*

**S. 37(2) : Business expenditure – Advertisement – Trade show**

Part of the expenditure incurred by the assessee on advertisement, trade shows, etc, being in the nature of entertainment expenditure, disallowance of such entertainment expenses is directed to be computed after making allowance of 35 per cent on account of employees' participation having regard to past practice. (A.Y. 1997-98)

*Silicon Graphics Systems India (P) Ltd. v. Jt. CIT (2006) 103 TTJ 220 (Delhi)(Trib.)*

**S. 37(2) : Business expenditure – Advertisement – Logo [Rule 6B]**

Tribunal held that, Rule 6B excludes the items which does not bear the name or logo of the company.

*Dy. CIT v. Eicher Tractors Ltd. (2003) 79 TTJ 158 / 132 Taxman 213 (Mag.)(Delhi)(Trib.)*

### **S. 37(2A) : Business expenditure – Entertainment – Employees**

Expenditure incurred on food and beverages of employees while discharging their duty to entertain customers of their company, is to be excluded from purview of section 37(2A). (A.Y. 1997-98)

*Addl. CIT v. Vestas RRB India Ltd. (2005) 92 ITD 1 / 93 TTJ 0144 (Delhi)(Trib.)*

### **S. 37(2A) : Business expenditure – Advertisement – No logo**

Expenditure incurred on presentation articles carrying no logo or insignia of the assessee company can not be treated as advertisement expenditure so as to attract rule 6B. (A.Y. 1994-95)

*Technova Imaging Systems Ltd v. Dy. CIT (2005) 2 SOT 116 (Mum.)(Trib.)*

### **S. 37(2A) : Business expenditure – Advertisement – Renting of holiday home**

Payment made for renting of holiday home can not be construed to be in nature of entertainment expenditure. (A.Ys. 1992-93 to 1997-98)

*British Bank of Middle East v. Jt. CIT (2005) 4 SOT 122 (Mum.)(Trib.)*

### **S. 37(2A) : Business expenditure – Advertisement – Presenting refrigerators to the dealers**

Amount spent on presenting refrigerators to the dealers for achieving target under the incentive scheme of the company cannot be disallowed treating it as advertisement expenditure. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 0782 / (2006) 103 ITD 0157 (Delhi)(Trib.)*

### **S. 37(2A) : Business expenditure – Travelling – Local conveyance**

Phrase 'any expenditure' in rule 6D is related to expenses incurred while travelling and on hotel for stay and not expenses incurred at place of visit to attend business matters and, therefore, expenses incurred at destinations of tours on local conveyance, telephone and petty expenses, could not be disallowed under rule 6D. (A.Ys. 1992-93, 1993-94)

*Khimji Visram & Sons v. Dy CIT (2005) 1 SOT 618 (Mum.)(Trib.)*

### **S. 37(3) : Business expenditure – Entertainment – Travelling expenses [Rule 6D]**

In computing the amount of deduction admissible under rule 6D, read with section 37(3), the ceiling should be applied not to the aggregate of all the tours made by the persons during the previous year but to individual tours. Part of the expenditure attributable to the staff of the assessee was to be excluded from the disallowance

under section 37(2A), in view of the Explanation added with effect from 1-4-1976. (A.Y. 19985-86)

*Ennore Foundries Ltd. v. CIT (2003) 259 ITR 414 / 187 CTR 496 / 135 Taxman 79 (Mad.)(High Court)*

**S. 37(3) : Business expenditure – Renovation of Noon-meal Centres – Contribution to Basket Ball Association**

Contribution towards renovation of noon-meal centres and contribution to Basket Ball Association in connection with SAF Games had no nexus with assessee's business, and therefore, deduction was not allowable.

*Tamil Nadu Minerals Ltd. v. Jt. CIT (2006) 100 TTJ 608 (Chennai)(Trib.)*

**S. 37(3A) : Business expenditure – Commission – Rebate – Dealers**

The expenses incurred on account of commission and rebate to dealers do not fall within the preview of section 37(3A) of the Act as sales promotion or publicity expenses.

*CIT v. J.M.P. Manufacturing Co. (2007) 197 Taxation 393 (P&H)(High Court)*

**S. 37(3A) : Business expenditure – Commission – Reimbursed to distributors**

Commission reimbursed to distributors which were in turn paid by them to sales representative, was held not to be covered under section 37(3A) of the Act, as the commission paid to sales representative is for services rendered and not a sales promotion expenses.

*CIT v. Lakhan Pal National Ltd. (2007) 196 Taxation 201 (Guj.)(High Court)*

**S. 37(3A) : Business expenditure – Commission – Sales agent – Dealers**

Expenditure incurred on payment of commission on sales to agents and dealer cannot be treated as sale promotion expenses and therefore cannot be taken into account while computing the disallowance under section 37(3A) of the Act.

*CIT v. Arundata Mills Ltd. (2007) 196 Taxation 203 (Guj.)(High Court)*

**S. 37(3A) : Business expenditure – Entertainment – Car expenses**

Repairs, driver's salary, etc. incurred on the cars belonging to the assessee are to be excluded from the purview of section 37(3A). (A.Ys. 1984-85, 1985-86)

*CIT v. Southern Roadways Ltd. (2003) 133 Taxman 350 / 181 CTR 340 / (2004) 265 ITR 404 (Mad.)(High Court)*

**S. 37(3A) : Business expenditure – Entertainment – Allowable**

Following the judgment of Apex court in *CIT v. Patel Bros & Co Ltd (1995) 215 ITR 165 (SC)*, the entertainment expenditure was held to be allowable expenditure. (A.Y. 1972-73)

*Sir Shadi Lal Sugar & General Mills v. CIT (2003) 132 Taxman 106 (All.)(High Court)*

**S. 37(3A) : Business expenditure – Entertainment – Sales promotion – Medical literature**

Where medical literature containing curative value of the drugs was given to doctors with free samples clearly aimed at instilling confidence and to publicise and promote the product, such expenditure would constitute 'advertisement' publicity and sales promotion and thus squarely fall within the scope of and ambit of section 37 (3A). Advertisement material could not be said to be a "journal", within the meaning of section 37(2B). (A.Ys. 1979-80, 1980-81)

*Ethnor Ltd v. CIT (2003) 126 Taxman 408 / 260 ITR 401 / 181 CTR 550 (Bom.)(High Court)*

**S. 37(3A) : Business expenditure – Entertainment – Advertisement – Statutory compliance**

Expenditure incurred by the assessee on advertisements in newspapers in compliance with statutory provisions of the Companies Act, 1956, for inviting fixed deposits from public does not form part of sales promotion expenses calling for disallowance under section 37(3A). (A.Y. 1984-85)

*CIT v. Investment Trust India Ltd. (2003) 127 Taxman 168 / 264 ITR 506 / 182 CTR 70 (Mad.) (High Court)*

**S. 37(3A) : Business expenditure – Entertainment – Marketing**

Marketing expenses were excluded from the purview of expenses on advertisement, publicity and sales promotion and such expenses did not fall in any other categories of expenditure detailed in sub-section (3B) of section 37, the question of invoking any part of section 37(3A) read with sub-section (3B) could not arise. (A.Y. 1985-86)

*CIT v. Udaipur Distillery Co Ltd. (2003) 132 Taxman 267 / 183 CTR 614 / (2004) 266 ITR 667 (Raj.)(High Court)*

**S. 37(3A) : Business expenditure – Sales promotion – Need for it**

No part of sales promotion expenses could be disallowed on the basis that the expenditure on advertisement was not required or that the bills could be bogus. (A.Y. 1992-93)

*ACIT v. Metallizing Equipment (P) Ltd. (2006) 100 TTJ 449 (Jodh.)(Trib.)*

**S. 37(3A) : Business expenditure – Car – Insurance**

Motor Car Insurance Premium is not covered under section 37(3A).

*Dy. CIT v. ITC Hotels Ltd. (2003) 131 Taxman 139 (Mag.)(Bang.)(Trib.)*

**S. 37(3A) : Business expenditure – Car – Repairs**

Expenses in respect of repairs and Taxes of Motor Car which falls under section 30 & section 31 cannot be disallowed under section 37(3A).

*ACIT v. National Peroxide Ltd. (2003) SOT 321 (Mum.)(Trib.)*

**S. 37(3D) : Business expenditure – Industrial undertaking – Need product**



The term "industrial undertaking" in section 37(3D), is not defined in the Income Tax Act and there is nothing to show that section 37(3D) applies only to newly established undertakings. Thus the section 37(3D) applies to every new product for three previous years, irrespective of the fact whether the new product was manufactured by an existing undertaking or by a newly set up undertaking. (A.Ys. 1979-80, 1981-82)

*Filmyug Pvt. Ltd. v. CIT (2003) 261 ITR 263 / 129 Taxman 399 / 182 CTR 395 (Bom.)(High Court)*

**S. 37(4) : Business expenditure – Guest house – Rent – Repair – Maintenance [S. 37(3), 30, 31, 32]**

The expense towards rent, repairs, depreciation and maintenance of guest house are to be disallowed under section 37(4). There is no merit in the contention that since expenditure incurred by assessee towards payment of rent, rates, taxes, repairs and insurance of premises, buildings and furniture used for the purposes of the business or profession have been provided for specifically under sections 30, 31 and 32 by virtue of the non-obstante clause used in section 37. (A.Y. 1994-95)

*Britannia Industries Ltd. v. CIT (2005) 278 ITR 546 / 148 Taxman 468 / 198 CTR 313 (SC) / (2006) 1 SCC 646*

**S. 37(4) : Business expenditure – Entertainment – Guest house**

Depreciation on guest house or asset used in guest house has to be considered for disallowance under section 37(4). (A.Y. 1989-90)

*CIT v. Ponni Sugars & Chemicals Ltd. (2003) 127 Taxman 188 / 260 ITR 605 / 179 CTR 477 (Mad.)(High Court)*

**S. 37(4) : Business expenditure – Guest house – Repairs**

Repair expenses of guest house cannot be disallowed under section 37(4) of the income tax Act.

*CIT v. Rampur Distillery & Chemical Co. Ltd. (2003) 131 Taxman 508 (All.)(High Court)*

**S. 37(4) : Business expenditure – Guest house – Lease rent of guest house**

Lease rent paid for guest house can not be disallowed under section 37(4). Rent paid is specially dealt with section 30 of the Income tax Act. (A.Y. 1984-85)

*CIT v. South India Viscose Ltd. (2003) 259 ITR 107 / (2004) 134 Taxman 727 (Mad.)(High Court)*

**S. 37(4) : Business expenditure – Guest house – Lodging facilities to employees on tour**

Expenses incurred for maintaining premises at various centres for providing to its employees on tour, the expenditure was in the nature of guest house expenses and not allowable under section 37(3). (A.Y. 1995-96)

*Industrial Finance Corporation of India v. Dy. CIT (2005) 4 SOT 223 / (2006) 101 TTJ 0894 (Delhi)(Trib.)*

**S. 37(4) : Business expenditure – Guest house – Salary of watchman – Cook – Depreciation on furniture**

Guest house expenses incurred on account of salary paid to watchman, cook, depreciation on furniture and fixtures, kitchen articles, could not be allowed as deduction in view of special Bench decision of the Tribunal in *Eicher Tractors Ltd. v. Dy. CIT (2003) 84 ITD 49 / (2002) 77 TTJ 0681 (Delhi)(Trib.)* (A.Y. 1995-96)  
*Budhewal Co-operative Sugar Mills Ltd. v. Dy CIT (2005) 94 TTJ 307 (Chd.)(Trib.)*

**S. 37(4) : Business expenditure – Guest house – Rent – Depreciation [S. 30]**

Section 37 (4) is a special section, and section 30 is general section therefore expenditure incurred on the guest house in respect of rent and depreciation can not be allowed under section 30. (A.Y. 1994-95)

*Jt. CIT v. Jamuna Auto Industries Ltd. (2005) 1 SOT 874 / (2005) 92 TTJ 0920 (Chd.)(Trib.)*

**S. 37(4) : Business expenditure – Guest house – Rent and repairs of guest house**

Applying the well settled rules of interpretation it was held that S. 37(4) is a specific provision whereas Ss. 30, 31 and 32 are general provisions and therefore, the former overrides the latter. Accordingly, expenditure on account of rent and repairs of guest-house was disallowable under S. 37(4). (A.Y. 1989-90)

*Eicher Tractors Ltd. v. Dy. CIT (2003) 84 ITD 49 (2002) 77 TTJ 681 (SB)(Delhi)(Trib.)*

**Section 38 : Building, etc. partly used for business, etc., or not exclusively so used**

**S. 38 : Building – Partly used for the purpose of business – Depreciation**

Assessee installed hub in its own premises of assessee and VSAT antenna and monitors were installed at premises of member brokers. Assessee was collecting only usage charges from members. Assessee claimed depreciation on said equipment. Assessing Officer held that VSAT network was being used by members for purpose of conducting their business, therefore by invoking provisions of section 38(2) he estimated that 40% of such net work could be said to have been used for the assessee's business and he disallowed 60% of depreciation. The Tribunal held that installation of system was expedient for carrying on business of assessee and full depreciation was to be allowed. (A.Ys. 1997-98, 1998-99 and 2001-02).

*ACIT v. National Stock Exchange of India Ltd. (2011) 133 ITD 27 / 142 TTJ 189 / 62 DTR 329 (Mum.)(Trib.)*

**S. 38(2) : Building – Partly used for the purpose of business – Depreciation**

In terms of section 38(2) where an asset is not exclusively used for business purpose, depreciation was to be restricted to proportionate part. (A.Y. 2001-02)

*Sushil Kumar Jalani v. ACIT (2007) 108 TTJ 724 / 108 ITD 613 (Jodh.)(Trib.)*

#### **Section 40 : Amounts not deductible**

##### **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Technician**

###### **[S. 195]**

Payment made outside India for services rendered by non-residence technicians outside India no disallowance can be made as provisions of section 195 is not applicable. (A. Y. 2003-04)

*CIT v. International Creative Foods (P) Ltd. (2011) 49 DTR 150 / 337 ITR 440 / 240 CTR 90 / 53 DTR 44 (Ker.)(High Court)*

##### **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Software**

The assessee had purchased a software from M and sold in the Indian market. The assessee acted as a dealer. This could not be termed as royalty, therefore, section 40(a)(i) had no application.

*CIT v. Dynamic Vertical Software India P. Ltd. (2011) 332 ITR 222 (Delhi)(High Court)*

##### **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Interest – Branch of foreign bank – Head office – Permanent establishment [S. 195]**

It was held that as regards taxability in the hands of the Head Office & obligation for TDS under section 195, the same was not chargeable to tax in the hands of the Head Office. The PE being assessable as separate legal entity pursuant to provisions of DTAA there is no obligation to deduct tax under section 195 and consequently no disallowance under section 40(a)(i) can be made in the hands of the branch. Thus, interest paid by a branch of a Foreign entity to its Head office is deductible in the hands of the branch. Such interest is not taxable in the Head Office's hands.

*ABN AMRO Bank, N.,V. v. CIT (2011) 57 DTR 85 / 241 CTR 552 / 198 Taxman 376 / (2012) 343 DTR 81 (Cal.)(High Court)*

*Editorial:- Betts Hartley Huett (1979) 116 ITR 425 (Cal.) distinguished*

*Hyundai Heavy Industries (2007) 291 ITR 482 210 CTR 178 / 161 Taxman 191 (SC) & Morgan Stanley (2007) 292 ITR 416 / 210 CTR 419 / 161 Taxman 165 (SC) followed*

##### **S. 40(a)(i) : Amounts not deductible – Deduction at source – Discounting charges – Export sales bill – Interest [S. 2(28A), 195]**

Discounting charges paid by assessee to a foreign company for discounting export sale bills is not "interest" as defined in section 2(28A), since foreign company has no

permanent establishment in India, it was not liable to tax in respect of discounting charges and therefore, assessee was under no obligation to deduct tax at source under section 195 and the discounting charges could not be disallowed under section 40(a)(i). (A. Ys. 2004-05 & 2005-06).

*CIT v. Cargill Global Trading (P) Ltd. (2011) 335 ITR 94 / 241 CTR 443 / 56 DTR 188 / 199 Taxman 320 (Delhi)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Royalty – Paid or deducted**

As per the proviso to section 40(a)(i), deduction for royalty could be allowed in the year in which TDS was either paid or deducted under Chapter XVII –B; where as tax was deducted in A. Y. 1995-96 but payment was made in the next A. Y. i.e. 1996-97, assessee was not entitled to claim the same as deduction in A. Y. 1996-97 but could be claimed in A. Y. 1995-96, only. (A. Y. 1996-97).

*CIT v. Whirlpool of India Ltd. (2011) 56 DTR 65 / 242 CTR 245 (Delhi)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Demurrage [S. 172]**

Demurrage paid by Indian Company to foreign company without deduction of tax at source, disallowance under section 40(a)(i) is justified.

*CIT v. Orient (Goa) P. Ltd. (2010) 325 ITR 554 /30 DTR 129 / (2009) 227 CTR 109 / (2009) 185 Taxman 131 (Bom.)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest payable outside India, etc. – Royalty – Non-resident [S. 200(1)]**

Assessee had deducted tax at source from royalty payment within same financial year, but deposited same subsequently in next financial year, but within the limitation of time specified under chapter XVIIIB of the Act, read with section 200(1). Held royalty payment could not be disallowed by invoking section 40(a)(i). (A.Y. 1994-95)

*CIT v. Nestle India Ltd. (2005) 275 ITR 1 / 145 Taxman 235 / 195 CTR 98 (Delhi)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest paid outside India – Non-resident [S. 195]**

Disallowance under section 40(a)(i) for failure on the part of assessee to deduct tax at source from a usance interest paid to a non-resident under section 195(1) is justified. (A.Y. 1995-96)

*CIT v. Vijay Ship Breaking Corpn. & Ors. (2003) 129 Taxman 120 / 261 ITR 113 / 181 CTR 134 (Guj.)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest paid outside India – Finance charges – Foreign banker – Non-resident**

The Assessing Officer denied claim for deduction of interest payment by assessee to foreign banker from business income under section 40(a)(i) as no tax was deducted

at source, and assessee's claim was that payment represented finance charges at a certain percentage of supply bill received by it and, hence, formed part of purchase price for it. The High court held that under section 9 (1)(v), the interest income payable by a resident is deemed to accrue or arise in India and unless tax has been deducted at source as provided in Chapter XVII-B, the interest paid is not deductible. Thus the Tribunal was not justified in allowing the claim of deduction of interest. (A.Y. 1990-91)

*CIT v. C.C.C. Holdings (2003) 127 Taxman 281 / 260 ITR 433 / 182 CTR 531 (Mad.)(High Court)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission – Non-resident**

**[S. 195]**

Tax is not deductible under section 195 with regard to payment of commission to foreign agent in view of Circular No. 23 of 1969 and Circular No. 786 of 2000. The payment cannot be disallowed under section 40(a)(i) as Circular No. 7 of 2009 had no retrospective effect.

(A. Y. 2007-08)

*Dy. CIT v. Sanjiv Gupta (2011) 135 TTJ 641 / 50 DTR 225 (Luck.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Non-resident [S. 9 (1)(vii)(b), 195]**

In order to fall within the exception of section 9(1)(vii)(b), the technical services for which the fees have been paid ought to have been utilized by resident in a business outside India or for the purpose of making or earning any income from any source outside India. Assessee having established that the testing and certification services provided by it by CSA were utilized only for export activity, section 9(1)(vii)(b) being not attracted, section 40(a)(i) could not be invoked. (A. Y. 2005-06).

*Havells India Ltd. v. Addl. CIT (2011) 59 DTR 118 / 140 TTJ 283 / 47 SOT 61 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – A Fee for “user of name” and “accreditation” not taxable as “royalty”. [S. 195]**

“Accreditation panel fees” paid to British Dental Health Foundation UK is not royalty and hence not taxable in India. Therefore, section 40(a)(i) is not applicable. (A. Y. 2004-05)

*ACIT v. Anchor Health and Beauty Care Pvt. Ltd. (2011) 47 SOT 284 / (2012) 143 TTJ 566 / 64 DTR 465 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Certificate by a Chartered Accountant [S. 195]**

A certificate issued by a chartered accountant cannot be a conclusive determination of taxability of income in the hands of the recipient. Question of taxability in the hands

of the recipient remains open and the assessee continues to have obligation to file all the relevant details, enabling determination of such liability before the revenue authorities. (A.Y. 2005-06).

*Dy. CIT v. Rediff Com India Ltd. (2011) 61 DTR 426 / 47 SOT 310 / 141 TTJ 679 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission – Non-resident – Agent – Service rendered outside India [S. 9(1)(i), 195]**

Commission paid to non resident agent for services rendered out side India not being chargeable to tax in India could not be disallowed under section 40(a)(ia). (A.Ys. 2001-02 to 2004-05).

*Dy. CIT v. Devi's Laboratories Ltd. (2011) 60 DTR 210 / 140 TTJ 746 / 131 ITD 271 / 10 ITR 501 (Hyd.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Royalty**

During assessment year 2000-01, assessee company made royalty payment to its holding company in US after deducting TDS, however, the company paid amount so deducted in the A.Y. 2001-02. As per proviso to section 40(a)(i) deduction is allowable to assessee in subsequent year in which TDS has been paid or deducted under Chapter XVIIB, however in the present case TDS had been paid by assessee in present year although deducted in preceding year hence its claim for deduction was allowable. (A.Y. 2001-02)

*McDonalds (India) (P) Ltd. v. ACIT (2010) 36 SOT 240 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Charter hire payments [S. 9]**

Charter hire charges paid to Foreign Ship did not constitute royalty payment. Section 9 is not attracted nor is there any liability for TDS and consequently section 40(a)(i) cannot be invoked. (A.Y. 2004-05)

*ACIT v. Kin Ship Services (India) (P) Ltd. (2010) 2 ITR 29 / 31 SOT 375 / 128 TTJ 108 (Cochin)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – SAP software – Depreciation – DTAA – India-Germany [Art. 24(1)]**

Payment for SAP software could not be charged to tax in India as interest or royalty or fee for technical services. Even otherwise because of non-discriminatory clause 24(1) of DTAA between India and Germany, foreign national could not be subjected to provisions of section 40(a)(i). As regards depreciation which is allowable under section 32 provisions of section 40(a)(i) are not applicable. (A.Y. 2000-01)

*SMS Demag (P) Ltd. v. Dy. CIT (2010) 38 SOT 496 / 132 TTJ 498 / 37 DTR 78 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Royalty – Guaranteed licence fee [S. 9(1)(vi)]**



Amount paid under licence agreement where non-resident licensees shall exploit the programme for rental and sale through distribution, fall outside the purview of royalty within the meaning of section 9(1)(vi) and therefore, no TDS is required to be made from such payment and consequently no disallowance under section 40(a)(i). (A.Y. 2003-04)

*Asiavision Home Entertainment (P) Ltd. v. ACIT (2010) 41 DTR 492 / 37 SOT 111 / 133 TTJ 354 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Compensation with interest on damages – DTAA – India-UK**

Compensation awarded with Interest on damages is not Assessable to tax under DTAA. If there is no PE no disallowance can be made under section 40(a)(i). (A.Y. 2005-06)

*Goldcrest Exports v. ITO (2010) 46 DTR 15 / 42 SOT 1 / 134 TTJ 355 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Non-resident [S. 195]**

Payment made by the assessee to an Austrian company by way of fees for technical services was not taxable in India as per Article 7 of the old DTAA of 1965 as applicable to the relevant assessment year 2002-03. In view of the fact that no portion of the activities were performed by the Austrian enterprise in India, and therefore, provisions of section 195 were not applicable to the payment made by the assessee to the said enterprise, and as such fees for technical services is not hit by the provisions of section 40(a)(i). (A.Y. 2002-03)

*VA Tech Wabag Ltd. v. ACIT (2010) 133 TTJ 121 / 44 DTR 1 (Chennai)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest – Payments to Non-residents – Non-discrimination – DTAA – India-USA [Art. 26(3)]**

Art. 26(3) of India-US DTAA protects the non-residents against any discrimination vis-à-vis residents. Thus payment to residents are equated with payment to non-residents. Thus in light of Art. 26(3), no disallowance under section 40(a)(i) can be made even in case of payment to non-resident. Herbal Life International (2006) 101 ITD 450 (Delhi) followed. (A.Ys. 1997-98 to 1999-2000)

*Central Bank of India v. Dy. CIT (2010) 42 SOT 450 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Reimbursement of expenses – Payable outside India**

Where the assessee made payment to its parent company in UK, which was merely reimbursement of expenses and not in nature of interest, royalty, fees for technical services or other sums chargeable under Act, no disallowance of said payment could be made while computing income under head "profits and gains of business or profession" on the ground that no tax at source had been deducted. (A.Ys. 2002-03 to 2006-07)

*Dy. CIT v. Lazard India (P) Ltd. (2010) 41 SOT 72 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Reimbursement of expenditure to parent, non-resident company**

No income accrued or arose to the payee from the payment made by the assessee to its non-resident parent company in respect of the expenditure incurred by the later in connection with the business activity carried on by assessee and the assessee was not required to deduct tax at source and therefore, the payments could not be disallowed by invoking the provision of section 40(a)(i). Disallowance could not be made also for the reason that the income of the assessee is to be computed as per the special provisions of section 42 which overrides the general provisions of computation of income contained in sections 30 to 38. (A.Ys. 1996-97 to 1999-2000)

*Cairn Energy India Pvt. Ltd v. ACIT (2009) 30 DTR 258 / 126 TTJ 226 / 31 SOT 375 / (2010) 2 ITR 38 (Chennai)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Non resident [S. 2(28A), 195]**

The discounting charges paid for discounting bills of exchange cannot be included under the ambit of interest under section 2(28A) of the Income-tax Act, 1961 and the assessee was not under an obligation to deduct tax at source as per section 195 of the Income-tax Act, 1961. Since the buyer did not have any PE in India, discount earned is not taxable in India. (A.Y. 2004-05)

*ACIT v. Cargill Global Trading (I) Pvt. Ltd. (2009) 34 SOT 424 / 126 TTJ 516 / 31 DTR 289 / (2011) 9 ITR 558 (Trib.)*

*Editorial : Affirmed by CIT v. Cargil Global Traling (P)(Ltd.) (2011) 335 ITR 94 (Delhi)(High Court) / CIT v. Cargil Global Trading (P)(Ltd.) SLA No. CC 19572/2011 dated 17-2-2011 from the ITA No. 331/2011 & 204 of 2011 Source : [www.itatonline.org](http://www.itatonline.org) (SC)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission paid to Non-resident – Outside India Deduction at source [S. 195]**

Commission paid to non-resident agent outside India for services rendered outside India could not be disallowed. (A.Ys. 1995-96 to 2000-01)

*CIT v. Ardeshi B. Cursetjee & Sons Ltd. (2008) 115 TTJ 916 / 7 DTR 51 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Down-linking (bandwidth) charges – Subscription fee**

The Tribunal held that tax is not required to be deducted from payments made to (i) telecom operators for down-linking (bandwidth) charges and (ii) subscription fees paid by way of an access fee to database maintained outside India. Hence no disallowance under section 40(a)(i). (A. Ys. 2002-03 & 2003-04)

*ACIT v. Infosys Technologies Ltd., ITA Nos. 653 & 969/Bang./2006, Bench - B, dt. 17-10-2007 – BCAJ P. 638, Vol. 39-E, Part 6, March 2008. (Bang.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Ad Airtime for advertisement**

The assessee was required to deduct tax at source under section 195 from the payments made to the channel companies for purchase of "ad airtime" for advertisements. Assessee-company having not deducted tax, disallowance under section 40(a)(i) was justified. (A.Y. 2000-01)

*Satellite Television Asian Region Ltd. v. Dy. CIT (2006) 99 TTJ 1025 / 99 ITD 91 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Payment to US company – Pre-amended provision – DTAA – India-USA [Art. 26(3)]**

In view of Art 26(3) of Indo-US DTAA regarding non-discrimination, the pre-amended provisions of S. 40(a) (i) cannot be invoked to disallow the claim for deduction of payment made to a US company. (A.Y. 2001-02)

*Herbalife International India (P) Ltd. v. ACIT (2006) 103 TTJ 78 / 101 ITD 450 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest paid outside India – Capital account**

Provisions of section 40 are in the nature of overriding provisions hence, section 40(a)(i) is also applicable in respect of payments made on capital account, and it does not make any distinction between revenue expenditure or capital expenditure, it covers both. (A.Y. 1992-93)

*Spaco Carburettors (I) Ltd. v. ACIT (2005) 3 SOT 798 (Mum.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Fee for ISO certificate – Non-resident – DTAA – India-UK**

When payments made to non resident NQA, UK for providing ISO certification are not taxable in view of DTAA, no disallowance can be made under section 40(a)(i). (A.Ys. 1994-95 to 1997-98)

*NQA Quality Systems Registrar Ltd. v. Dy CIT (2005) 2 SOT 249 / 92 TTJ 946 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Services of installation by non-resident sub-contractors – Reimbursement of expenses [S. 195]**

Services of installation by non-resident contractors on a continuing basis for about five years are technical services and payment made for such services was taxable in India and covered by the provisions of S. 195. Assessee having failed to deduct the tax at source; disallowance of payment under section 40(a)(i) was justified. Reimbursement of expenses is not income chargeable to tax in India, therefore it cannot be disallowance under section 40(a)(i). (A.Y. 1999-2000)

*HNS India VSAT Inc v. Dy. DIT (2005) 95 ITD 157 / 96 TTJ 486 (Delhi)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Remuneration – Year of allowability [S. 200 (1)]**

As per section 40(a) (i), a sum which is payable either outside India or in India to non resident has to be allowed as a deduction in computing income of previous year in which tax deducted at source has been paid. If tax has been deducted in any subsequent year or has been deducted in previous year but paid in any subsequent year after expiry of time prescribed under sub section (1) of section 200; no restriction is placed for allowability of deduction of such sum paid in subsequent year that it should have been claimed in earlier year. (A.Ys. 1992-93 to 1995-96)

*ABN AMRO Bank NV v. Jt.CIT (2005) 97 ITD 1 / (2005) 96 TTJ 1041 / (2005) 4 SOT 643 (TM)(Kol.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest, royalty etc. payable out side India to Head office – Permanent establishment [S. 195]**

Interest paid to head office etc. may constitute income chargeable to tax under sections 5(2), 9 but no deduction of tax at source on interest so paid is required under section 195 as PE of assessee (Foreign enterprise) and head office are same person and hence provisions of section 40(a)(i) can not be invoked for disallowing such interest. (A.Ys. 1997-98, 1998-99)

*ABN Amro Bank NV v. ADIT (2005) 97 ITD 89 / 98 TTJ 295 (SB)(Kol.)(Trib.)*

**S. 40(a)(i) : Amounts not deductible – Deduction at source – Interest [S. 2(28), 195]**

Definition of the term “interest” as given in the DTAA is a narrower definition than that given in s. 2(28A), and the provisions of DTAA prevail upon the provisions of the Act. As per the definition of the term “interest” given in the DTAA, the interest amount specified in the MOA partakes the character of purchase price and does not fall within the definition of the term “interest” given in the DTAA. Therefore, interest amount specified in the MOA was a part of purchase price and therefore, the assessee was not liable to deduct tax at source on interest under section 195(1). Therefore, disallowance of the interest amount specified in the MOA was not called for under section 40(a)(i). (A.Y. 1995-96)

*Vijay Ship Breaking Corpn. v. Dy. CIT (2003) 86 ITD 497 / (2002) 76 TTJ 169 (Rajkot)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payments by firm to partners – Sub-contract – Resident [S. 194C]**

Partners of the assessee firm having executed the transportation contracts undertaken by the firm by using their own trucks and the assessee having acted as an agent in routing the payments to partners, it cannot be held that there was a separate contract between the firm and the partners and, therefore, payments by firm to partners could not be disallowed under section 40(a)(ia) on the ground that

tax was not deducted at source under section 194C.  
(A. Y. 2006-07)

*CIT v. Grewal Brothers (2011) 54 DTR 99 / 240 CTR 325 (P&H)(High Court)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Resident – “Transaction charges” paid to BSE – “Fees for technical services” [S. 9(1)(vii), 194J]**

Transaction charges paid to BSE constitute “fees for technical services” under section 194-J and the assessee ought to have deducted tax at source. However, on facts, because from 1995 to 2005 no tax was deducted and no objection was raised by the Assessing Officer and because from A.Y. 2006-07 onwards the assessee had deducted tax, there was a bonafide belief that no tax had to be deducted, hence no disallowance under section 40(a)(i) could be made for A.Y. 2005-06.

*CIT v. Kotak Securities Limited (2011) 62 DTR 339 / 203 Taxman 86 / 245 CTR 3 / (2012) 340 ITR 333 (Bom.)(High Court)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Resident – Freight charges [S. 194C]**

Where the Tribunal has recorded a categorical finding of fact that there was no material on record to prove any written or oral agreement between the assessee and recipients of goods for transportation and that such payment of freight had not been shown to have been made in pursuance to a contract of transportation of goods for a specific period, quality or price and further, none of the individual payment exceeded ₹ 20,000/-, there was no liability to deduct tax under section 194C and disallowance under section 40(a)(ia) was rightly deleted. (A.Y. 2006-07)

*CIT v. Bhagwati Steels (2010) 326 ITR 108 / 47 DTR 75 / 241 CTR 480 / 198 Taxman 275 (P&H)(High Court)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Resident – Foreign exchange fluctuation in respect of technical know-how fees**

Assessee had provided certain amount as liability on account of foreign exchange fluctuation in respect of technical know-how fee. The amount was debited to profit and loss account even though no payment in that regard had been made to foreign parties. As no deduction of tax was made on that amount the Assessing Officer disallowed said amount under section 40(a)(i). Assessee contended that increase and decrease of payment of technical fees depends upon foreign exchange fluctuation at the time of payment and tax will be deducted when payment was made. High Court held that provision of section 40(a)(ia) were not applicable. (A.Y. 1991-92)

*CIT v. MacCharles (India) Ltd. (2010) 195 Taxman 296 (Karn.)(High Court)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Resident – Constitutional validity [S. 194C]**

It cannot be said that for the test of constitutional validity, the provision of Section 40(a)(ia) is very stringent and violative of Article 14 of the Constitution. If similar provision under section 40(a)(i) is working well for more than two decades in respect of non-resident, there is similarly no reason why similar provision for resident should be held arbitrary, unreasonable and anti-constitutional.

*Tube Investments of India Ltd. v. ACIT (2009) 226 CTR 313 / 218 Taxation 343 / 29 DTR 169 / 185 Taxman 438 / (2010) 325 ITR 610 (Mad.)(High Court)*

#### **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Constitutional validity**

The impugned section excludes the right to seek permissible deduction in the event of failure to deduct or to deposit deducted tax, is not violative of Article 14. It rather relaxes the rigour if tax is deducted in subsequent year, the benefit of deduction is allowable.

*Rakesh Kumar & Co. v. UOI (2009) 224 CTR 510 / (2009) 178 Taxman 481 / 24 DTR 67 / (2010) 325 ITR 35 (P&H)(High Court)*

#### **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Constitutional validity**

Section 40(a)(ia), disallowing the expenditure for failure of assessee to deduct tax at source where it was required to do so is not *ultra vires* either on the ground of legislative incompetence or violation of any provision of constitution including fundamental rights. (A.Y. 2005-06)

*Dey's Medical (U.P) (P) Ltd. v. Union of India (2008) 4 DTR 235 / 216 CTR 83 / (2009) 316 ITR 445 (All.)(High Court)*

#### **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Constitutional validity**

Petition admitted, stay of operation of said clause (ia) is declined pending the decision on writ petition. Petitioners are directed to submit return for Asst. Year 2007-08 by taking in to account the amount for which tax has been deducted at source and to pay tax on self assessment income and the respondents are directed to accept the return. (A.Y. 2007-08)

*Southern Agro Engine (P) Ltd. v. Union of India (2008) 4 DTR 253 / 215 CTR 470 / 170 Taxman 468 (Mad.)(High Court)*

#### **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Sub-contractor – Labour charges – Payments for goods [S. 194C]**

It was noted from records that a small fraction of total expenditure was in form of labour charges, and as such, it was difficult to say that contract was for supply of labour or work and would rather be categorized as one for purchase of goods, though some labour work stood performed. Hence, provision of section 194C cannot be applicable consequently disallowance was deleted.



Disallowance cannot be made under section 40(a)(ia) on account of non-deduction of tax at source in respect of estimated labour charges which is a small fraction of the total expenditure in respect of goods purchased. (A.Y. 2005-06)

*S. T. Reddiar & Sons v. Dy. CIT (2011) 129 ITD 475 / 135 TTJ 480 / 49 DTR 326 / 7 ITR 1 (Cochin)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Amendment – Clarificatory – Tax deposited before due date of filing of return**

Provisions of section 40(a)(ia), as amended by the Finance Act, 2010, w.e.f. 1-4-2010, which was been inserted by the Finance (No. 2) Act, 2004, w.e.f 1-4-2005 to section 40 of the Act is remedial in nature, designed to eliminate unintended hardship to the tax payers and which made the provision unworkable or unjust in a specific situation and is clarificatory in nature and, therefore, has to be treated as retrospective with effect from 1st April 2005, the date on which section 40(a)(ia) has been inserted by the Finance Act (No. 2) Act, 2004. (A.Y. 2005-06)

*Kanubhai Ramji Makwana v. ITO (2011) 49 DTR 70 / 135 TTJ 364 / 44 SOT 264 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest Commission – Sub-contractor – Freight charges**

Assessee deducted the tax at source and paid to Government beyond date stipulated in section 200 but before the due date of filing of his return of income for the year under consideration. Finance Act 2010 made amendments to provisions of section 40(a)(ia) as per which if tax has been deducted in relevant previous year and same has been paid on or before due date of filing of return of income for said previous year as specified in section 139(1), corresponding amount from which tax has been deducted shall be allowed as deduction. Said amendment was remedial / curative in nature, it would apply retrospectively with effect from 1-4-2005. (A. Y. 2006-07)

*Bansal Parivahan (India) (P) Ltd. v. ITO (2011) 43 SOT 619 / 53 DTR 40 / 137 TTJ 319 / 9 ITR 565 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment to truck operators without deduction TDS [S. 194C]**

Assessee operating trailer lorries disbursed freight charges amounting to ` 46,70,365 to 16 parties without deducting tax as specified in section 194C. Assessee was liable to deduct tax at source. Amendment to sub-section (3) of section 194C made through Finance Act 2005, where by second and third provisos were added to it w.e.f. 1st June, 2005 had no retrospective effect. The Assessing Officer was justified in making disallowance under section 40(a)(ia). (A.Y. 2005-06).

*ITO v. M.Sankar (2010) 127 ITD 316 / (2011) 138 TTJ 690 / 55 DTR 289 (Chennai)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Franchisee agreement – Sharing of profits [S. 194C]**

Franchisee agreement did not stipulate payment to be made to the licensee for any work done on behalf of the assessee and it was merely a case of running a study centre and to apportion profits thereof between the assessee and the licensee and therefore provisions of section 194C were not applicable and no disallowance under section 40(a)(ia) can be made. (A.Ys. 2005-06, 2006-07).

*Career Launcher (India) Ltd. v. ACIT (2011) 139 TTJ 48 / 56 DTR 10 / 131 ITD 414 (Delhi)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment of contractors – Form No. 15-I. [S. 194C]**

Once assessee has obtained Form No. 15-I from the sub-contractors, he is not liable to deduct tax from the payments made to sub-contractors and no disallowance can be made under section 40(a)(ia). Belated furnishing of form No. 15I to the CIT is an act posterior in time to payments made under to sub-contractor and therefore, this cannot itself undo the eligibility of exemption created by second proviso to section 194C(3)(i) by virtue of submission of Form No. 15-I by the sub-contractors. (A. Y. 2006-07).

*Valibhai Khanbhai Mankad v. Dy. CIT (2011) 56 DTR 89 / 46 SOT 469 / 139 TTJ 70 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payments to Indian agents of foreign shipping lines [S. 194C]**

Transportation of goods by railways does not fall within the ambit of "work" within the meaning of section 194C and therefore, there was no obligation on the assessee to deduct tax at source under section 194C from the payments made to Indian agents of foreign shipping lines for inland haulage of goods by railways and accordingly, no disallowance can be made under section 40(a)(ia). (A. Y. 2006-07).

*Airtech (P) Ltd. v. Dy. CIT (2011) 57 DTR 169 / 139 TTJ 318 / 45 SOT 100 (Delhi)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment to contractors – Section is applicable in respect of amount paid and payable [S. 194C]**

Assessee contended that the section 40(a)(ia) is not applicable in case where sum has been paid as the section refers the "sums payable". The Tribunal held that section is applicable in respect of amount paid also hence, the assessee failed to deduct the tax under section 194C, disallowance was justified. (A. Y. 2007-08).

*Dy. CIT v. Ashika Stock Broking Ltd. (2011) 139 TTJ 192 / 44 SOT 556 / 56 DTR 417 (Kol.)(Trib.)*

*Editorial : Contrary view was taken by Jaipur Bench in Jaipur Vidyut Vitran Nigam Ltd v. Dy CIT (2009) 123 TTJ 888 / 26 DTR 79 (Jp.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payable to a contractor or sub-contractor – Adjustment of refund [S. 194C]**

Irrespective of fact that an assessee is entitled to claim refund of excess tax paid or get adjusted against tax liability under provisions of Act, assessee can not withhold TDS deducted from payment made to a contractor so as to adjust same against excess taxes paid earlier and if an assessee does so then provisions of section 40(a)(ia) are attracted in respect of payment so made. (A.Y. 2005-06).

*HCC Pati Joint Venture v. ACIT (2011) 46 SOT 263 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest payment additional cost [S. 194A]**

When the amount of interest paid has been considered to be part of the purchase price and not interest under section 194A, such payment cannot be disallowed under section 40(a)(ia). (A. Y. 2005-06).

*Parag Mansukhlal Shah v. ITO (2011) 46 SOT 302 / (2012) 65 DTR 342 / 143 TTJ 606 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Fees for technical services – Non-resident – DTAA – India-UK [S. 9(1)(vii)(b), 195, Arts. 13 & 15]**

By amendment in the Finance Act, 2007, the legislature inserted the Explanation with retrospective effect from 1st June, 1976 to section 9(2) and it was impossible for the assessee to deduct tax in the financial year 2003-04 1st April, 2003 to 31st March, 2004, when the obligation to deduct TDS was not on the assessee during that period disallowance was not sustainable. Assessee acted bonafide in conformity with the provisions of Act. (A.Y. 2004-05).

*Sterling Abrasive Ltd. v. ACIT (2011) 140 TTJ 68 / 57 DTR 361 / 44 SOT 652 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Deposited before due date of filing of return – Amendment by FA 2010 is not retrospective**

The Finance Act, 2010 amended section 40(a)(ia) w.r.e.f 1.4.2010 to provide that no disallowance would be made if the TDS was deposited on or before the due date for filing the return. The assessee claimed that the said amendment was "remedial and curative in nature" and applicable from AY 2005-06. The Special Bench held that, the amendment to section 40(a)(ia) by the FA 2010 was made retrospectively applicable only from AY 2010-11 and not earlier. It is nowhere stated that the amendment is curative or declaratory in nature nor is such an intention discernible. A provision giving relief cannot be regarded as retrospective only because the original provision caused hardship to the assessee. Section 40(a)(i) caused "intended difficulty" with the object of discouraging non-compliance with the TDS provisions. A partial relaxation in its rigor, inserted with prospective effect, cannot be treated as "retrospective". (A. Y. 2005-06)

*Bharati Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 / 61 DTR 41 / 11 ITR 599 / 141 TTJ 129 (SB)(Mum.)(Trib.)*

*Editorial : Refer CIT v. Vergin Creations ITA No. 302 of 2011 dated 23-11-2011 (Cal.)(High Court) in favour of assessee Source : www.itatonline.org.*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Form No. 15G.**

Depositors having submitted form No. 15G to the assessee well in time, interest paid to them without deduction of tax at source cannot be disallowed under section 40(a)(ia) simply because the said forms could not be submitted to the Assessing Officer within the time stipulated in the Act. (A. Y. 2006-07).

*Shyam Sunder Kailash Chand v. ITO (2011) 60 DTR 270 / 141 TTJ 126 (Jp.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Short deduction at source – No disallowance for short-deduction TDS default [S. 194C]**

Where it is a case of short deduction from payment as against non-deduction of TDS, disallowance under section 40(a)(ia) could not be made. Section 40(a)(ia) provides for a disallowance if amounts towards rent, etc have been paid without deducting tax at source. It does not apply to a case of short-deduction of tax at source. As the assessee had deducted under section 194C, it was not a case of “non-deduction” of TDS. If there is a shortfall due to difference of opinion as to which TDS provision would apply, the assessee may be treated as a defaulter under section 201 but no disallowance can be made under section 40(a)(ia). [Chandabhoy & Jassabhoy (ITAT Mumbai) followed]. (A. Y. 2007-08)

*Dy. CIT v. S. K. Tekriwal (2011) 48 SOT 515 (Kol.)(Trib.)*

**S. 40(a)(ia) : Amounts deductible – Deduction at source – Retrospective amendment – No disallowance**

Where the assessee acted bona fide in conformity with the provision of Act and the legal position in not deducting tax at source, retrospective amendment could not make him liable and therefore no disallowance under section 40(a)(ia) was called for. (A. Y. 2004-05)

*Sterling Abrasive Ltd. v. ACIT (2011) 57 DTR 361 / 140 TTJ 68 / 44 SOT 652 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Professional fees – Brokerage and commission – Payments made before due date of filing of return [S. 139(1)]**

Tax deducted from the payments of professional fees in the month of March, 2005 having been deposited on 22nd June, 2005, within due date as per section 139(1), the payments cannot be disallowed. The brokerage and Commission payment on which tax was deducted in February, 2005, but deposited on 6th April 2005, i.e. after the end of relevant previous year, is to be disallowed under section 40(a)(ia). (A.Ys. 2002-03 to 2005-06).

*ACIT v. Bombay Real Estate Development Company (P) Ltd. (2011) 64 DTR 137 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Lease rent for cranes – Works contract [S. 194C]**

Payment made by the assessee for hiring of cranes to crane owners was with reference to the period of lease and not at all related to the work and therefore such payment cannot be said to be payment made for “works contract” covered by section 194C and therefore the assessee was not required to deduct tax at source under section 194C and consequently the payments could not be disallowed under section 40(a)(ia). (A. Y. 2006-07).

*ACIT v. Sanjay Kumar (2011) 48 SOT 615 / 63 DTR 441 / (2012) 143 TTJ 415 (Delhi)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Sub contractor – Labour charges [S. 194C]**

Assessee paid labour charges to various labourers which included cash payments exceeding ₹ 50,000 to some labourers throughout year. Assessing Officer disallowed such payments by invoking provisions of section 40(a)(ia) for non-deduction of tax at source under section 194C. According to assessee the number of persons from one family worked as casual labourers at site on daily wage basis and due to practical difficulties for preparing individual vouchers for each labour payment, only one voucher was prepared in name of head of family who received the money and if individual labourers were taken into consideration, payment did not exceed ₹ 50,000 in a year to each person. Assessee also filed the confirmation from persons who received the sums on behalf of a number of members and same had not been repudiated by revenue. Tribunal held that the disallowance was not justified. (A.Y. 2006-07).

*Nalawade C. Maruti v. Jt. CIT (2011) 48 SOT 566 (Pune)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Sub-contractor – Hiring of tractors and trolleys – Transport and Octroi charges [S. 194C, 194I]**

The nature of expenditure cannot be deduced merely on the basis of treatment accorded in account books, but has to be decided on the basis of substantive character of transaction. As hiring of tractors / trolleys for purpose of using them in business could not be equated to a contract for transportation for carriage as contemplated under section 194C, disallowance of expenses by invoking provisions of section 40(a)(ia) was unjustified. Even such an arrangement cannot be considered to be falling within the purview of section 194I of the Act, as during the period under consideration the requirement of deduction at source on machinery rentals are not applicable. (A.Y. 2006-07).

*Nalawade C. Maruti v. Jt. CIT (2011) 48 SOT 566 (Pune)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Sub-contractor [S. 194C(2)]**

Assessee taking vehicles on hire for purpose of executing contract is not a case of sub-contract. Tax need not be deducted at source. Payment allowable. (A.Y. 2005-06) *Mythri Transport Corporation v. ACIT (2010) 124 ITD 40 / 1 ITR 290 / 124 TTJ 970 / 28 DTR 129 (Visakha.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Debenture**

Expenditure claimed by the assessee as interest accrued on debentures without deducting the TDS could not be allowed in view of specific provisions of section 40(a)(ia). (A.Y. 2005-06)

*Dy. CIT v. Umang Dairies Ltd. (2010) 36 SOT 383 / 3 ITR 497 (Delhi)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – No professional expertise**

Payment made by actor to person for managing call sheets, cannot be called payment for professional services hence cannot be disallowed under section 40(a)(ia)(A). (A.Y. 2006-07)

*R. S. Suriya v. Dy. CIT (2010) 2 ITR 746 (Chennai)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Estimate of income**

Once estimate of income is made, further disallowance under section 40(a)(ia) for non deduction of TDS is not warranted. (A.Y. 2005-06)

*Teja Constructions v. ACIT (2010) 129 TTJ 57 / 36 DTR 220 (Hyd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Paid before due date of filing return [S. 194C]**

Tax deducted at source in the month of March and paid before due date of filing of return of income, disallowance under section 40(a)(ia) is not justified. (A.Y. 2005-06)

*Bapusaheb Nanasaheb Dhumal v. ACIT (2010) 43 DTR 374 / 132 TTJ 694 / 40 SOT 361 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Transport expenses – No obligation to get the accounts audited [S. 44AB, 194C]**

Since the assessee, a transporter, was not liable to get his accounts audited under section 44AB, in the immediately preceding assessment year, he was not required to deduct tax at source under section 194C from the payments and they could not be disallowed under section 40(a)(ia) on account of non deduction of TDS. (A.Y. 2005-06)

*ITO v. Dhirubhai Dajibhai Patel (2010) 133 TTJ 1 (UO)(Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Truck owners [S. 194C]**



Considering the legal and factual findings recorded by the CIT(A) regarding there being no liability of the assessee to deduct tax under section 194C from the payments made by it to different truck owners on the ground that each job undertaken by a truck owner was a separate job for the same person, at different rates and terms, hence the different jobs will not turn into single contract and thus there being no contract between the assessee and truck owners, there was no infirmity in the order of CIT(A) deleting the disallowance under section 40(a)(ia). (A.Y. 2006-07)

*ITO v. Indian Road Lines (2010) 45 DTR 49 (Amritsar)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Transportation of goods [S. 194C]**

Assessee a transport contractor herself having executed whole of the contract for transportation of goods by hiring trucks from various truck owners, it cannot be said that the payments made for hiring of vehicles fall in the category of payment to sub-contractor and therefore, the assessee was not liable to deduct tax at source as per the provision of section 194C for the payments made to the truck owners and the same could not be disallowed under section 40(a)(ia). (A.Y. 2006-07)

*Kavita Chug (Mrs.) v. ITO (2010) 45 DTR 146 / 134 TTJ 103 (Kol.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment of tax deduction at source in next year – Allowable in the year of payment**

Assessee having made all payments of TDS in respect of contract payments, interest, professional fees and commission for the A.Y. 2005-06 after due date and in the financial year 2005-06, corresponding amounts are deductible in computing the income of Asst. Year 2006-07, in view of section 40(a)(ia). Payment of rent has been inserted in section 40(a)(ia) w.e.f. 1st April 2006 and therefore, assessee is entitled to deduct the rental expenditure in computing the income of the relevant Asst. Year i.e. 2005-06, itself, even though payment of TDS was delayed. (A.Y. 2005-06)

*Uniword Telecom Ltd. v. Addl. CIT (2010) 45 DTR 433 (Delhi)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Reimbursement of expenses**

When there is no element of income and the payment is only a reimbursement of expenses incurred by the payee, then no disallowance can be made under section 40(a)(ia).

*Utility Powertech Ltd. v. ACIT (2010) TIOL 545 ITAT (Mum.) / (Nov., 2010) P. 22 150 (2010) 42B. BCAJ (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Accrued prior to 10-9-2004 – Amendment to section 40(a)(ia) by Finance Act, 2010**

Amendment to section 40(a)(ia) by the Finance Act, 2010 which extends the time limit for all TDS payable throughout the year has been introduced as curative measure and therefore, would apply to earlier years also.

*Golden Stables Life Style Centre Pvt. Ltd. ITA Nos. 5145/Mum/2009 Bench 'G' dt. 30-9-2010. (2010) Nov., 26 155 (2010) 42-B. BCAJ (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Application in Form No. 13, 15G [S. 194A]**

Disallowance under section 40(a)(ia) of interest payments on which no TDS was deducted was sustainable, as merely filing of Form No. 13 by payee to their respective Assessing Officers cannot be construed as an authorization to the assessee not to deduct tax for the interest due to them. No copies of Form No. 15G were forthcoming to justify the assessee's stand. (A.Y. 2006-07)

*Rajendra Kumar v. Dy. CIT (2010) 46 DTR 363 / 39 SOT 373 / 134 TTJ 244 (Bang.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Fess for technical services – Transaction charges paid to stock exchange**

Transaction charges paid by the brokers to the stock exchange were not for any services provided by the stock exchange, hence, the provisions of section 40(a)(ia) were not attracted as no tax was required to be deducted. (A.Y. 2005-06)

*Wall Fort Financial Services Ltd. v. Addl. CIT (2010) 134 TTJ 656 / 48 DTR 138 / 41 SOT 200 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Amendment by Finance Act, 2010 – Retrospective effect from the A. Y. 2005-06 – TDS paid before due date of filing of return**

Amendment to section 40(a)(ia) by Finance Act, 2010 is retrospective and applies from the day said section was brought into the statute book i.e. w.e.f. 1-4-2005, meaning thereby, that even if the TDS was paid by due date for filing return of income, no disallowance under section 40(a)(ia) could be made for any of the assessment years starting from assessment year 2005-06.

*Kanubhai Ramjibhai Makwana v. ITO (2011) 49 DTR 70 / (2011) 44 SOT 264 / 135 TTJ 364 (Ahd.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Fees for technical service vis-à-vis VSAT charges and lease line charges paid to stock exchange [S. 194J]**

Payment made by assessee, member of stock exchange, towards VSAT charges and lease line charges are not fees for technical services to warrant disallowance under section 40(a)(ia) for non deduction of TDS under section 194J. (A.Y. 2005-06)

*ITO v. Phoenix Shares and Stock Brokers (P) Ltd. (2010) 47 DTR 317 / (2011) 131 TTJ 364 (Mum.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Biri binding charges – Commission [S. 194H]**

Payment of Biri binding charges made through Munshis who are part of the labourers cannot be considered as commission in terms in Expln. (i) to section 194H, therefore, the said payment could not be disallowed under section 40(a)(ia). (A.Y. 2005-06)  
*Jahangir Biri Factory (P) Ltd. v. Dy. CIT (2009) 126 TTJ 567 / 22 DTR 130 (Kol.)(Trib.)*

**S. 40(a)(ia) : Amounts not deductible – Deduction at source – Labour charges to labour sardars [S. 194C(2)]**

Labour sardars could not be called labour contractors, within the meaning of section 194C(2), hence, provisions of section 40(a)(ia), cannot be made applicable. (A.Y. 2005-06)

*Samanwaya v. ACIT (2009) 34 SOT 332 (Kol.)(Trib.)*

**S. 40(a)(ii) : Amounts not deductible – Interest on Income tax – Not allowable**

Interest on late payment of income tax / advance tax or self assessment tax or any other direct tax cannot be allowed as deduction. (A.Y. 1972-73)

*CIT v. Kanpur Textiles Ltd. (2005) 276 ITR 140 / 143 Taxman 274 / 198 CTR 293 (All.)(High Court)*

**S. 40(a)(ii) : Amounts not deductible – Income tax – Predecessor – Deduction at source**

Section 40(a)(ii), does not make any distinction, between the income tax paid by the assessee on its own income and the income tax paid by the assessee on the income tax of its predecessor. Where the assessee company was one of the partners of the erstwhile firm and the assessee had agreed to take over tax liability of erstwhile firm at time of dissolution, income tax due of predecessor paid by assessee could not be allowed as deduction. (A.Ys. 1975-76 to 1978-79)

*Himson Textile Engineering Industries (P) Ltd. v. CIT (2004) 267 ITR 612 / 137 Taxman 432 / (2006) 200 CTR 203 (Guj.)(High Court)*

**S. 40(a)(ii) : Amounts not deductible – Taxes – Interest on Income tax**

Interest paid on delayed payment of the income-tax is part and parcel of income tax itself, and not an allowable deduction. (A.Y. 1991-92)

*Parshuram Agarwalla v. CIT (2003) 130 Taxman 774 / 184 CTR 82 (Gau.)(High Court)*

**S. 40(a)(ii) : Amounts not deductible – Interest on Foreign tax**

Allowability of interest payable on delayed remittances of withholding taxes to US Government, which the assessee had deducted from the payments made to its employees in USA remanded to CIT for fresh consideration. (A.Y. 2002-03)

*Mascon Global Ltd. v. ACIT (2010) 45 DTR 20 / 133 TTJ 257 / 37 SOT 202 (TM)(Chennai)(Trib.)*

**S. 40(a)(iii) : Amounts not deductible – Deduction at source – Salary payable outside India – Non-resident – DTAA – India-Netherlands [S. 5, 9]**

Employees were non-residents who rendered services outside India and also received salaries outside India, salaries paid to them were not liable to tax in India hence provisions of section 40(a)(iii) were not applicable. (A. Y. 2002-03)

*Mother Dairy Fruits, Vegetable (P) Ltd. v. CIT (2011) 198 Taxman 33 / 240 CTR 40 / 53 DTR 70 (Delhi)(High Court)*

*Editorial:- Refer Dy. CIT v. Mother Dairy Fruits & Vegetable (P) Ltd. (2011) 45 SOT 186 / 60 DTR 220 / 141 TTJ 97 (Delhi)(Trib.)*

**S. 40(a)(iii) : Amounts not deductible – Deduction at source – Reimbursement of expenses of Employee**

Amounts paid by the assessee to its employees toward overseas maintenance allowance. These amount constituted only reimbursement for the expenses incurred by the employees and would not form part of the salary in the hands of recipient. Sub-clause (iii) of clause (a) of section 40 would not be applicable. (A.Ys. 1998-99, 2000-01)

*CIT v. Information Architects Ltd. (2011) 220 Taxation 311 / (2010) 322 ITR 1 / 232 CTR 235 / 191 Taxman 415 / 40 DTR 85 (Bom.)(High Court)*

**S. 40(b) : Amounts not deductible – Interest and salary to partner – Partnership deed – CBDT – Circular [S. 119]**

Assessee had not filed certified copy of the partnership deed signed by all the partners specifying the individual share of partners. There was no agreement in respect of quantification of the salary or the rate of interest on the capital contribution of the partners and such payment was left to the discretion of the partners at the end of financial year. Circular No. 739 dt. 25th March, 1996 does not run counter to any of the provisions of the Act, therefore the Circular being clarificatory in nature cannot be said to be beyond the powers of the Board. When there was no agreement in respect of quantification of the salary or rate of interest on the capital contribution of the partners and such payment was left to the discretion of the partners at the end of the financial year deduction for interest and salary under section 40(b) could not be allowed. (A.Y. 1993-94).

*Sood Bhandari & Co. v. Central Board of Direct Taxes (2011) 64 DTR 338 / (2012) 246*

*89 / 204 Taxman 340 (P&H)(High Court)*

**S. 40(b) : Amounts not deductible – Salary to working partner – HUF – Karta**

Salary paid to working partner even though as Karta of HUF, is received as individual and as working partner, hence allowable as deduction while computing income of firm. (A.Y. 2005-06)

*CIT v. Jugal Kishor & Sons (2011) Tax. L.R. 550 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Remuneration to partners – CBDT circular – Partnership deed – Invalid**

Section 40(b)(v) allows a deduction of payment of remuneration to a working partner if it is authorized by the partnership deed and is not in excess of the limits. Section 40(b)(v) does not lay down any condition that the partnership deed should fix the remuneration or the method of quantifying remuneration. Accordingly, CBDT Circular No. 739 dated 25.3.1996 which requires that either the amount of remuneration payable to each individual should be fixed in the agreement or the partnership agreement deed should lay down the manner of quantifying such remuneration goes beyond section 40(b)(v). The CBDT cannot issue a circular which goes against the provisions of the Act. The CBDT can only clarify issues but cannot insert terms and conditions which are not part of the main statute. A partnership deed which provides that the remuneration would be as per the provisions of the Act meaning thereby that the remuneration would not exceed the maximum remuneration provided in the Act is valid and deduction is admissible. (A.Y. 1996-97)

*Durga Dass Devki Nandan v. ITO (2011) 241 CTR 180 / 200 Taxman 318 / 55 DTR 101 / (2012) 342 ITR 17 (HP)(High Court)*

**S. 40(b) : Amounts not deductible – Partnership deed – Manner of quantifying remuneration to partners**

Section 40(b)(i) to (v) which prescribe the conditions for deduction of remuneration paid to a partner require that the payment should be authorized by, and be “in accordance with the terms of the partnership deed”. This mandates that the quantum of remuneration or the manner of computing the quantum of remuneration should be stipulated in the partnership deed and should not be left undetermined, undecided or to be determined or decided on a future date. (A.Y. 2007-08)

*Sood Brij & Associates v. CIT (2011) 203 Taxman 188 (Delhi)(High Court)*

**S. 40(b) : Amounts not deductible – Partnership – Remuneration – Additional Income – Survey**

Where the additional income declared during the course of survey action was found to be business income of the firm, the remuneration to the partners has to be allowed out of the additional income also.

*CIT v. S. K. Srigin & Bros. (2008) 171 Taxman 264 / 298 ITR 13 (Karn.)(High Court)*

**S. 40(b) : Amounts not deductible – Interest by firm to partners – HUF**

Interest paid by firm to individual where he is representing his HUF as its karta in firm as partner cannot be disallowed under section 40(b) and, therefore, such interest cannot be added to income of assessee HUF. (A.Y. 1978-79)

*CIT v. Ram Prasad (2005) 145 Taxman 442 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Firm – Interest by firm to partners – HUF**

Interest paid to a partner who is representing the HUF does not fall within mischief of section 40(b), similar would be the position in a case where interest is paid to HUF and karta is a partner in his individual capacity in firm. (A.Y. 1983-84)  
*CIT v. Laxmi Dal Mills (2005) 146 Taxman 625 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Interest by firm to partners – HUF**

Interest paid by assessee-firm to members of families of partners representing their HUFs could not be disallowed. (A.Y. 1979-80)  
*CIT v. Bishambhar Nath Swarup Narain (2005) 145 Taxman 101 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Interest by firm to partners – AOP**

AOP is a separate assessable entity, interest paid by assessee-firm to AOP in which its partners are also members, cannot be disallowed under section 40(b). (A.Ys. 1978-79, 1979-80)  
*CIT v. Jagdish Medical Agencies (2005) 144 Taxman 844 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Remuneration – Representing HUF**

Salary paid to partner representing his HUF has to be disallowed; further salary paid to partners in their individual capacity who had joined firm as partners representing their respective HUFs too has to be disallowed. (A.Ys. 1988-89 to 1990-91)  
*CIT v. Kishori Lal & Sons (2005) 145 Taxman 79 / 196 CTR 185 (Delhi)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Remuneration – Firm taken over by company**

Assessee firm had taken over a company, remuneration paid by it to business adviser of company who happened to be one of partners of assessee, was hit by section 40(b).  
(A.Y. 1984-85)  
*CIT v. Gurudass Ram & Co. (2005) 278 ITR 255 / 199 CTR 543 / (2006) 153 Taxman 59 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Partner – HUF**

Salary paid to partner, representing his HUF, in individual capacity, is to be disallowed.  
(A.Ys. 1976-77 to 1978-79)  
*G.T. Cold Storage & Ice Factory v. CIT (2005) 275 ITR 340 / (2004) 191 CTR 264 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Technical consultancy fee – Partner**

Payment made to partner was disallowable even where it was termed as technical consultancy fee. (A.Y. 1982-83)  
*CIT v. Packwell (Karnataka) Industries (2004) 267 ITR 452 / 140 Taxman 44 (Mad.)(High Court)*



**S. 40(b) : Amounts not deductible – Salary – Paid by firm to partner**

Salary paid by assessee-firm to its partners is disallowable under section 40(b).

*Tola Ram Sons Dal Mill v. CIT (2003) 130 Taxman 602 (All.)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Paid by firm to partner**

Salary, consultancy and professional fees paid to partners, in their individual capacities, is disallowable even though each of them is a partner in assessee-firm in his capacity as karta of his HUF. (A.Y. 1982-83)

*Industrial Linings v. CIT (2003) 130 Taxman 258 / 263 ITR 315 (Guj.)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Paid by firm to partner**

Remuneration paid to individual partners who are working partners is not to be disallowed on the sole ground that such partners are nominees of their HUF's and, therefore, could not be treated as 'individuals' for purposes of Explanation 4. (A.Y. 1994-95)

*CIT v. Golden Touch (2003) 263 ITR 261 / 186 CTR 207 / 138 Taxman 190 (Mad.)(High Court)*

**S. 40(b) : Amounts not deductible – Salary – Paid by firm to partner**

Salary paid to partner representing HUF is to be disallowed. (A.Y. 1986-87)

*CIT v. P.S.T.S. Thiruvirathnam & Sons (2003) 261 ITR 406 / 186 CTR 400 / 140 Taxman 48 (Mad.)(High Court)*

**S. 40(b) : Amounts not deductible – Interest – Paid by firm to partners [S. 171(9)]**

Section 40(b) has no application to interest paid to partners (on family funds) who were members of erstwhile HUF in which partial partition was made in March, 1979, which was null and void in view of section 171(9). (A.Ys. 1988-89 to 1990-91)

*CIT v. B.S. Sundaravadivel Mudaliar & Sons (2003) 128 Taxman 74 / 260 ITR 662 / 181 CTR 544 (Mad.)(High Court)*

**S. 40(b) : Amounts not deductible – Firm – Partner – Interest – Salary [S. 28(i), 29, 32, 145]**

Assessee partnership firm paid interest to partners on their capital account and claimed the deduction. Assessing officer held that as the assessee has not claimed depreciation in books of account however claimed depreciation in the computation, he reworked the capital balances of partners by reducing the cumulative amount of depreciation therefrom and allowed the interest computed on such reduced capital balances. The Tribunal held that in terms of section 40(b), read with section 28(i) and 29, Assessing Officer is not entitled to disallow payment of interest to partners by reworking capital account balances of partners. (A.Ys 1999-2000 & 2003-04).

*Swaraj Enterprises v. ITO (2011) 132 ITD 488 / 140 TTJ 360 / 11 ITR 70 / 57 DTR 299 (Visakha.)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Remuneration – Not working partner**

Where remuneration is paid to a partner who is not a working partner, remuneration payable to him even in accordance with the deed of partnership is not allowable under the provisions of section 40(b) of the Act. (A. Ys. 1999-2000 to 2004-2005)

*Reliable Surface Coatings v. ACIT (2011) 7 ITR 183 (Ahd.)(Trib.)*

**S. 40(b) : Amounts not deductible – Disclosure in the course of survey – Business income [S. 133A]**

If the assets disclosed during the survey are identified with the business of the assessee then the same have to be treated as part of business income while computing total income, and the consequential deduction under section 40(b) has to be allowed.

*Fashion World v. ITO, ITA No. 1634 Bench B dt. 12-2-2010 (Feb., 2010, 598 ACAJ (Ahd.)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Book profit – Interest on bank fixed deposit**

For the purpose of computing deduction under section 40(b), interest on bank FDRs is not to be excluded from the net profit. (A.Y. 2005-06)

*Allen Career Institution v. Addl. CIT (2010) 37 DTR 379 (Jp.)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Salary to working partner – Interest – Book profit**

A firm of solicitor is under obligation to keep the money received from its clients as deposit in a separate bank account, therefore, interest from such deposits will be assessable as profits and gains of business or profession hence, such interest has to be considered while computing book profits as per section 40(b). (A.Ys. 2002-03 to 2004-05)

*ACIT v. Bilawala & Co. (2010) 37 DTR 335 / (2009) 32 SOT 486 / 133 TTJ 168 (Mum.)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Remuneration to working partner**

The presence of a clause in the partnership firm that gave partners power to modify the terms of remuneration does not render remuneration unqualified for deduction.

*Shabro International v. Addl. CIT, ITA No. 6629/Mum/2008, Bench 'E', dt. 20th March, 2010 / BCAS Journal, Volume 42-A – Part 1 – April, 2010 – Page 25. (Mum.)(Trib.)*

**S. 40(b) : Amounts not deductible – Inadequate manner – Partnership deed**

It was found from the records that there was indication as to when increase was agreed upon by partners in terms of partnership deed and further shares of each of the two partners after increase were not defined and same was not documented,

whereas all the requirements were of vital importance for purpose of section 40(b)(v) and more over there was no evidence of any such resolution made by partners. Disallowance under section 40(b) was upheld. (A.Ys. 2000-01 to 2006-07)  
*Dy. CIT v. Raja & Co. (2010) 42 SOT 136 (Cochin)(Trib.)*

**S. 40(b) : Amounts not deductible – Salary to partner – Not quantified in partnership deed**

Salary paid to partner can not be disallowed only on the reason that salary is not quantified in partnership deed. (A.Ys. 1999-2000 to 2000-01)  
*ACIT v. Suman Construction (2009) 34 SOT 495 / 121 TTJ 847 / 20 DTR 410 (Pune)(Trib.)*

**S. 40(b) : Amounts not deductible – Interest to partners – Excessive or unreasonable**

**[S. 36(i)(ii), 40A(2)]**

Assessee firm paid Interest to Partners and their family members at 12% / 18% p.a., as against Interest earned on FDR at average rate of 9% p.a. Assessing Officer worked Interest paid, in excess of interest received and disallowed same under section 40 A(2).

It was held that :

- i) If condition provided in section 36(i)(iii) that money must be borrowed for business, is satisfied then no disallowance be made except as per provisions of section 40(b).
- ii) Section 40(b) only restricts the allowance up to the limit prescribed in the section.
- iii) That provisions of section 40(b), being special provision, would prevail over general provisions of section 40A.

Based on above, in the instant case, as 40A(2) had no application, impugned disallowance of Interest being excessive was deleted.

*Syntholab Chemicals & Research v. ACIT (2008) 172 Taxman 38 (Mag.)(Mum.)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Salary, interest, etc. paid to partner**

Section 40(b) provides framework according to which payment of salary, interest, etc. to the partners is to be paid and allowed and therefore, the same cannot be interpolated to provide for such allowances disregarding books of account. (A.Ys. 2000-01, 2001-02)

*Sri Balaji Agencies v. ITO (2007) 106 ITD 419 / 107 TTJ 658 (Chennai)(Trib.)*

**S. 40(b) : Amounts not deductible – HUF – Remuneration – Karta**

HUF becomes a partner in a firm only through the individual who functions in his personal capacity qua the firm and hence, payment of remuneration by firm to such Karta is allowable as deduction under section 40(b) as if paid to an individual partner. (A.Y. 1993-94)

*ITO v. Bharat Enterprises (2006) 103 TTJ 280 / 101 ITD 353 (Pune)(Trib.)*

**S. 40(b) : Amounts not deductible – Firm – Discount to partner**

Provisions of s. 40(b) are not applicable to discount allowed by the assessee-firm on sales made to its partner. (A.Y. 1997-98)

*ITO v. Dhiman Systems (2006) 100 TTJ 466 (Amritsar)(Trib.)*

**S. 40(b) : Amounts not deductible – Book profits income declared under survey**

Cash Credits recorded in books of account was declared as an additional income as genuineness of said credits could not be substantiated during survey. Assessing Officer held that for purpose of 'book profits' the income declared during the survey could not be considered, and restricted the claim of Remuneration. It was held that Cash Credits recorded in books partakes the character of business income, and further, assessee had no other source of income nor any other business, and as also same was included in P & L Account, it forms part of book profit for purpose of computation of remuneration.

*Deepa Agro Agencies v. ITO (2006) 154 Taxman 80 / 202 CTR 395 / (2008) 299 ITR 143 (Bang.)(Trib.)*

**S. 40(b) : Amounts not deductible – Survey – Additional income – Stock**

Additional income representing excess value of stock and excess cash disclosed during the survey has direct nexus with the business of the assessee – firm and therefore, said income is to be treated as business income for the purpose of allowing remuneration to the partners. (A.Y. 2001-02)

*Royale Sunrise v. ITO (2006) 99 TTJ 1305 (Bang.)(Trib.)*

**S. 40(b) : Amounts not deductible – Survey – Excess stock**

Assessee declaring that excess stock discovered during survey was out of current year's undisclosed income, taking the same to its P & L a/c and claiming partners' remuneration against the same under section 40(b), same was allowable. (A.Y. 1994-95)

*ITO v. Jamandas Muljibhai (2006) 99 TTJ 197 (Rajkot)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration – Partners**

Payment of lesser remuneration made only to four out of five partners, which was the maximum amount admissible under section 40(b), was allowable as deduction. (A.Y. 2002-03)

*ITO v. J.M.P. Enterprises (2006) 99 TTJ 305 / 101 ITD 324 (Amritsar)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration – Partners**

Whole income embedded in the net profit as appearing in the P & L a/c of the assessee-firm is to be taken into consideration for allowing deduction of remuneration paid to partners under section 40(b) without excluding the interest income which formed part of the book profit. (A.Y. 1998-99)

*ACIT v. Sheth Brothers (2006) 99 TTJ 189 (Rajkot)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Supervision**

To be working partner it can be sufficient that said partner to whom remuneration is paid is supervising work of firm from different place and is devoting hours and not a whole day. (A.Y. 1997-98)

*Vivek Udyog v. ITO (2005) 95 TTJ 1090 (Delhi)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Representative capacity**

Remuneration paid to partner for service rendered to a firm in a representative capacity also qualifies for deduction.

*ACIT v. Laxmi Sailaja Traders (2005) 1 SOT 608 (Hyd.)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Loss – Taxability in the hands of firm and partner**

Remuneration paid to working partners will have to be allowed as per provisions of section 40(b)(v) ; remuneration would have to be provided even in case of loss. Further, remuneration received by partners will have to be taxed either in hands of firm or in hands of partners : it can not be taxed twice. (A.Y. 2001-02)

*Vilkas Oil Mill v. ITO (2005) 95 TTJ 1126 (Jp.)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Partnership deed – Specification of amount of salary or proportion of book profit**

Where partnership deed specifies neither amount of salary required to be paid to partners nor proportion of book profit for that purpose, salary paid to working partners will not be deductible under section 40(b)(v). (A.Ys. 1998-99 to 1999-2000)

*ITO v. Durga Dass Devki Nandan Kangra (2005) 1 SOT 263 (Chd.)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Representing HUF**

Remuneration paid to working partner where he is partner in firm representing his HUF is allowable. (A.Y. 1993-94)(1993-94 to 1999-2000)

*ACIT v. Giriraj Mines (2005) 1 SOT 279 (Ahd.)(Trib.)*

*ITO v. National Automobiles (2005) 93 TTJ 641 (Jodh.)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Mutually settlement**

Disallowance of remuneration paid to working partners on ground that partnership deed provided that both partners shall be entitled to draw monthly salary or rate would be mutually settled from time to time, subject to provisions of income tax Act, was not justified. (A.Y. 1997-98)

*Eqbal Ahmed & Co v. ITO (2005) 1 SOT 202 (Kol.)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Changes in profit and loss account**

For the relevant assessment year assessee firm claimed remuneration of three partners which was authorized by deed of partnership but not charged to profit and loss account on account of inadequate profits, when actually no remuneration had been paid, deduction of same could not be allowed under section 40(b).

*ITO v. Gezu (2005) 146 Taxman 2 (SMC)(Mag.)(Delhi)(Trib.)*

*Rajendra & Co, Contractor v. ACIT (2005) 146 Taxman 3 (Mag.)(Delhi)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – Higher income on the basis of return**

As per terms of partnership deed, partners of assessee firm were entitled for maximum amount of remuneration permissible under law, if income assessed was higher than income returned by assessee firm or assessment was completed on higher amount of income on basis of revised return of income, assessee firm would be entitled for claiming proportionate higher amount of remuneration payable to partners even if amount of remuneration debited in books of account of assessee firm was less. (A.Y. 2002-03)

*Chandra Enterprise v. ITO (2005) 96 ITD 341 / 97 TTJ 0501 (Mum.)(Trib.)*

**S. 40(b) : Amounts not deductible – Interest paid to partners – Withdrawals**

Interest paid to partners has to be calculated on credit balance standing in name of each partner after deducting withdrawals but in doing so entire withdrawals cannot be deducted from opening credit balance. (A.Y. 1998-99)

*Architectural Associates v. ACIT (2005) 92 ITD 479 / 92 TTJ 1074 (Hyd.)(Trib.)*

**S. 40(b) : Amounts not deductible – Discount – Partners**

Discount on sale of machinery to partner was given and as such discounts were given to all, including partners, for business exigencies, provisions of section 40(b) were not applicable to discount given. (A.Y. 1997-98)

*ITO v. Dhiman Systems (2005) 147 Taxman 37 (Mag.) / (2006) 100 TTJ 466 (Amritsar)(Trib.)*

**S. 40(b) : Amounts not deductible – Remuneration to working partner – HUF**

Held, Remuneration paid to a working partner, representing the firm in its representative capacity as karta of HUF is allowable under section 40(b).

*Pala Ram & Co v. ITO (2003) 133 Taxman 75 (Mag.)(Amritsar)(Trib.)*

**S. 40(b)(ii) : Amounts not deductible – Remuneration – Working partner – Calculation**

Where remuneration payable to working partners, as per partnership deed was 2.5 percent of net profits, remuneration payable to partners in terms of partnership deed



for purposes, of section 40(b)(ii), should be worked out on basis of net profit without deducting income tax liability. (A.Y. 1993-94)

*CIT v. Kajah Co. (2004) 266 ITR 122 / 136 Taxman 434 / 188 CTR 35 (Ker.)(High Court)*

#### **S. 40(b)(ii) : Amounts not deductible – Interest – Partner**

Even when a person is partner in a representative capacity, interest paid to him in representative capacity is to be treated as interest paid to partner and is hit by section 40(b). (A.Y. 1982-83)

*CIT v. Swastika Metal Works (2004) 191 CTR 390 (P&H)(High Court)*

#### **S. 40(ba) : Amounts not deductible – Remuneration paid by AOP to members**

If there is any failure on part of firm as mentioned in section 144, statute empowers Assessing Officer to complete assessment of firm in same manner as an AOP and in such case, provisions of section 40(ba) will automatically come in to operation. (A.Y. 1988-89)

*Rama Boiled Modern Rice Mill v. ITO (2005) 97 ITD 379 / (2006) 99 TTJ 607 (SMC)(Hyd.)(Trib.)*

#### **S. 40(c) : Amounts not deductible – Company – Perquisites [S. 40A(5)]**

Perquisites of director – employee of the assessee company are to be considered in accordance with provisions of both sections section 40(c) and section 40A(5) and the higher of two ceilings has to be applied. (A.Y. 1982-83)

*CIT v. Autometer Ltd. (2004) 136 Taxman 562 / 187 CTR 547 (Delhi)(High Court)*

#### **S. 40(c) : Amounts not deductible – Company – Perquisites-vehicles [S. 40A(5), 40(a)(v)]**

The total amount of the expenditure incurred on the vehicles which resulted in the provision of perquisite to the employees/directors of the assessee – company should be taken in to account for purposes of disallowance under sections 40(a)(v)/40A(5), 40(c). (A.Ys. 1971-72 to 1973-74)

*CIT v. Madura Mills Co. Ltd. (2004) 141 Taxman 250 / 188 CTR 66 (Mad.)(High Court)*

#### **S. 40(c) : Amounts not deductible – Company – Reimbursement of medical expenses – Group insurance premium**

Reimbursement of medical expenses is not be excluded while computing disallowance under section 40(c), however, reimbursement of group insurance premium is required to be excluded while computing the disallowance under section 40(c). (A.Y. 1980-81)

*CIT v. Rohit Mills Ltd. (2004) 139 Taxman 429 / 187 CTR 623 (Guj.)(High Court)*

#### **S. 40(c)(i) : Amounts not deductible – Company – Director-use of car – Perquisites**

For the purposes of section 40(c)(i), in case of free use of cars by directors, it is actual expenditure, and not perquisite value as determined under rule 3, that is to be taken into account. (A.Ys. 1975-76 to 1977-78)

*Atlas Cycle Industries Ltd. v. CIT* (2004) 270 ITR 108 / (2005) 142 Taxman 102 / 192 CTR 354 (P&H)(High Court)

### **Section 40A : Expenses or payments not deductible in certain circumstances**

#### **S. 40A(2) : Expenses not deductible – Application of Transfer Pricing Regulations [S. 92C]**

No interference called for with the concurrent finding of the authorities below that the companies were not related companies within the meaning of section 40A(2), as the entire exercise is revenue neutral. Amendments suggested for consideration by the Finance Ministry in certain provisions like sections 40A(2) and 80-IA(10) for empowering the Assessing Officer to apply any of the generally accepted methods of determination of arm's length price, including the methods provided under the Transfer Pricing Regulations to domestic transactions between related parties. (A.Y. 2001-02)

*CIT v. GlaxoSmithkline Asia (P) Ltd.* (2010) 47 DTR 65 / 195 Taxman 35 / 236 CTR 113 (SC)

#### **S. 40A(2) : Expenses not deductible – Excessive or unreasonable – Same rate of tax – Disallowance not justified**

Where assessee purchased from its subsidiary material at prices higher than the market rate for assured supply, there was no question of diversion of funds since both the assessee and the subsidiary were subjected to the same rate of tax, hence, there was no warrant for addition by invoking section 40A(2). (A.Y. 1985-86)

*CIT v. V. S. Dempo & Co. P. Ltd.* (2011) 196 Taxman 193 / 61 DTR 74 / 244 CTR 102 / 336 ITR 209 (Bom.)(High Court)

#### **S. 40A(2) : Expenses not deductible – Royalty – Trade mark and brands**

Royalty paid by the assessee to SWCL for use of latter's trade mark and brands could not be disallowed by invoking the provisions of section 40A(2), as SWCL is not holding substantial interest i.e. 20 percent or more of the share capital with attendant voting rights, whether directly or beneficially in the assessee company. (A.Ys. 1997-98 to 1999-2000).

*CIT v. V. R. V. Breweries & Bottling Industries Ltd.* (2011) 62 DTR 121 / 244 CTR 576 (Delhi)(High Court)

#### **S. 40A(2) : Expenses not deductible – Import – Excessive and unreasonable payments [S. 92]**

Import of goods at price higher than for local goods, Assessing Officer comparing figures for subsequent year is not proper, the Assessing Officer was required to compare the price which prevailed in the local market in the same year.

*CIT v. Denso Haryana Pvt. Ltd. (2010) 328 ITR 14 / 190 Taxman 389 (Delhi)(High Court)*

**S. 40A(2) : Expenses not deductible – Handling charges – Excessive and unreasonable**

Assessee has paid handling charges at the rate of 9.5 per cent to its sister concerns the Assessee had also paid handling charges at the same rate to other agents also.

Revenue had allowed similar rate in earlier years. Sister concerns paying tax at a higher rate. Hence it is not as case of evasion of tax. Under Board Cir. No. 6-P dated July 1968, no disallowance was to be made under sec. 40A(2) in respect of payment made to the relatives and sister concern where there was no attempt to evade tax. (A.Y. 1991-92, 1992-93)

*CIT v. Indo Saudi Services (Travel) P. Ltd. (2009) 310 ITR 306 / (2008) 219 CTR 562 / 12 DTR 304 (Bom.)(High Court)*

**S. 40A(2) : Expenses not deductible – Interest – Payment at same rate**

Where the interest paid by assessee to close relative and associate concern is not more than the rate at which interest was paid to other creditors the interest so paid cannot be disallowed by invoking the provisions of section 40A(2). (A.Y. 2001-02)

*CIT v. Amrit Soap Co. (2009) 17 DTR 350 / 308 ITR 287 (P&H)(High Court)*

**S. 40A(2) : Expenses not deductible – Fair market value – Specialised service**

Where the service rendered by the related concern was specific and specialized in nature and the Assessing Officer was not able to establish that the payment was excessive or unreasonable having regard to the fair market value of the service, no disallowance under section 40A(2) of the Act was called for. (A.Ys. 1987-88 to 1992-93)

*CIT v. Forbes Tea Brokers (2009) 27 DTR 113 / 228 CTR 174 / 315 ITR 405 (Mad.)(High Court)*

**S. 40A(2) : Expenses not deductible – Trade discount – Not an expenditure**

Trade discount provided to a sister concern is not an expenditure and therefore, no disallowance under section 40 A(2) of the Act can be made. (A.Y. 2004-05)

*United Exports v. CIT (2009) 28 DTR 315 / 229 CTR 93 / 333 ITR 549 / 185 Taxman 374 (Delhi) (High Court)*

**S. 40A(2) : Expenses not deductible – Commission to sister concern – Reasonable**

Payment of commission to sister concern rendering service as distributor was not in doubt and the payment was not unreasonable and hence, no part thereof could be disallowed under section 40A(2). (A.Ys. 1991-92 to 1995-96)

*Dy. CIT v. Microtex Separaters Ltd. (2007) 209 CTR 62 / 293 ITR 451 / 160 Taxman 244 (Karn.)(High Court)*

**S. 40A(2) : Expenses not deductible – Commission – Sole selling agent – Reasonable**

Reasonableness of commission to interested parties – Finding that commission paid by assessee to sole selling agents was reasonable having regard to the fact that agents had their well experienced work force and outlets which had admittedly resulted in more business for the assessee and there was no proof of excessive or unreasonable payments, therefore, no disallowance could be made under section 40A(2). (A.Ys. 1989-90 to 1994-95)

*CIT v. Computer Graphics Ltd. (2006) 205 CTR 403 / 285 ITR 84 / 155 Taxman 612 (Mad.)(High Court)*

**S. 40A(2) : Expenses not deductible – Service charges – Excessive or unreasonable**

Additional services charges paid by assessee in real estate business to an associate company had been allowed in earlier years and also in another case by Tribunal/ High Court, no addition of same could be sustained under section 40A(2) in assessee's case for assessment year in question. (A.Y. 2000-01)

*CIT v. Akash Deep Promoters & Developers (P.) Ltd. (2005) 146 Taxman 389 / 196 CTR 99 (Delhi) (High Court)*

**S. 40A(2) : Expenses not deductible – Salary – Excessive or unreasonable**

To establish reasonableness of expenditure and ratio of increase in salary, necessary material is to be placed by assessee-employer.

*Khan Carpets v. CIT (2003) 262 ITR 325 / 132 Taxman 23 / (2004) 187 CTR 668 (All)(High Court)*

**S. 40A(2) : Expenses not deductible – Salary – Excessive or unreasonable**

It is not for ITO to decide what would be the correct salary of directors or other officers of company unless on the face of it salary fixed is so exorbitant and absurd that it can clearly be said to be fictitious and aimed at tax evasion. (A.Y. 1978-79)

*Abbas Wazir (P.) Ltd. v. CIT (2003) 133 Taxman 702 / 185 CTR 152 / (2004) 165 ITR 77 (All)(High Court)*

**S. 40A(2) : Expenses not deductible – Burden of proof – Excessive or unreasonable**

Burden is on assessee to prove that price paid by it to person covered by section 40A(2)(b) is not excessive or unreasonable. (A.Y. 1988-89)

*CIT v. Shatrunjay Diamonds (2003) 128 Taxman 759 / 261 ITR 258 / 183 CTR 86 (Bom.)(High Court)*

**S. 40A(2) : Expenses not deductible – Transport – Excessive or unreasonable payments**

Where assessee-company doubled charges paid for transporting its vehicles to showroom, etc., to a firm where its directors were partners, section 40A(2) was clearly attracted. (A.Ys. 1985-86, 1986-87)

*V.S.T. Motors Ltd. v. CIT (2003) 260 ITR 440 / 135 Taxman 91 (Mad.)(High Court)*

**S. 40A(2) : Expenses not deductible – Salary – Excessive or unreasonable**

Salary paid for work which close relatives of partners had done for assessee-firm could not be subjected to disallowance. (A.Y. 1990-91)

*CIT v. Girnar Construction Co. (2003) 129 Taxman 691 / 261 ITR 463 / 181 CTR 248 (Raj.)(High Court)*

**S. 40A(2) : Expenses not deductible – Commission – Excessive or unreasonable**

Commission paid by subsidiary to its parent company in excess of 7 per cent of turnover was to be disallowed. (A.Ys. 1994-95, 1995-96)

*Keltron Component Complex Ltd. v. Dy. CIT (2003) 129 Taxman 525 / 264 ITR 352 / 182 CTR 58 (Ker.)(High Court)*

**S. 40A(2) : Expenses not deductible – Purchases – Evidence – Opportunity**

As the Assessing Officer did not call upon the assessee to furnish any evidence regarding purchase transaction from associate concern, no disallowance could be made by applying provisions of section 40A(2)(b).

*Dy. CIT v. B2C Implants (2011) 141 TTJ 638 / 130 ITD 184 / 52 DTR 192 (Mum.)(Trib.)*

**S. 40A(2) : Expenses not deductible – Interest – Availability of funds**

Obtaining the unsecured loan @ 11% from associated concern was commercially expedient as assessee could earn more income from such borrowed funds and secured loans were neither available easily nor they were enough to cater the business needs of the assessee as it did not have enough security and/or provision of guarantee for obtaining such loan and therefore no disallowance under section 40A(2) was called for. (A. Y. 2006-07)

*Addl. CIT v. Religare Finvest Ltd. (2011) 62 DTR 46 / 141 TTJ 649 (Delhi)(Trib.)*

**S. 40A(2) : Expenses not deductible – Managing director – Remuneration**

M is a Chartered Accountant from London and had quality experience as employee of AAF for ten years before joining the assessee Company. He is also stated to be running the entire business and other two directors are not so qualified and also did not take part in the business. Assessing Officer has not brought any evidence to show that the payment made to the Managing Director was excessive or unreasonable having regard to the fair value of the services for which the payment was made or the benefits derived from such services, the conditions of section 40A(2) are not satisfied. (A.Ys. 2002-03 to 2005-06).

*ACIT v. Bombay Real Estate Development Company (P) Ltd. (2011) 64 DTR 137 (Mum.)(Trib.)*

**S. 40A(2) : Expenses not deductible – Trade discount – Provision inapplicable**

Trade discount allowed by the assessee to its sister concern on the sales made could not be disallowed in part by invoking section 40A(2). (A.Y. 2005-06)

*ACIT v. Grandpix Fab. (P) Ltd. (2010) 128 TTJ 60 / 34 DTR 248 (Delhi)(Trib.)*

**S. 40A(2) : Expenses not deductible – Excessive interest – Evidence**

In the absence of any material to show that the payment of interest made by the assessee is in excess of fair market value, and keeping in view the case relied on by the Assessing Officer, 18 per cent rate of interest was considered as reasonable, interest paid by the assessee at 7 to 18 per cent to its sister concerns was wholly and exclusively laid out for the purpose of the business and hence, the disallowance of interest under section 40A(2) is deleted. (A.Ys. 2002-03 to 2004-05)

*Bharati Airtel Ltd. v. ACIT (2010) 48 DTR 416 / 41 SOT 175 (Mum.)(Trib.)*

**S. 40A(2) : Expenses not deductible – Service rendered – Commission**

Once it is decided that services have been rendered by an agent, then quantum of Commission to be paid is purely at discretion of assessee, and revenue cannot sit in judgment over same, and restrict the claim by reducing the % of commission, as being excessive or unreasonable.

*Gujarat Guardian Ltd. v. Jt. CIT (2008) 174 Taxman 151 (Mag.)(Delhi)(Trib.)*

**S. 40A(2) : Expenses not deductible – Interest – Prorated allowance**

Interest paid on borrowed funds to persons covered under section 40A(2)(b) at 21%, was considered as excessive, and same was allowed at 18% and balance amount of Interest was disallowed.

In view of decision of Amritsar bench in case of *ALM Forgings v. ACIT [IT Appeal No. 44 (ASR) of 2005]*, the entire amount of Interest paid was allowed as deduction.

*ACIT v. Alfa Rubber Industries (2008) 172 Taxman 32 (Amritsar)(Trib.)*

**S. 40A(2) : Expenses not deductible – Average price – Sister concern**

Disallowance under section 40A(2) was not justified simply because the average price paid by the assessee for purchase of raw material from its sister concerns was marginally higher than the prices charged by these concerns from other parties. (A.Y. 1998-99)

*Pondy Metal & Rolling Mills (P) Ltd. v. Dy. CIT (2007) 107 TTJ 336 (Delhi)(Trib.)*

**S. 40A(2) : Expenses not deductible – Services rendered – Fair market value**

Disallowance made by CIT (A) under section 40A(2) by employing cost plus method for determining fair market value of services did not call for any interference. (A.Y. 2001-02)



*Nutan Warehousing Co. (P) Ltd. v. ITO (2007) 106 TTJ 137 (Pune)(Trib.)*

**S. 40A(2) : Expenses not deductible – Excessive or unreasonable – Specific finding**

To invoke provisions of section 40A(2), a specific and clear finding that the expenses claimed is excessive or unreasonable should be brought on record.

*Shankar Trading Co. (P) Ltd. v. ACIT (2006) 152 Taxman 49 (Mag.)(Delhi)(Trib.)*

**S. 40A(2) : Expenses not deductible – Lease rental – Group company**

Lease rental paid by assessee to a group company could not be disallowed under section 40A(2) on the ground that the payments were excessive when the same amount was continuously paid in earlier years and was allowed in assessments made under section 143(3). (A.Y. 1996-97)

*Udaipur Distillery Co. Ltd. v. Jt CIT (2006) 102 TTJ 495 / 100 ITD 422 (Jodh.)(Trib.)*

**S. 40A(2) : Expenses not deductible – Excessive or unreasonable – Services from sister concern**

Unless there is a clear finding that market value of services taken from sister concern is less than market price at which services are obtained, there cannot be an occasion to apply disabling provisions of section 40A (2) : fact of an expenditure being excessive cannot be inferred based on some subjective perceptions of authority dealing with same. (A.Y. 1990-91)

*Batlivala & Karani v. ACIT (2005) 2 SOT 379 (Mum.)(Trib.)*

**S. 40A(2) : Expenses not deductible – Excessive or unreasonable payments – Services from sister concern – Commission**

Higher commission paid to sister concern cannot be disallowed in absence of adverse material. Commission was paid at 20% since entire follow up work was done by sister concern. (A.Ys. 1994-95 to 1996-97)

*Dy CIT v. Lab India Instruments (P) Ltd. (2005) 93 ITD 120 / 94 TTJ 113 (Pune)(Trib.)*

**S. 40A(2) : Expenses not deductible – Excessive and unreasonable – No material**

No addition can be made as being excessive, merely on conjecture and surmises, when no material has been brought on record to prove that payments were not genuine.

*Madan Lal & Bros v. ACIT (2003) SOT 401 (Delhi)(Trib.)*

**S. 40A(2) : Expenses or payments not deductible – Unsubstantiated claims – Payments to sister concerns**

Payments to sister concerns having common directors, as professional charges which were not substantiated with any evidence are not allowable.

*Amar Poly fabs (P) Ltd. v. Dy. CIT (2003) 127 Taxman 41 (Mag.)(Chd.)(Trib.)*

**S 40A(2)(a) : Expenses or payments not deductible – Sugar cane binding [S.37(1)]**

Assessee manufacturer of sugar, purchased raw material; i.e., sugarcane from members as well as non-members. Minimum price of sugarcane fixed by Central Government, sugarcane brought in bound and unbound conditions. Factories allowed to deduct 0.01 per cent from sugarcane price as rebate towards binding material, Assessing Officer disallowed cost of binding material for both members as well as non-members. On appeal by assessee, Commissioner of Income Tax (A) deleted the additions made by Assessing Officer. Appeal filed by Revenue dismissed by I. T. A. T. In appeal the court upheld the order of Tribunal. (A.Y. 1992-93)

*CIT v. Terna Shetkari Sahakari Karkhana Ltd. (2007) 109 BLR (Oct.) 2642 (Aurg.) (2008) 215 CTR 124 / 301 ITR 222 / 168 Taxman 266 / 2 DTR 66 (Bom.) (High Court)*

**S. 40A(2)(b) : Expenses not deductible – Technical know-how – Parent Company [S. 92]**

Once it is found that having regard to the nature, quantum and quality assurance aspects of technical know-how and other services provided to the assessee by the parent / foreign company, compensation paid in the form of royalty / consideration cannot be treated as excessive or unreasonable, Tribunal was justified in deleting the addition made by Assessing Officer by relying upon section 40A(2)(b) and section 92. (A.Ys. 1997-98 & 1998-99).

*CIT v. Nestle India Ltd. (2011) 57 DTR 65 / 337 ITR 103 (Delhi) (High Court)*

**S. 40A(2)(b) : Expenses not deductible – Interest – Relatives – Debtors**

Assessing Officer disallowed the Interest paid to relatives @ 24% on the ground that interest paid to others was only @ 12%. The disallowance made under section 40A(2)(b) as excessive or unreasonable, was deleted on following grounds :

- a) Assessee has recovered interest from Debtors @ 24%, and there was no loss of revenue to Assessee.
- b) The net interest was a credit figure, which was declared as income.
- c) In the past interest was paid @ 24% and no disallowances were made. (A.Y. 2005-06)

*Ram Avtar Garg v. ITO (2010) 195 Taxman 61 (Mag.) / 4 ITR 245 (Jp.) (Trib.)*

**S. 40A(2)(b) : Expenses not deductible – Remuneration – Excessive or unreasonable**

Steep increase in remuneration payable to directors, held disallowance is proper. (A.Y. 2001-02)

*Shree Laxmi Marketing v. ACIT (2010) 40 Tax LR 106 / (2009) 119 ITD 390 / 122 TTJ 108 / 20 DTR 473 (Pune) (Trib.)*

**S. 40A(2)(b) : Expenses not deductible – Payment to relatives – Discount**

A bare reading of the provisions reveals that such provision could be invoked only where an expenditure was incurred in respect to which, payment was to be made to sister concern. In case of discount on sales, no payment was made by the assessee as it only reduced the sale price. Therefore relying on the case of *CIT v. Udhoji Shrikrishnadas* 139 ITR 827 (MP) held that assessee was not covered under section 40A(2)(b). (A.Y. 2001-02)

*Dy. CIT v. Orgo Chem Guj. Pvt. Ltd., ITA No.7872/Mum/2004, Bench – H, dt. 17-8-2007 – BCAJ P. 520, Vol. 40-B, Part 4, January 2009. (Mum.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Block assessment – GP – Estimated [S. 158BC]**

Section 40A(3) applies to block proceedings. The provisions of block assessment are not special, or are a complete Code and the other provisions cannot apply. *CIT v. Suresh N. Gupta* (2008) 297 ITR 322 (SC) & *M. G. Pictures (Madras) Ltd. v. ACIT* (2003) 185 CTR 185 (Mad.) followed; *Cargo Clearing Agency (Gujarat) v. Jt. CIT* (2008) 218 CTR 541 (Guj.) not followed. The argument that if income is assessed by estimation on GP rate, no other disallowance can be made is not of universal application. If expenditure which is legally not permissible has been taken into account that can certainly be disallowed even where income is estimated.

*CIT v. Sai Metal Works* (2011) 241 CTR 377 / 54 DTR 327 (P&H)(High Court)

**S. 40A(3) : Expenses not deductible – Cash payments – Payment to government [Rule 6DD]**

Cash payments made by the assessee to the State Government who granted the contract to collect royalty on behalf of the Government cannot be disallowed under section 40A(3) in view of Rule 6DD(b). (A.Y. 2005-06)

*CIT v. Kalyan Prasad Gupta* (2011) 51 DTR 191 / 239 CTR 447 (Raj.)(High Court)

**S. 40A(3) : Expenses not deductible – Cash payments – Pay order**

Payment through Banker's cheques, pay orders and CDRs are bills of exchange and therefore, payments made through these instruments cannot be disallowed under section 40A(3), r.w.r. 6DD(d)(iv). (A.Y. 1993-94)

*CIT v. Vijay Kumar Goel* (2010) 324 ITR 376 / 46 DTR 146 / 235 CTR 516 (Chhattisgarh)(High Court)

**S. 40A(3) : Expenses not deductible – Cash payments – Capital expenditure**

The expenditure is in capital account and the Assessing Officer has not given any contrary finding the provisions of section 40A(3) cannot be invoked to disallow the expenditure incurred in cash in excess of the limit of ` 20,000/-. (A.Y. 1990-91)

*CIT v. Akha Toyo Ltd.* (2008) 174 Taxman 427 / 6 DTR 41 (P&H)(High Court)

**S. 40A(3) : Expenses not deductible – Cash payments – Hides and skins [Rule 6DD(F)(ii)]**

The cash payments to suppliers of hides and skin who collected raw hides/skin from villages from original skin peckers processed those hides and skin to some extent and thereafter sold the same to assessee were partially disallowed invoking the provisions of section 40A(3). Held that suppliers of hides and skin were processors and were to be recognized as producer of hides and skin as mentioned in rule 6DD(F)(ii) and disallowance was not justified.

*CIT v. CPL Tanmay (2009) 318 ITR 179 / (2008) 175 Taxman 316 / 318 ITR 179 (Cal.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments – Small time vendors [R. 6DD]**

The assessee had submitted necessary details for making cash payments. These payments were made to small time vendors, who came from village to sell their product. The CIT(A) and the Income Tax Tribunal noted that the purchases were made from the unorganized sector, cash payments were indispensable.

High Court on appeal confirmed ITAT's finding by applying CBDT's guideline which are illustrative u/r 6DD of the Income Tax Rules, 1962.

*CIT v. K. K. S. K. Leather Processor P. Ltd. (2007) 249 ITR 669 / 117 Taxman 377 (Mad.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments – Clubbing of payment – Multiple payments to same party – Single day**

Multiple payments to same party on a single day, various cash payments made to one party on one day were not required to be clubbed and treated as one cash payment and, for that reason, total cash payments exceeding ` 2,500 in a day to that party were not to be held as violative of section 40A(3), so also the payments made after banking hours. (A.Y. 1986-87)

*CIT v. Bal Krishan Jagdish Chand (2007) 213 CTR 174 / 164 Taxman 459 (P&H)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments – Aggregate payments**

Payment in cash exceeding prescribed limit, Provision refers to single payment and not aggregate of payments. (A.Y. 1997-98)

*CIT v. Kothari Sanitation and Tiles P. Ltd. (2006) 282 ITR 117 / 202 CTR 277 (Mad.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments – Identity of payee**

Once identity of the payee was established, genuineness of the payment was not doubted, the materials purchased under cash payments were utilized for construction activity carried on by the assessee, it was not possible to hold that purpose of payment in cash was to frustrate proper investigation by the Department; and as such disallowance of such payments in cash was not justified. (A.Y. 1979-80)

*CIT v. P. Pravin & Co. (2005) 274 ITR 534 / 144 Taxman 210 / 193 CTR 213 (Guj.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments [Rule 60D]**

Rule 6DD(j) cannot be applied for payments which were made for purchases in course of a business outside the books i.e., unaccounted business found during course of search.

*CIT v. Hynoup Food & Oil Ind. (P.) (Ltd.) (2005) Tax LR 600 (Guj.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Transportation – Coolie charges**

Where assessee had established the identity, genuineness of transport and coolie charges, one more opportunity had to be given to the assessee to produce confirmation letters obtained from the transporting agency to the effect that they were not willing to receive the transportation charges by crossed cheques/drafts and they insisted for payment of the charges in cash. (A.Y. 1990-91)

*CIT v. J. Rajmohan Pillai (2004) 267 ITR 561 / 134 Taxman 168 / 186 CTR 296 (Ker.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Constitutional validity**

Section 40A(3) is constitutionally valid.

*Kamath Marbles v. ITO (2003) 260 ITR 470 / 129 Taxman 17 / 182 CTR 319 (Ker.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Rejection of books of account – Net profit applied – No separate additions [S. 145]**

Disallowance under section 40A(3) is not called for once net profit rate has been applied to compute the income. (A.Ys. 1986-87 to 1996-97)

*CIT v. Purshottamlal Tamrakar Uchehra (2003) 184 CTR 349 / 270 ITR 314 (MP)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Not retrospective**

Amendment of section 40A(3) with effect from 1-4-1996 restricting disallowance to 20 per cent of expenditure, is not retrospective.

*M. G. Pictures (Madras) Ltd. v. ACIT (2003) 263 ITR 83 / 132 Taxman 859 / 185 CTR 185 (Mad.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Opportunity**

A disallowance under section 40A(3) can be made only after notice and after giving opportunity to the assessee. (A.Y. 1996-97)

*Dy. CIT v. Eastern Retreads (P.) Ltd. (2003) 130 Taxman 474 / 182 CTR 512 (Ker.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Business relationship**

Payments in cash made on insistence of payee and to maintain harmonious business relationship, are allowable. (A.Y. 1987-88)

*Goenka Agencies v. CIT (2003) 263 ITR 145 / 131 Taxman 673 / 184 CTR 104 (Cal.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – By agent**

Where under assessee's instruction all payments were made on its behalf by its agent-firm by account-payee cheques/drafts, it could not be said that since assessee had not made payment by cheque/draft, section 40A(3) was attracted. (A.Y. 1981-82)

*CIT v. Mrinalini V. Sarabhai (2003) 132 Taxman 257 / 184 CTR 122 / (2004) 265 ITR 64 (Guj.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Genuineness**

When genuineness of cash purchases was not in doubt and there was evidence that vendors would only accept cash, disallowance of cash payments in excess of prescribed limit was not justified. (A.Y. 1992-93)

*CIT v. Eastern Condiments (P.) Ltd. (2003) 261 ITR 76 / 129 Taxman 379 / 181 CTR 483 (Ker.)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payment – Share Broker**

Assessee-share-broker made cash payments because of peculiar nature of its business and genuineness of such payments was not in doubt, payments could be said to be covered by exceptions.

*Ramaditya Investments v. CIT (2003) 262 ITR 491 / 138 Taxman 231 (Delhi)(High Court)*

**S. 40A(3) : Expenses not deductible – Cash payments – Telephone cards, recharge coupons, etc. by distributor to cellular service provider**

Assessee distributor does not make any 'purchasers' either of goods or services on the acceptance of delivery of telephone cards, recharge coupons or other service products of the cellular service provider and, therefore, no disallowance can be made by applying section 40A(3) irrespective of the mode of payment. (A. Y. 2006-07)

*S. Rahumathulla v. ACIT (2011) 49 DTR 115 / 135 TTJ 720 / 127 ITD 440 / 7 ITR 41 (Cochin)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Rejection of books of account [S. 145]**

Assessing Officer having rejected the books of account and applied the net profit rate for the purpose of computing income, no disallowance could be made under section 40A(3). (A.Y. 2002-03).

*ITO v. Sadhwani Brothers (2011) 58 DTR 368 / 142 TTJ 26 (Jp.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Block assessment – Profit estimated [S. 158BB]**



Provisions of section 40A(3) cannot be invoked in block assessment with respect to the purchases found as per seized material and unrecorded in the regular books of account, especially, when the profit from the unrecorded transactions has been estimated and declared.

*Kirti Foods Ltd. v. ACIT (2011) 60 DTR 96 (Pune)(Trib.)*

#### **S. 40A(3) : Expenses not deductible – Cash payments – Presumption**

The Tribunal held that in the absence of any material to show that the assessee had cash payments in violation of provisions of section 40A(3), disallowance could not be made on presumptions. (A.Ys. 2001-02 to 2004-05).

*Free India Assurance Services Ltd. v. Dy. CIT (2011) 62 DTR 349 / 132 ITD 60 (Mum.)(Trib.)*

#### **S. 40A(3) : Expenses not deductible – Cash payments – Agent – Principal**

Since the relationship between “R” communication and assessee was one of principal and agent, the payment made by assessee to the principal cannot be disallowed under section 40A(3). (A.Y. 2007-08).

*Koottummal Groups v. ITO (2011) 133 ITD 335 / (2012) 143 TTJ 650 / 16 ITR 66 (Cochin)(Trib.)*

#### **S. 40A(3) : Expenses not deductible – Cash payments – Purchase of land from villagers – [Rule 6DD(h)]**

Cash payments made by the assessee for purchases of land from villagers who are engaged in farming activities and residing at places which are not served by any bank and who have no bank accounts anywhere, are covered by exception under rule 6DD(h) and, therefore, same cannot be disallowed under section 40A(3). (A.Y. 2001-02)

*PACL India Ltd. v. ACIT (2010) 38 DTR 1 (Jp.)(Trib.)*

#### **S. 40A(3) : Expenses not deductible – Cash payments – Distributor for BSNL in its card division – Principal and agent**

During the year under consideration assessee made total purchases of India Telephone cards at ` 270.64 lakhs, of which ` 187.73 lakhs were by way of cash purchases. Assessing Officer invoked provisions of section 40A(3) and disallowed 20% of impugned expenditure. CIT(A) upheld the disallowance. The Tribunal held that on facts, it was apparent that relationship between service provider i.e. BSNL and assessee–distributor, was of principal and agent and income arising to assessee was in nature of commission or remuneration against services rendered, hence, disallowance under section 40A(3) is not applicable. (A.Y. 2006-07)

*S. Rahumathulla v. ACIT (2010) 127 ITD 440 / (2011) 135 TTJ 720 / 49 DTR 115 / 7 ITR 41 (Cochin)(Trib.)*

#### **S. 40A(3) : Expenses not deductible – Cash payments – Each payment**

Provisions of section 40A(3) apply for each payment and not aggregate of the various payments made to same party during one day. (A.Ys. 2000-01, 2003-04)  
*Shanti Ram Mehata v. ACIT (2009) 119 ITD 62 / 123 TTJ 12 / 23 DTR 179 (TM)(Kol.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Business disallowance – Rejection – Books of account**

Where Assessing Officer has made trading addition after rejecting books of account and applied G.P. rate, no separate addition under section 40A(3) can be made.

*J. K. Construction Co. v. ITO (2007) 162 Taxman 46 (Mag.)(Jodh.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Profit sharing agreement**

Where the assessee has appropriated certain amount out of its income and made payment to another person under a profit sharing agreement, provisions of section 40A(3) are not attracted to such payment. (A.Y. 2001-02)

*ITO v. N. Padma (Smt) (2007) 106 TTJ 739 (Chennai)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Block assessment**

While computing the undisclosed income in a block assessment, disallowance under section 40A(3) cannot be made.

*ACIT v. Mohan Lal Swarnkar (Dr) (2005) 95 TTJ 969 (Jp.)(Trib.)*

*Bommana Swarana Rekha (Smt) v ACIT (2005) 94 TTJ 885 / 147 Taxman 59 (Mag.)(Visakha)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Retail business [S. 44AF]**

When assessment made under section 44AF(1), no disallowance can be made under section 40A(3). (A.Y. 1998-99)

*Gopalsingh R. Rajpurohit v. ACIT (2005) 94 TTJ 865 / 149 Taxman 32 (Mag.)(Ahd.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Estimate of gross profit**

Once the gross profit rate is applied to compute income, no further disallowance under section 40A (3) can be made. (A.Y. 1995-96)

*Jagdish Lal v. ITO (2005) 94 TTJ 1119 (Jodh.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Each payment**

There is no provision under the Act to give benefit of ` 20,000 against each and every payment made in excess of ` 20,000; disallowance under section 40A(3) at rate of 20 percent is to be made on whole of amount which is paid in excess of ` 20,000. (A.Y. 2000-01)

*Dy. CIT v. A.T.N. International Ltd. (2005) 4 SOT 239 (Kol.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – One time or aggregate payments**

Statutory limit provided under section 40A(3), applies to payments made to a party at one time and not to aggregate of the payments made in course of day as recorded in cash book.

*Dy. CIT v. Krishnan Lal (2005) 148 Taxman 56 (Mag.)(Chd.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Undisclosed investment**

S. 40A(3) can not be applied when assessment is made on basis of undisclosed Investment. (A.Ys. 1986-87 to 1996-97)

*Western India Bakers (P) Ltd. v. Dy. CIT (2003) 87 ITD 607 / 84 TTJ 223 (Mum.)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – Confirmation of assessee**

Confirmation of recipient that he did not accept Cheque, would cover the case under Rule 6DD, and disallowance of cash payment in excess of prescribed limit was not justified.

*Satpal Jain v. ACIT (2003) 79 TTJ 444 (Delhi)(Trib.)*

**S. 40A(3) : Expenses not deductible – Cash payments – No bank accounts**

When payee had no bank account at assessee's place, and assessee had no bank account at payee's place, it is covered by rule 6DD(j) and no disallowance is warranted, as per board's circular no. 220 dt 31.5.1977. (A.Y. 1982-83)

*Jain trading Co v. A.O (2003) SOT 26 (Amritsar)(Trib.)*

*Editorial : Also Refer Jupiter Textile v. ITO (2002) 77 TTJ 735 (Jodh.)(Trib.)*

**S. 40A(5) : Expenses not deductible – Company – Limit – Retirement of Employee**

The issue of whether two separate limits is to be applicable for the purpose of calculating disallowance under section 40A(5) in the year of retirement of employee – one in the capacity as employee and another in the capacity as former employee. The Supreme Court held that only one limit will apply whether paid to an employee or retired employee. (A.Y. 1978-79)

*Mercantile Bank Ltd. v. CIT (2006) 153 Taxman 97 / 283 ITR 84 / 202 CTR 457 / 193 Taxation 563 (SC) / 5 SCC 221*

*Editorial:- Whether same note should apply for all decisions covered under section 40A(5). Section 40A(5) omitted w.e.f. 1-4-1989.*

**S. 40A(5) : Expenses not deductible – Company – Value of rent free accommodation, etc.  
[S. 40(c)]**

Value of rent free accommodation and depreciation allowance on furniture provided by assessee – company to its employees, are required to be included while computing disallowance under section 40A(5).

*Cawnpore Textiles Ltd. v. CIT (2005) 276 ITR 612 / 144 Taxman 590 / (2006) 200 CTR 203 (All.) (High Court)*

**S. 40A(5) : Expenses not deductible – Company – Director – Employees [S. 40(c)]**

In case of directors who are also employees of company, provisions of both sections 40(c) & 40A(5) will be attracted and the higher of the two ceilings has to be applied. (A.Y. 1982-83)

*CIT v. Electra India Ltd. (2005) 147 Taxman 595 (All.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Perquisites – Cash payments**

Cash payments are not perquisite for purpose of disallowance under section 40A(5).

*CIT v. Hindustan Everest Tools Ltd. (2004) 141 Taxman 309 (Delhi)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Remuneration etc. paid by company – Directors [S. 40C]**

It is not for the ITO to decide what would be the correct salary of the Directors or other officers of the company, unless on the face of it the salary fixed is so exorbitant and absurd that it can clearly be said to be fictitious and aimed at tax evasion. High Court held that the Tribunal was not justified in disallowing part of remuneration. (A.Y. 1978-79)

*Abbas Wazir (P) Ltd. v. CIT (2003) 133 Taxman 702 / 185 CTR 152 / (2004) 165 ITR 77(All.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Remuneration – Employer [S. 40(c)]**

For the purpose of computing disallowance under section 40(c) in the hands of the employer, the value of the perquisite does not have to be taken as the same amount which has been determined in the hands of the employee in accordance with relevant rules or on the basis of the actual amount paid to the employee.

*CIT v. Raunaq & Co (P) Ltd. (2003) 262 ITR 86 / 130 Taxman 580 (Delhi)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Reimbursement of expenses [S. 40(c)]**

Reimbursed medical expenses would not constitute benefit or amenity to the director and are required to be taken into account for computing the ceiling limit under section 40(c) Reimbursement of medical expenses by the assessee to its employees falls with in the provisions of section 40A (5) as salary. (A.Y. 1985-86)

*Ennore Foundries Ltd. v. CIT (2003) 259 ITR 414 / 187 CTR 496 / 135 Taxman 79 (Mad.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Director [S. 40(c)]**

Section 40A(5) applies to persons other than directors where as section 40A(5)(a) related to directors.

*CIT v. Jain Tube Co Ltd. (2003) 132 Taxman 34 / 185 CTR 458 (Delhi)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Reimbursement of expenses**

For the purpose of disallowance under section 40A(5) salary includes retirement benefits such as pension and encashment of earned leave. Expenditure incurred by the assessee bank, on repair and maintenance of accommodation including ground rent, rates and society charges in respect of premises owned by it and given to employees for purpose of residence, would have to be taken in to account for the purpose of disallowance under section 40A(5). (A.Y. 1978-79)

*CIT v. Citibank N.A. (2003) 130 Taxman 334 / 264 ITR 18 / 184 CTR 228 (Bom.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Maintenance expenses**

Maintenance expenses incurred by the Bank on its ownership flat provided to the employees result in the provisions of perquisite to the concerned employees and said expenses should be considered for computing disallowance under section 40A(5).

*CIT v. Emirates Commercial Bank Ltd. (2003) 262 ITR 55 / 134 Taxman 682 (Bom.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Repair and maintenance of flat**

The expenditure incurred by the assessee company on repairs and maintenance of flats owned by the assessee company and used for the residence of employees is a perquisite within the meaning of section 40A (5). The expenditure incurred in insuring the building (asset) is also covered by section 40A(5)(a)(ii). The perquisite value of the car should not be computed as per rule 3(c) of the Income tax Rules. The house rent allowance paid to the employees should be considered as salary for the purpose of disallowance under section 40A(5). (A.Y. 1983-84)

*CIT v. British Bank of Middle East (2003) 183 CTR 488 / 133 Taxman 756 / (2004) 265 ITR 31 (Bom.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Reimbursement of expenses**

Reimbursement of medical expenses by the assessee to its employees falls with in the provisions of section 40A (5) as salary. (A.Ys. 1979-80, 1980-81)

*Ethnor Ltd. v. CIT (2003) 126 Taxman 408 / 260 ITR 401 / 181 CTR 550 (Bom.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Professional work of managing director**

Amount paid for professional work to the managing director should not be taken into account for computing disallowance under section 40(c). (A.Ys. 1979-80, 1980-81 and 1981-82)

*Filmyug Pvt Ltd v. CIT (2003) 261 ITR 263 / 129 Taxman 399 / 182 CTR 395 (Bom.)(High Court)*

**S. 40A(5) : Expenses not deductible – Company – Commission – Director**

Commission paid to managing director is to be treated as perquisite for purpose of section 40(c).

*Dinesh Mills Ltd. v. CIT (2003) 130 Taxman 260 / (2004) 268 ITR 502 (Guj.)(High Court)*

**S. 40A(7) : Expenses not deductible – Gratuity – Amount Deposited**

Deduction is not being claimed on account of any provision for gratuity but deduction being claimed in respect of amount actually deposited in fund which has become payable during relevant assessment year, question of grant of approval to gratuity fund is not relevant and deduction has to be allowed even in absence of approval of gratuity fund. (A.Y. 1979-80)

*CIT v. Bitoni Lamps Ltd. (2005) 277 ITR 396 / 144 Taxman 330 / 193 CTR 423 (P&H)(High Court)*

**S. 40A(7) : Expenses not deductible – Gratuity – Approval gratuity [S. 43B]**

Section 40A(7)(b)(i), is a special provision in regard to claim for deduction based on a provision made for payment towards an approved gratuity fund. There is no clear inconsistency between the section 40A(7) and 43B, section 40A(7) is in negative terms and section 43B is in positive terms. The harmonious construction of the two provisions would clearly indicate that the legislature never intended to take away the benefit conferred under clause (b) of section 40A(7) by the provisions of section 43B(b). (A.Ys. 1990-91, 1991-92)

*CIT v. Common Wealth Trust (I) Ltd. (2004) 269 ITR 290 / 189 CTR 393 (Ker.)(High Court)*

**S. 40A(7) : Expenses not deductible – Gratuity – Year of application**

For assessment year 1972-73, section 40A(7) had no application. (A.Y. 1972-73)

*CIT v. Dalmia Dadri Cement Ltd. (2003) 263 ITR 364 / 180 CTR 486 / (2004) 134 Taxman 743 (Delhi)(High Court)*

**S. 40A(7) : Expenses not deductible – Gratuity – Retrospectively approval**

Gratuity provision made pending approval of the scheme, is allowable where approval is granted retrospectively.

*Amar Poly Fabs (P) Ltd. v. Dy CIT (2003) 127 Taxman 41 (Mag.)(Chd.)(Trib.)*



**S. 40A(8) : Expenses not deductible – Interest on deposits – Erstwhile partners – Credit balance**

Credit balance of erstwhile partners taken over by assessee company, interest paid by assessee company on the credit balances of erstwhile partners taken over as liability by the assessee company was hit by section 40A(8). (A.Y. 1985-86)

*CIT v. Rockman Cycle Industries (P) Ltd. (2007) 212 CTR 139 / 164 Taxman 83 (P&H)(High Court)*

**S. 40A(8) : Expenses not deductible – Interest on deposits – Director or relatives**

Disallowance under section 40A(8) is not restricted to deposits made by directors or their relatives but it applies to all and sundry. (A.Y. 1983-84)

*CIT v. Harish Sugar Co. (P.) Ltd. (2005) 279 ITR 589 / 147 Taxman 11 (All.)(High Court)*

**S. 40A(8) : Expenses not deductible – Interest on deposits – Director and shareholders**

Deposits received by the assessee company from its directors and shareholders are not outside purview of section 40A(8).

*CIT v. Nath Roller Flour Mills (P) Ltd. (2004) 192 CTR 328 / (2005) 273 ITR 432 / 142 Taxman 578 (All.)(High Court)*

**S. 40A(9) : Expenses not deductible – Bonus to employees – Actual payment [S. 43B]**

Section 40A(9), overrides section 43B. Therefore, payment of bonus payable to employees to an employee's bonus trust would be hit by section 40A(9), even if such payment was in compliance with the provisions of section 43B. (A.Ys. 1999-2000 and 2001-02).

*CIT v. Shasun Chemicals & Drugs Ltd. (2011) 199 Taxman 107 (Mad.)(High Court)*

**S. 40A(9) : Expenses not deductible – Contribution by employer – Workmen**

All expenses incurred for benefit of workmen by entrepreneurs cannot be treated as contribution by employer towards various funds enumerated in section 40A(9) merely because of volume of amount. (A.Ys. 1989-90, 1991-92)

*CIT v. Hindustan Zinc Ltd. (2005) 194 CTR 121 (Raj.)(High Court)*

**S. 40A(9) : Expenses not deductible – Contribution by employer – Executives welfare**

For assessment year 1984-85 initial contribution made by assessee-company to Executives' Welfare Trust could not be allowed in view of retrospective insertion of section 40A(9) with effect from 1-4-1980. (A.Y. 1984-85)

*Raasi Cement Ltd. v. CIT (2005) 275 ITR 579 / 198 CTR 179 (AP)(High Court)*

**S. 40(A)(9) : Expenses not deductible – Contribution by employer – Employees benefit**

Section 40A(9), has application to contribution made to any fund unless it is made in capacity as employer towards fund which is for benefit of its employees. (A.Y. 1988-89)

*Addl. CIT v. Rajasthan Spg & Wvg. Mills (2004) 190 CTR 448 (Raj.)(High Court)*

**S. 40A(9) : Expenses not deductible – Contribution to trust – Subsidy – Clubs**

Payment made as subsidy to certain clubs, of which staff and workers of the assessee-company were members, would not attract section 40A(9).

*CIT v. Hind Lamps Ltd. (2003) 130 Taxman 586 / 185 CTR 342 (All.)(High Court)*

**S. 40A(9) : Expenses not deductible – Statutory Corporations – “force of law”**

The assessee, a corporation setup under a State Act, made a contribution of ₹ 16.77 lakhs in its capacity as employer and as per the service regulations to the “MSW Karmachari Welfare Fund”. The Assessing Officer & CIT (A) took the view that the payment to a “fund” was hit by section 40A(9) and not allowable as a deduction. The Tribunal allowing the appeal held that section 40A(9) provides that no deduction shall be allowed in respect of “any sum paid by the assessee as an employer ... as contribution to any fund ... except where such sum is so paid ... as required by or under any other law for the time being in force”. In the case of statutory corporations, the regulations providing for the terms and conditions of employment and conditions of service have the force of law. Consequently, the service regulations framed by the assessee by which it agreed to make payment to the Fund carried statutory force and fell within the expression “as required by or under any other law” for purposes of section 40A(9). (U. P. Warehousing Corporation 1980 3 SCC 459 followed)

*Maharashtra State Warehousing Corporation v. ACIT (2009) 122 TTJ 865 / 22 DTR 531*

*(Pune)(Trib.) Source : www.itatonline.org*

**S. 40A(9) : Expenses not deductible – Payments to clubs – Reimbursement**

Payment to various clubs by way of reimbursements is not disallowable under section 40A(9). (A.Y. 2001-02)

*Zuari Industries Ltd. v. ACIT (2007) 108 TTJ 140 / 105 ITD 569 / (2006) 9 SOT 569 (Mum.)(Trib.)*

**S. 40A(9) : Expenses not deductible – Contribution to school**

Expenses on contribution for a school situated in colony of assessee's employees, cannot be disallowed under section 40A(9), which bars deduction of contribution to any fund, trust, etc. for the benefit of its employees.

*Dy. CIT v. Gujarat Guardian Ltd. (2006) 152 Taxman 37 (Mag.)(Delhi)(Trib.)*

**S. 40A(9) : Expenses not deductible – Payment under benevolent Scheme – Family members**

Payments made by the assessee-company to members of families of deceased employees under a Benevolent Scheme, half of which was contributed by the employees are not hit by provisions of s. 40A(9) and are allowable as deduction. (A.Ys. 1994-95 to 1998-99 & 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 40A(9) : Expenses not deductible – Contribution by employer, etc. – Reimbursement**

Where payments made are only reimbursements in character, provisions of section 40A(9) would not be attracted. (A.Ys. 1992-93 to 1997-98)

*British Bank of Middle East v. Jt. CIT (2005) 4 SOT 122 (Mum.)(Trib.)*

**S. 40A(9) : Expenses not deductible – Club – Reimbursement**

S. 40A(9) is not applicable to payments to a club as reimbursement of expenditure for sports and recreational activities of employees. (A.Y. 1988-89)

*IOL Ltd v. Dy. CIT (2003) 81 TTJ 525 (Kol.)(Trib.)*

**S. 40A(10) : Expenses not deductible – Contribution to employees's welfare fund – Not allowable**

Contribution made by employer to welfare fund set up for employees is not allowable as an expenditure. (A.Ys. 1982-83 to 1984-85)

*CIT v. Best and Crompton Engineering Ltd. (2004) 266 ITR 479 / 141 Taxman 13 / 192 CTR 519 (Mad.)(High Court)*

**S. 40A(12) : Expenses not deductible – Payment of bonus**

Payment of bonus was made to workmen, because they had threatened to stop the work and they resorted to mass hunger strike, which was continued for two days. As the payment was made to keep industrial peace the same is allowable as business expenditure.

*CIT v. Hind Lamps Ltd. (2003) 130 Taxman 586 / 185 CTR 342 (All.)(High Court)*

**Section 41 : Profits chargeable to tax.**

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Block of assets**

**[S. 2(11), 32(1)(ii), 50]**

The assessee had received sale proceeds on sale of the soft drink bottles and crates on which depreciation was claimed @ 100 % as the cost of each item was less than ₹ 5000/-. The Supreme Court held that such receipts are not assessable under section 41(1) as it would have been taxable under section 41(2) which was omitted by the Finance Act 1988.

The Supreme Court held that bottles and crates purchased before 31st March, 1995 would not be assessable under section 50 as they do not form part of block of assets in view of the proviso to section 32(1)(ii), however, sale proceeds of bottles and crates purchased later would be adjusted as per provision of section 50 as the said proviso was deleted. (A.Ys. 1990-91 to 1998-99)

*Nectar Beverages Pvt. Ltd. v. Dy. CIT / Goa Botting Co. (P) Ltd. v. ACIT / Industrial Oxygen Co. Ltd. v. Dy. CIT / Inox Air Products Ltd. v. Jt. CIT / Ratnalaya (P) Ltd. v. ACIT (2009) 25 DTR 218 / 314 ITR 314 / 182 Taxman 319 / 224 CTR 433 / (2010) 214 Taxation 123 (SC) / 15 SCC 374*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – One time settlement of loan by bank**

Assessee had not got any deduction on account of acquisition of capital assets as it had been reflected in the balance sheet and not in the profit and loss account and the remission of the principal amount of loan obtained from the bank and financial institution had not been claimed as expenditure or trading liability in any earlier year, section 41(1) was not applicable.

*CIT v. Tosha International (2009) 319 ITR (St) 7 (SC)*

*Editorial:- Refer Mahindra & Mahindra Ltd. v. CIT (2003) 261 ITR 501 / 182 CTR 34 / 128 Taxman 394 (Bom.)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Loan**

Investment company has taken loan and invested in long term shares. As there was no communication and claim for many years by lenders and unsecured loan written back. No deduction was claimed in respect of loan. Amount written back cannot be assessed as business income under section 41(1). (A. Y. 2004-05).

*Logitronics P. Ltd. v CIT (2011) 333 ITR 386 / 240 CTR 20 / 197 Taxman 394 / 53 DTR 50 (Delhi)(High Court)*

*CIT v. Jubilant Securities P. Ltd. (2011) 333 ITR 445 / 59 DTR 172 (Delhi)(High Court)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unclaimed insurance premium**

Unclaimed insurance premium credited to profit and loss account which was the amount collected by the assessee from the hirers as insurance premium becomes income of the assessee and liable to be taxed as business income. (A. Ys. 1997-98 to 2003-04)

*Motor General Finance Ltd. v. CIT (2011) 53 DTR 273 / 199 Taxman 51 (Delhi)(High Court)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unclaimed balances**

The assessee was a shipping agent providing services to ships and acted as off shore representative. During the course of its business, the assessee was required to make deposits on behalf of its customers on various accounts with the Mumbai Port Trust. After recovering the charges, Mumbai Port Trust used to refund the amounts which in turn, were admittedly returned by the assessee to its principal as and when demanded. The refund of amount lying with the assessee for more than three years were considered by the assessee as income and offered to tax. The Assessing Officer rejected the method of accounting followed by the assessee and brought to tax entire refund amount lying with the assessee to tax under section 41(1). The Tribunal deleted the addition. On appeal the High Court upheld the view of Tribunal.

*CIT v. Modest Maritime Services P Ltd. (2011) 338 ITR 64 (Bom.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unilateral writing off the liability**

The mere fact that the creditors did not encash the cheques within the validity period does not imply that those debts have been either extinguished or become barred. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act. Therefore, there was no cessation of liability which could be charged as income under section 41(1). (A.Y. 1995-96).

*Goodricke Group Ltd. v. CIT (2011) 63 DTR 360 / 199 Taxman 402 / 338 ITR 116 (Cal.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Existing liability**

Assessee having shown the amount payable by it to another company as an existing liability in its books and written back the same, it cannot be said that the aforesaid liability has ceased to exist and therefore it cannot be treated as income by invoking the provisions of section 41(1). (A.Y. 1996-97)

*CIT v. GP International Ltd. (2010) 325 ITR 25 / 186 Taxman 229 / 33 DTR 163 / 229 CTR 86 (P&H)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Old outstanding**

The fact that the liability was old would not make any ground for addition. So long as there was no cessation of liability by writing back same no addition could be made under section 41(1). (A.Y. 2004-05)

*CIT v. Sita Devi Juneja (Smt.) (2010) 187 Taxman 96 / 33 DTR 201 / 325 ITR 593 (P&H)(High Court)*

*CIT v. Jaipur Jewellers (Exports) (2010) 187 Taxman 169 (Delhi)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Write back of loan [S. 115JB]**

Loan liability which was written back, which was subjected to tax as per section 115JB, cannot be taxed under section 41(1), as loan liability was not allowed as deduction or as allowable expenditure. (A.Y. 2002-03)

*CIT v. Goyal M. G. Gases Ltd. (2010) 36 DTR 400 / 321 ITR 437 (Delhi)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Business income – Unilateral write back of unclaimed credit balance**

There is no remission or cessation of liability within the meaning of section 41(1), on unilateral entry of write back of the unclaimed credit balances by the assessee. (A.Ys. 1991-92, 1992-93)

*CIT v. Indian Rayon & Industries Ltd. (2010) 38 DTR 313 / 236 CTR 279 (Bom.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Deemed profits**

Once the assessee gets back the amount which was claimed and allowed as business expenditure during the earlier year, the deeming provision in section 41(1), of the Income Tax Act, 1961, comes into play and it is not necessary that the Revenue should await the verdict of a higher Court or Tribunal. The Court or Tribunal up holds the levy at a later date, the assessee will not be without remedy to get back the relief. (A.Y. 1989-90)

*CIT v. Beirsdorf (India) Ltd. (2010) 324 ITR 106 / 183 Taxman 178 / (2009) 28 DTR 188 (Bom.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Deferred sales tax liability**

Sales Tax Tribunal having upheld the decision of the assessing authority to grant credit of the payment made by the assessee to SICOM (Implementing agency) towards discharge of present value of the deferred sales tax liability and Dy. CTO having issued a notice for the full amount, it cannot be said that there was a remission or cessation of liability and consequently section 41(1) is not applicable. (A.Ys. 2000-01, 2001-02)

*SI Group India Ltd. v. ACIT (2010) 42 DTR 1 / 192 Taxman 91 / 326 ITR 117 / 235 CTR 461 / (2011) 222 Taxation 169 (Bom.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unilateral write off of liability**

Explanation 1 to section 41(1) is effective from 1st April, 1997, therefore, the liabilities written back unilaterally by the assessee are not chargeable to tax under section 41(1) in A.Y. 1996-97.

*CIT v. Eid Mohd. Nizammudin (2007) 212 CTR 13 / 294 ITR 139 / 164 Taxman 378 (Raj.)(High Court)*



**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Refund of excise duty**

Refund of excise duty received by the assessee as per the order of CCE is taxable in the year of receipt irrespective of the fact that the Revenue had preferred an appeal before the Apex Court which was later withdrawn. (A.Y. 1987-88)

*CIT v. Travancore Chemical & Manufacturing Co. Ltd. (2006) 205 CTR 15 / 287 ITR 228 / 156 Taxman 469 (Ker.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unpaid Excise Credit**

Transfer of unpaid excise credit to profit and loss account of assessee is chargeable to tax as profit of year. (A.Y. 1976-77)

*CIT v. London Machinery Company (2006) 280 ITR 271 / (2005) 146 Taxman 326 (All.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Condition precedent**

In absence of finding that amount sought to be added to assessee's income had been allowed as deduction in earlier year in assessment of assessee, addition of such sum could not be made under section 41(1).

*Narayanan Chettiar Industries v. ITO (2005) 277 ITR 426 / 199 CTR 148 / (2007) 158 Taxman 15 (Mad.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unclaimed liabilities**

Unclaimed liabilities written off during relevant assessment year are not taxable under section 41(1). (A.Ys. 1973-74, 1975-76)

*CIT v. J.L. Gupta (2005) 144 Taxman 692 (Delhi)(High Court)*

*CIT v. Delhi Automobiles (2005) 272 ITR 381 / 142 Taxman 175 / (2004) 192 CTR 575 (Delhi) (High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Goods lost in transit**

Goods purchased by assessee from America were lost in transit due to confiscation by Pakistan, authorities during war between India and Pakistan and assessee's bank through whom assessee had made payment for goods, received insurance claim in excess of price of goods because of devaluation of rupee and assessee received part of such excess claim, such receipt in assessee's hands did not attract application of section 41(1), but was casual and non-recurring receipts. (A.Y. 1974-75)

*CIT v. Swastika Metal Works (2005) 274 ITR 280 / 146 Taxman 588 / (2006) 203 CTR 225 (P&H) (High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Deduction in earlier years**

All that provision of section 41(1), requires is that expenditure had been allowed as deduction while making assessment for any earlier year, there is no further requirement that assessment must result in a positive income. (A.Y. 1977-78)

*CIT v. Chaudhary Cotton Ginning and Pressing Factory (2004) 271 ITR 17 / (2005) 193 CTR 685 / 143 Taxman 252 (P&H)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unsecured loan [S. 28(iv)]**

Remission of unsecured loans can not be subjected to tax by invoking provisions of section 28 (iv), read with section 41(1). (A.Y. 1982-83)

*CIT v. Chetan Chemicals (P) Ltd. (2004) 139 Taxman 301 / 267 ITR 770 / 188 CTR 572 (Guj.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of Liability – Refund of excise duty**

The respondent – assessee received a refund of excise duty. The assessee claimed it as a liability as the amount represented the liability to the stockists. The Assessing Officer assessed that amount as income under section 41(1), as the assessee had availed deduction thereof in the earlier years, when the money was paid to the excise department. Held, that the point in issue being substantially settled by the Apex court in *Polyflex (India) (P) Ltd. v. CIT (2002) (7) SCC 188*, the refund of excise duty was taxable under section 41(1). (A.Y. 1988-89)

*CIT v. Engine Valves Ltd. (2004) 192 CTR 162 (Mad.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Refund of excise duty to assessee was in dispute**

It could not be said that there was a final cessation of liability where issue of refund of excise duty to assessee was in dispute, therefore, it could not be said that there was a final cessation of liability which is a necessary pre-requisite for invoking the provisions of section 41(1), thus, section 41 (1) was not applicable. (A.Y. 1978-79)

*CIT v. Das Raj Chiranji Lal Steel Rolling Mills (2004) 141 Taxman 166 / 191 CTR 170 / (2005) 273 ITR 273 (P&H)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Sales tax**

Unless assessment under Sales Tax Act is completed allowing assessee's claim for exemption from payment of purchase tax, it cannot be said that there is cessation of liability to pay sales tax. (A.Y. 1987-88)

*CIT v. K. E. Kesavan & Sons (2003) 129 Taxman 514 / 182 CTR 498 / (2004) 269 ITR 587 (Ker.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Excise duty collected**

The amount collected by the assessee against the refund of excise duty was credited to the suspense account and as such it could not constitute an income of assessee under any provisions of the Income-tax Act, could not be accepted. The amount after collection had neither been refunded to the customers nor paid to the Government. Thus, it was a case of unlawful enrichment. If such refund was not considered as income, the assessee would be benefited twice. Thus the amount of refund of excise duty was assessable in assessee's hands under section 41(1). (A.Y. 1986-87)

*Wolkem (P) Ltd. v. CIT (2003) 259 ITR 430 / 128 Taxman 20 / 180 CTR 302 (Raj.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Waiver of loan**

Where loan given to assessee by American company for purchase of toolings was waived by the latter, since toolings constituted capital asset and not stock-in-trade, and no deduction was availed of in earlier years in respect of loss, expenditure or trading liability incurred by assessee, section 41(1) was not attracted to tax waiver of loan. (A.Y. 1976-77)

*Mahindra & Mahindra Ltd. v. CIT (2003) 128 Taxman 394 / 261 ITR 501 / 182 CTR 34 (Bom.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Scheme of arrangement – Compromise**

Where scheme of arrangement and compromise concerning assessee-company remained unsanctioned both in cases of secured/unsecured creditors, question of applying section 41(1) to sacrifices made by creditors relating to interest, etc., could not arise. (A.Ys. 1986-87, 1987-88)

*CIT v. India Meters Ltd. (2003) 129 Taxman 771 / 262 ITR 549 / 183 CTR 283 (Mad.)(High Court)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Depreciation – Balancing charge – Benefit or perquisite [S. 28(iv), 41(2)]**

Where the cost of assets purchased by the assessee in earlier year was reduced by the seller on settlement of dispute, benefit of depreciation obtained by the assessee in the earlier years cannot be termed as an allowance or expenditure claimed by the assessee in the earlier years to warrant invocation of provisions of section 41(1) or 41(2). However, Assessing Officer is directed to bring back to tax, the amount of depreciation granted to the assessee in the earlier years on the alleged excess amount of ` 2 crores under section 28(iv) and redetermine the closing WDV of the block assets in the year under consideration. (A.Y. 2005-06)

*Binjarjka Steel Tubes Ltd. v. ACIT (2011) 50 DTR 89 / 136 TTJ 113 / 130 ITD 46 (Hyd.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Liability outstanding more than three years**

There is no rule that liability outstanding for more than three years need not be paid and the same becomes income of the assessee. In the absence of any specific information in the possession of the Assessing Officer that the amounts outstanding for more than three years were no longer payable by the assessee, same could not be treated as deemed income under section 41(1). (A. Ys. 2003-04 & 2004-05)

*Dy. CIT v C. M. Y. K. Printech Ltd. (2011) 53 DTR 59 (Delhi)(Trib.)*

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

Where the amount ceased to be payable in the books by showing nil balance and the assessee had claimed the deduction of same amount in earlier year, the provisions of section 41(1) were rightly attracted. (A. Ys. 2004-05 to 2006-07)

*ITO v. E. A. Infrastructure Operations P. Ltd. (2010) 41 SOT 269 / (2011) 135 TTJ 239 / 41 SOT 269 / 48 DTR 200 (Mum.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Capital or revenue receipt – Waiver loan [S. 2 (24), 28(iv)]**

Principal amount of loan, which is taken for the purpose of business or trading activity, on its waiver by the creditor, would constitute income chargeable to tax; however, if the loan is utilized for the purpose of acquiring any capital asset, the same, on its waiver, would not constitute income chargeable to tax either under section 41(1) or section 28(iv) or section 2(24). (A. Y. 2006-07)

*Dy. CIT v. Logitronics (P) Ltd. (2010) 127 ITD 16 / (2011) 53 DTR 73 / 137 TTJ 287 (Delhi)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Outstanding credit**

For treating amount of outstanding credit as taxable under section 41(1), there has to be a positive act on part of creditor in current year which would provide benefit to assessee by way of remission; merely because certain amount is outstanding for number of years will not justify holding that there is a cessation or remission. (A. Y. 2007-08).

*ITO v. Bhavesh Prints (P) Ltd. (2011) 46 SOT 268 / 142 TTJ 128 / 64 DTR 401 (Ahd.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Liabilities outstanding more than three years**

Outstanding liabilities of the assessee cannot be said to have ceased to exist merely because the relevant accounts have become non-operational or period of three years have expired and, therefore, such liabilities can not be charged to tax by invoking the

provisions of section 41(1), more so when the assessee has not written back such liabilities in its profit and loss account. (A.Ys. 2003-05 to 2007-08).

*Dy. CIT v. Hotel Excelsior Ltd. (2011) 60 DTR 450 / 141 TTJ 248 (Delhi)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Future Sales – Tax Liability is paid, there is no “remission” – Sales tax deferral Scheme**

There is no remission in case of payment of future sales tax liability. Two basic ingredients necessary for application of section 41 are, first, the assessee should have obtained an allowance or deduction in respect of any loss, expenditure or trading liability and second, the assessee should have subsequently (i) obtained any amount in respect of such loss or expenditure or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof. (A.Y. 2003-04)

*Sulzer India Ltd. v. Jt. CIT (2010) 47 DTR 329 / 42 SOT 457 (SB)(Mum.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Loan waived [S. 28(iv)]**

Where capital assets are acquired by obtaining a loan and subsequently, loan amount is waived by other party, principal amount of loan waived by other party cannot be brought to tax under section 28(iv) or under section 41(1). (A.Y. 2006-07)

*Dy. CIT v. Logitronics (P) Ltd. (2010) 127 ITD 16 / (2011) 137 TTJ 287 / (2011) 53 DTR 73 (Delhi)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Advance money against order**

Assessee received advance money against an order which remained unclaimed. The creditor under liquidation. Held that Assessing Officer was not justified in treating the unclaimed sum as income as it was not a trading liability.

*Nash Machines & Electronics P. Ltd. v. Jt. CIT, ITA No. 163/Pn/08, dt. 30-11-2009, 'A' Bench, BCAJ P. 24, Vol. 42-A, Part 1, April 2010 (Pune)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Waiver of loan**

Waiver of loan to discharge the liabilities of business to recoup losses over period of time were consequential to contractual agreement, cannot be assessed under section 41(1). (A.Y. 1999-2000)

Waiver of loan by creditor not being in respect of trading liability, S. 41(1) did not apply. (A.Y. 1999-2000)

*Mindteck (India) Ltd. v. ITO (2010) 122 ITD 486 / 124 TTJ 830 / (2009) 26 DTR 125 (Mum.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Outstanding unsecured loan for more than ten years**

Unsecured loan not being any trading transaction neither written off nor transferred to Profit & Loss and remained outstanding for more than 10 years could not be brought to tax under the provisions of section 41(1) of the Act. (A.Y. 2001-02)

*Inderson Leathers (P) Ltd. v. Addl. CIT (2008) 114 ITD 242 / (2007) 112 TTJ 280 (Amritsar)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Waiver of Loan**

Remission or cessation of liability on account of waiver of loan which was not claimed as deduction in any year cannot be brought to tax under section 41(1) in any year.

*Coastal Corpn. Ltd. v. Jt. CIT (2008) 307 ITR 78 (AT)(Visakha.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – No deduction allowed in past**

Addition under section 41(1) could not be made where no deduction or allowance were allowed in earlier assessment years. (A.Y. 2001-02)

*ITO v. Bansi Lal Gupta (2008) 113 TTJ 898 (Amritsar)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Waiver of principal amount**

Waiver of principal amount does not come under the purview of section 41(1). (A.Y. 2001-02)

*IFB Securities Ltd. v. ITO (2006) 101 TTJ 829 (Kol.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unclaimed balances**

Amount in unclaimed balance account and cheques in suspense account which had become time barred and were unilaterally written back by assessee are not chargeable to tax as there was no cessation of liabilities. (A.Ys. 1989-90 to 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 ITD 119 / (2007) 15 SOT 392 (Mum.)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Liability towards unmoved creditor**

Liability towards unmoved creditor having been shown by the assessee in its balance sheet and there being no material or evidence with the Revenue to show that the supplier (creditor) had given up its claim, no addition was called for. (A.Y. 1997-98)

*Uttam Air Products (P) Ltd. v. Dy. CIT (2006) 99 TTJ 718 (Delhi)(Trib.)*

**S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Change in identity of assessee [S. 28(iiib), 28(iiic), 176(3A)]**

The assessee company took over an entire undertaking as going concern for a lump sum consideration. Later, the assessee received claim of export incentives filed by erstwhile proprietary in form of excise duty draw back and cash assistance, and



claimed that those receipts were not in the nature of receipts, but were in the nature of realization of assets taken over as part of going concern, that excise duty refund received by it in the capacity of successor-in-business could not be taxed under section 41(1). The Assessing Officer accepted the fact that the provisions of section 41(1) were not applicable to excise duty refund. However he treated the cash assistance and duty draw back as business income, in view of sections 28 (iib) and 28 (iic). The Tribunal following the judgment of Apex court in the case of *Saraswati Industrial Syndicate Ltd v. CIT (1990) 186 ITR 278 (SC)*, held that if there is change in identity of assessee, there would be no tax liability under section 41 (1). (Position prior to 1-4-1997). (A.Y. 1990-91)

*ACIT v. HYT Engg Co. (P) Ltd. (2005) 92 ITD 202 / 93 TTJ 16 (TM)(Pune)(Trib.)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Unclaimed wages**

Unclaimed wages, bonus etc., are not taxable in view of the decision of the Supreme Court in *CIT v. Suguli Sugar Works (P) Ltd. (1999) 236 ITR 518 (SC)*. (A.Y. 1996-97) *Eastern International Hotels Ltd. v. Dy. CIT (2005) 93 ITD 233 / 93 TTJ 496 (Mum.)(Trib.)*

*Dy. CIT v. Id. Mohd. Nizamuddin (2005) 97 TTJ 142 (Jp.)(Trib.)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Refunds**

Where refund due from assessee to a party was neither claimed by such party nor his legal heirs on his death and claim was barred by limitation, amount of such refund was rightly treated as assessee's income. (A.Y. 2001-02)

*Distinctive Properties & Leasing Ltd v. ITO (2005) 1 SOT 460 (Delhi)(Trib.)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Deduction not allowed in past**

Cessation of liability of an amount which has never been allowed, cannot be brought to tax in the year of cessation. Section 41(1) seeks to reverse the undue benefit of deduction given in respect of liability which eventually turns out to be non existent. (A.Y. 1992-93)

*Jt. CIT v. Binani Zinc Ltd. (2003) 84 ITD 691 / (2004) 88 TTJ 346 (Kol.)(Trib.)*

#### **S. 41(1) : Profits chargeable to tax – Remission or cessation of liability – Taking over of running business**

A company after taking over the running business of the assessee firm, with all its statutory and contractual claims and liabilities, received the Refund of Excise duty paid by Firm. Held, that Excise duty refund was an actual revenue receipt in hands of company, and cannot be taxed in hands of firm by invoking Sec. 41(1). (A.Ys. 1987-88, 1988-89)

*ACIT v. Munnalal Sons & Co. (2003) SOT 533 (Agra)(Trib.)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Transfer – Exchange – Transfer of assets at written down value to share holders in exchange for shares [S. 2(47)]**

The assessee transferred certain assets in its textile unit to its share holders at written down value in exchange for shares surrendered to it. The Assessing Officer invoked section 41(2) in respect of the transferred assets in lieu of excess value of the shares over the written down value of the assets and made the addition. The CIT(A) deleted the addition. The Tribunal upheld the deletion. On reference the court held that the assets given at written down value in exchange of shares would amount to "Transfer" within the meaning of section 2(47). It attracted tax under section 41(2). (A. Y. 1983-84).

*CIT v. Oswal Spinning and Weaving Mills Ltd. (2011) 338 ITR 648 / (2010) 43 DTR 153 (P&H) (High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Insurance compensation**

Insurance compensation received by assessee for plant and machinery destroyed in fire would attract section 41(2).

*CIT v. Ganesh Dass & Sons (P.) Ltd. (2006) 280 ITR 535 / 147 Taxman 432 / (2005) 198 CTR 453 (All.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Written down value not ascertainable**

Written down value of assets was not ascertainable, it could not be said that estimated value, i.e. half of sale price, be substituted as written down value and other half be treated as taxable under section 41(2). (A.Y. 1980-81)

*CIT v. J.K. Cotton Spg. Mills Co. Ltd. (2006) 202 CTR 150 / (2005) 149 Taxman 23 / 275 ITR 277 (All.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Year of taxability – Amount became due**

Terms used in section 41(2) do not require that amount should have been received; emphasis is on point of time at which amount became due and it is that point of time alone which is relevant for purpose of determining year in which such amount is to be brought to tax. (A.Y. 1972-73)

*CIT v. Southern Roadways Ltd. (2004) 266 ITR 135 / 136 Taxman 550 (Mad.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Physical act of destruction**

For application of section 41(2) there should be physical act of destruction. (A.Y. 1980-81)

*Kerala Shipping Corpn. Ltd. v. CIT (2003) 132 Taxman 763 / 265 ITR 13 / 185 CTR 364 (Ker.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Slump price**

Slump price would not be subjected to tax as income from business under section 41(2).

*East India Electric Supply & Traction Co. Ltd. v. CIT (2003) 263 ITR 243 / 184 CTR 6 / 133 Taxman 759 (Cal.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Sale of entire business**

Where sale was of entire business, even though after deducting liability, balance was apportioned for different assets, apportionment would not make it a sale of assets so as to make section 41(2) applicable

*CIT v. Carew Phipson Ltd. (2003) 260 ITR 668 / 133 Taxman 366 / 182 CTR 549 (Cal.)(High Court)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Depreciation [S. 32]**

Assessee company claimed depreciation at 100% on wind mill project which was allowed. Subsequently the wind mills were destroyed in cyclone against which assessee received certain amount from insurance company. Revenue authorities brought said amount to tax under section 41(1) of the Income Tax Act. The Tribunal held that the amount received from insurance company cannot be taxed under section 41(1). (A.Y. 1999-2000)

*Rajhans Metals (P) Ltd. v. ITO (2010) 122 ITD 189 / (2008) 115 TTJ 779 / 6 DTR 393 (Mum.)(Trib.)*

**S. 41(2) : Profits chargeable to tax – Balancing charge – Unabsorbed depreciation**

B/F unabsorbed depreciation is to be set off against Income under section 41(2), as same is deemed to be the profits of business, even when business is not in existence. (A.Ys. 1976-77, 1977-78)

*Coimbatore Insulation tapes (P) Ltd v. ITO (2003) 84 ITD 459 / 79 TTJ 241 (Chennai)(Trib.)*

**S. 41(4A) : Profits chargeable to tax – Reserve created by Financial Corporation**

Amendment of the provisions of section 36(1)(viii) and the new provision of section 41(4A) being applicable w.e.f. assessment year 1998-99 the deduction allowable to the assessee under section 36(1)(viii) could not be curtailed on the ground of transfer of the amount from special reserve account to provision for bad debt account. (A.Ys. 1995-96 to 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

**Section 42 : Special provision for deductions in the case of business for prospecting, etc., for mineral oil.**

**S. 42 : Business for prospecting – Mineral oil – Business loss – Foreign Exchange Loss**

The foreign exchange loss on account of currency translation in production sharing contract for exploration of mineral oil is not a mere book entry and is allowable as a deduction. (A.Y. 1999-2000)

*CIT v. Enron Oil & Gas India Ltd. (2008) 305 ITR 75 / 173 Taxman 346 / 12 DTR 186 / 218 CTR 641 / (2009) 208 Taxation 49 (SC)*

**Section 43 : Definition of certain terms relevant to income from profits and gains of business or profession**

**S. 43(1) : Definitions – Actual cost – Depreciation – Assets acquired from franchisees – Valuation on the basis of valuation report [S. 32, 43(6)]**

Assessee company engaged in the business of manufacture of soft drinks acquired manufacturing assets and other assets, land and building of its franchisees on the basis of valuation done by the approved valuer. Assessing Officer increased the value of land by 50% on estimated basis and value of bottles and crates was reduced by 50% and plant and machinery by 25%. The Court held that Tribunal was justified in directing the Assessing Officer to accept the valuation of assets acquired by the assessee from five vendor companies on the basis of report of the registered valuer when there was no basis to discard the valuation report. (A.Y. 1996-97).

*CIT v. Pepsico India Holdings (P) Ltd. (2011) 334 ITR 404 / 56 DTR 137 (Delhi)(High Court)*

**S. 43(1) : Definitions – Actual cost – Depreciation – Custom duty paid under protest [S. 32]**

Assessee is entitled to add the disputed customs duty paid by it under protest on the imported machinery to the cost of plant and machinery and claim depreciation thereon. (A.Y. 2005-06)

*CIT v. Orient Ceramics & Industries Ltd. (2011) 200 Taxman 64 / 56 DTR 397 (Mag.)(Delhi)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy**

Amount of subsidy is not to be deducted from the cost of assets for the purpose of calculating depreciation. (A.Y. 1985-86)

*CIT v. Amol Decalite Ltd. (2006) 205 CTR 521 / 286 ITR 648 (Guj.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy**

Cash subsidy received under Central Government's Outright Grant of subsidy scheme of 1971 for industrial units set up in selected backward districts or areas was not to be reduced from actual cost. (A.Y. 1980-81)

*CIT v. K.C.A. Ltd. (2006) 283 ITR 65 / 198 CTR 331 / 151 Taxman 142 (Bom.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Capitalisation**

Capitalisation cannot be claimed in respect of every type of expenditure but it can only allowed in respect of those expenditures which are incurred for bringing into existence asset of enduring nature, e.g. plant, etc. (A.Y. 1990-91)

*Aaa Fun N food (P.) Ltd. v. Jt. CIT (2005) 279 ITR 219 / 144 Taxman 544 / (2006) 201 CTR 479 (MP)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy**

Subsidy cannot be deducted from actual cost of capital asset. (A.Y. 1978-79)

*CIT v. Rakesh Cold Storage (2005) 274 ITR 102 / 142 Taxman 571 (All.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Explanation 4A**

Explanation 4A to section 43(1), which came into force with effect from 1/10/1996, was not applicable to assessment year 1996-97.

*Om Sindhoori Capital Investments (2005) 274 ITR 427 (Mad.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Explanation 8**

Interest paid on borrowed capital under deferred payment scheme for acquisition of assets, for period relevant till asset was first put to use, would not be eligible for deduction under section 36(1)(iii) or section 37(1) since it is includible in actual cost of acquisition of asset in view of Explanation 8 to section 43(1). (A.Ys. 1987-88, 1988-89)

*JCT Ltd. v. Dy. CIT (2005) 276 ITR 115 / 144 Taxman 435 / 194 CTR 509 (Cal.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Interest – Installments**

Where assessee purchased machinery on installments, interest payable on installments for period after machinery was first put to use, was not to be included in actual cost in view of Explanation 8 to section 43 (1). (A.Ys. 1982-83, 1983-84)

*CIT v. Anang Polyfil (P) Ltd. (2004) 136 Taxman 692 / 267 ITR 266 / 187 CTR 576 (Guj.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Gratuity liability of workers – Part of consideration**

Where in addition to paying purchase consideration for an undertaking, assessee had also taken over liability towards gratuity in respect of existing employees, amount of gratuity liability was part of consideration and as such was to be added to cost of acquisition. (A.Y. 1989-90)

*CIT v. Hooghly Mills Co. Ltd. (2003) 131 Taxman 724 / 185 CTR 86 / (2004) 266 ITR 257 (Cal.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy – Depreciation [S. 32]**

Subsidy does not partake of incident which attracts conditions for its deductibility from 'actual cost'. Amount of subsidy is not to be deducted from the "actual cost" under section 43 (1) for the purpose of calculation of depreciation (Referred *CIT vs. P.J. Chemicals Ltd (1994) 210 ITR 830 (SC)*). (A.Ys. 1975-76, 1976-77)  
*CIT v. Jayana Cold Storage & Ice Factory (2003) 128 Taxman 51 / 260 ITR 430 (All.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy – Depreciation [S. 32]**

Subsidy is not to be deducted from value of generator while granting depreciation.  
*CIT v. Shankar Novelties Glass Industries (2003) 132 Taxman 67 (All.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Subsidy – Depreciation [S. 32]**

Subsidy is not to be reduced from actual cost of assets for the purpose of depreciation allowance or for computing rebate under section 80J. (A.Y. 1985-86)  
*CIT v. Suneel Textile Mills (P.) Ltd. (2003) 131 Taxman 822 / 187 CTR 39 (Raj.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Explanation 8 – Capitalisation of future Interest**

Future Interest payable on loan amount under deferred payment scheme for purchase of assets, cannot be capitalized in view of Explanation 8. (A.Y. 1986-87)  
*CIT v. Textool Co. Ltd. (2003) 263 ITR 523 / (2004) 186 CTR 501 / 139 Taxman 406 (Mad.)(High Court)*

**S. 43(1) : Definitions – Actual cost – Depreciation**

In order to apply Expl. 3 to section 43(1), Assessing Officer has to determine the actual cost of the assets to the assessee, which can only mean arm's length value or real value or worth of assets transferred. Burden is on Assessing Officer to establish that actual cost is not proper.

*Chitra Publicity Company (P) Ltd. v. ACIT (2010) 127 TTJ 1 / 4 ITR 738 / (2009) 32 DTR 227 (TM)(Ahd.)(Trib.)*

**S. 43(1) : Definitions – Actual cost – Depreciation – Foreign exchange forward contract [S. 43A]**

Where the foreign exchange contracts were made by the assessee for the purpose of acquiring capital assets and the forward contracts were settled during previous year relevant to the assessment year under appeal, the claim of the assessee to adjust the loss on settlement being legitimate, the said loss needs to be added to the cost of the concerned capital assets as per section 43A, and consequently, depreciation is to be allowed on the enhanced value of the capital assets. (A.Y. 2005-06)

*JSW Steel Ltd. v. ACIT (2010) 46 DTR 41 / 133 TTJ 742 / 5 ITR 31 (Bang.)(Trib.)*



**S 43(1) : Definitions – Actual cost – Vehicle purchased by HUF – No depreciation claimed**

Vehicle was purchased by HUF of Assessee, and on which no Depreciation was claimed, nor, same was used for purpose of business. The vehicle was brought as business asset of Assessee in his individual capacity after 3 years at original cost. Assessing Officer invoked provisions of the explanation to section 43(1), and reduced the original cost of ` 3,86,607/- to ` 2,00,000/-, and computed depreciation accordingly. Held, that as statute does not give discretion for purpose of the Explanation 3 to section 43(1) to enforce Depreciation, as two of the prescribed conditions needs to be fulfilled to justify and substitute the cost of WDV as claimed by the Assessee, and accordingly, Assessee was entitled to depreciation on original cost of vehicle as claimed.

*Shashikant Janardan Kulkarni v. ITO (2008) 173 Taxman 116 (Mag.)(Pune)(Trib.)*

**S. 43(1) : Definitions – Actual cost – Depreciation – Value of land as per stamp valuation – Not on the basis of valuation report**

Value of land as taken for stamp duty purposes and not the value as shown in the report of the valuer has to be taken and the value of the land is to be reduced in entirety from the value of plant and machinery for the purpose of working out depreciation. (A.Ys. 1995-96 to 1997-98)

*South Asia Tyres Ltd. v. Dy. CIT (2007) 107 TTJ 319 (Pune)(Trib.)*

**S. 43(1) : Definitions – Actual cost – Interest on borrowed capital**

Interest on capital borrowed for expansion of business is allowable deduction to which Expln. 8 to s. 43(1) does not apply. Proviso added to s. 36(1)(iii) by Finance Act, 2003, w.e.f. 1st April, 2004, not being retrospective will not apply to the Assessment Year in question. (A.Ys. 1991-92 and 1992-93)

*Finolex Industries Ltd. v. Dy. CIT (2006) 101 TTJ 463 (Pune)(Trib.)*

**S. 43(1) : Definitions – Actual cost – Actual payment – Mercantile system of accounting**

Actual payment has nothing to do with determination of actual cost, particularly when mercantile method of account is adopted by assessee as soon as liability is incurred to pay, it becomes cost of assets. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / (2005) 92 TTJ 987 (Delhi)(Trib.)*

**S. 43(1) : Definitions – Actual cost – Actual payment – Pre-operative production expenditure**

All pre-operative or pre-production expenditure, which has direct or indirect nexus with setting up of plant and machinery has to be capitalized. All revenue expenditure incurred in pre-operative /pre-production period needs to be capitalized, and assessee is entitled to claim depreciation thereon. (A.Ys. 1995-96, 1996-97)

*Gujarat Ambuja Cements Ltd. v. ACIT (2005) 4 SOT 59 (Mum.)(Trib.)*

### **S. 43(1) : Definitions – Actual cost – Actual payment – Explanation 3**

Assessee company purchased a unit from another company "M" which was having substantial shareholding in assessee company, for a consideration of 14 crores, whereas "M" had shown WDV of assets in its books at ₹ 4.71 crores just before their transfer to assessee. Assessing Officer was justified in invoking Explanation 3 to section 43(1) while working out actual cost of said unit in hands of assessee.

*Jt. CIT v. Mahindra Sons Ltd. (2005) 96 ITD 303 / 98 TTJ 134 (Mum.)(Trib.)*

### **S. 43(1) : Definitions – Actual cost – Actual payment – Explanation 11**

Explanation 11 to section 43(1) was inserted with prospective effect. The provisions are substantive and, therefore such provisions have to be considered as prospective. (A.Y. 1995-96)

*Jt. CIT v. Holland Equipment Co. B.V. (2005) 3 SOT 810 (Mum.)(Trib.)*

### **S. 43(1) : Definitions – Actual cost – Actual payment – Public issue expenses**

Assessee, an existing pharmaceutical company, embarked upon expansion – cum diversification project for manufacturing of certain high-tech bulk drugs and for that purpose it floated a public issue of equity shares and assessee capitalized expenditure incurred on public issue and claimed depreciation under section 32 on such capitalized expenditure on ground that public issue was made in order to raise finance for new project including plant and machinery required for project. Since impugned expenditure was incurred for purpose of raising equity capital and not for purpose of acquiring plant and machinery, impugned expenditure, though capitalized, could not be held to have direct nexus with cost of acquisition of assets in question and therefore assessee was disentitled to depreciation as claimed. (A.Y. 1996-97)

*Bombay Drugs & Pharmas Ltd. v. Dy. CIT (2003) 4 SOT 493 (Mum.)(Trib.)*

### **S. 43(1) : Definitions – Actual cost – Explanation 3 – No tax evasion**

Explanation 3 to S. 43(1) will not apply if the purpose of transfer is not tax evasion by claiming depreciation with higher cost, but a pure commercial transaction.

If the process of computation by way of assessment is not made, it cannot be said that any depreciation was actually allowed. Depreciation debited in the books of account for the purpose of assessee's own calculation cannot be said to have been "actually allowed". Phrase "actually allowed" cannot be stretched to mean "notionally allowed" or allowable on a notional basis. Unless there is a process of assessment, there cannot be any presumption of allowance of depreciation because the words "actually allowed" mean depreciation actually allowed by the Assessing Officer in making the assessment. (B.P. 1987-88 to 1997-98)

*G C Associates v. Dy. CIT (2003) 80 TTJ 539 / (2004) 2 SOT 136 (Pune)(Trib.)*

### **S. 43(3) : Definitions – Plant – Building – Depreciation [S. 32]**

Where building has been designed specifically to further cause of manufacture or production, then the same would be considered as a "plant", for the purpose of depreciation. (A.Ys. 1982-83 to 1985-86)

*CIT v. Shivalik Hatcheries (P) Ltd. (2010) 329 ITR 432 / 188 Taxman 291 / (2009) 222 CTR 299 / (2008) 9 DTR 154 (HP)(High Court)*

**S. 43(3) : Definitions – Plant – Tractor – Trailer – Drainage**

Tractor, Trailers used in factory premises of assessee for lifting and carrying equipments and materials constitute plant and machinery and not road transport vehicles.

Drainage and sewerage network installed in factory constitute plant and machinery and is entitled to investment allowance. (A. Y. 19983-84)

*CIT v. Gujarat Narmada Valley Fertilizer Co. Ltd. (2006) 281 ITR 297 / (2005) 195 CTR 404 (Guj.)(High Court)*

**S. 43(3) : Definitions – Plant – Bottles**

Assessee, engaged in business of manufacture and sale of liquor in bottles, was entitled to claim depreciation on bottles as bottles were essential tools of trade. (A.Ys. 1978-79 to 1981-82)

*CIT v. Doongaji & Co. Distilleries (2005) 276 ITR 402 / 146 Taxman 154 / 196 CTR 574 (MP)(High Court)*

**S. 43(3) : Definitions – Plant – Buildings**

Open plinth godowns given to FCI on rent by assessee were to be treated as 'plant' and not as a 'building'.

*Babulal Agrawal v. CIT (2005) 272 ITR 454 / 144 Taxman 621 / 194 CTR 369 (MP)(High Court)*

**S. 43(3) : Definitions – Plant – Cinema building**

Depreciation is not allowable on cinema building treating it as a plant. (A.Y. 1985-86)

*CIT v. Motor & General Sales Ltd. (2005) 148 Taxman 614 (All.)(High Court)*

**S. 43(3) : Definitions – Plant – Nursing homes**

In order to qualify a nursing home building as a 'plant', the test prescribed by Supreme Court in Dr. B. Venkata Rao's case should be satisfied. (A.Y. 1983-84)

*CIT v. Kamala Selvaraj (2005) 273 ITR 154 / (2006) 203 CTR 422 (Mad.)(High Court)*

**S. 43(3) : Definitions – Plant – Poultry shed**

Poultry shed is not a plant. (A.Y. 1988-89)

*CIT v. Shivalik Poultries (2005) 274 ITR 529 / 146 Taxman 449 / (2006) 201 CTR 218 (P & H) (High Court)*

**S. 43(3) : Definitions – Plant – Hotel building – Sanitary fittings**

Hotel buildings and also various fittings, such as sanitary fittings, electricity fittings etc., are not plant and therefore, depreciation is not allowable on these assets at the rate applicable to plant. (A.Ys. 1984-85, 1985-86)

*CIT v. S.B. Properties & Enterprises Ltd. (2005) 142 Taxman 82 / (2004) 190 CTR 516 (Raj.)(High Court)*

**S. 43(3) : Definitions – Plant – Building – Hotel**

Building used by an assessee as hotel and tourist complex can not be treated as a plant.

*CIT v. Ajit Bhavan Hotel (2004) 136 Taxman 415 (Raj.)(High Court)*

**S. 43(3) : Definitions – Plant – Studio – Cinematographic films**

Studio for production of cinematographic films is "Plant". Functional test is a decisive test. (A.Ys. 1985-86 to 1987-88)

*CIT v. Navodaya (2004) 135 Taxman 258 / 271 ITR 173 / 186 CTR 357 (Ker.)(High Court)*

**S. 43(3) : Definitions – Plant – Wooden Shells**

Wooden shells and crates/bottles are "Plant" within the meaning of section 43(3).

*CIT v. Aqueous Victuals (P) Ltd. (2004) 139 Taxman 33 / 266 ITR 573 (All.)(High Court)*

**S. 43(3) : Definitions – Plant – Operation undertaken for end-product**

Plant is not only the means of processing the end-products, but it includes the entire operation undertaken for the purpose of obtaining the end-product. (A.Y. 1985-86)

*CIT v. Birla Jute & Industries Ltd. (2003) 260 ITR 55 / 133 Taxman 337 / 180 CTR 339 (Cal.)(High Court)*

**S. 43(3) : Definitions – Plant – Building**

Building specifically designed and constructed for assessee's flour mill is to be treated as 'plant'.

*Nowrangroy Metals Pvt. Ltd. v. Jt. CIT (2003) 262 ITR 231 / 184 CTR 260 / (2004) 134 Taxman 460 (Gau.)(High Court)*

**S. 43(3) : Definitions – Plant – Building**

Building wherein plant and machinery are housed in the instant case was forming 'internal part of plant and machinery'.

*CIT v. R.G. Ispat Ltd. (2003) 132 Taxman 779 / 184 CTR 369 / (2004) 266 ITR 527 (Raj.)(High Court)*

**S. 43(3) : Definitions – Plant – Cinema Building**

Cinema building is not plant and therefore, depreciation on it can not be allowed.

*CIT v. Sangam Cinema (2003) 132 Taxman 1 (Raj.)(High Court)*

**S. 43(3) : Definitions – Plant – Cold Storage**

Cold storage is a plant; however, only that part of cold storage building will be treated as plant which is used and utilized as chamber for storing goods in cold storage.

*CIT v. Shree Gopikishan Industries Pvt. Ltd. (2003) 262 ITR 568 / 131 Taxman 729 / 184 CTR 1 (Cal.)(High Court)*

### **S. 43(3) : Definitions – Plant – Pond**

Pond can not be treated as plant. (A.Ys. 1992-93 to 1995-96)

*CIT v. Victory Acqa Farm Ltd. (2003) 129 Taxman 23 / 182 CTR 193 / (2004) 271 ITR 528 (Ker.)(High Court)*

### **S. 43(3) : Definitions – Plant – Roads**

Roads constructed by the assessee do not constitute 'plant' with in the meaning of section 43(3), followed the ratio of judgment in *CIT v. Gwalior Rayon Silk Mfg Co. Ltd. (1992) 196 ITR 149 (SC). (A.Y. 1976-77)*

*Mahindra & Mahindra Ltd. v. CIT (2003) 128 Taxman 394 / 261 ITR 501 / 182 CTR 34 (Bom.)(High Court)*

### **S. 43(3) : Definitions – Plant – Structure**

Structural steel and tubular structure used in construction of Dam constitutes its plant and therefore entitled for Depreciation.

*CIT v. Opal Construction (2003) 262 ITR 674 / (2004) 136 Taxman 628 (All.)(High Court)*

### **S. 43(3) : Definitions – Plant – Building**

Definition of Plant in S. 43(3) is an inclusive definition. Plant does not include the building or setting in which the business is carried on. Test to be applied to decide whether a particular item is plant or not in common parlance or trade or commercial parlance or an functional test. Based on the above test building of roller flour mill was held not to be a plant. (A.Ys. 1993-94 to 1994-95 and 1996-97)

*Jt CIT v. Nowrangroy Metals (P) Ltd. (2003) 85 ITD 220 (Gau.)(Trib.)*

### **S. 43(3) : Definitions – Plant – Racks**

Racks used for systematic storing of P & M parts used in reconditioning of diesel engine constitute Plant.

*PSM family Trust v. Dy. CIT (2003) 127 Taxman 95 (Mag.)(Jodh.)(Trib.)*

### **S. 43(3) : Definitions – Plant – Poultry sheds**

Poultry Sheds are plant as it satisfies the functional test to be entitled for rates applicable to Plant. (A.Y. 1992-93)

*Venkateshwara Farms (P) Ltd v. Dy. CIT (2003) 84 ITD 212 / 79 TTJ 74 (Pune)(Trib.)*  
*Also refer : Shivalik Hatcheries (P) Ltd v. Dy. CIT (2003) SOT 417 (Chd.)(Trib.)*

### **S. 43(3) : Definitions – Plant – Woollen rugs and carpets**

Assessee's five star Hotel using woollen rugs and carpets cannot claim higher depreciation considering the same as Plant. (A.Ys. 1990-91 to 1991-92)

*Lake Palace Hotels & Motels (P) Ltd v. Dy. CIT (2003) 81 TTJ 657 (Jodh.)(Trib.)*

### **S. 43(5) : Definitions – Speculative transaction – Reference to High Court [S. 256(2)]**

The Assessing Officer had not allowed a net loss of ₹ 77,33,061/-, to be set off against the profits of the general business of the assessee on the ground that it arose in a speculative transaction. The Appellate Tribunal on appeal held that the assessee was entitled to the exception covered by clause (c) of the proviso to section 43(5) of the Income Tax Act, and the High Court had dismissed an application by the Department for directing a reference on the ground that the onus was on revenue to establish that the assessee was not entitled to the exception and further that the Department had not sought reference of any question in regard to clause (c) of the proviso to section 43(5), (2001) 249 ITR 233 (All). The Department preferred an appeal to the Supreme Court. The Supreme Court dismissed the appeal agreeing with the High Court that no question of law was required to be referred though for reasons other than expressed by the High Court.

*CIT v. Sharwan Kumar Agarwal (2007) 292 ITR 3 / 210 CTR 616 / 163 Taxman 187 (SC)*

### **S. 43(5) : Definitions – Speculative transaction – Derivatives – Futures**

Losses incurred from the Exchange traded derivative transactions carried on by the assessee during relevant assessment year are speculative transactions covered under section 43(5) of the Act and the loss incurred in those transactions are liable to be treated as speculative loss. Section 43(5) is not restricted to contracts which are capable of performance by actual delivery, and therefore, fact that futures contracts settled otherwise than by actual delivery cannot be a ground to hold that futures contracts are not speculative transactions under section 43(5). Clause (d) inserted in proviso to section 43(5) with effect from 1-4-2006 is prospective in nature and, therefore, transactions covered under clause (d) are deemed not to be speculative transactions only with effect from 1-4-2006. (A. Y. 2003-04).

*CIT v. Bharat R. Ruia (HUF)(2011) 337 ITR 452 / 199 Taxman 87 / 241 CTR 1 / 54 DTR 153 / (2011) Vol. 113 (3) Bom. L.R. 1499. (Bom.)(High Court)*

### **S. 43(5) : Definitions – Speculative transaction – Loss – Set off – Property income [S. 73]**

Loss from speculative transaction cannot be set off against income from property. (A. Y. 1997-98).

*Aravali Engineers P. Ltd. v. CIT (2011) 335 ITR 508 / 237 CTR 312 / 49 DTR 68 (P&H)(High Court)*

### **S. 43(5) : Definitions – Speculation transaction – Loss – Set off against delivery based profit [S. 28, 73]**



Definition of speculative transaction in section 43(5), not be read in to deeming provision in explanation to section 73. Company is entitled to set off profits from such transactions against speculation loss brought forward from earlier years. Profits from purchase and sale of shares by actual delivery not to be excluded for deeming fiction. Speculation loss can be set off against delivery based profits deemed to be speculation profits for the purpose of section 73. (A.Y. 2003-04)

*CIT v. Lokmat Newspapers (2011) 220 Taxation 318 / (2010) 322 ITR 43 / 189 Taxman 370 / 37 DTR 85 (Bom.)(High Court)*

**S. 43(5) : Definitions – Speculation transaction – Speculation loss – Capital gain**

Claim of assessee for hedging loss in shares is not allowable, as, said shares were ultimately sold at capital gain.

*Bengal & Assam Company Ltd. v. CIT (2010) TLR 216 (Cal.) Vol. 40 Part 469 (Cal.)(High Court)*

**S. 43(5) : Definitions – Speculative transaction – No delivery or transfer of goods**

Where there is no actual delivery or transfer of goods between parties, such transfer would be a speculative transaction.

*Shiv Narain Karmandra Narain v. CIT (2003) 132 Taxman 886 (All.)(High Court)*

**S. 43(5) : Definitions – Speculative transaction – Forward contracts – Foreign exchange – Business loss**

Loss suffered by exporter in respect of forward contracts with banks in respect of foreign exchange would be business loss. (A.Y. 1992-93)

*CIT v. Badridas Gauridu (P.) Ltd. (2003) 261 ITR 256 / (2004) 187 CTR 453 / 134 Taxman 376 (Bom.)(High Court)*

**S. 43(5) : Definitions – Speculative transaction – Pre-A.Y. 2006-07 derivatives “speculation” losses have to be treated as “non-speculation” business losses for purposes of set-off**

- (i) When an assessee suffers a loss in business, speculative or non-speculative, he has a statutory right to carry forward the unabsorbed loss and set it off against profits and gains from the same business for the next year. The true nature of the loss has to be determined in the year of set-off. A finding as to the character of the loss reached in the year of incurring the loss is not binding in the year of set-off of the loss, even though the assessment may have reached finality. As such dual characterization is permissible (Manmohan Das 59 ITR 699 (SC) & Western India Oil Distributing Ltd. 126 ITR 497 (Bom) followed);
- (ii) Though, as held in *CIT v Bharat Ruia*, derivatives transactions, prior to the amendment to section 43(5) w.e.f. A.Y. 2006-07, are “speculative transactions” and the losses suffered therefrom are “speculative losses”, the question whether they are eligible for set-off has to be determined as per the law prevailing in the

year of set-off. As in the year of set-off, derivatives transactions are not, pursuant to the amendment to section 43(5), treated as "speculative transactions", the losses incurred prior to the amendment have to be treated as normal business losses and are eligible for set-off against all business income in accordance with section 72 (Shreegopal Purohit 33 SOT 1 distinguished);

- (iii) Also, the question whether the assessment order is erroneous or not has to be determined as per the then prevailing law and as it was then held that the amendment to section 43(5) was clarificatory and that derivative transactions were not speculative transactions, the order was not erroneous. (G. M. Stainless Steel 263 ITR 255 (SC) followed). (A. Y. 2006-07).

*Gajendra Kumar T Agarwal v. ITO (2011) 63 DTR 345 / 11 ITR 640 / 45 SOT 156 (URO)(Mum.)(Trib.)*

### **S. 43(5) : Definitions – Speculative transaction – Derivatives – FII [S. 115AD]**

Transactions in derivatives, both index based and individual share based, are to be considered as speculative transactions within the meaning of section 43(5) and they cannot be treated as normal business or non speculative transactions. Section 43(5) has no application to FIIs in respect of securities as defined in Explanation to section 115AD, income from sale of securities to be considered as short-term or long-term gains. (A. Y. 2004-05).

*L.G. Asian Plus Ltd. v. ACIT (2011) 46 SOT 159 / 140 TTJ 668 / 60 DTR 159 (Mum.)(Trib.)*

### **S. 43(5) : Definitions – Speculative transaction – Derivative – Loss**

Notification issued on 25th Jan., 2006 cannot curtail the applicability of cl.(d) of proviso to section 43(5) so as to make investments in derivatives done prior to 25th Jan., 2006 as speculative; transactions carried out through stock exchanges from 1st April, 2005 to 25th Jan., 2006 which are recognized by notification issued by CBDT on 25th Jan., 2006 would be eligible for being treated as non-speculative within the meaning of cl. (d) of proviso to section 43(5). (A.Y. 2006-07)

*ACIT v. Hiren Jaswantrai Shah (2011) 62 DTR 95 / 46 SOT 276 / 141 TTJ 851 (Ahd.)(Trib.)*

### **S. 43(5) : Definitions – Speculative transaction – Derivatives**

Derivatives are speculative transaction if not for *bona fide* hedging. (A.Y. 2004-05)

*ACIT v. Dinesh K. Mehta (HUF) (2010) 39 SOT 59 / 47 DTR 20 (Mum.)(Trib.)*

### **S. 43(5) : Definitions – Speculative transaction – Capital loss – Speculative loss – Purchase and sale of shares [S. 45]**

Assessee having entered into transactions of purchase and sale of shares and settled the same by delivery of shares through demat account, same cannot be regarded as speculative transactions and therefore, loss arising therefrom is not speculative loss, and it is to be treated as capital loss. (A.Y. 2003-04)

*Jahanganj Cold Storage v. ACIT (2010) 43 DTR 238 / 133 TTJ 278 / (2011) 45 SOT 74 (TM)(Agra)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Speculation loss – Derivatives trading [S. 73]**

Trading in derivatives cannot be considered as a speculative transaction and therefore set off of loss of derivative trading against the profits of the share trading business was permissible. (A.Y. 2004-05)

*Dy. CIT v. Paterson Securities (P) Ltd. (2010) 127 ITD 386 / 48 DTR 50 / 134 TTJ 777 (Chennai)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Derivatives – Speculation loss**

Term 'derivative' in which the underlying asset in shares falls within the meaning of the term 'commodity' for the purpose of section 43(5); cl. (d) of proviso to section 43(5) is prospective in nature and is effective w.e.f. 1st April, 2006; i.e., asst. year 2006-07 onwards; therefore, loss on account of futures and options was rightly treated as speculative loss for the asst. year. 2004-05 under consideration. (A.Y. 2004-05)

*Shree Capital Services Ltd. v. ACIT (2009) 28 DTR 1 / 124 TTJ 740 / 121 ITD 498 (SB)(Kol.)(Trib.)*

**S. 43(5) : Definitions – Speculation transaction – Futures and options**

The loss suffered in F & O transactions could not be considered as speculation loss under section 43(5). (A. Y. 2003-04)

*R.B.K. Securities Ltd. v. ITO, ITA No. 2465/Mum/2006, Bench – B, dt. 21-7-2008 – BCAJ P. 27, Vol. 40-B, Part 1, October 2008. (Mum.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Derivative trading**

As per the definition of speculative transaction, there has to be purchase or sale of any commodity, including stock and shares. As derivative trading did not involve any purchase and sale of shares, the loss on account of derivative could not be treated as loss on account of speculative transaction. (A.Y. 2001-02)

*Dy. CIT v. SSKI Investors Services Pvt. Ltd., ITA No. 3182/Mum/2004, Bench – J, dt. 25-9-2007, BCAJ P. 151, Vol. 39-E, Part 2, November 2007. (Mum.)(Trib.)*

**S. 43(5) : Definitions – Speculation transaction – Business income – Actual delivery – Speculation loss – Sale and purchase of shares**

It was held that in case of assessee dealing in sale and purchase of shares, the actual delivery of shares does not mean the delivery to the assessee only. The delivery taken by the broker being an agent on behalf of the assessee is also passive delivery. Such transactions cannot be held as Speculative transaction.

*ITO v. Rakesh Gupta 159 Taxman 41 (Mag.)(Chd.)(Trib.)*

**S. 43(5) : Definitions – Speculation transaction – Speculation loss – Forward contract**

A loss incurred by an assessee in the course of its merchandise business in forward contract to ward off fluctuation in prices is a business loss and not a speculation loss.

*ITO v. Pali Ram Bhadarmal (2006) 152 Taxman 43 (Mag.)(Jodh.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Actual delivery – Meaning**

The delivery contemplated by section 43(5) need not be actual but even constructive or implied. (A.Y. 2001-02)

*C. Bharath Kumar v. Dy. CIT (2005) 4 SOT 593 (Bang.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Actual delivery – Agent**

The words 'actual delivery or transfer' in section 43(5), are not restricted to delivery or transfer to assessee; it can be to his agent. Shares transferred on sale by the assessee's broker on behalf of assessee to ultimate buyer as per instructions given by assessee to broker. The provisions of section 43 (5) were not applicable. (A.Y. 2001-02)

*Jayasree Roychowdhury v. ACIT (2005) 92 ITD 400 / 93 TTJ 714 (Kol.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Settlement of contract**

Assessee bank claimed huge losses in respect of transactions with two banks on ground that assessee failed to deliver securities to purchaser banks for reasons beyond its control, as settlement of contract was not for payment of difference of value of securities contracted to be purchased and sold and assessee's intention had throughout been to take delivery of units in terms of contract as assessee could not enforce delivery of units in terms of contract as assessee could not enforce delivery from parties from whom it had purchased them, it could not be said that transaction was speculative transaction. (A.Y. 1996-97)

*State Bank of Saurashtra v. Dy. CIT (2005) 93 ITD 662 / 95 TTJ 225 / 3 SOT 869 (Ahd.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Forward contract – Arathia**

Assessee arathia entered into a forward contract as per custom and practice prevalent in its line of business, to ward off fluctuation in prices of items dealt with by him, it could not be treated as speculation loss in view of proviso (a) to section 43(5). (A.Y. 1991-92)

*ITO v. Pali Ram Bhandarmal (2005) 95 TTJ 1114 (Jodh.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Shares were sold first – Purchased later**

Merely for the reason that the shares were sold first and then purchased, they can not be treated as non genuine speculative transaction.

*ACIT v. Hotel President (2003) SOT 46 (Gau.)(Trib.)*

**S. 43(5) : Definitions – Speculative transaction – Hedging contracts – Forward sale**

Forward sale transactions though not covered within the meaning of hedging contracts as per proviso (a) to section 43(5), are covered within extended meaning given in Board's Circular No 23D dated 12-9-1960 and hedging contracts need not be identical quality or quantity of goods as held in stock.

*Sopropa S.A., In re (2004) 268 ITR 37 / 138 Taxman 75 / 189 CTR 457 (AAR)*

**S. 43(5)(d) : Definitions – Speculative transaction – Loss – Business – Derivatives**

Exchanges notified on 25-1-2006, transactions carried out in previous year relevant to assessment year 2006-07, eligible for benefit of section 43(5)(d), loss on derivative transactions to be set off against profit earned in purchase and sale of shares on derivative basis. No expenditure can be allocated towards speculative business. (A.Y. 2006-07)

*Seema Jain (Smt) v. ACIT (2010) 6 ITR 488 (Delhi)(Trib.)*

**S. 43(6) : Definitions – Written down value – Amalgamation of companies**

In case of amalgamation of companies, written down value of transferred assets of amalgamating company should be worked out without reducing there from unabsorbed depreciation relating to earlier years. (A.Y. 1972-73)

*CIT v. Kothari Industrial Corpn. Ltd. (2005) 274 ITR 600 / (2006) 156 Taxman 240 (Mad.)(High Court)*

**S. 43(6) : Definitions – Written down value – Conversion of firm in to company – Part IX**

Section 43(6)(c)(i)(B) will not apply in a case of conversion of firm into a company under Part IX of Companies Act. Assessee is entitled to depreciation on the value of assets vested on the company.

*CIT v. Texspin Engg. & Mfg. Works (2003) 129 Taxman 1 / 263 ITR 345 / 180 CTR 497 (Bom.)(High Court)*

**S. 43(6) : Definitions – Written down value – Initial depreciation**

Initial depreciation, allowed prior to the assessment year 1983-84 and earlier years should not be deducted from written down value of assets. (A.Y. 1986-87)

*CIT v. Madurantakam Co-operative Sugar Mills Ltd. (2003) 263 ITR 388 / 138 Taxman 150 / (2004) 186 CTR 203 (Mad.)(High Court)*

**S. 43(6) : Definitions – Written down value – Holiday resort – Time share**

Assessee holiday resort time share to members against discounted sum of money and out of total time sharing membership fees received by assessee, 45 per cent thereof was sought to be deducted from written down value of building by Assessing Officer. The Tribunal held that Assessing Officer's action was not justified. (A.Y. 1998-99)

*ACIT v. Asia Resorts Ltd. (2005) 96 TTJ 909 (Chd.)(Trib.)*

**S. 43(6)(b) : Definitions – Written down value – Depreciation – Port trust**

Port Trust was exempted under section 10(20) till 31-3-2002. As per the amendment by Finance Act, 2002 income of Port Trust was taxable for first time w.e.f. 1-4-2002. The Port Trust claimed depreciation on the original cost of assets which was disallowed by the Assessing Officer allowing depreciation on WDV as per the books. Held that as per section 43(6)(b) WDV is cost less depreciation actually allowed and not the depreciation 'allowable'. The phrase 'actually allowed' is thus limited to depreciation actually taken into account which was granted and it cannot be stretched to mean 'notionally allowed' or provided in books of account by having accounting entry hence depreciation allowable on Original cost. (A.Y. 2003-04)

*Kandla Port Trust v. ACIT, ITA No. 34/Rjt/2005 dt. 25th April, 2006 – ACAJ Volume 30 Part 4, July 2006 (Rajkot)(Trib.)*

**S. 43(6)(c) : Definitions – Written down value – Block of assets [S. 2(11)]**

When an asset is sold, the block of assets stands reduced only by money payable on account of sale of the asset and not by the fair market value of the asset sold.

*Dy. CIT v. Cable Corporation of India Ltd. ITA No. 5592/Mum./2002, January (2010) BCAJ Vol. 41-B (Mum.)(Trib.)*

**S. 43(6)(c)(i)(B) : Definitions – Block of assets – Depreciation – Computation – Apparent consideration – Not Fair market value [S. 2(14), 32]**

The expression "moneys payable" according to Explanation 4 to section 43(6) shall have the meaning as is in the Explanation below sub-section 4 of section 41. Therefore, the written down value of all the assets falling within the block of assets at the beginning of the previous year has to be adjusted by the amount at which the asset is actually sold and not the fair value of the asset that is sold.

*CIT v. Cable Corporation of India Ltd. (2011) 336 ITR 56 / 201 Taxman 339 (Bom.)(High Court)*

**Section 43A : Special provisions consequential to changes in rate of exchange of currency.**

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Depreciation [S. 32]**

Assessee is entitled to adjust the actual cost of the imported capital assets acquired in foreign currency, on account of fluctuation in the rate of exchange at each of relevant balance sheet dates pending actual payment of varied liability for the assessment years prior to the amendment in section 43A, w.e.f. 1st April 2003. (A.Ys. 1991-92 to 1997-98)

*Oil & Natural Gas Corporation Ltd. v. CIT (2011) 220 Taxation 102 / (2010) 36 DTR 345 / 322 ITR 180 / 189 Taxman 292 / 5 SCC 468 (SC)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate**



The Apex Court held that the decision in *Southern Cement Ltd. v. CIT* (2003) 259 ITR 631 (Mad.), has nothing to do with the question as to whether the allowance under section 43A(1) of the Income Tax Act, 1961, relating to the fluctuations of foreign exchange and effect on the valuation of assets, is allowable in one year or it was to be granted in different assessment years. The decision of the High Court was set aside and matter remitted for fresh adjudication after formulating the question of law involved. (A.Ys. 1989-90 to 1992-93)

*CIT v. Lucas T. V. S. Ltd.* (2008) 297 ITR 429 / 204 Taxation 3 / 214 CTR 1 / 166 Taxman 164 / 1 DTR 37 (SC)

#### **S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Depreciation – Last day [S. 32]**

The assessee was entitled to increase claim of depreciation on increased liability due to foreign exchange rate fluctuation on the last date of previous year.

*CIT v. Honda Siel power Products Ltd.* (2007) 164 Taxman 275 (Delhi)(High Court)

Editorial : Refer *CIT v. Woodward Governor India (P) Ltd.* (2009) 312 ITR 254 / 179 Taxman 326 / 21 DTR 106 / 223 CTR 1 / 213 Taxman 195 (SC) / 13 SCC 1 / *CIT v. Honda Siel Power Products Ltd.* (2009) 223 CTR 1 / 312 ITR 254 / 179 Taxman 326 / 21 DTR 106 (SC)

#### **S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate**

Section 43A, opens with a non obstante clause and therefore, it overrides any other provisions contained in the Act. When sub-section (1) of section 43A applies in terms it is rather mandatory to take the actual cost, capital expenditure or cost of acquisition at a higher or lower figure for the purposes of depreciation allowance irrespective of whatever might have been the position *de hors* the provision. A bare reading of the provision makes it clear that once the language of section 43A(1) is attracted, the section has to apply.

*CIT v. Iffco Ltd.* (2004) 191 CTR 558 / 142 Taxman 561 (Delhi)(High Court)

#### **S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Depreciation [S. 32]**

When terms of sub-section (1) of section 43A are fulfilled, it is rather mandatory to take the actual cost, capital expenditure or cost of acquisition at a higher or lower figure for purposes of depreciation allowance, irrespective of whatever might have been position *de hors* the provision. (A.Y. 1996-97)

*CIT v. Paper Products Ltd.* (2004) 271 ITR 472 (Delhi)(High Court)

#### **S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Investment allowance [S. 32A]**

Fluctuation in foreign exchange rate in a subsequent year cannot relate back to the year in which the asset was acquired. (A.Ys. 1977-78 to 1979-80)

*CIT v. Gujarat State Fertilizers Co. Ltd.* (2003) 126 Taxman 572 / 259 ITR 526 / 179 CTR 266 / (2002) 125 Taxman 593 (FB)(Guj.)(High Court)

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Investment allowance [S. 32A]**

Investment allowance is allowable in respect of liability arising out of fluctuation in exchange rate relating to repayment of principal amount borrowed for purchase of capital equipment.

*Ahmedabad Kaiser-I-Hind Mills Co. Ltd. v. CIT (2003) 130 Taxman 262 / 264 ITR 666 (Guj.)(High Court)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Investment allowance [S. 32A]**

Investment allowance is allowable on incremental cost by reason of foreign exchange fluctuation. (A.Y. 1985-86)

*Ennore Foundries Ltd. v. CIT (2003) 259 ITR 414 / 187 CTR 496 / 135 Taxman 79 (Mad.)(High Court)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Investment allowance [S. 32A]**

Investment allowance in respect of incremental cost of machinery, necessitated by the fluctuation in foreign exchange rate is allowable to the assessee in the respective years in which such cost arose. (A.Ys. 1985-86 to 1987-88)

*Southern Asbestos Cement Ltd. v. CIT (2003) 259 ITR 631 / 179 CTR 516 / (2004) 134 Taxman 89 (Mad.)(High Court)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Outstanding loan**

Increased liability on account of change in rate of exchange on outstanding loan at end of accounting year has to be added to actual cost.

*SKF Bearings India Ltd. v. Jt. CIT (2005) 4 SOT 534 (Mum.)(Trib.)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Depreciation [S. 32]**

Assessee is entitled to claim depreciation on the capitalised sum on account of additional liability incurred due to fluctuation in foreign exchange rate in respect of imported machinery obtained by way of loan from foreign institution.

*Indo US Wire Casting Ltd. v. Dy. CIT (2003) 84 ITD 335 / 79 TTJ 996 (Bang.)(Trib.)*

**S. 43A : Rate of exchange – Foreign currency – Actual cost – Change in rate – Investment Allowance [S. 32A]**

Investment allowance cannot be denied in respect of additional cost incurred due to fluctuation in exchange rate, which obviously comes into existence for the first time in a year later than year in which asset was acquired.

*ACIT v. National Peroxide Ltd. (2003) SOT 459 (Mum.)(Trib.)*

## **Section 43B : Certain deductions to be only on actual payment.**

### **S. 43B : Deductions on actual payment – Contribution to provident fund – Retrospective**

Retrospective effect to be given to the deletion of the second proviso to section 43B brought about by the Finance Act, 2003.

Deletion of the second proviso and consequent amendment in the first proviso to section 43B by the Finance Act, 2003 w.e.f. 1-4-2004 equating tax, duty, cess and fee with contribution to welfare funds was to overcome implementation problems. Once this uniformity is brought about in first proviso, the Finance Act, 2003 would become curative in nature. Hence, the change brought about by the Finance Act, 2003 would apply retrospectively w.e.f. 1-4-1988 when the first proviso was inserted.

*CIT v. Alom Extrusions Ltd. (2010) 1 SCC 489 / (2009) 319 ITR 306 / 185 Taxman 416 / 227 CTR 417 / 216 Taxation 98 / 32 DTR 49 (SC)*

*Editorial :- CIT v. Pamwi Tissues (2009) 313 ITR 137 / 215 CTR 150 / 3 DTR 66 (Bom.) impliedly overruled.*

### **S. 43B : Deductions on actual payment – Unutilized MODVAT Credit – Customs Duty**

Unutilised MODVAT credit of earlier years cannot be treated as actual payment for the purpose of section 43B. Custom duty paid and allowed as deduction under section 43B is to be taken into account in valuation of the closing stock.

*CIT v. Maruti Udyog Ltd. (2010) 320 ITR 729 / 218 Taxation 668 / 186 Taxman 407 / 229 CTR 5 (SC)*

### **S. 43B : Deductions on actual payment – Bottling fee – Rajasthan Excise Act**

Bottling fee for acquiring the right of bottling the Indian Manufactured Foreign Liquor, was payable by the assessee as a consideration for acquiring an exclusive privilege, and hence the amount did not fall within the purview of section 43B. (A.Ys. 1991-92 to 1994-95)

*CIT v. McDowell & Co. Ltd. (2009) 314 ITR 174 / 167 / 177 / 180 / 185 / 528 / 23 DTR 128 / 224 CTR / 22 / 24 / 27 / 30 / 213 Taxation 378 (SC)*

*CIT v. Udaipur Distilleries Co. Ltd. (2009) 314 ITR 188 / 224 CTR 32 / 180 Taxman 530 / 23 DTR 138 / (2010) 214 Taxation 344 (SC)*

### **S. 43B : Deductions on actual payment – Provident Fund – Due date – Return**

The contribution made to the provident fund before filing of the return could not be disallowed under section 43B as it stood prior to the amendment w.e.f. April 1, 2004.

*CIT v. Vinay Cement Ltd. (2007) 213 CTR 268 (SC)*

### **S. 43B : Deductions on actual payment – Excise and Custom Duty – Valuation – Closing stock**

Entire amount of Excise Duty / Custom Duty paid in the accounting year allowable as deduction in respect of that year irrespective of amount of Excise Duty / Custom Duty

which was included in the valuation of assessee's closing stock at the end of accounting year. (A.Ys. 1984-85 to 1987-88)

*Berger Paints India Ltd. v. CIT* (2004) 266 ITR 99 / 135 Taxman 586 / 187 CTR 193 / 180 Taxation 10 / 12 SCC 42 / 2 SCR 502 (SC)

**S. 43B : Deductions on actual payment – Sales tax – Extension for filing of Return [S. 139]**

Where time for filing of return is extended in terms of proviso to section 139(1), it automatically means extension of due date for purpose of section 43B, thus, Sales Tax paid within extended time for filing return cannot be disallowed under section 43B. (A.Y. 1988-89)

*CIT v. Narender Anand* (2011) 332 ITR 483 / 198 Taxman 51 / 55 DTR 193 / 242 CTR 32 (Delhi)(High Court)

**S. 43B : Deductions on actual payment – ESIC – Second proviso**

Omission of the second proviso and the amendment of the first proviso to section 43B by the Finance Act, 2003 would operate retrospectively from April 1, 1998 onwards. (A. Y. 1998-99)

*CIT v. Rai Agro Industries Ltd.* (2011) 334 ITR 122 (P&H)(High Court)

**S. 43B : Deductions on actual payment – Excise duty – Advance payment**

Assessing officer held that deduction can be claimed only on removal of goods from factories. High Court held that the assessee is entitled to deduction in respect of excise duty paid in advance. (A.Y. 1989-90).

*CIT v. Modipon Ltd. (No. 2)* (2011) 334 ITR 106 (Delhi)(High Court)

**S. 43B : Deductions on actual payment – Licence fee – Liquor**

Licence fees payable under the Abkari Act for grant of right / privilege to sell liquor if not paid within the period specified in section 43B of the Act cannot be disallowed, as the same is consideration payable to the Government only for grant of right / privilege to sell liquor and not in the nature of any tax, duty, cess or fees as provided in section 43B(a) of the Act. (A.Y. 1999-2000)

*CIT v. G. Soman* (2011) 53 DTR 220 / 241 CTR 82 / 196 Taxman 251 (Ker.)(High Court)

**S. 43B : Deductions on actual payment – Provident fund – No disallowance**

Provident fund payment made late cannot be disallowed under section 43B. (A. Y. 2001-02).

*B.D.P.S. Software Ltd. v. Dy. CIT* (2011) 62 DTR 361 / 245 CTR 19 / (2012) 340 ITR 375 (Bom.)(High Court)

**S. 43B : Deductions on actual payment – Interest – Financial institutions**

Assessee had only made provision in Profit and Loss Account and no actual payment was made in respect of the interest payable to the financial institutions. Deduction cannot be allowed. (A.Y. 1995-96).

*CIT v. Lotus Roofings (P) Ltd. (2011) 63 DTR 254 / (2012) 247 CTR 458 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Labour welfare expenses – Bonus**

Provision made for labour welfare expenses was not for payment of bonus or any other payment in guise of bonus but it was to be paid as a part of wages being incentive for performance of workers. Disallowance cannot be made. (A.Y. 1990-91).

*Dy. CIT v. Sri Shanmugavel Mills Ltd. (2011) 202 Taxman 640 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Duty – Electricity board**

Electricity Board collecting duty from customers as agent of State. Section 43B is not applicable. (A.Ys. 2002-03 to 2005-06)

*Kerala State Electricity Board v. Dy. CIT (2010) 329 ITR 91 / 236 CTR 337 / (2011) 196 Taxman 1 / 47 DTR 265 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Employees gratuity fund – Due date**

Contribution towards employee's gratuity fund was allowable if paid before filing of the return of income. (A.Y. 2004-05)

*CIT v. Popular Vehicles & Services Ltd. (2010) 33 DTR 140 / 228 CTR 346 / 189 Taxman 14 / 33 DTR 140 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Employees contribution – Provident fund**

Even employees' contribution to PF paid before due date of filing ROI is allowable under section 43B. (A.Y. 2002-03)

*CIT v. Aimil Limited (2010) 321 ITR 508 / 229 CTR 418 / 35 DTR 68 / 188 Taxman 265 / 218 Taxation 425 (Delhi)(High Court)*

**S. 43B : Deductions on actual payment – Rescheduling of loan – Outstanding interest**

Assessee's outstanding interest against loan from State Finance Corporation for period pertaining to A.Ys. 1994-95 & 1995-96, was rescheduled by the finance corporation and the same was sourced by means of a fresh loan which had a repayment schedule over three years. Assessee claimed deduction for such interest in its return. Held, that such rescheduling, amounts to deemed payment of interest and is hence deductible under section 43B, even if not actually paid. (A.Y. 1997-98)

*Vinir Engineering P. Ltd. v. Dy. CIT (2010) 186 Taxman 72 / 231 CTR 90 / (2009) 313 ITR 154 / 22 DTR 107 (Karn.)(High Court)*

**S. 43B : Deductions on actual payment – Employees contribution**

Payment of employer's to PF made beyond the due dates could not be disallowed under section 43B for the asst year 2003-04. (A.Y. 2000-01)

*CIT v. Lakhani India Ltd. (2010) 324 ITR 73 / 39 DTR 210 / 188 Taxman 132 / 232 CTR 81 (P&H)(High Court)*

**S. 43B : Deductions on actual payment – Employer's and employees' contribution [S. 2(24)(x)]**

Employer's and Employees' contribution to PF and other incidental charges paid by assessee beyond the due dates could not be disallowed. (A.Y. 2003-04)

*CIT v. Lakhani Rubber Works (2010) 326 ITR 415 / 232 CTR 350 / 40 DTR 46 (P&H)(High Court)*

**S. 43B : Deductions on actual payment – Employees PF and ESIC [S. 2(24)(x) r.w.s. 36(1)(va)]**

The assessee company claimed deductions for the A.Y. 1990-91 in respect of contributions made to the provident fund, Employee's provident fund and ESIC.

Income-tax Tribunal allowed all of them. On appeal by the Department, the Hon'ble High Court held as under.

The assessment in question was A.Y. 1990-91. The amendment is made applicable from the Asst. Year 2004-05 as far as provident fund dues are concerned. However, the section as it stood earlier was that the Employer's contribution to provident fund if not paid within the due date the employer was not entitled to deduction.

The Hon'ble High Court further held that the contribution of provident fund dues after closing of the accounting period, but before due date of filing returns are made, then also it was not allowable as deduction. (A.Y 1990-91).

Dismissal of the Special Leave Petition in *CIT v. Vinay Cement Ltd. (2007) 213 CTR 268 (SC)*, cannot be said to be law decided.

For assessment years prior to Asst. Year 2004-05, employees contribution to PF, EPF and ESI not paid within due date was disallowable under section 43B. (A.Y. 1990-91)

*CIT v. Pamwi Tissues Ltd. (2009) 313 ITR 137 / (2008) 215 CTR 150 / (2008) 3 DTR 66 (Bom.) (High Court)*

*Editorial : Refer CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC) in favour of assessee.*

**S. 43B : Deductions on actual payment – Conversion of interest into loan**

Under Explanation 3C, conversion of interest amount into loan would not be deemed to be regarded as "actually paid" amount within the meaning of section 43B. (A.Y. 1989-90)

*Eicher Motors Limited v. CIT (2009) 315 ITR 312 / (2006) 206 CTR 75 / (2006) 157 Taxman 501 (MP)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – Deferred scheme**

Amount of sales tax deferred under the State Government's Deferment Scheme could not be disallowed under section 43B of the Act.



*CIT v. Jyoti Jain (2009) 17 DTR 286 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Provident Fund – ESI**

Provident Fund (P.F.) and Employees State Insurance (E.S.I.) contribution paid into the funds beyond the due dates prescribed in respective Acts but prior to the date of filing the return of income could not be disallowed under section 43B of the Act. The Hon'ble High Court noted that the reasoning given by the Apex Court while dismissing the special leave petition in the case of *CIT v. Vinay Cement Ltd. (2007) 213 CTR (SC) 268*, would be binding on the High Court, as law declared by the Apex Court under Article 141 of the Constitution.

*CIT v. Nexus Computer (P) Ltd. (2008) 12 DTR 77 / 219 CTR 54 / (2009) 313 ITR 144 / (2009) 177 Taxman 202 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Special value branch deposit – Custom authorities**

Payment made on account of special value branch deposit to the custom authorities clearly fell within provisions of section 43B(a) of the Act, and was allowable as business expenditure, even though the same was made under protest by the assessee. (A.Y. 2002-03)

*CIT v. Hughes Escorts Communication (2008) 14 DTR 346 (Delhi)(High Court)*

**S. 43B : Deductions on actual payment – Provident fund – Employees State Insurance**

Provident Fund (P.F.) and Employees State Insurance (E.S.I.) contribution paid into the funds beyond the due date prescribed in respective Acts but prior to the date of filing the return of income could not be disallowed under section 43B of the Act. The Hon'ble High Court noted that the reasoning given by the Apex Court while dismissing the special leave petition in the case of *CIT v. Vinay Cement Ltd. (2007) 213 CTR (SC) 268*, would be binding on the High Court, as law declared by the Apex Court under Article 141 of the Constitution. The Hon'ble High Court dissented from the decision of Hon'ble Bombay High Court in the case of *CIT v. Pamwi Tissues Ltd. (2008) 215 CTR (Bom) 150*. (A.Y. 1998-99)

*CIT v. P.M. Electronics Ltd. (2008) 15 DTR 258 / 220 CTR 635 / (2009) 313 ITR 161 / 177 Taxman 1 (Delhi)(High Court)*

**S. 43B : Deductions on actual payment – ESIC – Contribution to PF**

Contributions made towards provident fund and Employees State Insurance within two to four days after the grace period provided under section 43B of the I.T. Act, 1961 but before filing the return are entitled to the benefit provided under section 43B. (A.Y. 2001-02)

*CIT v. Dharmendra Sharma (2008) 297 ITR 320 / (2007) 213 CTR 609 (Delhi)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – CST – Provident fund – Due date – Proviso is retrospective [S. 139(1)]**

Proviso to section 43B, which came into force with effect from 1-4-1988, is retrospective. For relevant assessment year, claim of assessee on account of sales tax / CST and PF shown in books of account as payable was allowable, if payment was made before due date prescribed under section 139(1). (A.Y. 1987-88)

*CIT v. Avery Cycle Inds. (P) Ltd. (2008) 170 Taxman 152 / (2007) 292 ITR 198 (P&H)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to PF – Due date [S. 2(24)(x), 36(1)(va), 139(1)]**

Contributions to provident fund and Employees State Insurance beyond period stipulated in sec. 36(1)(va) read with sec. 2(24) (x) and sec. 43B but paid on or before due date for furnishing return under sec. 139(1) are deductible.

*CIT v. Sabari Enterprises (2008) 298 ITR 141 / (2007) 213 CTR 269 / (2008) 2 DTR 394 (Karn.)(High Court)*

**S. 43B : Deductions on actual payment – Leave encashment provision – Allowable**

Struck down clause (f) of section 43B as arbitrary, unconscionable and *de hors* the Apex Court decision in *Bharat Earth Movers v. CIT (2000) 245 ITR 428/112 Taxman 61* so that leave encashment provision is held as an allowable deduction notwithstanding any payment.

*Exide Industries Ltd. v. Union of India (2007) 164 Taxman 9 / 212 CTR 206 / 292 ITR 470 (Kol.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to PF – Delayed payment**

Amendment made to S. 43B by Finance Act, 2003 is effective from 1st April, 2004; i.e., asst. year 2004-05 and, therefore prior to that, contribution towards PF made beyond the due date could not be allowed as deduction notwithstanding the fact that payment was made before filing the return. (A.Ys. 1991-92, 1994-95)

*CIT v. Godavari (Mannar) Sahakari Sakhar Karkhana Ltd. (2007) 212 CTR 384 / 109 BLR (Nov.) 2273 (Bom.)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – Due date**

Sales Tax Liability paid before due date of filing return is allowable as deduction. (A.Y. 1999-2000)

*CIT v. Keerana Vegetable Products Ltd. (2010) 191 Taxman 244 / (2011) 237 CTR 395 / (2010) 325 ITR 185 / 40 DTR 26 (P&H)(High Court)*

**S. 43B : Deductions on actual payment – Provident fund – Paid by Due date**

The contributions towards Provident Fund, etc. paid before filing of the Return by the assessee are entitled for the deduction under section 43B(b) of the Act.

*CIT v. George Williamson (Assam) (2006) 284 ITR 619 (Gua.)(High Court)*

**S. 43B : Deductions on actual payment – Employees' contribution to PF**

PF deposited by assessee into Govt. a/c. with some delay. As the deletion of second proviso to Sec. 43B by the Finance Act, 2003 w.e.f. 1-4-2004 being curative, it is justified to delete the addition. (A.Y. 1998-99)

*CIT v. Desh Rakshak Aushdhalaya Ltd. (2008) 218 CTR 7 / (2009) 313 ITR 140 / 178 Taxman 453 / (2008) 10 DTR 125 (Uttarakhand)(High Court)*

**S. 43B : Deductions on actual payment – Issue price – Liquor licence**

'Issue Price' payable by the assessee, holding licence under the UP Excise Act, was neither a 'tax' nor any amount payable by him so as to fall in any of categories covered by section 43B, as it stood during the assessment year 1987-88; thus, 'issue price' payable by the assessee could not be disallowed under section 43B. (A.Y. 1987-88)

*CIT v. Mohinder Kumar & Party (2006) 284 ITR 250 / 151 Taxman 253 / (2005) 195 CTR 335 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – General – Statutory liability**

Various statutory liabilities discharged after close of previous year, but before the due date for filing return of income under section 139(1) are allowable deduction. (A.Y. 1984-85)

*CIT v. Alembic Glass Industries Ltd. (2005) 279 ITR 331 / 149 Taxman 15 / 197 CTR 514 (Guj.) (High Court)*

**S. 43B : Deductions on actual payment – Sales Tax – First proviso – Retrospective**

First proviso below section 43B inserted by Finance Act, 1987, with effect from 1-4-1988 is retrospective in nature and, therefore, applicable for assessment year 1984-85 onwards.

*CIT v. P.C. Industries (2005) 148 Taxman 495 (All.)(High Court)*

**S. 43B : Deductions on actual payment – Sales Tax – Payment in next year**

Amount collected towards sales tax in last quarter of accounting period and paid over to Sales Tax Department within prescribed period in next accounting year, would not attract section 43B. (A.Y. 1984-85)

*CIT v. Krishna Satya Narain (2005) 277 ITR 354 (All.)(High Court)*

**S. 43B : Deductions on actual payment – Sales Tax – Payment in next year**

Sales Tax collected from parties by assessee and paid after close of period of assessment concerned, but before filing of return could not be disallowed. (A.Y. 1986-87)

*CIT v. Rane Brake Linings Ltd. (2005) 272 ITR 405 (Mad.)(High Court)*

### **S. 43B : Deductions on actual payment – Sales Tax – Due date**

Assessee had discharged its sales tax liabilities in respect of entire sum before due date of filing of return, no disallowance of such liability could be made. (A.Y. 1985-86)

*CIT v. Keerana Vegetable Products Ltd. (2005) 148 Taxman 92 / 199 CTR 200 (P&H)(High Court)*

### **S. 43B : Deductions on actual payment – Sales Tax – Deferred payment scheme**

Assessee was allowed to retain sales tax amount prescribed period under deferred payment scheme of State Government, deduction for sales tax covered under such scheme was to be allowed even though it was not paid during the accounting period relevant to the assessment year under consideration. (A.Ys. 1987-88, 1988-89)

*CIT v. Mahaluxmi Brick Mfg., Moulding & Fabricating Industries (P.) Ltd. (2005) 273 ITR 190 / 193 CTR 261 (P&H)(High Court)*

### **S. 43B : Deductions on actual payment – Duty – Excise duty – Job work**

No liability in respect of excise duty payable by person for whom petitioner had undertaken job work, could be said to be liability outstanding on account of excise duty so as to attract provisions of section 43B. (A.Y. 1992-93)

*CIT v. Plastopacks International (P.) Ltd. (2005) 196 CTR 70 (Raj.)(High Court)*

### **S. 43B : Deductions on actual payment – Cess – Fees**

Prior to its amendment with effect from 1-4-1989, section 43B(a) could not be regarded as applicable in respect of payment of cess and fees. (A.Y. 1985-86)

*CIT v. Nathan Mining Works (2005) 274 ITR 149 / (2006) 156 Taxman 239 (Mad.)(High Court)*

### **S. 43B : Deductions on actual payment – Cess – Fees**

Cess is not in nature of 'tax' or 'duty' and as such could not be disallowed prior to amendment of section 43B(a) w.e.f. 1-4-1989 to include cess therein. (A.Y. 1986-87)

*CIT v. Madan Lal & Bros. (2005) 276 ITR 571 / 145 Taxman 459 / 195 CTR 92 (P&H)(High Court)*

### **S. 43B : Deductions on actual payment – Cess – Fees**

The words 'cess or fee' have been added in section 43B with effect from 1/4/1989. For assessment year 1984-85 no disallowance in respect of unpaid royalty amount could be made by resorting to provision of section 43B. (A.Y. 1984-85)

*CIT v. Gujarat Industrial Products (2005) 274 ITR 635 / 148 Taxman 264 / 193 CTR 527 (Guj.)(High Court)*

### **S. 43B : Deductions on actual payment – Kist payable to Government – Rent**

Amount of 'kist' (Rental income) payable by assessee to state government can be allowed as a deduction even when this sum has not been actually paid by the assessee.

*CIT v. Satish Chandra Hegde Family Trust (2005) 276 ITR 208 / (2007) 158 Taxman 35 (Karn.)(High Court)*

#### **S. 43B : Deductions on actual payment – Incentive bonus – Due date**

Production incentive bonus, payable in respect of services rendered by employee under section 36(1)(ii), to extent of not being paid during previous year relevant to assessment year in question, could not be allowed as deduction under section 43B. (A.Y. 1990-91)

*CIT v. Kisan Sahkari Chini Mills Ltd. (2005) 148 Taxman 450 / 199 CTR 683 / (2006) 284 ITR 418 (All.)(High Court)*

#### **S. 43B : Deductions on actual payment – Approved gratuity fund [S. 40A(7)]**

Legislature never intended to take away benefit conferred under clause (b) of section 40A (7) by provisions of section 43B. Section 43B does not intend to take away benefit conferred under section 40A(7)(b).

*CIT v. Commonwealth Trust (I) Ltd. (2004) 269 ITR 290 / 189 CTR 393 (Ker.)(High Court)*

#### **S. 43B : Deductions on actual payment – Bank guarantee – Actual payment**

Bank guarantee is only a guarantee on some happening and that cannot amount to "actual payment" as required under section 43B. (A.Y. 1988-89)

*CIT v. Udaipur Distillery Co. Ltd. (No 1)(2004) 268 ITR 305 / 134 Taxman 398 / 186 CTR 1 (Raj.)(High Court)*

#### **S. 43B : Deductions on actual payment – First proviso – Retrospective [S. 139]**

The first proviso to section 43B has to be treated as retrospective. Payment made before filing of return under section 139 or along with the return of income, provisions of section 43B will not apply. (A.Y. 1984-85)

*Sirhind Steel (P) Ltd. v. CIT (2004) 187 CTR 159 (Guj.)(High Court)*

#### **S. 43B : Deductions on actual payment – Contribution to PF – Due date [S. 36(1)(va)]**

On an interpretation of section 43B, read with the explanation to clause (va) of section 36(1) the assessee was not entitled to claim deduction of the contribution to the provident fund for the asst year 1991-92, on actual payment basis, if the payment was not made before the "due date" as defined in the Explanation to section 36(1)(va). (A.Y. 1991-92)

*CIT v. Standard Tile and Clay Works P. Ltd. (2004) 265 ITR 525 / 181 Taxman 18 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Employees PF – Due date – Payment made subsequent to close of relevant previous year**

Amount paid by employer within due date specified under Employee's Provident Fund Act, is allowable even though actual date of payment may have been on a day subsequent to close of relevant previous year. (A.Y. 1988-89)

*Salem Co-operative Sugar Mills Ltd v. CIT (2004) 266 ITR 166 / 137 Taxman 499 / 184 CTR 650 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Employer's contribution – Group Gratuity Scheme**

Employer's contribution towards Group Gratuity Scheme is to be allowed as deduction only if employer credits said amount to employee's account in relevant fund on or before date by which he is legally or contractually required to do so.

*CIT v. Jairam & Sons (2004) 269 ITR 285 / 134 Taxman 503 / 187 CTR 199 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Employees' contribution – Gratuity Fund**

Where contribution to Employees Gratuity Fund not paid by the assessee within due date for making such payment under law is not allowable even if paid during the relevant year. (A.Y. 1992-93)

*CIT v. G.T.N. Textiles Ltd. (2004) 269 ITR 282 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Employees welfare fund [S. 36(1)]**

Contribution towards different funds for welfare of employees not paid on due date as defined in Explanation given below clause (va) of sub section (1) of section 36, read with second proviso to section 43B, cannot be allowed as deduction. (A.Y. 1992-93)

*CIT v. Udaipur Distillery Co. Ltd. (2004) 137 Taxman 201 / 187 CTR 369 / (2005) 274 ITR 429 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Bottling fees – Rajasthan Excise Act**

For assessment year 1988-89, liability incurred by assessee, a manufacturer and vendor of IMFL, towards payments of bottling fee under Rajasthan Excise Act, 1950, did not attract provisions of section 43B. (A.Y. 1988-89)

*CIT v. Udaipur Distillery Co. Ltd. (No. 1) (2004) 134 Taxman 398 / 268 ITR 305 / 186 CTR 1 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Bottling fees – Rajasthan Excise Act**

For the assessment year 1992-93, bottling fee payable under Rajasthan Excise Act, 1950 for bottling IMFL was not governed by section 43B. (A.Y. 1992-93)

*CIT v. Udaipur Distillery Co Ltd. (No. 3) (2004) 134 Taxman 616 / 268 ITR 451 / 186 CTR 39 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Kist payable to Government**



Kist amount payable to Government by assessee could not be brought within purview of provisions of section 43B.

*CIT v. Narasegowda (2004) 267 ITR 766 / 141 Taxman 67 (Karn.)(High Court)*

**S. 43B : Deductions on actual payment – Kist – Allowable**

Kist payable by assessee distillery company is allowable, even if not paid. (A.Y. 1996-97)

*CIT v. Distillers Co. Ltd. (2004) 266 ITR 276 (Karn.)(High Court)*

**S. 43B : Deductions on actual payment – First proviso is retrospective – A.Y. 1984-85**

First proviso to section 43B is retrospective. (A.Y. 1984-85)

*Patel Filters Ltd. v. CIT (2003) 132 Taxman 116 / 264 ITR 21 / 183 CTR 608 (Guj.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to provident fund – ESIC**

Contribution to the PF and ESI has to be made within due dates by which it is legally and contractually required in order to get deduction in view of the proviso to section 43B.

*CIT v. Hotel & Allied Traders (P.) Ltd. (2003) 127 Taxman 164 / 179 CTR 308 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to provident fund – Due date**

Provident fund contributions must be made within the due date for those to qualify for deduction under the Act.

*CIT v. Sudera Services (P.) Ltd. (2003) 179 CTR 310 / (2004) 268 ITR 505 (Cal.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to provident fund – Grace period**

Liabilities such as contribution towards Employees' Provident Fund and Family Benefit Fund paid within the grace period are eligible for deduction. (A.Y. 1988-89)

*CIT v. Madurai District Co-operative Spinning Mills Ltd. (2003) 131 Taxman 513 / (2004) 186 CTR 402 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to provident fund – Grace period**

Employer is entitled to deduction of amount representing its contribution to provident fund even if same is paid after end of accounting year but within grace period.

*CIT v. Sankar Spg. Mills (P.) Ltd. (2003) 127 Taxman 236 / 181 CTR 328 (Mad.)(High Court)*

**S. 43B : Deductions on actual payment – Contribution to provident fund – Belated**

Belated payment to provident fund is not allowable.

*CIT v. South India Corpn. Ltd. (2003) 132 Taxman 879 / 185 CTR 583 (Ker.)(High Court)*

**S. 43B : Deductions on actual payment – Electricity duty – Applicable**

Provisions of section 43B would be applicable in respect of electricity duty recovered by licensee under Bombay Electricity Duty Act, 1958. (A.Ys. 1983-84, 1984-85)

*CIT v. Ahmedabad Electricity Co. Ltd. (2003) 129 Taxman 190 / 262 ITR 97 / 181 CTR 222 (Guj.)(High Court)*

**S. 43B : Deductions on actual payment – Customs duty – Accrual**

Year in which the assessee incurred the liability to pay tax, duty, etc., has no relevance and cannot be linked with the matter of giving benefit of deduction under section 43B. (A.Y. 1988-89)

*CIT v. C.L. Gupta & Sons (2003) 126 Taxman 500 / 259 ITR 513 / 180 CTR 530 (All.)(High Court)*

**S. 43B : Deductions on actual payment – Interest – Sales tax**

Interest payable to the Sales Tax Department is also 'tax' for purposes of section 43B. (A.Y. 1987-88)

*Mewar Motors v. CIT (2003) 260 ITR 218 / 135 Taxman 155 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – Unpaid**

Only that much amount out of unpaid sales tax amount can be disallowed which has not been paid within stipulated time allowed under sales tax law.

*CIT v. Rajasthan Wine Agencies (2003) 132 Taxman 3 / 186 CTR 550 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – Not claimed as deduction**

Amounts collected as sales tax and not claimed as deduction will not attract section 43B.

*CIT v. India Carbon Ltd. (2003) 262 ITR 327 (Gau.)(High Court)*

**S. 43B : Deductions on actual payment – Sales tax – Deferment Scheme**

Sales tax collected but not paid in view of Sales Tax Deferment Scheme for Industries, 1987 would be hit by section 43B. (A.Y. 1990-91)

*CIT v. Devendra Udhyog (2003) 130 Taxman 560 / 264 ITR 701 (Raj.)(High Court)*

**S. 43B : Deductions on actual payment – Business expenditure – Sales tax – Set-off**

Sales tax which assessee was entitled to adjust/set off under rule 45(3) of Bombay Sales Tax Act was to be deemed to have been actually paid for purposes of section 43B. (A.Y. 1985-86)

*CIT v. National Standard Duncan Ltd. (2003) 260 ITR 97 / 180 CTR 329 / 134 Taxman 563 (Cal.)(High Court)*

**S. 43B : Deduction on actual payment – Service tax – No deduction claimed**

The assessee maintained its accounts on mercantile system of accounting. It had collected service tax. It was held that since the assessee did not debit the amount to the profit and loss account as an expenditure not claim any deduction in respect of the amount and considering that the assessee followed mercantile system of account, no disallowance would arise. (A.Y. 1999-2000)

*CIT v. Noble and Hewitt (I) P. Ltd. (2008) 305 ITR 324 (Delhi)(High Court)*

**S. 43B : Deductions on actual payment – Bonus to employees – Due date**

Bonus payment made before due date of filing of return. No disallowance can be made.

(A.Y. 2005-06).

*G. D. Metsteel (P) Ltd. v. ACIT (2011) 47 SOT 62 / 64 DTR 161 / 142 TTJ 641 (Mum.)(Trib.)*

**S. 43B : Deduction on actual payment – Service tax – No disallowance on account of service tax as no deduction claimed and Service tax not payable**

The rigour of section 43B cannot be applied in case of service tax as firstly, assessee is never allowed deduction on account of service tax which is collected on behalf of the government as the service provider is merely agent of the government and secondly, the service tax is not payable by the assessee as there is no liability to make payment to the credit of the Central Government because of non receipt of payment from receiver of service tax (A.Y. 2002-03)

*ACIT v. Real Image Media Technologies (P) Ltd. (2008) 114 ITD 573 (Chennai)(Trib.)*

**S. 43B : Deductions on actual payment – Interest – FCNR loans**

Since HSBC and ICICI banks did not fall under categories of State Financial Institutions, provisions of section 43B(d) were not applicable to case of an interest obtained from these institutions by the assessee. Hence, the disallowance made by the Assessing Officer was deleted. (A. Y. 2001-02).

*Rabo India Finance Ltd. v. ACIT (2011) 48 SOT 52 (Mum.)(Trib.)*

**S. 43B : Deductions on actual payment – Interest – Accrual**

Interest accrued for year under consideration, even though payable on date of maturity of bonds, was still allowable in view of mercantile system of accounting followed by assessee. Since, interest was payable in respect of certain deposits received by assessee and not in respect of any loans and advances or borrowings

made by assessee, clause (e) of section 43B relating to loans and advances from a scheduled bank was not applicable to instant case. (A.Y. 2003-04)

*Gujarat Toll Road Investment Co. Ltd. v. ACIT (2010) 125 ITD 159 / 126 TTJ 262 / 30 DTR 66 / 1 ITR 146 (All)(Trib.)*

**S. 43B : Deductions on actual payment – Employees' contribution – Provident fund**

Delayed payment of Employees' PF contribution allowable under section 43B. (A.Y. 2005-06)

*Pik Pen Pvt. Ltd v. ITO ITA No. 6847/Mum/2008 dt 28-1-2010 (Mum.)(Trib.) Source : www.itatonline.org*

**S. 43B : Deductions on actual payment – Interest – SEBI Turnover**

Interest on SEBI turnover charges is of the same nature as tax, duty, cess or fees and accordingly will be allowed in accordance with section 43B when paid in current year. (A.Y. 2005-06)

*Wall Fort Financial Services Ltd. v. Addl. CIT (2010) 134 TTJ 656 / 48 DTR 138 / 4 SOT 200 (Mum.)(Trib.)*

**S. 43B : Deductions on actual payment – Contribution towards ESIC – Due date**

Payment made to ESIC fund before due date for filing return is not hit by the rigour of S. 43B. (A.Ys. 2002-03, 2003-04)

*ACIT v. Indwel Linings (P) Ltd. (2009) 122 TTJ 137 / 21 DTR 21 (Chennai)(Trib.)*

**S. 43B : Deductions on actual payment – Not charged to P&L Account – Neither claimed**

Where neither such deduction is claimed nor charge is made to profit and loss account, no disallowance can be made under section 43B. (A.Ys. 1990-91 to 1992-93)

*Dynavision Ltd. v. ACIT (2009) 121 ITD 461 / 125 TTJ 370 / 28 DTR 465 (TM)(Chennai)(Trib.)*

**S. 43B : Deductions on actual payment – Contribution to ESI and PF – Grace period**

Contribution towards ESI & PF within the grace period could not be disallowed under section 43B. (A.Y. 2001-02)

*BASF India Ltd. v. Addl. CIT (2009) 125 TTJ 355 / 199 ITD 337 / 23 DTR 347 / (2010) 6 ITR 156 (Mum.)(Trib.)*

**S. 43B : Deductions on actual payment – Provident fund – Pension fund**

Payment of contribution of employer to provident fund and pension fund before due date for filing return is allowable as deduction.

*Jt. CIT v. I. T. C. Ltd. (2008) 299 ITR (AT) 341 (SB)(Kol.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Central Excise – MODVAT credit**

Deposits made to keep a sufficient balance in the current account that is necessitated by mandate of law and not made at the option of the assessee, are to be treated as actual payment of duties for the purpose of deduction under section 43B as it is irretrievable.

The MODVAT credit available as on the last day of the year does not amount to payment of Central Excise Duty under section 43B.

*Dy. CIT v. Glaxo SmithKline Consumer Healthcare Ltd. (2008) 299 ITR (AT) 1 (SB)(Chd.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Provident fund – ESIC**

Contribution towards PF and ESI though paid after the due date, but before due date of filing the return are allowable as deduction.

*Suhag Traders (P) Ltd. v. ITO (2008) 3 DTR 14 / 114 TTJ 116 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Custom duty – Valuation of stock**

Entire amount of customs duty paid by assessee in the relevant year is allowable as deduction irrespective of the amount of customs duty included in the valuation of closing stock at the end of the year. (A.Y. 1999-2000)

*Silicon Graphics Systems (I) (P) Ltd. v. Dy. CIT (2007) 106 TTJ 1153 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Tax duty – Allowable on payment basis**

Deduction of tax, duty, etc. is allowable under section 43B on payment basis before incurring the liability to pay such amounts. (A.Y. 2001-02)

*Dy. CIT v. Glaxo SmithKline Consumer Health Care Ltd. (2007) 110 TTJ 183 / 107 ITD 343 / 16 SOT 134 (SB)(Chd.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Contribution to provident fund – Retrospective**

The amendment to proviso made by the Finance Act, 2003 is retrospective in nature. (A.Y. 1998-99)

*Precision Fasteners Ltd. v. ACIT, ITA No. 5793/Mum/2004, Bench - C, dt. 27-2-2007 - BCAJ P. 420, Vol. 39-D, Part 4, July 2007 (Mum.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Interest to financial institutions – BIFR scheme**

Interest payable in earlier year to Financial Institutions was converted into shares in subsequent year, in accordance with the BIFR scheme, amount to actual payment and therefore allowable as business expenditure.

*Luster Tiles Ltd. v. Addl. CIT (2007) 291 ITR 152 (AT)(Jp.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Payment made – Grace period**

Where payment is made within grace period, no disallowance under section 43B can be made. (A.Ys. 1997-98 to 1999-2000)

*CIT v. Alchemic Financial Services Ltd. (2006) 7 SOT 626 / 109 TTJ 240 (Mum.)(Trib.)*

**S. 43B : Deductions on actual payment – Interest – Unpaid bottling fees**

Interest payable on unpaid bottling fee cannot be disallowed under section 43B. (A.Y. 1996-97)

*Udaipur Distillery Co. Ltd. v. Jt. CIT (2006) 102 TTJ 495 / 100 ITD 422 (Jodh.)(Trib.)*

**S. 43B : Deductions on actual payment – PF – Proviso – Curative – Retrospective**

Amendment made in proviso to section 43B was curative in nature and, therefore it is to be applied retrospectively. (A.Y. 2002-03)

*Kwality Milk Foods Ltd. v. ACIT (2006) 102 TTJ 1 / 100 ITD 199 (Chennai)(Trib.)*

**S. 43B : Deductions on actual payment – Interest – Electricity duty**

Interest payable on electricity duty is compensatory in nature and the provision of section 43B is not applicable to such interest. (A.Ys. 1994-95 to 1998-99 and 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 43B : Deductions on actual payment – Turnover charge – SEBI**

Turnover charges levied by SEBI in exercise of powers conferred under section 11 of the SEBI Act, 1992 is cess or duty payable under the law and hit by s. 43B. (A.Ys. 1997-98, 1998-99)

*ITO v. Sureshchand Jain (2006) 102 TTJ 970 / 100 ITD 431 (Mum.)(Trib.)*

**S. 43B : Deductions on actual payment – State financial corporation – Scheme**

Assessee State financial corporation, with the permission of the Government and RBI, having formulated its regulations for establishment and maintenance of provident fund of its employees, provisions of sections 43B, 2(24)(x) and 36(1)(va) had no relevance and disallowance, under section 43B was not called for on the ground that there is no actual cash payment. (A.Ys. 1990-91 to 1997-98)

*Orissa State Financial Corporation v. Dy. CIT (2006) 99 TTJ 316 (Cuttack)(Trib.)*

**S. 43B : Deductions on actual payment – Excise duty – Deposited under protest**

Excise duty deposited under protest on basis of show cause notice without any order, and shown as advance in books, cannot be allowed as deduction under section 43B.

*Gillette India Ltd. v. Jt. CIT (2006) 156 Taxman 236 (Mag.)(Jp.)(Trib.)*

**S. 43B : Deductions on actual payment – Provident fund – Grace period**



Provident fund contribution deposited after the due date but within the grace period cannot be disallowed under section 43B.

*ACIT v. Maharashtra Metal Powers Ltd. (2006) 105 TTJ 361 / 102 ITD 214 (Nagpur)(Trib.)*

#### **S. 43B : Deductions on actual payment – Advance payment of taxes**

Advance payment of taxes or duties without incurring liability to pay taxes or duties, cannot be allowed as deduction under section 43B. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 92 TTJ 0987 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Second proviso – Retrospective**

Amendment of section 43B by Finance Act, 2003, deleting second proviso and amending first proviso with effect from assessment year 2004-05 is curative in nature so as to be construed retrospectively. (A.Y. 1997-98)

*Vibhuti Gudda Mines (P) Ltd. v. ACIT (2005) 2 SOT 452 (Bang.)(Trib.)*

*Addl. CIT v. Vestas RRB India Ltd. (2005) 92 ITD 1 / 93 TTJ 144 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Sales tax – Excise – Customs duty**

Payment of sales tax as part of cost of raw material and debited to 'sales tax recoverable account' cannot be treated as 'actual payment'. (A.Y. 1999-2000)

Deduction on account of unutilized MODVAT credit cannot be allowed.

No disallowance under section 43B can be made in respect of customs duty paid on import of inputs for export purposes which, however remain unutilised in relevant assessment year. (A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 92 TTJ 0987 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Customs duty – Closing stock**

Custom duty included in closing stock valuation could not be disallowed under section 43B. (A.Y. 1996-97)

*Jt. CIT v. Sillicon Graphics Systems India (P) Ltd. (2005) 92 TTJ 297 (Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Method of accounting – Excise duty**

In respect of payment of excise duty, allowability of claim for deduction under section 43B would not depend upon accounting treatment of excise duty or method of accounting followed by assessee; any claim of cess, duty or tax would be allowed on actual payment basis and if payment is made in following year before filing of return, still it can be allowed in year to which it pertains. (A.Y. 1995-96)

*Dy. CIT v. Adavent Pharma (P) Ltd. (2005) 4 SOT 42 (Mum.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Encashment of bank guarantee – Year of allowability**

Assessee claimed deduction of disputed excise duty pertaining to assessment year 1984-85, in assessment year 1995-96 and as appeal of assessee against such levy had been dismissed by Supreme Court on 28-3-1995, but State Government had

actually encashed bank guarantee furnished by assessee only on 17-7-1995, such liability was deductible in assessment year 1996-97 and not in assessment year 1995-96.

*Jt. CIT v. Swarup Vegetable Products Industries Ltd. (2005) 96 ITD 468 / 98 TTJ 0420 (Delhi) (Trib.)*

#### **S. 43B : Deductions on actual payment – Provident Fund – ESIC – Grace period**

Deduction of provident fund and ESI made belatedly but within grace period are allowable. (A.Y. 1997-98)

*Continental Device (India) Ltd. v. Jt. CIT (2005) 147 Taxman 77 (Mag.)(Delhi)(Trib.)*

*Addl. CIT v. Hilton Rounds Ltd. (2005) 97 TTJ 490 (Delhi)(Trib.)*

*Artson Engg Ltd. v. Dy. CIT (2005) 142 Taxman 40 (Mag.)(Mum.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Employees' contribution [S. 2 (24) (x), 36 (1)(va)]**

To employees' contribution section 43B is not applicable and if payments are made beyond due date prescribed under relevant Act, such payments are not deductible by virtue of provisions of section 36(1)(va).

*A.P.L. (India) (P) Ltd. v. Dy. CIT (2005) 96 ITD 227 / 92 TTJ 187 (Mum.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Gratuity [S. 36(1)(va), 2(24)(x)]**

Payment of gratuity being not covered by sections 36(1) (va) and 2(24)(x) and being otherwise allowable, cannot be disallowed under section 43B. (A.Ys. 1998-99, 1999-2000)

*Wipro Limited v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Bank guarantee – Not payment**

Providing bank guarantee against payment of disputed excise duty/additional excise duty that is actually collected by the assessee does not amount to "actual payment" of the same to qualify for grant of deduction under section 43B. (A.Ys 1986-87 and 1987-88).

*ACIT v. Mugat Dyeing & Printing Mills (2003) 87 ITD 215 / (2002) 77 TTJ 696 (TM)(Ahd.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Customs Duty – Cost of raw material – Closing stock**

Custom Duty paid and included in the cost of raw material in closing stock, is eligible for deduction under section 43B irrespective of the method adopted. (A.Y. 1992-93)

*Sona Steering Systems Ltd. v. Dy. CIT (2003) 78 TTJ 213 / 129 Taxman 152 (Mag.)(Delhi)(Trib.)*

#### **S. 43B : Deductions on actual payment – Royalty – Due date**

Royalty paid before due date of filing Return is allowable under first proviso to section 43B.

*Sohan Singh Joginder Singh v. ACIT (2003) SOT 147 (Jodh.)(Trib.)*

#### **S. 43B : Deductions on actual payment – Textile Cess – Trading receipt**

Textile cess is a trading receipt, and irrespective of its accounting treatment it clearly falls within ambit of section 43B. (A.Y. 1991-92)

*Shri Rajasthan Syntex Ltd. v. Dy. CIT (2002) 77 TTJ 849 (Jodh.)(Trib.)*

#### **S. 43B(d) : Deductions on actual payment – Interest payments – Financial institutions**

Where disallowance of interest paid by assessee to financial institutions was sustained on basis that loans were from institutions enumerated in section 43B(d) whereas assessee claimed that it had material to show that loans were taken from institutions which fell outside section 43B(d), opportunity should be given to assessee to prove its case. (A.Ys. 1992-93, 1993-94)

*Bhuna Co-op. Sugar Mills Ltd. v. CIT (2005) 273 ITR 212 / 143 Taxman 369 / 194 CTR 1 / 187 Taxation 182 / 2 SCR 83 (SC)*

### **Section 44 : Insurance business.**

#### **S. 44 : Insurance business – Non obstante clause – Provision for bad and doubtful debt**

Section 44 dealing with the insurance business begins with a non obstante clause. Therefore, the jurisdiction of the assessing officer is limited only to the extent of what is provided in the First Schedule. Rule 5 of the First Schedule empowers the assessing officer to make any disallowance for any expenditure or allowance which is not admissible under sections 30 to 43A of the Act. "Provision for Income Tax" and "provision for bad and doubtful debt" not being in the nature of expenditure, the Assessing Officer cannot exercise any jurisdiction to disallow the same in relation to the insurance business. (A.Y. 1974-75)

*CIT v. The Oriental Fire & General Insurance Co. Ltd. (2007) 291 ITR 370 / 161 Taxman 181 / 210 CTR 162 / 201 Taxation 340 (SC)*

*Editorial:- Rule 5(a) of the First Schedule has been amended by the Finance Act, 1998 with retrospective effect from 1-4-1989, so the aforesaid decision would apply only for assessment years prior to 1-4-1989.*

#### **S. 44 : Insurance business – First Schedule – Reserve for bad and doubtful debt**

Reserve for bad and doubtful debts does not fall within permissible adjustments prescribed by rule 5(a) of First Schedule to the Act. (A.Y. 1991-92)

*General Insurance Corpn. of India v. Dy. CIT (2006) 284 ITR 613 / (2005) 148 Taxman 596 / 199 CTR 391 (Bom.)(High Court)*

#### **S. 44 : Insurance business – Provision for taxation – Expenditure – allowance**

Provision for taxation is neither an “expenditure” nor an “allowance” within meaning of rule 5(a) of the First Schedule. (A.Ys. 1974-75, 1975-76)

*Oriental Fire & General Insurance Co. Ltd. v. CIT (2005) 278 ITR 312 / (2004) 190 CTR 553 / 140 Taxman 446 (Delhi)(High Court)*

#### **S. 44 : Insurance business – Reserve for bad and doubtful debts – No add back**

Reserve for bad and doubtful debts cannot be added to the balance of profit disclosed in the annual accounts of the assessee of Insurance company.

*Oriental Fire & General Insurance Co Ltd. v. CIT (2005) 278 ITR 312 / (2004) 140 Taxman 446 / 190 CTR 553 (Delhi)(High Court)*

#### **S. 44 : Insurance business – Insurance Act – Rule 5 First Schedule – Adjustment by AO**

Section 44 read with Rule 5 of First Schedule makes figure of profit disclosed by profit and loss account drawn as per Insurance Act as absolute and binding both on assessee Insurance company as well as revenue and it is amenable only for adjustments expressly sanctioned by mandate of clauses (a) and (c) of Rule 5, for computing total income. Insurance company is required to be strictly assessed as per Rule 5 of First Schedule and it is not open to authorities under the Act to examine items separately debited or credited to profit and loss account with a view to determine their deductibility or inclusion in total income of assessee as per provisions of Act. (A.Y. 2004-05).

*New India Assurance Co. Ltd. v. Addl. CIT (2011) 133 ITD 131 / 142 TTJ 312 (Mum.)(Trib.)*

#### **S. 44 : Insurance business – Profits on sale of investment – First schedule**

The taxability of income of insurance companies under the head ‘Income from business and profession’ as governed by provisions of section 44, read with First Schedule to the Act, did not extend to taxability of profits on sale of investments so far as the relevant Assessment Years were concerned. (A.Ys. 2002-03, 2004-05)

*General Insurance Corporation of India v. ACIT (2010) 35 SOT 161 (Mum.)(Trib.)*

#### **S. 44 : Insurance business – Sale of investments – First schedule**

Income from sale of investments by insurance company is not taxable after deletion of sub- rule (b) of rule 5 of First Schedule. (A.Y. 2003-04)

*Bajaj Allianz General Insurance Co. Ltd. v. Addl. CIT (2010) 38 DTR 282 / 130 TTJ 398 (Pune)(Trib.)*

#### **S. 44 : Insurance business – Reserve for export market development – First schedule**

Reserve for export market development allowance cannot be considered to be an allowance or an expenditure and is not liable to be added back under section 5(a) of First Schedule. (A.Ys. 1982-83 to 1986-87, 1995-96, 1997-98)

*Dy. CIT v. Oriental General Insurance Co. Ltd. (2005) 92 TTJ 300 / 143 Taxman 15 (Mag.)(Delhi) (Trib.)*

#### **S. 44 : Insurance business – Investments written off – No add back**

Write off /Write down of investments made in the books of account of the assessee for the assessment year 1990-91 can not be considered to be "expenditure" or "allowance". The guidelines permit the insurance company to book loss in the account rather than writing for actual realization of loss on sale of investment. Such "loss" can neither be considered as an "expenditure" nor an "allowance". Thus, investments written off cannot be added back in the computation of assessee's income chargeable to tax.

*Dy. CIT v. Oriental General Insurance Co Ltd. (2005) 92 TTJ 300 / 143 Taxman 15 (Mag.)(Delhi) (Trib.)*

#### **S. 44 : Insurance business – Foreign companies – Special provisions – Royalties – Dependant Personal Services – India-Netherlands DTAA [S. 115A, Article 15]**

Whether tax exemption is available to employees under DTAA (regarding Dependant Personal Services) when non-resident employer is taxed in India on presumptive basis under section 44D – Held the said clause of DTAA relates to taxability of employees and not of the applicant and is therefore not relevant when employer is taxed in India on presumptive basis under section 44D and Section 115A of the Act.

*DHV Consultants BV, Netherlands (2005) 277 ITR 97 / 147 Taxman 521 / 197 CTR 105 (AAR)*

#### **Section 44AA : Maintenance of accounts by certain persons carrying on profession or business**

##### **S. 44AA : Maintenance of accounts – Profession – Business – Nursing Home – Register –**

##### **Rule 6F – Specific findings**

Assessee company running a nursing home is not required to maintain daily case register as per rule 6F(3), as the company cannot be said to be engaged in profession, and addition made by estimating gross receipts at higher figure in absence of daily case register is not justified. (A.Y. 1999-2000)

Books of the assessee could not be rejected in the absence of any specific finding or reason.

*ITO v. Ashalok Nursing Home (P) Ltd. (2006) 156 Taxman 86 (Mag.) / 103 TTJ 820 (Delhi)(Trib.)*

## **Section 44AB : Audit of Accounts of certain persons carrying on business or profession**

### **S. 44AB : Audit of accounts – Business – Profession – Tax audit – Business income**

In case of an individual carrying on business as a sole proprietor, it is necessary to comply with provisions of section 44AB, only in respect of his business income and not in respect of other income.

*Ghai Construction v. State of Maharashtra (2009) 184 Taxman 52 (Bom.)(High Court)*

### **S. 44AB : Audit of accounts – Tax Audit report – Non-filing – Curable [S. 139(9)]**

Non-filing of report of audit is one of defects which can be allowed to be rectified under section 139(9). (A.Y. 1994-95)

*M. P. State Agro Industries Development Corpn. Ltd. v. CIT (2003) 183 CTR 33 / (2004) 134 Taxman 665 / (2005) 274 ITR 582 (MP)(High Court)*

### **S. 44AB : Audit of accounts – Business – Profession – Corporate entity – Separate report**

Corporate entity is single entity, assessee is not bound to file tax audit reports for each separate business. (A.Ys. 1998-99 to 2004-05)

*Rolls Royce Industrial Power Ltd. v. ACIT (2010) 6 ITR 722 / 42 SOT 264 / 47 DTR 257 (Delhi)(Trib.)*

### **S. 44AB : Audit of accounts – Business – Profession – Tax audit – Partnership – Hospital – Nursing Home**

A partnership concern running a hospital providing nursing home and other supportive services for which the assessee was maintaining account books and accounted for room rent, operation theatre rent and nursing charges received from patients whereas the professional fees was received directly by the doctors from the patients. On these facts it was held that the activities carried on for providing nursing home and other facilities constituted as business activities but audit under the provisions of section 44AB was not required as the turnover from such activities were not exceeding ` 40 lakhs as prescribed under the said provisions. (A.Ys. 1998-99 & 1999-2000)

*Shalini Hospitals v. ACIT (2007) 108 ITD 534 / 110 TTJ 690 / (2006) 10 SOT 662 (Hyd.)(Trib.)*

### **S. 44AB : Audit of accounts – Business – Profession – Royalties, etc. – Foreign companies [S. 44D, 115A]**

Assessee covered by section 44D, is taxable at flat rate of 20 per cent under section 44D, read with section 115A. The assessee has not claimed any deductible expenses comprising expenditure or allowances. Therefore it was justified in asserting that



conducting an audit under section 44AB, would not at all be required. Penalty cannot be levied. (A.Y. 1997-98)

*Snam Progetti Spa v. Jt. CIT (2005) 95 TTJ 424 (Delhi)(Trib.)*

**S. 44AB : Audit of accounts – Business – Profession – Turnover – Chit fund**

In case of a chit fund, only foreman's commission, default interest, interest on loans and advances, etc., are revenue items, which are credited to profit and loss account and subscription receipts from other members to chit do not form part of "turnover" of the organization for purpose of section 44AB. (A.Y. 1998-99)

*Dy. CIT v. Mangal Dayak Chit Fund (P) Ltd. (2005) 92 ITD 258 / 92 TTJ 889 (Hyd.)(Trib.)*

**S. 44AB : Audit of accounts – Business – Profession – Plying of trucks**

Assessee is running business of transportation using its own trucks as well as outsiders, receipts from plying of trucks of outsiders can not be taken in to consideration for determining turnover of assessee for purpose of applying section 44AB. (A.Y. 1997-98)

*Paras Transport Co v. ITO (2005) 92 TTJ 607 (Agra)(Trib.)*

**S. 44AB : Audit of accounts – Business – Profession – Turnover – Stock broker**

Transactions by a sharebroker on behalf of parties cannot amount to sale, turnover or receipt of sharebroker within the meaning of Sec. 44AB. (A.Y. 1991-92)

*ACIT v. Hasmukh M Shah (2003) 85 ITD 99 / 80 TTJ 323 (Ahd.)(Trib.)*

**S. 44AB : Audit of account – Audit report – Burden is on revenue to prove ante dated – Return [S. 139(1)]**

Onus is on the revenue to prove that the audit report has been ante-dated.

There is no obligation to file Audit report under section 44AB within time as stipulated under section 139(1).

*Mahim Patran (P) Ltd. v. ACIT (2003) SOT 332 (Agra)(Trib.)*

**Section 44AC : Special provision for computing profits and gains from the business of trading in certain goods (Omitted by Finance Act, 1992, w.e.f. 1-4-1993)**

**S. 44AC : Trading – Business income – Profits from trading in alcoholic liquor, etc.**

Deduction under sections 28 to 43C are allowable while estimating Income under section 44AC.

*ACIT v. Roop Lal N. S Deol & Co. (2003) SOT 278 (Chd.)(Trib.)*

**Section 44AD : Special provision for computing profits and gains of business of Civil Construction, etc.**

**S. 44AD : Civil construction – Computation – Presumptive taxation – Trading – Undisclosed receipts**

It was held that sec. 44AD(1) of the Act does not deal with undisclosed receipts but deals with gross receipts. The gross receipts were admittedly above ` 40 lakhs and the Tribunal could not have assumed the estimated profit at 8 per cent, and indirectly applied the provisions of sec. 44AD(1) of the Act and directed the Assessing Officer to restrict the addition by estimating the net profit of the assessee at 8 per cent of the unaccounted receipts. (A.Ys. 1997-98 to 2001-02)

*CIT v. Sobti Construction (India) (2008) 307 ITR 374 / 8 DTR 66 / 174 Taxman 39 (Delhi)(High Court)*

**S. 44AD : Civil construction – Computation – Presumptive taxation – Constitutional validity**

Section 44AD is constitutionally valid. (A.Y. 1994-95)

*Manohar Ram Chandra Patil v. UOI (2003) 260 ITR 87 / 180 CTR 548 / 133 Taxman 792 (Orissa)(High Court)*

**S. 44AD : Civil construction – Computation – Presumptive taxation – Sub contracts**

Sub-contracts are also covered under section 44AD. (A.Y. 1994-95)

*Manohar Ram Chandra Patil v. UOI (2003) 260 ITR 87 / 180 CTR 548 / 133 Taxman 792 (Orissa)(High Court)*

**S. 44AD : Civil construction – Computation – Presumptive taxation**

Provisions of Section 44AD can not be invoked to apply 8% rate of Net Profit, when the Turnover of Assessee company was more than ` 40 lakhs, and proper books of account were maintained and duly audited. (A.Y. 2005-06)

*Allied Engineers v. CIT (2009) 180 Taxman 70 (Mag.)(Delhi)(Trib.)*

**S. 44AD : Civil construction – Computation – Presumptive taxation – Method [S. 145]**

It was held that once having applied the principles enunciated in section 44AD, and having applied net profit rate, there cannot be separate addition in respect of closing stock.

*ITO v. Modern Decorators (2007) 163 Taxman 46 (Mag.)(Delhi)(Trib.)*

**S. 44AD : Civil construction – Computation – Presumptive taxation – Sub-contract**

If the contract is divisible in two parts, viz., one for supply of material and other for transportation of the same, then the net rate of profit in respect of former will be 5 per cent and 8 per cent under section 44AD in respect of latter and if there is a composite agreement, then the entire receipts would be subject to 8 per cent under section 44AD. (A.Y. 2001-02)

*Dev Raj v. ITO (2006) 100 TTJ 415 (Chd.)(Trib.)*

**S. 44AD : Civil construction – Computation – Presumptive taxation**

Section 44AD is not applicable when contract receipts are more than 40 lakhs, and the income be computed by applying net profit rate of 6% instead of 8%.

*Dhalewan Co-operative L & C Society v. ITO (2006) 157 Taxman 239 (Mag.)(Amritsar)(Trib.)*

**S. 44AD : Civil construction – Computation – Presumptive taxation [S. 69]**

Assessee's claim that once the income of civil construction business is estimated under section 44AD, there is no necessity to make separate additions on account of alleged investment/reduction in liability, inasmuch as the provisions of section 44AD have limited overriding effect over sections 28 to 43C.

*I.T.O. v. Devi Singh Solanki 154 Taxman 155 (Mag.)(Jp.)(Trib.)*

**Section 44AE : Special provision for computing profits and gains of business of plying, hiring or leasing goods carriage**

**S. 44AE : Goods carriages – Computation – Transporters**

Section 44AE does not permit an assessee to apply provisions of section 44AE in case of some lorries and not to go for regular assessment on basis of books of account in respect of remaining lorries.

*Dy. CIT v. C.P. Kunhimammed (2005) 94 ITD 278 / 102 TTJ 502 (Cochin)(Trib.)*

**S. 44AE : Goods carriages – Computation – Transporters – Estimate of income**

Where Assessing Officer had applied provisions of section 44AE for estimating assessee's income from truck plying, he was not justified in making addition separately on account of sale proceeds of scrap because receipt from scrap was not a separate source of income. (A.Y. 1994-95)

*Mohad. Aslam v. ITO (2005) 94 TTJ 282 (Jodh.)(Trib.)*

**Section 44AF : Special provisions for computing profits and gains of retail business**

**S. 44AF : Retail business – Computation – Wholesale – Expenses**

Assessee engaged in wholesale grocery trade. Rate of net profit less than in retail trade. Net profit rate modified to 3 per cent. Separate deduction not available for expenses. (A.Y. 1999-2000)

*ACIT v. Shriram Properties and Constructions (Chennai) Ltd. (2010) 5 ITR 141 (Chennai)(Trib.)*

**S. 44AF : Retail business – Computation – Audit of accounts**

Assessee maintaining regular books of account and getting them audited under section 44AB cannot be denied the benefit of claiming lower profits and gains simply on the ground that it has furnished audit report under section 44AB beyond the specified time period. (A.Y. 2000-01)

*Leyland Automobiles v. ITO (2006) 103 TTJ 438 / (2007) 105 ITD 73 (Cochin)(Trib.)*

#### **S. 44AF : Retail business – Computation – Producer of liquor**

Assessee being a producer of liquor could not be treated as a retailer for purpose of section 44AF although assessee sold his products through outlets. (A.Y. 1998-99)

*Pramod Kumar Sahu (HUF) v. ITO (2005) 92 TTJ 101 (Ranchi)(Trib.)*

#### **Section 44B : Special provision for computing profits and gains of shipping business in the case of Non-residents**

#### **S. 44B : Shipping business – Non-residents – Computation – Demurrage charges**

Demurrage charges received by the assessee in India were includible in the assessee's total income. (A.Ys. 1983-84 to 1987-88)

*CIT v. Japan Lines Ltd. (2003) 260 ITR 656 / 139 Taxman 267 (Mad.)(High Court)*

#### **S. 44B : Shipping business – Non-residents – Computation – Sale of cruise tickets**

The assessee who was engaged in providing travelling and tour related services in India, entered into an agreement with a foreign company called SCNL, which was operating cruises on international waters. – As per terms of the contract, assessee was to sell cruise packages of SCNL in India and the amount collected was to be remitted back to SCNL. It was held that no Income had accrued to SCNL in India in terms of section 9 read with section 5 of the Act. Therefore the assessee was not liable to pay tax under the provisions of section 44 B of the Income-tax Act and consequential levy of tax and interest under section 201(1) and 201(1A) was not justified. (A.Ys. 2002-03, 2005-06)

*Dy. IT (International Tax) v. Star Cruises (India) Travel Services (P) Ltd. (2010) 39 SOT 18 / 134 TTJ 204 / 46 DTR 284 (Mum.)(Trib.)*

#### **S. 44B : Shipping business – Non-residents – Computation – Effective management – DTAA – India-Mauritius [S. 5(2), Art. 8]**

If the effective management of assessee Non-resident company was not situated in Mauritius, assessee is not entitled to benefit of article 8 of Indo-Mauritius DTAA, consequence would be that income of the assessee earned in India from operation of ships in international traffic had to be taxed as per section 44B, read with section 5(2). (A.Y. 1998-99)

*Integrated Container Feeder Service v. Jt. CIT (2005) 96 ITD 371 / 98 TTJ 69 (Mum.)(Trib.)*

**S. 44B : Shipping business – Non-residents – Barge hire charges – DTAA – India-Mauritius – Royalty [S. 9(1)(vi), Arts. 5, 7, 12]**

Barge hire charges amounts to “royalty” within the meaning of section 9(1)(vi) and under art 12 of DTAA, between India and Mauritius and is liable to tax in India under section 44B. (A.Y. 2001-02)

*ADIT v. Valentine Maritime (Mauritius) Ltd. (2010) 38 DTR 117 / 130 TTJ 417 / (2011) 45 SOT 34 (Mum.)(Trib.)*

**Section 44BB : Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils**

**S. 44BB : Mineral oils – Computation – Mobilisation – Demobilization charges**

Mobilisation charges received by the assessee in connection with supply of plant and machinery used in prospecting/extraction or production of mineral oils forms part of gross receipts for computation of income under section 44BB. (A.Y. 1999-2000)

*R & B Falcon Drilling Co. v. ACIT (2010) 188 Taxman 50 / (2009) 26 DTR 355 (Uttarakhand)(High Court)*

**S. 44BB : Mineral oils – Computation – DTAA – PE – Reimbursement of Expenses [S. 90]**

Assessee, affiliates of EOGIL, rendered service on cost-to-cost basis to EOGIL in terms of the PSC entered in to EOGIL with Indian concerns duly approved by the Government of India and payment received through debit notes are only reimbursement of actual expenses and in view of section 42, assessee is not taxable in India in view of Art. 7 of the DTAA with USA as they had no PE in India. (A.Y. 2000-01)

*CIT v. Enron Expat Services Inc. (2010) 45 DTR 154 / 194 Taxman 70 / 235 CTR 198 / 327 ITR 626 (Uttarakhand)(High Court)*

**S. 44BB : Mineral oils – Computation – Supply of plant and machinery**

Amount reimbursed to the assessee a non-resident company on account of supply of plant and machinery to be used in prospecting for or extraction or production of mineral oil in India and the amount reimbursed on account of mobilization charges in respect of transportation of rigs outside Indian water has to be taken into account while computing income under section 44 BB of the Act.

*CIT & Anr. v. Atwood Oceanics Pacific Ltd. (2010) 48 DTR 25 / (2011) 196 Taxman 325 / 338 ITR 156 (Uttarakhand)(High Court)*

**S. 44BB : Mineral oils – Computation – Mobilisation – Charges**

Mobilisation / demobilization charges paid to non-resident assessee for transporting plant & machinery is to be included in the gross receipts under section 44BB for calculating the deemed profit of 10 %, whether the same is paid for transporting within the territorial waters of India or from a place outside India. (A.Y. 2001-02)

*CIT v. R & B Falcon Drilling Co. (2009) 181 Taxman 62 / 25 DTR 118 (Uttarakhand)(High Court)*

**S. 44BB : Mineral oils – Computation – Catering charges – Reimbursement**

Catering charges reimbursed to the non-resident assessee is includible in the gross receipts under section 44BB, for calculating the deemed profit of ten per cent. This is because catering charges form part of 'services and facilities' in connection with extraction or production of mineral oil. (A.Y. 1998-99)

*CIT v. Ensco Maritime Ltd. (2009) 181 Taxman 46 / 317 ITR 14 / 24 DTR 221 (Uttarakhand)(High Court)*

**S. 44BB : Mineral oils – Computation – Tax paid by Indian company**

Only 10 per cent of total tax paid by Indian company on behalf of assessee foreign-company assessed to tax, can be taxed under section 44BB(2). (A.Ys. 1985-86 to 1988-89)

*CIT v. Compaigne Qeneral-de-Geophysique through Oil India (2003) 184 CTR 363 / (2004) 267 ITR 634 / 134 Taxman 342 (Raj.)(High Court)*

**S. 44BB : Mineral oils – Computation – Notional income [S. 28 (iv)]**

Section 44BB imposes tax on notional income which is to be computed in accordance with that section; there is no need to refer to section 28(iv).

Concept of multiple stage grossing up of income is inapplicable to deemed profits derived by the non-resident company under section 44BB. (A.Y. 1990-91)

*CIT v. O.N.G.C. (2003) 264 ITR 340 / (2004) 186 CTR 468 / 134 Taxman 156 (Uttaranchal)(High Court)*

**S. 44BB : Mineral oils – Computation – Deduction at source [S. 40(a)(ia), 195]**

Since payment to non-resident is covered under the special regime of section 44BB, withholding of appropriate tax by payer without approaching the Assessing Officer does not lead to any violation of withholding tax provisions, expenses cannot be disallowed under section 40(a)(ia) on the ground of short deduction of tax. (A. Y. 2004-05).

*Frontier Offshore Exploration (India) Ltd. v. Dy. CIT (2012) 13 ITR 168 (Chennai)(Trib.)*

**S. 44BB : Mineral oils – Computation – Feasibility study income [S. 9(1)(vii), 44D]**

Feasibility study on implementation of cyclic steam stimulation carried out by the non-resident assessee in pursuance of a contract with ONGC was a study substantially and directly connected with the extraction of mineral oil, and therefore, receipt for such services are taxable under section 44BB and not under section 9(1)(vii) r.w.s. 44D. (A.Y. 1997-98)



*ONGC as representative assessee of Alberta Research Council v. Jt. CIT (2010) 46 DTR 21 / 133 TTJ 663 (Delhi)(Trib.)*

#### **S. 44BB : Mineral oils – Computation – Reimbursement**

Reimbursement of expenditure relating to supply of raw material is taxable, and cannot be excluded from receipts while determining profit and gains under section 44BB, as same is on account of provision of services and facilities.

Whereas reimbursement of expenditure relating to custom duty is not taxable under section 44BB.

*ACIT v. Transocean Offshore Deep Water Drilling Inc. (2009) 176 Taxman 123 (Mag.)(Delhi)(Trib.)*

#### **S. 44BB : Mineral oils – Computation – Sub-contractor**

Non-resident assessee sub-contractor who is engaged in various activities, part of which consisted of mobilization /demobilization and transportation of marine spread to off shore India, which was done out side India, and installation of structures and pipelines at oilfield in Continental Shelf and /or Exclusive Economic Zone of India, there was no taxable income to be computed and section 44BB was applicable. (A.Y. 1993-94)

*McDermott ETPM Inc v. Dy. CIT (2005) 92 ITD 385 / 92 TTJ 733 / 1 SOT 133 (Mum.)(Trib.)*

#### **S. 44BB : Mineral oils – Computation – Production of LPG by GAIL**

GAIL was producing LPG, propane, butane etc, as well as CNG by ONGC and assessee was deriving income from laying pipelines for GAIL for purpose of transporting natural gas, section 44BB could not be applied for assessment of such income of assessee as production of LPG by GAIL did not amount to production of natural gas. (A.Y. 1997-98)

*ARB v. Jt. CIT (2005) 93 ITD 520 / 93 TTJ 608 (Delhi)(Trib.)*

#### **S. 44BB : Mineral oils – Computation – Seismic survey**

Applicant has entered into a contract with ONGC and Cairn Energy to conduct seismic survey and data acquisition activities. It has specialization for identifying the surface of the ocean for tapping gas and oil reserves. AAR observed that unless a seismic survey is taken, it is difficult to locate the ocean surface with oil and gas reserves. Drilling and other examinations are ancillary for this purpose and hence activities of the applicant fit into description of said section demanding computation of its income in accordance with this provision. (A.Y. 2008-09 and 2009-10)

*Global Geophysical Services Ltd., Cayman Islands (2011) 332 ITR 418 / 239 CTR 337 / 198 Taxman 342 / 52 DTR 322 (AAR)*

#### **S. 44BB : Mineral oils – Computation – Non-resident [S. 9(1)(vii), S. 44DA]**

Revenues earned by the applicant, a UK company, under seismic data acquisition and processing contracts in India are taxable under section 44BB.

**S. 44BB : Mineral oils – Computation – Income deemed to accrue or arise in India [S. 9(1)(vii)]**

Applicant, incorporated in Norway provides geophysical services to oil and gas exploration industry and is awarded contract by Cairn Energy Pvt. Limited (Cairn), India to conduct seismic surveys and provide onshore seismic data acquisition and other associated services. Revenue contends that services extended by the applicant fall under Explanation 2 of section 9(1)(vii) and not under section 44BB as the applicant is not undertaking a mining or like project which is undertaken by someone else and certain technical services are rendered by the applicant to the business enterprise that takes up the project. AAR held that section 44BB will apply relying on its ruling in *Geofizyka Torun Sp.zo.o.*, in AAR/813 of 2009 where it was held that if all the services that are in the nature of technical services within the meaning of Explanation 2 to section 9(1)(vii) are to be computed in accordance with 44DA, very little purpose will be served by incorporating special provision in section 44BB for computing the profits in relation to the services connected with the exploration and extraction of mineral oils.

*Bergen Oilfield Services AS, Norway (2011) 337 ITR 167 / 241 CTR 322 / 199 Taxman 274 / 55 DTR 409 (AAR)*

**S. 44BB : Mineral oils – Computation – Non-resident [S. 9(1)(vii), 44DA]**

Applicant, incorporated in Singapore has entered into a time charter vessels hiring agreement for provision of its offshore service vessels to Transocean Offshore International Ventures Ltd. (TOIVL) in India who in turn is providing various offshore drilling and support services to ONGC. Being a time charter agreement, the entire operation, navigation and management of the vessel provided on hire is under the exclusive command and control of the applicant though the vessel is operated and services are rendered as requested by TOIVL. AAR observed that for the purposes of section 44BB of the Act, the vessels provided are covered under the definition of "plant". The consideration received for supply of "plant" i.e. the vessels on hire when used in the prospecting for or extraction or production of oil and gas is covered under the special provision for computing profits and gains under said section. AAR further held that said section will apply relying on its ruling in *Geofizyka Torun Sp.zo.o.*, in AAR/813 of 2009 where it had held that if all the services that are in the nature of technical services within the meaning of Explanation 2 to section 9(1)(vii) are to be computed in accordance with 44DA, very little purpose will be served by incorporating special provision in 44BB for computing the profits in relation to the services connected with the exploration and extraction of mineral oils.

*Bourbon Offshore Asia Pte. Ltd, Singapore (2011) 242 CTR 225 / 58 DTR 155 / 200 Taxman 408 / 337 ITR 122 (AAR)*

**S. 44BB : Mineral oils – Computation – Technical services – Royalties – Non-resident – Mobilization and demobilization revenues [S. 9(1)(vii), 44DA]**

Applicant, a foreign company, having entered into a contract with another foreign company whereby it is providing seismic vessels and seismic crew at the area of operations to carry out 2D geophysical survey offshore India, it is engaged in the business of providing services or facilities in connection with extraction or production of oil and therefore, revenues earned by the applicant under the said contract are taxable in accordance with section 44BB, neither section 9(1)(vii) nor section 44DA was applicable. Entire mobilization and demobilization revenues received by the applicant in respect of seismic data acquisition and or processing activities is taxable in India under section 44BB at an effective rate of 4.223 percent.

*Western International Ltd. (2011) 242 CTR 634 / 338 ITR 161 / 59 DTR 89 (AAR)*

**S. 44BB : Mineral oils – Computation – Technical services – Royalties – Non-resident – DTAA – India-Norway – Service tax – Finance Act, 1994 – S. 68. [S. 90, Art. 23, 24]**

Activities of providing sea logistics services viz-transportation of cargo, material and personnel required at the rig, by the applicant, to ONGC are not technical services and thus, the income derived by the applicant from the said activities is out of the purview of section 9(1)(vii) and is liable to be taxed under section 44BB. Applicant company having shifted its managerial control to Norway in January, 2010, it is liable to be taxed in India in terms of Article 23 of the DTAA between India and Norway w.e.f. 1st Jan., 2010. Service tax said to be included in the consideration received by the applicant from ONGC has to go into computation while calculating the consideration for the services or facilities under section 44BB or Article 23(4) of the DTAA.

*Siem Offshore (2011) 242 CTR 625 / 337 ITR 207 / 59 DTR 141 (AAR)*

**S. 44BB : Mineral oils – Computation – Royalties – Fees for technical services – DTAA – India-Norway**

Service of conducting seismic surveys and providing onshore seismic data acquisition and other associated services are taxable under special provision. Entire receipts are subjects to deeming provision under section 44BB, income cannot be split.

*Bergen Oilfield Services AS, Norway (2011) 337 ITR 167 / 241 CTR 322 / 199 Taxman 274 / 55 DTR 409 (AAR)*

**S. 44BB : Mineral oils – Computation – Time Charter [Ss. 9(1)(vii), 44DA, 115A]**

Applicant, a Norwegian company, having hired a seismic vessel from another non-resident company under a time charter party agreement for the purpose of executing its contract for providing 3D seismic data acquisition and onboard processing services to ONGC, second limb to section 44BB(I) is clearly attracted and not section 44DA or 115A and therefore tax has to be deducted at source from the payments made by the applicant @ 4.223 per cent.

*Wavefield Inseis Asa, In Re. (2010) 230 CTR 106 / 36 DTR 139 / 320 ITR 290 / 187 Taxman 62 (AAR)*

**S. 44BB : Mineral oils – Computation – Service or facilities**

In the case of a non resident such as applicant engaged in the business of providing services or facilities in connection with prospecting for or extraction of mineral oil or supply of plant (Including ships) on hire used or to be used in prospecting or extraction of mineral oil, section 44BB is squarely attracted.

*Seabird Exploration FZ LLC, UAE, in re (2010) 192 Taxman 471 / 326 ITR 558 / 233 CTR 425 (AAR)*

**S. 44BB : Mineral oils – Computation – Royalty – India-Cyprus & India-Malta DTAA**

**[S. 9(1) (vi), Article 12]**

Applicant, a UAE company provides geophysical services to oil companies in India for which purpose it enters into Bareboat Charters ('BBC') with various international vessel providing companies ('VPC'); such agreements are executed outside India and the vessels would be delivered to and redelivered by the applicant outside India; also all payments due by the applicant to VPC would be received/paid outside India - AAR observed that mere physical presence of the non-resident's vessel in the territorial waters of India does not, without anything more, constitute a permanent establishment; further the non-resident owner of the vessel did not indulge in any business operations in India, thus, the criterion of business connection is ruled out; Next, it cannot be said that the income has been derived from an Indian source except in respect of vessels delivered or deemed to have been delivered in India; in case the Bareboat Charter Agreement was concluded outside India and delivery took place outside India, neither the origin of the income, i.e. the property or asset nor the activity giving rise to income can be said to be located in India and the vessel owner has not carried out any operations in India either directly or through the crew - Hence held hire charges paid by applicant under BBC to VPCs not taxable as no PE in India nor any source of income from India as agreement was executed outside India and the delivery of the vessel also took place outside India; but held taxable under section 44B in case of vessels delivered or deemed to have been delivered in India.

*Seabird Exploration FZ, UAE (2010) 233 CTR 425 / 326 ITR 558 / 192 Taxman 471 (AAR)*

**S. 44BB : Mineral oils – Computation – Precedence over general provisions [S. 9(1)(vii)]**

Non-resident providing onshore seismic data acquisition, processing & interpretation services to ONGC contends that it falls within the ambit of Section 44BB of the Income-tax Act, 1961 – Revenue contended that it can be so considered only if they are not covered under explanation 2 to section 9(1)(vii) of the Act – AAR observed that applicant neatly fits into the Sec 44BB and all the ingredients of that section are satisfied to attract its first part; further, if the business is of the specific nature as

envisaged by said section, the computation provision therein would prevail over the computation provision of Sec 44DA and therefore income has to be computed in terms of Sec 44BB.

*Geofizyka Torun SP ZO.O (2010) 320 ITR 268 / 186 Taxman 213 / (2009) / 227 CTR 5 / 32 DTR 139 (AAR)*

**Section 44BBA : Special provision for computing profits and gains of the business of operation of aircraft in the case of non-residents.**

**S. 44BBA : Aircraft – Non-residents – Computation – Presumptive taxation**

When assessee incurred loss, income cannot be computed under section 44BBA as the said section is machinery section. (A.Ys. 1995-96 to 1998-99, 2000-01)

*Royal Jordanian Airlines v. Dy. DIT (2010) 3 ITR 181 / 126 ITD 289 / 119 TTJ 145 / 14*

*DTR*

*167 / 25 SOT 270 (Delhi)(Trib.)*

**S. 44BBA : Aircraft – Non-residents – Computation – Wet leasing – Rental income**

Assessee, a non-resident entered in to a wet leasing agreement with Air India and not carrying on business of operation of aircraft, rental income received by assessee from Air India was not to be brought to tax under provisions of section 44BBA. (A.Ys. 1995-96 to 1997-98)

*Caribjit Inc v. Dy. CIT (2005) 4 SOT 18 (Mum.)(Trib.)*

**Section 44BBB : Special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects**

**S. 44BBB : Foreign companies – Civil construction – Turnkey power projects**

When income of the assessee under section 44BBB is to be computed at 10 per cent of gross receipts and the assessee does not claim a lower profit than that to be assessed under sub- section (2) of section 44BBB, Assessing Officer cannot proceed to determine income of assessee under sections 28 to 44AA on the pretext of consistency, assessee is also entitled to set off losses in other business from such income. (A.Y. 2004-05)

*DSD Industrieanlagen GmbH v. Dy. CIT (2010) 36 DTR 121 / 129 TTJ 84 / (2009) 33 SOT 211 (Delhi)(Trib.)*

**S. 44BBB : Foreign companies – Civil construction – Turnkey power projects – Computation**

Applicant is an engineering, procurement and construction company. It is a subsidiary of Toshiba Corporation, Japan. It is awarded a contract by an Indian company that is implementing a power project at Mundra for erection of steam turbines, turbo generators, etc. Simultaneously, its holding company Toshiba Corp. is awarded an

independent and distinct contract for off-shore supply of plant and machineries for the said power project. Learned departmental representative argues that the contract is a composite contract and that there is the possibility of nexus between the supply contract awarded to Toshiba Corporation and the Erection Contract awarded to the applicant that would impact the taxability of all the transactions taken together – AAR observed that both the contracts are independent of each other. The consideration received by M/s. Toshiba Corporation is not taxable in India for the offshore supply and facts of the case squarely fit into the description given in said section – Hence ruled that said section would apply; it would also apply in case applicant engages services of related party or third party for supply of labour for executing the work under the applicant's overall responsibility.

*Toshiba Plant Systems & Services Corp., Japan (2011) 52 DTR 155 / 198 Taxman 26 / 239 CTR 163 / 332 ITR 456 (AAR)*

#### **S. 44BBB : Foreign companies – Civil construction – Turnkey power projects**

Contract awarded to the applicant, a Japanese company, for erection of steam turbines, turbo generators and auxiliary equipments / heaters to execute a power project in India by an Indian Company being separate and machineries for the same project to the holding company of the applicant, the contract awarded to the applicant fits into the description given in section 44BBB and therefore, it is eligible for presumptive taxation under section 44BBB.

*Toshiba Plant Systems & Services Corporation, In Re (2011) 332 ITR 456 / 52 DTR 155 / 198 Taxman 26 / 225 Taxation 350 / 239 CTR 163 (AAR)*

#### **Section 44C : Deduction of head office expenditure in the case of non-residents**

##### **S. 44C : Non-residents – Head office expenditure – Total income [S. 2(45)]**

'Total income' in Explanations (i) and (ii) connotes taxable income. The expression "total income" has been defined under section 2(45), to mean total amount of income referred in section 5 and computed in the manner laid down under the provision of the Act. Therefore, the words "total income" in the two items of Explanation connotes taxable income. Section 44C exclusively deals with deduction of head office expenditure in the case of non residents. It provides for computation of three types of expenses on the basis of deduction could be granted to the least of the three alternatives. Where adjusted total income for assessment year in question was nil, ITO was right in allowing nil expense as the least of three parameters mentioned in clauses (a)(b) and (c) of section 44C. (A.Y. 1977-78)

*American Bureau of Shipping v. CIT (2003) 132 Taxman 93 / 263 ITR 590 / 185 CTR 168 (Bom.)(High Court)*

##### **S. 44C : Non-residents – Head office expenditure – Travelling expenses – Staff of HO**



Travelling expenses incurred on staff members of head office on their visit to branch office of assessee in India, are allowable and section 44C is not applicable.

*CIT v. Emirates Commercial Bank Ltd. (2003) 262 ITR 55 / 134 Taxman 682 (Bom.)(High Court)*

#### **S. 44C : Non-residents – Head office expenditure – Average HO expenses**

Average head office expenses were allowed by the department for earlier three years, in view of this for the relevant year also, the High Court confirmed the order of Tribunal.

(A.Y. 1981-82)

*CIT v. Bank of America NT and SA (2003) 262 ITR 504 / 183 CTR 251 / 133 Taxman 648 (Bom.)(High Court)*

#### **S. 44C : Non-residents – Head office expenditure – India branch**

Any expenditure to fall in consideration Zone of deductibility under the Act, whether under section 44C or under general, must have been incurred for purpose of business of Indian branch. If expenses are shared / allocated / apportioned / non-exclusive head office expenses, then they will find their residence in overall limit under section 44C, on the other hand exclusive expenses incurred by head office for Indian branch shall be distinctly considered under general provisions of Act. (A.Y. 2002-03).

*Addl. DIT v. Bank of Bahrain & Kuwait (2011) 44 SOT 693 (Mum.)(Trib.)*

#### **S. 44C : Non-residents – Head office expenditure – Salary to staff by HO – Service out side India [S. 37(1)]**

Salary paid by assessee's head office outside India to expatriates who were actually working with the assessee outside India, is not covered by section 44C and is allowable as deduction under section 37(1). (A.Ys. 1997-98, 1998-99, 2000-01 to 2003-04)

*Dy. DIT v. Chohung Bank (2010) 40 DTR 75 / 4 ITR 627 / 126 ITD 448 / 133 TTJ 331 (Mum.)(Trib.)*

#### **S. 44C : Non-residents – Head office expenditure – Expatriate employees – Mobilization of NRI deposits**

Where expatriate employees were working exclusively for India operations, expenses on salaries paid to them could not be treated as head office expenses. Expenditure incurred by assessee abroad on mobilization of NRI deposits would not fall under scope of "head office expenditure" under section 44C. (A.Ys. 1992-93 to 1997-98)

*British Bank Middle East v. Jt. CIT (2005) 4 SOT 122 (Mum.)(Trib.)*

#### **Section 44D : Special provision for computing income by way of royalties, etc., in the case of foreign companies**

#### **S. 44D : Foreign companies – Royalties – Computation – Double taxation relief – India & Australia – Art. 7, Income Tax Act [S. 5, 9(1)(vii), 115A]**

Fees received by non-resident for performing services in India through a PE are taxable in accordance with Article 7 of DTAA. If Article 7 applies, sections 9(1)(vii), 44D and 115A would not apply. (A.Ys. 1999-2000, 2001-02)

*Rio Tinto Technical Services v. Dy. CIT (2010) 39 DTR 327 / 41 SOT 12 / 131 TTJ 179 (Delhi)(Trib.)*

#### **S. 44D : Foreign companies – Royalties – Computation – Expenses**

Following unanimous views taken by Tribunal and Authority for Advance Ruling it was held that the deductions of any expenses are to be allowed against income in the nature of royalties and fees for technical services only in accordance with the provisions of domestic law. If the domestic law prohibits such deductions then such deductions would not be allowed.

Thus, section 44D has been considered to be the process of computation of business profits which provided restriction that the assessee is not entitled to any deductions contained in Ss. 28 to 44C of the Act. However, in view of the specific non obstante provisions contained in section 44D it was held that no deduction of any expenses would be allowed from income in the nature of royalties or fee for technical services received by the assessee i.e., the foreign company. (A.Ys. 2000-01, 2001-02)

*Dy. CIT v. Pipeline Engineering GmbH (2009) 318 ITR (AT) 210 / 125 TTJ 534 / 28 SOT 121 / 28 DTR 270 (Mum.)(Trib.)*

#### **S. 44D : Foreign companies – Royalties – Computation – DTAA – India-Singapore [S. 115A]**

The provisions of sections 44D and 115A, are required to be read together inasmuch as while one section lays down that no deductions are permissible in computation of income, from *inter alia*, royalties and fees for technical services, the other section provides for a lower of rate of tax from the said income. These are complimentary provisions. Limitation on deduction for expenses, as set out in section 44D, will not apply, in a case, where related incomes is not in the nature of "fees for technical services", though on test laid down under Explanation 2 to section 9(1) (vii), such income could be treated as "fees for technical services". (A.Y. 1997-98)

*Dy. CIT v. Boston Consulting Group Pte Ltd. (2005) 94 ITD 31 / 93 TTJ 293 (Mum.)(Trib.)*

#### **S. 44D : Foreign companies – Royalties – Computation – Rent – Non-residents [S. 115A]**

Section 44D and section 115A cannot be applied to the facts of the case because the payment of royalty to foreign companies was made by non-resident companies and not by Government or Indian concern and therefore, for computing the income by way of royalties, etc., recourse will have to be taken to the normal provisions of the IT Act, 1961. (A.Y. 1997-98)

*Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT (2003) 85 ITD 478 / 78 TTJ 489 (Delhi) (Trib.)*

#### **S. 44D : Foreign companies – Royalties – Application [S. 115A]**

Section 44D and section 115A cannot be read as treating gross receipts of fees for technical services as income without allowing deduction on account of expenses incurred for earning same as income; salaries paid to employees and indeed all revenue expenditure incurred for running PE will have to be taken into account for determining profits in India and, scheme of section 44D and 115A, would be deemed to have been treated as deductible.

*DHV Consultants BV, In re (2005) 277 ITR 97 / 147 Taxman 521 / 197 CTR 105 (AAR)*

#### **S. 44D : Foreign companies – Royalties – Computation – Income**

No option can be read in section 44D for computing income on net basis allowing benefit of sections 28 to 44C as principle laid down by Supreme Court in case of *Union of India v. A. Sanyasi Rao (1996) 219 ITR 330* in context of presumptive basis of taxation of certain receipts under section 44AC, would not apply.

*Timken India Ltd., In re (2005) 273 ITR 67 / 143 Taxman 257 / 193 CTR 610 (AAR)*

#### **S. 44D : Foreign companies – Royalties – Computation – Technical fees – Deduction of tax at source – India-Spain DTAA [S. 115A, 195, Articles 5, 7 & 13]**

Indian resident group company electronically purchases Business Information Reports ('BIRs') from Spanish group company, the applicant – issue is whether such payments to the Applicant will be treated as part of its business profits and hence be covered under the provisions of Article 7 of the Treaty – AAR observed that such payments are part of applicant's revenue receipts so the taxability will have to be considered under Article 7 read with Article 5 of the Treaty. The germane issue is whether the applicant has a PE in India within the meaning of Article 5 of the treaty. It observed that the Indian group company is carrying on in its own business and is an independent entity. It is not under the control and instructions of the applicant in carrying on its business. There is no material before it to conclude that it itself is an agent of the applicant and hence cannot be said to be the PE of the applicant. Further, such payments do not answer the description of "royalties" within the meaning of para 3 of Article 13 of the treaty as transaction of sale of BIRs can be equated or is akin to sale of a book, which does not involve any transfer of intellectual property – Hence ruled that payments are business receipts in hands of non-resident but as Indian company is independent entity, it is not an agent and hence no PE in India – Held payments not taxable in India.

*Dun and Bradstreet Espana (2005) 272 ITR 99 / 142 Taxman 284 / 193 CTR 9 (AAR)*

### **E. Capital gains**

#### **Section 45 : Capital gains**

#### **S. 45 : Capital gains – Business income – Investment in shares – Tests**

The Supreme Court vide order dated 15.11.2010 dismissed the Department's Special Leave Petition against the judgment of the Bombay High Court in *CIT v Gopal Purohit* (2010) 228 CTR 582 / 188 Taxman 140 / 34 DTR 52 (2011) 336 ITR 287 (Bom.)  
*CIT v. Gopal Purohit* (2011) 334 ITR 308 (St.) / (2012) 204 Taxman 183 (Mag.)(SC)

**S. 45 : Capital gains – Cost not determinable – Compensation [S. 50, 55(a)]**

The assessee, a banking company, was nationalized and it received certain amount as compensation. The compensation was not allocable item-wise on various intangible assets held by it, hence, it was impossible to determine capital gain and cost of acquisition. The compensation was not taxable under section 45. (A.Y. 1970-71)

*PNB Finance Ltd. v. CIT* (2008) 175 Taxman 242 / 307 ITR 75 / 15 DTR 47 / 220 CTR 110 / (2009) 208 Taxation 370 (SC)

**S. 45 : Capital gains – Liquidation – Share holders – Money or other assets – Agricultural land [S. 2(14)(iii), 46(2)]**

Assessee, as a share holder of a company, receives assets, whether capital or in any other form, from the company in liquidation, the assessee is liable to pay tax under the head "Capital Gains" on the market value of the assets as on the date of the distribution as provided in section 46(2). The invocation of section 2(14) which defines "Capital Asset" is unnecessary for the purpose of constructing section 46(2). (A.Y. 1970-71)

*N. Bagavanthy Ammal v. CIT* (2003) 259 ITR 678 / 173 Taxation 98 / 179 CTR 458 / 127 Taxman 422 (SC)

**S. 45 : Capital gains – Slump sale – Firm – Sale – Pending dissolution**

Assessee was a partnership firm. There was specific clause in the partnership deed, stating that on dissolution, business should vest in partner or partners, who offered highest price. The partnership firm was dissolved, the sale of the assets was conducted on the direction of the Court among the partners, therefore, the sale consideration cannot be said to be a slump sale. The assessee as erstwhile partners were liable to pay capital gains tax. (A. Y. 1995-96)

*B. Raghurama Prabhu Estate, Executrix, Smt. Kaveri Bai & Ors. v. Jt. CIT* (2011) 52 DTR 122 / 239 CTR 274 / 335 ITR 394 (Karn.)(High Court)

**S. 45 : Capital gains – Land with incomplete building – Short term [S. 2(29B), 2(42B)]**

Capital Gain arising to the assessee on the sale of lease hold land with incomplete building is to be bifurcated into gain arising out of sale of leasehold interest in land and sale of building. In the absence of perversity in the finding of the Tribunal estimating the value of the building at ` 2.15 crores as against the construction cost of ` 1.85 crore, the gain arising on the sale of land is to be treated as a long term capital gain where as the gain of ` 30 lakhs arising on the sale of incomplete building is to be treated as short term capital gain. (A.Y. 1996-97).

*CIT v. Hindustan Hotels Ltd. (2011) 237 CTR 32 / 49 DTR 17 / 199 Taxman 127 (Mag.) / 335 ITR 60 (Bom.) (High Court)*

**S. 45 : Capital gains – Transfer of goodwill – Sale of entire business**

Sale of entire business, including all assets and liabilities, as a going concern, not possible to bifurcate consideration received on account of transfer. Transfer does not give rise to capital gains. (A. Y. 1985-86)

*ACIT v. Patel Specific Family Trust (2011) 330 ITR 397 (Guj.) (High Court)*

**S. 45 : Capital gains – Business income – Loan borrowed – Interest paid [S. 28(iv)]**

It was held that a capital investment and resale does not lose its capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment [CIT v. Sutlej Cotton Mills Supply Agency Ltd. (1975) 100 ITR 706 (SC)] followed.

Merely because shares are purchased by taking loan at high interest does not mean gains are taxable as business profits. (A.Y. 2001-02)

*CIT v. Niraj Amidhar Surti (2011) 238 CTR 294 / 48 DTR 33 (Guj.) (High Court)*

**S. 45 : Capital gains – Compensation – Right to specific performance – Deduction allowable [S. 48]**

Compensation received for giving up the right to specific performance of an agreement to sell, constitutes capital gain chargeable to tax, however, deduction is allowable as per section 48. (A. Y. 1998-99).

*CIT v. H. Anil Kumar (2011) 56 DTR 384 / 242 CTR 537 (Karn.) (High Court)*

**S. 45 : Capital gains – Deduction at source – Non-resident – Corporate veil [S. 2(14), 195]**

The assessee, a company based in Cyprus, bought shares (100% together with another company) of a UK company called Finsider International, from another UK company. Finsider, UK, held 51% shares of Sesa Goa Ltd, India. The Assessing Officer took the view that the 51% shares in Sesa Goa held by Finsider, UK, constituted a capital asset under section 2(14) and that the transfer of the shares of Finsider amounted to a transfer of the said 51% shares of Sesa Goa and that the assessee was liable to deduct tax at source under section 195 when it bought the shares of Finsider, UK. He accordingly issued a show-cause notice under section 201 seeking to treat the assessee as a defaulter. The assessee filed a Writ Petition to challenge the notice on the ground that as one non-resident had sold shares of a foreign company to another non-resident, there was no liability under Indian law. Held not accepting the assessee's contention:

What is under challenge is only the show-cause notice issued under section 195. It may be necessary for the fact finding authority to lift the corporate veil to look into the real nature of transaction to ascertain virtual facts. It is also to be ascertained whether the assessee, as a majority shareholder, enjoys the power by way of interest

and capital gains in the assets of Sesa Goa and whether transfer of shares in the case on hand includes indirect transfer of assets and interest in Sesa Goa.

*Richeter Holding Ltd. v. ADIT (2011) 339 ITR 199 / 200 Taxman 263 / 243 CTR 142 / 59 DTR 357 (Karn.)(High Court)*

#### **S. 45 : Capital gains – Business income – Trade marks, brands, copyright and goodwill**

##### **[S. 28(va), 55]**

Trade marks, brands, copyright and goodwill constitute profit earning apparatus of business. Assessee was owner of brand name of journals which were also registered /indexed with Indian National Scientific Documentation Centre (INSDOC). Assessee company entered in to a "specified Assets Transfer Agreement" with one CMP for sale of all its rights titles and interest in specified assets of its health care journals and communication business. In consideration the assessee received certain amount from CMP which it showed as income from long term capital gains in its return. Assessing Officer, however held that amount received by assessee to be taxable as income from business under section 28(va). High Court held that the consideration received would be computed as capital gains. (A. Y. 2006-07).

*CIT v. Mediworld Publications (P) Ltd. (2011) 200 Taxman 1 / 337 ITR 178 / 244 CTR 387 / 61 DTR 391 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Business income – Shares – High volume & short holding period**

##### **[S. 28(i)]**

In the instant case the Tribunal recorded the finding that in a number of cases the assessee had held the shares for more than 10 years and that the purchase and sale of shares within a period of one year had been offered as STCG. The same was accepted in the preceding assessment year. It was held that it is open to an assessee to trade in the shares and also to invest in shares. When shares are held as investment, the income arising on sale of those shares is assessable as LTCG/STCG. Accordingly, the decision of the Tribunal in holding that the income arising on sale of shares held as investment were liable to be assessed as LTCG/STCG cannot be faulted. (A.Y. 2006-07)

*CIT v. Naishadh V. Vachharajani ITA No. 1042 of 2011 dated 22-9-2011 (Bom.)(High Court) Source : [www.itatonline.org](http://www.itatonline.org)*

#### **S. 45 : Capital gains – Business income – Short period [S. 28(i)]**

Mere fact that the shares were sold in a short span of time of acquisition due to steep and unanticipated rise in stock market does not mean that the intention was not to hold them for long period of time. (A. Y. 2005-06).

*CIT v. Consolidated Finvest and Holding Ltd. (2011) 337 ITR 264 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Business income – Sale of land and building [S. 28(i)]**



In the absence of any finding of the authorities as to the date of acquisition of the property in question by the assessee, the matter was remanded to the Tribunal to determine the actual date of acquisition of the property and also to decide afresh the question as to whether the profit arising out of the sale was in the nature of business profit or capital gain. (A. Y. 1997-98).

*Ramachandra Estate Development & Investment Co. (P) Ltd. v. Jt. CIT (2011) 244 CTR 573 / 48 DTR 321 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Possession – Transfer – Development agreement – Consideration**

##### **[S. 2(47)]**

Assessee entered in to a joint venture agreement with developers. Agreement provided that certain sum would be paid to the assessee as a non refundable advance and in addition to same he was entitled for a built up area of to be constructed by developer free at cost. Assessee contended that capital gain will be liable to be taxed in assessment year 2003-04 when construction was completed. The Court held that after introduction of deemed transfer under section 2(47)(v) of the Act, if the contract, read as a whole, involved passing of or transferring complete control over the property in favour of developer, then the contract would be relevant to decide the year of chargeability. On the facts the actual possession of property was handed over on 30-5-1996, hence, the capital gain will be chargeable in assessment year 1997-98. (A. Y. 1996-97).

*CIT v. T. K. Dayalu (Dr.) (2011) 202 Taxman 531 / 60 DTR 403 (Karn.)(High Court)*

#### **S. 45 : Capital gains – Share – Security of shares for loan – Pledge**

Assessee had taken loans from two parties and pledged certain number of shares as security of the loans but since the value of such shares had fallen, assessee pledged further shares, the addition made by the Assessing Officer treating the value of further shares as long term capital gains was deleted by CIT(A) on the basis of additional evidence in the form of correspondence between assessee and lender requiring further security. (A. Y. 2001-02).

*CIT v. Betterways Finance & Leasing (P) Ltd. (2011) 62 DTR 282 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Business income – Firm – Development of property [S. 28(i)]**

The assessee firm was carrying on business of dealing in grocery items. The object of the firm included development and sale of property. Firm constructed a commercial complex. The portions of said property was sold in relevant years and consideration received was utilized to clear debt which had been incurred for development of property. Assessee claimed the income as capital gain which was rejected by the Assessing Officer and assessed as business income. The Court held that notwithstanding the objects of firm, income would be assessed as capital gains. (A.Ys. 1996-97 to 1997-98 and 1999-2000).

*CIT v. Pai Provision Stores (2011) 203 Taxman 196 (Karn.)(High Court)*

**S. 45 : Capital gains – Cost of acquisition – Bonus shares – Indexed Cost [S. 48, 70 & 112]**

Benefit of lower tax rate under Proviso to section 112 is available to bonus shares despite no indexation. (A.Y. 2001-02)

*CIT v. Anuj A. Sheth (HUF) (2011) 237 CTR 423 / (2010) 38 DTR 26 / 324 ITR 191 / 190 Taxman 330 (Bom.)(High Court)*

*Editorial:- Refer Mohanlal N. Shah (HUF) v ACIT (2008) 26 SOT 380 (Mum.)(Trib.)*

**S. 45 : Capital gains – Chargeability – Sale of Copyright, Patent [S. 48, 55(2)(a)]**

Matter regarding taxability of amount received for transfer of patent, copyright, etc. is remanded for reconsideration as the Tribunal had not examined the facts and circumstances of the case vis-à-vis decision in *CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)* case, bearing in mind that the assessee himself had offered to tax, as an amount capable of being ascertained for capital gain and on his own shown initial cost of acquisition of asset as nil. (A.Y. 1996-97)

*CIT & Anr. v. P. R. Seshadri (2010) 228 CTR 334 / 33 DTR 128 / 329 ITR 377 (Karn.)(High Court)*

**S. 45 : Capital gains – Computation – Sale of property in consideration of flats [S. 48]**

Assessee having sold land also while executing lease deed in favour of purchaser / developer who had agreed to give 11 flats to the assessee in the building to be constructed, the Assessing Officer was justified in taking in to consideration value of land also apart from the value of flats and thus value of ` 332.335 per sq. ft. taken by the Assessing Officer as against ` 200 per sq. ft. adopted by the assessee was sustainable. (A.Y. 1981-82)

*CIT v. N. Srirama Reddy (Decd) (2010) 228 CTR 541 / 28 DTR 168 / 328 ITR 71 (Karn.)(High Court)*

**S. 45 : Capital gains – Capital asset – Membership Card of Stock Exchange [S. 2(14)]**

A membership card of stock exchange which confers right upon its member to trade at the exchange is 'an asset' and falls within the definition of the term 'capital asset' as defined in section 2(14) of the Act. Accordingly, any gain arising on sale of the membership card in auction by the Stock Exchange in pursuant to default committed by the member in terms of the stock exchange rules is chargeable to tax under the head 'Capital Gains'. (A.Y. 1994-95)

*CDR P. J. Mathew v. ITO (2010) 323 ITR 592 / 230 CTR 398 / 36 DTR 352 / 188 Taxman 376 / 36 DTR 352 (Ker.)(High Court)*

**S. 45 : Capital gains – Loss – Convertible warrants [S. (2)(47)]**

Forfeiture of convertible warrants results in extinguishment of right of the assessee to obtain a share in the company and results in loss under the head "capital gains". (A.Y. 2002-03)

*CIT v. Chand Ratan Bagri (2010) 36 DTR 244 / 230 CTR 258 / 329 ITR 356 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Computation – Deduction – Interest – Cost**

Interest on borrowed capital is includible as part of cost of acquisition. (A.Y. 2003-04)

*CIT v. Sri Hariram Hotels (P) Ltd. (2010) 34 DTR 162 / 188 Taxman 170 / 229 CTR 455 / 325 ITR 136 (Karn.)(High Court)*

#### **S. 45 : Capital gains – Sale of land not registered [S. 28(i)]**

Profit on sale of land (though not registered in his name) received by the assessee from the owner of land in pursuance of an agreement to develop his land and for spending certain amount for developing it for the owner was taxable as Capital Gain. (A.Y. 1997-98)

*CIT v. S. Rajamannar (2010) 40 DTR 282 / 241 CTR 372 / 329 ITR 626 (Karn.)(High Court)*

#### **S. 45 : Capital gains – Capital loss – Tax planning – Colourable device – Shares in group companies**

The assessee company filed a return declaring loss of ` 4,71,54,210/- for the A. Y. 2000-01. The learned Assessing Officer observed that the assessee company had outstanding liability of ` 19.77 crores, used for purchase of shares of group companies. According to Assessing Officer, the assessee company created capital loss by entering into transaction on the same date to evade tax liability. He disallowed the said capital loss on sale of shares on the ground that these shares were purchased from the funds made available by the group companies from the investment held by it. The learned Assessing Officer disallowed the loss. The learned CIT(A) upheld the said disallowance.

On appeal to Tribunal by the assessee, the Tribunal was of the view that no benefit of capital loss had been taken by the assessee till date by adjusting it against other long term capital gains. It further held that the transaction could not be thrown out merely because it was carried out a few days before amalgamation of the company. As noted by the Tribunal, neither the assessee company nor the amalgamated company adjusted the capital loss on account of sale of these shares against any long term capital gains even till A. Y. 2002-03. No tax benefit was, therefore taken by the assessee company for at least two years after the capital loss was booked by it. Therefore, it could not be said that the transactions in question were a colourable device, meant to gain some unfair tax advantage. Hence, no substantial questions of law is involved and it has to be dismissed. (A.Y. 2000-01)

*CIT v. Gillette Diversified Operations P. Ltd. (2010) 324 ITR 226 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Possession – Date of accrual**

The assessee had given possession and received the sale consideration in pursuance of the agreement dated March 1993. As the provisions of section 53A, of transfer of Property Act is attracted, the capital gains would accrue in the year of possession. (A.Ys. 1994-95, 1995-96)

*D. Kasturi (Smt.) v. CIT (2010) 42 DTR 288 / 323 ITR 40 / 233 CTR 581 (Mad.) (High Court)*

#### **S. 45 : Capital gains – Tax Avoidance – Colourable Device**

Assessee transferring the shares to another group of companies at prevailing market rate, to reduce its taxable income, cannot be dubbed as colourable device to evade taxes. (A.Ys. 2003-04, 2004-05)

*CIT v. Pivet Finance Ltd. (2010) 46 DTR 339 / 192 Taxman 21 / 236 CTR 111 (P&H) (High Court)*

#### **S. 45 : Capital gains – Renunciation – Foregoing of right to subscribe right shares**

Where the assessee claims to have renounced the right to subscribe right shares in favour of unknown persons by forgoing the right, and that to for no consideration, there is no transfer and hence, the notional loss on account of diminution in the value of its shares cannot be allowed. (A.Y. 1993-94)

*CIT v. United Breweries Ltd. & Anr. (2010) 325 ITR 485 / 236 CTR 160 / 39 DTR 49 (Karn.) (High Court)*

#### **S. 45 : Capital gains – Short-term or long-term – Dissolution – Period of holding [S. 2(42A), 49(1)(iii)(b)]**

On dissolution the property was taken over by the partner. Partner sold the property within three days of acquiring it. Sale has to be treated as short term. The benefit of section 49(1)(iii)(b) is not available.

*P. P. Menon v. CIT (2010) 325 ITR 122 / (2009) 31 DTR 159 / 183 Taxman 242 / 227 CTR 573 (Karn.) (High Court)*

#### **S. 45 : Capital gains – Business income – Investment in shares**

Shares transaction treated as investment in earlier years cannot be treated as business in subsequent years if facts are the same. (A.Y. 2005-06)

*CIT v. Gopal Purohit (2010) 34 DTR 52 / 228 CTR 582 / 188 Taxman 140 / (2011) 336 ITR 287 (Bom.) (High Court).*

*Editorial:- Gopal Purohit (2009) 20 DTR 99, (2009) 122 TTJ 87 / 29 SOT 117 (Trib.) Affirmed. SLP of revenue is rejected (2011) 334 ITR 308 (ST.)*

#### **S. 45 : Capital gains – Investment in shares – Sale of agricultural land**

Where the assessee sold its agricultural land which was used by it for carrying out agricultural activities after holding the same for more than two decades, gain arising

out of sale of such land was held to be assessable as 'Capital gain' and not 'Profits and gain of business or profession'. (A.Y. 2005-06)

*CIT v. S.K. Kaintal (2009) 23 DTR 68 / 231 CTR 531 / 187 Taxman 235 (P&H)(High Court)*

#### **S. 45 : Capital gains – Surrender of tenancy rights – Cost of improvement**

Cost of improvement incurred shown in the assessee's books of account as stock-in-trade.

One property was taken on rent by the assessee at Delhi. Thereafter, the assessee made improvements in the said rented premises and retained the same for more than five years. The assessee showed the said property as inventory in its balance sheets for several years.

On appeal to High Court, the High Court held that no fault could be found with the reasoning of the Tribunal. No perversity in its findings has been pointed out consequently, the appeal is dismissed. (A.Y. 2002-03)

*CIT v. Hitesh Estates Ltd. (2009) 313 ITR 393/ 18 DTR 206 / 178 Taxman 211 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Investment in residential house – Exemption – Son's name**

Assessee purchasing property in the name of son, held assessee not entitled to exemption under section 54F.

*Prakash v. ITO (2009) 213 Taxation 212 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Non-compete fee – Not liable to capital gain**

The amount received for not competing with the purchaser company in future in the suburbs could not be made taxable under the heading "capital gains".

*CIT v. Amol Narendra Dalal (2009) 318 ITR 429 / 13 DTR 87 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Slump Sale – Block of assets [S. 50, 50A]**

Sale proceeds received from sale of a going concern of one division of assessee, which was slump sale and not a sale of block of assets, section 50 was not applicable. (A.Y. 1998-99)

*CIT v. MaxIndia Ltd. (2009) 319 ITR 68 / 178 Taxman 196 (P&H)(High Court)*

#### **S. 45 : Capital gains – Immovable property – Physical possession**

Capital gain on sale of immovable property was chargeable to tax in the year in which actual physical possession of the property is given to the purchaser even though the agreement is entered into in earlier year. (A.Y. 1994-95)

*CIT v. Geetadevi Pasari (2009) 17 DTR 280 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Property as investment in balance sheet**

Property held for several years in capital Account and shown in Balance Sheet as a Capital Asset, Profit on sale of impugned property is to be assessed as Capital Gains and not as Business Income.

*CIT v. DCM Ltd. (2009) 221 CTR 513 / 320 ITR 307 / 179 Taxman 295 / 18 DTR 81 (Delhi) (High Court)*

#### **S. 45 : Capital gains – Calves from cows – No cost of acquisition**

Assessee having cows and deriving income from sale of milk. In the course of business assessee had calves from cows. The calves were sold. The receipts could not be charged to capital gains tax since there was no cost of acquisition.

*Dy. CIT v. Sri Surti Singh (2008) 215 CTR 326 / 299 ITR 183 / 4 DTR 1 (MP)(High Court)*

#### **S. 45 : Capital gains – Transfer – Family arrangement – Rearranging share holding in the company**

Rearrangement of shareholdings in the company to avoid possible litigation among family member is a prudent arrangement and the transfer of shares is not exigible to capital gains tax. (A.Y. 1996-97)

*CIT v. Kay ARR Enterprises & Ors (2008) 3 DTR 205 / 215 CTR 244 / 299 ITR 348 (Mad.)(High Court)*

#### **S. 45 : Capital gains – Registered sale deed – Transfer [S. 2(47)]**

There was no registered sale deed executed between the builder and the assessee. Neither the construction work completed nor the permission for construction granted by the local authorities. Mere grant of right to develop the land to the builder along with possession in order to facilitate the builder to develop the land under a joint collaboration arrangement did not involve transfer of capital asset as envisaged under section 2(47) of the Act so as to attract capital gains liability. (A.Ys. 1982-83, 1983-84)

*CIT v. Atam Prakash & Sons (2008) 12 DTR 1 / 219 CTR 164 / 175 Taxman 499 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Deemed profit or gain – Leasing of plot for 72 years**

Assessee-company had leased out a plot of land to a company for 72 years at annual rent. It had also received a sum as deposit from lessee which was repayable in 10 yearly installment with 9 per cent interest per annum. Assessing Officer considered 9 per cent of interest at lower side and taking into consideration market rate of interest at 18 per cent, brought differential amount of interest to tax as capital gains. As sections 45 and 48 do not make any provision for any deemed profit or gain to be taxable as capital gain, mere fact that Assessing Officer was of view that prevalent market interest rate was 18 per cent, could not render assessee liable for being taxed on differential amount as capital gains. (A.Y. 1993-94)

*CIT v. Lake Palace Hotel & Motels (2008) 171 Taxman 286 / 219 CTR 578 / 321 ITR 165 / 7 DTR 236 (Raj.)(High Court)*



#### **S. 45 : Capital gains – Long-term – Short-term – Land-House**

Assessee purchased the land in 1970 and constructed house partly in 1980. The assessee sold the land and house in the year 1982. The Court held that the gains attributable to land assessable as long-term capital gains and gains attributable to house is assessable as short-term capital gains. (A.Y. 1983-84)

*CIT v. A. S. Aulakh (2008) 304 ITR 27 / (2010) 192 Taxman 306 (P&H)(High Court)*

#### **S. 45 : Capital gains – Income – Land**

Where the assessee had no intention to sell the purchased land at a profit nor the assessee was a regular dealer in real estate, piecemeal sale of land by the assessee would constitute disposal of 'capital asset' and not an 'adventure in the nature of trade' and surplus thereof was taxable under the head capital gains. (A.Y. 1994-95)

*CIT v. Sohan Khan (2008) 7 DTR 361 / 304 ITR 194 (Raj.)(High Court)*

#### **S. 45 : Capital gains – Sale of stock – Creditors**

Stock left with the assessee on sale of the plant and machinery by the creditors in satisfaction of their dues would not constitute a capital asset and accordingly, the profit arising out of sale of such stock could not be taxed as capital gain. (A.Y. 1981-82)

*CIT v. Poddar Industrial Corporation (2008) 6 DTR 340 (All.)(High Court)*

#### **S. 45 : Capital gains – Investment – Stock-in-Trade – Shares**

The treatment given to a transaction in the books of account is of importance so that assessee's income from sale of shares is found to be assessable as capital gains instead of business income. In this case, the assessee had shown shares as investments in its books of account. (A.Ys. 1996-97, 1997-98)

*CIT v. Ess Jay Enterprises (P) Ltd. (2007) 165 Taxman 465 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Business income – Compensation**

Receipts from sale of land for Assessee having not carried out any business for several years and treated as an Investment company by the Assessing Officer, compensation received by the Assessee from the Government having acquired the land was assessable as Capital Gains. (A.Y. 1979-80)

*CIT v. Heritage Estate Pvt. Ltd. (2007) 213 CTR 275 / (2008) 303 ITR 469 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Interim compensation – Challenge in appeal**

The capital gains on the acquisition of land by the State Government is not chargeable to tax as the amounts received by the Assessee as per interim conditional order of the Court was challenged in Appeal by the State. (A.Ys. 1997-98, 1998-99)

*Anil Kumar Forma (HUF) v. CIT (2007) 163 Taxman 182 / 209 CTR 246 / 289 ITR 245 (Mad.) (High Court)*

**S. 45 : Capital gains – Valuation of immovable property – Uniform treatment – Co-owners**

Different treatment cannot be meted out to another co-owner while making the assessment of the same property or while valuing the same property. (A.Y. 1995-96) *CIT v. Kumararani Achi (Smt) (2007) 292 ITR 624 / 208 CTR 91 / 158 Taxman 4 (Mad.)(High Court)*

**S. 45 : Capital gains – Agricultural land – Agricultural purpose [S. 2(14)]**

Till the date of sale, agricultural activities were carried out by the assessee. The said land was put to use only for agricultural purposes and not for anything else. The fact that the purchaser had put it to use for a totally different purpose from that of the assessee ought not to have weighed with the tax authority. Hence, capital gains tax could not be levied. (A.Y. 1993-94)

*M. S. Srinivasa Naicker & Others v. ITO (2007) 292 ITR 481 (Mad.)(High Court)*

**S. 45 : Capital gains – Renouncement of rights shares – Period of holding – Fair market value [S. 2(29A), 2 (42A)]**

Proceeds realized against renouncement of rights shares which was adjusted against the loss arising on account of fall in market value of old shares. Held, as the right to receive rights shares accrues at the time of acquisition of old shares, the resultant loss is a long-term capital loss. (A.Y. 1992-93)

*Navin Jindal & Ors v. ACIT (2006) 202 CTR 86 / 280 ITR 608 / 153 Taxman 22 (P&H)(High Court)*

**S. 45 : Capital gains – Circular of CBDT – Trademark**

The revenue was not entitled to raise a contention contrary to the circular or instructions issued by CBDT and receipts on account of transfer of trademark and restrictive covenant were not exigible to capital gains tax before AY 1998-99. (A.Y. 1996-97)

*CIT v. Milk Food Ltd. (2006) 280 ITR 331 / 152 Taxman 50 / (2005) 199 CTR 567 (Delhi)(High Court)*

**S. 45 : Capital gains – Computation – Inheritance – Cost of acquisition with reference to certain modes of acquisition [S. 49]**

Property inherited by assessee had no cost of acquisition in the hands of his forefathers as it was acquired by conquest and had cost nothing to previous owner in terms of section 49(1)(iii), since neither cost nor date of acquisition of the property was ascertainable, no charge of capital gains would be attracted on its sale. (A.Y. 1983-84)

*CIT v. Mandharsinhji P. Jadeja (2006) 281 ITR 19 / (2005) 148 Taxman 110 / 199 CTR 223 (Guj.) (High Court)*

**S. 45 : Capital gains – Delivery of shares [S. 28(1)]**

Where delivery of Shares was taken after the period of one year after payment of purchase price and the share were sold immediately after taking delivery. Held, the fact that shares were sold within a short period after taking delivery does not indicate that transaction was in the nature of trade where the initial intention of assessee appeared to be of investment.

*Tushar Tanna & Ors. v. CIT (2006) Tax L. R. 110 (Bom.) (High Court)*

#### **S. 45 : Capital gains – Capital assets – Agricultural land [S. 2(14)]**

Where in revenue records property in question was shown as garden land and assessee produced documents to show that land was subjected to payment of land revenue and also produced award of LAO who had observed in award that land was agricultural land, Tribunal's finding that property sold by assessee was an agricultural land was a finding which had been rendered after considering totality of circumstances and, therefore, called for no interference. (A.Y. 1996-97)

*CIT v. Mingueal Chandra Pais (2005) 149 Taxman 131 / 200 CTR 152 / 282 ITR 618 (Bom.) (High Court)*

#### **S. 45 : Capital gains – Capital assets – Transfer – Specific performance – Conveyance**

Giving up the right to claim specific performance to get conveyance of immovable property in lieu of receiving consideration, would result in extinguishment of right in property. (A.Y. 1987-88)

*CIT v. Laxmidevi Ratani (Smt) (2005) 147 Taxman 642 / 198 CTR 336 / 296 ITR 363 (MP) (High Court)*

#### **S. 45 : Capital gains – Business income – Investment in shares [S. 28(i)]**

Shares in question were never treated by assessee as stock in trade and they were held for earning dividend only, profit earned on sale of shares was assessable as capital gains and not as business income.

*CIT v. N.S.S. Investments (P.) Ltd. (2005) 277 ITR 149 / 158 Taxman 13 (Mad.) (High Court)*

#### **S. 45 : Capital gains – Capital loss – Business loss – Loan**

It was an admitted position that land in question was held as a capital asset by assessee and not as a business asset, loss arising on account of transfer of such land to forest department in lieu of use of forest land for laying drainage for discharge of effluent, was a capital loss and not revenue or business loss. (A.Y. 1996-97)

*Shreyans Industries Ltd. v. Jt. CIT (2005) 277 ITR 443 / 149 Taxman 373 (P&H) (High Court)*

#### **S. 45 : Capital gains – Expenditure for transfer – Repayment of mortgage debt**

Repayment of mortgage debt created by assessee himself is not an expenditure incurred for effectively transferring property and is, therefore, not deductible while computing capital gain on sale of such asset. (A.Y. 1990-19)

*CIT v. Roshanbabu Mohammed Hussein Merchant (2005) 275 ITR 231 / 144 Taxman 720 / 195 CTR 106 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Expenditure for transfer – Removing encumbrance [S. 48(1)]**

If without removing any encumbrance, sale or transfer could not be effected, amount paid for removing that encumbrance will fall under clause (i) of section 48(1); where assets of a dissolved assessee-firm were sold subject to meeting of liability of loan due to bank, as per directions of High Court, liability met by assessee towards dues of bank was an expenditure incurred wholly and exclusively in connection with the transfer. (A.Y. 1992-93)

*Gopee Nath Paul & Sons v. Dy. CIT (2005) 278 ITR 240 / 147 Taxman 629 (Cal.)(High Court)*

#### **S. 45 : Capital gains – Shares – Computation – Option to substitute fair market value – Non resident – Amalgamation**

Assessee, a non resident company, had substantial shareholdings in three Indian Companies and as a result of amalgamation of said three companies with a new company on 1-7-1974, assessee was allotted certain shares in new company in lieu of shares held by it in three companies. In computing capital gain or loss on transfer of shares held by assessee- company in amalgamated company as on 1-7-1974, assessee was entitled to exercise option to substitute fair market value as on 1-7-1974. (A.Y. 1978-79)

*Madura Coats Ltd. v. CIT (2005) 279 ITR 493 / 148 Taxman 190 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Capital asset – Agricultural land – Rural area – Union territory of Delhi [S. 2(14)(iii)(a)]**

Provisions of section 2(14) (iii)(a) are applicable to the rural areas of Union Territory of Delhi. Thus the land in rural areas of Union Territory of Delhi constitutes capital asset and is exigible to capital gain tax on its transfer.

*CIT v. Ranjit Singh (2004) 265 ITR 680 / 136 Taxman 440 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Capital asset – Agricultural land – within municipality having a population of more than 10000 [S. 2(14)]**

Agricultural land in area within municipality having a population of more than 10000, is a capital asset, hence capital gain arising on transfer of agricultural lands ongoing to the assessee in village Nagal Dewat, Delhi was chargeable to tax.

*CIT v. Shri Chand (2004) 141 Taxman 57 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Deemed gift – Gift Tax Act – Double taxation**

Once a sum is taxed as deemed gift under Gift tax Act, that amount can not be taxed again under Income Tax Act as capital gains.

*Satya Narain Modani v. ITO (2004) 140 Taxman 655 / 190 CTR 507 / (2005) 272 ITR 138 (Raj.)(High Court)*

#### **S. 45 : Capital gains – Compensation in respect of shares – Nationalisation**

Where the assessee held shares of an insurance company prior to its nationalisation and received compensation in respect of shares of insurance company on its nationalisation, surplus over book value of shares was liable to be treated as capital gains.

*J.K. Traders Ltd. v. CIT (2004) 271 ITR 69 / (2005) 143 Taxman 222 (All.)(High Court)*

#### **S. 45 : Capital gains – Capital loss – Loss on revaluation – Shares**

Loss on revaluation of shares held by assessee, which it had no right to disinvest, could not be allowed as capital loss. (A.Y. 1983-84)

*Kerala Small Scale Industries Development Corpn. Ltd v. CIT (2004) 270 ITR 452 / 140 Taxman 509 / 190 CTR 281 (Ker.)(High Court)*

#### **S. 45 : Capital gains – Capital asset – Agricultural land – Union Territory [S. 2(14)]**

Agricultural land in village Haiderpur in rural area of Union Territory of Delhi, constitutes capital asset with in the meaning of section 2(14) (iii) (a), and is exigible to capital gains tax on its transfer.

*CIT v. Lakhee (2003) 130 Taxman 507 / 185 CTR 665 / 263 ITR 83 (Delhi)(High Court)*

#### **S. 45 : Capital gains – Short Term – Long Term – Share certificate [S. 42A]**

It is date of issue of share certificate which is relevant for deciding whether it is a short-term or long-term capital asset. (A.Y. 1990-91)

*S.N. Zubin George v. CIT (2003) 130 Taxman 778 / 183 CTR 179 / (2004) 265 ITR 683 (Ker.)(High Court)*

#### **S. 45 : Capital gains – Capital asset – Land – Site [S. 2(42A)]**

Profits arising from sale of site are required to be treated separately from profits arising from sale of building. (A.Y. 1979-80)

*CIT v. Citibank N.A. (2003) 261 ITR 570 / 182 CTR 635 / (2004) 134 Taxman 467 (Bom.)(High Court)*

#### **S. 45 : Capital gains – Short term – Long term – Capital asset – Land – Building [S. 2(42A), 54E, 80T]**

Where it was held that land had to be assessed as a long-term capital asset and building had to be assessed as a short-term capital asset for purpose of levy of capital gains tax. It was also held that income from the residential property was being

assessed as income from house property. It could not be a ground for denying the benefits available under section 80 T and 54E, of the Income Tax Act. (A.Y. 1985-86)  
*CIT v. Lakshmi B. Menon (Smt) (2003) 132 Taxman 197 / 264 ITR 76 / 184 CTR 52 (Ker.)(High Court)*

**S. 45 : Capital gains – Period of holding – Capital asset – Housing society – Flat – Shares**

**[S. 2(42A)]**

A member of a housing society becomes owner of flat on date on which he acquires shares in society and question as to whether flat is a long-term capital asset has to be decided by taking that date into consideration rather than date of possession of flat. (A.Y. 1983-84)

*CIT v. Anilaben Upendra Shah (2003) 262 ITR 657 / 184 CTR 129 / 134 Taxman 522 (Guj.)(High Court)*

**S. 45 : Capital gains – Transfer – Conversion of firm in to company – Part IX of Companies Act [S. 2(47), 45(4)]**

In case of a partnership firm being treated as company under provisions of Part IX of Companies Act, there is no transfer and neither section 45(1) nor section 45(4) is attracted. Section 45(1) and section 45(4) are mutually exclusive. (A.Y. 1996-97)

*CIT v. Texspin Engg. & Mfg. Works (2003) 129 Taxman 1 / 263 ITR 345 / 180 CTR 497 (Bom.)(High Court)*

**S. 45 : Capital gains – Transfer – Development agreement – Power of attorney [S. 2(47)]**

In cases of development agreements one cannot go by substantial performance of contract; in such cases year of chargeability is when contract is executed. On the facts as per agreement, when a limited power of attorney was given to deal with the property then that date would be the relevant date to decide the date of transfer under section 2(47)(v) of the Income Tax Act. If on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of the agreement for sale, a development agreement is contemplated, then Assessing Officer is entitled to take date of the contract as date of transfer in view of section 2(47)(v). (A.Y. 1996-97)

*Chaturbhuj Dwarkadas Kapadia v. CIT (2003) 260 ITR 491 / 180 Taxman 107 (Bom.)(High Court)*

**S. 45 : Capital gains – Transfer – Sham [S. 2(47)]**

Where assessee contended that since registered deed executed between parties concerning sale of certain property was not acted upon, there was no sale, if it was found that sale was sham, no capital gains would result. (A.Y. 1973-74)

*Maharana Bhagwat Singhji (Ded.) v. CIT (2003) 259 ITR 381 / 183 CTR 157 / (2004) 135 Taxman 71 (Raj.)(High Court)*

**S. 45 : Capital gains – Transfer – Power of attorney – Possession [S. 2(47)]**



Where there was nothing in agreement as well as in general power of attorney to hold that possession of land was delivered to purchaser, matter was to be sent back to Tribunal for fresh adjudication with regard to factum of delivery of possession or enjoyment of property by purchaser by any other means. (A.Y. 1991-92)

*Avtar Singh v. ITO (2003) 132 Taxman 113 / (2004) 270 ITR 92 (MP)(High Court)*

#### **S. 45 : Capital gains – Transfer – License [S. 2(47)]**

Transfer of license obtained to start a business is a transfer of capital asset but its cost of acquisition being not computable, such transfer would not give rise to capital gains. (A.Y. 1986-87)

*CIT v. General Industrial Society Ltd. (2003) 129 Taxman 628 / 262 ITR 1 / 183 CTR 67 (Cal.)(High Court)*

#### **S. 45 : Capital gains – Transfer of business as going concern [S. 2(47)]**

In case of transfer of business as a going concern, the profit arising out of such transaction was not exigible to capital gains tax could not be accepted. (A.Y. 1991-92)

*Kuttukaran Machine Tools v. CIT (2003) 131 Taxman 690 / 264 ITR 305 / 185 CTR 104 (Ker.)(High Court)*

#### **S. 45 : Capital gains – Transfer – Land acquisition – Issuance of notice [S. 2(47)]**

Where acquisition of land is made under Land Acquisition Act under urgency clause, capital gain arising there from is to be assessed in year in which vesting is completed after issuance of notice. (A.Y. 1986-87)

*Alexander George v. CIT (2003) 128 Taxman 851 / 262 ITR 367 / 182 CTR 277 (Ker.)(High Court)*

#### **S. 45 : Capital gains – Disclosed under Voluntary Disclosure Scheme – Business profits**

Income from transactions of sale of jewellery, precious stones, etc, declared, under Voluntary Disclosure Scheme was liable to be assessed as capital gains and not as business profits.

*CIT v. Manna Lai Nirmal Kumar Surana (2003) 132 Taxman 892 / 264 ITR 116 (Raj.)(High Court)*

#### **S. 45 : Capital gains – S. 53A of Transfer of property Act – Income from other sources**

Where there was transfer of property in assessee's favour as per section 53A of Transfer of Property Act, further transfer of that property by assessee would give rise to capital gains and not income from other sources.

*Assam Vegetables & Oil Products Ltd. v. CIT (2003) 264 ITR 47 / 134 Taxman 163 / 185 CTR 647 (Gau.)(High Court)*

#### **S. 45 : Capital gains – Business income – Investment in shares [S. 28(i)]**

Department has treated the shares as investment in earlier years as investment and assessed the income as capital gains. Assessing officer has not brought any fresh material, hence the income was assessable as capital gains. The court followed the ratio of judgment in *CIT v. H. Holock Larsen (1986) 160 ITR 67 / 58 CTR 93 / 26 Taxman 305 (SC)*. (A.Y. 1957-58-59) (A.Y. 1993-94)

*CIT v. Girish Mohan Ganeriwala (2003) 260 ITR 417 / 135 Taxman 233 (P&H)(High Court)*

#### **S. 45 : Capital gains – Transfer of capital asset to firm – Partner [S. 2(47)]**

When there is a transfer of the assets from the assessee partner to the partnership firm, in the light of ratio of the Apex court in the case of *Sunil Sidhrthbhai v. CIT (1985) 156 ITR 509 (SC)*, it is clear the same is without consideration and in such circumstances, no tax on capital gains can be levied as the computation machinery fails. (A.Y. 1982-83)

*CIT v. Subodhchandra S. Patel (2003) 184 CTR 393 / (2004) 265 ITR 445 / 138 Taxman 185 (Guj.)(High Court)*

#### **S. 45 : Capital gains – Year in which assessable – No books of account maintained [S. 2(47)]**

In a case where assessee had not maintained books of account and transfer took place on 4-1-1976, assessee's claim that capital gain was assessable in assessment year 1976-77 was justified. (A.Y. 1977-78)

*CIT v. Nirmal Kumar Soorana (2003) 131 Taxman 260 / 263 ITR 322 / 185 CTR 552 (Raj.)(High Court)*

#### **S. 45 : Capital gains – Capital loss – Brick kiln**

A brick kiln is a capital asset and the loss on the sale of it is a capital loss. (A.Y. 1975-76)

*Nagrath Chemicals Works (P.) Ltd. v. CIT (2003) 185 CTR 15 / (2004) 265 ITR 401 / 137 Taxman 382 (All.)(High Court)*

#### **S. 45 : Capital gains – Capital loss – Retirement of partner**

Where assessee received certain amount from firm on his retirement as partner, his claim for capital loss on ground that he had suffered losses in firm for several years prior to retirement, was not allowable. (A.Y. 1982-83)

*Siddharth Media Holdings Pvt. Ltd. v. Dy. CIT (2003) 260 ITR 286 / 183 CTR 450 / (2004) 135 Taxman 163 (Mad.)(High Court)*

#### **S. 45 : Capital gains – Capital loss – Right in debentures held as stock-in-trade**

Where rights debentures were issued in respect of shares held as stock-in-trade and valued at cost, loss on sale of rights was deductible as capital loss. (A.Y. 1990-91)

*CIT v. Motichand Construction Co. (P.) Ltd. (2003) 261 ITR 70 / 129 Taxman 985 / 182 CTR 149 (Bom.)(High Court)*

**S. 45 : Capital gains – Business income – Shares – High volume & short period [S. 28(i)]**

The assessee offered income by way of Long Term Capital Gain, Short Term Capital Gain, speculative profit and profit from future trading. In such a case, where shares are held for several years and so assessee had acted as investor and not trader, the said gain shall be assessable as long term capital gain. Where there is no intra-day trading, shares are held for period of 2 to 5 months and there are no borrowings, the same shall be assessed as Long Term Capital Gain. (A.Y. 2006-07)

*ACIT v. Naishadh V. Vachharajani ITA No. 1042 of 2011 dated 22-9-2011 (Mum.)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

**S. 45 : Capital gains – Business income – Shares – Borrowing**

The fact that the assessee borrowed for the purpose of buying shares is not conclusive that the assessee intended to do business in shares and not merely invest in them if the interest is capitalized as cost of the shares & not claimed as a revenue expenditure (Shanmugam 120 ITD 469 (Pune) followed). The fact of borrowing cannot be held against the assessee if there are other predominating factors in favour. Also as the assessee has own funds, it can be presumed that the shares were bought out of those funds. (A.Ys. 2005-06)

*Mahendra C. Shah v. Addl. CIT (2011) 58 DTR 242 / 140 TTJ 16 (Mum.)(Trib.)*

**S. 45 : Capital gains – Business income – Shares – Volume – Number of transactions**

Where assessee is a HUF and offers income from sale of shares as short term capital gain, the fact that the assessee has transacted in 158 shares should not be the sole criterion to come to the conclusion that assessee is a trader in shares. Following circumstances to be considered while assessing such income as capital gain. These are whether (a) the assessee was holding the shares in its books as an investor, (b) the assessee have any office or administration set up, (c) the shares were acquired out of own funds and family funds and not through borrowing, (d) there was not a single instance where the assessee had squared-up transactions on the same day without taking delivery of the shares, (e) In the previous and subsequent assessment years, the Assessing Officer had vide scrutiny assessments treated the assessee as an investor. (A.Y. 2006-07)

*Nagindas P. Sheth (HUF) v. ACIT ITA No. 961/Mum/2010 dated 5-4-2011 (Mum.)(Trib.)*

Source: [www.itatonline.org](http://www.itatonline.org)

**S. 45 : Capital gains – Business income – Shares – Investor – Trader – Large volume in shares not deciding factor to hold assessee trader**

The income of an assessee who has invested in shares to be assessed as capital gain if the following conditions are satisfied. If (a) The assessee was a good timer of purchase and sale of shares thereby substantially increasing his gains in the stock market, (b) The large turnover was because of bulk purchases and sales in a scrip. There were very few transactions of purchase and sale, as the assessee was purchasing in block of a particular share in large volume. Accordingly, large volume cannot be a deciding factor to hold as a trader, (c) the assessee was not a broker or sub-broker and did not have any office establishment, (d) The assessee did not do any speculative activity nor indulge in any sales without delivery, (e) The shares were shown as capital assets in the books of account, (f) The assessee had not pledged any shares with any financial institutions, nor borrowed any funds. (A.Ys. 2005-06 to 2007-08)

*Ramesh Babu Rao v. ACIT ITA No. 3719/Mum/2009 dated 13-4-2011 (Mum.)(Trib.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

#### **S. 45 : Capital gains – Business income – Shares – Share broker – Separate accounts [S. 45]**

Assessee is a broker as well as investor. It has maintained the investment portfolio separately income of which was liable to be taxed as capital gains, as intention in respect of this was to hold the investment as investment only and shown as such in the books of accounts. Income thereon was shown and treated as capital gains in successive assessments. Income to be assessed as capital gains. (A.Y. 2005-06)

*ACIT v. Bulls & Bears Portfolios Ltd. (2011) 137 TTJ 741 / 53 DTR 97 / 48 SOT 587 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Business income – Shares – Rule of consistency applied [S. 45]**

Though in case of transaction of large volumes, magnitude, frequency, continuity, regularity, the ratio between purchase & sale of shares are treated as income from business, but in certain circumstances, income from such transactions is treated as STCG as a reason of Rule of consistency propounded by Bombay High Court in Gopal Purohit 228 CTR 582 (Bom), which is squarely applicable. (A. Y. 2006-07)

*Shantilal M. Jain v. ACIT (2011) 132 ITD 466 / 64 DTR 425 / (2012) 144 TTJ 718 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Business income – Shares – PMS transactions – Not business profits**

Transactions carried out via PMS are in nature of transactions meant for Wealth maximization & not encashing profits on appreciation in value of shares. In case where assessee is engaged in systematic activity of holding of portfolio through PMS manager, it cannot be said that main object of holding the portfolio is to make profit by sale of shares. The high number of transactions are misleading as these are computer split transactions and not independent transactions. Hence, gains arising

out of PMS transaction has to be assessed as Capital Gain and not business income. (A.Y. 2006-07)

*ITO v. Radha Birju Patel (2011) 46 SOT 23 (URO)(Mum.)(Trib.)*

**S. 45 : Capital gains – Business income – Shares – PMS transaction – Not business profits [S. 45]**

- (i) Given the definitions of the term “business” and “capital asset” in section 2(13) & 2(14), shares, if held for more than 12 months, will be a long-term capital asset, inspite of continued and systematic dealings;
- (ii) On facts, as the assessee had engaged a portfolio manager to look after its’ investments and all decisions to buy and sell were taken by the portfolio manager and not by the assessee, the assessee cannot be called a “dealer”;
- (iii) The object of the PMS was to maximize the value of the portfolio. It was “wealth maximization” and not “profit maximization”;
- (iv) In the balance sheet, the shares were valued at cost and not at lower of cost or market value. (A. Y. 2004-05)

*ARA Trading & Investment Pvt. Ltd. v. Dy. CIT (2011) 47 SOT 172 (Pune)(Trib.)*

**S. 45 : Capital gains – Agricultural land – Beyond municipal limits [S. 2(14)(iii)]**

Sale of agricultural land situated beyond 8 Km from municipal limits of the village having a population of less than 10,000 persons is not liable to capital gains tax.

*ACIT v. Ashok Kumar Agarwal (2011) Tax World Feb. P. No. 112 (Jp.)(Trib.)*

**S. 45 : Capital gains – Conversion of units in bonds – Transfer [S. 2(47)]**

Assessee claimed capital loss on account of conversion of units of UTI into tax free bonds. The Tribunal held that the instant case was conversion of one asset into another and there was no transfer of asset within the meaning of section 2(47) hence the Assessing officer rightly rejected the claim. (A. Y. 2004-05).

*ACIT v. ABC Bearings Ltd. (2011) 44 SOT 338 (Mum.)(Trib.)*

**S. 45 : Capital gains – Consent by landowner – Transfer of development right (TDR) – Compensation paid to members [S. 2(24)]**

Mere grant of consent by the land owner to the developer to construct by consuming TDR purchased by the developer from the third party does not amount to transfer of land or any rights therein. Amount of compensation paid by the developer to the members of the society cannot be taxed in the hands of the society. (A. Y. 1997-98)

*Raj Ratan Palace Co-Operative Hsg. Ltd. v. (2011) 46 SOT 17 (URO) / (2011) 43A-BCAJ–April 33 (Mum.)(Trib.)*

**S. 45 : Capital gains – Transfer of development Right (TDR) – No cost of acquisition [S. 48]**

Transferable Development Rights (TDR) granted by the Development Control Regulations for Greater Mumbai, 1991, qualifying for equivalent Floor Space Index

(FSI) have no cost of acquisition and so sale thereof does not give rise to taxable capital gains (*Jethalal D. Mehta v Dy. CIT 2 SOT 422 (Mum) followed*). (A. Y. 1997-98).

*ITO v. Hemandas J. Pariyani ITA No. 2508/Mum/2010 dated 29-4-2011 (Mum.)(Trib.)*  
Source: [www.itatonline.org](http://www.itatonline.org)

#### **S. 45 : Capital gains – Shares – License – No cost of acquisition**

In the absence of any cost of acquisition for acquiring the license, consideration received for transferring such license is not liable to capital gain. (A. Y. 1996-97)

*Shree Changdeo Sugar Mills Ltd. v. Jt. CIT (2011) 44 SOT 479 / 139 TTJ 640 / 58 DTR 340 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Shares – PMS fee – NAV based – Deductible**

- (i) In computing capital gains under section 48, payments are deductible in two ways, one by taking full value of consideration net of such payments and the other by deducting the same as "expenditure incurred wholly and exclusively in connection with the transfer". The expression "full value of consideration" contemplates additions and deductions from the apparent value. It means the "real and effective consideration", which can be arrived at only after allowing the deductible expenditure (*CIT v Shakuntala Kantilal 190 ITR 56 (Bom) followed*);
- (ii) The PMS fee, on profit sharing basis, was for the twin purposes of acquisition and sale of the securities. The fact that bifurcation between the two is not possible is not relevant. The department's argument that fee should be share-specific is absurd because fees for shares transactions is never share specific but is volume based;
- (iii) Accounting Standard 13 (Accounting for Investments) issued by ICAI provides that brokerage, fees and duties have to added to the cost of investments. The assessee's method of accounting is to proportionately load the PMS fees on the opening portfolio and investments made during the year which means that no deduction is claimed for the fees on the unsold investments;
- (iv) *Devendra Kothari 50 DTR 369 (Mum)* cannot be followed because (i) it unfortunately did not refer to the 'read down' interpretation of s. 48 as laid down in *Shakuntala Kantilal* and (ii) on facts, the claim there was on the entire turnover on global basis and not restricted to only investments. (A.Ys. 2002-03, 2004-05 to 2006-07)

*KRA Holding & Trading Pvt. Ltd. v. Dy. CIT (2011) 46 SOT 19 (Pune)(Trib.)*

#### **S. 45 : Capital gains – Transfer – Assignment of interest by retiring partner to continuing partner [S. 2(47), 47(ii)]**

The continuing partners agreed to pay to the retiring partner for assigning or release of interest by retiring partner in favour of continuing partners. The transaction would amount to a transfer within the meaning of section 2(47). If the retiring partner is paid something over and above sum standing to credit of his capital account, there would be a capital gain chargeable to tax. In view of amendment carried out by



Finance Act, 1987 by omitting section 47(ii), profits or gains arising from transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as firm's income in previous year in which transfer took place and for purposes of computation of capital gains, fair market value of assets would be consideration received or accruing as a result of transfer. (A. Y. 2007-08).

*Sudhakar M. Shetty v. ACIT (2011) 130 ITD 197 / 139 TTJ 687 / 58 DTR 289 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Short term – Market value**

Assessee acquired 10 percent of share holding in company at par value in exchange for shares in two companies also at par. Mauritius Company acquired 45 percent of share holdings in same company at premium. There was no proof that transactions were linked in same chain. There was no proof that market value of shares at time of purchase by assessee was higher than price paid by him. Additions made by the Assessing Officer by taking price paid by Mauritius company as market value was deleted. (A. Y. 2004-05).

*Athappan Nandakumar v. ITO (2011) 9 ITR 436 (Chennai)(Trib.)*

#### **S. 45 : Capital gains – Transfer – Part performance of contract**

Assessee company purchased a piece of agricultural land on 20-11-1999. It entered into an agreement for sale of said land with "K" on 5-9-2002 and executed a power of attorney in favour of "M" a representative of "K" authorising him to cultivate said land and to sell agricultural produce grown on it. The said power of attorney was registered before sub-registrar on 21-11-2002. Sale consideration had been paid to assessee through cheque prior to 5-9-2002. Assessee claimed that transfer of land got completed on 21-11-2002 and therefore, capital gains arising on sale of land was to be assessed as long term capital gains. However, the Assessing Officer took date of execution of power of attorney and agreement to sell. i.e. 5-9-2002, to be date of transfer and assessed capital gains as short term capital gains. The Tribunal held that, once a document is registered, it is effective from date when it was executed. Therefore, power of attorney, even though registered on 21-11-2002, would be effective from 5-9-2002 and as possession of land had been given on 5-9-2002 when the power of attorney was executed, all ingredients of section 53A of Transfer of Property Act were satisfied in instant case on 5-9-2002 and accordingly transfer of land had duly taken place on 5-9-2002. (A. Y. 2003-04).

*V. Ram Chandra Construction (P) Ltd. v. ACIT (2011) 131 ITD 71 / 59 DTR 249 / 140 TTJ 521 (TM)(Agra)(Trib.)*

#### **S. 45 : Capital gains – Business income – Shares – Held for 30 days & less [S. 28(i)]**

To decide whether a gain is capital gain or business income, holding period is one of the criteria. The principles that have to be applied are (a) the intention of the assessee at the time of purchase, (b) whether borrowed funds were used, (c) the frequency of purchase and sales, (d) the treatment in the books etc. No single criteria

is conclusive and an overall view has to be taken (Associated Industrial Development 82 ITR 586 (SC) & Holck Larsen 160 ITR 67 (SC) followed). (A. Ys. 2003-04, 2004-05 & 2006-07)

*Hitesh Satishcandra Doshi v. Jt. CIT (2011) 58 DTR 258 / 140 TTJ 32 / 46 SOT 336 (Mum.)(Trib.)*

**S. 45 : Capital gains – Loss on pro-rata reduction of share capital is “Notional” – In absence of consideration, capital gains provisions do not apply**

- (i) When the face value of each share was reduced from ₹ 10 to ₹ 5 and then two shares of ₹ 5 each were consolidated into one share of ₹ 10 each, the earlier shares were replaced or substituted by new shares, and there was no “transfer” but it was merely a case of substitution of one kind of share with another kind of share.
- (ii) Assuming that a reduction of shares in the manner done by the assessee amounts to a “transfer”, section 45 is not attracted because there is no “consideration” received by the assessee for the transfer.
- (iii) Further, by the reduction, the assessee’s rights had not been extinguished because it continued to hold the same percentage in the holding of Times Guarantee as it did before the reduction.

Minority view is that,

- (i) A reduction of capital by cancellation of shares results in a “transfer”;
- (ii) The consideration received by the assessee was Nil. It was not a case where the consideration was incapable of ascertainment;
- (iii) On the point that there is no “loss”, the argument that as with the reduction of capital, there is a corresponding increase in the net worth per share and the assessee’s interest in TGL remains unaffected on an overall basis is not acceptable because after the reduction, the assessee is left with lesser number of shares. The fact that the book value has increased has no effect. An increase or decrease in the market value of shares is of no consequence if the shares are held as investment;
- (iv) the apprehension that the assessee would derive a double advantage by claiming the loss now and the entire cost at the time of sale is unfounded because (a) the assessee’s books shows the investments at the reduced amount and (b) under section 55(2)(iv)(v), the cost of acquisition of the remaining consolidated shares will be the reduced amount. (A. Y. 2002-03)

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

**S. 45 : Capital gains – PMS fees – Deductible – Reference to Special Bench**

Whether an earlier order should be followed or a reference to the Special Bench be made depends on whether the Bench is satisfied or not about the correctness of the earlier order and not on the view point of the aggrieved party. It is only when a subsequent Bench finds itself unable to endorse the earlier view that it may make

reference for the constitution of the Special Bench. The aggrieved party cannot compel the later Bench to either take a contrary view or make a reference for the constitution of the Special Bench. (A.Y. 2006-07)

*Homi K. Bhabha v. ITO ITA No. 3287/Mum/2007 dated 10-8-2011 (Mum.)(Trib.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

**S. 45 : Capital gains – Amount paid to bank by purchaser on behalf of assessee – Application of income**

Where the assessee had transferred plant and machinery, stores, spares, licenses, etc. alongwith certain specified liabilities under an agreement for a consideration and the purchaser had undertaken to pay a sum due by the assessee to a bank, such payment to the bank is only application of income and not charge on income and hence not deductible from total consideration. (A. Y. 1996-97)

*Shree Changdeo Sugar Mills Ltd. v. Jt. CIT (2011) 58 DTR 340 / 139 TTJ 646 / 44 SOT 479 (Mum.)(Trib.)*

**S. 45 : Capital gains – Shares – Held for less than 30 days business income – More than 30 days capital gains [S. 28(i)]**

The Tribunal held that shares held more than 30 days then profit and loss arising from sale of such shares was to be considered as short term capital gains. Shares held less than 30 days were to be taxed as business income. Shares held more than a year were to be assessed as long term capital gains. (A.Ys. 2003-04 to 2005-06).

*ACIT v. Kavita Devi Agarwal (2011) 48 SOT 191 (Jp.)(Trib.)*

**S. 45 : Capital gains – Business income – Investment in shares [S. 28(i)]**

During relevant assessment year assessee company sold shares of company "ICL" which were held by it since 1996 and had been shown in its balance sheets as investment. It treated income there from as long term capital gain and claimed exemption under section 10(38). The Assessing Officer treated the same as business income and denied the exemption. Commissioner (Appeals) up held the view of assessee. The Tribunal upheld the view of Commissioner (Appeals). (A. Y. 2006-07).

*ACIT v. Stargate Investments (P) Ltd. (2011) 48 SOT 379 / 10 ITR 211 (Chennai)(Trib.)*

**S. 45 : Capital gains – Investment in land [S. 28(i)]**

Object of assessee company were to manufacture, produce, process, purchase, sell or deal in ice-cream etc. It made investment in land and same was shown as fixed assets. Assessee sold lands when it got good price, income from same was shown as capital gain. Assessing Officer treated the said income as business income being adventure in nature of trade. The Tribunal held that there was only transfer of capital assets and not any income from adventure in nature of trade, claim of assessee was justified. (A. Y. 2007-08).

*High Range Foods (P) Ltd. v. Dy. CIT (2011) 48 SOT 453 (Cochin)(Trib.)*

#### **S. 45 : Capital gains – Transfer – Development agreement [S. 2(47)(v)]**

On the facts of the case the assessee neither received full consideration nor handed over possession of the property, capital gains cannot be assessed in the year of execution of development agreement. (A. Y. 2004-05).

*B. V. Kodre (HUF) v. ITO, ITA No. 834/PN/2008 dated 4-10-2011.174 (2011) 43-BCAJ (November-46) Bench – “B”(Pune)(Trib.)*

#### **S. 45 : Capital gains – Conversion of investment in to stock-in-trade – Development agreement**

Assessee converted its factory land in to stock-in-trade with an intention to develop and accordingly permission to develop land was obtained. Immediately, thereafter, the assessee entered in to a development agreement with a third party with no interest in the project except consideration in the form of constructed flats. The Tribunal held it as an adventure in the nature of trade and therefore, entitled to the benefit of the provisions of section 45(2). (A. Y. 2006-07)

*Vidyvihar Containers Ltd. v. Dy. CIT (2011) 133 ITD 363 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Shares – Capital loss – Investment – Written Off**

Loss arising from write off of shares held as capital asset is capital loss and not revenue loss. (A.Ys. 1995-96 to 1997-98 and 2000-01 to 2002-03)

*Tourism Finance Corp. of India v. Jt. CIT (2010) 128 TTJ 43 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Shares [S. 28(i)]**

Assessee was engaged in trading of shares as well as Investment in shares. Profit on sale of investment is assessable as capital gains and not as business income. (A.Y. 2005-06)

*Paresh D. Shah v. Jt. CIT (2010) 2 ITR 311 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Solitary transaction [S. 28(i)]**

Solitary transaction of purchase and sale of land made by the assessee company after retaining it for about ten years without undertaking any steps towards development of property or treating it as stock-in-trade cannot be regarded as business activity and, therefore, the gain arising on the sale of land is assessable as Capital gains.

*ITO v. Baguio Investment (P) Ltd. (2010) 33 DTR 457 / 127 TTJ 423 (Pune)(Trib.)*

#### **S. 45 : Capital gains – Stock option – Period of holding [S. 2(42A), 2(42B), 17(2), 48, 54EA, 112]**

It is the date of grant of the stock option in favour of the assessee that is material for determining the period of holding the asset in question and not the date on which the option was exercised and stock options were converted into shares. Capital gains arising out of sale of shares acquired through ESOPs have to be assessed as long term capital gains with consequential benefit of indexation and exemption under section 54. (A.Ys. 1998-99 to 2003-04, 2005-06)

*ACIT v. Dhurjati Gupta (Dr.) (2010) 33 DTR 287 / 127 TTJ 356 (Hyd.)(Trib.)*

#### **S. 45 : Capital gains – Speculation business – Sale of shares [S. 73]**

Assessee company earning income from the sale of shares. Assessing Officer holding that income earned was from speculation, and on the fact it was held that income earned was in the nature of capital gains.

*Axis Capital Markets (India) Ltd. v. ITO ITA No. 4098/Mum./2007 BCAJ January (2010) Vol. 41-B P. 33 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Society – Permission to construct additional floors [S. 48]**

Amount received by the society from the builder for permitting him to construct additional floors on existing building of the society by utilizing TDR FSI belonging to him is not chargeable to tax since there is no cost of acquisition.

*Om Shanti Co-op. Hsg. Society Ltd. v. ITO ITA No. 2550/Mum./2008. BCAJ January (2010) Vol. 41-B (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Trade mark [S. 2(42A), 47(iv), 48, 49(1)(iii)(e)]**

Transfer of trademarks being transfer of capital asset, gains arising therefrom chargeable to Capital Gains Tax. Cost of acquisition being indeterminable long term capital gains is not liable to any tax. Matter remanded to decide the period of holding and to tax gains, if held to be short term gains. (A.Y. 1999-2000)

*Trent Brands Ltd. v. ITO (2010) 127 TTJ 65 (UO) / (2009) 32 SOT 34 (Delhi)(Trib.)*  
*Editorial:- Direction given by the Tribunal to the Assessing Officer to assess the capital gains on transfer of trade mark has been rectified under section 254(2) and direction is expunged. Trent Brands Ltd. v. ITO (2010) 133 TTJ 70 (UO)(Delhi)*

#### **S. 45 : Capital gains – Capital asset – Lease from Municipal Corporation [S. 2(14), (47)]**

Assessee's right as lessee is capital asset. Receipt of one time fee for foregoing right to use property assessable as capital gains.

*ACIT v. United Motors (I) Ltd. (2010) 1 ITR 578 / 34 DTR 399 / 128 TTJ 290 / 32 SOT 399 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Development agreement – 53A Transfer of Property Act [S. 2(47)(v), 54]**

When possession was handed over and total consideration was also agreed upon by parties and vendee was allowed to enjoy and entertain property for purpose for which it was taken over, then the transaction had fulfilled conditions required under section 53A, of Transfer of Property Act, 1982, and therefore, it was covered under definition of 'Transfer' under section 2(47)(v). (A.Y. 1995-96)

*R. Kalanidhi v. ITO (2010) 122 ITD 388 / (2009) 122 TTJ 405 / 21 DTR 80 (Chennai)(Trib.)*

**S. 45 : Capital gains – Transfer of land to developer – Accrual – Exemption [S. 54EC]**

Transferring development right to developer in Asst. Year 2000-01 would give rise to capital gains and sale of flat in the Asst. Year 2005-06 will be long term capital gain which is eligible for exemption under section 54EC. (A.Y. 2005-06)

*ITO v. Vikash Behal (2010) 36 DTR 385 / 131 TTJ 229 (Kol.)(Trib.)*

**S. 45 : Capital gains – Indexed cost of inherited property [S. 48, 49(1)(iii)(a)]**

Assessee having inherited the property purchased by the previous owner, in the year 1974, cost of acquisition for the purpose of computing capital gains on sale of such property had to be computed by applying cost of inflation index of financial year 1981-82 and not financial year 1989-90 i.e. the year of inheritance by the assessee. (A.Y. 2005-06)

*M. Siva Parvavathi & Ors. v. ITO (2010) 37 DTR 124 / 129 TTJ 463 / 7 ITR 468 (Visakha)(Trib.)*

**S. 45 : Capital gains – Sale of shares [S. 28(i)]**

In respect of gain on sale of shares held for more than 365 days, when in the past the department has accepted the sale of shares held for more than a year as investment and profits thereon has been assessed under the head "capital gains" the gain should be assessed as long term capital gains. In respect of other shares with frequent transactions where shares are held for more than a month they should be treated as investment and assessable as short term capital gains. Where the shares are held less than a month the same may be treated as profit from business. (A.Ys. 2005-06, 2006-07)

*Sugam Chand C. Shah v. ACIT (2010) 37 DTR 345 / (2011) 139 TTJ 610 (Ahd.)(Trib.)*

**S. 45 : Capital gains – Sale of shares [S. 28(i)]**

Principles to be applied while deciding whether sale of shares is capital gain or business income.

As per the books of account, the assessee has treated the entire investment in shares as an "investment" and not as "stock-in-trade";

The assessee is not a share broker nor he is having a registration with any Stock Exchange;

Almost 83% of the capital gain is from shares that were held for a long period of time;

There were no derivative transactions by the assessee;

There were no transactions without delivery;

The assessee used his own surplus funds for investing in shares and not borrowed any money;

In the preceding years, the assessee consistently declared the gain/profit on the sale of the shares as 'Capital Gains' and the same has been accepted by the A.O. Though



the rule of res judicata is not applicable to income-tax proceedings, in the absence of change in facts, there should be consistency in the approach of the Revenue;  
The assessee received substantial dividend on the investments (A.Y. 2004-05)  
*Management Structure & Systems v. ITO (2010) 41 DTR 426 (Mum.)(Trib.)*  
Also see : *Sadhana Nabera (Smt) v. ACIT (2010) 41 DTR 393 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Slump sale – Going concern [S. 50]**

Sale of industrial unit by the assessee firm as a “going concern”, in its entirety on “as is where is” basis for a lump sum sale consideration which was arrived at by profit capitalization method and is not allocable to individual assets was a slump sale of the business and not a case of itemized sale. (A.Y. 1997-98)

*J. B. Electronics v. Jt. CIT (2010) 38 DTR 393 / 40 SOT 176 / 130 TTJ 249 (TM)(Pune)(Trib.)*

#### **S. 45 : Capital gains – Volume of transactions [S. 28(i)]**

Where the assessee has investment in shares under the head “investment” in the balance sheet for many years and the same is accepted by the Assessing Officer in the past, there is no justification for treating the activity of the assessee of purchase and sale of shares as “business” mainly on the reason of the volume of transactions, particularly when no money has been borrowed for making investment in shares. (A.Y. 2005-06)

*Bharat Kunverji Kenia v Addl. CIT (2010) 130 TTJ 86 / (2011) 8 ITR 325 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Shares – Full Value of consideration – FMV**

Transfer of shares being at face value and it is also not the case of the department that over and above that assessee has received any amount, no capital gains chargeable to tax accrued to the assessee. (A.Y. 2004-05)

*Reliance Communications Infrastructure Ltd. v. CIT (2010) 40 DTR 186 / (2009) 34 SOT 245 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Holding period – Conversion – Stock-in-trade – Capital asset**

When stock in trade is converted into capital asset, the holding period of capital asset for the purpose of computing capital gains is to be reckoned from the date of conversion of stock in trade into capital asset because prior to that date, the asset was not held as capital assets; after conversion of stock-in-trade of shares into capital assets, shares were not held for 12 months before sale and therefore exemption under section 10(38) was not allowable. (A.Y. 2005-06)

*Lohia Metals (P) Ltd. v. ACIT (2010) 40 DTR 246 / 131 TTJ 472 (Chennai)(Trib.)*

#### **S. 45 : Capital gains – Transfer – Part performance [S. 2(47)(v)]**

Where buyer could not acquire any right of ownership, use or possession in corpus of property or income arising there from due to unauthorized occupants provisions of section 2(47)(v), would not be attracted. (A.Y. 1996-97)

*ITO v. Satyawati Devi Verma (2010) 124 ITD 467 / (2009) 123 TTJ 97 / (2008) 16 DTR 408 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Ownership – Not mandatory**

For charging income under the head 'Capital gains' it is not necessary for an assessee to be owner of the asset transferred.

*Asian PPG Inds. Ltd. v. Dy. CIT, ITAT 'A' Bench, Mumbai, ITA No. 648/M/09, dated 9-2-2010, BCAJ P. 26, Vol. 42-A, Part 1, April, 2010 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Shares – Genuineness of share transactions – Onus on Assessing Officer**

Assessee having submitted copies of contract notes, bills, share certificates along with details of demand draft issued from the account of the broker to substantiate the sale of shares made by her, and the Assessing Officer having failed to establish that the assessee had introduced her own unaccounted money in the shape of sale proceeds of shares, the transaction of sale of shares cannot be treated as non genuine for the reason that the broker made contradictory statements and the assessee was not allowed cross examination and therefore the sale consideration declared by the assessee is assessable as capital gain and not as income from undisclosed sources. (A.Y. 2001-02)

*ITO v. Bibi Rani Bansal (Smt.) (2010) 43 DTR 279 / 133 TTJ 394 / 44 SOT 500 (TM)(Agra)(Trib.)*

#### **S. 45 : Capital gains – Shares – Capital loss – Long term and short term – Sale of shares – Consideration as ` 1 per share as per memorandum of understanding**

Amount introduced by financial institution in terms of memorandum of understanding to discharge liability of company, amount received by promoter of company as repayment of loan and not part of sale consideration on equity shares. Assessing officer directed to accept the long term and short term capital loss as computed by the assessee.

*Voltas Ltd. v. ACIT (2010) 4 ITR 721 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Transfer of development right (TDR) – FSI**

The gain arising on transfer of FSI / TDR is chargeable to tax under the head "capital gain", however as there is no cost of acquisition of the asset transferred; there will be no liability to capital gains.

*ITO v. Shri Ram Kumar Malhotra (2010) TIOL 512 ITAT (2010) (October) BCAJ. P. 22 (Mum.)(Trib.)*

**S. 45 : Capital gains – Agreement to sell – Termination [S. 2(47), Transfer of Property Act S. 53A]**

When the title of the property always remained with the assessee so also possession, there is no basis for the finding of the Assessing Officer that there was any part performance of the contract within the meaning of section 53A of the transfer of property Act, 1982 and thereby a transfer of asset within the meaning of section 2(47) especially when the agreement to sell had never culminated in to a contract of sale and the sale deed was never executed as proposed transfer of capital asset was aborted. (A.Y. 1999-2000)

*ACIT v. Hotel Harbour View (2010) 44 DTR 41 / 133 TTJ 454 / 2 ITR 178 (Cochin)(Trib.)*

**S. 45 : Capital gains – Cost of acquisition – Tenancy right [S. 55(2)]**

Assessee was in lawful possession of flat till issue of notice of eviction and statutory tenant after termination of tenancy right. Cost of acquisition of tenancy to be taken at nil. (A.Y. 1998-99)

*Praful Chandra R. Shah (Late) v. ACIT (2010) 5 ITR 598 / 124 TTJ 648 / 27 SOT 257 (Mum.)(Trib.)*

**S. 45 : Capital gains – Cost of acquisition – Surrender of tenancy right – Market value of tenancy right**

There is an important distinction between asset not having cost of acquisition and asset whose cost of acquisition cannot be determined. Asset sold by the assessee the property which was given to him on surrender of tenancy right. Cost of this asset is the market value of the tenancy right as on the point of time when it was surrendered. (A.Y. 1996-97)

*Balmukund P. Acharya v. ITO (2010) 45 DTR 281 / 133 TTJ 640 / 48 SOT 385 (Mum.)(Trib.)*

**S. 45 : Capital gains – Undisclosed income – Sale of shares [S. 69]**

Assessee having submitted copies of the contract notes, sales bills statement of account and confirmation from the broker to substantiate the sale of shares sold by him, and the Assessing Officer having failed to establish that the assessee has introduced his own unaccounted money, in the shape of the sale proceeds of shares, the impugned income disclosed by the assessee is chargeable to tax as capital gains and can not be treated as income from undisclosed sources. (A.Y. 2001-02)

*Bajinath Agrwal v. ACIT (2010) 133 TTJ 129 / 40 SOT 475 / 43 DTR 149 (TM)(Agra)(Trib.)*

**S. 45 : Capital gains – Sale of land – Trees and plants – Agricultural income – Composite sale**

The assessee, a Chartered Accountant by profession, sold land with trees and claimed ₹ 14.92 lakhs as expenses from the sale consideration of ₹ 10 lakhs as exempt agricultural income although this amount was part of sale due under which the land

was sold. The Assessee contented that the vendee had paid a sum of ₹ 10 lacs towards the total reimbursements of sale proceeds of the trees, plants and other existing crops and horticulture and it was included in the total value. The Assessing Officer held that it was a composite sale along with the land. Hence, it could not be treated separately as agricultural income. He made addition of ₹ 10,03,814/-. CIT(A) confirmed the assessment order. The Tribunal held that, although this amount was part of sale deed under which the land was sold, the part of sale proceeds was not agricultural income. Deduction was allowed on entire indexed cost of acquisition. (A.Y. 2006-07)

*Abhinav Ajmera v. ACIT (2010) 6 ITR 482 (Delhi)(Trib.)*

**S. 45 : Capital gains – Income – Society – Beneficial ownership – Receipt from developer [S. 4]**

According to Circular 9, dt. 25-03-1969, the legal ownership in flats vests in individual members and not in the co-operative society. Flat owners have proportionate interest in land and building. Amount received for permitting developer to construct additional area cannot be treated as income of the society.

*Auro Ville Co-op Hsg. Soc. Ltd. v. ACIT, ITA No. 570/Mum/2008, dt.31-03-2010, Mumbai 'H' Bench, BCAJ P. 28, Vol. 42-B, Part 2, November 2010. (Mum.)(Trib.)*

**S. 45 : Capital gains – Income – Society – Beneficial ownership – Transfer of development right (TDR) – FSI [S. 4]**

Beneficial ownership of the balance FSI and right to use TDR was that of the members of the society. The members transferred the rights and received consideration for such transfer.

*ITO v. Ashok Hindu Co-op Hsg. Soc. Ltd., ITA No.630/M/2006, dt.29-09-2008, Mumbai 'D' Bench, BCAJ P. 29, Vol. 42-B, Part 3, December 2010. (Mum.)(Trib.)*

**S. 45 : Capital gains – ESOP – Cost of acquisition [S. 48]**

Assessee having made no payment for exercising the right to purchase shares under ESOP, there was no cost of acquisition of such shares to the assessee and therefore, amount received on sale of said shares is not taxable as capital gains. Further date of exercise of option and date of sale being the same, there is no difference between the deemed cost of acquisition and actual price realized by the assessee and therefore, no amount is chargeable to tax as capital gains. (A.Y. 1993-94)

*Bomi S. Billimoria v. ACIT (2009) 124 TTJ 960 / 27 DTR 324 (Mum.)(Trib.)*

**S. 45 : Capital gains – Sale of agricultural land – Residential sites [S. 2(13), 28(i), 54EC]**

It was held that mere fact that the assessee obtained permission from the authorities for developing residential sites cannot lead to the conclusion that this was an adventure in the nature of trade. (A.Y. 2005-06)

*ITO v. D. N. Krishnappa (2009) 21 DTR 11 / 126 TTJ 140 (Bang.)(Trib.)*

#### **S. 45 : Capital gains – Co-operative Society – Sale of FSI**

Gains arising to the society on sale of 50% of the areas constructed by the builder, at his own cost, by utilising additional FSI received by society from BMC in lieu of roads taken over by BMC are chargeable to tax as Capital gains. (A.Y. 2000-01)

*ACIT v. Sai Ashish Bandra Co-op. Hsg. Soc. Ltd., ITA No. 5232/Mum/2004, dt. 22-8-2009, Bench - E – BCAJ P. 33, Vol. 41-B, Part 3, December 2009. (Mum.)(Trib.)*

#### **Capital gains – Capital gains – Co-operative society – FSI transfer [S. 48, 55(2)]**

The Assessee, a co-operative housing society, owned a land and building. Upon the enactment of Development Control Regulations, 1991 (DCR), it became entitled to additional FSI of around 11,000 sq. ft. which was transferred for the consideration of ₹ 48,96,225/-. Held that right transferred was not covered by any of the items mentioned under section 55(2) of the Act. Since the right transferred emanated from amendment to DCR and is not covered by any of the items of Sec. 55(2) and does not have any cost of acquisition no capital gain can be charged on transfer of additional FSI. (A.Y. 2003-04)

*New Shailaja CHS Ltd. v. ITO (2009) 121 TTJ 62 / 18 DTR 385 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Cost of acquisition – Fair market value [S. 55(2)(b)(i)]**

- (i) Section 48, 49 & 55 are machinery provisions for computing capital gains under different circumstances and therefore, they are not charging sections.
- (ii) Option to opt a Fair market Value [FMV] for the asset acquired prior to 1/4/1981 under section 55 is an independent provision for computing cost of acquisition in the given circumstances with a view to bring out such asset at the option of the assessee at its FMV as on 1/4/1981 and therefore, this option is independent of the section 48 under the statute. (A.Y. 2001-02)

*Alcan Inc. v. Dy. CIT (International Taxation) (2008) 110 ITD 15 / 112 TTJ 328 / (2007) 16 SOT 8 (Mum)(Trib.)*

#### **S. 45 : Capital gains – Family arrangement – Transfer [S. 2(47)]**

Transfer of assets under family arrangement, whereby assets and liabilities, including flats, were divided among the members, cannot be treated as transfer under section 2(47), and be taxed as capital gains, on the presumption that family arrangement was not bonafide and it was a colourable device to save tax, when no positive evidence or material was brought on record to establish that arrangement was not actually acted upon.

*Shirish S. Maniar v. ITO (2008) 167 Taxman 81 (Mag.)(Mum.)(Trib.)*

#### **S. 45 : Capital gains – Member of society – TDR [S. 2(14)]**

Amount received by a member of the housing society from a developer holding TDR, who constructed additional floors in a building owned by the housing society. The Assessing Officer was not justified in levying the capital gains tax on the member of the housing Society. (A.Y. 1995-96)

*Deepak S. Shah v. ITO. ITA NO 1483/M/2001 Bench 'D' dt. 16-6-2008 (2008) 40 A BCAJ 559 (August 2008) (Mum.)(Trib.)*

**S. 45 : Capital gains – Shares – Financier**

Assessee company was engaged in business of financier, trading, leasing, money lending. Shares acquired as promoter and which were classified as Investments and not as stock-in-trade in Balance Sheet, was sold after holding them for about 4 to 6 years. Profit earned on sale of said shares were assessed as Capital Gains, after granting indexation benefits.

*Gomti Credits (P) Ltd. v. Dy. CIT (2007) 164 Taxman 69 (Mag.)(Delhi)(Trib.)*

**S. 45 : Capital gains – Land – Flat – Bifurcation of cost**

Capital Gains on sale of flat's built on plot of land, has to be bifurcated, considering the period of holding of land and constructed flats.

*CIT v. Ashok Kumar Arora (2007) 161 Taxman 101 (Mag.)(Delhi)(Trib.)*

**S. 45 : Capital gains – Immovable property – Imperfect title**

Receipt From sale of immovable property with imperfect title is chargeable as capital gains. (A.Y. 2001-02)

*ITO v. Rina B. Parwani (2007) 110 TTJ 460 (Pune)(Trib.)*

**S. 45 : Capital gains – Computation – Slump sale [S. 50B]**

Provisions of section 50B inserted by the Finance Act 1999 w.e.f. 1-4-2000 are retroactive in operation and will apply to all pending assessments of slump sale. (A.Ys. 1996-97, 1997-98)

*ACIT v. Asea Brown Boveri Ltd. (2007) 110 TTJ 502 (Mum.)(Trib.)*

**S. 45 : Capital gains – Cost of acquisition – Fair market value [S. 55]**

In the case of land sold in 1983, cost of acquisition has to be determined by the Assessing Officer on the basis of fair market value as on 1st April, 1981 and not on the basis of cost of acquisition as on 1st January, 1964, as per balance sheet filed by assessee. (A.Y. 1984-85)

*Uttam Mitra v. ACIT (2006) 100 TTJ 632 (Cuttack)(Trib.)*

**S. 45 : Capital gains – Genuineness of transaction – Shares – Loss – VDIS [S. 72]**

Assessee having shown capital gains from purchase and sale of shares of a worthless company. The transactions could not be accepted as genuine but a make believe arrangement to set off the loss incurred by the assessee on the sale of jewellery declared under VDIS. (A.Y. 1997-98)

*ACIT v. Som Nath Maini (2006) 100 TTJ 917 / 7 SOT 202 (Chd.)(Trib.)*

**S. 45 : Capital gains – Profits from sale of house and shops – Terrorist activities**



Profits from house sold by assessee due to terrorist activities after using it for 10 years for residence and from sale of shops income from which was returned as income from house property were taxable as capital gains. (A.Ys. 1990-91 to 1993-94)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 316 (Amritsar)(Trib.)*

#### **S. 45 : Capital gains – Long term capital gains – Shares**

Assessee's claim under section 54F against Long Term Capital Gain on shares was rejected by Assessing Officer, on grounds that full amount was not paid for purchase of shares, and that it is highly improbable that prices of shares could go up so much within a short period of one year. It was held that, as the purchase is confirmed by share broker, and the shares were transferred in the name of the assessee, and rate was also supported by rates quoted at Patna Stock Exchange, there is no justification in suspecting the entire share transaction, and addition cannot be sustained. (A.Y. 1997-98)

*Dy. CIT v. Charan Singh (2006) 153 Taxman 1 (Mag.)(Chd.)(Trib.)*

#### **S. 45 : Capital gains – Shares – Possession of the flat – Registration [S. 54]**

When the possession of the flat was taken within the time prescribed under section 54, claim under section 54 cannot be denied on ground that property is not registered in favour of assessee. (A.Y. 1994-95)

*ACIT v. Rekha Mathur (Mrs) (2006) 152 Taxman 70 (Mag.)(Delhi)(Trib.)*

#### **S. 45 : Capital gains – Accrual – Possession – Consideration**

Assessee having received consideration and handed over possession of assets capital gains were chargeable to tax in that year notwithstanding that sale deed was registered in subsequent year. (A.Ys. 198-99, 1999-2000)

*Gripwell Industries Ltd. v. ITO (2006) 102 TTJ 441 / 99 ITD 368 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Capital loss – Investment written off [S. 2(47)]**

Investment written off by the assessee could not be allowed as a loss, there being no transfer of capital asset within the meaning of s. 2(47). (A.Ys. 1995-96 to 1998-99)

*Industrial Finance Corporation of India Ltd. v. Jt. CIT (2006) 101 TTJ 910 / 99 ITD 639 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Surrender of tenancy rights – Indexed cost**

Assessee having surrendered tenancy rights for consideration under a tripartite agreement between herself, lessor and purchaser, she was not entitled to deduction of indexed cost of first floor constructed by her on the leased premises. (A.Y. 1989-90)

*Indira P. Nichani (Dr) v. ITO (2006) 102 TTJ 643 / 6 SOT 624 (Bang.)(Trib.)*

#### **S. 45 : Capital gains – Sale of shops – Deduction under S. 80T**

Profit from the sale of shops is chargeable as capital gains and the assessee is entitled to deduction under 80T. (A.Ys. 1984-85 to 1989-90)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 297 (Amritsar)(Trib.)*

#### **S. 45 : Capital gains – Shares – Capital loss – Genuineness**

There being actual payment and delivery of shares, there was valid transfer and short-term capital loss sustained by assessee was allowable. (A.Y. 1997-98)

*Kameshwari Finance & Leasing (P) Ltd. v. Dy. CIT (2006) 102 TTJ 461 / 109 ITD 173 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Shares – Majority group – Restrictive – Negative covenants**

Assessee having agreed to transfer its shareholding to the majority group accepting various restrictive or negative covenants, market value of the share was below ` 100, the assessee was justified in apportioning an amount of ` 100 towards consideration paid to the assessee for observance of negative covenants. (A.Y. 1994-95)

*Ashok Behari Lal (HUF) v. ACIT (2006) 99 TTJ 513 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Capital assets – Depreciable assets [S. 2(14), 50A]**

A long term capital asset, even though used as depreciable asset, still could be a long term capital asset for purpose of taxation if property was not treated as depreciable asset at time of sale, it is always possible that a particular asset can be a personal asset for some time and a business asset for some other time. (A.Y. 1998-99)

*Sakhi Metal Depot v. ITO (2005) 3 SOT 368 (Cochin)(Trib.)*

#### **S. 45 : Capital gains – Control over the property – Delivery of possession [S. 2(47)(vi), 269UA(d)]**

Assessee made arrangement by irrevocable agreement and gave transferees complete control over title of property, date of contract between assessee and purchasers would be relevant and not date of delivery of possession. (A.Ys. 1992-93 to 1995-96)

*ACIT v. Pushpa Devi Jain (2005) 93 ITD 289 / 93 TTJ 590 / 2 SOT 584 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Capital asset – Transfer – Non user of technology – Information for production – Capital receipt [S. 2(14), 2(47), 48, 49, 55(2)(a)]**

Information, know how in respect of bottling of Coca – Cola products was possessed by assessee in their capacities as directors of a bottling Co, which was earlier doing the bottling work for HCC and after the closure of the unit of the bottling Co, and taking over of the same by HCC, it was agreed by the assessee not to use the said technology, information for production of similar products nor to disclose the said information to any other party for a period of five years and a sum of Rs 1.5 crores was paid to each of the assessee, the agreement between the assessee and HCC did not give rise to any transfer of capital asset with in the meaning of section 2 (47)

read with the amended provisions of section 55 (2) (a) to attract capital gains. (A.Y. 1998-99)

*Dinesh Chand v. Jt. CIT (2005) 95 ITD 209 / 97 TTJ 770 (Delhi)(Trib.)*

**S. 45 : Capital gains – Transfer – General power of attorney – Possession [S. 2(47)(v)]**

Assessee entered in to an agreement with builder /developer for development of impugned land and construction of flats thereon, assessee signed general power of attorney in favour of builder / developer and gave possession of property to builder and further assessee acted on impugned agreement by accepting from builder / developer payments by cheques on different dates in financial year 1997-98. The Tribunal held that as all conditions of section 2 (47)(v), were satisfied and there is transfer and assessee was laible to pay capital gains tax. (A.Ys. 1997-98 to 1999-2000)

*Dnyaneshwar N. Mulik v. ACIT (2005) 98 TTJ 179 (Pune)(Trib.)*

**S. 45 : Capital gains – Agreement to sell shares – Transfer [S. 2(47)]**

Assessee and his wife held entire share capital of a company which owned only two flats as its assets and assessee and his wife entered in to agreement to sell all shares in company to buyer, it would amount to transfer of flats with in the meaning of section 2 (47) and transfer could be said to have taken place on receipt of first instalment and as such provisions of section 2 (47) were attracted. (A.Y. 1997-98)

*Jt. CIT v. Rajat Lal (2005) 93 ITD 482 / 94 TTJ 714 / 1 SOT 559 (Delhi)(Trib.)*

**S. 45 : Capital gains – Forfeiture of advance money – Contract [S. 51]**

Advance money received by transferor for sale of property, which was forfeited by her due to non compliance of conditions of the contract, could not be construed to be capital gains. (A.Y. 1998-99)

*Smita N. Shah (Smt) v. Jt. CIT (2005) 94 TTJ 492 / 95 TTJ 640 (Mum.)(Trib.)*

**S. 45 : Capital gains – Land converted in to stock-in-trade**

Assessee converted a land held as investment in to stock in trade and sold it part of sale proceeds up to the time it was held as investment was to be treated as capital gains and difference between sale consideration and fair market value on date of conversion of land in to stock in trade was to be assessed as business income. (A.Y. 1998-99)

*Viyay Construction Co. v. Dy. CIT (2005) 3 SOT 840 (Mum.)(Trib.)*

**S. 45 : Capital gains – Land converted in to stock-in-trade**

Assessee converted a plot of land held by her for 50 years and used for agricultural purposes, in to housing sites and sold them, income arising from sale of plots was assessable as capital gains and not as business income. (A.Ys. 1995-96 to 1999-2000)

*N. Kaasivisalam v. ACIT (2005) 93 TTJ 537 (Chennai)(Trib.)*

#### **S. 45 : Capital gains – Business income – Shares held as investment**

Sale of shares held as investment for more than 10 years and shown as investment in books, can not be considered as business income merely considering volume of transactions. (A.Y. 2000-01)

*Shah – La Investments & Financial Consultants (P) Ltd. v. Dy. CIT (2005) 2 SOT 371 (Hyd.) (Trib.)*

#### **S. 45 : Capital gains – Capital loss – Block of assets [S. 2(11)]**

After introduction of concept of block of assets even if there is a loss on sale of an individual asset, same can not be independently considered for computation of income. (A.Y. 1997-98)

*J.B. Advani & Co Ltd. v. Jt. CIT (2005) 1 SOT 830 / 92 TTJ 175 (Mum.)(Trib.)*

#### **S. 45 : Capital gains – Capital loss – Renouncement of rights to subscribe to PCDs**

Assessee renounced its right to subscribe to PCDs in favour of transferee under an arrangement which provided for buy back of shares arising on conversion of PCDs, within specified period transferee claimed short term capital loss from such transaction, computation provisions could not be applied and loss could not be considered as a short term capital loss, thus assessee's claim for allowing loss as short term capital loss could not be allowed. If provisions of computation under section 48 fails, nothing would be chargeable to tax under head 'capital gains'. (A.Y. 1993-94)

*Tarnik Investment & Trading Ltd v. Jt. CIT (2005) 94 ITD 183 / 94 TTJ 489 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Consideration received – Onus on Assessing Officer**

Assessee cannot be charged to tax in relation to an amount other than amount actually received or accruing as consideration for transfer of any asset. In such cases the Revenue has to establish that certain consideration was either received by or accrued as income chargeable under the head 'Capital Gain' by the assessee which is sought to be taxed as such. (A.Y. 1997-98)

*Addl. CIT v. Glad Investments (P.) Ltd., 102 ITD 227 / 105 TTJ 218 / 8 SOT 612 (Delhi)(Trib.)*

#### **S. 45 : Capital gains – Set off loss – capital gains [S. 74(1)]**

In A.Y. 2002-03, the assessee suffered a long-term capital loss. Under section 74(1) as it then stood, such loss could be carried forward and set off against all capital gains including short-term capital gains. Section 74 was amended in A.Y. 2003-04 to provide that long-term capital loss could only be set-off against long-term capital gains and not against short-term-capital gain. When the assessee claimed a set-off in A.Y. 2004-05 the question arose whether the amended law should apply or the un-

amended law. The tribunal held that Right to set-off loss is a “vested right” which is available despite amendment in year of set-off. (A.Y. 2004-05)

*Geetanjali Trading v. ITO* ITA No. 5428/Mum/2007 dated Dec. 2009 (Mum.)(Trib.)

Source: [www.itatonline.org](http://www.itatonline.org)

#### **S. 45 : Capital gains – Transfer – Piecemeal basis [S. 2(47)]**

Original agreement provided for sale of land in one piece – On failure of the buyer to make payments on time, it was agreed to transfer land in piecemeal basis by executing supplementary agreement. In the year of appeal, capital gains qua the piece of land transferred was offered to tax, the tribunal held that Assessing Officer was not justified in levying tax on the sale of entire land. (A.Y. 1990-91)

*ITO v. National Foundry “F” Bench*, ITA No. 4540/Mum./1996 Order dated 4-1-2005 – unreported. (Mum.)(Trib.)

#### **S. 45 : Capital gains – Transfer – Chargeable in the year of transfer**

As per the provisions of section 45(1) of the Act, for charging capital gains tax, the previous year in which the transfer takes place is most crucial. (A.Y. 1998-99)

*Vemanna Reddy (HUF) v. ITO* (2009) 30 SOT 11 (URO)(Bang.)(Trib.)

#### **S. 45 : Capital gains – Transfer after revaluation – Firm to a company – Part-IX [S. 45(4)]**

Simple revaluation of assets does not lead to capital gain tax. There is no transfer on conversion of partnership firm into a company under the Part-IX, particularly in view of the provisions of section 575, 576 and 577 of the Companies Act, 1956, and therefore, there is no question of application of the provisions of section 45, 50, or any other provision of the Income Tax Act, 1961. (A.Y. 1995-96)

*Well Pack Packaging v. DY. CIT* (2003) 78 TTJ 448 (Ahd.)(Trib.)

#### **S. 45 : Capital gains – Shares – Non-resident – India-Mauritius – DTAA [Article 13(4)]**

Applicant is a company incorporated in Mauritius and was issued a Tax Residence Certificate by the Mauritius Tax Authorities. It realized capital gains from sale of shares in Indian company. The applicant was held not liable to pay capital gains tax in India in respect of the transfer of shares.

*D. B. Zwirn Mauritius Trading No. 3 Ltd., Mauritius* (2011) 333 ITR 32 / 240 CTR 1 / 198 Taxman 295 / 53 DTR 178 (AAR)

#### **S. 45 : Capital gains – Shares – Wholly owned subsidiary – Without consideration [S. 48, 92, 92C, 195]**

Transfer of shares to subsidiary company without consideration would not attract liability to tax under section 45 read with section 48.

*Good Year Tire & Rubber Co, In Re.* (2011) 240 CTR 209 / 54 DTR 281 / 334 ITR 69 / 199 Taxman 121 (AAR)

**S. 45 : Capital gains – Shares – Wholly owned subsidiary – Not a transfer [S. 47(iii), 92 to 92F, 139]**

Transfer of shares of wholly owned Indian subsidiary by the applicant a US company to another group company based in Singapore without consideration being a gift is not taxable under the provisions of section 45. Provisions of section 92 to 92F relating to transfer pricing are not applicable. However, applicant is under obligation to file return under section 139.

*Deere & Company, In re (2011) 56 DTR 242 / 337 ITR 277 / 241 CTR 497 (AAR)*

**S. 45 : Capital gains – Business income – Sale of shares – DTAA – India-France [S. 90, Article 14]**

Applicant MA, a French company, pursuant to an understanding with the other applicant GIMD, also a French company having floated a 100 percent subsidiary and acquired majority shares of an Indian Company in the name of said subsidiary and later both the applicants having sold their shares in the subsidiary to another French company, it was a preordained scheme to deal with the assets and control of the Indian Company without actually dealing with its shares thereby avoiding payment of tax on the capital gains in India. In substance, it involved alienation of the assets and controlling interest of the Indian company having assets, business and income in India in terms of Para. 5 of Article 14 of DTAA between India and France.

*Groupe Industrial Marcel Dassault In Re (2011) 64 DTR 1 / (2012) 340 ITR 272 / 245 CTR 353 (AAR)*

**S. 45 : Capital gains – Investment in shares – India – Mauritius DTAA [Article 13(4)]**

Applicant is a company incorporated in Mauritius and was issued a Tax Residence Certificate by the Mauritius Tax Authorities. It realized capital gains from sale of shares in Indian company - AAR observed that in the case of Azadi Bachao Andolan 263 ITR 706, the Honorable Supreme Court has held that the certificate of residence issued by Mauritius Revenue Authority constitutes a valid and sufficient evidence of residential status under DTAA. Also, CBDT in Circular No. 682 dated 30.03.1994 has further clarified that under the DTAA, a resident of Mauritius having income from alienation of shares of Indian company shall be liable to tax only in Mauritius. In the case of E\*Trade Mauritius, AAR No. 862 of 2009, and, the Delhi ITAT in the case of Saraswati Holding Corporation, 2009-TIOL-529-ITAT-DEL, held the view that the gains arising out of alienation of shares of an Indian Company to a company who is a resident of Mauritius is liable to tax only in Mauritius in terms of Article 13(4) of the DTAA - Hence ruled that on the facts presented by the applicant and in the light of legal position discussed, the applicant is not liable to pay capital gains tax in India in respect of the transfer of shares.

*D.B. Zwirn Mauritius Trading No. 3 Ltd., Mauritius (2011) 333 ITR 32 / 240 CTR 1 / 198 Taxman 295 / 53 DTR 178 (AAR)*



### **S. 45 : Capital gains – Transfer without consideration – International transaction [S. 48, 92]**

Transfer of shares of Indian subsidiaries of an American company without consideration, in a scheme approved for bankruptcy proceedings in an American court - Revenue contended that taking over of liabilities can be taken as the consideration for the transfer of shares and that transfer includes even transfer by operation of Law and or under the orders of Court; also an arm's length price can be arrived at by taking resort to the transfer pricing provisions - AAR observed that the profit or gains or the full value of consideration cannot be arrived on a notional basis or hypothetical basis, the profit or gains to the transferor must be distinctly and clearly identifiable component of the transaction and that hypothetical benefit cannot be presumed and hence cannot be taxed. If charge under section 45 fails to operate for want of consideration or determinable consideration, provisions of sec. 92 etc. cannot be invoked as it is not an independent charging provision, but a machinery for the computation of income from an international transaction, which is charged to tax elsewhere under the Act.

*Dana Corporation, (2009) 32 DTR 11 / 227 CTR 441 / 321 ITR 178 / 186 Taxman 187 (AAR)*

### **S. 45 : Capital gains – Transfer – Receipt – Not conclusive [S. 2(47)(V)]**

Agreement entered into with a Developer for development of agricultural land by constructing residential complex - Irrevocable General POA issued after fulfillment of conditions of Letter of Intent issued by Director of Town Planning and supplementary agreement was entered into whereby owners agreed to sell their share for a consideration to be received in 6 installments within 27 months from date of agreement - Issue is about the year of chargeability of capital gains, integrally connected to which is the identification of the previous year in which the deemed transfer under section 2(47)(5) had taken place - Authority observed that clause (v) to section 2(47) seeks to include transactions that closely resemble transfers but are not treated as such under general law. It seeks to arrest avoidance or postponement of tax on capital gains by adopting devices such as enjoyment of property in pursuance to irrevocable power of attorney or part performance of a contract falling within the scope of section 53A of the Transfer of Property Act. The crucial question is what point of time the transaction allowing the taking of or retaining of possession in performance of such contract had taken place for it to be regarded as transfer. So long as the transferee is, by virtue of the possession given, enabled to exercise general control over the property and to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of agreement or that full consideration has not yet been received does not introduce any incompatibility. Authority took the view that the crucial event or step that tantamounts to a "transaction allowing the possession to be taken" is the execution of irrevocable GPA in accordance with what is laid down in para 15 of the Collaboration Agreement as that was the culmination of a long series of pre-requirements - hence held on such

execution, transfer is deemed to have taken place and capital gains held to have arisen that year although entire sale consideration up to the last installment not yet received.

*Jasbir Singh Sarkaria (2007) 221 CTR 100/ 294 ITR 196 / 164 Taxman 108 (AAR)*

**S. 45 : Capital gains – Non-Resident – Resident of UAE – Shares of Indian listed Company – India-UAE DTAA [S. 90(2), Article 13]**

Applicant, a partnership firm in UAE intends to sell shares in an Indian listed company - Issue is whether capital gains would be taxable under Indian laws or under Article 13(3) of the DTAA which states that such gains are taxable only in UAE - Revenue contended that it should be taxed in India otherwise it would result in a case of double non-taxation as the applicant is not taxable in UAE - AAR observed that under the IT Act, it cannot be disputed that the capital gains arising to a non-resident in India, are taxable in India. But having regard to section 90(2) of the Act, the terms of the Treaty have overriding effect over the provisions of the Act in the event of there being conflict between the Treaty and the Act. Hence, in view of the provisions of para 3 of article 13 of the treaty, the capital gains arising to the applicant can be taxed only in UAE and not in India and that their taxability under the Act in India does not depend upon whether they are as a fact taxable in UAE

*Emirates Fertilizer Trading Company WLL, UAE; (2005) 272 ITR 82 / 142 Taxman 127 / 192 CTR 590 (AAR)*

**S. 45 : Capital gains – Foreign Institutional Investor (FII) – Indexation [S. 48, 115AD]**

Foreign Institutional investor has to follow special provision for computation of capital gains from investment in securities. It is a self contained code. Foreign Institutional investor has no option to follow the general provisions for computing the capital loss. FII cannot opt out of section 115AD and claim to be covered by section 48. (A.Y. 2003-04)

*Universities Superannuation Scheme Ltd., In re (2005) 275 ITR 434 / 145 Taxman 141 / 194 CTR 289 (AAR)*

**S. 45(2) : Capital gains – Period of holding – Renouncement of right to receive Right Shares [S. 48(2)]**

For the computation of gain / loss resulting from renunciation of option given to the existing shareholders a right to subscribe to offer additional shares / debentures, the crucial dates for determination of nature of capital gains / loss (short term / long term) are the date of coming into existence of such right and date of renunciation thereof. Said right comes into existence when the offer is made and it is distinct and separate, capable of being transferred independently of the original shareholding. Hence, where the assessee renounced that right in favour of a third party for money in the assessment year and consequently suffered loss of a higher amount due to diminution in the value of original shares, the net loss so suffered was a short-term capital loss. Hence, the assessee rightly applied deduction under section 48(2) to

amount of long-term capital gains earned during the year and then from the remainder deducted the said short-term capital loss. Department erred in deducting the said short-term loss from long-term gains and then applying section 48(2) to the remainder.

An important principle for computation of capital gains under section 48 is that computation is an integral part of chargeability. (A.Y. 1992-93)

*Navin Jindal v. ACIT (2010) 320 ITR 708 / 187 Taxman 283 / 34 DTR 1 / 2 SCC 525 / 228 CTR 478 / 216 Taxation 53 (SC)*

*Editorial: - Please see section 55(2)(aa)(A) introduced w.e.f. 1-4-1995.*

#### **S. 45(2) : Capital gains – Computation – Cost of inflation index – Conversion into stock [S. 48]**

Assessee firm converted its immovable property in 1987-88 into stock in trade and developed it by entering into an agreement with developer. Revenue did not treat the said arrangement as a transfer at that stage. Capital gains arising on sale of flats and registration of deeds in 1992-93 is to be computed by applying the cost of inflation index as applicable to Asst year 1992-93 and not that applicable in 1987-88. (A.Y. 1993-94).

*CIT v. Rudra Industrial Commercial Corporation (2011) 55 DTR 5 / 244 CTR 304 (Karn.)(High Court)*

#### **S. 45(2) : Capital gains – Capital asset – Stock-in-trade – Valuation [S. 2(14)]**

When a partnership firm is dissolved and the erstwhile partner receives stock, it is a capital asset in his hands. When that asset is introduced into a business as stock, it gets converted into stock-in-trade. The value of this stock will have to be the market value on the date of introduction. The same principle would apply if the assessee used her share of the stock obtained from the dissolved firm in the new business.

*Madu Rani Mehra v. CIT ITR No. 541/1992 dated 21-3-2011 (Delhi)(High Court)*

*Source: www.itatonline.org*

#### **S. 45(2) : Capital gains – Business income – Conversion into stock – Genuineness**

Where Tribunal found that alleged conversion of land into stock-in-trade was not genuine inasmuch as assessee was not in possession of property in question and said land had already been sold in earlier years, it was justified in treating transactions as sale of immovable property resulting in capital gain. (A.Ys. 1982-83, 1983-84)

*Sathappa Textiles (P.) Ltd. v. CIT (2003) 126 Taxman 491 / 263 ITR 371 / 183 CTR 339 (Mad.)(High Court)*

#### **S. 45(2) : Capital gains – Shares – Conversion of individual in to stock – Evasion of tax**

Where the sole object of the conversion of the individual holding into stock-in-trade was merely to evade the liability for capital gain tax as those shares were, in effect, not

utilized as stock-in-trade and were never intended to be so used, capital gain arising on sale of such shares to company in which assessee and his son were only shareholders was liable to tax. The assessing officer was right in holding that the capital gains had arisen and was liable to be taxed as such by taking the difference between the cost of acquisition of shares in the hands of the assessee and the price at which the shares had been sold to the private limited company. (A.Y. 1984-85)

*R. Krishnaswamy v. CIT (2003) 261 ITR 623 / 180 CTR 184 / (2004) 134 Taxman 360 (Mad.)(High Court)*

**S. 45(2) : Capital gains – Converted in to stock – Cost of improvement – Payment for change of user [S. 48]**

Assessee company which was engaged in the business of manufacturing of containers in the year 1999 converted the factory land in to stock-in-trade. The land was converted in to stock-in-trade by passing a special resolution in extraordinary general meeting of share holders approving the commencement of business of real estate. Assessing officer rejected the claim of the assessee and held that it was a simple transfer of said land as capital asset by assessee company for a stipulated consideration in terms of development agreement and rejected the claim of benefit under section 45(2) of the Income-tax Act. The Tribunal held that since the business of real estate development was duly carried on by assessee, it was entitled to benefit of provisions of section 45(2) in respect of conversion of factory land in to stock in trade. Payment made by the assessee prior date of conversion of land in to stock in trade, would constitute cost of improvement of land since land as a result of said expenditure had become fit for development / redevelopment. (A.Ys. 2002-03, 2004-05 and 2006-07).

*Vidhyavihar Containers Ltd. v. Dy. CIT (2011) 133 ITD 363 (Mum.)(Trib.)*

**S. 45(2) : Capital gains – Accrual – Sale of land – Conversion into Stock [S. 2(47), 45(1)]**

Assessee having converted land into stock-in-trade in an earlier year and sold the same in the relevant year by executing a general power of attorney, showing it as sale of stock-in-trade and crediting the sale proceeds, land stood "otherwise transferred" and hence, capital gain is taxable under section 45(2) in the relevant assessment year though no conveyance deed was registered. (A.Ys. 2001-02, 2002-03)

*Wipro Ltd. v. Dy. CIT (2010) 34 DTR 493 (Bang.)(Trib.)*

**S. 45(2) : Capital gains – Conversion in to stock – Year of Chargeability [S. 2(47)]**

Where the assessee converted his land in to stock-in-trade and thereafter a development agreement was entered into by the assessee with the developer where by assessee provided his land measuring 44000 sq. ft. to developer for construction of residential apartments and the assessee was to get constructed area of 25130 sq. ft., the capital gain arising from the conversion of the land and building in to stock-in-trade

were assessable proportionately in the previous years in which the constructed property was sold by the assessee and not in the year of development agreement. (A.Ys. 2004-05, 2005-06)

*R. Gopinath (HUF) v. ACIT (2010) 42 DTR 127 / 133 TTJ 595 (Chennai)(Trib.)*

**S. 45(2) : Capital gains – Business income – Shares – Sale after conversion into stock**

Assessing Officer having accepted the genuineness of the transaction in the year of purchase of shares or in the year of conversion of the same from investment into stock-in-trade, he was not correct in examining the genuineness of the transaction in the subsequent year in which the shares were sold and assessing the surplus as business income as per section 45(2), surplus is assessable as capital gains. (A.Ys. 1997-98 to 1999-2000)

*ACIT v. Tata Housing Development Co. Ltd. (2010) 48 DTR 452 / (2011) 139 TTJ 8 / 45 SOT 9 (Mum.)(Trib.)*

**S. 45(2) : Capital gains – Conversion in to stock – Commercial activity**

Assessee owned a property which was given on rent and thereafter existing property was demolished and a commercial complex was built and let out. Assessing Officer was justified in applying section 45(2) to hold it was a conversion of capital asset in to business asset. (A.Y. 1995-96)

*Dy. CIT v. Kamal Chand Kasliwala (2005) 97 TTJ 427 (Jp.)(Trib.)*

**S. 45(2) : Capital gains – Development rights – Land – Conversion in to stock**

Developmental rights of lands are embedded in the ownership of land and are recognized as distinct from the land by Developmental Control Rules and therefore, constituted capital asset and the provisions of sec. 45(2) were applicable on sale of development rights of land which was converted into stock-in-trade by the assessee.(A.Y. 1996-97).

The claim of assessee that the developmental rights were non existent when land was converted was not upheld, as they were held to be part & parcel of ownership of land and were valuable property rights, which were embedded with ownership of land, and were only recognised by development control rules. (A.Y. 1996-97)

*Shakti Insulated Wires Ltd v. Jt. CIT (2003) 132 Taxman 171 (Mag.) / 87 ITD 56 / 79 TTJ 796 (Mum.)(Trib.)*

**S. 45(3) : Capital gains – Revaluation of stock – Contribution in capital of firm – Capital assets [S. 2(47), 28(1), 45(2)]**

Where the land held by assessee company as stock-in-trade was contributed as capital in a partnership firm after revaluing the same, the surplus was assessable as capital gains by application of section 45(3). Even otherwise, transaction of such conversion was device or ruse to convert the land in to money substantially for the benefit of the assessee and therefore same was assessable as business income. (A.Ys. 1992-93, 1997-98 to 2000-01)

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

**S. 45(3) : Capital gains – Computation – revaluation of assets after conversion of proprietary concern in to partnership [S. 4(1)(a) of Gift Tax Act]**

Assessee having converted his proprietary concern in to a partnership firm revalued the assets and credited the capital accounts of the partners by the revalued figure at the end of the same previous year, section 45(3), is applicable and the said value has to be taken to be the full value of consideration and not the amount credited to the capital account of assessee. When capital gain is charged there is no deemed gift under section 4(1)(a) of Gift Tax Act. (A.Y. 1995-96)

*Dharmshibhai B. Shah v. ITO (2009) 32 DTR 106 / 126 TTJ 721 / 32 DTR 106 (TM)(Ahd.)(Trib.)*

**S. 45(4) : Capital gains – Assets taken over by partners on dissolution of firm by court order [S. 2(14), 2(47), 45(1)]**

Outgoing partners of the firm having received amount towards their respective shares in the net assets of the firm from a group of three partners who took over the business the capital gains arising on transfer of the assets of the erstwhile firm were taxable in the hands of the outgoing partners. (A. Y. 1995-96)

*B. Raghurama Prabhu Estate, Executrix Smt. M. Kaveri Bai & Ors. v. Jt. CIT (2011) 335 ITR 394 / 52 DTR 122 / 239 CTR 274 (Karn.)(High Court)*

**S. 45(4) : Capital gains – Reconstitution of firm – Goodwill [S. 2(47)]**

When there were only four partners, first change in June 1994 when two partners retired and two new partners inducted. Second change in 2004 when remaining two partners also retired and two more partners, who have brought the capital. The Court held that the provisions of section 45(4) is applicable as it amounts to transfer Hence, capital gain is applicable. (A.Y. 1995-96)

*CIT v. Gurunath Talkies (2010) 328 ITR 59 / 214 Taxation 729 / 189 Taxman 171 / (2009) 26 DTR 314 (Karn.)(High Court)*

**S. 45(4) : Capital gains – Distribution of assets on dissolution of firm – Valuation – FMV [S. 50(1)]**

Distribution of assets among the partners at the time of dissolution of the firm is to be assessed under section 45(4) and the same is not covered by section 50(1). Assessing Officer was free to refer the assets for valuation under section 55A, as the transfer value shown in the book value which can not be accepted as the fair market value of the assets i.e. Land and Building.

*CIT v. Kumazha Tourist Home (Dissolved) (2010) 38 DTR 166 / 190 Taxman 40 / 328 ITR 600 / 233 CTR 591 (Ker.)(High Court)*



**S. 45(4) : Capital gains – Conversion in to company – Part-IX of Companies Act**

Provisions of section 45(4) is not attracted to conversion of partnership firm in to company under the provisions of part IX of Companies Act. (A.Y. 1995-96)

*CIT v. Rita Mechanical Works (2010) 46 DTR 133 (P&H)(High Court)*

**S. 45(4) : Capital gains – Distribution of assets on dissolution – Death of one of two partners**

No capital gain arose under section 45(4) to assessee firm on dissolution of firm on death of one of two partners of firm. (A.Y. 1991-92)

*CIT v. Moped & Machines (2005) 198 CTR 608 / 281 ITR 52 / 150 Taxman 98 (MP)(High Court)*

**S. 45(4) : Capital gains – Distribution of assets on dissolution of firm [S. 45(4)]**

Word “otherwise” used in section 45 (4) takes into sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of retiring partner. (A.Y. 1997-98)

*CIT v. A.N. Naik Associates (2004) 265 ITR 346 / 136 Taxman 107 / 187 CTR 162 (Bom.)(High Court)*

**S. 45(4) : Capital gains – Dissolution of firm – Winding up – Distribution**

Where though firm stood dissolved but for a limited purpose of winding up of affairs of firm, it continued till its assets and business were sold as a going concern and as such it continued to hold properties as owner till date of sale of assets, as there was no distribution of capital assets of firm, despite its dissolution, assessee firm could not be made liable for capital gains tax under section 45 (4). (A.Y. 1989-90)

*CIT v. Mangalore Ganesh Beedi Works (2004) 136 Taxman 42 / 265 ITR 658 / 187 CTR 401 (Karn.)(High Court)*

**S. 45(4) : Capital gains – Dissolution of firm – Business taken over by one partner**

Where for A.Y. 1976-77, on dissolution of firm, one partner out of two partners took over assets by paying consideration to other partner, there was no transfer so as to attract capital gains in the hands of other partner. (A.Y. 1976-77)

*CIT v. Surendra Kumar Gupta (2004) 270 ITR 325 / 191 CTR 538 (All.)(High Court)*

**S. 45(4) : Capital gains – AOP – Distribution on dissolution of trust**

The petitioner trust on coming to an end handed over a flat owned by it to its beneficiaries, subsequently such flat was sold. Assessing officer held that on dissolution of trust, capital assets comes to be distributed to beneficiaries and therefore, profit arising from transfer of such capital assets was chargeable to tax as income of trust.

The court held that in the instant case trustee could not be assessed as AOP, hence section 45 (4) would have no application. (A.Y. 1995-96)

*L.R. Patel Family Trust v. ITO (2003) 129 Taxman 720 / 262 ITR 520 / 182 CTR 255 (Bom.)(High Court)*

#### **S. 45(4) : Capital gains – Transfer – Dissolution – Otherwise [S. 2(47)]**

Land was transferred in the name of the partners by book entries, the assessee contended that as no registration is done, the immoveable property was not legally transferred and also contended that as there was no dissolution, section 45(4) cannot be applied. The Tribunal held that the provision of section 45(4) were applicable. The word "otherwise" covers the transfer other than the dissolution also. (A.Y. 2001-2002)

*New Gujarat Tin Printing Works v. ITO (2011) 128 ITD 182 / 136 TTJ 64 / 50 DTR 289 (Ahd.)(Trib.)*

#### **S. 45(4) : Capital gains – Transfer – Retirement of partner**

The assessee which was a partnership firm consisted of two partners. The business of the partnership firm was that of builders, developers, contractors and real estate consultants. The assessee firm commenced the business and development of the project and all the costs incurred in connection with the same were shown as work-in-progress. One of the partners of the firm died and his legal heirs decided to continue the business with the other partner. The legal heirs also retired from the firm and the existing partner took over the assets and liabilities of the firm. This transfer was held as a transfer under the provisions of section 45(4) of the Act and the matter was remanded back to the Assessing Officer for computation of capital gains in hands of the assessee. (A.Y. 2005-06)

*ITO v. Om Namah Shivay Builders & Developers (2011) 43 SOT 397 / 138 TTJ 49 (UO)(Mum.)(Trib.)*

#### **S. 45(4) : Capital gains – Transfer of asset to partner by book entry – Registration [S. 2(47)]**

If a transaction falls within the ambit of the definition of transfer under the section 2(47) then irrespective of the fact as to whether the transaction is a transfer within the Transfer of Property Act, 1881 or not, the resultant income accrued is chargeable to tax under the provisions of section 45(4). (A.Y. 2001-02)

*New Gujarat Tin Printing Works v. ITO (2011) 128 ITD 182 / 136 TTJ 64 / 50 DTR 289 (Ahd.)(Trib.)*

#### **S. 45(4) : Capital gains – Retirement of Partner – Allocation of properties**

On allocation of properties and goodwill to the account of the retiring partner, and constitution by remaining partners, by a new deed on next day, would not amount to dissolution of existing firm, and constitution of new firm so as to invoke provisions of section 45(4).

*Purayannur Industries v. ACIT (2010) 188 Taxman 34 (Mag.)(Cochin)(Trib.)*

**S. 45(4) : Capital gains – Firm – Revaluation of assets before conversion**

Revaluation of assets before conversion of firm in to company, not a case of dissolution of firm nor transfer of assets of firm hence, section 45(4) not attracted. (A.Y. 1994-95)

*ITO v Gulabdas Printers (2010) 4 ITR 264 (Ahd.)(Trib.)*

**S. 45(4) : Capital gains – Partnership Firm – Retirement – Family arrangement**

The expression “distribution of capital assets on the dissolution of a firm or Other association of persons or body of individuals or otherwise” cannot be extrapolated to bring retirement of one partner in to ambit of section 45(4). Even otherwise as there was family arrangement, provisions of section 45(4), cannot be applicable. (A.Y. 2004-05)

*ACIT v. Goyal Dresses (2010) 126 ITD 131 / 30 DTR 75 (Chennai)(Trib.)*

**S. 45(4) : Capital gains – Assets taken over by partner – Expression “Otherwise”**

Assets taken over by a partner on dissolution of firm. Expression “otherwise” appearing in sub-section(4) of section 45 has not to be read “ejusdem generis” with the expression “dissolution of a firm or other AOP”. It has to be read with the words “transfer of a capital asset by way of distribution of capital asset”. Therefore capital gain is chargeable to tax on takeover of a capital asset by a partner on dissolution of firm. (A.Y. 2000-01)

*ITO v. International Rubber & Plastics (2010) 48 DTR 219 / 27 ITD 347 / (2011) 136 TTJ 482 (Chennai)(Trib.)*

**S. 45(4) : Capital gains – Take over of business – Partnership – Relinquishment**

One of the two partners of the firm having relinquished his rights thereon in favour of the other by way of deed of dissolution w.e.f., 19th December, 2001, and the said partner having taken over the running business of the erstwhile firm as the sole proprietor, and later formed a new partnership with a new partner commencing from 21st December, 2001, provisions of section 45 (4) are clearly applicable. (A.Y. 2002-03)

*ITO v. Marketers (2008) 4 DTR 383 / 114 TTJ 887 (Amritsar)(Trib.)*

**S. 45(4) : Capital gains – Distribution of assets to ex-partners – Satisfaction of debt**

Distribution of assets to ex-partners for satisfaction of their debts representing their capital on the date of retirement is not caught within the mischief of section 45(4). (A.Y. 1988-89)

*Gandamal & Sons v. ACIT (2007) 107 TTJ 228 / (2006) 11 ITD 368 (Pune)(Trib.)*

**S. 45(4) : Capital gains – Slump sale – Manufacturing division [S. 50B]**

Gains arising from the slump sale of its manufacturing division by the assessee company was not liable to tax prior to introduction of section 50B w.e.f. 1st April, 2000. (A.Ys. 1995-96, 1996-97)

*Jt. CIT v. Steri Sheets Ltd. (2007) 106 TTJ 460 (Delhi)(Trib.)*

**S. 45(4) : Capital gains – Retirement – No transfer**

Section 45(4) is not applicable on Retirement, as it does not result in transfer. (A.Y. 1989-90)

*Dy. CIT v. G K Enterprises (2003) 79 TTJ 82 / 131 Taxman 181 (Mag.) / (2004) 2 SOT 691 (Mad.)(Trib.)*

**S. 45(4) : Capital gains – Retirement – Business continued – Closing stock**

Section 45(4) is not applicable on Retirement, when business is still going on. Held, Assessing Officer is not justified in revaluing the closing stock at market rate.

*ACIT v. Sohrabji Khanna & Co (2003) 133 Taxman 112 (Mag.)(Amritsar)(Trib.)*

**S. 45(5) : Capital gains – Enhanced compensation – Withdrawal of disputed amount**

When the appeal is pending before the Court / Tribunal / Authority and the Court / Tribunal / Authority permits the claimant to withdraw the disputed enhanced compensation against security or otherwise, the same is liable to be taxed under section 45(5). Interest under section 28, additional amount under section 23(1A) and solatium under section 23(2) of the Land Acquisition Act, 1894 forms part of the enhanced compensation under section 45(5)(b). (A.Y. 1999-2000)

*CIT v. Ghanshyam (HUF) (2009) 26 DTR 129 / 315 ITR 1 / 224 CTR 522 / 182 Taxman 368 / 8 SCC 412 / (2010) 214 Taxation 106 (SC)*

**S. 45(5) : Capital gains – Compensation – Compulsory acquisition**

Enhanced compensation by the assessee for compulsory acquisition of waste lands and trees by the State Government under the Jagir Abolition Act is taxable as per the provisions of section 45(5)(b), therefore, the amount of enhanced compensation is chargeable to tax despite the fact that the cost of acquisition of the said capital asset is nil. (A.Y. 1989-90)

*Sajjansinh N. Chauhan v ITO (2010) 38 DTR 155 / 232 CTR 268 (Guj.)(High Court)*

**S. 45(5) : Capital gains – Compulsory acquisition – Pendency of appeal – Amount in dispute**

When an appeal was pending against award of enhanced compensation for acquisition of land, it was absolutely necessary to know amount of compensation that was actually received by appellant unconditionally and amount that was received on his furnishing a bank guarantee and it was only then that it could be determined, as a matter of fact, what was the amount of compensation received by the appellant; thereafter law applicable, that is, section 45(5) would come into play.

*V.K. Jain v. CIT (2005) 275 ITR 474 (Delhi)(High Court)*

**S. 45(5) : Capital gains – Compensation – Compulsory acquisition – Interim order**

If any amount is received after stay of award, in pursuance of an interim order as a payment subject to final result, it will not be an amount received as enhanced compensation contemplated under section 45 (5) (b) but only an interim payment received subject to final decision. The amount taxable only when final order is passed. (A.Y. 1994-95)

*CIT v. Shantavva (Smt) (2004) 267 ITR 67 / 136 Taxman 678 / 188 CTR 162 (Karn.)(High Court)*

**S. 45(5) : Capital gains – Enhanced compensation – Capital asset – Relevant issue**

If at time of transfer, asset does not fall with in definition of capital asset', there is no occasion to treat enhanced compensation in respect thereof in a subsequent year as capital gain under section 45(5). (A.Y. 1994-95)

*A.R. Dahiya v. ACIT (2004) 269 ITR 542 / 141 Taxman 449 / 192 CTR 37 (P&H)(High Court)*

**S. 45(5) : Capital gains – Award – Compensation – Date**

Compensation received by the assessee, the date of award i.e. 18-12-1992, was the crucial date for determining the assessment year with respect to which the compensation could be brought to capital gain tax. The finding of the Tribunal that the advance compensation received must be assessed in the year of receipt and the balance amount received pursuant to the award must be assessed in the year of receipt of amount, could not be accepted. Such a conclusion was not warranted from the provisions of clause (a) of sub section (5) of section 45. Section 45 (5)(a) does not refer to amount received as advance earlier to award passed by Collector. Where there was no case of the department that enhanced compensation was awarded by Court, Tribunal or other authority, there was no question of application of sub-section (5) of section 45 at all. (A.Y. 1992-93)

*CIT v. C. P. Lonappan & Sons (2003) 132 Taxman 468 / 184 CTR 159 / (2004) 265 ITR 101 (Ker.)(High Court)*

**S. 45(5) : Capital gains – Conversion of proprietary business in to firm – Tax avoidance**

Where it was held that entire transaction of conversion of proprietary business into firm was a device adopted by assessee to avoid payment of capital gains tax, the assessee was liable for the payment of capital gains tax and the assessee was liable for the payment of that tax on the value of the proprietary business made over to the firm. (A.Y. 1982-83)

*S. V. Kumaragurupasamy v. CIT (2003) 260 ITR 127 / 133 Taxman 360 / 180 CTR 227 (Mad.)(High Court)*

**S. 45(5) : Capital gains – Enhanced compensation – Interest – Year**

Enhanced compensation along with interest thereon is assessable entirely in the year in which it is received. (A.Ys. 1999-2000 to 2002-03)

*Dy. CIT v. Ajay Sharma (2011) 135 TTJ 222 / 49 DTR 65 / 140 TTJ 388 / 48 SOT 164 (URO)(Delhi)(Trib.)*

**S. 45(5) : Capital gains – Accrual – Enhanced Compensation [S. 155(16)]**

Enhanced compensation for acquisition of land is taxable in the year of receipt and cannot be taxed in different years in which it accrued. (A.Y. 2000-01)

*ITO v Roop Singh (2010) 127 TTJ 377 / 33 DTR 257 (Delhi)(Trib.)*

**S. 45(5) : Capital gains – Enhanced compensation – Acquisition of land**

Assessee having received additional compensation for acquisition of land in the year under consideration pursuant to the judgement of Addl. District Judge, same was chargeable to tax in the year of receipt as per the provisions of section 45(5) irrespective of the fact that the additional / enhanced compensation is subject matter of further litigation. (A.Ys. 1994-95, 1995-96)

*Dy. CIT v. Bhim Singh Lather (2006) 100 TTJ 170 (AT)(TM)(Delhi)(Trib.)*

**S. 45(5) : Capital gains – Enhanced compensation – Original transaction**

Enhanced compensation was not taxable under section 45(5) as the original transaction was not subject to capital gains. (A.Y. 1996-97)

*ITO v. Prajapati Shankarbhai Ramabhai Through LR & Ors. (2006) 100 TTJ 143 / 6 SOT 487 (Ahd.)(Trib.)*

**S. 45(5) : Capital gains – Enhanced compensation – Year of receipt – Code**

- (i) Section 45(5) deals with a situation where compensation on compulsory acquisition is enhanced (including further enhanced) by any court, Tribunal or other authority. Such enhancement of compensation is brought to charge in the year in which such enhanced compensation is received.
- (ii) Section 45(5) is a complete code as it provides not only for charging enhanced compensation but also contains a machinery for computation of income by providing that cost of acquisition and cost of improvement in such a case would be nil. It further provides that in case of a death, enhanced compensation shall be deemed to be the income of the person receiving it. The amount is to be taxed in the year of the receipt. Thus, section 45(5) is an overriding provision and quite different from sub-section (1) of section 45 in content and texture. (A.Y. 1995-96)

*Dy. CIT v. Padam Prakash (HUF) (2006) 104 ITD 1 / 104 TTJ 989 / 10 SOT 1 (SB)(Delhi)(Trib.)*

**S. 45(5) : Capital gains – Agricultural land – Enhanced compensation**

Enhanced compensation received by the assessee for the acquisition of land cannot be charged to tax under section 45(5). (A.Y. 1995-96)



*ITO v. Chaman Lal Nagpal (2006) 102 TTJ 890 / 7 SOT 887 (Amritsar)(Trib.)*

**S. 45(6) : Capital gains – Investment in ELSS – Transfer – Switchover [S. 2(47), 80CCB(1)]**

Units of mutual funds by way of switchover not being units in respect of which assessee had claimed deduction under section 80CCB(1) nor those units were originally issued under a plan formulated under any equity linked savings scheme, they were not of the type of units mentioned in sub section (2) of section 80CCB and therefore, surplus arising to the assessee on account of switch over of the units cannot be assessed as capital gains under section 45(6). (A. Y. 2000-01).

*A. Vadivel & Ors. v. Dy. CIT (2011) 142 TTJ 875 / 63 DTR 460 (Chennai)(Trib.)*

**Section 46 : Capital gains on distribution of assets by companies in liquidation.**

**S. 46 : Capital gains – Liquidation – Distribution of assets – Cost of acquisition [S. 49(1), 55]**

For the relevant assessment year, assessee computed his capital gains by taking cost of acquisition of said property on basis of value of shares purchased by him. Assessing Officer held that since the capital asset became assessee's property on distribution of same by company in-liquidation, cost of acquisition of said asset had to be taken as cost to previous owner as per section 49(1)(iii)(c). The Tribunal confirmed the view of Assessing Officer. (A.Y. 1991-92)

*ACIT v. T. R. Srinivasan (2010) 36 SOT 312 / 131 TTJ 49 (Chennai)(Trib.)*

**Section 47 : Transactions not regarded as transfer.**

**S. 47 : Capital gains – Transaction not a transfer – Lease – Registration**

Leasing out of property for twenty years is a transfer of a capital asset even if it is unregistered lease deed.

*CIT v. C.F. Thomas (2006) 284 ITR 557 / 204 CTR 21 / (2007) 158 Taxman 310 (Ker.)(High Court)*

**S. 47 : Capital gains – Transaction not a transfer – Cost – Previous owner [S. 46, 47(v) and 49(1)(iii)]**

In view of section 49(1)(iii)(e) capital gain should be computed by taking the cost in the hands of the previous owner. Benefit of section 47(v) would not be available to the assessee in view of the section 46(2) and hence capital gains is chargeable to tax.

*CIT v. Brahmi Investments Pvt. Ltd., Gujarat High Court, Income Tax Reference No. 102 of 1995, dated 7/10-2-2006 — ACAJ, April 2006 - Page 40 (Guj.)(High Court)*

**S. 47 : Capital gains – Transaction not a transfer – Rearrangement of share holdings – Possible litigation**

Rearrangement of shareholdings in the companies to avoid possible litigation among family members and to control companies effectively by major shareholders is not a transfer exigible to capital gains tax. (A.Y. 1996-97)

*Kay ARR enterprises v. Jt. CIT (2006) 99 TTJ 411 / (2005) 97 ITD 291 (Chennai)(Trib.)*

**S. 47 : Capital gains – Transaction not a transfer – Partner receiving share in assets of partnership firm [S. 2(47), 45]**

When a partner receives his/her share in assets of partnership firm or when she receives something in excess of her share in assets of partnership firm, and even in a case where partner receives a share of profit, either in case of retirement or in case of dissolution, same can not be brought to tax, irrespective of existence or deletion of section 47(ii), when partner received by mutual consent was only money's worth of her share in partnership assets only. Thus the amount in question could not be brought to tax as capital gain under section 45 read with section 2 (47), as there was no transfer. (A.Ys. 1991-92 to 2000-01)

*Durdana Khatoon (Smt) v. Dy. CIT (2005) 93 ITD 15 / 93 TTJ 753 (Hyd.)(Trib.)*

**S. 47(iv) : Capital gains – Transaction not a transfer – Exemption – Transfer to subsidiary**

Transfer of assessee's shares to its subsidiary companies. Surplus realized on sale of shares. No Capital Gains to be leviable. (A.Y. 1979-80)

*CIT v. Shahibaug Enterprises P. Ltd. (2010) 320 ITR 695 / (2008) 2 DTR 251 (Guj.)(High Court)*

**S. 47(iv) : Capital gains – Transaction not a transfer – Capital loss – Transfer of business and work in progress – 100 percent subsidiary**

Assessee transferred business and work in progress to hundred percent subsidiary, which is Indian Company. In view of provisions of section 47(iv), capital gains on such transfer of capital asset was not chargeable to tax. At the same time loss arising on transfer of business assets would also not be allowed as deduction. (A. Y. 2003-04).

*Dy. CIT v. Mother Dairy Fruits & Veg (P) Ltd. (2011) 45 SOT 186 / 141 TTJ 97 / 60 DTR 220 (Delhi)(Trib.)*

**S. 47(iv) : Capital gains – Transaction not a transfer – Transfer to subsidiary – Transfer pricing – Minimum Alternate Tax – India-Mauritius DTAA [S. 92 to 92F, 115JB, Articles 5, 7 & 13(4)]**

Applicant, a Mauritius holding company transfers shares in an Indian company to its wholly-owned subsidiary in India - AAR observed that as the conditions under Section 47(iv) of the Act are fulfilled, the transfer would not be regarded as transfer within the meaning of Section 45 of the Act and hence the gains if any arising on transfer would not be taxable in India; further, under Article 13 of the India Mauritius Tax Treaty, as the applicant is tax resident of Mauritius, it would not be subjected to tax

in India on the capital gains arising from the proposed transaction in India; as regards applicability of MAT, it relied on ruling in AAR 836 of 2009 in the case of Timken Company, USA, that under Section 591 of the Companies Act, only such foreign companies who have established a place of business within India are required to make out a balance sheet and P&L account; hence Section 115JB is not designed to be applicable to a foreign company who has no presence or PE in India - Hence held transfer cannot be regarded as transfer and that provisions of MAT are not attracted as the applicant is a foreign company and has no place of business or PE in India; transfer pricing norms are also not applicable in absence of capital gains tax.

*Praxair Pacific Ltd., Mauritius (2010) 326 ITR 276 / 193 Taxman 1 / 233 CTR 350 / 42 DTR 177 (AAR)*

**S. 47(v) : Capital gains – Transaction not a transfer – Transfer to Subsidiary [S. 2(47)]**

On 3-1-1992, assessee entered in to an agreement with ATCL a group concern of assessee, for sale of shares of ARL. Assessee applied for necessary permission to Central Government under section 372 of Companies Act, 1956. On 9-7-1992, Central Government granted approval for transfer of shares of ARL by assessee to ATCL. On 20-11-1992, ATCL acquired entire shareholding of assessee company. Thereafter, on 22-12-1992; assessee effected transfer of shares of ARL to ATCL and received consideration for transfer. The Tribunal held that transaction of transfer of shares is complete only when share certificates together with transfer deed duly signed are delivered and payment received by seller. In the instant case transfer of shares took place on 22-12-1992, i.e. on a date when assessee had already become wholly owned subsidiary of ATCL and therefore, Capital Gain arising on sale of shares was not taxable in assessee's hands by virtue of provisions of section 47(v). (A.Ys. 1992-93, 1993-94)

*Anusandhan Investments Ltd. v. ITO (2010) 40 SOT 205 (Mum.)(Trib.)*

**S. 47(v) : Capital gains – Transaction not a transfer – Subsidiary company – Shares held jointly in the name of director – Whole of share capital**

Section 47(v) requires that the whole of the share capital is held by the holding company is not the same thing as whole of share capital being held in name of same holding company. Shares held by the holding company jointly with its director are to be treated as held by assessee holding company as director becomes joint owner in fiduciary capacity for assessee company. (A.Y. 1993-94)

*ACIT v Papillon Investment (P) Ltd. (2005) 4 SOT 304 (Mum.)(Trib.)*

**S. 47(vi) : Capital gains – Transaction not a transfer – Amalgamation – Foreign companies [S. 47(vii), 245R(2)]**

Applicant companies having resolved to amalgamate in order to achieve synergies of operation, enhanced operational flexibility and to create a stronger base for future growth of the amalgamated entity, the amalgamation can not be characterized as a mere device for avoidance of tax within the meaning of cl. (iii) of the proviso to

section 245R(2). Applicants would therefore be entitled to benefits of sections 47(vi) and (vi) and consequently no tax liability would arise in respect of transfer of assets / shares pursuant to and as a part of the terms of amalgamation.

*Star Television Entertainment Ltd. & Ors. In Re (2010) 229 CTR 7 / 321 ITR 1 / 188 Taxman 206 / 34 DTR 98 (AAR)*

**S. 47(vi) : Capital gains – Transaction not a transfer – Amalgamation – Subsidiary**

**[S. 2(47), 45]**

Capital gains on transfer of shares in Indian company by amalgamating wholly owned foreign subsidiary company with amalgamated foreign parent company - Authority ruled that amalgamation of the wholly owned subsidiary foreign company with its parent company does not result in a transfer for consideration and therefore does not give rise to any capital gains. The liability to capital gains tax (if any) can only be on the transferor company (subsidiary), which in the present case has lost its identity and ceased to exist. Hence, no capital gains is chargeable. Amalgamation of a wholly owned subsidiary company with its parent company, does not result in a transfer for consideration, and therefore, does not give rise to any capital gains.

*Hoechst GmbH, Germany (2007) 159 Taxman 207 / 289 ITR 312 / 208 CTR 197 (AAR)*

**S. 47(xiii) : Capital gains – Transaction not a transfer – Conversion of firm in to company – Partners capital balance – Loan – Withdrawal of credit balance**

Partners converted the firm into company and partners credit balance lying as their capital was converted in to loan and was repaid to them. Assessing Officer held that there was violation of proviso (c) to section 47(xiii). The Tribunal held that merely because the partners' credit balance lying as their capital was converted in to loan and which was repaid to them, it cannot be said that there was any undue benefit directly or indirectly to the partners. As there was no violation, addition was deleted. (A. Y. 2005-06).

*Vishal Containers P Ltd. v. ACIT ((2011) BCAJ Sept P. 399 (Ahd.)(Trib.)*

**S. 47(xiii) : Capital gains – Transaction not a transfer – Conversion of partnership into company – Part IX [S. 47A(3) & Ss. 574 & 575 of Companies Act]**

No capital gains accrued or arose at the time of conversion of erstwhile partnership firm into private limited company under Part IX of the Companies Act, 1956, as the partners of the firm became the shareholders of the said company having shareholdings identical to the profit-sharing ratio and by reason of transfer of shares to the applicant before five years, the company is not liable to pay tax on capital gains.

*Umicore Finance Luxembourg In Re. (2010) 36 DTR 249 / 323 ITR 25 / 189 Taxman 250 / 230 CTR 218 (AAR)*

## **Section 48 : Mode of computation.**

### **S. 48 : Capital gains – Computation – Cost of acquisition – Short term or Long term – Renouncement of right to receive right shares**

Computation of gain / loss resulting from renunciation of option to subscribe to right shares.

For the computation of gain / loss resulting from renunciation of option given to the existing shareholder's a right to subscribe to offer additional shares / debentures, the crucial dates for determination of nature of capital gains / loss (short term / long term) are the date of coming into existence of such right and date of renunciation thereof. Said right comes into existence when the offer is made and it is distinct and separate capable of being transferred independently of the original shareholding. Hence, where the assessee renounced that right in favour of a third party for money in the AY and consequently suffered loss of a higher amount due to diminution in the value of original shares, the net loss so suffered was a short-term capital loss. Hence, the assessee rightly applied deduction under section 48(2) to amount of long-term capital gains earned during the year and then from the remainder deducted the said short-term capital loss. Department erred in deducting the said short-term loss from long-term gains and then applying section 48(2) to the remainder.

An important principle for computation of capital gains under section 48 is that computation is an integral part of chargeability. (A.Y. 1992-93)

*Navin Jindal v. ACIT (2010) 2 SCC 525 / 320 ITR 708 / 228 CTR 478 / 34 DTR 1 / 187 Taxman 283 (SC)*

### **S. 48 : Capital gains – Computation – Cost of acquisition – Land Acquired by succession from ex-Ruler – Cost of previous owner not ascertainable – Market value [S. 49, 55(2), 55(3)]**

For the assessment years 1977-78 and 1979-80, the assessee sold plots of land for consideration. The assessee contended that the previous owner was an ex ruler of Pepsu State and since the asset was acquired under the instrument of annexation its cost of acquisition could not be ascertained and that capital gains tax was not attracted. Held that the contention that the value was incapable of being ascertained was not tenable. It was not the case of the assessee that the land had no market value at all on the date of acquisition . Even where the cost of acquisition of capital asset cannot be ascertained but the asset has a market value, capital gains tax will be attracted by taking the cost of acquisition to be fair market value as on January 1, 1954 or on a date statutorily specified or at the option by assessee, market value on the date of acquisition. (A. Ys. 1977-78, 1979-80).

*CIT v. Raja Malwinder Singh (2011) 334 ITR 48 / 56 DTR 366 / 241 CTR 520 (FB)(P&H)(High Court)*

### **S. 48 : Capital gains – Computation – Cost of acquisition – Original and bonus share [S. 55(2)(b)]**

Capital gains on sale of original and bonus shares have to be computed by spreading the cost of acquisition of original shares over the original shares and the bonus shares. (A. Y. 1990-91).

*M. B. & Co. Ltd. v. ACIT (2011) 55 DTR 76 / 337 ITR 29 / 198 Taxman 168 (Mad.)(High Court)*

#### **S. 48 : Capital gains – Computation – Rectifying the defect in title – Expenditure deductible**

Amount incurred by the assessee for rectifying the defect in title to the property and removing encumbrance on the property were held to be amount spent in connection with the transfer of the property and allowable as deduction while computing capital gain.

*V. Lakshmi Reddy v. ITO (2011) 333 ITR 359 / 55 DTR 241 / 196 Taxman 78 / 241 CTR 364 (Mad.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Gift – Indexed cost**

The assessee's daughter purchased a flat on 29.1.1993 at a cost of ` 50.48 lakhs. She gifted the flat to the assessee on 1.2.2003. The assessee sold the flat on 30.6.2003 for ` 1.10 crores. In computing LTCG, the assessee took the indexed cost of acquisition under Explanation (iii) to section 48 on the basis that she "held" the flat since 29.1.1993. The Assessing Officer held that as the assessee had "held" the flat from 1.2.2003, the cost inflation index for 2002-03 would be applicable. The CIT(A) and the Special Bench of the Tribunal upheld the claim of the assessee. On appeal by the department, HELD dismissing the appeal:

Under Explanation 1(i)(b) to section 2(42A), in determining the period for which any asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner has to be included. Accordingly, though the assessee acquired the capital asset on 30.6.2003, she was deemed to have "held" the asset from 29.1.1993 onwards. This fiction will apply to clause (iii) of the Explanation to section 48 as well for determining the "indexed cost of acquisition". The object of the legislature is to tax the gains arising on transfer of a capital acquired under a gift or will by including the period for which the said asset was held by the previous owner. This object cannot be defeated by excluding the period for which the said asset was held by the previous owner while determining the indexed cost of acquisition of that asset to the assessee.

*CIT v. Manjula J. Shah (2012) 204 Taxman 691 / 68 DTR 267 / 249 CTR 270 (Bom.)(High Court)*

#### **S. 48 : Capital gains – Computation – Capital loss – Partly convertible debenture**

Assessee would be entitled to claim capital loss that had arisen due to transfer of rights issue to partly convertible debentures. (A.Y. 1994-95)



*CIT v. New Ambadi Investments (P) Ltd. (2010) 188 Taxmann 67 / (2008) 304 ITR 211 (Mad.)(High Court)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Interest on loan**

Where the asset / property was purchased by the assessee out of the loans taken from its directors and the interest due thereon for the relevant previous year was not actually paid to the directors, the interest payable on such loans was held by the court to be included in the cost of acquisition of the property for the purpose of computing capital gains even though the interest was not paid by the assessee till the asset / property was sold / disposed off. (A.Y. 2003-04)

*CIT & Anr. v. Sri Hariram Hotels (P) Ltd. (2010) 34 DTR 162 / 188 Taxman 170 / 229 CTR*

*455 / 325 ITR 136 (Karn.)(High Court)*

**S. 48 : Capital gains – Computation – Business income – Sale of ancestral house [S. 28(i)]**

Where the assessee sold ancestral property which was capital asset and Tribunal has found that the same was not converted in to stock-in-trade, the profit on sale of such property is assessable as capital gains. (A.Y. 2005-06)

*CIT v. Raja Malwinder Singh (2010) 40 DTR 273 (P&H)(High Court)*

**S. 48 : Capital gains – Computation – Block of assets – Slump sale [S. 50]**

Sale proceeds received from sale of a going concern of one division of assessee, which was slump sale and not a sale of block of assets, section 50 was not applicable.

(A.Y. 1998-99)

*CIT v. MaxIndia Ltd. (2009) 319 ITR 68 / 178 Taxman 196 (P&H)(High Court)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Coupons – NCDs [S. 55(2)]**

Coupons received along with non-convertible debentures having no cost of acquisition were not chargeable to capital gains.

Assessee is entitled to adopt cost of acquisition as on 1st April, 1981, for purpose of computing capital gains even though the shares were held as stock-in-trade as on that date and were converted into capital asset on 6th November, 1987.

*CIT v. Jannhavi Investments (P) Ltd. (2008) 1 DTR 374 / 215 CTR 72 / 304 ITR 276 (Bom.)(High Court)*

**S. 48 : Capital gains – Computation – Sale consideration – Full value of consideration**

The expression 'full value of consideration' in section 48 of the Act only refers to the consideration referred to in the sale deed as the sale price of the asset, which have been transferred and does not mean market value of the asset.

Held further that in case of sale simpliciter the full value of the consideration is the sale value shown in the sale deed and in such case there is no necessity to refer the matter to the valuation officer under section 55 A of the Act.

*CIT v. Nilofer I. Singh (Smt) (2008) 14 DTR 108 / (2009) 221 CTR 277 / 309 ITR 233 / 176 Taxman 252 (Delhi)(High Court)*

#### **S. 48 : Capital gains – Computation – Mortgage debt – Diversion of income**

The assessee was not entitled to the deduction on account of mortgage debt to the Bank. It was application of income and not diversion of income by overriding title.

*CIT v. Sharad Sharma (2008) 305 ITR 24 (All.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Exemption – Priority – First deduction and then exemption [S. 54E]**

While computing the Long Term Capital Gains, the deduction under section 48(2) has to be allowed before exemption under section 54E. (A.Y. 1992-93)

*Sercon (P.) Ltd. & Ors. v. ACIT (2008) 218 CTR 479 / 174 Taxman 245 / 11 DTR 193 (Guj.)(High Court)*

#### **S. 48 : Capital gains – Computation – Foreign buyer – Deduction for expenditure**

The assessee sold share to a foreign buyer at a price much higher than the market value. Out of the sale consideration received the assessee claimed deduction on account of brokerage, stamp duty, etc. The Assessing Officer restricted the deduction so claimed by the assessee to 0.5% of the sale consideration. The High Court on the appeal filed by the revenue held that the assessee was entitled to deduction of full expenditure incurred on sale of shares on the ground that the assessee required the services of professionals who were employed not only for sale of shares but also for procuring the appropriate price.

*CIT v. Plash Food Pvt. Ltd. (2007) 198 Taxation 220 (Delhi)(High Court)*

#### **S. 48 : Capital gains – Computation – Capital receipt – Liquidated damages**

Where the assessee entered into an agreement for purchase of a property with a condition that if the seller does not hand over the assessee vacant possession of the property on or after a particular date, the seller would have to pay liquidated damages. The liquidated damages so received by the assessee buyer upon seller's failure to hand over the possession was held to be in the nature of a capital receipt and not a revenue receipt as held by the Assessing Officer.

*CIT v. Ram Nath Exports Ltd. (2007) 201 Taxation 42 (Delhi)(High Court)*

#### **S 48 : Capital gains – Computation – Cost of acquisition – Land in lieu of land left at Pakistan**

Cost of agricultural land which was allotted to assessee in lieu of land left in Pakistan is not incapable of being ascertained and, therefore, capital gain arising on acquisition of said land is exigible to tax. Since assessee was allotted the land before 1st March,

1970; i.e., the date from which agricultural land situated within the municipal limits is deemed to be a capital asset, cost of the land has to be determined as on 1st March, 1970. (A.Y. 1972-73)

*CIT v. S. Hoshnak Singh (HUF) (2007) 212 CTR 422 / 292 ITR 390 (P&H)(High Court)*

#### **S. 48 : Capital gains – Computation – No cost of acquisition – Sale of inherited property**

The Hon'ble Court held that the Income-tax authorities were not right in working out capital gains so as to bring the same to tax under the head "Capital Gains" as neither the cost nor the date of acquisition were ascertainable.

*CIT v. Manoharsinhji P. Jadeja (2006) 281 ITR 19 / 199 CTR 223 / 148 Taxman 110 (Guj.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Consideration**

Where the revenue contended that the assessee had received higher consideration than that is shown to have been received by the assessee, the burden to prove that assessee has received higher consideration is on the revenue which must be discharged by the revenue by bringing in some cogent evidences.

*CIT v. Shree Prakash Gupta (2006) 193 Taxation 347 (Delhi)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Non-compete agreement – No cost**

Assessee received amount for agreeing not to engage in competitive business, No cost of acquisition of asset, hence no capital gains. (A.Y. 1989-90)

*CIT v. A. S. Wardekar (2006) 283 ITR 432 / 199 CTR 255 / 151 Taxman 303 (Cal.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Valuation of bonus shares**

Where an assessee had opted to value the shares held by it as on 1-1-1964, at the market rate as on that date, that has to be regarded as the cost of acquisition of those shares and any bonus shares issued subsequent thereto have to be valued by spreading the value of original shares at its market value as on the specified date over the bonus shares. (A.Y. 1986-87)

*CIT v. T.S. Santhanam (2004) 141 Taxman 302 / 190 CTR 185 (Mad.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Full value of consideration – VDIS – Conversion into stock-in-trade**

Where genuineness of conversion of assets disclosed under Voluntary Disclosure Scheme into stock-in-trade was not accepted, value shown thereof under VDIS, and not value at time of alleged conversion, should be taken as their value for purposes of capital gains.

*Manna Lal Nirmal Kumar Surana v. CIT (2003) 263 ITR 328 / 132 Taxman 463 / 185 CTR 61 (Raj.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Deductions – On money**

'On-money' received by assessee in earlier year and taxed in his hands could not be deducted while computing capital gain in subsequent year from sale of property in absence of proof of refund of 'on money'. (A.Y. 1996-97)

*Vijendra Manjunath Shenai v. CIT (2003) 260 ITR 176 / 181 CTR 423 / 134 Taxman 688 (Bom.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Agricultural land – Converted into non agricultural**

Cost of acquisition of agricultural land converted into non-agricultural land and gifted to assessee, was to be determined on the basis of value of the land as on the date of its conversion into non-agricultural land. (A.Y. 1971-72)

*CIT v. B.B. Vyas (2003) 128 Taxman 166 / 261 ITR 73 / 183 CTR 108 (Guj.)(High Court)*

#### **S. 48 : Capital gains – Computation – Assets having no cost of acquisition [S. 45, 49]**

Provisions pertaining to the head 'Capital gains' do not include an asset in acquisition of which no cost at all can be conceived. Charging section and computation provisions together constitute an integrated code. (A.Y. 1986-87)

*CIT v. General Industrial Society Ltd. (2003) 129 Taxman 628 / 262 ITR 1 / 183 CTR 67 (Cal.)(High Court)*

#### **S. 48 : Capital gains – Computation – Assets having no cost of acquisition – License fee**

Receipt on transfer of license cannot be brought within purview of capital gains since cost of acquisition is unascertainable.

*CIT v. Magnum Export (P.) Ltd. (2003) 130 Taxman 702 / 262 ITR 10 / 183 CTR 75 (Cal.)(High Court)*

#### **S. 48 : Capital gains – Computation – Assets having no cost of Acquisition – Goodwill**

It cannot be disputed that the goodwill comprises of various components but, goodwill as a whole comprising such components can also be transferred and in such a situation the components cannot be separated so as to render goodwill into nullity. (A.Y. 1995-96)

*B. Raghurama Prabhu Estate v. Jt. CIT (2003) 127 Taxman 605 / 264 ITR 124 / 180 CTR 87 (Karn.)(High Court)*

#### **S. 48 : Capital gains – Computation – Assets having no cost of acquisition – Tenancy right**

Consideration received by tenant for surrendering tenancy right held not taxable following the judgment of *Caddell Weaving Mills Co Ltd. v. CIT* (2001) 249 ITR 265 (Bom.). (A.Ys. 1994-95 to 1996-97)

*Bhor Industries Ltd. v. ACIT* (2003) 183 CTR 292 / (2004) 136 Taxman 632 (Bom.)(High Court)

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Shares received as a consideration**

Where assessee had transferred shares held by it in one company to another for consideration of shares of transferee company at specified consideration, face value of such shares could not be made basis of computation of capital gains. (A.Y. 1992-93)

*P. S. Rajan v. ACIT* (2003) 129 Taxman 703 / 263 ITR 279 / 181 CTR 487 (Ker.)(High Court)

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Slump sale**

Neither income tax Act nor any judicial pronouncement declares that where sale of the assets is made for lump sum consideration, it can not be subjected to tax under the heading "capital gains". The law is that if individual assets can reasonably valued for ascertaining their respective cost of acquisition, then by resorting to statutory parameters and mode of calculation devised under the head "capital gains" in Chapter IV, the gains so computed can always be brought to tax. (A.Y. 1995-96)

*B. Raghurama Prabhu Estate v. Jt. CIT* (2003) 127 Taxman 605 / 264 ITR 124 / 180 CTR 87 (Karn.)(High Court)

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Slump sale – Land and building**

Mentioning of consideration in respect of land or building would not per se take transaction out of slump sale and in case of sale of business as a whole, there is no allocation of price to any particular asset and, therefore, computation of capital gains in such case is done on business as a whole which business itself is capital asset. (A.Y. 1995-96)

*Premier Automobiles Ltd. v. ITO* (2003) 129 Taxman 289 / 264 ITR 193 / 182 CTR 202 (Bom.)(High Court)

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Slump sale – Going concern**

Where business had been sold as a going concern, in absence of any material to show that the value of land had been taken in block of assets, capital gain arising from land was entitled to deduction under section 48(2). (A.Y. 1991-92)

*Kuttukaran Machine Tools v. CIT* (2003) 131 Taxman 690 / 264 ITR 305 / 185 CTR 104 (Ker.)(High Court)

**S. 48 : Capital gains – Computation – Cost of acquisition – Indexed cost – Date of allotment letter – Stamp duty – Interest – Processing charges [S. 45]**

Stamp duty, interest, processing fee, development charges, fire fighting charges, generator charges, etc. paid to the builder form part of cost of acquisition incurred by the assessee for acquiring the ownership of the flat and therefore, assessee is entitled to deduction of all aforesaid payments under section 48(ii) on computation of capital gain on the sale of flat.

Assessee is also entitled to indexation from 1995, when he started making the payment to builder and received the allotment letter and not from the date of conveyance deed in 2001. (A. Y. 2007-08)

*Praveen Gupta v. ACIT (2011) 52 DTR 334 / 137 TTJ 307 (Delhi)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Fair market value**

Provision contained in section 48 regarding computation of capital gains contemplates ascertainment of full value of consideration received or accruing as a result of transfer capital asset, said provision does not contain words to effect “fair market value” etc. Where there was no evidence on record that transferees were related to directors of assessee company and that assessee had received amount more than stated consideration, income was to be computed by Assessing Officer on basis of consideration actually received. (A.Y. 2006-07).

*Dy. CIT v. Jindal Equipment Leasing & Consultancy Services Ltd. (2011) 131 ITD 263 / 10 ITR 128 (Delhi)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Shares – Fees paid for Portfolio Management Services – Diversion of income**

Fees paid by assessee for PMS was not inextricably linked with particular instance of purchase and sale of shares and securities and sale of shares and securities so as to treat the same as expenditure incurred wholly and exclusively in connection with cost of acquisition, improvement, of shares and securities so as to be eligible for deduction in computing capital gains under section 48. Payment of fees by assessee for PMS did not amount to diversion of income by an overriding title. (A. Y. 2004-05).

*Devendra Motilal Kothari v. Dy. CIT (2011) 132 ITD 173 / 136 TTJ 188 / 50 DTR 369 (Mum.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Indexation – Preference shares**

Once shares are specifically covered by indexation of costs, and unless there is a specific exclusion clause for “preference shares”, it cannot be open to Assessing Officer to decline indexation benefits to preference shares. (A. Y. 2005-06).

*G. D. Metsteel (P) Ltd. v. ACIT (2011) 47 SOT 62 / 64 DTR 161 / 142 TTJ 641 (Mum.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – PMS fees**



Professional fees and profit sharing fees paid to an asset management company, cannot be allowed as deduction under section 48 while computing the capital gains. The Tribunal followed the ratio of *Devendra Motilal Kothari v Dy. CIT* (2011) 13 Taxman 15 and *Pradeep Kumar Harlalka v. ACIT* (A. Y. 2006-07).  
*Homi K. Bhabha v. ITO* (2011) 48 SOT 102 (Mum.)(Trib.)

**S. 48 : Capital gains – Computation – Cost of acquisition – Deduction – Compensation – To free the encumbrance of lessee**

Assessee purchased an Aircraft from MFL subject to the rights of MAL (lessee) under the lease agreement between MFL and MAL, compensation paid by assessee to MAL for surrendering its pre-existing rights in order to resell the Air craft and deliver the same to the purchaser free of all encumbrances is inextricably connected to the transfer of air craft the same is allowable as deduction under section 48(1). (A. Y. 2003-04)

*ITO v. Taj Services (P) Ltd.* (2011) 64 DTR 105 / (2012) 143 TTJ 70 (Mum.)(Trib.)

**S. 48 : Capital gains – Computation – Indexed cost – Date of agreement – Payment to tenant**

For the purpose of determining the indexed cost of acquisition of property, indexation has to be allowed from the date on which the assessee purchased the property by way of agreement and not from the date on which the assessee got vacant possession thereof after evicting the tenant. Assessee is entitled to consider the amount paid to the tenant for obtaining vacant possession as cost of improvement of property. (A.Y. 2004-05)

*Nita A. Patel (Mrs.) v. ITO* (2011) 128 ITD 24 / 7 ITR 659 / (2010) 40 DTR 507 /132 TTJ 468 (Mum.)(Trib.)

**S. 48 : Capital gains – Computation – NAV based PMS fees – Deductible**

In computing capital gains under section 48, payments are deductible in two ways, one by taking full value of consideration net of such payments and the other by deducting the same as "expenditure incurred wholly and exclusively in connection with the transfer". The expression "full value of consideration" contemplates additions and deductions from the apparent value. It means the "real and effective consideration", which can be arrived at only after allowing the deductible expenditure. The PMS fee, on profit sharing basis, was for the twin purposes of acquisition and sale of the securities. The fact that bifurcation between the two is not possible is not relevant. Accounting Standard 13 (Accounting for Investments) issued by ICAI provides that brokerage, fees and duties have to added to the cost of investments. (A.Ys. 2004-05 to 2006-07)

*Editorial : CIT v. Shakuntala Kantilal* (1991) 190 ITR 56 (Bom.) followed; *Devendra Kothari* (2011) 50 DTR 369 (Mum.)(Trib.) not followed). (A. Ys. 2002-03, 2004-05 to 2006-07)

*KRA Holding & Trading P. Ltd. v. Dy. CIT* (2011) 46 SOT 19 (Pune)(Trib.)

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Gift – Indexed Cost**

For the purpose of computing long term capital gain arising from the transfer of a capital asset which had become property of the assessee under gift, the indexed cost of acquisition of such capital asset had to be computed with reference to the year in which the previous owner first held the asset. (A.Y. 2004-05)

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

*Editorial : Affirmed by Bombay High Court CIT v. Manjula Shah (2012) 204 Taxman 691 / 68 DTR 267 / 269 CTR 470 (Bom.)(High Court)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Interest – Shares**

When interest bearing funds are utilized for making an application for allotment of shares and the number of shares allotted is less than the number of shares applied for, the entire interest is to be treated as cost of acquisition of shares allotted.

*Neera Jain (Smt.) v. ACIT, ITA No. 1861/Mum./2009, decided on 22-2-2010 (BCAJ 42-A, June 2010 P. 347)(Mum.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Indexed cost – FII [S. 112, 115AD]**

Foreign institutional investor is assessable as per section 115AD, and is not entitled to the benefit of indexation on the transactions resulting in long term capital gain/loss. (A.Y. 1998-99)

*Advantage Advisors Inc. v. Dy. CIT (2010) 39 DTR 217 / (2009) 33 SOT 46 / 6 ITR 235 / 131 TTJ 41 (Mum.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Indexed cost – Inheritance – Previous owner [S. 55(2)(b)]**

Base year of cost index to be considered while computing the indexed cost of acquisition in relation to an asset which had been acquired through inheritance in the year 1992-93 from the previous owner who held the property in 1956 was 1981-82. (A.Y. 2006-07)

*ACIT v. Sayed Maqbul Hussain (2010) 4 ITR 44 (Chennai)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Agricultural land – FMV [S. 55]**

Market rate of agricultural land cannot be made the basis for ascertaining the fair market value of commercial land for computation of capital gains; fair market value of the land as on 1st April, 1981, estimated by the assessee by applying the cost inflation index to the sale value of land for stamp duty purposes in the reverse order was sustainable. (A.Y. 2003-04)

*Jahanganj Cold Storage v. ACIT (2010) 43 DTR 238 / 133 TTJ 278 / 45 SOT 79 (TM)(Agra)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Share acquired by a partner on dissolution of firm [S. 55(2)(b)]**

Though strictly speaking the capital gain on sale of the shop allotted to the assessee partner on dissolution of the firm can be computed only by taking the fair market value of the shop on the date of dissolution i.e. 10th Sept., 1990 as cost of acquisition, assessee having computed the capital gains on the basis of fair market value as on 1st April 1981, on which the assessee had only tenancy rights and the department having appealed against the order of CIT(A), upholding the assessee's computation of capital gains, no direction can be given to rework the capital gain by taking the cost of acquisition as on 10th Sept., 1990, so as to place the revenue in worse off situation. Order of the CIT(A), directing the Assessing Officer to accept the capital Gain declared in the return is confirmed. (A.Y. 2005-06)

*Dy. CIT v. Leelavati S. Mehta (2010) 44 DTR 34 / 133 TTJ 633 (Mum.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Market value – Cost of construction**

Assessee had sold land to the builder-developer. Only the cost of construction of proposed building allotted to the assessee in the ultimately constructed area and not the market value of such share of constructed area, has to be reckoned as consideration for the purpose of computation of capital gains. (A.Ys. 2005-06, 2006-07)

*Dy. Director of IT v. G. Rahguram (2010) 46 DTR 136 / 39 SOT 406 (Hyd.)(Trib.)*

**S. 48 : Capital gains – Computation – Fair market value – Full value of consideration**

**[S. 45, 50C, 55A]**

Under section 45 the full value of consideration is to be adopted for computing the capital gains. Under section 50C, fair market value estimated by the registering authority is deemed to be full value of consideration, however, there is no provision in the Act under which the fair market value assessed by the DVO is to be taken as full value of consideration, hence the Assessing Officer was not justified in adopting the fair value determined by the DVO as the full value of consideration for computing the income from capital gains. (A.Y. 2007-08)

*ITO v. Mohinder Nath Sehgal & Sons (2010) 46 DTR 238 (Chd.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Chargeability – Transfer of right to acquire property – Nil cost of acquisition [S. 45]**

Transfer of right to acquire property i.e. for giving up right to claim specific performance did not attract capital gains as no cost of acquisition was determinable. (A.Ys. 2007-08, 2008-09)

*B. Ramakrishnaiah v. ITO (2010) 46 DTR 406 / 134 TTJ 600 / 39 SOT 379 (Hyd.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Interest capitalised**

Interest was paid because installments could not be paid in time and same became part of cost of acquisition, hence, the interest capitalised has to be considered as part of cost of acquisition. (A.Ys. 2003-04, 2004-05)

*Ajmal Fragrances & Fashions (P) Ltd. (2009) 34 SOT 57 (Mum.)(Trib.)*

**S. 48 : Capital gains – Computation – Period of holding – Firm – Partners [S. 54, 54F, 55(2)]**

Where the property purchased by firm and transferred to partners at latter date. The period of holding of property has to be computed from the date of allotment to partner and not from the date of acquisition by the firm. (A.Y. 1999-2000)

*Shantilal J. Jain v. Addl. CIT (2009) 126 TTJ 831 / 31 SOT 457 / 32 DTR 91 (Mum.)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Registration charges**

The assessee had purchased the land out of borrowed funds. The Tribunal held that registration charges and interest paid on borrowings formed part of cost of acquisitions and eligible for deduction. Indexation was also granted on the same. (A.Y. 2002-03)

*Ishtiaque Ahmad v. ACIT, ITA No. 863/D/2009, Bench 'C', dt. 28-8-2009 – BC&AJ P. 21, Vol. 41-B, Part 2, November 2009. (Delhi)(Trib.)*

**S. 48 : Capital gains – Computation – Cost of acquisition – ESOP – Right to purchase shares**

Assessee having made no payment for exercising the right to purchase shares under ESOP, there was no cost of acquisition of such shares to the assessee and therefore, amount received on sale of said shares is not taxable as capital gains, further date of exercise of option and date of sale being the same, there is no difference between the deemed cost of acquisition and actual price realized by the assessee and therefore, no amount is chargeable to tax as capital gains. (A.Y. 1993-94)

*Bomi S. Billimoria v. ACIT (2009) 124 TTJ 960 / 27 DTR 324 (Mum.)(Trib.)*

**S. 48 : Capital Gains – Computation – Cost of acquisition – Interest – Shares [S. 14A]**

Interest paid on borrowed funds for acquisition of shares is allowed to be capitalized and treated as cost of shares for the purpose of computation of capital gain and it cannot be disallowed in view of the provisions of section 14A on the ground that intention of the investment in shares was to earn dividend income which is exempt. (A.Y. 2002-03)

*S. Balan alias Shanmugam v. Dy. CIT (2009) 120 ITD 469 / 120 TTJ 397 / (2008) 15 DTR 60 (Pune)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Property – Fair market value**

The fair market value of the property has to be determined after considering host of cumulative factors including size, location and other special advantages/dis-advantages attached to the property.

*Shankarlal Gupta v. Dy. CIT (2007) 162 Taxman 209 (Mag.)(Jodh.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Land and building [S. 49]**

On sale of two assets viz., land & building, by a composite agreement for a composite consideration, assessee has right to segregate consideration amongst two assets and compute respective capital gains.

*ACIT v. Yamuna Syndicate Ltd. (2007) 162 Taxman 167 (Mag.)(Chd.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Actual sale consideration**

Section 48 does not preclude the Assessing Officer from substituting the actual sale consideration for the sale consideration shown in the sale deeds if there is evidence to show that the assessee has indeed received higher amount. (A.Y. 2002-03)

*Inderpal Singh Ahuja v. ACIT (2006) 100 TTJ 497 / 103 ITD 271 (Amritsar)(Trib.)*

#### **S. 48 : Capital gains – Computation – Expenditure for transfer – Brokerage – Commission and interest**

For computing the capital gains the commission/brokerage, interest to bank and interest payments to tenants paid by assessee were deductible. (A.Y. 1995-96)

*B. Sbhandha (Smt) v. ITO (2005) 92 ITD 285 / 92 TTJ 405 (Hyd.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Deduction – Partner in a firm – Only once**

Deduction under section 48(2) is allowable only once, and assessee partner in a firm cannot claim deduction from his share of Capital Gains, arrived at after deduction under section 48(2) in assessment of firm. (A.Y. 1992-93)

*S M Sundaram v. ACIT (2003) 84 ITD 199 / 78 TTJ 786 (Mad.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Full value of consideration – Sale within 2 months**

Where the assessee purchased and sold the property within a short span of 2 months, Assessing Officer was not justified in adopting the higher value as per report of DVO, without bringing any material on record, as the onus is on the Assessing Officer, if he is not satisfied with the sale consideration. The Tribunal also held that S. 55A can be applicable when the price is not known or not determined.

*Sankta Prasad Gupta v. ITO (2003) 128 Taxman 88 (Mag.)(Delhi)(Trib.)*

#### **S. 48 : Capital gains – Computation – Full value of consideration – Splitting of consideration**

Assessee company is not liable to pay Capital Gains on whole amount of spin off transaction treating the same as full value of consideration received by the assessee company, on part consideration received by the shareholders, in form of shares as per sanctioned scheme, since same is not diversion of Income.

*Salora International v. Jt. CIT (2003) SOT 671 / 129 Taxman 68 (Mag.)(Delhi)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Fair market value**

While determining the Fair market value of Immovable property as on 1.4.1981, the value should be taken as per DVO's report, when the matter has been referred to him, and not the value as on 1.4.1981 determined in wealth tax proceedings. (A.Y. 1996-97)

*Chaturbhuj Dwarkadas v. Jt. CIT (2003) 87 TTD 147 (Mum.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Registered valuer**

The value adopted by the assessee as on 01.04.1981 based on report of registered valuer, cannot be brushed aside without pointing any reason. There has to be reliable material to rebut the valuation, since the report of a registered valuer is a valid piece of evidence in deciding matters of valuation, and Assessing Officer's action in rejecting the valuation was held to be unlawful and arbitrary. (A.Y. 1996-97)

*Sosamma Paulose (Mrs) v. Jt. CIT (2003) 79 TTJ 573 / 133 Taxman 46 (Mag.)(Cochin)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – 100 % deduction [S. 35]**

On sale of scientific research assets on which 100 % deduction was claimed under section 35, Assessee is not entitled to deduction of cost of acquisition, and same was to be assessed to tax under section 41(3).

However the difference between the cost, as increased to indexed cost, and sale consideration is allowable as Capital Loss under the head Capital Gains. (A.Y. 1993-94)

*Pharmson Pharmaceuticals Ltd v. Dy. CIT (2003) 87 ITD 668 / 81 TTJ 818 (Ahd.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Asset having no cost – Conversion into company [S. 45]**

On conversion of Partnership into Joint stock Company as the cost of acquisition can not be determined, same cannot be brought to tax under section 45, in view of ratio of the Supreme Court decision in case of B C Srinivasa Shetty (A.Y. 1995-96)

*Well Pack Packaging v. Dy. CIT (2003) 78 TTJ 448 / 130 Taxman 215 (Mag.)(Ahd.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Asset having no cost**



Amount received for surrendering the right to manufacture and marketing, which had been generated over years, was held to be not liable to Capital Gains Tax. (A.Y. 1996-97)

*P L Chemicals Ltd v. ACIT (2003) 86 ITD 46 / 86 TTJ 745 (Mad.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Renunciation of right shares**

Capital Gain/Loss on renunciation of Right shares has to be computed in the manner approved by S.C in *Dhun Dadabhoy Kapadia v. CIT 63 ITR 651*. (A.Y. 1994-95)

*ITC Ltd v. Dy. CIT (2003) 86 ITD 135 / 80 TTJ 15 (TM)(Kol.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Cost with reference to certain mode of acquisition – Trust**

Where a Capital asset became property of assessee under transfer to a Trust, it can not be said that asset had no cost of acquisition, and hence was out of purview on Capital Gains. As the amount settled by settlor was ascertainable, which was further improved, it cannot be said that there was no cost of acquisition of beneficial interest acquired by the assessee in Trust. (A.Y. 1992-93)

*Anjali Goel (Miss) v. ITO (2003) 85 ITD 27 / 79 TTJ 1004 (Mum.)(Trib.)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Non-resident – Indexation – DTAA – India-Canada – Shares [S. 90, Art. 24]**

Denial of the benefit of the second proviso to section 48 to a non resident assessee while computing capital gains from the sale of shares would not amount to discriminatory treatment in terms of Art. 24 of the DTAA with Canada.

*Transworld Garnet Company Ltd., In Re. (2011) 333 ITR 1 / 197 Taxman 428 / 239 CTR 152 / 52 DTR 161 / 225 Taxation 355 (AAR)*

#### **S. 48 : Capital gains – Computation – Cost of acquisition – Non-Resident – Long-term capital gains – Indexation benefit – India-Canada DTAA [Article 24]**

Applicant holds 74% of the equity share capital in Transworld Garnet India Pvt. Ltd. ('TGI') and enters in an agreement to transfer such shareholding. It contends that denial of indexation benefit is tantamount to discriminatory tax treatment under the DTAA - AAR observed that said Article seeks to prevent differentiation solely on ground of nationality and not on basis of residence status. The state is not obliged to extend the same privileges which it accords to its own residents to one who is not. For example the residents are taxable on their worldwide income and the non-residents are not. Hence held that denial of indexation benefit to the non-resident applicant while computing capital gains arising from the sale of shares of TGI would not amount to discriminatory treatment in terms of said Article.

*Transworld Garnet Co. Ltd. (TG) (2011) 239 CTR 152 / 52 DTR 161 / 333 ITR 1 / 197 Taxman 428 (AAR)*

**S. 48 : Capital gains – Computation – Cost of acquisition – Long-term capital gains – benefit of lower tax rate of 10% available to non-resident – Interest [S. 112(1)]**

Non-resident applicant sold shares in an Indian listed company resulting in long-term capital gains; issue is whether the applicable tax rate would be 10% as per the proviso to S. 112(1) of the IT Act - AAR followed the ruling in case of Timken SAS, France where it was observed that applicability of 'second proviso to section 48' as mentioned in proviso to S.112(1) is not a condition precedent for availing the benefit under said proviso and AAR therein ruled that non-resident foreign company can avail the said benefit of 10% tax - It further ruled that interest paid to the shareholders to compensate for the delay and pursuant to the order of a statutory body becomes an inseparable part of cost of acquisition in plain sense or commercial sense as but for the payment by way of interest, it would not have been possible to acquire the shares and hence interest paid is admissible as cost of acquisition

*Burmah Castrol Plc (2008) 307 ITR 324 / 175 Taxman 353 / 221 CTR 63 / 16 DTR 145 (AAR)*

**Section 49 : Cost with reference to certain modes of acquisition.**

**S. 49 : Capital gains – Previous owner – Cost of acquisition – Family arrangement – Company assets – HUF – Director [S. 45]**

Assessee is Director in a company AG. By way of family arrangement half of the land owned by company came to the share of the present assessee and other half went to the share of another family group. Assessee sold their share of land for an amount of ₹ 2.9 crores. Assessee computed the capital gains by applying the provision of section 49(1). The Assessing Officer held that assets in question are not the property of HUF but it was owned by company AG and there was no distribution of its assets, because there was no liquidation of the company. Consequently, the said capital asset continued to be owned by AG and did not become the property of the assessee's hands therefore section 49(1) would not apply. The Court directed the Assessing Officer to compute the capital gains in the said company and give credit of taxes paid by assessee.

*CIT v. Shashi Charla (2011) 334 ITR 129 / 51 DTR 232 / (2010) 195 Taxman 148 / 243 CTR 394 (Delhi)(High Court) / CIT v. Atul Charla / Baldev Charla / Jyoti Charla (2011) 51 DTR 232 / (2010) 195 Taxman 148 / 243 CTR 394 / 334 ITR 129 (Delhi)(High Court)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition – Dissolution of firm – Liability of partnership**

Where capital asset becomes property of assessee-partner on dissolution of a firm, then cost of acquisition is deemed to be cost for which property was acquired by partnership firm and there is no provision for entitlement to set off liability of partnership in computation of capital gain. (A.Ys. 1968-69 to 1970-71)

*Delhi Safe Deposits Co v. CIT (2004) 269 ITR 66 / 136 Taxman 417 / 188 CTR 602 (Delhi)(High Court)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition – Dissolution of firm – Amount paid to continuing partner**

In case of dissolution of firm amount paid by continuing partner to retiring partner cannot be treated as part of cost of acquisition of asset of dissolved firm. (A.Y. 1976-77)

*CIT v. Theatre Sri Rangaraja (2003) 260 ITR 453 / 181 CTR 117 / 135 Taxman 269 (Mad.)(High Court)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition [S. 50C]**

Once a particular amount is considered as full value of consideration at the time of its purchase, the same shall automatically become the cost of acquisition at the time when such capital asset is subsequently transferred.

Section 50C applies to a capital asset being 'land or building or both' and not to 'any right in land or building or both'. Leasehold rights in plot of land is not 'land or building or both' and hence section 50C does not apply to leasehold rights. (A. Y. 2006-07)

*Atul G. Puranik v. ITO (2011) 58 DTR 208 / 11 ITR 120 / 141 TTJ 69 / 132 ITD 499 (Mum.)(Trib.)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition – Deemed gift**

The assessee contended that the expression "gift" in section 49 includes a deemed gift with in meaning of section 4(1)(a) of Gift tax Act, 1958 and thus actual value of property, relinquished by her children should be taken as cost to her instead of taking in to consideration price paid by her under relinquishment deed. The Tribunal held that the definition in section 2(xii) or section 4(1) of the 1958 Act, cannot be imported for the purpose of construing the word "gift" occurring in section 47(iii), since, the scope of the two Acts is different. (A.Y. 1997-98)

*M. Suseela v. ITO (2010) 2 ITR 760 / 125 ITD 253 (Visakha.)(Trib.)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition – FMV on 1st April, 1981 – Sale of Land – Dismantling the building [S. 48, 55(2)(b)]**

The assessee had sold land by second sale deed after dismantling the building, the fair market value for the purpose of computation of capital gain should be taken, of the land as well as the construction thereon since as on 1st April 1981, building was existing over the plot. Assessing Officer was not justified in taking the fair market value of land only. (A.Y. 2004-05)

*Subash Chand Kapoor v. ITO (2010) 46 DTR 314 / (2011) 132 ITD 587 (Agra)(Trib.)*

**S. 49 : Capital gains – Previous owner – Cost of acquisition – Surrender of tenancy rights [S. 45]**

Assessee trust sold certain property acquired by it in lieu of surrender of its tenancy rights, such transfer was covered by provisions of section 49 (1)(iii)(d) and ratio laid down in *CIT v. B.C. Srinivasa Shetty (1981) 128 ITR 294 (SC)* was not applicable and capital gain arising to assessee was exigible to tax under section 45, read with section 49(1)(iii)(d). The Commissioner (Appeals) held that the asset acquired was a gift by one 'M' to the trust and it was also transfer to a trust, therefore it was covered under section 49 (1)(iii)(d). Order of CIT (A) was confirmed by the Tribunal. (A.Y. 1996-97) *Madanlal Gupta Family Trust v. Jt. CIT (2005) 1 SOT 292 (Mum.)(Trib.)*

## **Section 50 : Special provision for computation of capital gains in case of depreciable assets.**

### **S. 50 : Capital gains – Depreciable assets – Transfer of undertakings – Tangible and intangible assets [S. 45]**

In the case of transfer of entire business undertaking, section 50 has application as far as tangible assets are concerned, assessee having transferred its entire marketing undertaking consisting of both tangible and intangible assets to another company, Assessing Officer is directed to apportion and / or segregate the amount of consideration received by the assessee by way of transfer of tangible assets out of the total consideration for assessment under the head capital gains under section 45, read with section 50. (A. Y. 1996-97)

*Kwality Ice Creams (India) Ltd. v. CIT (2011) 52 DTR 366 / 198 Taxman 65 / 336 ITR 100 / 239 CTR 449 (Cal.)(High Court)*

### **S. 50 : Capital gains – Depreciable assets – Undertaking – Block of assets [S. 2(11), 10B]**

On expiry of tax holiday period specified in section 10B undertaking comes in automatically for regular assessment and income chargeable has to be computed in accordance with normal provisions, therefore, on expiry of period mentioned under section 10B, block of assets. Viz., plant and machineries of industry are available for working out relief under section 50(2). (A.Y. 1993-94)

*S. Muthurajan v. Dy. CIT (2011) 202 Taxman 356 / 339 ITR 301 (Mad.)(High Court)*

### **S. 50 : Capital gains – Depreciable assets – Short term capital gains [S. 2(11), 2(42A), 50A]**

Building which was acquired by the assessee in 1974, and in respect of which depreciation was allowed to it as a business asset for 21 years, still continued to be part of depreciable asset even though the assessee discontinued claiming depreciation for two years before its date of sale, and therefore, profit on sale of the building was assessable under section 50 as short term capital gains. (A.Y. 1998-99)

*CIT v. Sakthi Metal Depot (2011) 333 ITR 492 / 220 Taxation 235 / (2010) 37 DTR 153 / 189 Taxman 329 / 232 CTR 279 (Ker.)(High Court)*

### **S. 50 : Capital gains – Depreciable assets – Slump sale [S. 41(2)]**

Provisions of section 41(2), r.w.s. 50 are not applicable in the case of a transfer of entire going concern where the agreement does not reflect the actual value of land, building, plant and machinery and also does not reflect the actual liability of the assessee payable to different persons. (A.Y. 1995-96)

*CIT v. Agrosynth Chemicals (2010) 233 CTR 101 / 327 ITR 135 / 41 DTR 226 (2011) 198 Taxman 232 (Karn.)(High Court)*

#### **S. 50 : Capital gains – Depreciable assets – Hotel – Same block of assets – Set off [S. 2(11)]**

Where the CIT(A) and the Tribunal have drawn conclusion of the facts that the property sold by the assessee was not used as a Hotel and hence, under section 50(2), the set off of the sale proceeds of such property was available to the assessee against the purchase cost of new property falling under the same block of assets, no substantial question of law arises. (A.Y. 1999-2000)

*CIT v. Scindia Investment (P) Ltd. (2010) 327 ITR 282 / 233 CTR 458 / 39 DTR 12 / 191 Taxman 225 / (2011) 222 Taxman 162 (Bom.)(High Court)*

#### **S. 50 : Capital gains – Depreciable assets – Land – Depreciation – Transfer of undertaking**

Land is not a depreciable asset. Section 50 deals only with the transfer of depreciable assets. Once land forms part of the assets of the undertaking and the transfer is of the entire undertaking as a whole, it is not possible to bifurcate the sale consideration. Section 50 applies when depreciable assets alone are transferred.

*CIT v. Coimbatore Lodge (2010) 328 ITR 69 (Mad.)(High Court)*

#### **S. 50 : Capital gains – Depreciable assets – Set off of the sale proceeds [S. 2(11)]**

Set off of the sale proceeds was available to the assessee against the purchase cost of new property falling under the same block of assets. (A.Y. 1999-2000)

*CIT v. Scindia Investment (P) Ltd. (2010) 327 ITR 282 / 233 CTR 458 / 39 DTR 12 / 191 Taxman 225 / (2011) 222 Taxman 162 (Bom.)(High Court)*

#### **S. 50 : Capital gains – Depreciable assets – Computation – Cost of acquisition**

S. 50 being a special provision for computing cost of acquisition in case of depreciable assets would override general provisions of section 55(2) and, thus, where capital asset is depreciable and assessee has availed of deduction on account of depreciation, cost of acquisition shall have to be determined in terms of provisions of section 50, read with section 48, and not substitution of value of assets on 1-1-1954 as per section 55(2). (A.Y. 1964-65)

*CIT v. Modi Electric Supply Co. Ltd. (2005) 276 ITR 135 / 146 Taxman 621 / 195 CTR 261 (P&H) (High Court)*

#### **S. 50 : Capital gains – Depreciable assets – Computation – Investment in securities [S. 54E]**

Fiction created in section 50(1)/(2) is restricted only to section 48 & 49; it does not apply to other provisions like section 54E hence, capital gain on sale of long term capital asset on which depreciation was allowable, inserted in specified securities exemption under section 54E is allowable. (A.Y. 1992-93)

*CIT v. ACE Builders (P.) Ltd. (2005) 144 Taxman 855 / 195 CTR 1 / (2006) 281 ITR 210 (Bom.) (High Court)*

*Editorial : SLP rejected in CIT v. Legal heir of Late S. R. Pandit SLP No. 17026 dt. 23-3-2007 from Bombay High Court ITA C. No. 775 of 2005 dt 30-8-2005.*

### **S. 50 : Capital gains – Depreciable assets – Indexation [S. 43(6)(b), 48, 49]**

Assessee sold depreciable asset, what was provided in section 48 and 49 was subject to the modification set out in section 50 and therefore, the assessee was not entitled to any indexing. For the purpose of section 50 (2) benefit of indexing is not available.

*M. Raghavan v. ACIT (2004) 266 ITR 145 / 134 Taxman 790 (Mad.) (High Court)*

### **S. 50 : Capital gains – Depreciable assets – Exemption under section 54E available [S. 54E]**

Section 50 is a special provision where the mode of computation of capital gains is substituted if the assessee has claimed depreciation on capital assets. Section 50 nowhere says that depreciated asset shall be treated as short term asset. Section 54E is an independent provision, which is not controlled by section 50. Assessee invested net consideration in specified assets entitled to exemption.

*CIT v. Assam Petroleum Industries (P.) Ltd. (2003) 262 ITR 587 / 131 Taxman 699 / 185 CTR 71 (Gau.) (High Court)*

### **S. 50 : Capital gains – Depreciable assets – Sale of business as a whole [S. 41(2)]**

Principles for computing capital gains are the same, both under section 41(2) as it stood at the relevant time, and under section 50. The sale value assigned by the transferee for the purpose of their books of account could not constitute the basis for computing income/ profits of the assessee company under the Act. In the case of sale of business as a whole, there is no allocation of price to any particular asset and therefore, the computation of capital gains in such a case is done on the business as a whole which business is a capital asset. (A.Y. 1995-96)

*Premier Automobiles Ltd. v. ITO (2003) 129 Taxman 289 / 264 ITR 193 / 182 CTR 202 (Bom.) (High Court)*

### **S. 50 : Capital gains – Depreciable assets – Set off of brought forward business loss [S. 2(11)]**

Income assessed by the assessee in the relevant year on sale of factory building, plant and machinery although not taxable as profits and gains of business or profession is an income in the nature of business though assessed as capital gains under section 50 and therefore, assessee is entitled to set off of brought forward business losses against the said capital gains. (A. Y. 2005-06).



*Digital Electronics Ltd. v. Addl. CIT (2011) 49 DTR 484 / 135 TTJ 419 (Mum.)(Trib.)*  
*Editorial:- See J. K. Chemicals Ltd. v ACIT, ITA No. 8206/Bom/1089 and 8618/Bom/89 Bench 'A' dt. 1-11-1993, Sri Padmavathi Srinivasa Cotton Ginning Factory v. Dy. CIT (2009) 29 DTR 1 (Visakha.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Block of assets [S. 2(11)]**

Section 50(1)(iii) does not make a distinction between block of assets of one unit and block of assets of another unit, even if they are independent units. Even if new asset is not used for the purpose of business, its cost will have to be deducted from full value of consideration received or accruing on transfer of block of assets, while computing short term capital gains. (A. Y. 1989-90)

*Dy. CIT v. Ansal Properties & Infrastructure Ltd. (2011) 44 SOT 236 / 60 DTR 294 / 141 TTJ 237 (Delhi)(Trib.)*

**S. 50 : Capital Gains – Depreciable assets – Indexation – Block of assets [S. 2(11)]**

Assessee claimed depreciation on capital asset (flat) for two years as it was used as office premises which was allowed. Flat was the only asset in the block of assets. No depreciation was claimed for later years as the flat was not used for the purposes of business but leased on rent. Assessing Officer and CIT(A) held that the as the flat being only asset in the block of assets the capital gains is assessable as short term capital gains. On appeal the Tribunal held that the moment the assessee stopped claiming depreciation in respect of the flat and even let out the same for rent, it ceased to be a business asset. The Tribunal directed the Assessing Officer to allow benefit of indexation as claimed by the assessee treating the sale as long term capital asset.

*Prabodh Investment & Trading Company Pvt. Ltd. v. ITO, ITA No. 6557/Mum/2008 Bench 'C' dt. 28-2-2011 (2011) 43-A BCAJ - April P. 34 (Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Block of assets [S. 2(11)]**

If any capital asset on which depreciation has been allowed under Income Tax Act 1961, or Indian Income Tax Act 1922, and which otherwise qualifies to form a part of block of assets as on 1-4-1988, special provisions contained in section 50 shall apply on transfer of such asset. Therefore, plant and machinery on which assessee was allowed depreciation upto 1984 constituted block of assets hence, provision of section 50 would be applicable. (A. Y. 1996-97)

*Shree Changdeo Sugar Mills Ltd. v. Jt. CIT (2011) 44 SOT 479 / 139 TTJ 646 / 58 DTR 340 (Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Block of assets [S. 2(11)]**

Provisions of section 50 are not attracted in a case where on the asset transferred depreciation was neither claimed nor allowed. (A. Y. 2006-07)

*Divine Construction Co. v. ACIT (2011) 138 TTJ 72 / 53 DTR 461 (Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Income includes loss – Sale of manufacturing unit**

On the sale of entire assets of manufacturing unit, case of assessee falls within the ambit of section 50 because the word "income" includes within its ambit the "loss", Assessing Officer is directed to hear the assessee and compute the loss as provided in section 50(2). (A. Ys. 2005-06 and 2006-07).

*Sony India (P) Ltd. v. ACIT (2011) 56 DTR 156 / 141 TTJ 432 (Delhi)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Set off of unabsorbed long term loss [S. 74]**

Provisions of section 50 are to be extended only up to the stage of computation of capital gains and therefore, capital gain resulting from transfer of depreciable assets which were held for a period of more than three years would retain the character of long term capital gain for all other provisions and consequently qualify for set off against brought forward loss from long term capital assets. (A. Y. 2005-06).

*Manali Investments v. ACIT (2011) 139 TTJ 411 / 56 DTR 218 / 45 SOT 128 (URO)(Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Setoff of long term capital loss against short term capital gains [S. 2(11), 74(1)(b)]**

Under section 74(1)(b), the assessee is entitled to claim of set off of long term capital loss against the capital gains income arising from the sale of office premises being depreciable asset, the gain of which is short term due to the deeming provisions of section 50(2) but the asset is long term. (A. Y. 2005-06).

*Komac Investments & Finance (P) Ltd. v. ITO (2011) 62 DTR 196 / 132 ITD 290 / 142 TTJ*

*308 / (2012) 66 DTR 209 (Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Block of assets [S. 2(11)]**

If after crediting sale proceeds the written down value of block is reduced, it cannot be taxed separately, but if it exceeded the written down value it would be brought to tax as short term capital gains. (A.Ys. 1998-99 to 2004-05)

*Rolls Royce Industrial Power Ltd. v. ACIT (2010) 6 ITR 722 / 42 SOT 264 / 47 DTR 257 (Delhi)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Double taxation reliefs – India-Mauritius**

**[S. 9(1)(i), 45, 90]**

Gains on sale of rig, which was a PE asset on which depreciation was claimed all long, is taxable in India under the IT Act, as also under 13 of the India-Mauritius tax treaty, it is wholly immaterial, in this case whether the assets were sold in India or outside India. (A.Y. 1998-99)

*Cartier Shipping Co. Ltd. v. Dy. DIT (2010) 131 TTJ 129 / 40 DTR 459 / 41 SOT 470 (Mum.)(Trib.)*

### **S. 50 : Capital gains – Depreciable assets – Actually allowed – Notionally allowed**

It was held that there cannot be any presumption regarding allowing depreciation unless it was actually claimed by the assessee and allowed by the Assessing Officer. However, it was held that connotation of the phrase used under section 43(6)(b) is “actually allowed” which means depreciation actually taken into account or granted and given effect to it cannot be stretched to mean “notionally allowed” or merely allowable on notional basis. Therefore, for the purpose of section 50, during the relevant period of time, depreciation has been allowed means depreciation actually allowed to the assessee.

(A.Y. 2001-02)

*Sadhuram Patel & Sons v. ITO (2009) 120 ITD 291 / 121 TTJ 180 / 16 DTR 443 (Mum.)(Trib.)*

### **S. 50 : Capital gains – Depreciable assets – Capital loss – Business loss [S. 32(1)(iii)]**

On transfer of depreciable asset the excess shall be deemed to be short-term capital gain under section 50 whereas loss arising out of such transfer is allowable as deduction under section 32(1)(iii), provided such loss/deficiency is actually written-off in the books of account of the assessee. (A.Y. 2000-01)

*Mukund Global Finance Ltd. v. Dy. CIT (2009) 309 ITR 294 (AT) / 117 ITD 20 / 119 TTJ 467 (Mum.)(Trib.)*

### **S. 50 : Capital gains – Depreciable assets – Trading in assets**

The assessee had sold, amongst others, a building wherein it had constructed industrial galas. The assessee claimed that the same was held stock-in-trade. On the sale the assessee suffered loss which was claimed as business loss. The Assessing Officer treated the same as “short-term capital loss” under section 50. On Appeal, CIT(A) upheld the assessment order. Tribunal noted that no depreciation was claimed and advances were received on sale of galas. The Tribunal held that once an assessee has trading assets, and the assessee, for whatever reasons, sells the same in whatever form, the resultant profit or loss can only be treated as business profit/loss. (A.Y. 1999-2000)

*Magna Industries & Exports Ltd. v. ITO, ITA No. 5337/Mum/2003, Bench – F, dt. 9-3-2007, BCAJ P. 545, Vol. 39-D, Part 5, August 2007. (Mum.)(Trib.)*

### **S. 50 : Capital gains – Depreciable assets – Compensation from insurance company**

It was held that, as the amount received from Insurance Co. for loss of depreciable asset was lower or lesser than the items mentioned in section 50(1), the entire receipts has been rightly adjusted against the w.d.v. of assets under section 43(6), and there would be no Capital Gains as per provisions of section 45(1A).

**S. 50 : Capital gains – Depreciable assets – Block of assets – Bottles – 100% depreciation**

**[S. 2(11), 32(1)(ii)]**

Items on which 100 percent depreciation has been allowed under section 32(1)(ii), would definitely fall under 'block of assets' mentioned in section 2(11), therefore, bottles consisting less than ` 5000 constitute part of 'block of assets' as contemplated under section 2(11) and thereby will attract provision of section 50. (A.Ys. 1990-91 to 1992-93)

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

**S. 50 : Capital gains – Depreciable assets – Block of assets – Cylinders [S. 2(11)]**

Assessee purchased gas cylinders in 1997-98 and was allowed 100 percent depreciation in that year, the Cylinders were sold in the previous year 1989-90, though the written down value of cylinders was nil as beginning of year and as consideration received exceeded W.D.V. of block of assets at beginning of year, sale consideration of those cylinders was assessable under section 50(1). (A.Y. 1990-91)

*Ulka Advertising (P) Ltd. v. Dy. CIT (2005) 94 ITD 282 (Mum.)(Trib.)*

**S. 50 : Capital gains – Depreciable assets – Depreciation allowed – No business in latter years**

For the applicability of Sec. 50, it is not necessary that the depreciation is allowed for the very year under consideration. Provision of Sec. 50 is applicable as the Assessee admittedly carried on business up to A. Y. 1985-86 from the factory building i.e. sold during the previous year relevant to asst. yr. 1988-89 even though the assessee has not carried on the business after the asst. yr. 1985-86. Section 50 would be applicable if depreciation is allowed in any of the year either under income tax Act 1961 or 1922 Act. Thus the user of the asst during the year under consideration is not necessary. (A.Y. 1988-89)

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

**Section 50A : Special provision for cost of acquisition in case of depreciable asset.**

**S. 50A : Capital gains – Cost of acquisition – Depreciable asset – Power sector [S. 32(1)(i), 43(6)]**

Effect of the provision of section 50A is that if depreciation was allowed on a particular asset in the past, the cost of acquisition of the said asset shall be reduced to that extent. But for the difference in the cost of acquisition, a past claim of depreciation does not change the character of the asset as such. (A.Y. 1998-99)

*Sakthi Meatl Depot v. ITO (2005) 3 SOT 368 (Cochin)(Trib.)*

**S. 50A : Capital gains – Cost of acquisition – Depreciable asset – Power sector – Not retrospective – Slump sale [S. 50B]**

Sec 50A and Sec 50B being not retrospective, will not be applicable for the years prior to the year in which respective section was brought in statute.

*Salora International Ltd v. Jt. CIT (2003) SOT 671 / 129 Taxman 68 (Mag.)(Delhi)(Trib.)*

**Section 50B : Special provision for computation of capital gains in case of slump sale.**

**S. 50B : Capital gains – Slump sale – Going concern – Slump sale [S. 45]**

Assessee having transferred the assets and liabilities pertaining to its business as one whole unit as a going concern for a lump sum consideration without assigning any separate value to land, building / structure, plant and machinery, office equipment, furniture and fixtures and vehicles, the sale was a slump sale and therefore, the same is not exigible to tax under the head "Capital Gains". (A. Y. 1999-2000)

*CIT v. Chemical Industries Consulting Bureau (2011) 51 DTR 283 (Karn.)(High Court)*

**S. 50B : Capital gains – Slump sale – Depreciable assets [S. 2(42C), 45, 50]**

Sale of an industrial undertaking as a whole which includes land building, machinery, equipments, etc. as a going concern with all the assets and liabilities, was assessable under section 50B treating the transaction as a "slump sale" and not under section 50 as a sale of depreciable assets. (A. Y. 2003-04)

*CIT v. Accelerated Freeze Drying Co. Ltd. (2011) 53 DTR 44 / 198 Taxman 18 / 240 CTR 90 / 337 ITR 440 / (2011) Tax. L. R. 448 (Ker.)(High Court)*

**S. 50B : Capital gains – Slump sale – Depreciation – Block of assets [S. 2(11), 32, 43(6)(i)(c)]**

In the case of slump sale, depreciation has to be allowed on the assets sold in slump sale up to date of transfer and allowable depreciation has to be computed for all years after 1st April 1998, for computing value of assets to be reduced from block of assets irrespective of the fact whether in the books the assessee had charged depreciation or not. (A. Y. 2003-04).

*Dy. CIT v. Warner Lambert (India) (P) Ltd. (2011) 56 DTR 121 / (2012) 143 TTJ 571 (Mum.)(Trib.)*

**S. 50B : Capital gains – Slump sale – Transfer of undertaking – Non money consideration – Cost of acquisition not determinable [S. 2(42C), 45]**

In order to constitute a "slump sale" under section 2(42C), the transfer must be as a result of a "sale" i.e. for a money consideration and not by way of an "Exchange". The difference between a sale and an exchange is this that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter. The presence of money consideration is an essential element in a transaction of sale. As the

undertaking was transferred in consideration of shares & bonds, it was a case of "exchange" and not "sale" and so section 2(42C) and section 50B cannot apply. As regards taxability under section 45 & 48, the "capital asset" which was transferred was the "entire undertaking" and not individual assets and liabilities forming part of the undertaking. In the absence of a cost/date of acquisition, the computation & charging provisions of section 45 fail and the transaction cannot be assessed (*Premier Automobiles Ltd. v. ITO* (2003) 264 ITR 193 (Bom.) distinguished). (A.Y. 2005-06) *Bharat Bijlee Limited v. ACIT* ITA No. 6410/Mum/2008 dated 11-3-2011 (Mum.)(Trib.)

Source : [www.itatonline.org](http://www.itatonline.org)

### **S. 50B : Capital gains – Slump sale – Notional depreciation [S. 43(6)(c)(i)(c)]**

When assessee transferred its entire assets by way of slump sale, depreciation for earlier assessment year which was not claimed by it cannot be notionally allowed in computing the capital gains under section 50B, provisions of sections 43(6)(c)(i)(c)(b) have no application where the entire assets forming part of block are sold by way of slump sale. (A. Y. 2001-02).

*Dharampal Satyapal Ltd. v. Dy. CIT* (2011) 138 TTJ 74 / 53 DTR 177 (Delhi)(Trib.)

### **S. 50B : Capital gains – Slump sale – Itemized sale [S. 50]**

Where itemized sale of assets and liabilities of an undertaking takes place, the nomenclature of "slump sale" cannot be assigned thereto and in such a case short term capital gain is to be computed in accordance with the provisions of section 50. (A.Y. 2005-06)

*Harvey Heart Hospitals Ltd. v. ACIT* (2010) 130 TTJ 700 / 36 DTR 201 (Chennai)(Trib.)

### **S. 50B : Capital gains – Slump sale – Cost of acquisition**

Assessee had sold entire undertaking with all its assets and liabilities together with licences, permits, approvals, registration, contracts employees and other contingent liabilities for a slump price, provisions of section 50B were applicable. (A.Y. 2000-01) *VST Industries Ltd. v. ACIT* (2010) 41 SOT 415 / 46 DTR 265 / 134 TTJ 361 (Hyd.)(Trib.)

### **S. 50B : Capital gains – Slump sale – Going concern [S. 2(19AA), 2(42C), 50]**

Where a business as a going concern is transferred including inventory, contract, license agreements, accounts receivables, vendor lists, etc., same would fall within the definition of slump sale and is to be considered for computation of capital gains in accordance with section 50B. (A.Y. 2000-01)

*Duchem Laboratories Ltd. v. ACIT* (2010) 134 TTJ 532 / (2009) 32 SOT 183 / 47 DTR 484 (Mum.)(Trib.)

### **S. 50B : Capital gains – Slump sale – Fix assets as well as current assets**



All the fixed assets as well as the current assets of agrochemical division were valued. The fixed assets were valued itemised by ascertaining the value of each and every asset separately and after adding the non-compete fee. Held that such a transaction could not be considered as slump sale. (A.Y. 2002-03)

*ACIT v. RPG Life Sciences Ltd., ITA No. 1579/Mum/2006, Bench – C, dt. 31-8-2009 – BCAJ P. 31, Vol. 41-B, Part 1, October 2009. (Mum.) (Trib.)*

**S. 50B : Capital gains – Slump sale – Liabilities more than assets – Cost will be nil**

In the case of slump sale, where liabilities are more than value of assets, the net worth, viz., the cost of acquisition has to be taken at nil and entire sale consideration is liable to capital gains tax. (A.Y. 2001-02)

*Zuari Industries Ltd. v. ACIT (2007) 108 TTJ 140 / 105 ITD 569 / 9 SOT 569 (Mum.) (Trib.)*

**Section 50C : Special provision for full value of consideration in certain cases.**

**S. 50C : Capital gains – Full value of consideration – Stamp valuation [S. 28(1)]**

Provisions of section 50C can be applied only to find out the true value of a capital asset and not for computing business income hence the same cannot be applied when sale of stock in trade. (A.Y. 2004-05)

*CIT v. Thiruvengadam Investments (P) Ltd. (2010) 34 DTR 81 / 320 ITR 345 / 229 CTR 284 (Mad.) (High Court)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Not-ultra vires**

The assessee was the owner of land & building, it entered into a development agreement for the development & sale of the land. The consideration receivable by the assessee was ` 4.85 crores. The stamp authorities valued the same at ` 15.50 crores and the duty was paid by the developer. As the stamp valuation adversely affected the assessee for the purpose of section 50C (which provides that the value adopted by the stamp authorities shall be deemed to be full value of the consideration received or accruing as a result of transfer). The assessee challenged the validity of the provision. The Court dismissing the petition held that (1) there is a distinction between the subject matter of a tax and the standard by which the amount of tax and the standard by which the amount of tax is measured. Section 50C is only a standard of measuring for imposition of tax hence valid. The Court followed the principle laid down in *A Sanyasi Rao* 219 ITR 330 (SC).

*Bhatia Nagar Premises Co-operative Society Ltd. v. UOI (2010) 44 DTR 19 / 234 CTR 175 / 197 Taxman 249 / (2011) 334 DTR 145 (Bom.) (High Court)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation**

The assessee did not object to the stamp duty valuation adopted by the assessing officer as the deemed sale consideration accruing as a result of transfer of immovable property. As the assessee had not availed of the opportunity provided under section 50C(2) of the Act, the assessing officer was held to be right in treating the value of the immovable property by the stamp valuation authority as deemed sale consideration accruing to the assessee on transfer. (A.Y. 2004-05)

*Ambattur Clothing Co. Ltd. v. ACIT (2008) 16 DTR 142 / 221 CTR 196 / (2010) 326 ITR 248 (Mad.)(High Court)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Depreciable assets – Applicable [S. 2(11), 48, 50]**

There are two deeming fictions created in section 50 and section 50C for computing capital gains on building. While section 50 modifies the “cost of acquisition” for purposes of section 48, section 50C modifies the term “full value of the consideration received or accruing as a result of transfer of the capital asset”. The two deeming fictions operate in different fields and there is no conflict between them. As section 50C was inserted to prevent assessee’s indulging in under-valuation, there is no logic why it should not be applied to a depreciable building.

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

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – “Leasehold rights”**

Section 50C is a deeming provision which extends only to a capital asset which is “land or building or both”. A deeming provision cannot be extended beyond the purpose for which it is enacted. If a capital asset cannot be described as “land or building or both”, section 50C cannot apply. A lease right in a plot of land is neither “land or building or both”. The distinction between a capital asset being “land or building or both” and any “right in land or building or both” is well recognized. “Land or building” is distinct from “any right in land or building”. Consequently, section 50C does not apply to leasehold rights. (A. Y. 2006-07)

*Atul G. Puranik v. ITO (2011) 58 DTR 208 / 11 ITR 120 / 141 TTJ 69 / 132 ITD 499 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Development rights [S. 2 (47), (45)]**

Where there is transfer of existing land & building which was demolished by builder for fresh construction and documents were registered in such cases there involves a “transfer of land / FSI in case of grant of development right. Thus, it does include cost of acquisition.

*Chiranjeev Lal Khanna v. ITO (2011) 132 ITD 474 / 66 DTR 260 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Ownership of land**

Assessee purchased certain land through her father in law who was her power of attorney holder. Subsequently, assessee sold said land again through her father in law. The assessing officer applied the provisions of section 50C. On appeal Commissioner (Appeals) held that since assessee's own name did not appear in revenue records as owner of land, provisions of section 50C did not apply. On further appeal to Tribunal, the Tribunal held that in order to apply provisions of section 50C, it is not necessary that assessee should be direct owner of property. The Tribunal confirmed the view of Assessing Officer. (A. Y. 2003-04)

*ITO v. Sushma Gupta (Smt.) (2011) 44 SOT 568 (Delhi)(Trib.)*

#### **S. 50C : Capital gains – Full value of consideration – Stamp valuation – DVO**

The DVO determined fair market value at ` 46.48 lakhs, which is lower than the value for the purpose of stamp duty at ` 1.18 Crores. As per the provisions of section 50C(2) the capital gains is required to be computed by considering the fair market value of the property which was at ` 46,48,781 as the full value of the consideration received or accruing to the assessee as a result of the transfer of capital asset. Assessing Officer cannot disregard the value determined by the DVO under section 50C(2) read with 16A of the Wealth-tax Act and proceed to compute long term capital gain in accordance with the value determined by stamp valuation authority. (A. Y. 2005-06).

*Bharti Jayesh Sangani v. ITO (2011) 55 DTR 212 / 138 TTJ 661 / 128 ITD 345 (Mum.)(Trib.)*

#### **S. 50C : Capital gains – Full value of consideration – Stamp valuation – DVO**

Assessing Officer can refer for valuation of capital assets to valuation officer under section 50C if he finds that consideration received is less than value adopted by stamp valuation authority for purpose of stamp duty. (A. Y. 2006-07).

*ITO v. Chandrakant R. Patel (2011) 131 ITD 1 / 140 TTJ 430 / 11 ITR 317 / 56 DTR 449 (Ahd.)(Trib.)*

#### **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Value by DVO**

The assessee pointed out strong reasons that sale consideration is less than value determined for stamp duty, such cases have to be referred to DVO and in such cases sale consideration which has been deemed to be value adopted for stamp duty purposes as per main provisions, would be value adopted by DVO. As such the matter when once referred to the DVO, the valuation given by the DVO had to be adopted as deemed consideration (A.Y. 2006-2007)

*Nandita Khosla (Mrs) v. I.T.O. (2011) 46 SOT 90 (Mum)(Trib.)*

#### **S. 50C : Capital gains – Full value of consideration – Stamp valuation – DVO**

Assessing Officer cannot disregard the value determined by the DVO under section 50C(2) r.w.s 16A of Wealth Tax Act and proceed to compute long term capital gain in

accordance with the value determined by stamp valuation authority. (A. Y. 2005-06).

*Bharti Jayesh Sanghani (Smt) v. ITO (2011) 55 DTR 212 / 128 ITD 345 / 138 TTJ 661 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – May and shall – DVO**

If stamp valuation adopted by stamp authority is disputed before Assessing Officer, then Assessing Officer is bound to refer matter to DVO for determining fair market value of property. The term "may" used in sub section (2) of section 50C is to be read as "shall". (A. Y. 2004-05).

*Manjula Singhal v. ITO (2011) 46 SOT 149 / 141 TTJ 511 (Jodh.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Power of AO**

Once document is with stamp authority, value adopted by stamp duty authority is to be considered as value of asset for purpose of clause (b) of section 50C. Assessing Officer can not substitute value which the stamp authority ought to have adopted for purpose of stamp duty. (A. Y. 2004-05).

*Hasmukhbhai M. Patel v. ACIT (2011) 46 SOT 419 (Ahd.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Development rights**

Provisions of section 50C were applicable to transfer of development rights in the property. Once the assessee handed over the possession of the property to the developer against payment then the property deemed to have been transferred as per deeming provisions of section 2(47)(v). Not making changes in municipality records is not relevant. Valuation officer has valued much less than the stamp authority, hence, there the valuation has to be accepted. (A. Y. 2006-07)

*Arif Akhtar Hussain v. ITO (2011) 59 DTR 307 / 140 TTJ 413 / 45 SOT 257 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Not challenged**

**[S. 50C(2)]**

Assessee sold a piece of land value of which sale deed was registered was found to be value below value determined by Stamp Valuation Authority. Assessing Officer invoked provisions of section 50C and brought to tax differential. As the assessee has accepted the valuation determined by Stamp Valuation Authority and not availed the opportunity under sub section(2) of section 50C for demonstrating that fair market value was less than stamp duty valuation, Tribunal held that Assessing Officer had rightly invoked the provision of section 50C. (A. Y. 2006-07)

*Sanjaybhai Z. Patel v. ACIT (2011) 48 SOT 231 (Ahd.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Transfer before 1-4-2003**

Transfer of land took place on 28-12-2000. Section 50C which applies to transfer of plot of land and considers value assessed by Stamp Valuation Authority to be deemed full value of sale consideration for purpose of computing capital gain was inserted by Finance Act, 2002 with effect from 1-4-2003 and hence not applicable to the facts of the assessee. (A. Y. 2005-06).

*Rajshree Bihani (Smt) v. ITO (2011) 48 SOT 594 (Kol.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation [S. 45]**

When sale consideration is less than the price determined by stamp valuation authority, assessing officer has no option but to adopt the valuation made by the stamp valuation authority. (A.Y. 2004-05)

*Mohd. Shoib v. Dy. CIT (2010) 1 ITR 452 / 127 TTJ 459 / 29 DTR 306 (Luck.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Transfer**

Substitution of sales consideration on transfer of land and building with the value adopted by the stamp valuation authority. Assessee objecting to the substitution of sales price. Assessing Officer has no discretion and should refer the matter to valuation officer to determine fair value.

*Abbas T. Reshamwala v. ITO, ITA No. 3093/Mum./2009, January (2010) BCAJ Vol. 41-B. (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Unexplained investment – Sale value [S. 69B, 143(3)]**

Difference between consideration shown in sale deed and valuation taken for stamp purposes cannot be added as unexplained investment in the hands of purchaser. (A.Y. 2005-06)

*ITO v. Fitwell Logic system P. Ltd (2010) 1 ITR 286 (Delhi)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Sale of Stock-in-Trade – Deeming provisions [S. 45]**

Sale of stock-in-trade. Officer making addition in sale price based on fair market value arrived are rent capitalisation method. Addition made not justified. (A.Y. 2004-05)

*ACIT v. Excellent Land Developers P. Ltd. (2010) 1 ITR 563 (Delhi)(Trib.)*

*Editorial:- Refer CIT v. Thiruvengadam Investments (P) Ltd. (2010) 34 DTR 81 (Mad.), 320 ITR 345 (Mad.) / Inderlok Hotels P. Ltd. v. ITO (2009) 318 ITR 234 (At)(Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Depreciable assets [S. 50]**

Stamp duty valuation is not applicable in respect of sale of assets where depreciation has been allowed. (A.Y. 2005-06)

*Panchiram Nahata v. Jt. CIT (2010) 127 TTJ 128 (UO)(Kol.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Tenancy rights**

Transfer of tenancy right. As in the case of assessee, the capital assets transferred was tenancy right, held that such transaction not covered under the provisions of section 50C.

*Kishori Sharad Gaitonde v. ITO, ITA No. 1561/M/09, BCAJ P. 28, Vol. 41 B Part 5, February 2010 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Investment [S. 69B]**

Provisions of section 50C do not apply to the purchaser of property. Section 69B requires collection of independent evidence to show that any undisclosed investment was made by the assessee in purchase of property failing which the buyer could not be saddled with the liability on account of undisclosed investment.

*ITO v. Kusum Gilani(Smt), ITA No. 1576/Del/08, BCAJ P. 16, Vol. 41 - B Part 6, March 2010 (Delhi)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Higher Valuation**

Assessee entering into agreement with land developer and appointing assessee's wife as power of attorney. Land subsequently transferred by eleven sale deeds to purchasers, value fixed by stamp authorities higher than consideration mentioned in sale deeds. Section 50C is applicable. (A.Y. 2006-07)

*Meera Somasekaran v. ITO (2010) 4 ITR 271 (Chennai)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – No registration**

**[S. 54EC]**

As the agreement not registered provisions of section 50C of the Act would not apply. Sale consideration as admitted in return of income to be accepted. (A.Y. 2005-06)

*ITO v. Kumudini Venugopal (Mrs.) (2010) 5 ITR 145 (Chennai)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Transaction – Prior to 1-4-2003 – Reference to DVO**

Provisions of section 50C of the Act shall not be applicable in respect of transaction of sale of property entered into on or before 1-4-2003, considering the theory of natural justice and impossibility. Assessee has a right to challenge the valuation of property under section 50C(2), adopted by SVA and in that case Assessing Officer should refer the matter to DVO.



*Ashutosh Bhargava, v. Dy. CIT (2010) Tax World Nov., 10 Vol. XIV Part-5 Page 173 / (2011) 138 TTJ 479 (Jp.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Reference to DVO**

If the assessee is of the opinion that the valuation fixed by the registering authority is higher, the assessee can request the Assessing Officer to refer the matter to the Departmental valuation officer. The Tribunal held that the Assessing Officer is bound to refer the matter to the valuation officer. The matter was set aside to Assessing Officer to refer the matter to Departmental valuation officer. (A.Y. 2007-08)

*B. N. Properties Holdings P. Ltd. v. ACIT (2010) 6 ITR 1 (Chennai)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Business income**

Section 50C cannot be applied for determining the income under other heads, it is applicable only for the purpose of determining the sale consideration for computation of capital gains, only.

*Inderlok Hotels (P) Ltd. v. ITO (2009) 122 TTJ 145 / 32 SOT 419 / 20 DTR 148 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Reference to DVO**

If there is objection from assessee's side regarding sale consideration without challenging stamp duty valuation, then valuation should be referred to valuation officer who is an expert and who can do correct valuation. (A.Y. 2003-04, 2004-05)

*Ajmal Fragrances & Fashions (P) Ltd. v. ACIT (2009) 34 SOT 57 (Mum.)(Trib.)*

**S. 50C : Capital gains – Full value of consideration – Stamp valuation – Reference to DVO**

In the event of the assessee contending that valuation as done by Stamp Valuation Authority is not acceptable to him and asking the Assessing Officer to make a reference to the Valuation Officer, it is mandatory on the part of the Assessing Officer to make such a reference notwithstanding that the assessee has not filed an appeal against such valuation. (A.Y. 2005-06)

*Kalpataru Industries v. ITO, ITA No. 5540/Mum/2007, dt. 24-8-2009, Bench – H – BC&J P. 32, Vol. 41-B, Part 3, December 2009. (Mum.)(Trib.)*

**Section 51 : Advance money received.**

**S. 51 : Capital gains – Advance money received – Capital or revenue – Forfeiture**

The amount received by an owner of property from the agreement holder as advance was forfeited for breach of contract. Such amount was held to be a capital receipt. (A.Y. 1974-75)

*S. Zoraster and Co. v. CIT (2010) 322 ITR 35 / (2009) 31 DTR 107 / 182 Taxman 52 (Raj.)(High Court)*

**S. 51 : Capital gains – Advance money received – Cost of acquisition [S. 48]**

The assessee was the co-owner of an immoveable property acquired prior to 31-3-1981. Both the co-owners agreed to sell the property in 1994 and they have received advances in installment. Transfer took place in the year 2003-04. Assessing Officer and Commissioner (Appeals) held that advance reduced by the assessee should be deducted from the value of property as on 1-4-1981, while computing cost of acquisition. The Tribunal held that the provisions of section 51 are applicable to an aborted transaction only. In the case of the assessee, the advances were received from transaction which was not aborted, therefore Assessing Officer was not justified in reducing the advance money received from cost of acquisition. (A.Y. 2004-05).

*Upendra Shah v. ITO, ITA No. 1730/Mum/2009 dated 30-8-2011. 299 (2011) 43-B BCAJ (December P. 35) (Mum.)(Trib.)*

**S. 51 : Capital gains – Advance money received – Indexed cost of acquisition**

Where the capital asset was on any previous occasion the subject of infructuous negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost of which the asset was acquired or in case of depreciable asset written down value, or in case asset was acquired before 1-4-1981, the fair market value thereof as on 1-4-1981 as the case may be, in terms of section 51. Words 'indexed cost of acquisition' are now where mentioned in section 51; where after deduction of advance received for sale of property, which sale did not materialize, result was a minus figure, cost of acquisition was rightly taken as nil for computing capital gains. (A.Y. 1998-99)

*Smita N. Shah (Smt) v. Jt. CIT (2005) 94 TTJ 492 / 95 TTJ 640 (Mum.)(Trib.)*

**Section 52 : Consideration for transfer in cases of understatement.**

**Section 52 is omitted by the Finance Act, 1987 w.e.f. 1-4-1988.**

**S. 52 : Capital gains – Consideration – Under statement – Sale of shares to members of family**

Where there was sale of shares to members of the family, there was no finding that any sum in excess of that declared was realized. Sale consideration cannot be estimated by invoking section 52.

*CIT v. I. P. Chaudhari (2010) 328 ITR 7 (Delhi)(High Court)*

**S. 52 : Capital gains – Consideration – Under statement – Sale of land – Fair market value**

Difference between consideration and fair market value, no evidence of receipt of amount over and above sale consideration, section 52(2) cannot be employed.

On appeal to High Court under section 260A of the Act, High Court held that there is no finding by any authority on the second condition which was also required to be proved by the revenue before invoking section 52(2) and hence, in the absence thereof, provisions of section 52(2) have been wrongly invoked. Therefore, assessee's appeal is allowed. (A.Y. 1975-76)

*Prem Narain & Co. v. CIT (2006) 287 ITR 56 / 202 CTR 449 / 163 Taxman 579 (P&H)(High Court)*

### **S. 52 : Capital gains – Consideration – Under statement – Sale of shares – Consideration in kind**

To invoke section 52(2), it is not only necessary for the revenue to establish that the fair market value of the capital asset transferred by the assessee exceeds the full value of the consideration, declared in respect of the transfer by not less than 15 percent of the value so declared, but it is also necessary for the revenue to establish that the full value of the consideration declared by the assessee is less than the amount actually received by the assessee. (A.Y. 1986-87)

*Alpanan (Mrs) v. ITO (2004) 269 ITR 123 / 134 Taxman 484 / 187 CTR 67 (Bom.)(High Court)*

### **Section 53 : Exemption of capital gains from a residential house.**

#### **Omitted by Finance Act, 1992, w.e.f. 1-4-1993**

### **S. 53 : Capital gains – Residential house – Exemption**

The language of section 53 comprehends that the assets should be predominantly residential building and may have land appurtenant thereto and not just an open plot of land, having some insignificant structure, which might under some constraints, be used for residence, or which might be actually used by some employee, as a person taking care of protection of the plot. The asset did not fulfil the character of a residential house. The assessee was not entitled to exemption under section 53. (A.Y. 1992-93)

*Rajesh Surana v. CIT (2008) 306 ITR 368 / 215 CTR 482 / 2 DTR 237 (Raj.)(High Court)*

### **S. 53 : Capital gains – Residential House – Exemption – Individual – AOP – Trust**

Where the assessee was Trust and the Trust had been assessed in the status of "AOP" and the AOPs were not entitled to the benefit of exemption under section 53. Merely because income ultimately went in the hands of "Individual" beneficiaries, was immaterial. The plain language of provisions of section 53 leaves no doubt that the benefit is available to the assessee being an "Individual". (A.Y. 1986-87)

*CIT v. Madan Parami Family Trust (2004) 269 ITR 16 / 140 Taxman 286 / 189 CTR 340 (Raj.)(High Court)*

## **Section 54 : Profit on sale of property used for residence.**

### **S. 54 : Capital gains – Property used for residence – Exemption – Investment in two houses**

Assessee was not entitled to exemption in respect of two independent residential houses situated at different locations. (A. Y. 2005-06)

*Pawan Arya v. CIT (2011) 237 CTR 210 / 49 DTR 123 / 200 Taxman 66 (Mag.)(P&H)(High Court)*

### **S. 54 : Capital gains – Property used for residence – Exemption – Deposit of amount in capital gains account scheme by date mentioned under section 139(4) – Eligible for exemption**

If a person has not furnished the return of the previous year within time allowed under Sub section (1) i.e. before 31st July of the Assessment year, the assessee can file the return before expiry of one year from the end of the relevant previous year. The assessee has deposited the amount before filing of return under section 139(4), therefore the assessee is entitled the benefit of exemption under section 54. (A. Y. 2006-07).

*CIT v. Jagriti Aggarwal (Ms) (2011) 339 ITR 610 / 203 Taxman 203 / 64 DTR 333 (P&H)(High Court)*

### **S. 54 : Capital gains – Property used for residence – Exemption – Investment of sale consideration – Need not in the name of assessee – Joint names**

To claim exemption under section 54 and 54EC what is material is investment of sale consideration in acquiring residential premises or constructing a residential premises or investing amount in bonds set out in section 54EC, there is no requirement that such investments should be in name of assessee only. Assessee sold her residential house property and invested part of sale proceeds in purchasing residential house property and specified bonds in joint names of assessee and her husband. The Court held that as entire consideration had flown from assessee and no consideration had flown from her husband, merely because either in sale deed or in bonds her husband's name is mentioned, in law, he would not have any right, and assessee could not be denied benefit of deduction under section 54 and 54EC. (A. Y. 2007-08).

*DIT v. Jennifer Bhide (2011) 203 Taxman 208 (Karn.)(High Court)*

### **S. 54 : Capital gains – Property used for residence – Exemption – Investment in more than one residential house [General Clauses Act 1897 - S. 13]**

Expression "a residential house" in section 54 should be understood in a sense that the building should be residential in nature and "a" should not be understood to indicate a singular number, assessee was entitled to claim exemption under section 54 in respect of four residential flats acquired by (A.Y. 2004-05)

*CIT v. K. G. Rukminiamma (Smt.) (2011) 331 ITR 211 / (2010) 48 DTR 377 / 239 CTR 435 / 196 Taxman 87 (Karn.)(High Court)*

*Editorial:- ITO v. Sushila M. Jhaveri (Ms) (2007) 107 ITD 321 (SB)(Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Long Term capital gains – Allotment of flat under DDA [S. 2(14), 2(29A), 2(42A)]**

Assessee was allotted a flat under scheme of DDA on 27-2-1982. Delivery of possession of said flat took place on 15-5-1986, when actual flat number was allotted to assessee. Assessee sold said flat on 1-1-1989 and claimed set off under section 54 against long term Capital Gain. Assessing Officer treated the said transaction as short term capital gain considering the date as 15-5-1986. The High Court held that under self finance scheme, an allottee gets title to property on issuance of an allotment letter and payment of installments is only a consequential action upon which delivery of possession flows hence claim under section 54 was justified. (A.Y. 1989-90)

*Vinod Kumar Jain v. CIT (2010) 195 Taxman 174 / 46 DTR 185 / (2011) 244 CTR 346 (P&H)(High Court)*

**S. 54 : Capital gains – Property used for residence – Exemption – More than one house**

Benefit under section 54 is not confined to one house. The word 'a' occurring in section 54(1) does not indicate singular. (A.Y. 1996-97)

*CIT v. D. Ananda Basappa (2009) 180 Taxman 4 / 223 CTR 186 / 309 ITR 329 / 20 DTR 266 (Karn.)(High Court)*

**S. 54 : Capital gains – Property used for residence – Exemption – HUF**

For the A.Y. 1981-82 the assessee H.U.F. sold a residential house and invested the sales consideration in purchase of a residential house and claimed exemption of capital gain under section 54 of the Income-tax Act, 1961. This claim was negatived by the assessing officer. On appeal to the High Court the Hon'ble High Court held that exemption under section 54 of the Income-tax Act, 1961 was not available to the H.U.F.

*CIT v. Nareseh Ratilal Shah (2006) 192 Taxation 574 (Guj.)(High Court)*

**S. 54 : Capital gains – Property used for residence – Exemption – Gains invested in residential house before expiry of time limit to file returns under section 139(4) are exempt**

Section 139 cannot mean only 139(1) but it means all sub-sections of section 139. Thus, the condition laid down under section 54 stands satisfied if the capital gains are utilized for the purchase of new residential accommodation before the due date to file returns under section 139(4). (A.Y. 1996-97)

*CIT v. Rajesh Kumar Jalan (2006) 157 Taxman 398 / 206 CTR 361 / 286 ITR 274 (Gau.)(High Court)*

**S. 54 : Capital gains – Property used for residence – Exemption – Purchase in wife's name**

The assessee sold his residential house at Bangalore and purchased another residential house at Chennai out of the sale consideration in the name of his wife. The

assessee is entitled to exemption under section 54 on the house purchased in the name of his wife. (A.Y. 1990-91)

*CIT v. V. Natarajan (2006) 154 Taxman 399 / 203 CTR 37 / 287 ITR 271 (Mad.)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – More than one house**

Assessee's claim for exemption under section 54 was denied by department on the ground that there was more than one unit of property purchased out of sale proceeds of a residential property but Tribunal held that the execution of four different sale deeds did not materially affect the nature of transaction or the nature of property.

*CIT v. Sunita Aggarwal (Smt) (2006) 284 ITR 20 / 204 CTR 527 (Delhi)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – HUF – Individual**

HUF subletting a contract to Karta in his individual capacity having no adverse tax effect. The act of subletting cannot be held as sham transaction. Court held that there is no justification to assess the income from contract as income of HUF. In other words a karta can be assessed in the individual capacity also for the income earned in this individual capacity. (A.Y. 1991-92)

*Vijayprakash Toshniwal & Ors. v. CIT / 284 ITR 306 / 203 CTR 207 / 156 Taxman 337 (Raj.)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption**

For purpose of claiming exemption under section 54, ownership of 'building' and 'land appurtenant thereto' must be with same person; where assessee's father owned vast area of land and residence thereon and he gifted part of land to assessee who sold part of it and built a residential house on remaining part of gift land, assessee was not entitled to exemption under section 54 as land sold by assessee could not be said to be land appurtenant to building within the meaning of section 54 as house/building thereon was owned by the assessee's father and not the assessee. (A.Y. 1979-80)

*P.K. Lahiri v. CIT (2005) 275 ITR 17 / 146 Taxman 349 / 196 CTR 406 (All.)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – Sale of plots**

Assessee sold plots on which there was only a tin shed and no kitchen or bathroom, it could not be said to be a sale of residential house used for residence and the claim for exemption of capital gain arising from the said plot could not be allowed. (A.Y. 1975-76)

*A.S. Atwal (Dr) v. CIT (2005) 277 ITR 462 / 146 Taxman 171 / 195 CTR 353 (P&H)(High Court)*



#### **S. 54 : Capital gains – Property used for residence – Exemption – HUF – Prior to 1-4-1988**

The word appearing in section 54 prior to its amendment with effect from 1-4-98 were "being used by the assessee or parent of his". This clearly shows that a reference was made to the assessee as an individual; otherwise, the question of "parent of his" would not have arisen. Similarly, expression "For the purpose of own or his parent's residence" further clarifies this position. Thus there is ambiguity in the section so as to extend the benefit to the persons other than the individual. Thus an HUF was not entitled to the benefit of section 54 prior to its amendment with effect from 1-4-98. (A.Y. 1976-77)

*Raghunath Dass Sethi v. CIT (2005) 277 ITR 341 / (2004) 141 Taxman 319 / 191 CTR 114 (P&H)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – HUF**

Assessee-HUF having only one surviving male member would be entitled to exemption under section 54(1) in respect of property sold. (A.Y. 1976-77)

*Estate of Late V. S. Thiagaraja Mudaliar v. CIT (2003) 129 Taxman 235 (Mad.)(High Court)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – Multiple sales & purchases [S. 45]**

Though section 54 refers to capital gains arising from "transfer of a residential house", it does not provide that the exemption is available only in relation to one house. If an assessee has sold multiple houses, then the exemption under section 54 is available in respect of all houses if the other conditions are fulfilled. If more than one house is sold and more than one house is bought, a corresponding exemption under section 54 is available. The exemption is not available on an aggregate basis but has to be computed considering each sale and the corresponding purchase adopting a combination beneficial to the assessee. (A. Y. 2006-07)

The decision of the Special Bench in *ITO v Sushila Jhaveri (2007) 292 ITR (AT) 1* is distinguishable.

*Rajesh Keshav Pillai v. ITO (2011) 44 SOT 617 / 60 DTR 402 / 141 TTJ 183 (Mum.)(Trib.)*

#### **S. 54 : Capital gains – Property used for residence – Exemption – Date of Transfer – Purchase of new flat – Section 53A of Transfer of Property Act, 1882 [S. 2(47), 45]**

Assessee sold a building on 30-4-2004 and claimed deduction under section 54 in respect of capital gain arising on sale of building as he has invested in a new flat on 25-6-2003. i.e. within one year from date of transfer of building. Assessing Officer was of the view that as registration of transfer deed of building was dated 26-8-2004 hence, claim under section 54 was denied. The Tribunal held that buyer had performed their part of obligation as on 30-4-2004, in such a situation, mere non registration of

transfer deed would not change date of transfer of building to 26-8-2004. Tribunal held that assessee was entitled to deduction under section 54. (A. Y. 2005-06).

*Sureshchandra Agarwal v. ITO (2011) 48 SOT 210 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Investment from bank loan**

Assessee having sold self occupied flat and purchased a new residential house partly by taking bank loan and repaid the bank loan partly in the relevant year out of sale proceeds of the original flat, he is entitled for exemption under section 54.

*Ishar Singh Chawla v. Dy. CIT (2010) 130 TTJ 108 (UO)(Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – License – Deposit & Purchase**

Premises taken on licence under agreement for a period of two terms of eleven months against interest-free deposits, cannot be considered as purchase of residential house, hence, exemption under section 54 is not eligible. (A.Y. 1998-99)

*Praful Chandra R. Shah (Late) v. ACIT (2010) 5 ITR 598 / 124 TTJ 648 / 27 SOT 257 / 24 DTR 358 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Sale of house or land – Land appurtenant to the building [S. 54]**

Assessee is entitled to exemption under section 54 in respect of capital gains on sale of the land appurtenant to the building. Such land is sold separately, after dismantling the existing building. What is sold is only land and hence, exemption under section 54 will not be allowable. (A.Y. 2004-05)

*Subhash Chand Kapoor v. ITO (2010) 46 DTR 314 (Agra)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Two houses**

If the assessee purchases two houses out of the sale proceeds of one residential house, exemption under section 54 cannot be denied. (A.Y. 1995-96)

*ITO v. P. C. Ramakrishna (HUF) (2007) 107 TTJ 351 (Chennai)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Borrowed capital**

There is no requirement for claiming exemption under section 54 that same amount of sale consideration should be utilized for acquisition of property; even borrowed funds can be utilized for that purpose. (A.Y. 1993-94)

*Prema P. Shah (Mrs) v. ITO (2006) 100 ITD 60 / 101 TTJ 849 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Substantial amount**

Agreement entered into by the assessee with a builder / developer to acquire a row-house in the blocks to be built by the latter was an agreement for construction and sale of one house and assessee having paid substantial amount of consideration

within two years from the date of sale of old property, domain and control over the new property had passed to the assessee, and he was therefore entitled to exemption under section 54. (A.Y. 1998-99)

*P. K. Datta v. ITO (2006) 100 TTJ 1039 / 98 ITD 335 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Purchased in foreign Country – On lease in UK for 150 years**

Assessee having acquired a residential property on lease in UK after selling residential property in India exemption under section 54 was allowable since the lease is valid for 150 years and the assessee is as good as absolute owner of property. (A.Y. 1993-94)

*Prema P. Shah (Mrs) v. ITO (2006) 101 TTJ 849 / 100 ITD 60 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Sale of old property – Possession – New property**

Assessee having paid substantial amount of consideration within two years from the date of sale of old property having domain and control over the new property had passed to the assessee. He was entitled to exemption under section 54, even though possession of house was given after two years. (A.Y. 1991-92)

*P. K. Datta v. ITO (2006) 100 TTJ 133 (Pune)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Purchase of property used for residence – 1/3 owner – Co-owner**

Where assessee utilized capital gain in construction of a house of which he was 1/3 owner, his claim for exemption could not be denied on ground that assessee was only a co-owner and not owner in toto of residential house. (A.Y. 1993-94)

*ITO v. Shekhar Sood (2005) 93 TTJ 909 (Amritsar)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Conveyance deed in the name of assessee, her mother and father – Repair expenses allowable**

Assessee sold a property against which she purchased a flat but in conveyance deed, assessee, her mother and father were mentioned as purchasers as entire purchase consideration with expenses was borne by assessee. Entire amount spent by her had to be considered towards purchase price paid by her for computation while allowing deduction under section 54. Repairs carried out in new flat allowable while working out chargeable capital gain under section 54. (A.Y. 1996-97)

*Jt. CIT v. Armeda K. Bhaya (Smt.) (2005) 95 ITD 313 / 99 TTJ 358 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Construction – Purchase – Property from builder – Time limit**

Assessee invested sale proceeds of house for purchase of house property from a builder, it was a case of construction of residential flat and not a case of purchase of a residential flat for purpose of application of prescribed time limit under section 54(1). ie three years. (A.Y. 1997-98)

*ACIT v. Sunder Kaur Sujan Singh Gadh (2005) 3 SOT 206 (Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Two independent flats [S. 54F]**

Assessee sold a residential house and reinvested total sale consideration in purchasing two independently located flats and claimed exemption under section 54. But the exemption is held to be allowable in respect of either of the flats at the option of the assessee as the exemption is available in respect of investment in only one flat. *ITO v. Sushila M. Jhaveri (Mrs) (2007) 107 ITD 327 (SB)(Mum.)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Claimed wrongly under section 54F instead 54**

Deduction under section 54 cannot be denied for the reason that assessee has claimed the deduction under section 54F, instead of Section 54. (A.Y. 1996-97) *Sosamma Paulose (Mrs) v. Jt. CIT (2003) 79 TTJ 573 / 133 Taxman 46 (Mag.)(Cochin)(Trib.)*

**S. 54 : Capital gains – Property used for residence – Exemption – Cost of new asset [S. 54F]**

Assessee claimed and was allowed exemption under section 54 for asst. yr. 1996-97 in respect of part of capital gains. And he claimed balance of purchase price of new house as exempt under section 54F in asst. yr. 1997-98 was allowed accordingly as the assessee, otherwise, had fulfilled all the conditions of Sec. 54F in the relevant year. However, cost of new asset has to be determined under section 54(1)(iii). In view of these facts the Assessing Officer was directed to work out and allow exemption under section 54F by taking cost of new asset at purchase price of house less capital gains already exempted under section 54. (A.Y. 1997-98). *Ravindra K. Mariwala v. JT. CIT (2003) 86 ITD 35 / 81 TTJ 589 (Mum.)(Trib.)*

**Section 54B : Capital gain on transfer of land used for agricultural purpose not to be charged in certain cases.**

**S. 54B : Capital gains – Land used for agricultural purposes – Exemption [S. 2(14)(iii)]**

Report of the Tehsildar having certified that the assessee's land was 8 kms, away from the municipal limits the land constituted agricultural land hence, the assessee is entitled to exemption under section 54B. (A.Y. 1995-96) *CIT v. Lal Singh & Ors. (2010) 325 ITR 588 / 228 CTR 575 / 195 Taxation 420 / 32 DTR 348 (P&H)(High Court)*

**S 54B : Capital gains – Land used for agricultural purposes – Exemption [S. 2(14)(iii)]**

Reports of the Tehsildar having certified that the assessee's land was 8 kms away from the municipal limits, the land constituted agricultural land, entitled to exemption under section 54B.

*Satish Kumar Mittal & Mehinder Singh & Ors. (2009) 32 DTR 345 / (2010) 228 CTR 575 / 325 ITR 588 / 195 Taxman 420 (P&H)(High Court)*

#### **S. 54B : Capital gains – Land used for agricultural purposes – Exemption – Co-owner**

The assessee sold agricultural land which was used by him for agricultural purpose. Out of the sale proceeds the assessee purchased another agricultural land jointly along with his only dependent son and claimed exemption under section 54B of the Act on reinvestment. Assessing officer denied the assessee's claim of deduction under section 54B as the land was purchased by the assessee jointly with his son. On these facts the High Court held that as the land was purchased for agricultural purpose, merely because in the deed for purchase of land his son was shown as co-owner the exemption under section 54B could not be denied to the assessee.

*CIT v. Gurnam Singh (2008) 6 DTR 83 / 218 CTR 624 / 327 ITR 278 / 170 Taxman 160 (P&H)(High Court)*

#### **S. 54B : Capital gains – Land used for agricultural purposes – Exemption – HUF – Individual**

On purchase of another agricultural land within two years the exemption can be claimed by individual alone and not by HUF

*Darapaneni Chenna Krishnayya (HUF) v. CIT (2007) TLR (Oct.) 643 (AP)(High Court)*

#### **S. 54B : Capital gains – Land used for agricultural purposes – Exemption – Commercial area**

Benefit is available in respect of land used for agricultural purposes and facts that it was located in commercial area or it was partially used for non-agricultural purposes or vendees purchased it for non-agricultural purposes are irrelevant considerations for application of section 54B.

*CIT v. Savita Rani (Smt) (2003) Tax LR 713 (P&H)(High Court)*

#### **S. 54B : Capital Gains – Land used for agricultural purposes – Exemption – Name of wife and other relations**

Deduction under section 54B of the Act will be admissible only in respect of investment made in the purchase of a new asset in his own name, however, deduction shall not be available in respect of the amount invested in the purchase of new asset in the name of wife and other relations.

*ITO v. Rameshwar Sharma (2011) Tax World Feb., P. 114 (Jp.)(Trib.)*

#### **S. 54B : Capital gains – Land used for agricultural purposes – Exemption – Investment in the name of family members**

Exemption under section 54B on transfer of agricultural land cannot be denied even though Investment in new agricultural land by the Assessee has been made in the name of his family members. It was observed that so long as the consideration had passed from the consideration received, on transfer of asset, deduction has to be granted considering the spirit of the provision.

*Jagpal Singh v. ITO (2010) 186 Taxman 26 (Mag.)(Delhi)(Trib.)*

### **Section 54E : Capital gain on transfer of capital assets not to be charged in certain cases**

#### **S. 54E : Capital gains – Investment in specified assets – Exemption – With in six months**

Assessee investing additional amount of compensation in respect of acquisition of its land within six months from date of its receipt is entitled to claim exemption under section 54E.

*Darapaneni Chenna Krishnayya (HUF) v. CIT (2007) TLR (Oct.) 643 (AP)(High Court)*

#### **S. 54E : Capital gains – Investment in specified assets – Exemption [S. 48, 49, 50, 54E]**

Fiction in section 50(1) /(2) is restricted to section 48 & 49 and does not apply to section 54E; when long term capital gain arises on transfer of a depreciable long term capital asset, assessee cannot be denied exemption under section 54E merely because section 50 provides that computation of such capital gains should be done as if arising from transfer of short term capital asset.

*CIT v. ACE Builders (P.) Ltd. (2005) 144 Taxman 855 / 195 CTR 1 / (2006) 281 ITR 210 (Bom.)(High Court)*

*Editorial : SLP rejected in CIT v. Legal heirs of Late S.R. from Bombay High Court ITA L. No. 775 of 2005 dt. 30-8-2005.*

#### **S. 54E : Capital gains – Investment in specified assets – Exemption – Depreciable asset [S. 45, 50, 54E]**

If conditions under section 54E are satisfied, assessee will be entitled to exemption under section 54E in respect of capital gain on depreciated asset as section 54E is an independent provision, which is not controlled by section 50.

*CIT v. Assam Petroleum Industries (P.) Ltd. (2003) 262 ITR 587 / 131 Taxman 699 / 185 CTR 71 (Gau.)(High Court)*

#### **S. 54E : Capital gains – Investment in specified assets – Exemption – Date of transfer and not date of final receipt**

For claiming exemption under section 54E, the period of six months for making Investment in specified assets will be reckoned from the date of transfer and not the date of final receipt of sale consideration.

*Jyotindra H Shodhan v. ITO (2003) 87 ITD 312 / 81 TTJ 1 (SB)(Ahd.)(Trib.)*



## **Section 54EA : Capital gains – Investment in specified securities – Exemption**

### **S. 54EA : Capital gains – Investment in specified securities – Exemption – Time limit**

#### **[S. 45(5), 54H]**

Enhanced compensation for land acquired in 1992 having been received by the assessee in 1997 and invested immediately in specified bonds for the purpose of section 54EA, assessee was entitled to claim exemption under section 54EA notwithstanding the fact that on the dates relevant for the assessment year 1998-99 section 54H did not contain section 54EA. (A. Y. 1998-99).

*CIT v. J. Palemar Krishna (2011) 244 CTR 618 (Karn.)(High Court)*

## **Section 54EB : Capital gain on transfer of long-term capital assets not to be charged in certain cases**

### **S. 54EB : Capital gains – Investment in specified assets – Exemption – Consideration to be paid in future date – Specific amount**

Where full value of consideration is agreed to be paid at a future date or is paid in installments over a period, after previous year in which transfer of capital asset takes place, capital gains would be treated as income of previous year in which transfer takes place, irrespective of actual date of payment of consideration and any hardships that may be caused to transferor and, in such a case, transferor obviously cannot avail the benefit of provisions of section 54EB and 54EC.

*Anurag Jain, In re. (2005) 277 ITR 1 / 145 Taxman 413 / 195 CTR 117 (AAR)*

## **Section 54EC : Capital gain not to be charged on investment in certain bonds.**

### **S. 54EC : Capital gains – Investment in bonds – Exemption – In joint names [S. 54]**

To claim exemption under sections 54 and 54EC what is material is investment of sale consideration in acquiring residential premises or constructing a residential premises or investing amount in bonds set out in section 54EC, there is no requirement that such investments should be in name of assessee only. Assessee sold her residential house property and invested part of sale proceeds in purchasing residential house property and specified bonds in joint names of assessee and her husband. The Court held that as entire consideration had flown from assessee and no consideration had flown from her husband, merely because either in sale deed or in bonds her husband's name is mentioned, in law, he would not have any right, and assessee could not be denied benefit of deduction under section 54 and 54EC. (A. Y. 2007-08).

*CIT v. Voith Paper Fabrics India Ltd. (2011) 64 DTR 58 / 245 CTR 516 (P&H)(High Court)*

### **S. 54EC : Capital Gains – Investment in bonds – Exemption – Date of investment**

For the purpose of calculation of period of six months the date to be calculated from the date of receipt issued by the national housing bank and not from the date of issue of certificate. (A.Y. 2004-05)

*Hindustan Unilever Ltd. v. Dy. CIT (2010) 38 DTR 91 / 191 Taxman 119 / 325 ITR 102 / (2011) 237 CTR 287 (Bom.)(High Court)*

### **S. 54EC : Capital gains – Investment in bonds – Exemption – Six months from the end of month [S. 45]**

During the previous year relevant to the assessment year under consideration the assessee sold shares of two companies on 24th February 2005. The assessee invested entire sale consideration on 30th August 2005, in the bonds specified under section 54EC. i.e. REC Bonds. The Tribunal held that the word used in section is “any time with in a period of six months after the date of such transfer”. The term “month” is not defined in the Income-tax Act, 1961. Applying the expression used in the General clauses Act, 1897, the term six months should be reckoned from the end of month in which the transfer takes place. On the facts as the invest were made on 30th August, 2005, the Tribunal held that the assessee is entitled to exemption under section 54EC. (A. Y. 2005-06).

*Yahya E. Dhariwala v. Dy. CIT (2012) 49 SOT 458 / 247 CTR 230 / (2012) 43B BCAJ (2012) Jan., P. 32 (Mum.)(Trib.)*

### **S. 54EC : Capital gains – Investment in bonds – Exemption – Allowable before set-off of brought forward loss**

While section 54EC is an exemption provision which exempts capital gains and takes them outside the purview of chargeable “capital gains”, section 74 deals with the carry forward and set off of loss under the head “capital gains”. The stage at which set off of carried forward long term capital loss is to be given is subsequent to the stage at which income under the head capital gains is computed and deduction under section 54EC is to be given in the course of the latter. Accordingly, section 54EC deduction has to be given before set-off of losses. (A. Y. 2005-06)

*Tata Power Co. Ltd. v. ACIT (2011) 47 SOT 470 (Mum.)(Trib.)*

### **S. 54EC : Capital gains – Investment in bonds – Exemption – Date of payment – Delivery**

The Tribunal held that since the assessee had delivered the cheque to NABARD by 09-02-2006, the date of payment would be the date of delivery of the cheque. The date when the cheque was encashed by NABARD cannot be said to be the date of investment. (A. Y. 2006-07)

*Kumar Amrutlal Doshi v. Dy. CIT, ITA No. 1523/Mum/2010, dt. 09-02-2011, ‘G’ Bench, BCAJ P. 31, Vol. 43-A, Part 1, April 2011 (Mum.)(Trib.) Source : [www.itatonline.org](http://www.itatonline.org)*

### **S. 54EC : Capital gains – Investment in bonds in joint names – Exemption**

Assessee invested the sale proceeds of Tenancy rights in specified bonds in his name along with wife and daughters were co holders of said bonds. Exemption under section 54EC cannot be denied to the assessee. (A. Y. 2007-08).

*ACIT v. Vijay S. Shirodkar (2011) 48 SOT 8 / (2012) 146 TTJ 685 (Mum.)(Trib.)*

### **Section 54F : Capital gain on transfer of certain capital assets not be charged in case of investment in residential house.**

### **S. 54F : Capital gains – Introduction in partnership firms – Investment in residential house – Exemption – Deposit in capital gain scheme [S. 45(3)]**

Where assessee had earned capital gains by virtue of section 45(3) i.e. on account of introducing capital asset in a partnership firm by way of capital contribution, the assessee could not claim benefit of section 54F by constructing a new house if he had not deposited the sale proceeds in capital gains scheme account. Further since the assessee had utilized borrowed amount to construct new property he was debarred from claiming benefit under section 54F. (A. Y. 1995-96)

*CIT v. V. R. Desai (2011) 197 Taxman 52 (Ker.)(High Court)*

### **S. 54F : Capital gains – Investment in residential house – Prior to transfer – Exemption**

The assessee purchased a residential house and within one year of such purchase, sold his insurance survey business and claimed deduction under section 54F against the purchase of residential house. The Assessing Officer rejected the same on the ground that the property was not purchased out of sale consideration of the transferred asset. It was held that the assessee was entitled to the deduction under section 54F since the section itself provides for acquisition of property prior to transfer of asset.

*CIT v. R. Srinivasan (2011) 198 Taxman 26 (Mag.) / 235 CTR 588 (Mad.)(High Court)*

### **S. 54F : Capital gains – Investment in residential house with in time specified under section 139(4) – Exemption – Revision of orders prejudicial to revenue [S. 263]**

Commissioner passed the order under section 263 withdrawing exemption under section 54F, on the ground that new house was registered in favour of the assessee beyond the due date prescribed under sub section (1), of section 139 and that the assessee failed to deposit the sale proceeds as provided under section 54F(4). High Court held that Tribunal was justified in setting aside the order of the Commissioner by holding that the investment made by the assessee being within time specified under section 139 (4), the assessee is eligible for exemption under section 54F in view of the binding decision of the Jurisdictional High Court. (A. Y. 2006-07).

*CIT v. Vrinder P. Issac (Smt.) (2011) 64 DTR 376 (Karn.)(High Court)*

**S. 54F : Capital Gains – Investment in residential house – Exemption – Within three years**

Capital Gains to be charged in the previous year after expiry of three years from the date of transfer. (A.Y. 1993-94)

*Ranjit Narang v. CIT (2010) 215 Taxation 674 / (2009) 317 ITR 332 (All.)(High Court)*

**S. 54F : Capital Gains – Investment in residential house – Exemption – Registration**

Assessee is entitled to exemption in respect of investment in new house. Possession of new house is relevant. Registration is not relevant.

Capital Gains arising on sale of residential house and its investment in new house shall not be exempt if assessee owned another house on date of transfer.

To claim exemption from capital gains tax under Section 54F the assessee has to purchase a residential unit. The condition is not to become owner of the residential unit.

*CIT v. Ajitsingh Khajanchi (2008) 297 ITR 95 / 211 CTR 403 / 163 Taxman 426 (MP)(High Court)*

**S. 54F : Capital Gains – Investment in residential house – Exemption – Construction must be real – Not symbolic**

High Court denying the exemption under section 54F of the Act held that the construction must be real one and not symbolic, as such, a mere construction by way of extension of old existing house would not mean construction of a residential house as contemplated under section 54F of the Act.

*CIT v. Pradeep Kumar (2006) 195 Taxation 348 (Mad.)(High Court)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Deposit under Capital Gains accounts scheme**

Assessee having deposited the sale proceeds of property in his bank account under the capital gains account scheme within the prescribed period and purchased a new property by availing of a loan which was paid out of the same bank account, he has complied with the provisions of Capital Gains Accounts Scheme and, therefore, assessee is entitled to exemption under section 54F. (A. Y. 2006-07)

*P. Thirumoorthy v. ITO (2011) 49 DTR 91 / 135 TTJ 75 / 7 ITR 10 (UO)(Chennai)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Time limit**

Where the assessee had purchased a flat after one year of sale of original asset and constructed a new house within three years of sale of original asset proviso (ii) to section 54F was not attracted and assessee was entitled to exemption under section 54F in respect of new house constructed by him. (A. Y. 2006-07)

*P. R. Kulkarni & Sons (HUF) v. Addl. CIT (2011) 49 DTR 442 / 135 TTJ 630 (Bang.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Purchase price of new house adjusted – Construction of new house [S. 45]**

Assessee sold the land to MTDC on 31st March 2005, and possession of new constructed bungalow has been given by the MTDC to the assessee on 31st March 2008 and even otherwise as the entire purchase price of the new house property was adjusted on 31st March 2005, itself i.e. the date of transfer of land in question to MTDC, assessee was entitled to exemption under section 54F. The contention of the revenue stating that as construction was not started prior to date of filing of return i.e. 31st July 2005, the assessee should have deposited the consideration received on transfer of land in capital gains account with the bank which has not been done. The Tribunal held that there was no occasion for depositing the amount in question as it was not received by the assessee any point of time. According to the Tribunal the view of Assessing Officer was not correct. (A. Y. 2005-06).

*Chetan Vithal Tupe v. ACIT (2011) 64 DTR 218 / 47 SOT 1 (Pune)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Cost of acquisition – Advocate fee – Brokerage – Expenditure on laying tiles, white-washing, electrical rewiring, and wood work [S. 45]**

Expenses relating to advocate fee and brokerage of property would be included in cost of acquisition. Expenditure incurred by assessee on laying tiles, white-washing, electrical rewiring, and wood work after acquisition of property could not be treated as part of acquisition cost. (A. Y. 2008-09).

*S. Sudha (Smt) v. ACIT (2011) 48 SOT 335 / 10 ITR 206 (Chennai)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Transfer of two commercial properties [S. 45]**

Assessee sold two commercial properties/ capital assets and claimed deduction under section 54F on ground of purchase of two residential units being ground and first floor in a Group Housing Complex. Assessing Officer disallowed same on ground that deduction was not allowable as two distinct properties were purchased. Commissioner (Appeals) considering all the factors held that assessee had in possession was one single unit comprising of two floors of one and same double storeyed residential house having common stair case kitchen, etc. The Tribunal held that assessee would be entitled to exemption as claimed. (A. Y. 2005-06).

*ACIT v. Sudha Gurtoo (2011) 48 SOT 393 / 7 ITR 653 (Delhi)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption [S. 2(47), 45, 50C]**

Assessee transferred her 1/3 share in land which was sold vide agreement dated 28-12-2000, for a total consideration of ` 24-10 lakhs to original purchaser in part performance of contract. Possession was handed over on 28-12-2000. Subsequently

on request of the purchaser conveyance deed was entered in to in favour of nominee during previous year 2005-06. Assessee purchased a residential flat for a total consideration of ₹ 23-50 Lakhs vide agreement for sale dated 23-3-2001 and possession of said property was delivered to assessee on 27-4-2001, it means that long term capital gain arising out of sale of land was invested in residential house, therefore exemption under section 54F would be allowable. (A. Y. 2005-06).

*Rajshree Bihani (Smt.) v. ITO (2011) 48 SOT 594 (Kol.)(Trib.)*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Investment in two adjacent flats [S. 45]**

The assessee had purchased two adjacent flats which were interconnected and used as one residential house. Assessing Officer denied the exemption. On appeal the Tribunal held that the Assessing Officer shall allow the exemption in respect of both the flats if it is found that the flats are being used as one residential house and the investment was made by assessee himself. In appeal by revenue the Bombay High Court up held the decision of Tribunal.

*CIT v. Joe B. Fernandes ITA No. 1467 of 2007 dt. 10-12-2008 429 (2012) 43-B BCAJ (January- 2012 – P. 41)*

*Editorial:- Departmental S.L.P. No. (C) 23581 of 2009 dated 7-9-2009 was rejected by Supreme Court. (2010) 322 ITR (St) 8 / CIT v. Rashmi Khanna : S.L.P. (C) No. 30894 of 2009 dt. 9-11-2009 (2010) 322 ITR (St) 8*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Stamp duty valuation [S. 45, 50C]**

Capital gains arising from the transfer of any long term capital asset for the purpose of section 54F has to be worked out applying section 48 without imposing section 50C into it, when sale consideration was shown at ₹ 20,00,000/- stamp duty valuation was ₹ 36,00,000/- and the assessee invested in new house ₹ 24,00,000/- including ₹ 20,00,000/- sale consideration, he could claim exemption under section 54F only of ₹ 18,06,494/- and not entire ₹ 36,00,000/-. (A. Y. 2005-06).

*Gouli Mahadevappa v. ITO (2011) 49 DTR 207 / 128 ITD 503 / 9 ITR 129 / 135 TTJ 489 (Bang.)(Trib.)*

*Editorial:- Gyan Chand Batra v ITO (2010) 133 TTJ 482 / 45 DTR 41 (Jp.)(Trib.) Tribunal has taken different view.*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Deposit in savings bank account**

Where the assessee had deposited sale proceeds in normal savings account as against scheme specified by Central Government through notification in Official Gazette as per section 54F(4), it violated provisions of section 54F(4), hence, not eligible for exemption. (A. Y. 1996-97).

*Thakorlal Harkishandas Intwala v. ITO (2011) 43 SOT 347 / 140 TTJ 21 (UO)(Ahd.)(Trib.)*



**S. 54F : Capital gains – Investment in residential house – Exemption – Purchase of Flat**

Assessee had purchased a flat, prior to sale of land after demolition of building on the land and therefore neither proviso to section 54F(1) nor section 54F(2) attracted and the assessee was entitled to exemption under section 54F. (A.Y. 2004-05)

*Subhash Chand Kapoor v. ITO (2010) 46 DTR 314 (Agra)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Transfer to developer**

When residential property is allotted in lieu of transfer of land as per development agreement with developer, assessee is entitled to exemption under section 54F. (A.Y. 2004-05, 2005-06)

*R. Gopinath (HUF) v. ACIT (2010) 42 DTR 127 / 133 TTJ 595 (Chennai)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Full value of consideration [S. 50C]**

For the purpose of deduction under section 54F full value of consideration shall be the value as specified in the sale deed for the purpose of computation of capital gains. Provision of section 50C can not be applicable as it contains only deeming provision. Full value of sale consideration as mentioned in other provisions of the Act is not governed by the meaning of full value of consideration as contained in section 50C of the Act. (A.Y. 2006-07)

*Gyan Chand Batra v. ITO (2010) 45 DTR 41 / 133 TTJ 482 / 6 ITR 147 (Jp.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Commercial complex**

When a house is located in a commercial complex, it can not be accepted that it is residential house or that it was used for residential purposes, in the absence of any evidence or record for use of residential purposes. (A.Y. 1995-96)

*Sunita Oberoi (Smt.) v. ITO (2009) 126 TTJ 745 / 30 DTR 474 (TM)(Agra)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Additional construction in existing house**

Assessee is not entitled to exemption under section 54F on investment of capital gain in the construction of an additional floor in existing house.

*ACIT v. T. N. Gopal (2009) 125 TTJ 1 / 121 ITD 352 / 28 DTR 249 / (2010) 1 ITR 309 (TM)(Chennai)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Registration**

The registration of the property in the name of the holder was no longer necessary.

*Kamlesh Bansal v. ITO (2007) 109 TTJ 417 (Delhi)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Expenditure incurred**

Expenditure incurred on making the house habitable should be considered as investment in purchase of the house. (A.Y. 1999-2000)

*Saleem Fazelbhoy v. Dy. CIT (2007) 108 TTJ 894 / 106 ITD 167 / 9 SOT 601 (Mum.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Own – Residential House – Share in other house**

Word "own" in section 54F would include only a residential house which is fully and wholly owned which consequently would not include a residential house which is owned by more than one person. In other words, a shared interest in a residential house property is different from absolute ownership and therefore, for the purpose of section 54F the word "own" would include only a residential property which is fully and wholly owned by the assessee.

*ITO v. Rasiklal N. Satra (2006) 280 ITR (AT) 243 (Mum.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Construction of ground floor of residential house**

Assessee having invested the entire sale consideration in construction of ground floor of the house within a period of three years, the utilisation of the amount is complete and exemption under section 54F could not be disallowed on the ground that the assessee needed more funds to complete the house in a particular manner. (A.Y. 2000-01)

*Ajay Goyal v. ITO (2006) 99 TTJ 164 (Jodh.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Bigger HUF**

Assessee was not the owner of the residential house property which was owned by the bigger, HUF till the order of Subordinate Judge ordering partition of the property in the partition suit was upheld by the appellate Court and, therefore, he was not disentitled from claiming exemption under s. 54F in respect of investment of capital gains in the construction of the new residential house. (A.Y. 1996-97)

*R. Sureshkumar v. ACIT (2006) 99 TTJ 997 (Chennai)(Trib.)*

**S. 54F : Capital gains – Investment in share in residential house – Exemption – Co-owner**

Assessee, co-owner of a flat, invested the sale proceeds of shares in acquiring the right of the other co-owner in the flat and claimed exemption which was allowed by Tribunal. (A.Y. 1997-98)

*ITO v. Varsha P. Thanawala, Bench 'F', ITA No. 6257/Mum/2002 dated 24/02/2006 — BCAJ, April 2006 (39-B) P. 25 (Mum.)(Trib.)*

### **S 54F : Capital gains – Investment in residential house – Exemption – Share transactions**

Assessee's claim under section 54F against Long Term Capital Gain on shares was rejected by Assessing Officer, on grounds that full amount was not paid for purchase of shares, and that it is highly improbable that prices of shares could go up so much within a short period of one year. It was held that as the purchase is confirmed by share broker, and the shares were transferred in the name of the assessee, and rate was also supported by rates quoted at Patna Stock Exchange, there is no justification in suspecting the entire share transaction, and addition cannot be sustained.

*Dy. CIT v. Charan Singh (2006) 153 Taxman 1 (Mag.)(Chd.)(Trib.)*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Co-owner**

Word 'own' in s. 54F would include only a residential house which is fully and wholly owned by assessee and therefore assessee could not be denied exemption under section 54F on the ground that he was co-owner of another residential house with his wife.

*ITO v. Rasiklal N. Satra (2006) 100 TTJ 1039 / 98 ITD 335 (Mum.)(Trib.)*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Remodelling and renovation – Construction of house**

The assessee had sold two shops and the entire amount of capital gain was claimed to have been invested in remodeling and renovation of residential house. The Assessing Officer has denied the exemption. The Tribunal held that terms 'remodel' and 'renovation' sufficiently refer to new construction also and therefore, the assessee had to be held to have made investment in construction of residential house within the stipulated time. (A.Ys. 2000-01, 2001-02)

*Jyoti Pat Ram v. ITO (2005) 92 ITD 423 / 96 TTJ 947 (Luck.)(Trib.)*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Income of minor clubbed with income of his father [S. 64]**

Even if the income of minor is clubbed with the income of other individual, all the deductions are to be allowed while computing income of the minor /spouse and only the net taxable income is to be clubbed under section 64. Merely because the income of the minor is clubbed with the income of the assessee father, it can not be said that he is not entitled to the benefits contemplated under section 54F. (A.Y. 1995-96)

*Estate of Late Shri Dharambir Hansraj Aggrwal v. Dy. CIT (2005) 95 ITD 83 / 96 TTJ 880 (Mum.) (Trib.)*

### **S. 54F : Capital gains – Investment in residential house – Exemption – Payments to tenants**

Payments made by assessee to tenants for vacating residential house purchased by assessee are not eligible for deduction under section 54F. (A.Y. 1995-96)

*Dy. CIT v. Uday S. Kotak (2005) 96 ITD 177 / 96 TTJ 1018 (Mum.)(Trib.)*

**S. 54F : Capital gains – Investment in residential house – Exemption – Own name only**

The expression “that the assessee has purchased or constructed a new asset would mean that new asset has to be purchased in assessee’s own name, and purchase in some other name would not be valid and no benefit under section 54F would be granted. (A.Y. 1983-84)

*ITO v. Prakash Timaji Dhanjode (2003) 81 TTJ 694 (Nagpur)(Trib.)*

**Section 55 : Meaning of “adjusted”, “cost of improvement” and “cost of acquisition”.**

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – FMV – 1-4-1981**

Fair market value of land at ₹ 330 per square yard as on 1st April, 1981 adopted by the Tribunal in view of sale of land by Investment Trust on 1st June, 1981 and other comparable sale instances in the same area which is not shown to be erroneous the same has to be accepted as against ₹ 60/- per square yard adopted by the Assessing Officer. (A. Y. 1995-96).

*CIT v. Bhupindera Flour Mills (P) Ltd. (2011) 59 DTR 307 (P&H)(High Court)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Bonus shares**

The cost of bonus shares for the purpose of calculating capital gain is to be determined by spreading over the cost of old shares over the old shares and bonus shares.

*CIT v. Gaja Nand Dalmia & Sons (2007) 201 Taxation 539 (P&H)(High Court)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – FMV on 1-4-1981**

Assessee acquired 1/9 right in a property. She sold her share of property. She adopted 1 lakh per ground as fair market value of property as on 1-4-1981. Inspector visited concerned sub registrar Office and gathered the details on basis of fair market value of ₹ 15,000 per ground. The Assessing Officer adopted the guideline value of registrar’s office for computing capital gains. The Tribunal held that the guideline value collected from sub-registrar office is only a guiding factors for valuing a property and such guideline value need not be market value for all time. Market value has to be determined by so many external factors including prevalent market conditions hence detailed enquiry is needed for arriving at a reasonable market value of property. Accordingly the Tribunal remanded the matter for fresh consideration. (A. Y. 2007-08)

*ITO v. Usha Ramesh (Smt) (2011) 133 ITD 67 (TM)(Chennai)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition [S. 2(22B)]**

Cost of acquisition of the property under section 55(2)(b)(i) will be its fair market value as on 1-4-1981 as determined by the registered valuer and not the circle rate. (A. Y. 2005-06).

*Pyare Mohan Mathur HUF v. ITO, (2011) 46 SOT 315 (Agra)(Trib.)*

#### **S. 55 : Capital gains – Cost of improvement – Nil Cost of acquisition – Co-operative society – FSI**

The assessee had not incurred any cost of acquisition on a capital asset and as each 'capital asset' did not fall into the category of 'capital assets' specified in section 55(2). No capital gain would be brought to tax on sale/ transfer of it. As the assessee had not incurred any cost of acquisition in respect of additional FSI and also the revenue failed to point out any particular asset as specified in section 55(2) which would include right to additional FSI no capital gains could be charged on its transfer by assessee. (A.Y. 2003-04)

*New Shailaja Co-operative Housing Society Ltd. v. ITO (2010) 36 SOT 19 / (2009) 18 DTR*

*385 / 121 TTJ 62 (URO)(Mum.)(Trib.)*

#### **S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Warrants – Bonds**

Cost of acquisition of warrants by virtue of original holding of bonds is to be taken as nil for computation of capital gains on sale of such warrants. (A.Y. 1998-99)

*Bharat S. Shah v. Jt. CIT (2006) 101 TTJ 244 / 101 ITD 200 / 7 SOT 582 (Mum.)(Trib.)*

#### **S. 55 : Capital gains – Cost of improvement – Cost of acquisition – FMV**

The action of the Assessing Officer in substituting the full value of consideration by the fair market value as stated by the DVO in his report for computation of capital gains was not valid. (A.Y. 1997-98)

*Ashok Soni v. ITO (2006) 102 TTJ 964 (Delhi)(Trib.)*

#### **S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Shares – Indexation**

Even though the assessee did not file any return or information with regard to the cost of shares it is still entitled for deduction of the cost of acquisition of the shares by applying indexation for computing the capital gains.

*Vijay Sehgal (HUF) v. ACIT (2006) 102 TTJ 904 / 100 ITD 560 (Amritsar)(Trib.)*

#### **S. 55 : Capital gains – Cost of improvement – Cost of acquisition**

In the case of land sold in 1983, cost of acquisition has to be determined by the Assessing Officer on the basis of fair market value as on 1st April, 1981 and not on the basis of cost of acquisition as on 1st January, 1964, as per balance sheet filed by assessee. (A.Y. 1984-85)

*Uttam Mitra v. ACIT (2006) 100 TTJ 632 (Cuttack)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – No cost of acquisition – Development right – FSI**

Assessee was owner of plot, which was reserved for public purpose under development plan DCR, received award of compensation by way of 'development right certificate' of equivalent floor space index (FSI), transfer of such rights by assessee to a developer could not be said to give rise to assessable capital gains, as said rights had no cost of acquisition. (A.Y. 1996-97)

*Jethlal D. Mehata v. Dy. CIT (2005) 2 SOT 422 (Mum.)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Trade mark – Goodwill**

It is not possible to extend meaning of term 'goodwill' to 'Trademark' and thus, for assessment year 1995-96, amount received by assessee – company on transfer of trade mark rights was not taxable under head 'capital gains'. (A.Y. 1995-96)

*Addl. CIT v. Kwaliti Frozen Foods Ltd. (2005) 1 SOT 243 (Mum.)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Right to manufacture – Non compete fee – Capital receipt**

Amounts received by Directors of bottling of Coca-Cola products in their capacity as directors, not to use the technology, information for production similar products nor to disclose the said information to any other party for a period of five years and a sum of Rs 1.50 crores was paid to each director will be a capital receipt for the purpose of avoiding immediate competition, the same was in the nature of non-compete fee. (A.Y. 1998-99)

*Dinesh Chand v. Jt. CIT (2005) 95 ITD 209 / 97 TTJ 770 (Delhi)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – Bonus shares – Financial assets**

Provisions of section 55 (2)(aa), are applicable only in respect of transfer of financial asset allotted to original shareholder and where original allottee being share holder renounces financial asset in favour of any representative at a price, provisions of section 55(2)(aa) have no application. (A.Y. 1996-97)

*Dy. CIT v. Dharmesh H. Doshi (2005) 4 SOT 748 (Mum.)(Trib.)*

**S. 55 : Capital gains – Cost of acquisition – Share allotted before 1-4-1981 – Fair market value**

Bonus shares allotted before 1-4-1981. Even after insertion of section 55 (2)(aa)(iia), for purpose of computing capital gains on transfer of said bonus shares assessee has an option to take their fair market value as on 1-4-1981 as cost of acquisition. (A.Y. 1996-97)

*Heinrich de Fries Gmbh v. Jt .CIT (2005) 96 TTJ 864 / 98 ITD 292 (Mum.)(Trib.)*



**S. 55 : Capital gains – Cost of acquisition – Valuation report – CII – Reverse direction**

Value of raw and uncut diamond as on 1st April, 1981, is to be taken by obtaining valuer's report and not by applying the cost inflation index in the reverse direction. (A.Y. 1998-99)

*Hiralal Lokchandani v. ITO (2007) 107 TTJ 405 / 106 ITD 45 (Kol.)(Trib.)*

**S. 55 : Capital gains – Cost of improvement – Cost of acquisition – FMV – Registered Valuation Report**

CIT (A) was justified in estimating the fair market value of assessee's property located at prime location as on 1st April, 1981 as per registered valuer's report for the purpose of computation of capital gains. (A.Y. 1995-96)

*ITO v. P. C. Ramakrishna (HUF) (2007) 107 TTJ 351 (Chennai)(Trib.)*

**S. 55 : Capital gains – Cost of acquisition – Bonus shares – Non-resident**

Non-resident applicant sells bonus shares acquired prior to 1-4-1981 - ITO passed an order taking cost of acquisition of bonus shares as 'nil' - AAR observed that applicability of the said clause is subject to the phrase appearing therein i.e. 'subject to the provisions of sub-clauses (i) and (ii) of clause (b)' which extends benefit of deemed cost of acquisition to assets acquired before 1-4-1981 - hence ruled that cost of acquisition of bonus shares held on 1-4-1981 would be the fair market value as on 1-4-1981 in terms of sub-clause (i) of S. 55(2)(b) and not Nil in terms of S.55(2)(aa)(B)(iiia).

*Kern-Liebers International GmbH, (2008) 216 CTR 326 / 170 Taxman 85 / 301 ITR 178 / 7 DTR 21 (AAR).*

**Section 55A : Reference to Valuation Officer**

**S. 55A : Capital gains – Reference to valuation officer – Cost of construction [S. 131(1), 133(6), 142(2)] [S. 37(1) & 38 Wealth Tax Act]**

Assessing Officer cannot refer matter to the Valuation Officer for estimating cost of construction. The Valuation Officer appointed under the Wealth Tax Act has no jurisdiction to give report on cost of construction for determining Capital Gain. Power of the Assessing Officer under section 131(1) and 133(6) and 142(2), (S. 37(1) & 38 of Wealth Tax Act) is distinct and does not include power to refer to the Valuation Officer under section 55A. (A.Y. 1983-84)

*Amiya Bala Paul (Smt.) v. CIT (2003) 262 ITR 407 / 130 Taxman 511 / 182 CTR 489 / 176 Taxation 221 / 6 SCC 342 (SC)*

**S. 55A : Capital gains – Reference to valuation officer – After assessment.**

Once the Assessing Officer has determined value of the capital assets of the assessee and completed the assessment, he cannot, thereafter, refer matter to valuation officer under section 55A for determining fair market value of the asset. (A.Y. 2002-03)

*Rallis India Ltd. v. Dy. CIT (2006) 154 Taxman 73 / 204 CTR 45 / 284 ITR 159 (Bom.)(High Court)*

**S. 55A : Capital gains – Reference to valuation officer – Reference – Cost of construction**

Assessing officer has no jurisdiction to make reference to Valuation Officer for determination of cost of construction of property, such reference would be invalid and any addition based on such report of Valuation Officer would also be liable to be deleted.

*CIT v. Sudhish Kumar (2005) 276 ITR 563 / 146 Taxman 612 / 195 CTR 77 (Delhi)(High Court)*

**S. 55A : Capital gains – Reference to valuation officer – FMV [S. 48]**

Section 55A, is meant only to ascertain fair market value of a capital asset but not meant to determine full value of consideration received as result of transfer and therefore it has its own limitation for its operation. Since section 48 do not prescribe determination of capital gain on fair market value it is out of ambit of reference prescribed under section 55A. (A. Y. 2006-07).

*ITO v. Chandrakant R. Patel (2011) 131 ITD 1 / 140 TTJ 430 / 11 ITR 317 / 56 DTR 449 (Ahd.)(Trib.)*

**S. 55A : Capital gains – Reference to valuation officer – Cost of acquisition – FMV – 1-4-1981**

Value adopted by assessee much higher than fair market value as on 1-4-1981, reference to valuation officer permissible. Average of both valuation was taken.

Valuation charges incurred by assessee, not spent in connection with cost of acquisition or cost of improvement of asset hence not deductible. (A.Y. 2001-02)

*VijayKumar M. Shah v. Dy. CIT (2010) 2 ITR 116 / (2009) 126 TTJ 910 / 124 ITD 93 / 29 SOT 338 (Mum.)(Trib.)*

*Editorial:– Refer Bombay High Court Judgment Daulat Mota HUF ITA No. 1031 of 2008*

*dt. 22-9-2008 (Unreported), Krishnabai Tingre (Smt.) (2006) 101 ITD 317 / 103 TTJ 216 (Pune)*

**S. 55A : Capital gains – Reference to valuation officer – Valuation as on 1-4-1981**

Assessing Officer cannot resort to departmental valuation officer's report for ascertaining fair market value of an asset as on 1st April 1981, and for the purpose of computing cost of acquisition under section 55(2)(b)(i). No reference can be made to the DVO to determine the fair market value as on 1st April, 1981.

*ITO v. Surendra V. Shah ITA No. 5667/Mum./2008 Bench 'E' dt. 23-7-2010 (2010) (October) BCAJ P. 23 (Mum.)(Trib.)*

**S. 55A : Capital gains – Reference to valuation officer – FMV as on 1-4-1981**

Fair market value of the property as on 1st April 1981, declared by the assessee as per Government registered valuer's report being more than the fair market value as estimated by the DVO on reference by the Assessing Officer, the reference to the DVO is not valid and consequently, estimation of fair market value of property as made by the assessee is to be accepted. (A.Y. 2006-07)

*Sarala N. Sakraney v. ITO (2010) 46 DTR 208 / 130 ITD 167 (Mum.)(Trib.)*

### **S. 55A : Capital gains – Reference to valuation officer – FMV – Validity**

The act of the Assessing Officer in accepting the valuation made under section 55A, which was undoubtedly less than the fair market value shown by the assessee, proved that the Assessing Officer was of the opinion that the assessee's claim was more than its FMV and hence the Assessing Officer was not justified in making reference to the Valuation Officer. (A.Y. 2001-02)

*ITO v. Lalitaben B. Kapadia, ITA No. 8763/Mum/2004, – Bench 'K', dt. 20-9-2007 - BCAJ P. 16, Vol. 40-A, Part 1, April 2008. (Mum.)(Trib.)*

### **S. 55A : Capital gains – Reference to valuation officer – Subsequent to assessment**

Valuation report received subsequent to completion of assessment can be examined and adopted by appellate authority as same becomes part of record. The information obtained in said report can be utilised by Commissioner (Appeals). Once the Assessing Officer had exercised the option to adopt cost of acquisition as on 1-4-1981 under 55(2)(b), then the substitution of the said figure, by any figure other than the value determined by valuation cell of the department is not justified.

*ICBI India (P) Ltd. v. Jt. CIT (2008) 166 Taxman 123 (Mag.)(Bang.)(Trib.)*

### **S. 55A : Capital gains – Reference to valuation officer – Recording of reasons**

For making reference under section 55A(b)(ii), it is obligatory on part of Assessing Officer to record such other relevant circumstances on basis of which he has formed opinion to make such reference and also record as to why it is necessary to adopt such a course and in absence of same, reference made to valuation officer is invalid. (A.Y. 1996-97)

*Sajjankumar M. Harlalka v. Jt. CIT (2006) 100 ITD 418 / 102 TTJ 974 (Mum.)(Trib.)*

### **S. 55A : Capital gains – Reference to valuation officer – Validity**

Value of land as on 1st April, 1981, shown by the assessee on the basis of approved valuer's report being more than its fair market value, reference under s. 55A was not valid. (A.Y. 1993-94)

*Krishnabhai Tingre (Smt) v. ITO (2006) 103 TTJ 216 / 101 ITD 317 (Pune)(Trib.)*

## **F. Income from other sources**

### **Section 56 : Income from other sources.**

**S. 56 : Income from other sources – Casual or non-recurring – Tenancy right**

It would be illogical and against the language of section 56 to hold that everything that is exempted from capital gains by statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56. A receipt that is capital in nature cannot be assessed under the head income from other source. (A.Y. 1987-88) *CIT v. D. P. Sandhu Bros. Chembur (P.) Ltd. (2005) 273 ITR 1 / 142 Taxman 713 / 193* CTR

578 / 185 Taxation 471 (SC)

Editorial:- *Cadell Weaving Mill Co. (P) Ltd. v. CIT (2001) 249 ITR 670 (Bom.) approved.*

**S. 56 : Income from other source – Deposit for performance guarantee – Interest**

Fixed deposit placed with Bank as performance guarantee as condition for being awarded contract work. Interest on fixed deposits not assessable as income from other sources.

(A. Y. 2003-04).

*CIT v. Jaypee DSC Ventures Ltd (2011) 335 ITR 132 / 56 DTR 305 (Delhi)(High Court)*

**S. 56 : Income from other sources – Business income – Letting out factory**

The assessee let out its factory with all machineries with effect from September 8, 1983 as per lease agreement for a period of 11 months. After the expiry of lease period, lease agreement was not renewed. The Court held that one has to see whether the intention of the assessee is to go out of business altogether or to come back and restart the same. Except lease agreement, no material has been produced by the assessee before the Assessing Officer or this court to come to the conclusion that the assessee is likely to come back and restart the business. Accordingly the court held that income to be treated as income from other sources. (A.Ys. 1997-98 to 1999-2000).

*CIT v. Venkateswara Agro Chemicals and Minerals P. Ltd. (2011) 338 ITR 428 (Mad.)(High Court)*

**S. 56 : Income from other sources – Relinquishing right in the firm – Pending decree**

Receipt by a partner for relinquishing his partnership right in the firm so as to enable the firm to sell its land, pending the final decree for dissolution was liable to be assessed as income from other sources. (A.Y. 1997-98)

*Visalakshy Kumaran (Smt) v. CIT (2009) 18 DTR 139 (Ker.)(High Court)*

**S. 56 : Income from other sources – Business income – Hotel – Lease for 33 years**

Rental income from lease of Hotel under an agreement for 33 years with an option of further renewal for 33 years should that assessee had no intention to resume hotel

business and the rental income was to be assessed as income from other sources and not business income. (A.Y. 1989-90)

*East West Hotels Ltd v. Dy. CIT (2009) 309 ITR 149 / 217 CTR 198 / 171 Taxman 141 / 7 DTR 109 (Karn.)(High Court)*

#### **S. 56 : Income from other sources – Interest income – Pre-operative period**

Interest income which accrued to the assessee during the pre-operative period on the funds kept with the bank which, were specifically earmarked for purchase of capital asset constitute capital receipt and could not be taxed under the head income from other source. (A.Ys. 2001-02, 2002-03)

*Indian Oil Panipat Power Consortium Ltd. v. ITO (2009) 20 DTR 107 / 230 CTR 199 / 315 ITR 255 / 181 Taxman 249 (Delhi)(High Court)*

#### **S. 56 : Income from other sources – Interest – Short term deposit – Pre-operative period**

Where money borrowed for the purchase of plant and machinery was put in short-term deposits during the period of construction, interest received on such deposit was assessable under the head Income from Other Sources and cannot be set off against actual cost of plant and machinery. (A.Y. 1989-90)

*CIT v. Winsome Dyeing & Processing Ltd. (2008) 10 DTR 207 / 220 CTR 599 / 306 ITR 340 / 188 Taxman 274 (HP)(High Court)*

#### **S. 56 : Income from other sources – Interest – Surplus funds**

Where no business was carried on by the assessee during the year, interest earned on any surplus funds parked with other companies was liable to be assessed under the head income from other sources.

*International Marketing Ltd. v. ITO (2006) 194 Taxation 150 (Delhi)(High Court)*

#### **S. 56 : Income from other sources – Interest – Short term deposits**

Income earned by the assessee by investing surplus money received in public issue, in bank deposits for a short period is assessable under head 'Income from other sources'.

*Shree Krishna Polyster Ltd. v. Dy. CIT (2005) 274 ITR 21 / 144 Taxman 41 / 195 CTR 206 (Bom.) (High Court)*

#### **S. 56 : Income from other sources – Interest – Short term deposits**

Assessee was engaged in business of civil construction and was not engaged in any kind of money lending or deposit business. Income earned by assessee on its funds invested in short term deposits in order to earn interest was not to be treated as its business income but was chargeable to tax as income from other sources.

*Ferro Concrete Construction (India) P. Ltd. v. CIT (2005) 144 Taxman 885 / 196 CTR 158 / 290 ITR 713 (MP)(High Court)*

**S. 56 : Income from other sources – Estimated expenditure – Business set up [S. 57(iii)]**

Estimated expenditure was allowable from interest income earned by assessee from funds deposited by it, where business had not been set up. (A.Ys. 1978-79, 1979-80) *CIT v. Kisan Sahakari Chini Mills Ltd. (2004) 190 CTR 341 / 274 ITR 119 / 114 Taxman 464 (All.)(High Court)*

**S. 56 : Income from other sources – Interest – Fixed deposits**

Interest received by assessee on fixed deposits made out of surplus funds is assessable as income from other sources. (A.Y. 1986-87)

*CIT v. Monarch Tools Pvt. Ltd. (2003) 260 ITR 258 / 182 CTR 463 / 135 Taxman 166 (Mad.)(High Court)*

**S. 56 : Income from other sources – Interest – Investment in shares**

If interest is earned by assessee on investment of share application money, it is 'income from other sources'. (A.Y. 1993-94, 1994-95)

*Southern Herbals Ltd. v. Settlement Commission IT & WT (2003) 129 Taxman 831 / 261 ITR 681 / 180 CTR 536 (Karn.)(High Court)*

**S. 56 : Income from other sources – Lease Rent – Lease of mill**

Where assessee had given mill on lease, amount received on account of lease could not be treated as income from business but income from other source. (A.Ys. 1973-74 to 1976-77)

*CIT v. Gambhir Mai Pandey (P.) Ltd. (2003) 130 Taxman 807 / 185 CTR 540 / (2004) 266 ITR 274 (Raj.)(High Court)*

**S. 56 : Income from other sources – Deductions – Interest – Fixed deposits**

Interest payable to bank on loans taken on security of fixed deposits is not allowable as deduction against interest received on said deposits. (A.Y. 1990-91)

*CIT v. C. John Rajan (Dr) (2003) 130 Taxman 806 / 190 CTR 164 (Ker.)(High Court)*

**S. 56 : Income from other sources – Deductions – Interest – Investment in shares**

Where assessee-company had borrowed certain sum and invested it in shares and later entire investment shares was transferred to assessee's subsidiary at book value, disallowance of interest on borrowed capital was justified. (A.Ys. 1978-79, 1979-80, 1980-81)

*Kalindi Investment (P.) Ltd. v. CIT (2003) 129 Taxman 219 / 260 ITR 261 / 179 CTR 301 (Guj.)(High Court)*

**S. 56 : Income from other sources – Company-in-Liquidation – Fixed deposits**



In care of a company in liquidation expenses not related to earning of interest on funds invested in fixed deposits could not be allowed under section 57(iii). (A.Y. 1987-88)

*CIT v. Wandoor Jupiter Chittry (P.) Ltd. (2003) 130 Taxman 479 (Ker.) (High Court)*

#### **S 56 : Income from other sources – Interest – Fixed deposit with bank**

Interest from deposits made with bank for securing bank guarantee in favour of DOT for obtaining license was inextricably linked to the business of assessee and, therefore, had to be treated as business income not Income from Other Sources. (A.Y. 1996-97)

*CIT v. Koshika telecom Ltd. (2006) 203 CTR 99 / 286 ITR 479 (Delhi) (High Court)*

#### **S. 56 : Income from other sources – Business income – Interest income**

Since there was nothing on record to show that assessee company was in business of finance or money lending in year under consideration, net interest income earned by it was chargeable to tax under head income from other sources. (A. Ys. 2002-03, 2004-05 and 2006-07).

*Vidhyavihar Containers Ltd. v. Dy. CIT (2011) 133 ITD 363 (Mum.) (Trib.)*

#### **S. 56 : Income from other sources – Interest – Pre commencement [S. 28(i), 37(1), 57(iii)]**

Interest earned by the assessee company by investing its surplus funds in deposits with banks and other companies at the time when it was constructing the building of the institute for conducting its main business activity was taxable as "income from other sources" since the business was not set up. In respect of income only expenditure incurred for earning interest income can be allowed. (A.Ys. 2003-04, 2004-05)

*Whistling Woods International Ltd. v. ITO (2011) 135 TTJ 28 / (2010) 48 DTR 371 (Mum.) (Trib.)*

#### **S. 56 : Income from other sources – Business income – Interest – Pre-operative period [S. 4]**

Interest received by assessee on advances given to contractors for undertaking the expansion project of its refinery, though treated as part of business income is to be adjusted in the work in progress. (A.Y. 2000-01)

*Mangalore Refinery & Petrochemicals Ltd. v. ACIT (2010) 128 TTJ 285 / 34 DTR 600 / 4 ITR 259 (Mum.) (Trib.)*

#### **S. 56 : Income from other sources – Business income – Gift received by Politicians [S. 28(i)]**

Gifts received by assessee, a politician, from numerous donors as a token of appreciation of her reformatory work for upliftment of Dalits without any perceptible or intended quid pro quo as evident from the affidavits of the donors are to be treated as personal gifts and not vocational or professional receipts and therefore all such

gifts including those upto ` 25,000 are to be considered under section 56(2)(v) and not under section 28 and thus gifts up to ` 25,000 were not taxable. (A.Ys. 2004-05 to 2006-07)

*Dy. CIT v. Mayawati (Ms.) (2010) 48 DTR 233 / 42 SOT 59 / 135 TTJ 167 (Delhi)(Trib.)*

**S. 56 : Income from other sources – Interest – Surplus Fund – Pre-operative period**

Interest earned on surplus funds during pre operative period was assessable under section 56.

*Dy. CIT v. Capital Cars (P) Ltd. (2008) 113 TTJ 120 / 114 ITD 286 (Delhi)(Trib.)*

**S. 56 : Income from other sources – House Property – Business income – Letting of ware house [S. 22]**

Income from letting out of warehouse was assessable as income from house property. (A.Y. 2001-02)

*Nutan Warehousing Co. (P) Ltd. v. ITO (2007) 106 TTJ 137 (Pune)(Trib.)*

**S. 56 : Income from other sources – Business income – Interest from FDR – Deduction [S. 28(i)]**

Interest from FDRs is assessable as income from other sources and cannot be treated as business income. Interest paid to the bank cannot be allowed as deduction. (A.Ys. 1997-98, 1998-99)

*Dy. CIT v. Allied Construction (2007) 106 TTJ 595 / 105 ITD 1 / 11 SOT 101 (SB)(Delhi)(Trib.)*

**S. 56 : Income from other sources – Interest on deposits – Business purpose**

Interest earned on FDRs placed by the assessee for the purpose of obtaining overdraft and bank guarantee which have been utilized for the business of the assessee has to be treated as a business income of the assessee. (A.Y. 1996-97)

*ACIT v. Allied Construction (2007) 106 TTJ 616 (Delhi)(Trib.)*

**S. 56 : Income from other sources – Nexus – Fixed deposit – Letter of credit**

There being no nexus between making fixed deposit with the bank and opening of letter of credit for business of import of timber, interest on fixed deposit cannot be treated as business income. (A.Ys. 1997-98 to 1999-2000)

*A. R. Enterprises v. ACIT (2006) 99 TTJ 85 (Chennai)(Trib.)*

**S. 56 : Income from other sources – Trading – Interest – advance money [S. 28(i)]**

Assessee, ordinarily engaged in trading in timber, advancing loans to two companies and earning interest thereon, interest on such isolated transaction of advancing

money is assessable under the head "Other sources" and not as "business income" (A.Ys. 1997-98 to 1999-2000)

*A. R. Enterprises v. ACIT (2006) 99 TTJ 85 (Chennai)(Trib.)*

#### **S. 56 : Income from other sources – Interest – Set off against public issue expenses**

When interest was earned on deposit made in a bank as a statutory requirement of keeping share application money in separate bank account in a scheduled bank until permission for listing of share on stock exchange was granted such interest income was to be set off against cost of public issue and cost of capital assets and not be treated as income from other sources.

*Aarti Industries Ltd. v. Dy. CIT (2005) 95 TTJ 14 (Ahd.)(Trib.)*

#### **S. 56 : Income from other sources – Interest income – Set up of business – Pre-operative period**

Assessee had undertaken a project to construct dam and exploit it by generation of revenue from sale of water and electricity. During construction of dam, it could not be said to have set up business and as such interest income earned by it on short term deposits was assessable as income from other sources, and it could not be reduced from cost of construction. The Tribunal has laid down detailed propositions to be considered for allowing interest under section 57, such as the expenditure must not be capital in nature, the purpose of making or earning such income must be the sole purpose etc. (A.Y. 1989-90)

*Jt. CIT v. Sardar Sarovar Narmada Nigam Ltd. (2005) 93 ITD 321 / 93 TTJ 965 (Ahd.)(Trib.)*

#### **S. 56 : Income from other sources – Lease rent – Cylinders – Finance arrangement**

Lease rent in case of cylinders given on lease by assessee under a finance arrangement was assessable as income from other sources. Since the advancement of loan was not the regular activity of the assessee, the income earned there from could not be assessed as business income. (A.Ys. 1988-89 to 1993-94)

*Dy. CIT v. John Tinson & Co (P) Ltd. (2005) 1 SOT 47 (Delhi)(Trib.)*

#### **S. 56 : Income from other sources – Nature of receipt – Tenancy rights**

Unless a receipt is in nature of revenue receipt, it can not be said to be in nature of income and unless a receipt is in nature of income, same cannot be said to be in nature of 'income from other sources'. Payment received by legal heir of tenant under a tripartite agreement between such legal heir, landlord and purchaser for handing over peaceful possession to purchaser was not chargeable to tax. (A.Y. 1997-98)

*Niyati B. Youdh v. ACIT (2004) 4 SOT 941 (Mum.)(Trib.)*

#### **S. 56 : Income from other sources – Voluntary contribution – Political party [S. 13A]**

Voluntary contribution to a political party cannot be taxed under section 56, as same is exempt as per provisions contained in section 13A.

*Indian National Congress All India Congress Committee (I) v. ACIT (2003) 133 Taxman 205 (Mag.)(Delhi)(Trib.)*

**S. 56 : Income from other sources – Interest FDR – LC for exports [S. 10A]**

Interest earned on fixed deposits placed with banks for availing performance guarantee / letter of credit is assessable as income from other sources and not eligible for deduction under section 10A. For computation of income from other sources any reasonable sum paid by way of commission or remuneration to a banker or any other person for the purpose of realizing interest on securities/FDRs by way of expenses incurred by or on behalf of the applicant, may be deducted from such interest income in computing chargeable income.

*Shams Tabrez Vanti (2005) 273 ITR 299 / 143 Taxman 215 / 193 CTR 481 / 273 ITR 299 (AAR)*

**S. 56(2)(ib) : Income from other sources – Prize Money – Distributor of Lotteries [S. 115BB]**

Prize money received by a distributor of the lotteries on unsold lottery tickets held by it is to be treated as winning from lottery and assessable under the head, 'income from other sources' under section 56(2)(ib) of the Act and to be taxed as per the provisions of section 115BB of the Act. (A.Ys. 2000-01, 2001-02)

*CIT v. Manjoo & Co. (2010) 47 DTR 312 / 195 Taxman 39 / 335 ITR 527 (Ker.)(High Court)*

**S. 56(2)(v) : Income from other sources – Amount received and repaid as loan – Scope**

Amount received and repaid as a loan cannot come within the ambit of section 56(2)(v).

(A. Y. 2006-07)

*CIT v. Saranapal Singh (HUF) (2011) 198 Taxman 202 (Mag.) / 237 CTR 50 / (2010) 48 DTR 95 (P&H)(High Court)*

**S. 56(2)(v) : Income from other sources – Gifts received by minor sons – Maternal uncle [S. 64]**

Section 56(2)(v), read with Explanation, speaks of relationship between the donor and donee and not deemed assessee. Maternal uncle of the assessee who made gifts of ` 5 Lakhs to two minor sons of the assessee is not a "relative" of the donees with in the meaning of Explanation to section 56(2)(v) and therefore, the impugned sum is chargeable to tax in the hands of the assessee under the provisions of section 56 read with section 64. (A. Y. 2005-06).

*ACIT v. Lucky Pamnani (2011) 49 DTR 501 / 135 TTJ 607 / 129 ITD 489 (Mum.)(Trib.)*

**S. 56(2)(v) : Income from other sources – Receipt by legal heir – Abstaining from contesting the will of deceased**

Assessee, a legal heir of deceased having received a compromise amount under a settlement with the legatee for agreeing to the Court granting probate in respect of the last will of the deceased and withdrawing his caveat against grant of probate, the abstinence of the assessee from contesting the will constituted the consideration for payment and therefore the provisions of section 56(2)(v) are not attracted and the amount received by the assessee cannot be treated as income under section 56(2)(v). (A. Y. 2006-07).

*Purvez A. Poonawala v. ITO (2011) 138 TTJ 673 / 55 DTR 297 / 47 SOT 380 (Mum.)(Trib.)*

**S. 56(2)(v) : Income from other sources – Gift received from HUF – Exempt – “Relative”**

Where assessee receives gift from HUF it was held that though the definition of the term “relative” does not specifically include a Hindu Undivided Family, a ‘HUF’ constitutes all persons lineally descended from a common ancestor and includes their mothers, wives or widows and unmarried daughters. As all these persons fall in the definition of “relative”, an HUF is ‘a group of relatives’. As a gift from a “relative” is exempt, a gift from a ‘group of relatives’ is also exempt since the singular will include the plural. (A. Y. 2005-06).

*Vineetkumar Raghavjibhai Bhalodia v. ITO (2011) 46 SOT 97 / 58 DTR 412 / 140 TTJ 58 / 12 ITR 616 (Rajkot)(Trib.)*

**S. 56(2)(v) : Income from other sources – Gift – Agricultural land – Non resident**

Value of agricultural land from a non-relative can not be added to total income of donee under section 56(2)(v) of the Act, since agricultural land cannot be considered as “any sum of money”.

*ITO v. Kumar Bader. Tax World Vol. XLII 207 October 2009 (Trib.)*

**S. 56(2)(viiia) : Income from other sources – Receipt of shares without consideration – Shares of quoted company [S. 92 to 92F]**

Applicant is to receive contribution of shares of GIL without consideration. GIL is a company in which public are substantially interested and its shares are listed on BSE, therefore no income is liable to tax within the meaning of section 56(2)(viiia). Consequently, provisions of sections 92 to 92F are not applicable.

*Goodyear Tire & Rubber Co. In Re. (2011) 240 CTR 209 / 54 DTR 281 / 334 ITR 69 / 199 Taxman 121 (AAR)*

**Section 57 : Deductions**

**S. 57 : Income from other sources – Deductions – Expenditure – Interest – Direct nexus – Pre-operative period**

Interest expenditure incurred having a direct nexus with interest income earned, is liable to be deduction from income earned, for computing income from other sources. Disallowing interest paid on ground that assessee has not commenced its business during the year is not justifiable.

*Pench Power Ltd. v. ACIT (2006) 156 Taxman 84 (Mag.)(Delhi)(Trib.)*

**S. 57 : Income from other sources – Deductions – Expenditure – Interest income**

Interest expenditure can be deducted from interest earned only if assessee can prove and establish that borrowed money was utilized for giving advance on which interest was received. (A.Ys. 1989-90 to 1993-94)

*Jt. CIT v. Sumatinath Enterprises (2005) 1 SOT 312 (Mum.)(Trib.)*

**S. 57 : Income from other sources – Deductions – Expenditure – Interest income – Temporary surplus – Pre-commencement**

Funds raised from various financial institutions on substantial interest were partly utilized for project and surplus funds were invested by the assessee in term deposits with a view to earn interest, proportionate pre-operative expenses including interest on borrowed capital incurred for earning such interest income were to be allowed as deduction from such interest income. (A.Ys. 1993-94 to 1995-96)

*J.F. Laboratories Ltd. v ITO (2005) 96 ITD 448 / 98 TTJ 389 / 2 SOT 824 (Mum.)(Trib.)*

**S. 57 : Income from other sources – Deductions – Expenditure – Interest on borrowed money**

Assessee finance company borrowed certain amount and invested the same in 'P' Ltd, as share application money for equity participation allegedly under joint venture which did not materialize and amount was refunded to assessee without any interest. Since assessee did not earn any income from advancing borrowed fund to 'P' Ltd., interest on borrowed funds was not allowable under section 57(iii). (A.Y. 1996-97)

*Dignity Trading Co v. Jt. CIT (2005) 96 ITD 296 / 97 TTJ 745 (Mum.)(Trib.)*

**S. 57 : Income from other sources – Deductions – Expenditure – Commission**

Commission paid by assessee to property agent in connection with letting out its property, could not be allowed as deduction under the head 'income from other sources'. (A.Y. 198-99)

*Piccadily Holiday Resorts Ltd. v. Dy. CIT (2005) 94 ITD 267 / 97 TTJ 362 (Delhi)(Trib.)*

**S. 57 : Income from other sources – Deductions – Expenditure – MLA**

Income of MLA consisting of salary and constituency, medical and telephone allowances was assessable as income from other sources and his claim for deduction



of expenses towards, travelling, conveyance and telephone, which were necessary, for discharging, his duties while holding office as member of legislative Assembly, Madhya Pradesh were to be allowed to the extent of amount specified in certificate issued by Dy. Secretary, M.P. Legislative Assembly.

*Jaswant Singh v. ITO (2005) 96 TTJ 660 (Indore)(Trib.)*

### **S. 57(iii) : Income from other sources – Deductions – Expenditure – Interest – Lifting veil – “Substance”**

Under section 57(iii), expenditure laid out or expended wholly or exclusively for the purpose of making or earning income is deductible. It is the purpose of the expenditure that is relevant but the purpose need not be fulfilled. *CIT v. Rajendra Prasad Moody (1978) 115 ITR 519 (SC)* followed. The assessee must act bona fide & show nexus between the advancing of funds and his business interest. The dominant purpose for making the investment must be to earn income & to ascertain the purpose the Assessing Officer may lift the veil (*CIT v. Swapna Roy (2011) 331 ITR 367 (All) & Punjab Stainless Steel Industries v. CIT (2010) 324 ITR 396 (Delhi)* followed);

It was also held that legal effect of a transaction cannot be displaced by probing into the “substance of the transaction”. Thus, the exercise of jurisdiction cannot be stretched to hold a roving enquiry or deep probe. (A. Y. 1986-87).

*CIT v. Rockman Cycle Industries Pvt. Ltd. (2011) 331 ITR 401 / 51 DTR 169 / 238 CTR 363 / 203 Taxman 302 (FB)(P&H)(High Court)*

### **S. 57(iii) : Income from other sources – Deductions – Expenditure – Fixed deposit in banks**

Where the assessee borrowed funds from bank and invested the same in Fixed Deposits ('F.D') and earned more interest on the F.D. than the interest payable on the borrowed funds taking advantage of Export Import policy of the Government interest paid on the borrowing was held to be allowable as deduction under section 57(iii) of the Act from the interest earned on F.D. as there was direct nexus between the interest earned and interest paid by the assessee. (A.Ys. 2005-06 & 2006-07).

*CIT v. Taj International Jewellers (2011) 50 DTR 348 / 335 ITR 144 (Delhi)(High Court)*

### **S. 57(iii) : Income from other sources – Deductions – Expenditure – Packing credit – Interest**

The amount was transferred by the bank at the instance of the assessee from the cash / packing credit account of the assessee into fixed deposit account. The interest income earned thereon was offered by the assessee as Income from Other Sources after deducting an estimated amount of interest expenses in terms of section 57(iii) of the Act from the interest earned by the assessee on such fixed deposits. On these facts the Hon'ble High Court held that as the term deposits made by the assessee were not from borrowed funds but from the export proceeds credited in the cash / packing credit

account as such the interest expenses cannot be allowed as deduction from the interest income earned by the assessee on such term deposits. (A.Y. 2001-02)

*CIT v. Dhanalakshmi Weaving Works (2010) 36 DTR 461 / 241 CTR 285 / 331 ITR 188 (Ker.)(High Court)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Interest**

Assessee having borrowed money from group company and invested the same in a sister concern managed by her close associates and relative which is running in loss, the expenditure towards interest on loan cannot be said to have been laid out wholly and exclusively for the purpose of making or earning income but was a colourable device, to utilize the funds of one company in the other sister concern and therefore, the interest on loan is not allowable deduction under section 57(iii). (A.Y. 1996-97)

*CIT v. Swapna Roy (Smt.) (2010) 40 DTR 193 / 192 Taxman 105 / 233 CTR 10 / 331 ITR 367 (All.)(High Court)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Interest – Pre-operative period**

Interest earned on short term deposit of surplus borrowed funds where assessee had not yet commenced business was assessable as income from other sources and interest paid on moneys so borrowed for construction of project being a capital expenditure, was not allowable as deduction from interest earned on short term deposits. (A.Ys. 1990-91, 1991-92)

*Consolidated Fibres & Chemicals Ltd. v. CIT (2005) 273 ITR 353 / 146 Taxman 14 / 195 CTR 605 (Cal.)(High Court)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Pre-operative period**

Prior to commencement of manufacturing activity assessee- mills earned interest income, since expenditure incurred on Maintenance of office and for planning of construction did not fall under any of sub-clauses of section 57, such expenditure could not be allowed as deduction from interest income.

*Chief CIT v. Kisan Sahkari Chini Mills Ltd. (2005) 277 ITR 259 / 145 Taxman 363 (All.)(High Court)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Interest on money borrowed – Investment in shares [S. 56]**

Interest on money borrowed by assessee to invest in sick company of which he was Executive Chairman was allowable even though he had not earned dividend on company's shares. (A.Y. 1996-97)

*CIT v. M. Ethurajan (2004) 192 CTR 378 / 273 ITR 95 / 142 Taxman 708 (Mad.)(High Court)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Investment in shares**

Interest paid by assessee on amount borrowed for investment in shares of a company was allowable as deduction under section 57(iii). (A.Y. 1996-97)

*ITO v. Manohar Das Agarwal (2006) 102 TTJ 636 (Jp.)(Trib.)*

**S. 57(iii) : Income from other sources – Deductions – Expenditure – Acquisition of shares – Interest on borrowing**

Interest on money borrowed and utilized for acquisition of shares of other companies is deductible under section 57(iii).

*ATE Enterprises Ltd. v. Jt. CIT (2006) 103 TTJ 810 / 102 ITD 110 (Mum.)(Trib.)*

**CHAPTER V**

**Income of Other persons, included in assessee's total income**

**Section 60 : Transfer of income where there is no transfer of assets**

**S. 60 : Transfer of income where there is no transfer of assets – Diversion by overriding title – Interest in Partnership Firm – Assignment [Indian Partnership Act, 1932, S. 29(1)]**

In view of section 29(1) of the Partnership Act, the trust as an assignee, became entitled to receive the assigned share of the profits from the firm, it received the share of profits not as a sub-partner, because no sub-partnership came into existence, but as an assignee of the share of income of the assignor-partner. There was no diversion of income by overriding title. The share of the income of the assessee (partner) assigned to the trust had to be included in the income of the assessee. (A.Y. 1974-95)

*CIT v. Sunil J. Kinariwala (2003) 259 ITR 10 / 172 Taxation 389 / 179 CTR 15 / 126 Taxman 161 (SC) / 1 SCC 660*

**S. 60 : Transfer of income where there is no transfer of assets – Income – Absolute transfer**

Section is has its applicability only to the case where the income accrues to the transferee but the income earning asset or source of income remains with the transferor. There is no provision to require an absolute transfer, either in section 60 or section 63 which defines word "transfer". (A.Ys. 1988-89, 1989-90)

*CIT v. A. Radhakrishnan (2004) 271 ITR 109 / 192 CTR 253 / 144 Taxman 315 (Mad.)(High Court)*

**S. 60 : Transfer of income where there is no transfer of assets – Interest free loan – Interest earned**

Assessee had given interest free loan to relatives and relatives had earned interest on such amounts and declared same as their income, notional addition to assessee's income on account of income earned by relatives on amounts given to them, could not be made by applying the section 60. (A.Y. 1997-98)

*ITO v. Nalinbhai M. Shah (2005) 93 TTJ 107 / 149 Taxman 28 (Mag.)(Ahd.)(Trib.)*

## **Section 64 : Income of individual to include income of spouse, minor child, etc.**

### **S. 64 : Clubbing of income – Minor child – Will**

Where certain ornaments and movable properties were bequeathed to minor's by virtue of a will. The Assessing Officer treated the case, as creation of trust by way of will and clubbed the income under Explanation 2A of section 64(i)(iii) of the Act. On appeal the High Court held that no trust was ever created by the testator under the will and as such, such income cannot be clubbed under section 64 of the Act.

*CIT v. Abdul Gafar A. Mistri (2007) 196 Taxation 255 (Guj.)(High Court)*

### **S. 64 : Clubbing of income – Spouse – Share income as partner – Karta of HUF**

Where the wife derived the share of income as a partner in the firm where her husband was also a partner as a Karta of HUF provisions of section 64(1)(i) are not attracted.

*CIT v. H. K. Anand (2006) 190 Taxation 651 (All.)(High Court)*

### **S. 64 : Clubbing of income – Minor child – Accrual of income**

The issue before the Full Bench of the Hon'ble High Court was whether income of the minor, which will be distributed to the minor, on his gaining majority can be clubbed in the hands of the parents on accrual of the income. The Hon'ble Court held that to attract clause (iii) of section 64(1), read with Explanation 2A to section 64(1), unless it is found that the minor for whose benefit the income was available, is shown to have an absolute right of disposal in presents over the same, it cannot be included in the income of the individual in computing his total income. In other words, if such income is to reach the hands of the minor / beneficiary only on attaining majority, then it cannot be included in the income of the individual in computing his total income. (A.Ys. 1983-84, 1985-86)

*CIT v. K. J. Ramaswamy (2006) 157 Taxman 2 / 205 CTR 352 / 286 ITR 77 (FB)(Mad.)(High Court)*

### **S. 64 : Clubbing of income – Income to include income of other person – Daughter in law**

Daughter in law of existing partners were included in firm and they invested like amounts out of cross gifts made by existing partners to them, gifts made by existing partners being part of same transactions, section 64(1) (vi) was clearly applicable. (A.Y. 1982-83)

*Om Dutt v. CIT (2005) 277 ITR 63 / 144 Taxman 824 / 194 CTR 239 (P&H)(High Court)*

### **S. 64 : Clubbing of income – Spouse – Salary – Technical – Professional qualification**

Where it was held that spouse possessed technical/professional qualification and hence, salary paid to her was not includible in assessee's hands. (A.Ys. 1982-83, 1983-84)

*CIT v. Major B.K. Kaul (2004) 265 ITR 345 / 136 Taxman 411 (All.)(High Court)*

#### **S. 64 : Clubbing of income – Transfer of assets to minor Child – Position prior to 1-4-1993**

Trust were created by the brother-in-law of the assessee and the assessee and the minor daughters of the assessee were beneficiaries under the Trusts. Under the trust deeds, the income from the trust fund was to be accumulated and held by the trustees and was to be handed over to the two daughters of the assessee on their attaining the age of 18. Under the trust deeds the trust funds were invested in the partnership firms. The income of the trusts from the firms was assessable in the assessee's hands under Explanation 2A to section 64 (1) (iii). The court held that the income of the trusts from the firms was rightly assessed in the assessee's hands. (A.Y. 1980-81)

*Manik Chandra v. ACIT (2004) 265 ITR 212 / 135 Taxman 517 / 186 CTR 750 (Uttaranchal)(High Court)*

#### **S. 64 : Clubbing of income – Admission of minor to firm's benefit – HUF**

Income received by minor by way of admission to benefits of partnership firm which was to be treated as income of HUF and not of individual minor, could not be included in income of assessee (mother) under section 64(1)(iii).

*CIT v. T. Suryamani Kothavalasa (Smt.) (2003) 130 Taxman 538 / 263 ITR 271 / 184 CTR 167 (AP)(High Court)*

#### **S. 64 : Clubbing of income – Non-resident – Resident**

A plain reading of provision of section 64(1)(iii) would make it clear that it does not make any difference between a resident and a non-resident.

*CIT v. B. Narasimha Rao (2003) 263 ITR 62 / 132 Taxman 821 / 185 CTR 219 (AP)(High Court)*

#### **S. 64 : Clubbing of income – Minor child – Partner as karta of HUF**

Income of wife and minor children of assessee from firm in which the assessee is partner as karta of family, cannot be included in assessee's income.

*Paras Kumar Jain v. CIT (2003) 126 Taxman 179 (All.)(High Court)*

#### **S. 64 : Clubbing of income – Assets transferred to minor child – Rental income – Muslim**

Where assessee, a Muslim, makes a transfer of property in favour of his minor sons and property is fetching rental income, section 64(1)(v) shall apply. Contention of assessee that it was for parents to educate their children and once transfer of property was made by parents in favour of their children, any income arising out of

consequences of transfer of that property, should not be taxed in the hands of assessee transferor, could not be accepted. (A.Ys. 1983-84, 1984-85, 1985-86)  
*Nizamuddin v. CIT (2003) 130 Taxman 781 / 264 ITR 107 / 164 CTR 70 (Raj.)(High Court)*

**S. 64 : Clubbing of income – Spouse – Allowance from firm – Total income [S. 28(v)]**

Assessee and his wife were partners in a firm. Assessee's wife getting allowance from firm in terms of partnership deed and shows the income in her return as business or profession. Assessment of assessee's wife completed assessing the income under section 28(v). Income cannot be included in the hands of assessee. (A.Y. 2004-05)  
*Dy. CIT v. A. V. Jose (2010) 1 ITR 88 (Cochin)(Trib.)*

**S. 64 : Clubbing of income – Minor child – Net income – Deductions**

Even if the income of the minor is clubbed with the income of other individual, all deductions are to be allowed while computing income of the minor/ spouse only the net taxable income is to be clubbed under section 64. (A.Y. 1995-96)  
*Jt. CIT v. Govind Rohira alias Srichand Rohra (2005) 95 ITD 77 / 96 TTJ 346 (Mum.)(Trib.)*

**S. 64 : Clubbing of income – Minor child – Method of accounting – Accrual**

Though under section 64(1A), the income of minor child is to be included in the parents, the minor child is basically to be treated as an assessee. He can follow his own method of accounting, unless and until income is said to be received by minor child on basis of method of accounting regularly employed by him, section 64 can not be invoked to club income which otherwise would have accrued to minor child. (A.Y. 1997-98)  
*Bajaj Ashok Chunnilal v. Dy. CIT (2005) 92 ITD 353 / 92 TTJ 914 (Bang.)(Trib.)*

**S. 64 : Clubbing of income – Minor child – Agricultural income**

Agricultural income of minor can not be clubbed with income of assessee. For the purpose of section 2(2) of the Finance Act, 1997, the agricultural income of minor children of assessee can not be included in the income of the assessee for rate purposes. (A.Y. 1997-98)  
*Babita P. Kanungo v. Dy. CIT (2005) 96 ITD 91 / 96 TTJ 573 (Mum.)(Trib.)*

**S. 64 : Clubbing of income – Minor child – Both parents not alive – Grand parents**

Minor's income in case where both parents are not alive, can not be assessed in hands of grand parent or any other relatives. Further, there is no provision to assess minor's income in hands of minor if parents do not survive then that income can not be clubbed in hands of any of his grand parents or any body who maintains minor child. (A.Ys. 1995-96 to 1999-2000)  
*R.P. Sarathy v. Jt. CIT (2005) 97 TTJ 801 (Chennai)(Trib.)*



### **S. 64 : Clubbing of income – Spouse – Maintenance of minor**

In absence of any material on record, to show that after the death of her husband, assessee was maintaining minors, the Income of minors can not be clubbed in her hands.

*Laxmi Agarwal (Smt) v. ACIT (2003) 133 Taxman 114 (Mag.)(Luck.)(Trib.)*

### **S. 64 : Clubbing of income – Spouse – Non-resident – Transfer of assets by husband – Capital gains**

Where applicant, a non resident, gifted certain shares of Indian Companies to his wife and out of those shares, wife sold some of the shares and earned capital gain, section 64(1)(iv) was attracted.

*Govindram T. Jarani, in re (2004) 138 Taxman 73 / 189 CTR 481 (AAR)*

## **CHAPTER VI**

### **Aggregation of income and set off or carry forward of loss Aggregation of income**

### **Section 67A : Method of computing a member's share in income of association of persons or body of individuals**

### **S. 67A : Association persons – Body of individuals – Member's share – Aggregation of income – Method of computing a member's share in income**

Assessment or determination of tax liability arising out of joint venture of AOP has to be made only with reference statutory requirements of section 67A/ 86/ 167B

*CIT v. D.H. Secheron Electrodes Ltd. (2005) 194 Taxman 211 (MP)(High Court)*

### **S. 67A : Aggregation of income – Assessment of AOP – Member**

Section 67A regulates the assessment of member of AOP and does not affect assessment of AOP.

Also the share of a member in income or loss shall be apportioned under various heads, in same manner in which the income or loss of association has been determined under each head of income.

*Birla Tyres v. Jt. CIT (2003) 80 TTJ 915 / 88 ITD 1 (TM)(Kol.)(Trib.)*

### **Section 68 : Cash credits**

### **S. 68 : Cash credits – Foreign gifts – Addition not**

Assessee had filed confirmation of the person from whom the gift was given. Genuineness of the transaction of gift and the capacity of the donor stood established. Addition cannot be made under section 68.

*CIT v. Asha Hampannavar (2009) 319 ITR (St.) 5 (SC)*

*Editorial:- ITA No. 1108 of 2008 dt. 26-9-2008 (Bombay High Court) ITA No. 5319/Mum/2007 Bench 'A' dt. 30-6-2008 Asst. Year 2003-04.*

### **S. 68 : Cash credits – Share application money – Action in hands of shareholders**

If the assessee has given the name of the shareholders from whom they have received the share application money, then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as the undisclosed income of the company.

*CIT v. Lovely Exports Pvt. Ltd. (2008) 216 CTR 195 / 6 DTR 308 (SC)*

### **S. 68 : Cash credits – Foreign gifts – Unacceptable evidence**

Assessing Officer, CIT(A) and Tribunal after consideration of material on record found that the explanation offered by the assessee was unacceptable and held that NRI Gifts were not real, no substantial question of law arose and the High court was not justified in disturbing the said findings of fact for deleting the addition under section 68. (A.Ys. 1995-96, 1996-97)

*CIT v. P. Mohanakala (2007) 291 ITR 278 / 210 CTR 20 / 161 Taxman 169 / 201 Taxation 349 (SC) / 6 SCC 21*

### **S. 68 : Cash credits – Share application money – Explanation – ‘Nature of the source’**

In order to provide satisfactory explanation as to the “nature and source” of a sum found credited in his books, the initial burden is on the assessee. The assessee is required to prove (a) Identity of the shareholder; (b) Genuineness of transaction; and (c) credit worthiness of shareholders; (A. Ys. 2003-04 & 2004-05)

*CIT v. Oasis Hospitalitys Pvt. Ltd. (2011) 198 Taxman 402 / 238 CTR 402 / 333 ITR 119 / 51 DTR 74 (Delhi)(High Court)*

### **S. 68 : Cash credits – Work in progress – Partners capital account – Burden of proof**

WIP in a construction project transferred by a contractor firm to the Assessee firm and credited to the Capital Accounts of partner. Such credit could not be treated as Cash Credit since the transactions are genuine and identity of parties are established. (A. Y. 2005-06)

*CIT v. S. K. Banerjee J. V. Transport Plaza (2011) 241 CTR 152 / 335 ITR 563 / 55 DTR 1 (Bom.)(High Court)*

### **S. 68 : Cash credits – Share application money – Degree of proof**

Where the assessee had provided to the assessing authority the name, age, address, date of filing the share application and number of shares applied by each shareholder, addition under section 68 of the Act cannot be made. (A.Y. 2000-01 & 2002-03)

*CIT v. STL Extrusion (P) Ltd. (2011) 333 ITR 269 / 53 DTR 97 (MP)(High Court)*

### **S. 68 : Cash credits – Gifts – Relation – Occasion – Unexplained investments [S. 69]**

Where the donors who had made the gifts to the assessee having appeared before the Assessing Officer, submitted affidavit on oath confirming the gifts made by them, citing their old relations with the assessee and proved their capacity to make gifts, said gifts could not be treated as non genuine simply because there was no occasion for making the gifts or there was no blood relation between the donors and the donee or that the gifts were made by donors by taking loans. (A. Y. 2003-04).

*CIT v. Mayawati (Ms.) (2011) 338 ITR 563 / 59 DTR 177 / 201 Taxman 1 / 243 CTR 9 (Delhi)(High Court)*

*Editorial: - Delhi Tribunal in Mayawati (2010) 48 DTR 233 (Delhi)(Trib.) was affirmed.*

### **S. 68 : Cash credits – Share application money – Identity of shareholders**

Assessee having established identity of shareholders, addition under section 68 could not be made on the ground that assessee failed to explain the source of credit. Department was free to proceed against shareholders in accordance with law. (A. Y. 1992-93).

*Hindustan Inks & Resins Ltd. v. Dy. CIT (2011) 60 DTR 18 (Guj.)(High Court)*

### **S. 68 : Cash credits – Burden of proof – Creditor's I. T. Return**

If the creditor discloses his PAN and claims to be an assessee, the Assessing Officer cannot himself examine the return and P&L A/c. of the creditor and brand the same as unworthy of credence. Instead, he should enquire from the creditor's Assessing Officer as to the genuineness of the transaction and whether such transaction has been accepted by the creditor's Assessing Officer. So long it is not established that the return submitted by the creditor has been rejected by the creditor's Assessing Officer, the assessee's Assessing Officer is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.

*CIT v. Dataware Pvt. Ltd. ITA No. 263 of 2011 dated 2-9-2011 (Cal.)(High Court)*

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### **S. 68 : Cash credits – Burden of proof – Loan**

When an unexplained credit is found in books of account of an assessee initial burden is placed on assessee and once that onus is discharged, it is for revenue to prove that credit found in with respect of deposits found in the books of account of assessee is undisclosed income of assessee. Assessee returned the money, tax was deducted at source, assessee not required to prove the source of source. (A. Y. 1998-99).

*CIT v. Kinetic Capital Finance Ltd. (2011) 202 Taxman 548 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Identity and credit worthiness**

As the assessee failed to prove the identity and credit worthiness of person who made share application, the addition was justified as cash Credits. (A. Y. 2005-06).

*Power Drugs Ltd. v. CIT (2011) 62 DTR 276 / 245 CTR 623 (P&H)(High Court)*

**S. 68 : Cash credits – Burden of proof – Loan confirmation – PANs – Report of inspector –Natural justice**

The Court held that Tribunal was not justified in confirming the addition under section 68 after taking in to consideration of Inspector's report, without giving adequate opportunity to the assessee to explain the information received by the Assessing Officer from the inspector. Assessee has produced the loan confirmation disclosing the Permanent Account numbers. (A.Y. 1997-98).

*S. K. Bothra & Sons (HUF) v. ITO (2011) 62 DTR 234 / 203 Taxman 436 (Cal.)(High Court)*

**S. 68 : Cash credits – Gift – Non-resident – Partners capital account**

There is no rigid rule that whenever credit entry is in the capital account of a partner, addition could not be made in the hands of firm even when credit entry is, on the face of it, bogus or a device to evade tax. Held that the Assessing Officer was justified in making addition on account of unexplained NRI gifts allegedly received by the partners and brought in to the books of account of the firm through capital accounts of partners. (A.Y. 1993-94)

*CIT v. Deepak Iron & Steel Rolling Mills (2011) 63 DTR 196 / 336 ITR 307 / 245 CTR 340 (P&H)(High Court)*

**S. 68 : Cash credits – Deposits – Burden of proof – Public notice**

Assessee company raised deposits by public notice and brought on record every possible information regarding the depositors which was included in the application forms submitted by them, the Court held that it has discharged the initial onus that lay on it under section 68, hence addition could not be made merely for the reason that no confirmation letters were filed in respect of some depositors. (A. Y. 1997-98)

*CIT v. Samtel Color Limited (2011) 64 DTR 46 (Delhi)(High Court)*

**S. 68 : Cash credits – Gift from father in law – Cash withdrawals not proved**

Assessee received gift of ` 8 lakhs from father in law, however the father in law failed to prove the source of gifts on the basis of confirmation filed, therefore addition was justified. (A. Y. 2005-06).

*Mukesh Shaw v. ITO (2011) 64 DTR 353 / (2012) 246 CTR 82 (Jharkhand)(High Court)*

**S. 68 : Cash credits – Gifts – Blood relationship**

There is no legal basis to assume that to recognize the gift to be genuine, there should be any blood relationship, or any close relation-ship, between the donor and the donee. When assessee produced the affidavit, gift deed in the absence of anything to show that the gift was by way of money laundering, addition under section 68 as cash credit not justified. (A.Y. 1998-99)

*CIT v. Padama Sungh Chauhan (2010) 214 Taxation 792 / (2009) 319 ITR 433 (Raj.)(High Court)*

### **S. 68 : Cash credits – Share application money – Income from undisclosed sources**

Merely because some of the persons did not respond to the notice issued by the Assessing Officer under section 133(6), of the Act, it could not be taken that the transaction was not genuine. The amount could not be added as unexplained income in the hands of the assessee. (A.Y. 1996-97)

*CIT v. GP International Ltd. (2010) 325 ITR 25 / 186 Taxman 229 / 33 DTR 163 / 229 CTR 86 (P&H)(High Court)*

### **S. 68 : Cash credits – Share application money – Identity**

Genuineness of receipt of application money by assessee company had been duly established by the assessee apart from establishing the identity of the share applicants and therefore, the addition was not called for. (A.Y. 2004-05)

*CIT v. Winstral Petrochemicals (P) Ltd. (2010) 41 DTR 139 / 233 CTR 392 / 330 ITR 603 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Failure to produce creditor**

Substantial evidence was produced by assessee to prove creditworthiness of creditor and genuineness of share application. Mere failure to produce the creditor not material, hence the money can not be regarded as undisclosed income. (A.Y. 2001-02)

*CIT v. Orbital Communication (P) Ltd. (2010) 327 ITR 560 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Capital gains [S. 45]**

Assessee having established the genuineness of purchase and sale of shares by producing documentary evidence and declaring the purchase and sale price of shares in conformity with market rates prevailing on the respective dates, the finding of the Tribunal that transactions were genuine is a finding of fact based on documentary evidence on record and therefore no substantial question of law arises from the order of the Tribunal deleting the addition under section 68. Statement of broker that the transaction was bogus was not relevant, transaction being off market the assessee produced relevant documents. (A.Y. 2001-02)

*CIT v. Jamnadevi Agrawal (Smt.) (2010) 328 ITR 656 / 46 DTR 271 / 236 CTR 32 (Bom.)(High Court)*

### **S. 68 : Cash credits – Loans – Onus discharged**

Where assessee proves the identity of the creditors by providing their PAN nos. and shows that the transaction is through banking channels, then the onus to prove the contrary would shift to the Revenue and adverse inference against the assessee cannot be drawn just because the creditors could not be found at the address. (A.Y. 2001-02)

*CIT v. Dwarkadish Investment P. Ltd. (2010) 194 Taxman 43 / 45 DTR 281 / 239 CTR 478 / 330 ITR 298 (Delhi)(High Court)*

### **S. 68 : Cash credits – Sale of shares – Year of taxability**

Receipts on account of sale of shares made in earlier year treated as unexplained cash credit in the relevant year. Assessee discharging initial onus by proving the identity and creditworthiness of the creditors, held, no addition under section 68 is called for. (A.Y. 2000-01)

*CIT v. Kishorilal Construction Ltd. (2010) 236 CTR 374 / 191 Taxman 194 / 45 DTR 230 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Burden discharged**

- (i) Existence of applicants accepted. Assessing Officer has not shown that the Applicants did not have means to make the investments and that such investments actually had come from the coffers of the Assessee Company. Addition is rightly deleted.
- (ii) Where the identity of the shareholders were established, all the shareholders were income tax assesseees and disclosed the transaction in their accounts which were reflected in their income – tax return also, simply because the monies were received as share application money by a private limited company in cash, the same cannot be treated as cash credit under section 68 of the Act.

*Bhav Shakti Steel Mines (P) Ltd. v. CIT (2009) 18 DTR 194 / 320 ITR 619 / 179 Taxman 25 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Degree of proof**

Share application money was received by the assessee through account payee cheque from a Company which is regularly assessed to tax and having a substantial amount of paid up capital. Further, the subscribing Company was also a member of the National Stock Exchange (NSE) and involved in purchase and sale of shares of other Companies. The onus in respect of veracity and genuineness of the transaction was held to be established and additions under section 68 of the Act was not sustainable. (A.Y. 1996-97)

*CIT v. Gangour Investments Ltd. (2009) 18 DTR 242 / 335 ITR 359 / 179 Taxman 1 (Delhi)(High Court)*

### **S. 68 : Cash credits – Gifts – Assessee's burden**

Where claim of gift is made by the assessee, onus lies on him not only to establish identity of the donor but also his capacity to make a gift and that it has actually been received as a gift from donor. It is not sufficient to simply identify the donor and show the movement of gift amount through banking channels. (A.Y. 1999-2000)

*Yash Pal Goel v. CIT (2009) 181 Taxman 175 / 224 CTR 315 / 310 ITR 75 / 22 DTR 209 (P&H)(High Court)*

### **S. 68 : Cash credits – Share application money – Degree of proof**

Where the assessee had furnished complete details of shareholders name, addresses, Permanent Account Number (P.A.N.), bank details and confirmations of subscribers to



its shares before the Assessing Officer, action of treating the share capital as unexplained cash credit under section 68 cannot be sustained.

*CIT v. TDI Marketing (P) Ltd. (2009) 26 DTR 358 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Loans – Existence of creditors**

Once the assessee proves the existence of his creditors and such person owns up the credits which are found in the books of the assessee, the onus cast upon the assessee stands discharged and the assessee cannot be further asked to prove the source from which the creditors could have acquired the money deposited with the assessee. (A.Y. 1993-94)

*Aravali Trading Co. v. ITO (2008) 8 DTR 199 / 220 CTR 622 / 187 Taxman 338 (Raj.)(High Court)*

#### **S. 68 : Cash credits – Loans – Account payee cheque**

Where the assessee had received loans through account payee cheques and the creditors had confirmed the loans by making statement on oath, the High Court held that in such situation the assessee is not required to establish the capacity of the lenders to advance the money as that would amount to calling upon the assessee to establish source of the source.

*Labh Chand Bohra v. ITO (2008) 8 DTR 44 / 219 CTR 571 / 189 Taxman 141 (Raj.)(High Court)*

#### **S. 68 : Cash credits – Natural justice – Statement of third party**

Where additions are made by the Assessing Officer under section 68 of the Act by relying solely reliance on the statement of a third person, and the said statement was not given to the assessee nor was the assessee afforded an opportunity to cross examine the said person, on these facts, the High Court held that the addition made by the Assessing Officer is liable to be deleted on the ground that the additions were made in gross violation of principles of natural justice. (A.Y. 1985-86)

*Heirs & L.Rs of Late Laxmanbhai S. Patel v. CIT (2008) 12 DTR 108 / 222 CTR 138 / 327 ITR 290 / 174 Taxman 206 (Guj.)(High Court)*

#### **S. 68 : Cash credits – Books of account – Not maintained**

In the present case the assessee firm had not maintained books of account. However, the firm had prepared a Profit and Loss Account. The Assessing Officer during the assessment proceeding added the amount invested by the partners as unexplained cash credit under section 68 of the Act. On appeal the High Court held that as there were no books of account maintained by the assessee there could be no credit in the books of the assessee so as to attract the provisions of section 68 of the Act in the assessee's case.

*CIT v. Taj Borewells (2008) 202 Taxation 413 (Mad.)(High Court)*

#### **S. 68 : Cash credits – Consideration on sale of shares – Assessing Officer to establish evasion**

Assessing Officer held that long-term capital gain declared by assessee was false and transaction was not genuine and considered same as unexplained credit. Assessee had taken shares from market, shares were listed and transaction took place through a registered broker of stock exchange. Therefore there was no material before Assessing Officer which could have led to a conclusion that transaction was simpliciter a device to camouflage activities, to defraud revenue.

*CIT v. Anupam Kapoor (2008) 166 Taxman 178 / 212 ITR 491 / 299 ITR 179 (P&H)(High Court)*

#### **S. 68 : Cash credits – Gifts – Relative – Uncle**

Genuineness of gift received from maternal uncle through cheque from NRE A/c – Held, it is not non-genuine gift when NRE A/c was found to be genuine and identity of donor was established. No addition under section 68 is called for. (A.Y. 1989-90)

*CIT v. Kulwant Industries (2008) 214 CTR 223 / 311 ITR 377 / 164 Taxman 512 (P&H)(High Court)*

#### **S. 68 : Cash credits – Share application money – Addition not possible**

No addition under section 68 can be made in respect of investment made by different persons in share capital of assessee-company, limited by shares, whether public or private. (A.Y. 1997-98)

*Jaya Securities Ltd. v. CIT (2008) 166 Taxman 7 (All.)(High Court)*

#### **S. 68 : Cash credits – Gift – NRI**

Gift Deeds and affidavits of NRI donors produced. In the absence of anything to justify that the alleged transactions were by way of money laundering, no addition could be made in the hands of donee for absence of blood relationship between donor and the donee.

*CIT v. Padam Singh Chauhan (2008) 215 CTR 303 / 315 ITR 433 / 3 DTR 190 (Raj.)(High Court)*

#### **S. 68 : Cash credits – Credit balance of earlier year – No fresh loan**

Where the credit balance reflected in the accounts of the assessee pertained to earlier year and no fresh loans were taken during the year under consideration, provisions of section 68 were not attracted in the assessee's case.

*CIT v. Usha Stud Agricultural Farms (2008) 5 DTR 335 / 301 ITR 384 / 183 Taxman 277 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Sale transaction – Jewellery**

In the absence of any material brought on record to suggest that transaction of sale as sham, sum received on account of sale of jewellery could not be brought to tax under section 68. (A.Y. 1998-99)

*CIT v. A. K. Daga & Sons (2007) 163 Taxman 682 / 296 ITR 623 (Mad.)(High Court)*

#### **S. 68 : Cash credits – Deposits – Partners capital – Partner's hands**

Once partner accepts that he/she has made deposits into the capital a/c. of firm no addition can be made in the hands of the firm by invoking the provision of Section 68. (A.Y. 1987-88)

*CIT v. Rameshwar Dass Suresh Pal Chuka (2007) 163 Taxman 270 / 208 CTR 459 (P&H)(High Court)*

#### **S. 68 : Cash credits – Loan – Agriculturist – Source at loan**

Where the Assessing Officer during the course of assessment proceedings found that the person who had given loan to the assessee was small time agriculturist and the Assessing Officer also found that one of the partners of the assessee firm had given the loan creditor money which he deposited in his bank and thereafter, loan was given by him to the firm. Under these circumstances the High Court held that cash credit was non – genuine.

*Gujarat Fertiliser v. CIT (2007) 196 Taxation 187 (Guj.)(High Court)*

#### **S. 68 : Cash credits – Loans – No confirmation of accounts**

Assessee had credit in the name of certain person. No confirmation or other proof about the said loan was filed. Further, there were variant versions and shift of stand with respect to the loan. Under these circumstances, the High Court considering the discrepancies and unsubstantiated explanation, held that loan was not genuine.

*Bharti Telecom Finance Ltd. v. ACIT (2007) 200 Taxation 360 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Gifts from unrelated persons-donors – Friends**

Mere identification of donor or receipt of amount through banking channel is not sufficient to satisfy the requirement of a genuine gift. The Court emphasized on the genuineness when it found that there was no occasion for the donor to make the gift and the plea of gift for the treatment of the assessee on account of his ill health had remained unsubstantiated. (A.Y. 1997-98)

*Subhash Chand Verma v. CIT (2007) 164 Taxman 401 / 211 CTR 445 / 311 ITR 239 (P&H)(High Court)*

#### **S. 68 : Cash credits – Gift – Not related party**

Where the gifts were given to the assessee by persons who were not related to him in any manner and were not given to him for any particular reason.

The taxing authorities in gift transactions must look into the surrounding circumstances to find out the real and factual position. In this case the assessee though produced documentation to show the creditworthiness of both the donors, yet offered no proper, reasonable and acceptable explanation in his defence. (A.Y. 2001-02)

*Rajeev Tandon v. ACIT (2007) 164 Taxman 271 / 215 CTR 272 / 294 ITR 488 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Gift – Non-resident**

Gift received by the assessee from a Non Resident Indian was held to be non genuine on the fact of the case, where the assessee was not aware of the business of the donor, donor was employed only as a watchman in foreign country and there was also no occasion for gift.

*Shri Tirath Ram Gupta v. CIT (2007) 197 Taxation 533 (P&H)(High Court)*

#### **S. 68 : Cash credits – Deposits – Tenants – Identity**

Deposits from tenants, it is sufficient if assessee proves identity of tenant and genuineness of transaction under which deposit is made; it will not be necessary for assessee to prove capacity of tenant to make deposit/ advance. (A.Ys. 1989-90, 1990-91, 1991-92)

*CIT v. Nevendram Ahuja (2007) 290 ITR 453 / (2005) 197 CTR 462 (MP)(High Court)*

#### **S. 68 : Cash credits – Firm-Partner**

Once a partner has accepted having advanced amount to the firm, no addition could be made in the hands of the firm under section 68. (A.Y. 1987-88)

*CIT v. Rameshwar Dass Suresh Pal Cheeka (2007) 208 CTR 459 / 163 Taxman 270 (P&H)(High Court)*

#### **S. 68 : Cash credits – Gifts – NRI**

Assessee received the gift from NRI industrialist through proper banking channels. Established the identity and solvency of the donor. Addition was not sustainable. (A.Ys. 1995-96, 1996-97)

*A. Rajendran & Ors. v. ACIT (2006) 204 CTR 9 / 291 ITR 178 / 155 Taxman 364 (Mad.)(High Court)*

#### **S. 68 : Cash credits – Identity and credit worthiness – Discrepancy in accounts**

The High Court held that where identity and creditworthiness of parties have been established by the assessee, mere discrepancy in accounts of the assessee and creditors would not justify addition to income.

*CIT v. Kantilal Parikh (2006) 192 Taxation 272 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Share application money – Level of proof**

Once it is found that the credit entry relates to issue of share capital and once shares are found to have been issued to genuine persons, the creditworthiness of the subscriber may have not been gone into by the assessing authorities.

*CIT v. International Marketing Ltd. (2006) 192 Taxation 799 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Purchase – On credit – Not applicable**

Provision of section 68 are not attracted to amounts representing purchases made on credit. (A.Y. 1976-77)

*CIT v. Pancham Dass Jain (2006) 205 CTR 444 / 156 Taxman 507 (All.)(High Court)*

### **S. 68 : Cash credits – Share application money – Identity established**

Where the assessee had produced before the Assessing Officer certificate of incorporation of the company, which had subscribed its shares, register of members, evidence of dividend paid to the shareholders and that the subscribers were also assessed to tax. It was held that the identity of subscriber was established and addition under section 68 of the Act was not called for.

*CIT v. A. R. Leasing P. Ltd. (2006) 194 Taxation 323 (Delhi)(High Court)*

### **S. 68 : Cash credits – Loan – Income tax assessee – Account payee**

Creditors are income tax payee. Payments made by account payee cheques. Payments made from bank account with sufficient funds available. No material to doubt genuineness of transactions addition not justified. (A.Y. 1989-90)

*P. K. Sethi v. CIT (2006) 286 ITR 318 / 206 CTR 445 (Gau.)(High Court)*

### **S. 68 : Cash credits – Share application money – Appellate authorities**

The assessee company disclosed ₹ 4,75,000/- in its return of income as received on account of share application money for the A. Y. 1989-90.

The learned Assessing Officer, however, made addition under section 68 on the ground that the identity of the subscribers not established. But the CIT(A) and ITAT held that the assessee discharged the onus by reference to the material produced to establish the identity of the subscribers. (A.Y. 1989-90)

*CIT v. Illac Investments P. Ltd. (2006) 287 ITR 135 / 207 CTR 607 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Discharge of burden**

The Department contended before the Hon'ble High Court that the assessee company while discharging the onus cast on it has not established the capacity of the creditor of the share holder. The Hon'ble Court observed that the revenue could have gone back, insofar as the assessee was concerned, to determine whether the shareholder was a genuine person and whether she had requisite creditworthiness or not. Once that was established, there was no occasion for the revenue to go further to find out whether creditor of the shareholder was also genuine and creditworthy. That would be stretching the provisions of section 68 a little too far. (A.Y. 2001-02)

*CIT v. Glacom Impex (P) Ltd. (2006) 157 Taxman 308 / 205 CTR 571 / 299 ITR 571 (Delhi)(High Court)*

### **S. 68 : Cash credits – Gift – Donor's assessment – Gift tax**

When the donor has given confirmation and explained the source thereof and gift-tax proceeding having completed against the donor, the onus is said to have been discharged,. Addition was not justified. (A.Y. 1981-82)

*Murlidhar Lahorimal v. CIT (2006) 200 CTR 109 / 280 ITR 512 / 153 Taxman 451 (Guj.)(High Court)*

### **S. 68 : Cash credits – Loan-Confirmation – Affidavit – GIR nos.**

Assessee discharged onus by placing (i) confirmation letters of cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and Permanent Account Numbers, it could be said that assessee had discharged its burden and no addition to his income on account of cash credits was called for. (A.Y.

*CIT v. S. Kamaljeet Singh (2005) 147 Taxman 18 (All.)(High Court)*

**S. 68 : Cash credits – Cash introduced in the name of Director – Source not established**

Assessee company had introduced cash on various dates in name of its director and there was no consistency in assessee's version as to source of such cash, addition of cash in assessee's hands was justified.

*United Tours & Travels (Calicut) (P.) Ltd. v. CIT (2005) 145 Taxman 320 / 194 CTR 185 (Ker.) (High Court)*

**S. 68 : Cash credits – Peak credit in bank Account – Applicability**

Peak Credit of bank account cannot be held to be undisclosed income of assessee; obviously, banking transaction in regular course of business cannot be considered as cash credit so as to invoke section 68.

*CIT v. Ranjeet Kunar Sethia (2005) 198 CTR 550 (Raj.)(High Court)*

**S. 68 : Cash credits – Share application money – Existence of investor**

Once existence of investor is proved, there is no further burden on assessee to prove whether that person itself had invested said money or some other person had made investment in name of that person.

*Barkha Synthetics Ltd. v. ACIT (2005) 197 CTR 432 / 283 ITR 377 / 155 Taxman 289 (Raj.)(High Court)*

**S. 68 : Cash credits – Share application money – Income tax assessee**

Assessee had produced all relevant evidence to establish that share application money received by the company was as a result of genuine transactions and Assessing Officer himself had noticed in order that applicant – shareholders were income tax payers, in such circumstances, it could not be presumed that shareholder who was assessed to tax was not in existence; as such addition in account of share application money was not justified. (A.Y. 1997-98)

*CIT v. Dwarkadhish Financial Services (2005) 148 Taxman 54 / 197 CTR 202 (Delhi)(High Court)*

**S. 68 : Cash credits – Security deposits – Doctor**

Amount held by the assessee doctor as security deposits made by his patients, could not be added under section 68. (A.Y. 1976-77)

*CIT v. Bhital Das Modi (Indl.) (2005) 276 ITR 517 / 193 CTR 574 (All.)(High Court)*

**S. 68 : Cash credits – Deposits in the bank accounts – Daughters**



In the books of accounts of the assessee, certain deposits were found credited in names of his two daughters and assessee explained that the money was deposited by his daughters after withdrawing same from their bank accounts and that they had been assessed to tax under Amnesty Scheme, Tribunal was justified in deleting addition on finding that the assessee had discharged his burden in proving source of money. (A.Y. 1987-88)

*CIT v. Jauharimal Goel (2005) 147 Taxman 448 / 201 CTR 54 (All.)(High Court)*

#### **S. 68 : Cash credits – Bank deposits – Search [S. 132]**

There was search proceedings under section 132 at premises of assessee-cooperative bank and due to various discrepancies/ irregularities, in record maintained by assessee - bank, with special reference to issuance of various fixed deposit receipts, additions were made as income from undisclosed sources representing unexplained fixed deposits, as assessee had given an explanation of discrepancies which was not found to be false, impugned addition was not justified, assessee having discharged primary onus that lay on it. (A.Y. 1983-84)

*CIT v. Pragati Cooperative Bank Ltd. (2005) 278 ITR 170 / 149 Taxman 149 / 197 CTR 505 (Guj.) (High Court)*

#### **S. 68 : Cash credits – Unexplained credits in the books of firm – Surrender by partners**

Unexplained credits in names of partners in books of firm can be treated as income of firm even though same had been also assessed in hands of partners as they had surrendered said amount. (A.Y. 1977-78)

*Jagmohan Ram Chandra v. CIT (2004) 141 Taxman 574 / 193 CTR 153 / 274 ITR 405 (All.)(High Court)*

#### **S. 68 : Cash credits – Partners – Capital**

Amount introduced by partners in assessee firm as capital would not attract section 68.

*CIT v. Md Prewaz Ahmad (2004) 268 ITR 381 (Patna)(High Court)*

#### **S. 68 : Cash credits – Deposit – Partners**

Deposit made by partners on first day of start of assessee-firm's business can not be treated as unexplained income of the firm. (A.Y. 1976-77)

*CIT v. Jaiswal Grain Stores (2005) 272 ITR 136 / (2004) 191 CTR 187 (All.)(High Court)*

#### **S. 68 : Cash credits – Gift – Documentary evidence**

Where assessee had produced documents to show that gifted amounts were donated by donors out of love and affection for him, no question of law arose from finding of lower authorities that assessee had discharged onus that lay on him with regard to genuineness of gifts. (A.Y. 1994-95)

*CIT v. R.S. Sibal (2004) 269 ITR 429 / 135 Taxman 492 (Delhi)(High Court)*

### **S. 68 : Cash credits – Share application money – Identity – Confirmation**

Addition on account of share application money is not permissible where shareholders were identified and it was established that they had invested in purchase of shares. (A.Ys. 1989-90, 1990-91)

*CIT v. Down Hospital Pvt Ltd. (2004) 267 ITR 439 / 139 Taxman 247 (Gau.)(High Court)*

### **S. 68 : Cash credits – Share application money – Small farmers – Creditworthiness**

Company's shares were all small farmers from same area, their creditworthiness and genuineness of transaction being not established, addition of cash credits was justified. (A.Y. 1996-97)

*Bhola Shankar Cold Storage Pvt Ltd. v. Jt. CIT (2004) 270 ITR 487 (Cal.)(High Court)*

### **S. 68 : Cash credits – Creditors were persons of small means – Assessee's obligation**

Where creditors were persons of small means, assessee could not be said to have proved capacity of creditors. (A.Ys. 1991-92, 1993-94)

*Premnath Goel & Co v. CIT (2004) 271 ITR 390 / 136 Taxman 340 (Delhi)(High Court)*

### **S. 68 : Cash credits – Burden of proof – Cheques – Onus on assessee**

It cannot be said that a transaction which takes place by way of cheque, is invariably sacrosanct. Once the assessee has proved the identity, of creditors, the genuineness of transactions, which he had with the creditors, his burden stands discharged and the burden shift to the revenue to show that though covered by cheques, the amounts in question, actually belong to or was owned by the assessee himself, but no material, direct or indirect, existed on record to come to such a conclusion. (A.Y. 1992-93)

*Nemi Chand Kothari v. CIT (2003) 264 ITR 254 / 185 CTR 635 / (2004) 136 Taxman 213 (Gau.)(High Court)*

### **S. 68 : Cash credits – Failure to issue summons – Request of assessee**

Failure to issue summons to creditor under section 131 on the request of assessee in order to enable him to discharge his prima facie onus, is fatal to the proceedings. When such request is made it becomes incumbent on the Assessing Officer to issue such summons in order to enable the assessee to avail such opportunity. Without request no duty is cast on the assessee.

*CIT v. Kamdhenu Vyapar Co. Ltd. (2003) 130 Taxman 147 / 263 ITR 692 / 182 CTR 600 (Cal.)(High Court)*

### **S. 68 : Cash credits – Onus of Proof – Parties assessed to tax**

Onus is on assessee to discharge that cash creditor is a man of means to allow the cash credit. There should be identification of the creditor and he should be a person of

means. When the cash creditor is an income tax assessee, it can not be said that he is not a man of means. (A.Y. 1989-90)

*Kamal Motors v. CIT (2003) 131 Taxman 155 / 180 CTR 166 (Raj.)(High Court)*

#### **S. 68 : Cash credits – Onus of proof – Creditor and sub contractor**

It is not burden of the assessee to prove the genuineness of the transactions between creditor and sub-creditors nor is it burden of assessee to prove that sub-creditor had creditworthiness to advance cash credit to creditor from whom cash credit had been, eventually, received by assessee. (A.Y. 1992-93)

*Nemi Chand Kothari v. CIT (2003) 264 ITR 254 / 185 CTR 635 / (2004) 136 Taxman 213 (Gau.)(High Court)*

#### **S. 68 : Cash credits – Telescoping – Onus of assessee**

In case of cash credits coming out of black money, no separate addition should be made but onus is on assessee to show that these cash credits are bogus and have come out of black money.

*Kamal Motors v. CIT (2003) 131 Taxman 155 / 180 CTR 166 (Raj.)(High Court)*

#### **S. 68 : Cash credits – Share application money – Identity**

Establishment of identity is not sufficient even if the subscriber confirms the subscription; creditworthiness too is to be proved.

*CIT v. Kundan Investment Ltd. (2003) 130 Taxman 689 / 263 ITR 626 / 182 CTR 608 (Cal.)(High Court)*

#### **S. 68 : Cash credits – Share application money – Degree of proof**

Assessee has to establish identity of subscribers to share capital and prove their creditworthiness and genuineness of transaction; furnishing of income-tax file numbers may not be sufficient to discharge the burden.

*CIT v. Nivedan Vanijya Niyojan Ltd. (2003) 130 Taxman 153 / 263 ITR 623 / 182 CTR 605 (Cal.)(High Court)*

#### **S. 68 : Cash credits – Share application money – Genuineness**

Amounts received by assessee as advance against share application money from two companies for which shares were allotted were not to be added as unexplained cash credits where these companies were found to be genuine. (A.Y. 1992-93)

*CIT v. Antartica Investment (P.) Ltd. (2003) 262 ITR 493 / 179 CTR 526 / 133 Taxman 605 (Delhi)(High Court)*

#### **S. 68 : Cash credits – Share application money – Degree of proof**

Where subscriptions are dealt with through nationalized banks and receipts are received by cheques and particulars of income-tax files of subscribers who have purchased shares are given, it is incumbent on taxing authority to enquire into same and find out creditworthiness of subscribers and genuineness of transactions and then come to a conclusion regarding genuineness of such subscriptions.

*Hindusthan Tea Trading Co. Ltd. v. CIT (2003) 129 Taxman 601 / 263 ITR 289 / 182 CTR 585 (Cal.)(High Court)*

**S. 68 : Cash credits – Share application money – Assessee's responsibility**

In respect of investment in shares of assessee-company even if such payments were made through bank and by cheques, the assessee would have to satisfy Assessing Officer about the genuineness of the same.

*CIT v. Ruby Traders & Exporters Ltd. (2003) 263 ITR 300 / 182 CTR 596 / 134 Taxman 29 (Cal.)(High Court)*

**S. 68 : Cash credits – Share application money – Initial burden**

Where in regard to share application money assessee had discharged initial burden and further enquiry had not been pursued by the revenue, it could not be said that any substantial question of law arose for consideration from Tribunals order deleting the addition. (A.Y. 1997-98)

*CIT v. Shree Barkha Synthetics Ltd. (2003) 131 Taxman 114 / 182 CTR 175 / (2004) 270 ITR 477 (Raj.)(High Court)*

**S. 68 : Cash credits – Share application money – Degree of proof**

Tribunals findings that there was existence of investors and their confirmations had been obtained and were found to be satisfactory, are all conclusions of fact. (A.Y. 1997-98)

*CIT v. Shree Barkha Synthetics Ltd. (2003) 131 Taxman 114 / 182 CTR 175 / (2004) 270 ITR 477 (Raj.)(High Court)*

**S. 68 : Cash credits – Gift – Assessing Officer to examine donors**

Assessee has filed address of both the donors, however, revenue authorities did not examine them in person before making addition, further the revenue authorities failed to bring any evidence on record showing that amount received by assessee from donors was actually her own undisclosed income. Addition confirmed by the CIT(A) was deleted. (A. Y. 2002-03).

*Amita Devi Sanganageria (Smt) v. ACIT (2011) 129 ITD 72 / 53 DTR 214 / 137 TTJ 521 (TM)(Gau.)(Trib.)*

**S. 68 : Cash credits – Gift – Cheque – Confirmation**

Assessee received the gift by way of cheques which have been confirmed by the donors in their affidavits and disclosed in their respective returns, the same could not be treated as non genuine. (A. Y. 2005-06).

*Dy. CIT v. Vishwanath Prasad Gupta (2011) 52 DTR 346 / 130 ITD 73 / 57 DTR 89 / 139 TTJ 257 (TM)(Jab.)(Trib.)*

**S. 68 : Cash credits – Gifts – Addition sustained**

Assessee received gift of ` 1 lakh from ten individuals. It was noted from the records that donors had deposited monies in their bank account on same day or one day prior

to making of gifts through account payee cheques. It was observed that, personal withdrawals of donors for their house hold expenses were petty and it did not support status of donors to gift of ₹ 1 lakh, besides none of donors was relative of assessee, in view of the facts gifts received by the assessee confirmed as cash credits. (A. Y. 2001-02)

*Arvind Kumar Mohnani v. ITO (2011) 129 ITD 117 / 54 DTR 33 / 138 TTJ 403 (TM)(Jab.)(Trib.)*

**S. 68 : Cash credits – Gift – Failure to produce donors – Assessing Officer's onus**

No addition could be made simply rejecting explanation and evidences filed on record in support of the gift without any scrutiny about the confirmation and without bringing any conclusive evidence brought on record merely on the plea that the assessee failed to produce donors for examination. (A. Y. 2006-07)

*P. R. Kulkarni & Sons (HUF) v. Addl. CIT (2011) 135 TTJ 630 / 49 DTR 442 (Bang.)(Trib.)*

**S. 68 : Cash credits – Existence of books of account – Condition precedent**

Where the assessee had not maintained books of account, there was no legal scope to invoke provisions of section 68. Existence of books of account by assessee is a condition precedent for making addition under section 68. (A. Y. 2002-03)

*Madhu Raitani (Smt.) v. ACIT (2011) 45 SOT 231 / 10 ITR 91 (TM)(Gau.)(Trib.)*

**S. 68 : Cash credits – Share application money – Burden discharged**

Assessee company having filed letters of the share applicant companies written to the ACIT confirming that they had applied for shares in the assessee company giving details of drafts, copies of acknowledgment of returns, certificates of incorporation and balance sheets of the said companies where in investment made in the assessee company is shown, it has discharged the onus which lay upon it under section 68 establishing the identity and credit worthiness of each share holder. The Tribunal held that addition can not be made under section 68. (A. Y. 2005-06).

*Dy. CIT v. Dolphine Marbles (P) Ltd. (2011) 57 DTR 58 / 129 ITD 163 / 139 TTJ 129 (TM)(Jab.)(Trib.)*

**S. 68 : Cash credits – Confirmation – Satisfaction of AO – Appreciation of materials and surrounding circumstances**

Assessee had filed confirmation and copy of bank statement as well as cash book. It could be said that assessee had proved genuineness of loan and no addition could be made under section 68 of the Income Tax Act. Opinion of Assessing Officer for not accepting explanation offered by assessee under section 68 as not satisfactory. It must be based on proper appreciation of material and other surrounding circumstances available on record and Assessing Officer can not reject each and every explanation of assessee. (A. Y. 2000-01).

*Umesh Electricals v. ACIT (2011) 131 ITD 127 / 60 DTR 385 / 141 TTJ 288 (TM)(Agra)(Trib.)*

**S. 68 : Cash Credits – Share application money – Burden of proof**

Mere submission of share application forms, PAN names and address and ROC registration etc. was not sufficient in view of the fact that these companies were found to be non-existent. On the facts the assessee failed to produce any of its directors or employees of the share applicants, as their identity was not proved, the onus cast on the assessee was not discharged. Addition under section was confirmed. (A. Ys. 2005-06 to 2006-07).

*Agarwal Coal Corporation (P) Ltd. v. Addl. CIT (2011) 63 DTR 201 / 142 TTJ 409 / (2012) 13 ITR 531 (Indore)(Trib.)*

**S. 68 : Cash credits – Gifts – No relation – No occasion – Gift not genuine**

To prove the genuineness of gift, mere identification of gift amount through banking channels is not sufficient, onus lies on the assessee to prove not only to establish identity of donor, but his capacity to make gift and also the occasion to make the gift. As the Donor refused to attend before the Assessing Officer, addition was justified under section 68. (A.Y. 2004-05)

*Asha M. Agarwal v. ITO (2010) 41 SOT 30 (Mum.)(Trib.)*

**S. 68 : Cash credits – Gifts – Donor appeared in person**

Donor appeared in person before the Assessing Officer and confirmed making of gift and reason which persuaded him to make gift, he being friend of assessee's father who helped him in past. Donor also proved the source of gift. Addition under section 68 was deleted. (A.Y. 2001-02)

*Avneesh Kumar Singh v. ITO (2010) 126 ITD 1 / 2 ITR 663 (TM)(Agra)(Trib.)*

**S. 68 : Cash credits – Gift – Voluntary – Love and affection**

In order to establish that the money received by assessee to be a gift, it should be proved to be voluntary and at the instance of the donor out of love and affection. Gift being as per advice of donor's brother-in-law and not voluntary out of love and affection, addition under section 68 was sustainable. (A.Y. 2003-04)

*Vimaladevi S. Garg (Smt) v. ITO (2010) 46 DTR 294 / 134 TTJ 121 (Mum.)(Trib.)*

**S. 68 : Cash credits – Credits in capital accounts of partners – Firm**

If credits in capital accounts of partners are not satisfactorily explained, the deeming fiction created by section 68 is applicable and the same can be assessed in the hands of the firm.

*Paras Collins Distilleries v. ITO (2010) 48 DTR 353 / 237 CTR 9 / 338 ITR 218 / 198 Taxman 443 (Hyd.)(Trib.)*

**S. 68 : Cash credits – Share application money – Degree of proof**



Where the identity of the share applicant is not doubted as they were income tax assessee and the share application money was received by the assessee through account payee cheques, the share application monies received by the assessee cannot be regarded as undisclosed income of the assessee under section 68 of the Act. (A.Y. 2005-06)

*CIT v. Rock Fort Metal & Minerals Ltd. (2010) 47 DTR 326 / 198 Taxman 497 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – NRE – Foreign Exchange (Immunities) Scheme, 1991**

Sum received from NRE account of non-resident Indian is entitled to immunity under Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991 addition as cash credit cannot be made.

*Amritlal S. Punamiya HUF v. ITO (2010) 1 ITR 242 / 126 TTJ 695 / 31 DTR 441 / 3 SOT 547 (Mum.)(Trib.)*

#### **S. 68 : Cash credits – Balance outstanding – Inapplicability**

Liability of an earlier year which has been shown in the balance sheet cannot be said to have been ceased to exist and therefore, addition under section 68 cannot be sustained. (A.Ys. 2004-05, 2005-06)

*Tulip Hotels (P) Ltd. v. Dy. CIT (2010) 132 TTJ 633 / 37 SOT 77 (TM)(Mum.)(Trib.)*

#### **S. 68 : Cash credits – Summons were duly served – Burden of proof**

Once summons were duly served on the creditors, their identity is duly proved and the Assessing Officer could not have drawn an inference against the assessee, without enforcing the attendance of the parties to whom summons were issued and served and without giving an opportunity to the assessee. (A.Y. 2003-04)

*ITO v. Mayur Agarwal (2010) 133 TTJ 1 / 128 ITD 55 / 43 DTR 116 (TM)(Agra)(Trib.)*

#### **S. 68 : Cash credits – Share application money – Opportunity for cross examination**

Assessee company having received share application money through account payee cheques and filed certificate of incorporation of the companies which had applied for shares, bank statements and affidavits confirming payment of money as share application money, existence of the applications is proved and therefore, no addition under section 68 could be made by simply relying on the statements of two persons who were not even allowed to be cross-examined by the assessee. (A.Y. 2000-01)

*ITO v. Nova Promoters & Finlease (P) Ltd. (2010) 44 DTR 9 (Delhi)(Trib.)*

#### **S. 68 : Cash credits – Loans – Income tax assessee – Bank accounts**

When particulars regarding income tax assessments and bank accounts had been filed, initial burden on assessee under section 68 had held discharged burden shift on revenue to show that what was stated or explained by assessee was not satisfactory. (A.Y. 2002-03)

*Kalyan Memorial & Charitable Trust v. ACIT (2009) 121 ITD 525 / 24 TTJ 883 / 27 DTR 152 (TM)(Agra)(Trib.)*

**S. 68 : Cash credits – Gift – Loan received earlier year**

Loan amount received in earlier year converted into gift in later year is a valid gift.

*Haresh A. Dhanani v. ACIT, ITA No. 5850/Mum/2008, dt. 22-5-2009 – BCAJ P. 43, Vol. 41A, Part 6, September, 2009. (Mum.)(Trib.)*

**S. 68 : Cash credits – Share application money – Degree of proof**

It was held that burden of proof is confined to establish identity of creditor, its credit worthiness and genuineness of transaction and not to explain entire background. Once the assessee had discharged the burden, the extraneous material on which reliance is placed by Assessing Officer for doubting the genuineness of transactions is not relevant. Further, when there are no adverse material or tangible evidence against evidence produced by the assessee, the impugned addition can not be sustained. In the instant case share application money treated as undisclosed Income under section 68 was deleted.

*Monnet Ispat & Energy Ltd. v. Dy. CIT (2008) 171 Taxman 27 (Mag.)(Delhi)(Trib.)*

**S. 68 : Cash credits – Sale of shares – Broker not produced – Exemption [S. 54EC]**

Assessee disclosed the sale of shares and receipt thereof in her Return of Income and claimed exemption under section 54EC, but could not produce broker and purchaser and even requisition under section 133 (6) were returned unserved. Assessing Officer treated the sale proceeds of shares as her unexplained cash credits under section 68. Held, that as the transaction entered was duly supported by Bill, Contract Note, Delivery and transactions having been reflected in Balance Sheets, and Assessing Officer having no evidence, additions based merely on doubts can not be justified.

*Saumya Agrawal(Km) v. ITO (2008) 173 Taxman 60 (Mag.)(Agra)(Trib.)*

**S. 68 : Cash credits – Bank pass book – Book of accounts**

Bank pass book is not as book of account maintained by assessee. (A.Y. 2003-04)

*Mayawati (Ms) v. Dy. CIT (2008) 113 TTJ 178 / 19 SOT 460 / 1 DTR 68 (Delhi)(Trib.)*

**S. 68 : Credit balance – Entry by credit**

Additions cannot be made on account of difference in ledger balance which arises when creditor passes entry without any instructions or without any concurrence by the assessee.

If in an account showing credit balance, there is no transfer of money either through cheque or cash during the year under consideration, the additions under section 68 cannot be made.

*Shirish S. Maniar v. ITO (2008) 167 Taxman 81 (Mag.)(Mum.)(Trib.)*

**S. 68 : Cash credits – Trade creditors – Income tax assessee**

Cash credits standing in the names of trade creditors, all income-tax assesseees, could not be treated as non-genuine and addition could not be made in respect of cash credits or interest paid thereon. (A.Y. 2001-02)

*ITO v. Rajendra Kumar Taparia (2007) 106 TTJ 712 (Jodh.)(Trib.)*

#### **S. 68 : Cash credits – Gift – NRI**

Statement of the donor recorded behind the back of the assessee without being subjected to cross-examination cannot be fully admitted as evidence against the assessee. (A.Y. 1995-96)

*Vijender Kumar Jain & Sons (HUF) v. ACIT (2007) 106 TTJ 83 (Delhi)(Trib.)*

#### **S. 68 : Cash credits – Gifts – Mere Suspicion**

Additions of Gift under section 68 on mere suspicion, could not form the basis for coming to the conclusion that the nature and source of gifts remained unexplained, when the Assessing Officer has not exercised the inherent powers entrusted under section 131 by issuing summons to examine various donors.

*ITO v. Sanjay Kumar Goel (2007) 160 Taxman 169 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – Unexplained share capital – Identity of shareholder**

If the shareholders existed, then no further inquiry need be made. (A.Ys. 1997-98 & 1999-2000)

*ITO v. Lanyard Foods Ltd. (2007) 112 TTJ 334 (Mum.)(Trib.)*

#### **S. 68 : Cash credits – Share application money – Power of Assessing Officer**

Where the facts and circumstances justify the finding that what has been credited as share capital of the company is actually not so, the provisions of s. 68 clearly permit an IT authority to make enquiries and if necessary to assess the same as representing the income of the company. (A.Y. 1986 to 1996)

*Npar Drugs (P) Ltd. v. Dy. CIT (2006) 100 TTJ 38 / 98 ITD 285 (Delhi)(Trib.)*

#### **S. 68 : Cash credits – Gift – Close relatives**

Addition made on account of Gifts received from close relatives treating it as Hawala racket, on ground that the same were made without any occasion, were deleted as assessee discharged the initial onus of proof, and mere disbelief without rebutting evidence of assessee cannot be made basis for addition, as it is a settled law that assessee need not prove source of the source, and evidence may be direct or circumstantial.

*Narinder Kumar Sekhri v. Dy. CIT (2006) 152 Taxman 3 (Mag.)(Amritsar)(Trib.)*

#### **S. 68 : Cash credits – Non production of the creditor – Other evidence**

Non production of the creditor cannot be a reason for making addition, when the identity of the creditor was not disputed nor there was a doubt about the advance and repayment which was through account payee cheque.

*Anil Kumar Midha HUF v. ITO (2006) 153 Taxman 65 (Mag.)(Jodh.)(Trib.)*

**S. 68 : Cash credits – Partner of partnership firm-Credit – Capital account**

Addition in respect of credits in the capital account of a partner has to be considered in the case of the partner and not in the case of the assessee-firm, more so when the partner has given confirmatory letter regarding the introduction of capital in the firm and also the details of source of the amount. (A.Y. 1997-98)

*ITO v. Dhiman Systems (2006) 100 TTJ 466 (Amritsar)(Trib.)*

**S. 68 : Cash credits – No Summons issued – Assessee's request**

Addition of cash credit was justified where assessee failed to discharge onus in proving the identity of creditor, creditworthiness of creditor and genuineness of transactions, but not where the Assessing Officer failed to issue summons to the concerned person even after assessee's request. (A.Y. 1994-95)

*A. P. S. Associates (P) Ltd. v. ACIT (2006) 101 TTJ 15 / 101 ITD 215 (Amritsar)(Trib.)*

**S. 68 : Cash credits – Share application money – Degree of proof**

In respect of share capital money, the assessee-company has to prove only the existence of the person in whose name share application is received and there is no further burden on the assessee to prove whether that person himself has invested the money or some other person has made the investment in his name. (A.Y. 1989-90)

*Uma Polymers (P) Ltd. v. Dy. CIT (2006) 101 TTJ 124 / 100 ITD 1 (TM)(Jodh.)(Trib.)*

**S. 68 : Cash credits – Silver utensils – VDIS**

When the silver utensils were earlier disclosed under VDIS, the addition of sale proceeds of utensils under section 68 is not sustainable. (A.Y. 1998-99)

*ACIT v. Surya Kanta Dalmia (2006) 99 TTJ 1 / 97 ITD 235 (SB)(Kol.)(Trib.)*

**S. 68 : Cash credits – Creditor – Confirmation letter – GIR nos – Balance sheet**

Assessee having furnished confirmation letter, GIR number and copy of balance sheet of the creditor, and Assessing Officer having failed to consider the assessment records of creditor as directed by the CIT(A) on remand, addition under section 68 was invalid. (A.Y. 1988-89)

*Varsha Plastics (P) Ltd. v. ACIT (2006) 99 TTJ 487 (Mum.)(Trib.)*

**S. 68 : Cash credits – Cross examination – Unexplained addition**

The Assessing Officer having not allowed an opportunity to the assessee to cross-examine the employee, the credit balance could not be treated as unexplained and addition under section 68 could not be made. (A.Y. 1993-94)

*Madan Lal v. ITO (2006) 99 TTJ 538 (Jodh.)(Trib.)*

**S. 68 : Cash credits – Unexplained cash balance – Proof furnished**

Deposit in the capital account of the assessee could not be treated as unexplained as the assessee was having substantial opening cash balance, which was shown in the

balance sheet for the preceding year and the said cash in hand was accumulated on closure of business at one place which was brought into the new business. (A.Y. 1998-99)

*ITO v. Prakash Chand (2006) 100 TTJ 639 (Jodh.)(Trib.)*

#### **S. 68 : Cash credits – Introduction of capital – Partner and firm**

Addition in respect of credits in the capital account of a partner has to be considered in the case of the partner and not in the case of the assessee-firm, more so when the partner has given confirmatory letter regarding the introduction of capital in the firm and also the details of source of the amount. (A.Y. 1997-98)

*ITO v. Dhiman Systems (2006) 100 TTJ 466 (Amritsar)(Trib.)*

#### **S. 68 : Cash credits – Share application money – Level of proof**

Investor companies incorporated under the Companies Act, holding GIR numbers and assessed to tax, copies of acknowledgment of filing IT returns as also their affidavits/confirmations as also share application forms and letters of allotment of shares being available on record, identity of these investors could not be doubted so as to call for addition under section 68, more so when there was no material to show that share application money belonged to assessee. (A.Y. 1996-97)

*Dy. CIT v. Esteem Towers (P) Ltd. (2006) 99 TTJ 472 (Delhi)(Trib.)*

#### **S. 68 : Cash credits – VDIS – Sale proceeds [S. 69C]**

CIT (A) having taken into consideration the declaration under VDIS, manner of transactions, absence of material regarding payment of commission, the fact that statement of one of the purchaser was not supplied to the assessee and the other purchaser had retracted the same and the findings of CIT(A) remaining uncontroverted by any cogent material, order of CIT(A) deleting additions under sections 68 and 69C deserved to be confirmed. (A.Ys. 1998-99 and 1999-2000)

*ITO v. Jyoti Prakash Chhabria (Smt) & Ors. (2006) 99 TTJ 351 (Mum.)(Trib.)*

#### **S. 68 : Cash credits – Gift – Level of proof**

Gifts received by the assessee from his close relatives who are persons of sufficient means and who confirmed the gift in their statements before the Assessing Officer cannot be treated as non-genuine and addition under section 68 cannot be made. (A.Y. 1995-96)

*Suraj Bhan Bajaj v. ITO (2006) 102 TTJ 665 (Delhi)(Trib.)*

#### **S. 68 : Cash credits – Purchase of diamonds – Sale proceeds – VDIS 1997**

Buyer having confirmed the purchase of diamonds in question from the assessee addition under s. 68 could not be made in respect of sale proceeds of diamonds earlier declared under VDIS, 1997. (A.Y. 1998-99)

*Uttamchand P. Jain v. ITO (2006) 103 TTJ 1 / 103 ITD 1 (TM)(Mum.)(Trib.)*

*Editorial : Affirmed by High Court in CIT v. Uttamchand Jain (2009) 224 CTR 473 / 26 DTR 23 (Bom.)(High Court)*

### **S. 68 : Cash credits – Identity of creditor – Summons [S. 131]**

Assessee not able to prove genuineness of sum received as share application money – All details filed and thus demonstrated credit-worthiness and genuineness of transaction – But third condition; i.e., identity of creditor not fulfilled – Responsibility to produce creditor – Assessee failed to produce creditor – Held that Assessing Officer required to do more than merely issuing summons to the creditors to enforce their attendance. (A.Y. 1997-98)

*Gayak Trading Co Pvt. Ltd. v. Jt. CIT (2006) 102 TTJ 110 (Mum.)(Trib.)*

### **S. 68 : Cash credits – Share application money – Onus on assessee**

Onus under section 68 is on the assessee to establish the owner, when money comes from any source. In the instant case as assessee could not establish the identity and genuineness of the person from whom Share Application money were received the addition under section 68 was justified.

*Pranland Housing & Finance Ltd. v. ITO (2006) 155 Taxman 274 (Mag.)(Mum.)(Trib.)*

### **S. 68 : Cash credits – Goods or services – Credit**

Section 68 cannot apply where goods or services are received by assessee on credit and an entry is made crediting liability in account of person from whom goods and services are acquired. (A.Y. 1998-99)

*Annamaria Travels & Tours (P.) Ltd. v. Dy. CIT (2005) 95 TTJ 71 (Delhi)(Trib.)*

### **S. 68 : Cash credits – Source of source – Burden of proof**

While examining applicability of section 68, source of source cannot be investigated; where identity of lenders and means of lenders were beyond any doubt and factum of borrowing was also not in dispute, addition in question was liable to be deleted. (A.Y. 1998-99)

*Jaikishan Dadlani v. ITO (2005) 4 SOT 138 (Mum.)(Trib.)*

### **S. 68 : Cash credits – Block assessment – Cash flow statement [S. 158BC]**

Addition of cash credits noticed from cash flow statement cannot be made in block assessment.

*Surjit Tosaria (Dr. Mrs) v. Jt. CIT (2005) 92 TTJ 338 / 146 Taxman 32 (Mag.)(Delhi)(Trib.)*

### **S. 68 : Cash credits – Telescope – Suppressed profits**

Assessee can explain that suppressed profits had been brought in as cash credits and that one has to be telescoped into other. (A.Y. 1994-95)

*Maina Devi (Smt) v. ITO (2005) 98 TTJ 21 (Jodh.)(Trib.)*

### **S. 68 : Cash credits – Statement recorded in the course of survey – Opportunity for cross examination**



Where addition was sought to be made to assessee's income on basis of a person's statement recorded during survey but department failed to secure presence of such person for cross-examination by assessee, addition based on such statement was not justified. (A.Y. 1998-99)

*Mahes Gulabrai Joshi v. CIT (2005) 95 ITD 300 / 96 TTJ 876 (Mum.)(Trib.)*

#### **S. 68 : Cash credits – Confirmation – Creditors – Onus discharged**

Where creditors confirmed their statements of account as appearing in accounts of assessee and had produced their copies of balance sheets tallying figures in name of assessee-firm with those of accounts of assessee and Assessing Officer was also informed about new address of creditors vide communication of assessee in writing, assessee could be said to have discharged its onus to prove identity and creditworthiness of creditors and also that loan transactions were genuine. (A.Y. 1994-95)

*V. T. R. Marketing v. ACIT (2005) 1 SOT 205 (Kol.)(Trib.)*

#### **S. 68 : Cash credits – Affidavits – Confirmations**

Where affidavits and confirmations of creditors were produced and their capacity to advance loans had been established, addition of cash credits was not justified and it was immaterial that amounts were kept at home by creditor and deposited in bank just before issuing cheques. (A.Y. 1998-99)

*ITO v. M.S. Advance (P.) Ltd. (2005) 93 TTJ 778 (Amritsar)(Trib.)*

#### **S. 68 : Cash credits – Confirmation – Creditors – Summons by Assessing Officer**

Where assessee produced confirmation regarding cash credits. Assessing Officer did not require assessee to produce creditors, he did not examine creditors by issuing summons directly to them and had not brought any material on record to doubt genuineness of transactions, Assessing Officer was not justified in making addition on account of cash credits.

*Dy. CIT v. Frank Pharmaceuticals (P.) Ltd. (2005) 147 Taxman 75 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – Confirmation – GIR Nos.**

Where confirmation letter from creditor and his GIR No. had been furnished and loan was received by assessee by account-payee cheque, mere contradiction between outstanding balance mentioned in confirmation letter and that shown in assessee's books would not justify addition under section 68. (A.Y. 1990-91)

*Maheshwari Industries v. ACIT (2005) 95 TTJ 111 / 148 Taxman 74 (Mag.)(Jodh.)(Trib.)*

#### **S. 68 : Cash credits – Affidavit – Creditors – Production of creditors**

Where assessee filed affidavit of creditors, who were uneducated labourers, in support of credits in their names but did not produce them despite being given an

opportunity, mere production of affidavits could not be said to have proved their creditworthiness and addition of those credits was justified. (A.Y. 1993-94)

*ITO v. Jagan Nath (2005) 97 TTJ 265 (Chd.)(Trib.)*

#### **S. 68 : Cash credits – Source – Encashment of National Savings Certificates – Repayment**

Where cash credits shown by assessee in its books were explained as on account of encashment of National Savings Certificates and on account of repayment received from a finance company and explanation was supported by evidence, explanation was to be accepted and addition on account thereof was to be deleted.

*Devender Kumar Jain v. ITO (2005) 147 Taxman 73 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – Income tax assessee – In the knowledge of Assessing Officer**

Where it was in knowledge of Assessing Officer that creditor was income-tax assessee and Assessing Officer was in possession of particulars of assessment records of creditor, it was mandatory to examine source of income of alleged creditor to find out whether he was creditworthy or was such who could advance alleged loan; where Assessing Officer had not confronted assessee with material gathered and inferences drawn on basis of assessment records of creditor, matter was to be remitted to Assessing Officer for decision afresh.

*Shiv Cable & Wire Industries (India) v. Addl. CIT (2005) 149 Taxman 3 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – Confirmation of parties – Level of proof**

Where in respect of loans taken from two parties, assessee had furnished confirmed copies of their accounts and her own balance sheet showing lenders as creditors, there was no reason for making any addition by applying provisions of section 68.

*Shikha Gupta (Smt) v. ITO (2005) 148 Taxman 31 (Mag.)(Delhi)(Trib.)*

#### **S. 68 : Cash credits – Affidavit of creditor – Summons attended**

Where assessee filed an affidavit and creditors confirmed transactions, Assessing Officer also summoned both creditors and recorded their statements wherein they confirmed having given said loans, addition of credits in names of such creditors was not justified.

*ITO v. Somsons & Co. (2005) 148 Taxman 21 (Mag.)(Amritsar)(Trib.)*

#### **S. 68 : Cash credits – Share capital – Family members of directors**

Where assessee-company claimed that it had taken certain share capital money and unsecured loan from family members of directors but assessee failed to produce confirmations from creditors and also failed to discharge primary onus put upon it, share capital money and unsecured loan were rightly treated as unexplained cash credits. (A.Y. 2001-02)

*Earthmetal Electricals (P) Ltd. v. ITO (2005) 4 SOT 484 (Mum.)(Trib.)*

*Editorial : High Court dismissed the appeal ITA No. 590 of 2005 dt 15-10-2008 Supreme Court allowed the appeal of the assessee. SLA (Civil) No. 21073/2009, civil Appeal No. 618 of 2010 dt 30-7-2010. Hence, the order of the Tribunal is no more good law.*

**S. 68 : Cash credits – Peak credits – CITCAS’s findings**

Where assessee had made disclosure of ` 6 lakhs considering bogus entries made in cash book, which were duly considered by Commissioner (Appeals) in his order, instead of adding each and every entry, Commissioner (Appeals) had rightly considered peak credits of ` 4,73,738 for making addition. (A.Ys. 1987-88 to 1996-97)

*ACIT v. Tritan Happy Home (P.) Ltd (2005) 94 TTJ 628 (Cuttack)(Trib.)*

**S. 68 : Cash credits – Share application money – Private Limited company**

Decision of Supreme Court in case of *CIT v. Stellar Investment Ltd. (2001) 251 ITR 263(SC)* is also applicable to private limited companies hence additions as cash credits were deleted. (A.Y. 1993-94)

*Super Threading India (P.) Ltd. v. ACIT (2005) 1 SOT 195 (Chd.)(Trib.)*

**S. 68 : Cash credits – Share application money – Burden of proof – Level**

Where creditor was a company incorporated under Companies Act, and share application money was received by account-payee cheques, addition of money invested by it in assessee’s share capital was not justified. (A.Y. 1995-96)

*Dy. CIT v. GVS Investments (P.) Ltd. (2005) 92 TTJ 706 / 146 Taxman 36 (Mag.)(Delhi)(Trib.)*

**S. 68 : Cash credits – Share application money – Source of source**

Where since investor companies, incorporated under Companies Act, 1956, were assessed to tax and were holding GIR number, and their confirmation / affidavits of making investment in shares of assessee and share application forms and letter of allotment of shares were also available on record, identity of investor companies and their existence could not be doubted and assessee could not be made to explain source of source.

*Dy. CIT v. Esteem Towers (P.) Ltd. (2005) 149 Taxman 1 (Mag.)(Delhi)(Trib.)*

**S. 68 : Cash credits – Share application money – Cash receipts**

Where during relevant accounting year assessee received certain money in cash from persons against allotment of shares, who explained their source of income and admitted purchase of shares in cash, but Assessing Officer doubted creditworthiness of transaction and made addition, since all persons had declared their source of income for making payment for purchase of shares in cash, balance of convenience was in favour of assessee and, therefore, addition if any, could be made in hands of investors if their explanation was not acceptable and not in hands of assessee.

*Dhawan Builders v. ACIT (2005) 147 Taxman 106 (Mag.)(Delhi)(Trib.)*

### **S. 68 : Cash credits – Gifts – NRI**

Gifts from NRI account of donor to assessee and his wife were rightly added to assessee's income where neither donor was produced nor his confirmation was filed.

*ACIT v. Raghbir Singh (2005) 92 TTJ 290 / 147 Taxman 52 (Mag.)(Chd.)(Trib.)*

### **S. 68 : Cash credits – Gifts – Relative of partner**

Where donor was a close relative of partners and transaction had not been doubted by Assessing Officer, amounts introduced by assessee-firm in books and claimed to be gifts could not be added. (A.Y. 1997-98)

*ITO v. Super Chemicals Distributors (2005) 1 SOT 102 (Delhi)(Trib.)*

### **S. 68 : Cash credits – Gifts – Occasion of birth day**

Where assessee had explained amount found deposited in his daughter's account as gift received by her on occasion of her birthday and Assessing Officer could not rebut such explanation, addition of such deposit to assessee's income was not justified.

*Vishnu Kumar Gupta v. Dy. CIT (2005) 94 TTJ 1082 (Mum.)(Trib.)*

### **S. 68 : Cash credits – Gifts – NRI**

Where Assessing Officer treated a gift received by assessee from an NRE account as non-genuine on ground that donor was not a man of means, as money had come from NRE account, prima facie genuineness of same could not be doubted, especially in face of fact that revenue had not led any material or evidence to allege any collusion or under-hand dealing in entire transaction and as such, addition on account of such gift was not justified. (A.Y. 2000-01)

*ITO v. Puneet Chugh (2005) 2 SOT 101 (Delhi)(Trib.)*

### **S. 68 : Cash credits – Gifts – Wife of assessee**

Where documents found during search indicated that assessee's wife had received gifts and those were shown in respective balance sheet of donors, failure of assessee's wife to explain such gifts in her statement under section 132(4) would not justify addition thereof. (A.Ys. 1988-89 to 1998-99)

*Dy. CIT v. M. L. Jain (2005) 96 TTJ 362 (Jodh.)(Trib.)*

### **S. 68 : Cash credits – Gifts – Opening of capital**

Where assessee had accumulated certain amount as opening capital and explained that she had received gifts at time of marriage which she had deposited and received interest thereon, addition of amount of opening capital was not justified. (A.Y. 1993-94)

*ITO v. Resma Devi (Smt) (2005) 94 TTJ 761 (Jodh.)(Trib.)*

### **S. 68 : Cash credits – Firm – Partners**

Cash credit in name of partner is to be considered in his hands and such addition cannot be made in case of assessee-firm.

*ITO v. Dhiman Systems (2005) 147 Taxman 37 (Mag.)(Amritsar)(Trib.)*

**S. 68 : Cash credits – Deposits – Accounts payee Cheque**

Even in a case where loan/deposit/credit is received by account-payee cheque or draft, repayment is also through cheque or draft along with interest and confirmations are filed, impugned cash credit cannot covertly be taken to be genuine on face of it and even in these cases, certain further investigation is required. (A.Y. 1996-97)

*Sampat Automobiles v. ITO (2005) 96 TTJ 368 (Jodh.)(Trib.)*

**S. 68 : Cash credits – Jewellery – VDIS**

Where assessee sold certain jewellery which he had declared under VDIS and such sale was confirmed by purchaser, Assessing Officer was not justified in treating sale as bogus and making addition in respect of such jewellery under section 68. (A.Y. 1998-99)

*Jagdish Mitter v. Dy. CIT (2005) 96 TTJ 1027 (Amritsar)(Trib.)*

**S. 68 : Cash credits – Remittance received from NRE Account**

Where assessee had given identity of depositor, filed confirmation on his behalf and requested Assessing Officer to summon concerned person, but latter did not do so, as assessee had discharged its burden to prove genuineness of deposit and identity of depositor, addition made in hands of assessee was not justified, particularly when it was first year of assessee's business.

*Ghaziabad Footwear (P.) Ltd. v. Dy. CIT (2005) 142 Taxman 18 (Mag.)(Delhi)(Trib.)*

**S. 68 : Cash credits – Loans – Affidavits – Confirmation letters**

Where assessee-company, received loans from creditors mostly through banking channels and filed affidavits/confirmatory letters of its creditors, who were also assessed to income-tax and assessee also filed copies of bank accounts of creditors confirming transactions, since material available on record clearly suggested that assessee had been able to discharge preliminary onus to prove genuineness of transactions on basis of documentary evidence, Assessing Officer was not justified in making addition without bringing some material on record to reject case of assessee

*Jt. CIT v. Manohar Cold Storage & General Mills (P.) Ltd. (2005) 147 Taxman 101 (Mag.)(Delhi) (Trib.)*

**S. 68 : Cash credits – Advances from customer – Identity**

Advance received from customer cannot be added simply because customer could not be traced. (A.Y. 1997-98)

*ITO v. Super Chemicals Distributors (2005) 1 SOT 102 (Delhi)(Trib.)*

**S. 68 : Cash credits – Lease rentals – Bogus lease**

Where treating a lease agreement under which assessee had let mild steel cops to a party as bogus, Assessing Officer made addition under section 68 of lease rentals,

since nature of lease rentals and its source had been fully explained, section 68 was wrongly invoked.

*ITO v. Enpro Export (P.) Ltd. (2005) 147 Taxman 103 (Mag.)(Delhi)(Trib.)*

### **S. 68 : Cash credits – Reassessment – Revision**

Where reassessment proceedings initiated on grounds that certain cash credits in assessee's books were bogus were dropped after due and proper enquiries, Assessing Officer's order could not be held to be erroneous and prejudicial to interests of revenue. (A.Ys. 1991-92 to 1993-94 & 1997-98)

*Dewas Silk Mills v. CIT (2005) 93 ITD 31 / 92 TTJ 481 (TM)(Indore)(Trib.)*

### **S. 68 : Cash credits – Books of accounts – Financier**

The existence of assessee's own books of accounts is a condition precedent for invoking power under section 68, and cash credits must have been recorded in assessee's books of account.

Addition made on basis of books of finance broker was held to be erroneous in law.

*ACIT v. Omprakash & Co (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

### **S. 68 : Cash credits – Bank pass book – Books of account**

S. 68 is not applicable in case where amount is found directly credited to bank account and not found credited in books maintained by the assessee

*International Guwar Gum & Chemicals v. ITO (2003) SOT 240 (Jodh.)(Trib.)*

### **S. 68 : Cash credits – Non resident – Addition as cash credit – Investment [S. 5(2), 69]**

Taxability of an Income of a non resident will be decided with reference to provisions of S. 5(2). What is not taxable under section 5(2) cannot be taxed under section 68 or 69. (A.Y. 1996-97)

*Dy. CIT v. Finlay Corporation Ltd (2003) 86 ITD 626 / 84 TTJ 788 (Delhi)(Trib.)*

### **S. 68 : Cash credits – Books of account – Rough Note book**

Rough note book whose pages can be removed easily, can not be considered as books of account'.

*ACIT v. Omprakash & Co (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

### **S. 68 : Cash credits – Source of source – Balance sheet**

Assessee is said to have discharged the primary onus cast on him to establish the creditworthiness of creditor by furnishing his balance sheet for last few years, and I Tax No.

Assessee is not supposed to establish source of source in the hands of the creditor.

If department is not satisfied about source in the hands of creditor, appropriate action should be taken in the case of the creditor.

*Parminder Kaur Sandhu v. ITO (2003) SOT 422 (Cuttack)(Trib.)*

Also Refer :



*Seth Textiles v. ITO (2003) 126 Taxman 34 (Mag.)(Mum.)(Trib.)*  
*ITO v. Bhatia Enterprises (2003) 81 TTJ 503 (Chd.)(Trib.)*

**S. 68 : Cash credits – Share application money – Level of proof**

In case where identity of the shareholder is established, as also the confirmation of having invested the money, No further inquiry can be made with the assessee regarding the capacity of shareholders. (A.Y. 1996-97)

*Dy. CIT v. Sahara India Financial Corporation Ltd (2003) 81 TTJ 389 / 2 SOT 733 (Luck.)(Trib.)*

*Also refer : Swagat Synthetics (P) Ltd v. ITO (2002) 77 TTJ 987 (Jodh.)(Trib.)*

*Sky High Properties (P) Ltd. V. ITO (2003) 132 Taxman 142 (Mag.)(Delhi)(Trib.)*

**S. 68 : Cash credits – Share application money – Address of company**

When the identity of the shareholder, their creditworthiness and genuineness were examined, Share application money cannot be added as unexplained only on the ground of non existence of the company at the given address when Assessing Officer visited the place for inspection. (A.Y. 1992-93)

*ACIT v. Antartica Investment(P) Ltd (2003) 78 TTJ 257 / 130 Taxman 118 (Mag.)(Delhi)(Trib.)*

**Section 69 : Unexplained investments**

**S. 69 : Unexplained investments – Difference in statement of value of stock furnished to bank and entries in books of accounts addition justified**

Where the stock statement of hypothecated goods furnished bank was at variance with stock recorded in books of accounts. It was held that addition was justified as the assessee neither denied statement made to bank nor furnished valid explanation of discrepancy. (A. Y. 1995-96).

*B. T. Steels Ltd. v. CIT (2011) 196 Taxman 362 / (2010) 47 DTR 227 / 328 ITR 471 / 236 CTR 471 (P&H)(High Court)*

**S. 69 : Unexplained investments – Genuineness – Sale of shares**

Purchase and sale of shares said to have been made by the assessee being the solitary transaction in shares by him allegedly made through a broker who is not registered with the stock exchange and concerned company as well as the said broker having denied the transaction, Assessing Officer was justified in not accepting the said transaction as genuine by applying the test of human probabilities and treating the impugned amount as income from undisclosed sources. (A. Y. 1997-98).

*CIT v. Hakumat Rai (2011) 237 CTR 513 / 49 DTR 266 (P&H)(High Court)*

**S. 69 : Unexplained investments – Set off against account of intangible additions**

If the intangible additions are made as undisclosed income during survey for earlier assessment years, while considering the assessment of subsequent assessment year

and making addition of unexplained investment in stock, the Assessing Officer should consider the question of set off of the intangible addition made in appeal. (A. Y. 1997-98).

*Balram Saha v. CIT (2011) 56 DTR 209 / 334 ITR 383 (Cal.)(High Court)*

#### **S. 69 : Unexplained investments – Search and seizure – Jewellery – CBDT circular**

The court held that the CBDT circular had been issued for the purpose of non seizure on the basis of recognized customs prevailing in Hindu Society and unless the revenue showed anything to the contrary, it could safely be presumed that source to extent as stated in Circular No. 1916 stands explained, accordingly the order of Tribunal deleting the addition was confirmed.

*CIT v. Ratanlal Vyaparilal Jain (2011) 199 Taxman 90 / 339 ITR 351 / (2010) 235 CTR 568 / 45 DTR 290 (Guj.)(High Court)*

#### **S. 69 : Unexplained investments – Statement in the course of search – Retraction [S. 132(4)]**

Merely on the basis of statement made under section 132(4), in respect of loans, addition under section 69 as income from undisclosed source cannot be made when the said statement was retracted and evidence to show the genuineness of loan was filed. The Court also referred the Circular of CBDT No. F.NO.286/2/2003 IT (Inv) dt 10th March 2003. (A. Y. 1994-95).

*M. Narayanan & Bros. v. ACIT (2011) 60 DTR 233 / 339 ITR 192 / 243 CTR 588 (Mad.)(High Court)*

#### **S. 69 : Unexplained investments – Statement of family members of sellers under Foreign Exchange Regulation Act**

Assessee purchased the property from joint owners of property who were family members. Sale consideration was shown at ` 4 lakhs in the deed. In the statement recorded under Foreign Exchange Regulation Act senior most member of family who was responsible for sale of property admitted that actual sale consideration was ` 16 lakhs. High Court held that the addition was justified. (A.Ys. 1997-98 to 1999-2000).

*CIT v. T. O. Abraham (2011) 202 Taxman 632 (Ker.)(High Court)*

#### **S. 69 : Unexplained investments – Survey – Addition on the basis of statement [S. 69A, 133A]**

Confession made by the assessee during survey proceedings is not conclusive and it is open to the assessee to establish that the same was not true and correct by filing cogent evidence. Additions deleted by the Tribunal was justified. (A.Y. 2000-01)

*ITO v. Vijay Kumar Kesar (2010) 36 DTR 13 / 327 ITR 497 / 231 CTR 195 (Chhattisgarh)(High Court)*

#### **S. 69 : Unexplained investments – Sale of shares**

Assessing Officer doubted the sale of shares made by the assessee and hence issued inquiry letters to some of those persons under section 133(6). A few of those persons responded while others failed to respond and hence the Assessing Officer made additions of ₹ 15 Lakhs by treating sources of share capital of those persons as 'unexplained'. Held merely because some of the persons did not respond to the notice issued by the Assessing Officer, it could not be said that the transaction was not genuine. (A.Y. 1996-97)

*CIT v. GP International Ltd. (2010) 325 ITR 25 / 186 Taxman 229 / 33 DTR 163 / 229 CTR 86 (P&H)(High Court)*

#### **S. 69 : Unexplained investments – Hypothecation – Stock – Bank**

Where the assessee was able to show from its books of account maintained by it in the course of its regular business and which was supported by the vouchers, etc., addition under section 69 of the Act cannot be made with respect to such inflated statement given to the bank of the stock which was hypothecated with it merely to obtain higher credit facility.

*CIT v. Arrow Exim (P) Ltd. (2010) 35 DTR 280 / 230 CTR 293 (Guj.)(High Court)*

#### **S. 69 : Unexplained investments – Addition – Statement of third party**

Addition in the hands of the assessee having been made merely on the basis of a statement made by a third party without there being any corroborative evidence, the Tribunal was justified in deleting the addition particularly when the assessee was not allowed opportunity to cross examine the persons who made such a statement. (A.Y. 1996-97)

*Dy. CIT v. Mahendra Ambalal Patel (2010) 40 DTR 243 (Guj.)(High Court)*

#### **S. 69 : Unexplained investments – VDIS – Jewellery**

VDIS declaration was filed and valid certificate issued. Subsequent sale of VDIS declared jewellery cannot be held as ingenuine on the face of verifiable evidences. (A.Y. 1998-99)

*CIT v. Uttamchand Jain (2009) 224 CTR 473 / 26 DTR 23 (Bom.)(High Court)*

*Editorial : Order of Tribunal in Uttamchand P. Jain V. ITO (2006) 103 ITD 1 / 103 TTJ 1 (TM)(Mum.)(Trib.), affirmed*

#### **S. 69 : Unexplained investments – Presumption [S. 292C]**

Presumption under section 292C is a rebuttable presumption wherein Assessee could rebut the claim of the Department on the strength of documents seized from his premises. Assessee having failed to rebut the presumption and thus failed to discharge the burden cast on him, the addition made by the revenue is justified.

*Surendra M. Khandhar v. ACIT & Ors. (2009) 224 CTR 409 / 224 CTR 409 / 321 ITR 254 (Bom.) (High Court)*

#### **S. 69 : Unexplained investments – Loose sheets – Insufficient evidences**

Loose sheets by them self may not be enough to justify addition on estimated basis even though the explanation of the assessee is found unbelievable and circumstances may be pointing other wise. (A.Y. 2005-06)

*CIT v. Atam Valves (P) Ltd. (2009) 184 Taxmann 6 (P&H)(High Court)*

#### **S. 69 : Unexplained investments – Stock valuation – Sale price**

No addition on account of understatement of sale price can be made, in absence of evidence on record to show that the assessee had received higher price as consideration for sale of land than shown in the registered sale deed. The Court further held that the rate of the property fixed by the Stamp Valuation Authority cannot be applied to arrive at the consideration for which the property might have been sold. (A.Y. 1997-98)

*CIT v. K.K. Enterprises (2008) 13 DTR 289 / 178 Taxman 187 (Raj.)(High Court)*

#### **S. 69 : Unexplained investments – Valuation of stock – Quantity – Bank**

No addition as unexplained investment under section 69 can be made on account of difference in valuation of stock, where there is a finding recorded by the Tribunal that the Assessing Officer had not pointed out any discrepancy in the quantity of stock hypothecated by the assessee with bank the discrepancy was only on account of valuation.

*CIT v. Laxmi Engg. Industries (2008) 5 DTR 106 / 308 ITR 279 (Raj.)(High Court)*

#### **S. 69 : Unexplained investments – District valuation officer – Valuation – Evidence by CIT(A)**

Where the finding of fact recorded by the CIT(A) that the report of the DVO was not reliable was not challenged by the Revenue authorities, addition made by the Assessing Officer on account of difference between the value of the property declared by the assessee and that estimated by the DVO was held not tenable at all. (A.Y. 1997-98)

*CIT v. N.S. Bakshi (2008) 9 DTR 146 / 325 ITR 607 (P&H)(High Court)*

#### **S. 69 : Unexplained investments – Survey – Surrender [S. 133A]**

Addition on the basis of surrender during survey held to be not justified.

*CIT v. Gianchand Bhajan Lal (2008) 3 DTR 269 (P&H)(High Court)*

#### **S. 69 : Unexplained investments – Sale consideration – Evidence**

Alleged understatement of sale consideration of shops, in the absence of any material on record to show that the actual consideration received by assessee for transfer of shops in question was more than what has been stated in the transfer deed, no addition could be made.

*CIT v. Emerald Construction (P) Ltd. (2007) 212 CTR 20 / 291 ITR 59 (Raj.)(High Court)*

**S. 69 : Unexplained investments – Assessment – Cost – Reference to valuation officer**

The assessee was engaged in construction business. Whether there could be any addition on account of DVO's report that the assessee had invested unexplained income.

The High Court held that if the unexplained income in the investment was added, that would give rise to the cost of construction and the result would remain the same; i.e., "Zero". The said addition was made on the basis of DVO's report. Reference could be made to the DVO for the purpose of sections 55(A), 131, 133(6) and 142(2) and not for the purpose of finding out the cost.

*CIT v. Star Builders (2007) 294 ITR 338 (Guj.)(High Court)*

**S. 69 : Unexplained investments – Bogus purchases – Proof – Closing stock**

No addition is sustainable on account of alleged bogus purchases of raw materials since the Revenue has not disputed the details of closing stock nor there was any material to show that purchase price shown in the invoices was inflated or part of the amount paid to supplier had come back to the assessee. (A.Y. 1977-78)

*CIT v. Kashiram Textile Mills (P). Ltd. (2006) 202 CTR 293 / 284 ITR 61 (Guj.)(High Court)*

**S. 69 : Unexplained investments – Sales – Identity disclosed – Parties denied – Purchases**

Transaction of purchase shown in regular books of accounts, identity of sales disclosed. Amount cannot be added in total income as unexplained investment. (A.Y. 1988-89)

*Babulal C. Borana v. ITO (2006) 282 ITR 251 / 195 CTR 199 / 144 Taxman 174 (Bom.)(High Court)*

**S. 69 : Unexplained investments – Stock statement to bank – Practice**

Addition due to discrepancy in stock statements shown to the bank and the stock reflected in the books as per Balance Sheet. Prevailing practice is that inflated figures are given to bank in order to avail more overdraft facilities. Addition not sustainable. (A.Y. 1979-80)

*CIT v. Khan & Sirohi Steel Rolling Mills (2006) 200 CTR 595 / 152 Taxman 224 (All.)(High Court)*

**S. 69 : Unexplained investments – Stock statement to Bank – Estimated**

No addition could be sustained on the basis of difference between closing stock declared in trading account and stock statement submitted to the bank as the stock position shown to the bank was on estimate basis and inflated value was shown to avail more credit facility. (A.Y. 1990-91)

*Ashok Kumar v. ITO (2006) 201 CTR 178 / 149 Taxman 479 (J&K)(High Court)*

**S. 69 : Unexplained investments – Construction cost – Material**

Estimation of higher cost of construction of the building made by the Assessing Officer – In the absence of any objective material on record to negate the findings of Appellate Authorities (CIT(A) and ITAT) that cost of construction determined by assessee was fair and reasonable, addition made thereof is deleted. (A.Ys. 1982-83, 1983-84)

*CIT v. Nathubhai H. Patel (2006) 201 CTR 102 / 285 ITR 67 / 154 Taxman 117 (Guj.)(High Court)*

**S. 69 : Unexplained investments – Investment – Jewellery**

Investment in jewellery assessed as income from undisclosed sources. Assessee explaining that the alleged jewellery was gifted to his wife by his father-in-law during various ceremonies including on the occasion on marriage. No convincing material brought in by the Revenue to reject the explanation. Addition deleted. (A.Y. 1990-91)

*CIT v. V. Natarajan 203 CTR 37 / 287 ITR 271 / 154 Taxman 399 (Mad.)(High Court)*

**S. 69 : Unexplained investments – Construction expenses – Valuation report**

In view of decision of Apex Court in *Smt. Amiya Bala Paul v. CIT* (2003) 262 ITR 407 / 130 Taxman 511, Assessing Officer cannot obtain report of the Department Valuation for the purpose of determining cost of construction and, therefore, addition based on report of DVO on account of discrepancy in cost of construction cannot be sustained. (A.Y. 1983-84)

*CIT v. Ganesh Rice Mills (2006) 280 ITR 409 / (2005) 145 Taxman 452 / 196 CTR 513 / 280 ITR 409 (P&H)(High Court)*

**S. 69 : Unexplained investments – Construction expenses – Valuation report**

When credibility of books of account maintained by assessee is not doubted, Revenue should not be carried away merely by the report of the Departmental Valuation Officer and make addition with respect to difference in cost of construction between Valuation Report of the Departmental Valuation Officer and cost of construction as debited in books of account of assessee. Tribunal order deleting the addition was affirmed by High Court.

*ACIT v. C. Subba Reddy (2005) Tax LR 373 (Mad.)(High Court)*

**S. 69 : Unexplained investments – Excess stock – Year of addition**

Party ledgers of appellant- firm seized revealed a sum of ` 2.66 lakhs in account of sundry creditors whereas Balance sheet filed by appellant at time of original assessment revealed

` 5.47 lakhs on account of sundry creditors, in absence of a finding by Assessing Officer that appellant actually made investments in stock in trade during relevant financial year, addition of such difference to assessee's income under section 69 for relevant year was not justified. (A.Y. 1989-90)

*Aurobindo Sanitary Stores v. CIT (2005) 276 ITR 549 / 144 Taxman 872 / 196 CTR 230 (Orissa) (High Court)*



### **S. 69 : Unexplained investments – Jewellery – Instruction no 1916 dt 11-5-1994 – Seizure**

Even after relief under CBDT Instruction No. 1916 dated 11/5/1994 (exemption for jewellery owned by ladies of family) had been given in respect of unexplained jewellery found during search, Tribunal was justified in deleting remaining addition by taking into consideration status of assessee and his family member and fact that the jewellery had been declared by ladies in their wealth tax assessments. (A.Ys. 1988-89 to 1998-99)

*CIT v. Kailash Chand Sharma (2005) 198 CTR 201 / 146 Taxman 376 (Raj.)(High Court)*

### **S. 69 : Unexplained investments – Stock – Bank**

Addition on account of difference between stock value declared in the accounts and the value declared to the Bank. Addition was sustained in the absence of any acceptable evidence on record to disbelieve the bank statement. (A.Y. 1989-90)

*Recon Machine Tools Pvt. Ltd. v. CIT (2004) 204 CTR 184 / 286 ITR 637 / 155 Taxman 252 (Ker.)(High Court)*

### **S. 69 : Unexplained investments – Cash credit in the name of a partner – Firm**

Even where cash credit in the name of a partner has been assessed as unexplained in hands of firm, if a partner's explanation regarding source of such deposit is disbelieved, such deposit can be assessed as unexplained investment in the hands of partner also; there is no question of double taxation. (A.Y. 1977-78)

*Jagmohan Ram Chandra v. CIT (2004) 141 Taxman 574 / 274 ITR 405 / 193 CTR 153 (All.)(High Court)*

### **S. 69 : Unexplained investments – Jewellery – Wealth tax returns**

Where jewellery seized during search and seizure operation was shown in wealth tax returns of the person who had given jewellery to assessee before such search operation, jewellery seized could not be treated as unexplained investment by assessee. (A.Y. 1993-94)

*Mahadev Prasad Agarwal v. CIT (2005) 272 ITR 598 / (2004) 136 Taxman 211 / 186 CTR 264 (Raj.)(High Court)*

### **S. 69 : Unexplained investments – Lottery ticket – Black money – Proof**

Where both Commissioner (Appeals) and Tribunal found that on basis of enquiry by Assessing Officer it could not be held that assessee had purchased lottery ticket in market after draw from some one else to convert his black money in to white addition of prize money in assessee's hands was not justified. (A.Y. 1988-89, 1989-90)

*CIT v. Suresh Kumar Goyal (2004) 140 Taxman 420 / 270 ITR 50 / 190 CTR 344 (Raj.)(High Court)*

**S. 69 : Unexplained investments – Construction Expenses – Surrender of amount – Loose sheets**

If assessee had surrendered amount against excess stock found at the time of search, then, no addition was warranted on basis of transactions mentioned in loose slips found during search. (A.Y. 1990-91)

*Radhakishan Rammranjan v. CIT (2003) 132 Taxman 204 / 185 CTR 368 / (2005) 272 ITR 410 (Raj.)(High Court)*

**S. 69 : Unexplained investments – AIR information – Second owner of the units of mutual funds**

Addition on account of unexplained investment cannot be made in the hands of the assessee on the basis of AIR information, when the assessee was only the second owner of the units of mutual funds and the identity of the first owner was established and they are assessed to tax.

*S. Ganesh v. ACIT (2011) TIOL 87 ITAT-Mum. 701 / (2011) 42-B. BCAJ (March P. 33)(Mum.)(Trib.)*

**S. 69 : Unexplained investments – Statement on oath – Stamp duty valuation [S. 132(4)]**

Price of the plots paid by the assessee being consistent with the circle rate which the stamp duty has been paid and the department having not found any document or evidence to establish that the assessee has made more payment than that found recorded in his accounts, the statement made by the assessee under section 132(4) surrendering the amount could not have been taken as basis for making addition as unexplained investments in plots. (A. Y. 2006-07).

*ACIT v. Raj Dharwala (Dr) (2011) 63 DTR 113 (Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Addition on money**

In the absence of any material on record to show that the assessee has in fact paid on money for the purchase of flat, addition could not be made in the hands of the assessee merely on the basis of the statement of a partner of the vendor firm or the notings on a document which was seized from the business premises of the said firm. (A.Y. 1999-2000)

*Jawaharbai Atmaram Hatthiwala v. ITO (2010) 128 TTJ 36 (UO)(Ahd.)(Trib.)*

**S. 69 : Unexplained investments – Remittances through banking channel [S. 5(2)(b)]**

In the case of remittances through banking channel the nature and source of the funds get an such remittances cannot be taxed under section 5(2)(b). (A.Y. 1995-96)

*Susila Ramasamy (Smt.) v. ACIT (2010) 36 DTR 418 / 130 TTJ 363 / 37 SOT 146 / 8 ITR 363 (Chennai)(Trib.)*

**S. 69 : Unexplained investments – Stamp valuation [S. 50C, 69B]**

Section 50C creates a legal fiction for taxing capital gains in lands of seller and it cannot be extended for taxing difference between apparent consideration and valuation done by stamp authorities as undisclosed investment under section 69 and 69B. (A.Y. 2004-05)

*ITO v. Harley Street Pharmaceuticals Ltd. (2010) 38 SOT 486 / 6 ITR 182 (Hyd.)(Trib.)*

#### **S. 69 : Unexplained investments – Purchase of goods – Third party statement**

Addition could not be made towards unrecorded purchases of goods by the assessee from a third party simply on the basis of some entries found in the books of the said party, once the assessee has denied the transaction and the statement relied upon by the revenue does not disclose the bill number through which the alleged transaction was entered into. (A.Y. 2003-04)

*ITO v. Mayur Agarwal (2010) 133 TTJ 1 / 128 ITD 55 / 43 DTR 116 (TM)(Agra)(Trib.)*

#### **S. 69 : Unexplained investments – Remanding the matter back to Assessing Officer – Justification**

In the course of assessment proceedings the Assessing Officer asked for the source of investment of ₹ 8,64,670/- in connection with supply of coal of 1408 MT on road permit. In reply assessee filed the affidavit of "H" (Coal lifting agent) and the copy of agreement executed between assessee and "H", who had deposited money with CCL on behalf of assessee. Not satisfied with the explanation, the Assessing Officer made addition under section 69. On appeal CIT(A) deleted the addition. On appeal by the Department the Judicial member remanded the matter back to Assessing Officer, whereas the Accountant Member confirmed the order of Assessing Officer. On reference to third member it was held that the Judicial member was right in restoring the matter back to Assessing Officer for disposal afresh. (A.Y. 1991-92)

*ACIT v. Kaycee Glass Works (2010) 127 ITD 109 / 132 TTJ 406 / 42 DTR 522 (TM)(Agra)(Trib.)*

#### **S. 69 : Unexplained investments – Alleged bogus purchase – Non filing of Confirmation – Certificate from Bank [S. 145]**

Assessing Officer was not justified in making the disallowance of purchases made by the assessee merely due to non filing of confirmation from suppliers especially when assessee has filed certificate from the bank indicating the facts that cheques issued by it were cleared and no defects in the books of account was pointed out. (A.Y. 2004-05)

*YFC Projects (P) Ltd. v. Dy. CIT (2010) 46 DTR 496 / 37 SOT 130 / 134 TTJ 167 (Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – VDIS, 1997 – Other than Declarant – Gift from Declarant [S. 68]**

Benefit of declarations made by ladies and minors under VDIS, 1997, is also available to a person other than the declarant to the extent of amount declared unlike the

earlier schemes and therefore, gifts received by the assessee from three ladies by way of account payee cheques out of the amounts declared by them under VDIS, 1997 which are supported by valid and subsisting certificates issued by the competent authority (CIT) have to be accepted as genuine and cannot be treated as undisclosed income of the assessee. (A.Ys. 2001-02 and 2002-03)

*Dy. CIT v. Mayawati (Ms.) (2010) 48 DTR 65 / (2011) 135 TTJ 274 (Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Investment in purchase of land – Stamp duty valuation**

A plot was purchased by four individuals for a total consideration of ` 5 lakhs. It was valued by Sub-Registrar for the purposes of stamp duty at ` 9,82,355/- on which stamp duty of ` 88,420/- was paid. Assessing Officer added the entire amount of ` 10,70,775/- as the value of investment made in the subject land purchased by the alleged AOP. It was held that provisions of section 50C cannot be extended to the case of the purchaser unless the fact of understatement is established by the Revenue.

Further, all the four individual purchasers were income tax assessee and were in the service of State Govt. for last several years and in some cases their spouses are also in service. It was not difficult for them to invest ` 5 lakhs collectively. Hence, as no contrary material was brought on record. Addition was deleted.

*Sangam Tower v. ITO (2009) 31 DTR 172 (Jp.)(Trib.)*

#### **S. 69 : Unexplained investments – Statement of third parties – Burden on revenue**

Assessee's Income cannot be assessed on basis of statement of a third party, unless there is some material to corroborate that statement. Burden shifts on the Revenue to prove that Assessee had deliberately suppressed his Income.

*ITO v. R. L. Narang (Dr.) (2008) 174 Taxman 96 (Mag.)(Chd.)(Trib.)*

#### **S. 69 : Unexplained investments – Bogus purchase – Sales tax department**

Assessing Officer could not make addition on the basis of observations made by the Sales-tax Department without conducting independent enquiries. (A.Y. 1999-2000)

*ITO v. Permanand (2007) 107 TTJ 395 (Jodh.)(Trib.)*

#### **S. 69 : Unexplained investments – Rate of local PWD – CIT(A)**

Rates of local PWD has to be adopted and not that of CPWD and therefore CIT(A) was justified in deleting under section 69. (A.Y. 1997-98)

*ITO v. L. N. Memorial & Hospital Research Center (2007) 107 TTJ 291 (Jodh.)(Trib.)*

#### **S. 69 : Unexplained investments – Cost of construction – District valuation officer**

Difference between the cost of construction declared by the assessee and the cost estimated by DVO being negligible, it cannot be inferred that the assessee has made

any undisclosed investment and therefore, no addition can be sustained. (A.Ys. 1988-89, 1989-90)

*Saroj Gupta (Smt) v. ITO (2007) 106 TTJ 1073 (Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Value of stock**

Addition made on account of difference in value of stock declared to the bank vis-à-vis stock found recorded in the books of account was rightly deleted as the stock shown to the bank included the stocks of the proprietary concerns of two directors of the assessee company. (A.Y. 1998-99)

*ACIT v. Simron Printers (P) Ltd. (2006) 100 TTJ 1106 (Rajkot)(Trib.)*

#### **S. 69 : Unexplained investments – Purchase – Outstanding payable**

Purchases having been accepted to be genuine balance remaining outstanding at the end of the year against such purchases cannot be treated as bogus liability. Addition made on that basis cannot be sustained. (A.Y. 1997-98)

*Jt. CIT v. Mathura Das Ashok Kumar (2006) 101 TTJ 810 (All.)(Trib.)*

#### **S. 69 : Unexplained investments – Sales – Firm – Directors partners**

Where the sale was shown to be made to a firm consisting of assessee's director as partner addition of credit balance in account of firm was justified where neither amount was claimed by firm nor genuineness of sale to firm was proved. (A.Y. 1994-95)

*A. P. S. Associates (P) Ltd. v. ACIT (2006) 101 TTJ 15 / 101 ITD 215 (Amritsar)(Trib.)*

#### **S. 69 : Unexplained investments – Loan transaction recorded in seized diaries**

Assessing Officer having accepted that the outgoings recorded in two diaries maintained in the normal course of finance business. There being no material on record so as to fasten the ownership of the outgoings to the assessee, addition was not called for. (A.Ys. 1993-94 to 1995-96)

*Biren V. Savla v. ACIT (2006) 100 TTJ 1006 (Mum.)(Trib.)*

#### **S. 69 : Unexplained investments – Statement – Retracted**

Evidence placed while retracting the statement made under survey, can not be rejected by christening it as afterthought, and addition on basis of earlier statement could not be sustained.

*Laxmi Narayan Jangid v. ITO (2006) 152 Taxman 61 (Mag.)(Jodh.)(Trib.)*

#### **S. 69 : Unexplained investments – VDIS – Validity**

Once the declaration under VDIS was accepted, Assessing Officer can not make addition in regular assessment treating the declaration filed as invalid, and can not ignore the facts of VDIS.

*Parvati Roopchand Hemrajani (Smt) v. Dy. CIT (2006) 153 Taxman 3 (Mag.)(Ahd.)(Trib.)*

**S. 69 : Unexplained investments – Purchases – Parties not traceable**

Addition cannot be made for bogus purchases simply because parties are not traceable. (A.Y. 1987-88, 1988-89, 1989-90)

*ACIT v. Jewel Emporium, Bench "B" (ITA No.402 to 404/JP/2003) dated 25th January, 2006 (Tax World – April 2006 – Vol XXXV - P. 119) (Jp.)(Trib.)*

**S. 69 : Unexplained investments – Bank deposits – Plot of land – Fund flow**

Addition for bank deposits and investment in plot of land cannot be made under section 69 treating its source as unexplained ignoring the fund flow statement. (A.Y. 198-99)

*Adeshwar Jain v. ITO – ITA No. 261/JU/2004, dated 20th January, 2006 (Tax World – May 2006 – Vol XXXV – P. 150)(Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Report of inspector – Opportunity**

Assessing Officer was not justified in making addition in respect of unexplained investment in house property only on the basis of the report of the Inspector, more so when such report was not even confronted to the assessee. (A.Y. 1998-99)

*ITO v. Prakash Chand (2006) 100 TTJ 639 (Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Cash flow statement – Plot of land**

Assessee having explained the source of investment in the plot through cash flow statement and the CIT(A) having accepted the explanation of the assessee addition rightly deleted. (A.Y. 1990-91)

*ACIT v. Jagdish Raj Chauhan (2006) 100 TTJ 464 (Amritsar)(Trib.)*

**S. 69 : Unexplained investments – Suppliers could not be located**

Addition under section 69 was not justified merely because suppliers could not be located and were not produced for examination. (A.Y. 1995-96)

*Rajesh P. Soni v. ACIT (2006) 100 TTJ 892 (Ahd.)(Trib.)*

**S. 69 : Power of attorney – Sold on behalf of owners – Power of Attorney**

Addition could not be made in the hands of the assessee on account of unexplained investment merely because he was holding power of attorney and sold the property on behalf of the owners. (A.Ys. 1984-85 to 1989-90)

*ACIT v. Janak Raj Chauhan (2006) 102 TTJ 297 (Amritsar)(Trib.)*

**S. 69 : Unexplained investments – Investment – Source explained**

Assessee having adduced all the requisite evidence the transactions could not be treated as bogus, and the explanation of the assessee that the investment in construction of residential house was made out of sale proceeds of shares could not be rejected. Addition under section 69 rightly deleted. (A.Y. 1997-98)

*ITO v. Kusumlata (Smt) (2006) 105 TTJ 265 (Jodh.)(Trib.)*



**S. 69 : Unexplained investments – VDIS – Sale of Jewellery**

Assessee having sold jewellery which was duly disclosed by him under VDIS, 1997, and produced bills and vouchers and sale consideration which was received through account payee draft, the primary onus cast on the assessee stood discharged and, therefore, addition could not be made. (A.Y. 1998-99)

*Badri Vishal Aggarwal v. Dy. CIT (2006) 105 TTJ 418 (Delhi)(Trib.)*

**S. 69 : Unexplained investments – Block assessment – Agricultural income**

Reasonable agricultural income shown by the assessee could not be treated as income from undisclosed sources merely because assessee has shown agricultural income for the first time and the land records show a different produce than what was sold by assessee. (A.Y. 2001-02)

*Bhanuben Chimanlal Malavia (Smt) v. ITO (2006) 100 TTJ 337 (Rajkot)(Trib.)*

**S. 69 : Unexplained investments – Valuation of Inventory – Discrepancy in stock [S. 145]**

Matter remitted to Assessing Officer to verify the explanation of the assessee that the difference between the valuation of inventory in the books and that submitted to the bank arose merely on account of difference in bifurcation of the total quantity into levy and non-levy (free) sale sugar in the two statements and to enquire as to whether the reduction in quantity of levy sugar as shown by the assessee at the end of the year was on account of a temporary or a permanent reason and to adjudicate the matter in accordance with law after recording definite findings. (A.Y. 1994-95)

*ITO v. Sahakari Khand Udhog Mandal Ltd. (2006) 99 TTJ 771 (Ahd.)(Trib.)*

**S. 69 : Unexplained investments – Jewellery – Circular of Board – Limit of 500 gms – Seizure**

Held that while making an addition on account of unexplained investment in Jewellery at least a credit of 500 gms per married lady, and 250 gms per unmarried daughter be given. (CBDT Instruction No. 288/63/93-It (Inv) II dt. 11-5-1994)

*Rajendra C. Shah v. Jt. CIT (2007) 158 Taxman 170 (Mag.)(Mum.)(Trib.)*

**S. 69 : Unexplained investments – Search & Seizure – On money – Statement – Retraction [S. 131, 132]**

Assessee purchased a flat in a building from a builder under an agreement. During search and seizure operation conducted some loose papers, allegedly pertaining to that flat, were seized. When confronted, assessee's father, in his statement recorded under section 132(4), admitted to have paid ` 50 lakhs as on-money besides agreed consideration for said flat. However, during post-search operations, in his subsequent statement made under section 131, he denied to have paid any on-money and clarified that his earlier statement was incorrect. Subsequent clarification given by him had to be accepted as proper explanation of earlier statement during course of search and no addition could be retained only on basis of earlier statement, ignoring subsequent clarification given before conclusion of search enquiries.

*Aishwarya K. Rai (Ms) v. Dy. CIT (2007) 104 ITD 166 / (2006) 105 TTJ 825 (TM)(Mum.)(Trib.)*

**S. 69 : Unexplained investments – Estimation – Second hand car**

Assessing Officer having not made any enquiry to determine the amount paid by the assessee for purchase of second-hand car, addition on account of unexplained investment could not be made simply by estimating higher value than the disclosed amount. (A.Y. 1995-96)

*ITO v. Chaman Lal Nagpal (2006) 102 TTJ 890 / 7 SOT 887 (Amritsar)(Trib.)*

**S. 69 : Unexplained investments – Gold ornaments – CBDT-Circular – 500 gms.**

Gold ornaments which have been assessed in the wealth-tax assessments of assessee's wife jewellery said to be belonging to the assessee's daughter-in-law being less than the prescribed limit of 500 gms. laid down by the CBDT, and jewellery claimed to be belonging to married daughters of the assessee addition on account of unexplained investment was rightly deleted. (A.Y. 1991-92)

*Dy. CIT v. Arjun Dass Kalwani (2006) 102 TTJ 977 / 101 ITD 337 (Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Date of purchase and payments – Discrepancy**

Discrepancy between date of purchase and date of payment would not justify treatment of such payment as undisclosed investment in purchase. (A.Ys. 1986-87 to 1996-97)

*Subhash Chand Chopra v. ACIT (2005) 92 TTJ 1087 (Delhi)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – CPWD rates**

Where difference in cost of construction arrived at by Assessing Officer for making addition on account of unexplained investment was because DVO had applied CPWD rate while PWD rates, which should have been applied (as Ujjain where property was situated was a mufassil area), were 25 per cent lower, addition was not justified. (A.Ys. 1994-95 to 1996-97)

*ITO v. Prakashchand Soni (2005) 94 TTJ 631 (Indore)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Valuation reports – Rejection of books of account – CPWD rates opportunity for cross examination [S. 144]**

Where search did not result in discovery of any secret books or documents or diaries showing that assessee incurred a higher expenditure on construction than declared in the books and accepted by Assessing Officer in regular assessment, difference in valuation arising out of subject report of Valuation Officer could not be brought to charge in block assessment. Reference to valuation cell was not justified where there was no rejection of books of assessee in respect of cost of construction. CPWD rates cannot be applied in State of Karnataka to estimate cost of construction. Opportunity

of cross examination of under to whom allegedly on-money was paid must be provided.

*Dinesh K. Shah v. Dy. CIT (2005) 92 TTJ 109 (Bang.)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Valuation officer [S. 142A]**

Where no material was recovered during course of search relating to cost of construction of building, Assessing Officer could not make a reference to Valuation Officer under section 142A to arrive at cost of construction and make addition on the basis thereof. (A.Y. 1986-87 to 1996-97)

*Subhash Chand Chopra v. ACIT (2005) 92 TTJ 1087 (Delhi)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Records**

Where assessee had maintained complete records of cost of construction and same was duly reflected in books of account and during course of search and seizure action, while evidence was found indicating undisclosed income from profession, no such evidence was found to show that assessee had utilised her undisclosed income in construction of house property, addition on account of undisclosed investment in property was not justified.

*ACIT v. Sharda Adhalkha (Dr. Mrs). (2005) 95 TTJ 643 (Amritsar)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Factory building – Accounts – Audit**

Where cost of construction as incurred by assessee in erection of factory building, was duly accounted for in its books of account, assessee had filed audit report relating to assessment in question showing details of such investment therein and Assessing Officer had not disputed year-wise investment either, no addition to assessee's income on account of unexplained investment in cost of construction could be made. (A.Y. 1988-89)

*Dy. CIT v. Shakti Enterprises (P.) Ltd. (2005) 97 TTJ 426 (Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Benami flat**

Where addition was made to assessee's income on account of investments in flats allegedly held benami in assessee's name without affording reasonable opportunity of hearing to assessee, matter was to be remanded to Assessing Officer for deciding issue afresh.

(A.Y. 1992-93)

*ITO v. Janak Kumar C. Vyas (2005) 92 TTJ 1231 (Ahd.)(Trib.)*

**S. 69 : Unexplained investments – Construction expense benami – Relevance of statement**

Where apart from confessional statement made by assessee before DDIT (Inv.) there was no evidence that assessee had indeed made any investment in property in assessment year under reference and facts showed that he had neither acquired any

plot or shops in year 1993 as stated by him in confessional statement, addition based on such statement was not justified. (A.Ys. 1994-95 to 2000-01)

*ITO v. Bua Dass (2005) 97 TTJ 650 (Amritsar)(Trib.)*

#### **S. 69 : Unexplained investments – Stocks – Excess deficit stock**

Where during course of search, excess stock/deficit stock was found in respect of various items of scrap and Assessing Officer treated excess stock found as purchases made by assessee out of unaccounted income and deficit stock as sold outside books of account, addition made by Assessing Officer on both counts was not justified. (A.Ys. 1990-91 and 1991-92)

*ACIT v. Mercury Metals (P.) Ltd. (2005) 1 SOT 435 / (2004) 90 TTJ 156 (Ahd.)(Trib.)*

#### **S. 69 : Unexplained investments – Stocks – Surrender**

Where it was crystal clear that surrender made by assessee was not forced surrender but, on contrary, assessee surrendered a sum of ` 5 lakhs when he was cornered regarding unrecorded purchases, addition based on assessee's surrender was justified. (A.Y. 1996-97)

*ITO v. Ashok Kumar (2005) 92 TTJ 467 (Chd.)(Trib.)*

#### **S. 69 : Unexplained investments – Stocks – Retraction – Evidence**

Where assessee had made a statement and on basis of same impugned additions were made, but statement was retracted and 'evidence' was placed that stock was not correctly taken and verified, action of Assessing Officer was not justified as he had simply rejected above evidence of assessee and solely placed reliance on statement in question. (A.Y. 1997-98)

*Laxmi Narayan Jangid v. ITO (2005) 93 TTJ 37 (Jodh.)(Trib.)*

#### **S. 69 : Unexplained investments – Stocks – Survey [S. 133A]**

If assessee can demonstrate that valuation of stock adopted by survey party during survey proceedings under section 133A was wrong with reference to material on record, then addition under section 69 on account of unexplained investment in excess stock could not be justified merely on ground that said addition was offered by assessee during survey proceedings. (A.Y. 1997-98)

*Harshad L. Thakker v. ACIT (2005) 3 SOT 277 (Mum.)(Trib.)*

#### **S. 69 : Unexplained investments – Share application money**

Where assessee had proved identity of investors as also genuineness of transactions and furnished details of their PAN/GIR numbers, burden of proof on assessee stood discharged and there was no justification for treating share application money as unexplained investment by assessee.

*Ghaziabad Footwear (P.) Ltd. v. Dy. CIT (2005) 142 Taxman 18 (Mag.)(Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Cash – Entry found in loose paper**

Entry found on a loose paper cannot have any authenticity or evidentiary value in itself.

*Nem Chand Daga v. ACIT (2005) 1 SOT 515 (Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Jewellery – VDIS**

Addition on account of alleged bogus sale of diamond and ornaments, declared by assessee under VDIS, on basis of statement of buyer which he had subsequently retracted, was not justified. (A.Y. 1998-99)

*Mohanlal R. Daga v. ITO (2005) 92 TTJ 1236 / 147 Taxman 28 (Mag.)(Trib.)*

#### **S. 69 : Unexplained investments – Jewellery – Search**

Where gold ornaments and silver articles were seized during search of assessee's premises and during course of search itself, assessee had given full details and descriptions of gold ornaments and silver articles found from his bedroom and bedroom of his wife, he had also indicated that ornaments were received by his wife at time of her marriage, and gold ornaments and silver articles found at time of search were much less than what were received by wife of assessee at time of her marriage and thereafter, department had not disputed that wife of assessee belonged to a very reputed and rich family, addition on account of such jewellery, etc., was not justified. (A.Ys. 1983-84 & 1985-86 to 1988-89)

*ACIT v. Ganga Devi Sangneria (Smt) (2005) 96 TTJ 351 (Cuttack)(Trib.)*

#### **S. 69 : Unexplained investments – Jewellery – Search and seizure**

Where pursuant to search and seizure, assessee stated that excess jewellery found during search belonged to his married daughter who had left same with her parents, but neither nexus of assessee's daughter with jewellery found at assessee's residence was established nor source of acquisition of said jewellery was satisfactorily explained by her and no satisfactory explanation was offered by assessee about same, addition on account of jewellery was justified.

*Nem Chand Gupta v. Dy. CIT (2005) 1 SOT 515 (Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Household goods – Search**

Where during course of search conducted at residence of assessee, certain documents related to purchase of air-conditioners were found and seized and assessee contended that air-conditioners did not belong to him but belonged to trust and his name was referred or used only for availing discounted price, in absence of material found during search to connect assessee with purchase of air-conditioners, addition made could not be sustained.

*Arif Mohd. Khan v. Jt. CIT (2005) 147 Taxman 93 (Mag.)(Delhi)(Trib.)*

#### **S. 69 : Unexplained investments – Household goods – VDIS**

Where an addition for ₹ 4,50,000 was made by Assessing Officer on account of alleged unexplained investment made by assessee in furniture, renovation and interior decoration of residential property and it was case of assessee before lower

authorities that assessee's father had disclosed ` 4.5 lakhs under VDIS, 1997, as amount declared by assessee's father under VDIS, 1997 was proximate to expenditure incurred by assessee for renovating his house, assessee's explanation was to be accepted and addition deleted.

*Dy. CIT v. Sunil Umashankar Rungta (2005) 94 TTJ 329 (Mum.)(Trib.)*

#### **S. 69 : Unexplained investments – Investment in machinery – Ownership**

Where addition was made on account of unexplained investment in machinery which assessee claimed as belonging to another company and used by assessee, it was duty of assessee to prove that it was not owner of machinery but that machinery was taken from some other company; however, as no evidence was brought on record by assessee in support of explanation, addition was justified. (A.Ys. 1987-88 to 1996-97)

*ACIT v. Tritan Happy Home (P.) Ltd. (2005) 94 TTJ 628 (Cuttack)(Trib.)*

#### **S. 69 : Unexplained investments – Deposits – Source – Marriage gift**

Explanation of assessee that deposit of ` 25,000 made in Money Multiplier Deposit Scheme, which deposit certificates were found from his residence during search operation, came out of marriage gifts was a reasonable explanation and no addition was justified on account of such certificates.

*Bommana Swarna Rekha(Smt) v. ACIT (2005) 94 TTJ 885 / 147 Taxman 59 (Mag.)(Visakha.)(Trib.)*

#### **S. 69 : Unexplained investments – Deposits – Firm and partner**

Where in respect of deposits with firm of which he was partner, assessee had explained plausible source which could not be countered and assessee had no other source of income, addition by treating such deposits as unexplained, was not justified. (A.Y. 1996-97)

*Rajkumar Niyati v. ITO (2005) 98 TTJ 23 (Jodh.)(Trib.)*

#### **S. 69 : Unexplained investments – Blank – Promissory notes – Affidavit of Director**

Addition on basis of blank promissory notes found during search of assessee's premises was not justified where director of company issuing those promissory notes had filed affidavit to the effect that no amount had been borrowed by company in respect of seized document and assessee's explanation was that those promissory notes were mere proposals which did not materialize.

*Godavari Devi Agrawal (Smt) v. Jt. CIT (2005) 95 TTJ 720 (Nagpur)(Trib.)*

#### **S. 69 : Unexplained investments – Drafts in name of partner – Nexus**

Addition on account of alleged purchase of drafts was not justified where no nexus between drafts purchased in name of partner and assessee-firm was established. (A.Ys. 1985-86, 1987-88)

*ITO v. Varun Steel Industries (2005) 1 SOT 464 / 91 TTJ 382 (Chd.)(Trib.)*



**S. 69 : Unexplained investments – Income of firm – Partner**

Assessee-partner's share in undisclosed income declared by firm has to be treated as available for investment in assessee's hands and cannot be treated as unexplained investment in his hands. (A.Y. 1992-93)

*V. P. Oswal v. ACIT (2005) 92 ITD 227 / 92 TTJ 665 (TM)(Pune)(Trib.)*

**S. 69 : Unexplained investments – Loans advanced in earlier years**

Where assessee had invested certain amount in business of commission agency and dealing in agricultural produce and in his return, assessee showed break up of source of investment as receipt of loans from his wife and his HUF and recoveries of loans from three relatives, which were advanced by assessee in earlier years out of his agricultural income and sale consideration of agricultural land, since all three persons admitted fact of having received loan from assessee in past and returned in year in question, in absence of any material or evidence to controvert their version, amount could not be treated as unexplained income of assessee and, therefore, addition made on that count was to be deleted. (A.Y. 2000-01)

*Narayan Ram Chhaba v. ITO (2005) 96 ITD 163 / 97 TTJ 297 (TM)(Jodh.)(Trib.)*

**S. 69 : Unexplained investments – Cash flow statement – HUF – Sources**

Where there was evidence to show that assessee's HUF had income from house property and had sold certain properties and that assessee had income from brokerage in money-lending transactions and thus there was no reason to disbelieve accumulation of capital addition on account of unexplained investment by recasting cash flow statement was not justified. (A.Ys. 1983-84 & 1985-86 to 1988-89)

*ACIT v. Ganga Devi Sangneria (Smt) (2005) 96 TTJ 351 (Cuttack)(Trib.)*

**S. 69 : Unexplained investments – Valuation report Cash flow**

Where cash flow chart of the assessee showed that there was no difference in investment on account of investment in FDR and purchase of plot, addition in respect of said items could not be sustained. Further since Assessing Officer has no power to refer matter to DVO under section 131(l)(d), addition on account of unexplained investment in construction of house based on DVO's report could not be sustained.

*Nitin Sharma v. ITO (2005) 146 Taxman 62 (Mag.)(Delhi)(Trib.)*

**S. 69 : Unexplained investments – Capital asset – Any asset**

S. 69 nowhere provides that the addition under section 69 can be made only when undisclosed Investments are made in a Capital asset.

*Das's Friends Builders (P) Ltd. v. Dy. CIT (2003) 127 Taxman 130 (Mag.)(Agra)(Trib.)*

**S. 69 : Unexplained investments – House hold articles – Year of investment**

Section 69 can be invoked if an assessee has made any Investment in the immediately preceding year which is unexplained. As revenue could not prove that Investments in household articles viz TV, A.C etc were made in immediate preceding year, the additions made were deleted.

*Anil Jain v. ACIT (2003) 130 Taxman 181 (Mag.)(Delhi)(Trib.)*

**S. 69 : Unexplained investments – Non-resident – NRE account – Source**

Non-resident assessee is duty bound to explain source of Investment in NRE account, as maintenance of books of account is not a condition precedent for application of S. 69. (A.Y. 1996-97)

*Dy. CIT v. Finlay Corporation Ltd. (2003) 86 ITD 626 / 84 TTJ 788 (Delhi)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Year of assessability**

The alleged unaccounted Investment in construction cannot be assessed in one year. (A.Y. 1992-93 & 1993-94)

*M Papaiah Reddy v. ITO (2003) 79 TTJ 181 / 132 Taxman 57 (Mag.)(Bang.)(Trib.)*

**S. 69 : Unexplained investments – Construction expenses – Expert's opinion**

In absence of any defect found in maintaining the cost of construction, and which was duly supported by approved valuer's report, enhancement was held to be unjustified. Also held that expert opinion cannot be rejected without obtaining another valuation report.

*Suman Goel (Smt) v. ITO (2003) SOT 127 (Delhi)(Trib.)*

**S. 69 : Unexplained investments – Gifts – Occasion – Financial capacity**

Burden is on the assessee to prove the genuineness of the Gift, establishing the identity and financial capacity of the donor. And if same is established that the relationship part or specific occasion for making of the gift can be ignored. (A.Y. 1996-97)

*Devichand B Jain v. ITO (2002) 77 TTJ 789 (Pune)(Trib.)*

**S. 69 : Unexplained investments – Gifts – Remittances in Foreign Exchange (Immunities) Scheme 1991**

Once it is proved that gift has been received as per special Act, then it would not be subject matter of enquiry under the Income-tax Act. (Circular No 611 dt 30.09.1991 (191 ITR 319 (st). (A.Y. 1992-93)

*ACIT v. V K Gupta (2003) 86 ITD 200 / 81 TTJ 141 (All.)(Trib.)*

**S. 69 : Unexplained investments – Jewellery etc. – CBDT instruction – 500 gms – Seizure**

Held, that addition under section 69 when the Jewellery found is below 500 gms is not justified.

Board has vide Instruction No. 1916 dt 11.5.1994 prescribed the limit of 500 gms for Gold Jewellery which can not be seized.

*Sulochana Devi Jaiswal (Smt) v. Dy. CIT (2003) SOT 228 (Jab.)(Trib.)*

**S. 69 : Unexplained investments – Excess Stock – Survey**

Held, that excess stock found during survey was rightly added as unexplained Investment as Income from other Sources.

*ACIT v. Harshad F Sheth (2003) 127 Taxman 158 (Mag.)(Mum.)(Trib.)*

**S. 69 : Unexplained investments – Inflated stock statement – Hypothecation – Onus assessee**

Held, that in absence of any evidence produced by the assessee in support of the claim that stock in hypothecation statement to bank was inflated, addition was justified. (A.Y. 1991-92)

*ACIT v. Vikas Agency (2003) 85 ITD 536 / 80 TTJ 999 (Ahd.)(Trib.)*

**S. 69 : Unexplained investments – Discrepancy in Stock statement given to bank – Obtaining loan**

Addition on account of Stock valuation shown at higher value in the statement submitted to Bank for availing Loan as against value as per Books, was deleted. (A.Y. 1989-90)

*Sudhir Industries v. ITO (2003) 81 TTJ 765 / (2004 2 SOT 941 (Jodh.)(Trib.)*

Also refer :

*Poly Plastics v. ACIT (2003) SOT 66 (Chd.)(Trib.)*

*ITO v. Harihar Plastic Industries (2003) SOT 55 (Jab.)(Trib.)*

**S. 69 : Unexplained investments – Double addition – Discrepancy in Stock statement given to bank**

Held, addition made on account of suppressed sale of goods from excess raw material as shown in statement to bank, as well as addition on account of excess stock as per discrepancy in bank statement and books, would amount to double addition.

*Sarin Chemical Laboratory v. ACIT (2003) SOT 463 (Agra)(Trib.)*

**S. 69 : Unexplained investments – Initial investment – Purchase of goods**

Where the sale proceeds of first consignment of goods bought outside the books were utilized for purchase of goods and so on, only initial Investment in purchase of drafts, alongwith expenses and margin could be added to Income.

*Gujrati Mal Pran Nath v. ACIT (2003) 126 Taxman 60 (Mag.)(Chd.)(Trib.)*

**Section 69A : Unexplained money, etc.**

**S. 69A : Unexplained money – Deemed income – Deposit in the name of 3rd person**

In order to find out whether the assessee is the owner of the money in terms of section 69A, which provides that unexplained money, etc., may be deemed by the Assessing Officer to be the income of the assessee, the principle of common law jurisprudence in section 110 of the Evidence Act, 1872, can be applied.

When a deposit stands in the name of a third person and that person is related to the assessee, the proper course would be to call upon the person in whose books the

deposit appears or the person in whose name the deposit stands, to explain such deposit. (A.Ys. 1992-93, 1993-94, 1994-95)

*CIT v. K. Chinnathamban* (2007) 292 ITR 682 / 209 CTR 183 / 162 Taxman 459 / 211 CTR 86 / 201 Taxation 157 (SC) / 5 SCC 390

**S. 69A : Unexplained money – Claim for redemption fine – Deduction not allowed**

It was held that section 69A does not provide for any deduction, thus claim for redemption fine is not admissible. Adjudication, confiscation and later redemption fine does not affect the assessment in case of seized articles under section 69A. (A. Y. 1989-90)

*P. Soman v. CIT* (2011) 196 Taxman 335 (Ker.)(High Court)

**S. 69A : Unexplained money – Statement of third party – Survey**

No incriminating material was found during search proceedings. Merely on the basis of statement of third party no addition can be made.

*CIT v. Concorde Capital Management Company Ltd.* (2011) 334 ITR 346 / (2009) 25 DTR 97 / 183 Taxman 172 (Delhi)(High Court)

**S. 69A : Unexplained money – Search and seizure – Jewellery – Streedhan**

During search at assessee's premises 906.900 gms. jewellery was found from assessee, assessee explained that he was married 25 years back and jewellery was received by his wife in form of 'stree dhan' or on occasions, such as, birth of a child etc. The High Court held that collecting jewellery of 906.900 gms by a women in a married life of 25 years in the form of stree dhan or other occasions is not abnormal hence the assessing officer was unjustified treating only 400 gms as 'reasonable' and treating remaining jewellery as 'unexplained'. (A. Y. 2006-07).

*Ashok Chaddha v. ITO* (2011) 202 Taxman 395 / 63 DTR 353 / 245 CTR 416 / (2012) 69 DTR 82 (Delhi)(High Court)

**S. 69A : Unexplained money – Undisclosed sales – Rate of profit**

Where purchases are duly recorded in the books, the entire undisclosed sales cannot be assessed as income; only the net profit rate can be treated as income. (A.Y. 1997-98)

*Man Mohan Sadani v. CIT* (2010) 188 Taxman 277 / (2008) 304 ITR 52 (MP)(High Court)

**S. 69A : Unexplained money – Deemed income – Owner**

Assessee is liable to be assessed in respect of short delivery of such goods to its customer. (A.Y. 1996-97)

*D. N. Singh v. CIT* (2010) 324 ITR 304 / 233 CTR 304 / 42 DTR 87 (Patna)(High Court)

**S. 69A : Unexplained money – VDIS 1997 – Sale of Jewellery**

Sale of jewellery disclosed in the VDIS 1997 certificate had been issued. Once identity of purchasers were accounted for, in the absence of any contrary material to the contrary it was difficult to hold that the transactions were not genuine. Deletion of addition by the Tribunal was justified.

*CIT v. Kiran Deepak Kukreja (2010) 190 Taxman 393 (Bom.)(High Court)*

### **S. 69A : Unexplained money – Finding of directorate of revenue intelligence – Independent proof**

Assessing Officer makes the addition merely by relying on the findings of Directorate of Revenue Intelligence and Commissioner of Customs. Held that in the absence of any independent enquiry made by the Assessing Officer, no addition is sustainable. (A.Y. 2001-02)

*CIT v. Vignesh Kumar Jewellers. (2009) 222 CTR 79 / 180 Taxman 18 / 12 DTR 293 (Mad.)(High Court)*

### **S. 69A : Unexplained money – No sales outside books found – Quantity tally**

No sales outside the books were found; full details of opening stock, purchases, issues, balance were furnished before the Assessing Officer which were not at all examined by him. The High Court held that addition made by the Assessing Officer under section 69A of the Act could not be sustained more so, when the Assessing Officer had ignored very vital details and documents filed before him.

*CIT v. Hindustan Tin Works Ltd. (2007) 199 Taxation 361 (Delhi)(High Court)*

### **S. 69A : Unexplained money – Reference to district valuation officer [S. 55A, 131, 133(6)]**

The assessee was engaged in construction business. Whether there could be any addition on account of DVO's report that the assessee had invested unexplained income.

The High Court held that if the unexplained income in the investment was added, that would give rise to the cost of construction and the result would remain the same; i.e., "Zero". The said addition was made on the basis of DVO's report. Reference could be made to the DVO for the purpose of sections 55A, 131, 133(6) and 142(2) and not for the purpose of finding out the cost.

*CIT v. Star Builders (2007) 294 ITR 338 (Guj.)(High Court)*

### **S. 69A : Unexplained money – Estimated cost – Valuation officer**

Where the Assessing Officer added the difference between the estimated cost of construction as determined by the assessee, which was supported by a registered valuer's report, and cost of construction as determined by the D.V.O. to the income of the assessee. On appeal the Hon'ble High Court, held that as the Assessing Officer had not pointed out any defect in the books of account maintained by the assessee mere difference in estimation by the D.V.O. and the registered valuer cannot be the sole ground for making addition to the income of the assessee.

*CIT v. Swastik Udyog P. Ltd. (2006) 194 Taxation 707 (P&H)(High Court)*

### **S. 69A : Unexplained money – Cash found – Presumption [S. 132(4A)]**

Where the assessee could not explain that the cash found in his possession belonged to third person by bringing on record any cogent material to that effect, the revenue under section 132(4A) was entitled to draw a presumption against the assessee in respect of the cash found in assessee's possession.

*Shri Sakhrum v. ACIT (2006) 195 Taxation 532 (Delhi)(High Court)*

### **S. 69A : Unexplained money – Cash seized – Sufficiency of balance**

Assessee had sufficient cash in hand on date of search to cover amount seized during search, addition of cash was not justified.

*CIT v. Vinod Vivyogi (2005) 274 ITR 373 / (2004) 140 Taxman 711 (P&H)(High Court)*

### **S. 69A : Unexplained money – Sales – Profit**

Total undisclosed sale cannot be regarded as the profit of assessee.

*CIT v. Balchand Ajit Kumar (2003) 263 ITR 610 / 186 CTR 419 / 135 Taxman 180 (MP)(High Court)*

### **S. 69A : Unexplained money – Deemed owner – Seized diamonds**

Where assessee was treated as deemed owner of diamonds seized during search operations, view taken by the Tribunal will be a possible view, order of tribunal was confirmed.

*Dialust v. Dy. CIT (2003) 261 ITR 456 / 183 CTR 413 / 133 Taxman 810 (Bom.)(High Court)*

### **S. 69A : Unexplained money – Amounts recovered from possession of another person – Burden of proof**

When department wants to add an amount recovered from possession of another person as income of an assessee, department has to prove that assessee is owner of amount recovered from possession of another person.

*Bimal Kumar Damani v. CIT (2003) 128 Taxman 723 / 261 ITR 635 / 181 CTR 494 (Cal.)(High Court)*

### **S. 69A : Unexplained money – Sale proceeds of shares – Demat account**

Where the shares sold by the assessee were received by the assessee in her demat account on July 3, 2003 transferred from another client and were not those shares stated to be purchased by the assessee on June 17, 2002. The credit in demat account of the assessee on July 3, 2003 remaining unexplained and hence addition was justified. (A. Y. 2004-05).

*Kusum Lata (Smt) v. ACIT (2011) 10 ITR 737 / 127 ITD 378 (Delhi)(Trib.)*

### **S. 69A : Unexplained money – Gift – Onus on assessee to prove – Occasion**



When assessee received the gift onus is on him not only to establish identity of person making gift but also his capacity to make such gift and he is also required to demonstrate, what kind of relationship or what kind of love and affection donor has for assessee and to explain circumstances in which gift were made. (A. Y. 2001-02).  
*Sushil Kumar Mohanani v. ITO (2011) 131 ITD 237 / 138 TTJ 150 / 54 DTR 1 (TM)(Jab.)(Trib.)*

**S. 69A : Unexplained money – Opportunity of cross examination – Third party statement**

Addition under section 69A made by the Assessing Officer on the basis of statements of third parties without providing these statements to the assessee and without affording any opportunity to him to cross-examine the deponents despite repeated requests by the assessee is not sustainable.

*ITO v. Pawan Kumar Gupta (2010) 42 DTR 148 / 131 TTJ 92 (Delhi)(Trib.)*

**S. 69A : Unexplained money – Gift from Donor residing USA – Creditworthiness not proved – No occasion or reason to Gift**

As the explanation offered by the assessee was not satisfactory and as there was no direct confirmation from the Donor, credit worthiness of Donor was not proved through independent sources, particularly about his assets from record of US Revenue authorities, as there was no occasion or reason for giving gift, addition was confirmed as unexplained money.

*Dinesh Babulal Thakkar v. ACIT (2010) 39 SOT 332 (Ahd.)(Trib.)*

**S. 69A : Unexplained money – Statement in the course of survey [S. 133A]**

In the course of survey excess cash was found, the assessee's statement was recorded under section 131, where he offered the same as income. In the return the assessee has not shown the income offered in the course of survey. The Explanation was offered stating that the said amount was withdrawal from the bank. The Tribunal confirmed the addition by applying the test of human probabilities. (A.Y. 2003-04)

*Shree Mahalaxmi Rice Mill v. ITO (2010) 122 ITD 1 / (2009) 121 TTJ 594 / 20 DTR 298 (TM)(Nagpur)(Trib.)*

**S. 69A : Unexplained money – Loose papers – Survey**

Amount shown and recorded on slips found during survey having been advanced to one person for purchase of land and that person having confirmed the same, no addition was called for simply on the basis of presumption. (A.Y. 2001-02)

*Prakash Motwani v. ITO (2009) 125 TTJ 941 / 122 ITD 17 / 30 DTR 42 (TM)(Agra)(Trib.)*

**S. 69A : Unexplained money – Gift – First cousin**

Gift was received by assessee from first cousin in Austria, and sufficient evidences were filed. It was held that gifted amount can not be treated as income on basis of

suspicion, and Assessing Officer not accepting the declaration filed as an admissible piece of evidence, unless there are some tangible evidences.

*Saurab Gupta v. ITO (2006) 153 Taxman 52 (Mag.)(Delhi)(Trib.)*

#### **S. 69A : Unexplained money – Jewellery – Gold**

Where assessee-jeweller failed to rebut presumption due to its inability to furnish full addresses of customers, under these circumstances, mere entry in GS-11 and GS12 register could not conclusively prove ownership of such gold by alleged customers so as to absolve assessee from its onus to prove that gold possessed by it actually belonged to customers which was lying with assessee for abnormally long period ranging from 1 to 15 years. (A.Y. 1991-92)

*ACIT v. Jyotsna Alankar Bhandar (2005) 92 TTJ 443 / 147 Taxman 45 (Mag.)(Cuttack)(Trib.)*

#### **S. 69A : Unexplained money – Gifts – Denial by donor**

Where donor denied having made gifts allegedly received by assessee's minor daughters and donor was found to be not a man of means, onus was on assessee to show that donor had capacity to make said gifts and since assessee had failed to show that donor had capacity and sufficient income to make gifts in question, assessee's claim of gifts to his minor daughters could not be accepted as established; affidavit of donor and gift-tax return were of no avail to assessee. (A.Y. 1990-91)

*Ashok Kumar Narwania v. ITO (2005) 95 ITD 103 / 95 TTJ 915 (TM)(Chd.)(Trib.)*

#### **S. 69A : Unexplained money – Gifts – NRE Account – ED – Denial by donor**

Where assessee claimed certain receipts as gifts from NRE account of a party but alleged donor had stated before Enforcement Directorate that no foreign currency had ever been deposited by him and he had never executed any gift to anybody, addition treating such gifts as bogus was justified. (A.Y. 1993-94)

*Angoori Devi Jain (Smt) v. ITO (2005) 1 SOT 413 (Delhi)(Trib.)*

#### **S. 69A : Unexplained money – Money used for repayment of loan – Joint account**

Where assessee had paid back a loan which was considered beyond his means and assessee's explanation was that money came from joint account with his sister and belonged to her. As there is no presumption that moneys lying in a joint account with a bank, vis-à-vis third parties, other than bank, belong to only one of them or to both equally, amount coming from joint account could not be treated as belonging to assessee and added to his income; it was particularly so since his sister was a lady of means and had confirmed that moneys in joint account belonged to her.

*ITO v. Pravin Ramkrishna Urganlawar (2005) 142 Taxman 76 (Mag.)(Nagpur)(Trib.)*

#### **S. 69A : Unexplained money – Construction of premises – Survey [S. 133A]**

Valuation report for cost of construction of premises was found during survey under section 133A depicting higher figure. The addition made based on subsequent re-valued figures based on physical verification by the Valuation Cell was upheld.

*ITO v. Shakti Banquet Hall 159 Taxman 83 (Mag.)(Jodh.)(Trib.)*

#### **S. 69A : Unexplained money – Statement during search – Loose paper**

Addition under section 69A cannot be sustained when no evidence in form of loose paper or documents was found to prove that the assessee owned undisclosed money except the statement recorded during search, which was also not relied by the Assessing Officer.

*Davi Sarin v. ACIT (2003) 84 ITD 391 / 79 TTJ 39 (Agra)(Trib.)*

#### **S. 69A : Unexplained money – Gift – Friend**

Mere suspicion is not sufficient to doubt the genuineness of gift from friend. Also quantum of Gift can not be the reason for doubting the gift which had been proved by the assessee by producing the donor, who not only confirmed the transaction but even proved his capacity. There is no bar that a friend cannot gift to his friend.

*Sudhir Budhreja v. ACIT (2003) 129 Taxman 21 (Mag.)(Delhi)(Trib.)*

#### **Section 69B : Amount of investments, etc., not fully disclosed in books of account**

##### **S. 69B : Investments not disclosed in books – DVO's report**

Addition under section 69B of the Act alleging undisclosed investment cannot be made merely on the basis of District Valuation Officer's (D.V.O.) report when the books of accounts of the assessee are not rejected nor any incriminating material was found during the search to suggest that assessee had made any payment over and above the consideration mentioned in the return.

*CIT v. Bajrang Lal Bansal (2011) 335 ITR 572 / 51 DTR 287 / 241 CTR 64 (Delhi)(High Court)*

##### **S. 69B : Investments not disclosed in books – Reference to DVO – Block assessment – Search and seizure [S. 142A]**

Proviso to section 142A has no retrospective effect, assessment by Assessing Officer and appeal by CIT(A) having been decided prior to 30th Sept., 2004, it was not open to the Assessing Officer to order valuation of property by DVO.

*CIT v. Naveen Gera (2011) 56 DTR 170 / (2010) 328 ITR 516 (Delhi)(High Court)*

##### **S. 69B : Investments not disclosed in books – Discrepancy in stock – Statement to bank**

Stock shown more to bank, additions deleted by the Tribunal was confirmed. (A.Y. 2000-01)

*ITO v. Bhagwati Prasad Raika (2010) 39 DTR 45 / 232 CTR 101 (Chhattisgarh)(High Court)*

**S. 69B : Investments not disclosed in books – Pronotes – Mother of Karta**

During the search of premises of assessee-HUF certain pronotes were recovered from mother of karta and there was no plausible explanation as to how those came into her possession, such pronotes were rightly treated as assessee- HUF's investments.

*Babulal Jiwan ram (HUF) v. CIT (2005) 146 Taxman 275 / 202 CTR 612 (All.)(High Court)*

**S. 69B : Investments not disclosed in books – Statement of counsel in civil court – Not sufficient to make addition in tax proceedings**

Merely because counsel for assessee made a statement in a civil court that total investment in property was ` 13 crores and odd, it would not be sufficient material to come to the conclusion that the said figure represented actual investment.

*CIT v. Naresh Khattar (HUF) (2003) 261 ITR 664 / 130 Taxman 15 / 183 CTR 317 / 261 ITR 664 (Delhi)(High Court)*

**S. 69B : Investments not disclosed in books – Stamp duty valuation – Sub-register**

Addition cannot be made on account of unexplained investment in property only on the basis of stamp duty charged by the Sub-Registrar. (A.Y. 2001-02)

*ITO v. Satyanarayan Agarwal (2007) 112 TTJ 717 (Jodh.)(Trib.)*

**S. 69B : Investments not disclosed in books – Stamp valuation – Understatement of purchase consideration of house**

No addition under section 69B can be made simply on the basis of stamp duty valuation as this is not a good parameter to determine the real cost of a property. (A.Y. 1999-2000)

*Kamal Kishore Chandak v. ITO (2006) 103 TTJ 843 (Jodh.)(Trib.)*

**S. 69B : Investments not disclosed in books – Construction of residential house – Value's report**

Addition made under section 69B towards unexplained investment in the cost of construction of residential house rejecting the report of the registered valuer which was rendered by a detailed estimate method after item wise measurement of construction of work and taking into account rates on the basis of scheduled rate prevailing in that particular area, and relying only on the report of Assistant Valuation Officer (AVO) under section 133(6) without any suspicion of understatement in cost of construction cannot survive. CPWD rates can not be applied. (A.Y. 1999-2000)

*S. Bangarappa HUF v. Dy. CIT (2005) 96 TTJ 662 / (2006) 155 Taxman 84 (Mag.)(Bang.)(Trib.)*

**S. 69B : Investments not disclosed in books – Bogus wages – Payment**

Where Assessing Officer accepted a contract between assessee and a contractor but allowed deduction of only ` 50,000 out of total wages of ` 4,11,780 due to contractor

as assessee had paid only that sum during relevant assessment year, holding that it was unbelievable that labourers engaged by contractor worked without getting daily wages and contractor lacked financial capacity to engage labourers on credit basis to carry contract work, as assessee's claim was supported by entries in accounts and accounts of contractor, Assessing Officer was not justified in making addition by treating balance of wages as bogus and making addition thereof. (A.Y. 1996-97)  
*ITO v. Twinkle Papers (P.) Ltd. (2005) 95 ITD 235 / 96 TTJ 914 (TM)(Chd.)(Trib.)*

**S. 69B : Investments not disclosed in books – Construction expenses – DVO's report – Nursing home – Rejection of books**

Addition to Income on account of cost of construction of a nursing home on basis of DVO's valuation, without rejecting the books of account was held to be unjustified. (A.Y. 1990-91)  
*ITO v. V. K. Bansal (2003) 79 TTJ 12 / 131 Taxman 186 (Mag.)(Chd.)(Trib.)*

**Section 69C : Unexplained expenditure, etc.**

**S. 69C : Unexplained expenditure – Payment by assessee to hospital doctors – Fees received which was distributed**

In the course of search unaccounted collection of fees was noticed in the names of doctors which claimed to be distributed to various doctors whether as regular employees or as consultants. The Court held that addition cannot be made in the hands of assessee, department should have issued the notice to the Doctors for confirmation of the payments and if they deny then only proceedings can be initiated under section 69C. On the facts the assessee has discharged the burden by providing the particulars of payments made to doctors. High Court confirmed the order of Tribunal which has deleted the addition. (A. Ys. 2000-01 to 2003-04).  
*CIT v. Lakshmi Hospital (2011) 62 DTR 261 / 245 CTR 471 / 201 Taxman 300 (Ker.)(High Court)*

**S. 69C : Unexplained expenditure – Assessment – Power [S. 142A]**

Powers under section 142A do not extend to estimating amount of unexplained expenditure referred to under section 69C. (A.Y. 1998-99)  
*CIT v. Aar Pee Apartments P. Ltd. (2010) 188 Taxman 39 / (2009) 319 ITR 276 / 227 CTR 495 / 32 DTR 92 (Delhi)(High Court)*

**S. 69C : Unexplained expenditure – Search – Slips – Jotting**

During the search certain slips containing some jotting were found. It was explained by the assessee that jotting were just rough noting and not actual expenditure incurred by the assessee. The Assessing Officer treated the amount jotted by the assessee as unexplained expenditure under section 69C of the Act, without making any inquiry as to actual incurring of expenses by assessee. The High Court held that as there was nothing on record to show that the expenditure was actually incurred by

the assessee nor did the Assessing Officer made any efforts to find out whether expenditure were actually incurred by the assessee.

*CIT v. Lubtec India Ltd. (2008) 202 Taxation in 484 (Delhi)(High Court)*

**S. 69C : Unexplained expenditure – Proviso w.e.f. 1-4-1999 is not retrospective – Ouns**

Burden is on the Revenue to show that the amount credited in the name of the assessee in the books of the third party constituted income of the assessee for the purpose of section 69C of the Act. Thus, if Revenue authorities failed to discharge this burden addition under section 69C was not called for. The High Court also held that the proviso to section 69C of the Act w.e.f. 1-4-1999 is not retrospective and would not apply to earlier years.

*Krishna Textile v. CIT (2008) 11 DTR 217 (Guj.)(High Court)*

**S. 69C : Unexplained expenditure – Estimate of house hold expenditure – Future income**

Estimated household expenditure in a particular year, with reference to income of a future year (that too 5 to 10 years later) in absence of any other evidence, would be arbitrary and illogical.

*CIT v. C.L. Khatri (2006) 282 ITR 97 / (2005) 147 Taxman 652 / 197 CTR 44 (MP)(High Court)*

**S. 69C : Unexplained expenditure – Marriage expenditure – Duty's of ITAT**

Where basis on which expenditure on marriage was estimated at higher figure was not discussed by Tribunal while confirming addition, addition on account of such expenditure was not justified. (A.Y. 1990-91)

*Vinay Kumar Modi v. CIT (2005) 272 ITR 91 / (2004) 190 CTR 548 (Delhi)(High Court)*

**S. 69C : Unexplained expenditure – Statement of Director before Central Excise Authorities – Basis**

Additions cannot be made merely on the basis of statement made by the Director before Central Excise Authorities, without any supporting evidence regarding suppression of production. (A. Ys. 2004-05, 2005-06).

*ITO v. Arora Alloys Ltd. (2011) 12 ITR 263 (Chd.)(Trib.)*

**S. 69C : Unexplained expenditure – Third Party Records – Purchases**

Additions under section 69C for unaccounted purchases and for unexplained expenditure, cannot be made on basis of third parties records, when Assessee has not claimed said amounts as expenditure in its books.

Held, section 69C can be invoked only when Assessee has incurred expenditure for which he has no explanation or the explanation is not satisfactory. (A.Y. 2003-04)

*ACIT v. Abhishek Exports (2010) 195 Taxman 59 / 3 ITR 823 (Mag.)(Ahd.)(Trib.)*



**S. 69C : Unexplained expenditure – Construction of shopping complex – Deductible**

Unexplained expenditure on construction of shopping complex is business expenditure and is allowable as deduction. (A.Ys. 1988-89, 1989-90)

*ITO v. Jagdish Chandra Virmani (2007) 106 TTJ 1073 (Delhi)(Trib.)*

**S. 69C : Unexplained expenditure – Ad hoc addition – Debited in P&L account**

Assessing Officer having made ad hoc addition on the basis that certain trading expenses had not been debited in the books and were incurred outside the books of account without looking to the trading and P & L a/cs wherein such expenses have been debited, addition was without any basis and was rightly deleted. (A.Y. 1998-99)

*ITO v. Prakash Chand (2006) 100 TTJ 639 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Marriage expenses – Incurred by father**

In view of the explanation of assessee that marriage expenses of his son and daughter were incurred by assessee's father supported by the statement of assessee and his daughter. Addition was rightly deleted by the CIT(A). (A.Y. 1982-83)

*ACIT v. D. S. Mehta (2006) 102 TTJ 161 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Estimate basis – Evidence**

Addition under section 69C cannot be made simply on estimate basis after estimating higher expenditure without conducting enquiries and bringing adverse material on record. (A.Y. 1997-98)

*Nathulal v. Dy. CIT (ITA No.321/JP/2001) dated 8th December, 2005 (Tax World – April 2006 – Vol XXXV – P 91) (Jp.)(Trib.)*

**S. 69C : Unexplained expenditure – Disclosed in books – Mahurat of shop**

Assessee having admitted to have spent ` 4,000 on Mahurat of shop but not disclosed the same in the books of account, addition under section 69C was justified.

*Bhimraj Rajpurohit v. ITO (2006) 105 TTJ 899 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Report of inspector – Opportunity**

Assessing Officer was not justified in making addition in respect of unexplained investment in house property only on the basis of the report of the Inspector, more so when such report was not even confronted to the assessee. (A.Y. 1998-99)

*ITO v. Prakash Chand (2006) 100 TTJ 639 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Expenditure – Property of AOP**

Property in question being a property of an AOP in which assessee had only 1/3rd share, addition in respect of unexplained investment could not be made in the hands of the assessee merely on the basis of disclosure made by him under section 132 (4). (A.Ys. 1991-92 and 1993-94)

*Jagdish Raj Chouhan v. ACIT (2006) 99 TTJ 153 (Amritsar)(Trib.)*

**S. 69C : Unexplained expenditure – Cash seized – Evidence produced**

Assessee having produced necessary evidence to substantiate his explanation that the cash seized from his driver was received as advance from some of the relatives of the assessee who were in the same line of business by producing said person who have owned up various amounts before the Assessing Officer, addition under section 69A was not justified. (A.Y. 1994-95)

*Khalil Choudhary v. ITO (2006) 99 TTJ 249 (Mum.)(Trib.)*

**S. 69C : Unexplained expenditure – Gold seized – Possession of brother**

In the absence of any evidence, value of gold seized by DRI from the possession of assessee's brother could not be added in the hands of the assessee. (A.Y. 1987-88)

*ITO v. Pukhraj N. Jain (2006) 99 TTJ 364 / 95 ITD 281 (Mum.)(Trib.)*

**S. 69C : Unexplained expenditure – Surrender by Husband – No defects in the books of account**

Audited accounts and declared profits having been accepted and no document showing expenditure outside books of accounts having been found during search, addition towards unexplained expenditure on the basis of 'surrender' by assessee's husband in his statement during search was invalid. (A.Y. 1995-96)

*Sujata Grover (Smt) v. ACIT (2006) 99 TTJ 837 (Delhi)(Trib.)*

**S. 69C : Unexplained expenditure – Surrender by Husband – No defects in the books of account**

Assessee making high seas sales and producing evidence that customs duty, transportation and clearing charges were borne by buyers, no addition under section 69C was called for. (A.Y. 1988-89)

*Varsha Plastics (P) Ltd. v. ACIT (2006) 99 TTJ 487 (Mum.)(Trib.)*

**S. 69C : Unexplained expenditure – Expenses on marriage – Satisfactory explanation**

Expenses on marriage of assessee's son, Assessee having explained the expenditure incurred on the marriage of his son, addition on account of unexplained expenditure cannot be sustained. (A.Y. 1998-99)

*ITO v. Arun Kumar Gupta (2006) 103 TTJ 134 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Household expenses – Without basis**

Addition on account of low household expenses on basis of suspicion and surmises cannot be justified. (A.Y. 2000-01)

*Bajrang Lai Bansal v. Dy. CIT (2005) 94 TTJ 1071 (Delhi)(Trib.)*

**S. 69C : Unexplained expenditure – Household expenses – Search**

In absence of any incriminating document found during the course of search which could indicate any unexplained household expenses, no addition could be made on estimate basis in block assessment.

*Dy. CIT v. M. L. Jain (2005) 96 TTJ 362 (Jodh.)(Trib.)*

**S. 69C : Unexplained expenditure – Expenses – Registration – Source**

Where assessee-company had incurred certain expenditure on account of stamp duty and registration charges for purchase of immovable property, but had not shown same in its books of account and Assessing Officer made addition of said expenditure rejecting assessee's explanation that amount in question was spent by director from his personal fund, assessee's plea that such expenses were borne by a director from his personal fund could not be accepted when director was not shown as creditor in its books of account.

*Arti Exports (P.) Ltd. v. ITO (2005) 146 Taxman 89 (Mag.)(Delhi)(Trib.)*

**S. 69C : Unexplained expenditure – Proviso wef 1-4-1999 – Not retrospective**

Proviso added to Sec 69C w.e.f 1.4.1999 is not retrospective.

*Hindustan Metal Work v. ACIT (2003) SOT 442 (Agra)(Trib.)*

**S. 69C : Unexplained expenditure – Addition based on third party evidence – Opportunity**

No addition can be made on basis of material seized from premises of third party during search, without confronting assessee with such material.

*Babcock Power (Overseas Project) Ltd. v. Dy. CIT (2003) 131 Taxman 86 (Mag.)(Delhi)(Trib.)*

**S. 69C : Unexplained expenditure – Foreign tour expenses – Estimation**

Estimation of expenses and addition thereof in connection with foreign tour was deleted on facts.

*Chaman Lal v. ACIT (2003) 133 Taxman 193 (Mag.)(Amritsar)(Trib.)*

**S. 69C : Unexplained expenditure – Household expenses**

Held that burden lie on the Department to prove that assessee had incurred more expenditure beyond the amount of withdrawal shown.

*Surendra D. Patel (Dr.) v. ACIT (2003) SOT 345 (Ahd.)(Trib.)*

**S. 69C : Unexplained expenditure – Marriage expenses – Source – Marriage gift**

Assessee's claim that part of marriage expenses were incurred out of marriage gifts, being reasonable had to be accepted, as giving gifts at time of marriage is conventional in this country.

*Barsaiya Glass House v. ITO (2003) SOT 518 (Jab.)(Trib.)*

**Section 69D : Amount borrowed or repaid on hundi**

**S. 69D : Amount borrowed or repaid on hundi – Hundi – Photocopies of paper**

Where the Assessing Officer made an addition under section 69D treating certain photocopies of paper seized as 'Hundi'. The High Court after analyzing the attributes of a 'Hundi' held that the seized paper cannot be a 'Hundi' as there are always three parties in a 'Hundi' transaction that is the drawer, drawee and payee. The drawer cannot himself be the drawee. The Court further held that a 'Hundi' is normally written in the oriental language as per mercantile custom and the seized paper was written in English language.

*CIT v. Capital Flour Mills P. Ltd. (2008) 202 Taxation 306 (Delhi)(High Court)*

**S. 69D : Amount borrowed or repaid on hundi – Hundi – Hand writing expert**

Departmental officers are not technically competent to give their findings on handwriting of parties. The only requirement of applying provision of section 69D is that the amount should be borrowed or re-paid on Hundi in cash.

*ACIT v. Omprakash & Co. (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

***Set Off or carry forward and Set Off***

**Section 70 : Set off of loss from one source against income from another source under the same head of income**

**S. 70 : Set off loss – Same head of income – Set off of indexed long term capital loss against non indexed long term capital gains [S. 48, 55, 112]**

Provisions of section 70(3) existed much prior to the mode of computation of capital gain without applying the benefit of indexation which were introduced later by an amendment in the year 2000. It cannot be therefore that the legislature would have contemplated while enacting the provisions of section 70(3) a situation as contemplated by proviso to section 112(1), when it used the expression 'similar computation' in section 70(3). Expression 'similar computation' used in section 70(3) refers to the computation under section 48 to 55 and not the computation under section proviso to section 48 vis-à-vis proviso to section 112(1). The Assessee was justified in setting off indexed long-term capital loss against non-indexed long-term capital gains. (A. Y. 2004-05)

*Vipul A. Shah v. ACIT (2011) 63 DTR 272 / 142 TTJ 807 / 47 SOT 189 (Mum.)(Trib.)*

**S. 70 : Set off loss – Same head of income – Capital gains – Capital loss [S. 112]**

Capital loss computed by assessee with indexation cost can be set off against long term capital gains computed without indexation. (A.Y. 2004-05)

*Keshav S. Phansalkar v. ITO (2009) 32 DTR 454 / 126 TTJ 892 / 32 DTR 454 (Mum.)(Trib.)*

**S. 70 : Set off loss – Same head of income – Exemption – STPI [S. 10A]**

Exemption under section 10A has to be allowed on income earned without setting off of loss of non STPI unit. Loss of the non STPI unit is to be carried forward. (A.Ys. 2003-04 & 2004-05).

*ACIT v. Honeywell Technology Solutions Lab. Pvt. Ltd., ITA Nos. 344 & 345/Bang/2009,*  
*dt. 4-8-2009, Bench – A – BCAJ P. 30, Vol. 41-B, Part 3, December 2009*  
*(Bang.)(Trib.)*

#### **S. 70 : Set off loss – Same head of income – Short term capital gain**

Set off of long-term capital loss against short-term capital gains is permissible under section 70 as it existed in assessment years 1988-89 to 2002-03.

*Jt. CIT v. Montgomery Emerging Markets Fund (2006) 102 TTJ 31 / 100 ITD 217*  
*(Mum.)(Trib.)*

#### **S. 70 : Set off loss – Same head of income – Intra-Source Set Off – Current years loss**

Current year's business Loss can be set-off against current year's profit from profession. (A.Ys. 1991-92 & 1992-93)

*ITO v. Vanishree Karunakaran (Mrs) (2003) 86 ITD 373 (Chennai)(Trib.)*

#### **S. 70 : Set off loss – Same head of income – Capital gains – Loss – Exemption [S. 10(38), 74(1)]**

Non-exempt capital loss cannot be set off against exempt capital gains. (A.Y. 2005-06)

*G. K. Ramamurthy v. Jt. CIT (2010) 2 ITR 139 / 129 TTJ 361 / 37 SOT 345 / 36 DTR 257 (Mum.)(Trib.)*

#### **Section 71 : Set off of loss from one head against income from another**

#### **S. 71 : Set off loss – Different heads – Year of Allowability**

Stock stored in State warehousing corporation was destroyed by fire in the year 1978. Suit was filed for reimbursement of loss. Suit was dismissed in the year 1982. Loss was allowable in the year 1983-84. (A.Y. 1983-84)

*New Diwan Oil Mills v. CIT (2010) 328 ITR 432 / 20 DTR 124 / 178 Taxman 461*  
*(P&H)(High Court)*

#### **S. 71 : Set off loss – Different heads – Loss from Non-Industrial Unit [S. 80HHA, 80AB]**

While computing deduction under section 80HHA with regard to income derived from industrial undertaking, loss from a non industrial unit, in terms of section 80AB and section 71, has to be adjusted first. (A.Y. 1987-88)

*CIT v. Mentha & Allied Products (2010) 326 ITR 297 / 47 DTR 284 / 236 CTR 329*  
*(All.)(High Court)*

### **S. 71 : Set off loss – Different heads – Inter head set off – Long term capital gain**

When there is long term capital gain, the assessee has to first set off short term capital loss there against and not against income from other sources.

*CIT v. Mahendra Co Ltd. (2004) 139 Taxman 315 / 269 ITR 12 / 190 CTR 86 (Raj.)(High Court)*

### **S. 71 : Set off loss – Different heads – Capital loss – Capital gains**

Assessee sold certain shares of Company "A" and claimed capital loss. Assessing Officer disallowed loss holding that assessee sold shares so as to claim set off this loss against capital gains arising on sale of land. Tribunal held that since shares were duly transferred and recorded in books of account and further, assessee also explained the circumstances in which he sold shares, capital loss on sale of shares can not be disallowed. (A. Y. 2004-05).

*Hasmukhbhai M. Patel v. ACIT (2011) 46 SOT 419 (Ahd.)(Trib.)*

### **S. 71 : Set off loss – Intra-head set off – Capital gain**

Set off of business loss against other income. Assessee's claim that the business loss should be first set off against income from other sources and balance if any is to be set off against the capital gains was sustainable. (A.Y. 1998-99)

*Coated Fabrics (P) Ltd. v. Jt. CIT (2006) 102 TTJ 1053 / 101 ITD 297 (Pune)(Trib.)*

### **S. 71 : Set off loss – Intra-head set off**

Loss claimed by assessee in order to be setoff against other income of assessee must be net result of computation of assessee's income chargeable to tax under any source or head and an assessee is not entitled to claim set off of any other arithmetical loss. (A.Ys. 2000-01 & 2001-02)

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

### **S. 71 : Set off loss – Intra-head Set Off – Brought forward unabsorbed depreciation**

Assessee can adjust brought forward unabsorbed depreciation against income under any other head (short-term capital gain in instant case), where assessee does not have income from business.

*ITO v. Basi Agri. Farm (P.) Ltd. (2005) 147 Taxman 100 (Mag.)(Delhi)(Trib.)*

## **Section 72 : Carry forward and set off of business losses**

### **S. 72 : Carry forward and set off – Business losses – Exempted income [S. 10B(6), 10B(8)]**

Where the assessee had forfeited the claim under section 10B because they were debonded by the Development Commissioner and hence, in the Income return filed for the Asst. year 1999-2000 deduction under section 10B was not claimed, the Tribunal



held that non compliance of section 10B(8) should not deprive the assessee from claiming the benefit of carry forward of business loss computed for that year. (A. Y. 1999-2000).

*CIT v. Torry Harris Sea Foods (P) Ltd. (2011) 55 DTR 239 / 242 CTR 111 (Ker.)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Hotel business – Agreement for running hotels – Disputes – Court receiver – No cessation of business – Brought forward losses**

The assessee was in the business of running hotels and for that purpose had entered into an agreement with another company to run the same. Disputes arose between the assessee and the company, the court pending adjudication of dispute appointed a court receiver to run the hotel business of the assessee. The dispute was decided by the court and the possession of the hotel was handed over to the assessee, the assessee ran the hotel business on its own. The Hon'ble High Court held that there was no cessation of business by the assessee, as the business was managed by the court receiver, who was none other than its own directors, and the business and assets were also never divested with the receiver, and therefore the assessee was entitled to carry forward and set off losses and depreciation relating to earlier years. (A. Ys. 1990-91 to 1992-93).

*CIT v. Dencomar Hotels (Goa) Ltd. (2011) 332 ITR 441 / (2009) 222 CTR 606 / (2008) 15 DTR 191 (Bom.)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Return filed – Claim before AO**

The assessee claimed a lesser amount of loss in its return filed. Subsequently, during the assessment proceeding before the assessing officer claimed a higher amount of loss. The High Court held that the claim of the assessee of a higher loss was correct and allowed the assessee to carry forward and set off the same in subsequent years. (A.Y. 1995-96)

*CIT v. Nalwa Investments Ltd. (2009) 19 DTR 235 / 322 ITR 233 / 179 Taxman 262 (Delhi)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Return filed within extended time – Assumption**

Return filed with extension of time on the basis of application seeking extension. When application was not disposed of, the assessee is justified to entertain belief that application is granted. Carry forward and set off is allowable even though intimation regarding extension of time to file the return was not given to the assessee. (A.Y. 1984-85, 1985-86)

*CIT v. Swastik Sanitary Works Ltd. (2006) 205 CTR 517 / 286 ITR 594 (Guj.)(High Court)*

*CIT v. Sumathi Process India Ltd. (2006) 206 CIT 236 / 284 ITR 109 (Mad.)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Shares held as Stock-in-trade – Nature of dividend income**

Shares are treated as stock in trade by assessee, dividend income earned thereon would be business income and set-off of carried forward loss against such income would be permissible. (A.Y. 1996-97)

*CIT v. Excellent Commercial Enterprises & Investments Ltd. (2005) 147 Taxman 558 / 197 CTR 187 / 282 ITR 423 (Delhi)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Unabsorbed depreciation-Investment allowance**

Unabsorbed depreciation gets precedence over unabsorbed investment allowance in matter of set-off. (A.Y. 1991-92, 1992-93)

*Seshasayee Paper & Boards Ltd. v. Dy. CIT (2005) 272 ITR 165 / 144 Taxman 812 (Mad.)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Change of previous year – Period of carry forward**

Change in previous year would be of no consequences in determining the period of carry forward of business loss provided under section 72(3). Assessee would not be entitled to carry forward business loss beyond period of eight years notwithstanding fact that because of change in previous year there was no assessment for one assessment year during period of eight assessment years. (A.Ys. 1986-87, 1987-88)

*CIT v. Covelong Beach Hotel (India) Ltd. (2003) 129 Taxman 473 / 262 ITR 544 / 182 CTR 461 (Mad.)(High Court)*

**S. 72 : Carry forward and set off – Business losses – Dividend income – Shares held for business**

Under section 72(1)(i), the brought forward business loss can be set-off against "the profits and gains of any business or profession carried on" by the assessee. Section 72(1)(i) does not use the word "assessable under the 'head' profits & gains of business". The answer to the question as to whether the securities formed part of the trading assets of the business and the income there from was income from the business has to be decided on commercial principles and not on the basis of the classification of 'heads of income' in section 14. Though for the purpose of computation of the income, dividends are assessable under the head "Other Sources", it does not cease to be part of the income from business if the securities are part of the trading assets. Accordingly, the assessee is eligible for set-off of dividend income as against business loss (*CIT v. Cocanada Radhaswami Bank Ltd. (1965) 57 ITR 306 (SC)* & *CIT v. New India Investment Corporation Ltd. (1978 ) 113 ITR 778 (Cal.)* followed). (A.Y. 2003-04)

*Gagan Trading Co. Ltd. v. Dy. CIT ITA No. 678/Mum/07 dated 18-2-2011 (Mum.)(Trib.) Source : [www.itatonline.org](http://www.itatonline.org)*

**S. 72 : Carry forward and set off – Business losses – Gains arising from “business assets” not eligible for set-off against brought forward business loss**

The assessee sold land & building used for business purposes. Though the gain was offered as capital gains, the assessee claimed, relying on *CIT v. Cocanada Radhaswami Bank Ltd. (1965) 57 ITR 306 (SC)* and other judgements, that as the assets were “business assets”, the gains there from were eligible for set-off against the brought forward business loss. The issue was referred to a Special Bench. HELD by the Special Bench against the assessee:

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

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

**S. 72 : Carry forward and set off – Business losses – Speculation business – Derivatives – Same business [S. 43(5), 73, 263]**

Loss from trading in derivatives treated as speculation loss in earlier years carried forward. The said loss can be set off against the profit from same business. i.e. allowable against the profit from trading in derivatives after amendment. (A. Y. 2006-07).

*Gajendra Kumar T. Agrawal v. ITO (2011) 63 DTR 345 / 11 ITR 640 / 45 SOT 156 (URO)(Mum.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Remission or cessation of trading liability – Business income [S. 41(1)]**

In order to allow business loss under section 72(1)(i) condition is that assessee should carry on business in year under appeal and it is only against profits of such business that brought forward loss can be set off. Where assessee's profits were assessed under section 41(1) as business income, said profits did not represent profits and gains of any business carried on by assessee and therefore, brought forward business loss was not allowable against profits assessed under section 41(1). (A.Y. 2002-01)

*Karnataka Intrade Corporation Ltd. v. ACIT (2010) 127 ITD 74 / 133 TTJ 616 / 45 DTR 257 (Bang.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Capital gain – Genuineness of transaction**

Assessee having shown capital gains from purchase and sale of shares of a worthless company. The transactions could not be accepted as genuine but a make believe arrangement to set off the loss incurred by the assessee on the sale of jewellery declared under VDIS. (A.Y. 1997-98)

*ACIT v. Som Nath Maini (2006) 100 TTJ 917 / 7 SOT 202 (Chd.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Capital loss – Intra head [S. 71, 74]**

Sec. 10B(6)(ii) restricts carry forward and set off of loss under section 72 & 74 only and not intra-head set off under section 70 and inter-head set off under section 71.

*Mindtree Consulting (P) Ltd. v. ACIT (2006) 102 TTJ 691 (Bang.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Bad debts – Finding in assessment order**

Section 72 speaks about a loss determined in the past year and not wholly set off against the income and as such where there was no finding either by Assessing Officer or by Commissioner (Appeals) that claim of bad debts was determined as a loss in any of past assessment years, provisions of section 72 could not be invoked. (A.Y. 1997-98)

*Aleli & Co. (P.) Ltd. v Dy. CIT (2005) 1 SOT 546 (Mum.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Belated return – Bona fide reason**

Assessee's claim for carry forward of loss could not be denied only on basis that return was filed late due to a bona fide reason. (A.Y. 1993-94)

*Jagdish Malpani v. ACIT (2005) 94 TTJ 321 (Indore)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Block assessment – Each previous year**

Where Assessing Officer has himself computed losses on basis of seized material and figure of losses is much more than figure of undisclosed income appearing in block assessment period, losses cannot be allowed to be ignored as block period for all purposes is one unit and figures of loss and income have to be looked into as a whole and not in context of each previous year.

*Singhania Polyester (P.) Ltd. v. ACIT (2005) 96 TTJ 614 (Luck.)(Trib.)*

**S. 72 : Carry forward and set off – Business losses – Purchase and sale price – Comparison**

Where assessee's claim for set-off of loss was rejected on ground that assessee was buying goods at higher rate and selling them at lower rate but it was found that Assessing Officer had compared average purchase price with average sale price whereas comparison was required to be made between purchase price of a specific

material with sale price of that very kind of material, disallowance of loss was to be deleted.

*Shiv Cable & Wire Industries (India) v. Addl. CIT (2005) 149 Taxman 3 (Mag.)(Delhi)(Trib.)*

### **S. 72 : Carry forward and set off – Business losses – Letting out immoveable property – Character of income**

Mere letting out of immovable property in exercise right of ownership of property would not imply carrying on of a business of letting out of properties and section 72 would not apply for setting-off of carried forward business loss against income from house property assessed under section 22 or against income assessed as 'Income from other sources'. (A.Y. 1995-96)

*ACIT v. Lavish Apartments (P.) Ltd. (2005) 92 ITD 58 / 98 TTJ 1100 (Delhi)(Trib.)*

### **S. 72 : Carry forward and set off – Business losses – Composite business – Manufacturing and trading**

Where manufacturing and trading of cement and other businesses of assessee constituted a composite business activity of assessee and assessee's cement plant was no longer in operation during relevant previous year, set off of loss incurred in earlier years against income of current year was permissible.

*Dy. CIT v. Dwarka Cement Works Ltd. (2005) 3 SOT 869 (Mum.)(Trib.)*

### **S. 72 : Carry forward and set off – Business losses – AOP or members – Right to carry forward**

AOP is entitled to carry forward and set off of business loss, as AOP is a separate assessable entity dehors the members of AOP. (A.Y. 1995-96)

*Birla Tyres v. Jt. CIT (2003) 80 TTJ 915 / 88 ITD 1 (TM)(Kol.)(Trib.)*

### **S. 72 : Carry forward and set off – Business losses – Book profit – Absorption of loss [S. 115J]**

A bare reading of sub-s. (2) of s. 115J shows that the benefit of carry forward of loss of the relevant accounting year would be covered by the computation of income as per normal provisions of the Act and determination thereof would not be dependent on the income computed under section 115J. On the facts of the case, the income was first computed under the normal provisions of the IT Act and after allowing the benefit of entire brought forward business loss of ` 85,51,607, the Assessing Officer determined the net business income under the normal provisions of the Act at ` 24,29,792 whereas 30% of book profit was worked out at ` 36,63,558 which was greater than the income computed under the normal provisions of the Act. Therefore, as per provisions of s. 115J, net taxable income was determined at ` 36,63,560. Therefore, the assessee was held to be not entitled to carry forward of loss claimed at ` 12,33,768, being difference between income computed under section 115J and income computed under the normal provisions of the Act i.e. ` 36,63,558 less ` 24,29,792. (A.Ys 1989-90 & 1990-91 ).

*S.A. Builders Ltd. v. ACIT (2003) 86 ITD 58 (2004) 86 TTJ 865 (Chd.)(Trib.)*

**Section 72A : Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.**

**S. 72A : Carry forward and set off – Amalgamation – Accumulated loss – Unabsorbed depreciation – Demerger – Hospitals – Industrial undertakings**

As both amalgamating and amalgamated companies are hospitals, they are not industrial undertakings" within the meaning of Sec. 72A(7)(aa). Therefore, amalgamated company is not entitled to C/F and set off of unabsorbed depreciation of amalgamating company under section 72A. (A.Y. 2000-01)

*ACIT v. Apollo Hospitals Enterprises Ltd. (2008) 215 CTR 460 / 300 ITR 167 / 171 Taxman 397 / 4 DTR 274 (Mad.)(High Court)*

**S. 72A : Carry forward and set off – Amalgamation – Demerger – Accumulated loss – Unabsorbed depreciation**

S. 72A(1) will come into operation after amalgamation is made effective and not before that; so far as sub-section (3) of section 72A is concerned, it is in nature of an advanced ruling.

*I.C.I. India Ltd. v. UOI (2005) 274 ITR 105 / 274 ITR 105 / 151 Taxman 65 (Delhi)(High Court)*

**S. 72A : Carry forward and set off – Amalgamation – Accumulated loss – Unabsorbed depreciation – Closing down of the business – New business**

Concession under section 72A is not available when the amalgamation is followed by a closing down of the business and amalgamated company or a subsidiary of amalgamated company starts a new business or industry with practically a new work force.

*Indian Metals & Ferro Alloys Ltd. v. Union of India (2003) 262 ITR 553 / 184 CTR 542 / 133 Taxman 817 (Orissa)(High Court)*

**S. 72A : Carry forward and set off – Amalgamation – Demerger – Accumulated loss – Unabsorbed depreciation – Carry forward and set off – Amalgamation of companies  
[S. 72, 78, 79]**

Amalgamating company was not having loss and provisions of sections 72A, 78 and 79 not being applicable, benefit of carry forward of losses of amalgamated company cannot be denied. Provisions of section 72A, trigger only when the losses of the amalgamating company are to be carried forward by the amalgamated company. As the amalgamating company was a profit making company, section 72A is not applicable. Provisions of section 79 are not applicable as more than 51 percent of the share holdings is in the same hands. As provisions of section 78 are not applicable benefit of carry forward cannot be denied. (A. Y. 2006-07).



*Wrigley India (P) Ltd. v. Addl. CIT (2011) 62 DTR 201 / 142 TTJ 23 (Delhi)(Trib.)*

**S. 72A : Carry forward and set off – Amalgamation – Demerger – Accumulated loss – Unabsorbed depreciation –Unabsorbed capital expenditure**

Terms “accumulated loss” and “unabsorbed depreciation” as defined in section 72A(7), do not include unabsorbed capital expenditure on scientific research, therefore in case of demerger, benefit of section 72A(4), cannot be extended to resulting company in respect of unabsorbed capital expenditure on scientific research. (A.Y. 2001-02)

*ITO v. Mahyco Vegetable Seeds Ltd. (2010) 123 ITD 40 / 13 DTR 574 / 119 TTJ 64 (Mum.)(Trib.)*

**S. 72A : Carry forward and set off – Amalgamation – Accumulated loss – Unabsorbed depreciation – Deduction [S. 80I]**

Where assessee's assessment was reopened to disallow excess deduction under section 80-I after amalgamation of RFL with it by virtue of an order of BIFR and in response to the notice assessee filed return of income and claimed set off of loss of RFL. As it was not a case where a fresh claim of loss had been made by assessee for first time or a claim was being made which had been rejected by Assessing Officer, Assessing Officer was to be directed to examine claim of loss considering order of BIFR passed under section 72A. (A.Ys. 1994-95, 1995-96)

*Vam Organic Chemicals Ltd. v. Dy. CIT (2005) 96 TTJ 600 / 6 SOT 775 (Delhi)(Trib.)*

**S. 72A : Carry forward and set off – Amalgamation – Accumulated loss – Unabsorbed depreciation – Overriding effect**

Provisions of Sec 72A dealing with Carry Forward & Set-Off in Case of Amalgamation, are special provisions and have overriding effect on any other provisions of the Act. (A.Y. 1992-93)

*Dy. CIT v. Ballarpur Industries Ltd. (2003) 85 ITD 172 / 80 TTJ 975 (Nagpur)(Trib.)*

**Section 73 : Losses in speculation business**

**S. 73 : Losses – Speculation business – Delivery based loss also speculation loss – Fiction applied**

It is held that the Explanation to section 73 creates a fiction that the loss suffered by certain companies from the business of purchase & sale of shares shall be deemed to be speculation loss. The definition of speculative transaction in section 43(5) not applicable to Explanation to section 73. The CBDT Circular dated 24.7.1976 cannot be treated as guide for interpretation of section 73 when the provision is very clear and free from any ambiguity. (A. Y. 1994-95)

*Paharpur Cooling Towers Ltd. v. ACIT (2011) 52 DTR 41 / 239 CTR 394 / 338 ITR 295 / 198 Taxman 83 (Cal.)(High Court)*

### **S. 73 : Losses – Speculation business – Speculative loss – Money lending business**

Where the Company amended its memorandum and articles of association so as to enable it to make money lending as its main business, the loss on account of sale and purchase of shares was allowed to be adjusted against other business income as the assessee's case fell under exception clause of section 73 of the Act. (A. Y. 1997-98).  
*CIT v. Front Line Securities Ltd. (2011) 50 DTR 337 (Delhi)(High Court)*

### **S. 73 : Losses – Speculation business – Explanation – Grant of loans**

When in respect of the assessment of the assessee of the for Asst. years 1998-99, 1996-97 and 1995-96, the Tribunal specifically held that the principal business of the assessee was grant of loans, the assessee comes within the exception to the Explanation under section 73, and therefore the Tribunal was not justified in holding that the business loss was to be treated as speculation loss. (A. Y. 1997-98).  
*PCBL Industrial Ltd. v. CIT (2011) 58 DTR 25 / 337 ITR 536 / 242 CTR 220 (Cal.)(High Court)*

### **S. 73 : Losses – Speculation business – Set off of business loss – Speculative transaction –Purchase and sale of shares [S. 43(5)]**

Assessee, company dealing with transaction of sale and purchase of shares and suffering loss. The Transaction should be treated to be speculative transaction within the meaning of section 73, though it is not speculative nature as there has been actual delivery of share scripts. Business loss arising out such transaction could be carried forward and set off only against speculative transaction and not from any other head. (A. Y. 1991-92)

*R.P.G. Industries Ltd. v. CIT (2011) 338 ITR 313 / 241 CTR 19 / 198 Taxman 349 / 54 DTR 73 / Tax. L. R. 913 (Nov.)(Cal.)(High Court)*

### **S. 73 : Losses – Speculation business – Shares in Stock in trade – Valuation loss**

Even shares-in-stock on valuation at the close of accounting year resulting in profit or loss, such profit & loss under section 28(1) is speculation profit or loss by virtue of proviso to section 73. (A.Y. 2001-02)

*Prasad Agents (P) Ltd. v. ITO (2009) 213 Taxation 571 / 226 CTR 13 / 21 DTR 217 (Bom.)(High Court)*

### **S. 73 : Losses – Speculation business – Unit**

Loss suffered on sale of units of Unit Trust of India within one month of its purchase was not speculative loss.

*CIT v. Lakshmi Mills Co. Ltd. (2006) Tax L.R. 574 (Mad.)(High Court)*

### **S. 73 : Losses – Speculation business – Set off**

Loss in speculation business can be set-off or adjusted against income of same speculation business or against income of any other speculation business carried on

by the assessee in following assessment year. There is no merit in contention that in view of sub-section (1) of section 73, speculation loss cannot be set-off against income from another speculation business but from same business. (A.Y. 1997-98)  
*CIT v. Soorajmall Baijnath Agencies (P.) Ltd. (2005) 272 ITR 325 / 145 Taxman 105 (Cal.)(High Court)*

### **S. 73 : Losses – Speculation business – Negative profit – Loss**

While computing the gross total income for the purpose of Explanation, loss is also to be taken into account; loss is also treated as negative profit. (A.Y. 1989-90)  
*CIT v. Park View Properties (P.) Ltd. (2003) 261 ITR 473 / 182 CTR 274 / 139 Taxman 38 (Cal.)(High Court)*

### **S. 73 : Losses – Speculative business – Loss in share dealings – Speculative transactions**

#### **[S. 43(5)]**

Badla charges claimed by the assessee company were rightly treated to be speculative loss in view of Explanation to section 73, since entire share trading activity was deemed to be speculative, provisions of Explanation to section 73 being deeming provisions, section 43(5) cannot override section 73. (A. Y. 2001-02).  
*Dartmour Holdings (P) Ltd. v. ITO (2011) 51 DTR 321 / 136 TTJ 432 (Mum.)(Trib.)*

### **S. 73 : Losses – Speculative business – Shares valuation of closing Stock – Trading in shares – Investment – Capital gains – Company**

Loss from valuation of closing stock cannot be excluded while determining the loss from share trading business, therefore, explanation to section 73 is applicable even to the loss arising from the valuation of closing stock of shares.

If the shares are held by the assessee company as investment and not as stock in trade, the second condition of Explanation to section 73 Viz. business of purchase and sale of shares is not satisfied and therefore, capital gain arising from the sale of shares held as investment is not hit by Explanation to section 73. (A. Y. 2001-02).

*Krishnalakshmi Multi Trade (P) Ltd. v. ACIT (2011) 55 DTR 167 / 138 TTJ 623 / 130 ITD 584 (Ahd.)(Trib.)*

### **S. 73 : Losses – Speculation business – Bills rediscounting business – Sale and purchase of shares**

Assessee was mainly doing business of bill discounting / rediscounting, under contractual obligation between the assessee and parties to the bills. Bills were re discounted and placed only as collateral security. The Tribunal held that activity of bills rediscounting would amount to granting of loans and advances and accordingly, explanation to section 73 would not be applicable, hence loss on account of sale and purchase of shares could not be treated as speculation losses, though the object clause of memorandum of Association showed that advancing the money was only ancillary object. (A. Y. 1996-97)

*Momaya Investments (P) Ltd. v. ITO (2011) 132 ITD 604 / 63 DTR 192 / 142 TTJ 761 (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Gross total income – Exclusion of speculation loss**

For the purpose of deciding whether the case of assessee is covered by exception provided in Explanation to section 73, speculation loss is to be excluded while computing business income and arriving at the gross total income.

*Paramount Information Systems Pvt. Ltd. v. ITO 'K' Bench, ITA No. 921/Mum/2008, decided on 24-2-2010 (BCAJ 42-A, May 2010 P. 169)(Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Business of financing – Shares**

Where assessee company was engaged in business of financing, trading in paper, shares and real estate and highest funds were employed in investment activities while principal business of assessee was of granting loans and advances, merely because income / loss in dealing in shares in a particular year was more than income / loss from principal business of granting loans and advances, assessee was not covered by deeming provisions of explanation to section 73. (A.Y. 2005-06)

*ITO v. Bijay Paper Traders & Investments Ltd. (2010) 38 SOT 578 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Limit of carried forward – Prospective amendment [S. 73(4)]**

Any speculation loss computed for Asst year 2006-07 and later assessment years alone would be hit by the amendment made w.e.f. 1-4-2006 by Finance Act, 2005 to section 73(4). Limit of carry forward of subsequent assessment years applies only to such loss. (A.Y. 2006-07)

*Virendra Kumar Jain v. ACIT, ITA No. 1009/Mum/2010 Bench 'B' dt. 31-5-2010. [BCAJ July P. 42 (493) (2010) 42A BCAAJ](Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Brokerage business and trading in shares**

Assessee having brokerage business and also trading in shares, loss arising from trading in shares is speculative loss. (A.Y. 2002-03)

*Priyasha Meven Finance Ltd. v. ITO (2010) 5 ITR 441 / 122 TTJ 976 / 119 ITD 163 / 24 SOT 422 / 22 DTR 473 (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Investment Co-Purchase and sale of shares**

Loss arising on account of purchase and sale of shares in another company is to be treated as speculative loss in view of the clear provisions of Explanation to section 73. (A.Y. 1999-2000)

*Centurion Investment & International Trading Co. (P) Ltd. v. ITO (2010) 133 TTJ 803 / 46 DTR 177 / 126 ITD 356 (Delhi)(Trib.)*

### **S. 73 : Losses – Speculation business – Interest on purchase of shares – Sale essential**

Provisions of Explanation to section 73 apply only where any part of business consists in purchase and sale of shares and not purchase alone.

Interest paid on purchase of shares from bank finance which were carried forward as stock, cannot be disallowed by invoking Explanation to Section 73, as a loss arising to assessee in speculation business.

*Pioneer Equity Trade (India) Pvt. Ltd. v. ITO (2008) 168 Taxman 76 (Mag.)(Mum.)(Trib.)*

### **S. 73 : Losses – Speculation business – Share broker – Default of client**

Loss incurred by assessee share broker due to client's disowning the transaction or refusing to accept the delivery, cannot be treated as speculation loss, so as invoke provisions of explanation to section 73, and such loss cannot be denied to be set-off against other business income.

*ITO v. JPS Share Brokers (P) Ltd. (2007) 163 Taxman 89 (Mag.)(Delhi)(Trib.)*

### **S. 73 : Losses – Speculation business – Explanation – Share activity – Interest on FCB – Stock-in-trade**

Principal business of the assessee-company not being of banking or of granting loans and advances. Explanation to section 73 was applicable and the loss from share trading activity had to be treated as speculative loss. Interest earned by the assessee company on FCDs held as stock-in-trade is to be treated as business income and is to be adjusted against the loss arising from the sale of shares and then the net amount of loss is to be treated as a speculative loss within the meaning of explanation to section 73. (A.Y. 1996-97)

*Jt. CIT v. Kalindi Holdings (P) Ltd. (2007) 106 TTJ 292 (Pune)(Trib.)*

### **S. 73 : Losses – Speculation business – Explanation – Business loss higher**

Assessee company's business loss being much higher than income from other sources, "gross total income" of assessee would become nil and loss from dealing in shares shall be deemed to be speculative loss by application of Explanation to section 73. (A.Y. 2001-02)

*I. I. T. Investrust Ltd. v. ITO (2007) 106 TTJ 1037 / 107 ITD 257 / 12 SOT 411 (Mum.)(Trib.)*

### **S. 73 : Losses – Speculation business – Explanation – Trading in shares**

Explanation to section 73 is applicable even where the entire business of the company consists of trading in shares and therefore, speculation loss arising from share transactions where delivery of shares was not taken is to be set off against the profit from trading in shares where delivery was taken. (A.Y. 2000-01)

*ACIT v. Sucham Finance & Investments (I) Ltd. (2007) 107 TTJ 315 / 105 ITD 353 (Mum.)(Trib.)*

### **S. 73 : Losses – Speculation business – Valuation – Fiction applicable**

Loss on account of valuation of closing stock of shares is speculative loss. (A.Y. 2001-02)

*I. I. T. Investrust Ltd. v. ITO (2007) 106 TTJ 1037 / 107 ITD 257 / 12 SOT 411 (Mum.)(Trib.)*

### **S. 73 : Losses – Speculation business – Against speculation income – Set off permissible**

Profit in another speculative business can be set off against deemed speculation loss. (A.Y. 1997-98)

*Chik Mik Leasing & Investment Pvt. Ltd. v. Asst. DCIT, ITA No. 104/Del/2003, Bench – SMC, dated 12-1-2007 – BCAJ P. 31, Vol. 39-D, Part 1, April 2007.(Delhi)(Trib.)*

### **S. 73 : Losses – Speculation business – Business loss – Applicable only where 'part of business'**

Explanation to s. 73 is attracted only when part of the business of the assessee-company consists of purchase and sale of shares of other companies. (A.Y. 1997-98)

*Parkar Securities Ltd. v. Dy. CIT (2006) 102 TTJ 235 / 8 SOT 257 (Ahd.)(Trib.)*

### **S. 73 : Losses – Speculation business – Set off of brought forward loss – Revised return**

In view of circular No. 14 (XI) – 35) Dt. 11-04-1995. Assessee would be entitled to set-off of B/F loss against speculative profit of current year, on basis of statement submitted with Revised Return, though same is not a valid return in the eyes of law, (As Original Return was filed under section 139 (4) and not under section 139(1)).

*ITO v. Sadhu Ram & Co. (2006) 153 Taxman 55 (Mag.)(Amritsar)(Trib.)*

### **S. 73 : Losses – Speculation business – Shares – Public issue**

(a) Loss on account of sale of shares allotted to a dealer in public issue is a speculation loss in view of Explanation to section 73.

(b) Explanation to section 73 is applicable to all transactions of purchase and sale of shares by an assessee whose business consists of purchase and sale of shares and its application cannot be restricted to the transactions which are found to be a device resorted to by the business houses controlling groups of companies to manipulate and reduce taxable income of the companies under their control. (A.Y. 2001-02)

*AMP Spg & Wvg Mills (P.) Ltd. v. ITO (2006) 100 ITD 142 / 101 TTJ 1113 (SB)(Ahd.)(Trib.)*

### **S. 73 : Losses – Speculation business – Investment – unaffected**

Assessee-company not dealing in shares and securities and the same are held as investment. Explanation to s.73 is not applicable and therefore, claim of loss on purchase and sale of shares was allowable. (A.Ys. 1989-90 to 1999-2000)



*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / (2006) 6 SOT 497 (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Loans and advances – Vyaj Badla – Bill Discounting**

Income derived from bills discounting and vyaj badla could be considered as income from granting of loans and advances – Accordingly Explanation to section 73 was not applicable. (A.Y. 2001-02)

*Omega Securities & Trading Co. Pvt. Ltd. v. ITO, Bench D, ITA 981/Mum/2004 dt. 25-5-2006 - BCAJ P. 538 Vol 39-B, Part 5 August 2006 (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Purchase and sale of shares – Computation of income – Test of applicability**

(i) For the purpose of Explanation to section 73 it is the absolute figure of two incomes either under head 'Business' or under head 'Other sources' without sign, i.e., irrespective of whether it is positive income or loss, which should be taken for comparison for deciding as to whether a case falls in first exception of Explanation to section 73 or not. On the facts, therefore, Explanation to section 73 was rightly invoked as the loss due to trading in shares was greater than income from dividend.

(ii) Provisions of Explanation would be applicable even if whole of business is that of sale and purchase of shares and the said provisions of the Explanation would attract irrespective of the fact as to whether the assessee deals in shares of a single company or in shares of several companies.

(iii) For invoking Explanation to section 73 it is no longer necessary for the Assessing officer to establish that the assessee is manipulating to reduce its taxable income by trading in shares and incurring losses. (A.Y. 1996-97)

*Yucca Finvest (P.) Ltd. v. Dy. CIT, (2006) 101 ITD 40 / 103 TTJ 180 (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Explanation – Share trading – Advancing loans**

Assessee's business consisted of share trading as well as advancing of loans – Funds invested in loans and advances was substantially more than in business of share trading. Hence, Explanation is not applicable.

*ACIT v. Vakharia Financial Services Ltd. Bench "H", ITA No. 4185/Mum/2001 dated 23-9-2005. (P. 506). (Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Interest income – In past and subsequent year**

Though interest income was marginal during the year, it was substantial in the part and subsequent year. Therefore, assessee's principal business was that of granting of loans and advance. Hence, Explanation to sec. 73 was not applicable. (A.Y. 1999-2000)

*Dy. CIT v. Fortress Financial Services Ltd., Bench "J", ITA No. 6679/Mum./2002 dated 19-1-2006 (P. 621).(Mum.)(Trib.)*

**S. 73 : Losses – Speculation business – Income from share trading – Brokerage**

Suggestion of tax avoidance is not a condition for invoking Explanation. Further there is no force in argument that if provisions of Explanation to section 73 are to be applied, they should be applied both to income from share trading as well as income from share brokerage. (A.Y. 1996-97)

*Dy. CIT v. Frontline Capital Services Ltd. (2005) 4 SOT 473 / 96 TTJ 201 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Dealing in shares [S. 43(5)]**

Explanation to section 73 applies only to regular dealings in shares made in normal course of business and not to speculative transactions falling under section 43(5), and it is only by virtue of this Explanation that such normal non-speculative transactions are deemed to be speculative transactions. (A.Y. 1997-98)

*Rohini Capital Services Ltd. v. Dy. CIT (2005) 92 ITD 317 / 93 TTJ 137 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Purchase and sale of shares – Gross total income – Dividend income – Income from other sources**

Transactions of purchase and sale of shares would be held as speculation business only if a company is hit by Explanation to section 73; where gross total income of assessee, after setting off trading loss in shares against dividend income, was made up of dividend from shares held as stock-in-trade, it was chargeable under head 'Income from other sources' and therefore, provisions of section 73, read with Explanation thereto were inapplicable to assessee and it would be entitled to set off of share trading loss against its other income. (A.Y. 1989-90)

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

**S. 73 : Losses – Speculation business – Devices to reduce taxable income – When applicable**

Only if there is reason to believe that a device is being adopted by companies to reduce their taxable income, Explanation can be invoked. (A.Y. 1997-98)

*Aman Portfolio (P.) Ltd. v. Dy. CIT (2005) 92 ITD 324 / 92 TTJ 351 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Principal business – Advancing loans and advances**

Merely because loss in share dealings is more than profit earned in core business of assessee of advancement of loans and advances, that does not mean that business of advancement of loans and advances is not principal business of assessee so as to treat loss from share dealings as speculation loss. (A.Y. 1997-98)

*Dy. CIT v. Venkateswar Investment & Finance (P.) Ltd. (2005) 93 ITD 177 / 92 TTJ 1129 (SB)(Kol.)(Trib.)*

**S. 73 : Losses – Speculation business – Stock broker**

Loss incurred by assessee-stock-broker in respect of trading by himself and on account of difference Bills issued by him to different persons was rightly treated as speculation loss where assessee had failed to prove delivery in any of transactions. (A.Y. 1993-94)

*ACIT v. Girish Sareen (2005) 1 SOT 359 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Purchase of units – Short period of holding**

Where assessee purchased units of UTI from a bank on 21-5-1990 and sold them back to same bank on 5-7-1990, after receiving dividend, resulting in substantial loss, loss so incurred was to be treated as speculation loss. (A.Y. 1991-92)

*Porritts & Spencer (Asia) Ltd. v. Addl. CIT (2005) 92 TTJ 541 (Delhi)(Trib.)*

**S. 73 : Losses – Speculation business – Explanation [S. 70]**

Explanation to Sec 73 cannot be overlooked while giving effect to provisions of Sections 70, 71 & 72. (A.Y. 1991-92)

*R.P.G. Industries Ltd. v. ACIT (2003) 85 ITD 105 / 79 TTJ 819 (TM)(Kol.)(Trib.)*

**S. 73 : Losses – Speculation business – Set off any other head – Not possible**

Speculation Loss within the meaning of Explanation to Sec 73, cannot be set off against any other nature of Income under any other head. (A.Ys. 1993-94 & 1994-95)

*Paharpur Cooling Towers Ltd. v. Dy. CIT (2003) 85 ITD 745 (Kol.)(Trib.)*

**Section 74 : Losses under the head “Capital gains”**

**S. 74 : Losses – Capital gains – Set off of long term capital loss against short term capital gains – Depreciable assets [S. 2(11), 50]**

Under section 74(1)(b), the assessee is entitled to claim of set off of long term capital loss against the capital gains income arising from the sale of office premises being depreciable asset, the gain of which is short term due to the deeming provisions of section 50(2) but the asset is long term. (A. Y. 2005-06).

*Komac Investments & Finance (P) Ltd. v. ITO (2011) 62 DTR 196 / 132 ITD 290 / 142 TTJ 308 / (2012) 66 DTR 209 (Mum.)(Trib.)*

**S. 74 : Losses – Capital gains – Carry forward and set off of losses**

While dealing with carry forward and set off losses in asst year 2003-04 loss computed for any assessment year will be governed by the amended provisions of section 74 applicable from A. Y. 2000-01 and therefore, carried forward long term

capital loss of A. Y. 2000-01 could not be set off against the short term capital gains for A. Y. 2003-04.

*Komaf Financial Services Ltd. v. ITO (2010) 132 TTJ 359 / 42 DTR 402 (Mum.)(Trib.)*

**S. 74 : Losses – Capital gains – Capital loss – Carried forward and set off – Non-resident**

Claim of carry forward of capital loss brought forward from earlier years by the assessee, a company, tax resident of Mauritius, could not be rejected by the Assessing Officer while making assessment of subsequent year on the ground that since the assessee company was not liable to tax on the capital gains under Art. 13 of DTAA between India and Mauritius, such capital loss was also exempt. (A.Y. 2005-06) *Flagship Indian Investment Co. (Mauritius) Ltd. v. ADIT (2010) 133 TTJ 792 / 46 DTR 166 / 38 SOT 426 (Mum.)(Trib.)*

**S. 74 : Losses – Capital gains – Capital loss – Carried forward and set off – Purchase and sale of shares – Investment**

Assessee having established by furnishing details that it was engaged in business of purchase and sale of shares, Assessing Officer was not justified in invoking section 74 notwithstanding the fact that assessee had shown the shares in the balance sheet as "investment." (A.Ys. 1997-98, 1999-2000)

*Jt. CIT v. Alchemic Financial Services Ltd. (2007) 109 TTJ 240 / 7 SOT 626 (Mum.)(Trib.)*

**S. 74 : Losses – Capital gains – Prospective – Part losses – Set-off possible**

The amendment to section 74(1)(b) does not apply to long term capital loss incurred prior to A.Y. 2003-04. Long term capital loss of an assessment year prior to A.Y. 2003-04 can be set off even against short term capital gain of A.Y. 2003-04 or thereafter. The Tribunal after considering the decision of Bombay High Court in the case of Central Bank of India, held that the amendment to section 74(1)(b) is prospective and not retrospective, and that the assessee is entitled to set-off long term capital loss incurred in A.Y. 2002-03 against any income assessable under the head 'Capital Gains' for any subsequent year.

*Geetanjali Trading Ltd v. ITO, ITA No. 5428/M/2007, BCAJ P. 15, Vol. 41 - B Part 6, March 2010 (Mum.)(Trib.)*

**Section 74A : Losses from certain specified sources falling under the head "Income from other sources"**

**S. 74A : Losses – Income from other sources – Maintenance of race horses – Stud farm**

To meet the requirement of Sec 74A(3), words 'horses maintained by him' should not construed to mean that assessee should personally look after the horses. Thus appointment of stud farm to maintain the horses would not amount to violation of requirement of Sec 74A. (A.Ys. 1990-91 to 1993-94)

## **Section 75 : Losses of firm**

### **S. 75 : Losses – Firm – Continuity of partner – Condition for allowance**

Allowance of set off in hands of firm is subject to condition that partner continues in said firm in subsequent year. (A.Y. 1994-95)

*K. Aboo Bakar v. ACIT (2003) 86 ITD 412 / 91 TTJ 484 (Hyd.)(Trib.)*

## **Section 79 : Carry forward and set off of losses in the case of certain companies**

### **S. 79 : Carry forward and set off losses – Change in share holdings – Companies which public are not substantial interested – Merger**

Due to merger of IIPL holding 98% shares of assessee company with the assessee company, the share holders of the IIPL were allotted shares but there was no change in the management which continued to be with persons of the family who were having the control and management of the IIPL as well as of the assessee company and therefore, provisions of section 79 were not violated and the assessee was entitled to carry forward of loss. (A. Ys. 2004-05 & 2005-06).

*Dy. CIT v. Select Holiday Resorts (P) Ltd. (2011) 52 DTR 14 / 138 TTJ 304 (Delhi)(Trib.)*

### **S. 79 : Carry forward and set off losses – Change in share holdings – Companies which public are not substantial interested [S. 2(18)]**

Although the assessee company was originally registered as a private company, it became public company by virtue of the provisions of section 3(iv)(c) of the Companies Act when GT Ltd., a public company, acquired more than fifty percent shares of the assessee company in the preceding year. Assessee had satisfied condition of Item(B) of section 2(18)(b) as well as in much as GT Ltd. held more than 50 percent of the shares of the assessee company during the whole of the previous years in question. Therefore, assessee company became a company in which the public are substantially interested by fulfilling the requisite conditions and consequently, application of section 79 is automatically ruled out. Hence, CIT was not justified in setting aside the orders allowing set off of brought forward losses of an earlier year against the income of the year under consideration. (A.Ys. 2004-05 & 2005-06)

*Meredith Traders (P) Ltd. v. ITO (2011) 62 DTR 404 / 46 SOT 207 (URO)(Mum.)(Trib.)*

### **S. 79 : Carry forward and set off losses – Change in share holdings – Companies which public are not substantial interested – Change in voting power – Holding company**

Section 79 of the Act is applicable if 51% of the voting power is beneficially held during the year under reference by persons who held such voting power during the year in which the loss was incurred. Since the board of directors of APIL were controlled by ABL, holding company, the voting power of APIL was controlled by ABL and beneficially held by ABL, the assessee was entitled to set-off of carry forward business loss. (A.Y. 2003-04)

*Amco Power Systems Ltd. v. ITO (2010) 3 ITR 775 / 123 TTJ 238 / 23 DTR 361 (Bang.)(Trib.)*

## **Section 80 : Submission of return for losses**

### **S. 80 : Return for losses – Film production expenses – Carried forward [S. 139(3), Rule 9A(2)]**

The rule states that when the film is exhibited for less than 180 days, deduction of the cost of production is to be allowed to the extent of the amount realised during the year and the balance amount shall be allowed in the next year. The assessee did not file a loss return under section 139(3) and the issue was whether section 80 would apply and the assessee would not be allowed the loss in the next year. The Supreme Court held that the balance cost of production had to be amortised under rule 9A(2) and then carried forward and be allowed as a deduction for the next year. This was not a business loss as contemplated by section 80 of the Act. (A.Y. 1992-93)

*CIT v. Joseph Valakuzhy (2008) 8 SCC 127 / 302 ITR 190 / 170 Taxman 196 / 216 CTR 320 / 7 DTR 1 / 206 Taxation 541 (SC)*

### **S. 80 : Return for losses – Carry forward – Prescribed time – Question of law [S. 139(3)]**

Carry forward and set off of loss in a case where loss return is filed beyond the time prescribed under section 139(3), is a question of law. The language of section 22 of the 1922 Act, and section 139 sub sections (3) and (4), does not prima facie appear to be in pari materia.

*CIT v. Alok Enterprises (2004) 266 ITR 399 / 137 Taxman 343 / 190 CTR 390 / 181 Taxation 134 (SC)*

### **S. 80 : Return for losses – Loss carry forward and set off – Best Judgment [S. 139(1)(3)(4), 146]**

Where a best judgment assessment is set aside under section 146 of the Income-tax Act 1961, the Income-tax Officer being satisfied that the assessee was prevented by sufficient cause from making a return required under section 139(2), he naturally has to receive the return filed along with the application under section 146 or within such time as he may specify. Such a return would then be a return filed under section 139 for the purpose of section 80. Pursuant to that return the loss has to be determined and carried forward under section 80.

*CIT v. HMT Bearings Ltd. (2003) 263 ITR 7 / 185 CTR 35 / 132 Taxman 600 / (2004) 179 Taxation 1 (SC)*



**S. 80 : Return for losses – Carry forward – Belated filing of return [S. 139(3)]**

Assessee is not entitled to carry forward the business loss if the return is not filed within the prescribed time limit under section 139(1). (A. Y. 1999-2000)

*Joginder Paul (HUF) v. CIT (2011) 239 CTR 566 / 331 ITR 31 / 53 DTR 170 (P&H)(High Court)*

**S. 80 : Return for losses – Carry forward of unabsorbed depreciation [S. 32(2), 139(3)]**

Period of limitation for filing loss return not applicable for carrying forward of unabsorbed depreciation. Section 80 and 139(3) apply to business loss and not to unabsorbed depreciation governed under section 32(2). (A. Y. 2001-02).

*CIT v. Govind Nagar Sugar Ltd. (2011) 334 ITR 13 / 56 DTR 35 / 244 CTR 266 (Delhi)(High Court)*

**S. 80 : Return for losses – Return filed – Loss not determined – Valid return [S. 139(3)]**

A business loss cannot be carried forward unless it has been determined in pursuance of a return filed under section 139. In order to be entitled to carry forward a business loss, the assessee must submit a return under section 139 (3), have an assessment made for the year in which he has incurred the loss. The assessing officer has to notify to the assessee in writing the amount of the business loss as computed by him which the assessee is entitled to have carried forward. Where the business loss determined has not been notified to the assessee, the assessee can have it determined in a subsequent year in which the business loss is to be set off. (A.Y. 1987-88)

When no valid return for earlier assessment year had been filed by assessee and consequently no assessment could be made, assessee could not be allowed to set-off business losses of earlier years during the assessment year in question.

*CIT v. Haryana Hotels Ltd. (2005) 276 ITR 521 / 148 Taxman 373 / 276 ITR 521 (P&H)(High Court)*

**S. 80 : Return for losses – Carried forward – Application for extension [S. 139(1)]**

When application for extension of time for furnishing return provided under section 139 (1) or under section 80 is pending assessee will be justified in believing that extension has been granted. (A.Y. 1986-87)

*CIT v. Panavision Electronics (Kerala) (P) Ltd. (2003) 264 ITR 710 / (2004) 135 Taxman 374 (Ker.)(High Court)*

**S. 80 : Return for losses – Carried forward – Specified period [S. 139(4)]**

For assessment year 1984-85, assessee would be entitled to carry-forward of loss where return was filed before expiry of period specified in section 139(4). (A.Y. 1984-85)

*CIT v. Sakthi Silvain Theatres (P.) Ltd. (2003) 263 ITR 644 / 187 CTR 569 / (2004) 139 Taxman 270 (Mad.)(High Court)*

#### **S. 80 : Return for losses – Carried forward – Specified period [S. 139(3)]**

For assessment year 1976-77, benefit of carry-forward and set-off could not be disallowed on the ground that the return was not filed under section 139(3). (A.Y. 1976-77)

*CIT v. Greeves Enterprises (P.) Ltd. (2003) 127 Taxman 668 / 264 ITR 347 / 182 CTR 80 (Delhi)(High Court)*

#### **S. 80 : Return for losses – Carried forward – Extension not rejected – Pre amendment of 1989**

If assessee has applied for extension of time for filing return and ITO has not rejected the said application and failed to communicate his view on the question of extension of time, it is open to the assessee to presume that time sought for has been granted to assessee and assessee would be entitled to carry-forward of loss. (A.Y. 1986-87)

*CIT v. S. Rangasamy Nadar & Co. (2003) 260 ITR 197 / 128 Taxman 640 / 182 CTR 386 (Mad.)(High Court)*

#### **S. 80 : Return for losses – Carried forward – Within prescribed time [S. 139(1)]**

Where return of income was furnished by assessee which was not within prescribed time under section 139(1), in view of provisions of section 80, loss could not be allowed to be carried forward. (A.Y. 2001-02)

*Jaya Jawahar Kanungo (Smt) v. ITO (2005) 1 SOT 254 (Mum.)(Trib.)*

#### **S. 80 : Return for losses – Carried forward – Revised return – Loss [S. 139(5)]**

Where in original return filed within time allowed under section 139(1) assessee did not claim any loss, assessee's claim for loss made for first time in revised return under section 139(5) could not be allowed. (A.Y. 1996-97)

*M. Narendranath v. ACIT (2005) 94 TTJ 284 / 147 Taxman 58 (Mag.)(Visakha.)(Trib.)*

#### **S. 80 : Return for losses – Carried forward – Belated return [S. 139(4)]**

Loss is not allowed to be carried forward, if the Loss return is filed under section 139(4). (A.Y. 1985-86 & 1986-87)

*Peerless General Finance & Investment Co. Ltd. v. Jt. CIT (2003) 85 ITD 215 / 79 TTJ 915 (TM)(Kol.)(Trib.)*

#### **S. 80 : Return for losses – Carried forward – Losses determined in earlier years [S. 139(3)]**

Provisions of Section 80 r.w Sec 139(3) apply only in respect of returns for assessment year in which loss is claimed to be c/f. It does not apply to a case where losses were already determined in earlier years. (A.Y. 1994-95)

*K. Aboo Bakar v. ACIT (2003) 86 ITD 412 / 91 TTJ 484 (Hyd.)(Trib.)*

## **CHAPTER VI-A**

### **DEDUCTIONS TO MADE IN COMPUTING TOTAL INCOME**

#### **A. General**

#### **Section 80A : Deductions to be made in computing total income**

##### **S. 80A : Deductions – Computation – Total income – Set off unabsorbed losses and depreciation [S. 80A, 80B(5), 80HH & 80I]**

Provisions of section 80A r.w.s. 80B(5) override other provisions in Chapter VI-A and, therefore, deduction under sections 80HHC, 80HHD and 80-I cannot be allowed where the gross total income of the assessee is nil after setting off brought forward losses and depreciation and the losses of other units against the profit earned by it from the eligible unit. (A.Y. 1995-96)

*CIT v. Arif Industries Ltd. (2010) 339 ITR 6 / 231 CTR 271 / 37 DTR 185 / 191 Taxman 97 (All.)(High Court)*

##### **S. 80A : Deductions – Computation – Total income – Eligible industrial units [S. 80B(5), 80IB]**

Loss in one unit can not be set off against profit of eligible unit. It is a mandatory to work out the eligible amount of deduction under various sections of Chapter VI-A, individually and then such aggregate amounts has to be restricted to the amount of gross total income as computed under section 80B(5). (A.Y. 2003-04)

*Meera Cotton & Synthetic Mills (P) Ltd. v. ACIT (2009) 28 DTR 139 / 125 TTJ 274 / 29 SOT 177 (Mum.)(Trib.)*

#### **Section 80AA : Computation of deduction under section 80M**

##### **S. 80AA : Deductions – Computation – Management expenses [S. 80M]**

Proportionment of management expenses attributable to earning of dividend income has to be reduced from the gross amount of dividend v/s. 80AA of the Act where there is no income assessable under the head income from other source.

*Oriental Insurance Co. Ltd. v. CIT (2006) 190 Taxation 93 (Delhi)(High Court)*

#### **Section 80AB : Deductions to be made with reference to the income included in the gross total income**

##### **S. 80AB : Deductions – Gross total income – Loss of the division – Set off**

Loss from one division is required to be set off with the profit of another division before determining the gross total income from which deduction under Chapter VI-A could be claimed and if the effect of the adjustment is that the gross total income is nil then the assessee is not entitled to claim any deduction under Chapter VI-A.

The Supreme Court further held that it is well settled that where the majority of the High Courts have taken a certain view on the interpretations of certain provisions, the Supreme Court should lean in favour of that view. (A.Ys. 1990-91, 1991-92)

*Synco Industries Ltd. v. Assessing Officer (2008) 299 ITR 444 / 168 Taxman 224 / 215 CTR 385 / 4 DTR 203 (SC) / 4 SCC 22*

### **S. 80AB : Deductions – Gross total income – Overriding effect**

Section 80AB has been given overriding effect over all other sections in Chapter VIA. (A.Y. 1996-97)

*IPCA Laboratory Ltd. v. Dy. CIT (2004) 266 ITR 521 / 135 Taxman 594 / 187 CTR 513 / 181 Taxation 2 (SC) / 12 SCC 1075*

### **S. 80AB : Deductions – Gross total income – Taxable income**

Where the assessee had not shown any taxable income, no deduction under chapter VI-A could be allowed.

*Modern Syntex (India) Ltd. v. CIT (2005) 142 Taxman 80 / (2004) 189 CTR 339 (Raj.)(High Court)*

### **Section 80B : Definitions**

### **S. 80(B)(5) : Definitions – Set off – Loss of eligible unit – Profit of other unit [S. 80-IA]**

While computing deduction under section 80-IA, loss of one eligible unit is not to be set off or adjusted against profit of another eligible unit. (A.Ys. 1992-93 to 2000-01)

*CIT v. Sona Koya Steering Systems Ltd. (2010) 35 DTR 273 / 189 Taxman 110 / 230 CTR 251 / 321 ITR 463 (Delhi)(High Court)*

### ***B. Deductions in respect of certain payments***

### **Section 80C : Deduction in respect of life insurance premia, deferred annuity, contributions to provident fund, subscription to certain equity shares or debentures, etc.**

### **S. 80C : Deduction – Public provident fund – Limit of one lakh**

Where, amount deposited in PPF Account exceeded ` 70,000/- prescribed under PPF Scheme, it was held that in view of fact that Act was amended by Finance Act, 2005, permitting an individual to deposit maximum of rupees one lakh in any specified scheme, concerned authorities were to be directed to amend paragraph 3 of PPF

Scheme, 1968 in terms of section 80C and increase maximum limit of subscription to PPF as per Finance Act, 2005.

*M. S. Padmarajaiah v. Secretary Department of Finance, Government of Karnataka (2009) 183 Taxman 209 (Karn.)(High Court)*

### **S. 80C : Deduction – Life insurance premium – Contribution to Provident Fund**

Section 80C does not require that house should be constructed or house should be identified on date of payment or part-payment.

*CIT v. Rajesh Khandelwal (2003) 180 CTR 392 (Raj.)(High Court)*

### **Section 80CCB : Deduction in respect of investment made under Equity Linked Savings Scheme**

### **S. 80CCB : Deduction – Investment – ELSS – Transfer – Switchover [S. 2(47), 45(6)]**

Units of mutual funds by way of switchover not being units in respect of which assessee had claimed deduction under section 80CCB(1) nor those units were originally issued under a plan formulated under any equity linked savings scheme, they were not of the type of units mentioned in sub section (2) of section 80CCB and therefore, surplus arising to the assessee on account of switch over of the units can not be assessed as capital gains under section 45(6). (A. Y. 2000-01).

*A. Vadivel & Ors. v. Dy. CIT (2011) 142 TTJ 875 / 63 DTR 460 (Chennai)(Trib.)*

### **Section 80G : Deduction in respect of donations to certain funds, charitable institutions, etc.**

### **S. 80G : Deduction – Donation – High fees – Profit – Educational institutions [Rule 11AA]**

Assessee filed application under section 80G(5)(vi) which was rejected on the ground that assessee society was running five educational institutions and was charging high fee and further its profit ranged from 20.44% to 28.49 and further assessee was enhancing earning capacity of institutions through acquiring of buildings and fixed assets and not fulfilling any noble objects. The Court held that solely because the assessee was charging fees and was getting surplus would not be a reason to deny registration under section 80G(5)(vi) when the consideration laid down in Rule 11AA had been complied with.

*CIT v. Gaur Brahmin Vidya Pracharini Sabha (2011) 203 Taxman 226 (P&H)(High Court)*

### **S. 80G : Deduction – Donation – Charitable institutions – Power of Commissioner**

Scope of enquiry by Commissioner, while dealing with application under section 80G(5)(vi), extends to eligibility to exemption under various provisions of the Act,

referred to in it that sub-section, but not to actual computation of income under the Act, particularly when a society or a trust is claiming an exemption under section 11 and 12 and not under section 10. Registration of an institution under section 12A(a) by itself is a sufficient proof of fact that the trust or institution concerned is created or established for charitable or religious purposes.

*Sonepat Hindu Educational & Charitable Society v. CIT (2005) 278 ITR 262 / 147 Taxman 1 / 196 CTR 623 / 278 ITR 262 / 147 Taxman 1 (P&H)(High Court)*

### **S. 80G : Deduction – Donation – Charitable institution – Similar trusts – Yardsticks**

Section 80G does not contemplate different yardsticks and different parameters being applied to different trusts having similar objects and similar purpose. It is not open to the income-tax department to apply different norms to different trusts having similar object seeking grant of exemption under section 80G.

*Tax Practitioners Benevolent Fund, A Public Charitable Trust v. CIT (2004) 136 Taxman 282 / 266 ITR 561 / 188 CTR 26 (Bom.)(High Court)*

### **S. 80G : Deduction – Donation – Exemption – Renewal of recognition**

Grant of exemption of renewal of recognition under section 80 G (5) is not automatic in character. Competent authority may reject the application.

*Ganjam Nagappa & Son Trust v. Dy CIT (Exemption) (2004) 135 Taxman 321 / 269 ITR 59 / 187 CTR 311 (Karn.)(High Court)*

### **S. 80G : Deduction – Donation – Charitable institution – Claim in return**

Assessee was not entitled to relief under section 80G on donation, which was not claimed in original return, but was claimed in return filed under Amnesty Scheme which was treated as return filed in response to notice under section 148. (A.Y. 1974-75)

*CIT v. Keshoram Industries Ltd. (2004) 271 ITR 353 / (2005) 193 ITR 116 / 144 Taxman 1 (Cal.)(High Court)*

### **S. 80G : Deduction – Donation – Charitable institution – Ceiling – Aggregate of sums**

Ceiling specified in sub-section (4) applies to aggregate of sums in respect of which deduction is claimed. (A.Ys. 1978-79, 1979-80)

*CIT v. Mafatlal Fine Spinning & Manufacturing Co. Ltd. (2003) 263 ITR 140 / (2004) 187 CTR 64 / 138 Taxman 143 (Bom.)(High Court)*

### **S. 80G : Deduction – Donation – Charitable institution – Renewal of exemption**

Where no charitable activity mentioned in its MOA was conducted by petitioner-society except construction of shopping complex, its application for renewal of exemption was rightly rejected.



*Madani Musafir Khana Welfare Society v. CIT (2003) 264 ITR 481 / (2004) 188 CTR 52 / 139 Taxman 384 (Patna)(High Court)*

**S. 80G : Deduction – Donation – Charitable institutions**

Where the petitioner trust had its many objects which were wholly and substantially religious, mere fact an insignificant amount had been spent on non religious, charity would not entitle the donors to claim deduction under section 80G to it. With effect from 1-4-2000 sub section 5B, was inserted to change the law was changed. (A.Ys. 1994-95 to 1997-98)

*Sri Marudhar Kesari Sethanakwasi Jain Samiti Trust v. UOI (2003) 185 CTR 674 / (2005) 273 ITR 475 (Raj.)(High Court)*

**S. 80G : Deduction – Donation – Charitable institutions – Salaries of preachers**

Assessee church society incurred expenditure on T.V. telecast and salaries of preachers. Preachers were generally engaged to spread teachings of Lord Jesus Christ, therefore, salaries paid to preachers cannot be considered to be an expenditure incurred for charitable activities. If salaries to preachers was taken out from the category of expenditure for charitable activities, expenditure on religious activities would be more than 5 percent of total income, thus assessee would be hit by sub section 5(ii) read with sub section (5B) of section 80G. (A. Y. 2010-11).

*Church of Christ Social Service Society, Amalapuram v. CIT (2011) 48 SOT 1 (Visakha)(Trib.)*

**S. 80G : Deduction – Donation – Renewal of application – Failure to take any action**

Where assessee Trust filed an application seeking renewal of approval under section 80G(5)(vi) and Commissioner failed to take any action on said application within time limit prescribed by Rule 11AA(6) of Income-tax Rules 1962, it was held that assessee became legitimately entitled for approval of renewal, a s applied for. (A. Y. 2010-2011).

*S. Lakha Singh Bahra Charitable Trust v. CIT (2011) 133 ITD 201 / 139 TTJ 636 / 58 DTR 162 (Amritsar)(Trib.)*

**S. 80G : Deduction – Donation – In kind – Not eligible**

Assessee is not entitled to deduction under section 80G in respect of donation of grass fodder supplied to various cattle camps on the direction of the State Government. (A.Y. 2001-02)

*Surat Electricity Co. Ltd. v. ACIT (2010) 35 DTR 272 / 128 TTJ 696 / 125 ITD 277 / 5 ITR 280 (Ahd.)(Trib.)*

**S. 80G : Deduction – Donation – Recognition – Refusal to renew [80G(5)]**

Activity of assessee of dispensing homoeopathic medicines for a token consideration cannot at all be termed as the assessee's income being profits and gains of business

within the meaning of the proviso to section 80G(5)(i). Rather, it amounts to an object by way of 'medical relief' as defined in section 2(15). Therefore, the said proviso does not get attracted and assessee was not therefore required to maintain separate books of account in respect thereof. Further, if any payment has been made to any institution which is not registered under section 12AA, this shall be taken care of in the assessment of the assessee and it does not have any bearing on the renewal of the approval sought under section 80G(5)(vi). It was held that CIT was therefore not justified in refusing renewal of registration to the assessee especially when renewal had been granted in the past for several years.

*Agrawal Metal Works Charitable Trust v. CIT (2009) 28 DTR 54 / 125 TTJ 400 (Delhi)(Trib.)*

### **S. 80G : Deduction – Donation – Charitable institutions – Partial disallowance**

Assessee is entitled to deduction under section 80G out of taxable income and there is no justification for partial disallowance on ground that part of his income is not liable to tax. (A.Ys. 1995-96, 1996-97)

*Dy. CIT v. Haryana Warehousing Corpn. (2005) 1 SOT 257 (Chd.)(Trib.)*

### **S. 80G : Deduction – Donation – Charitable institution – Income of previous year**

For claiming deduction under section 80G, there is no condition that the donation should be out of Income chargeable to tax and that too of the concerned previous year. Thus donation can be out of Capital or exempt Income also.

Refer Boards circular bearing No. F.No 45/313 dt 2.12.1966 in 66 TTJ 61. (A.Y. 1992-93)

*Parkside Holdings Ltd. v. Dy. Commissioner (2003) 86 ITD 252 / 89 TTJ 605 (Chennai)(Trib.)*

### **S. 80G : Deduction – Donation – For acquiring engineering seat**

Donation for acquiring an engineering seat cannot qualify for deduction under section 80G.

*Manoj Kumar v. ITO (2003) SOT 412 (Hyd.)(Trib.)*

### **S. 80G : Deduction – Donation – Cheque issued**

Donation cheque issued on 31.03.1992, but realised on 11.04.1992 would be eligible for deduction during the accounting year ending 31.03.1992.

The cheque issued which is not dishonored, but is encashed, the payment thereof relates back to the receipt of cheque. In law the date of payment would be the date of delivery of the cheque. Refer Circular No 26 dt 8.8.1979. (A.Y. 1992-93)

*Parkside Holdings Ltd. v. Dy. Commissioner (2003) 86 ITD 252 / (2004) 89 TTJ 605 (Chennai)(Trib.)*

### **S. 80G(5B) : Deduction – Donation – Charitable trust – Approval of institution**

Single donation of more than 5% for construction of one room in a hostel managed by particular community – Not a ground to deny renewal. Matter remanded for fresh consideration.

*Shri Sardarmal Sancheti Charitable Trust v. UOI & Ors. (2010) 322 ITR 167 / (2009) 20 DTR 203 (Raj.) (High Court)*

### ***C. Deductions in Respect of Certain Incomes***

#### **Section 80HH : Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas**

##### **S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Cashew processing – Out sourcing activities**

In the absence of details of outsourcing of activities to sister concerns, location of sister concern in backward state, etc., the assessee was not entitled to deduction under section 80HH for its profits from the cashew processing business. (A.Y. 1994-95)

*CIT v. R. Pratap (2009) 310 ITR 405 / 227 CTR 632 / 181 Taxman 1 (SC)*

##### **S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Conversion of Jumbo rolls into small flat and rolls [S. 80-I]**

The conversion of jumbo rolls of photographic films into small flats and rolls of desired sizes, amounts to manufacture or production and, therefore, it is entitled to claim deduction under sections 32AB, 80HH and 80I.

*India Cine Agencies v. CIT / Computer Graphics Ltd. v. CIT (2008) 175 Taxman 361 / 220 CTR 223 / (2009) 308 ITR 98 / 15 DTR 121 / 209 Taxation 410 (SC)*

##### **S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Ship breaking activity [S. 80-I]**

The ship breaking activity results in production of a distinct and different article and, therefore assessee doing such activity would be entitled to deduction under sections 80HH and 80I. (A.Y. 1995-96)

*Vijay Ship Breaking Corpn. & v. CIT (2008) 175 Taxman 77 / 219 CTR 639 / (2009) 314*

*ITR*

*309 / 14 DTR 74 / 208 Taxation 675 (SC) / 10 SCC 39*

##### **S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Simultaneous deduction [S. 80-I]**

The deductions under section 80HH and section 80-I are independent of each other. Therefore, a new industrial unit can claim deduction under both sections on gross total income independently.

*Jt. CIT v. Mandi Deep Engg. & Pkg. India Pvt. Ltd. (2007) 292 ITR 1 / 163 Taxman 337 / 210 CTR 614 / 201 Taxation 388 (SC)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Derived from – Interest on Deposit**

Derivation of interest or profits on deposit with the Electricity Board could not be said to be flowing directly from the industrial undertaking and therefore, deduction under section 80HH could not be allowed in respect thereof. The word “derived from” in section 80HH must be understood as something which has direct or immediate nexus with an industrial undertaking. (A.Y. 1984-85)

*Pandian Chemicals Ltd. v. CIT (2004) 179 Taxation 2 / (2003) 262 ITR 278 / 129 Taxman 539 / 183 CTR 99 (SC) / 5 SCC 590*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Liquidated damages [S. 80IA, 260A]**

The question whether liquidated damages received by the assessee on account of contract are a part of the profits received from its industrial undertaking and the assessee is entitled to deduction in relation thereto under section 80HH and 80-IA of the Income-tax Act 1961, is a substantial question of law. The Supreme Court directed the High Court to hear the appeal on merits.

*CIT v. Alpine Solvex Ltd. (2003) 259 ITR 719 / 181 CTR 21 / 129 Taxman 16 (SC)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Computation – Adjustment of loss of other unit [S. 80I]**

Assessee company had three units, two manufacturing units eligible for deduction under section 80HH and 80I and one service unit. For the purpose of calculating deduction under section 80HH and 80I, the loss sustained in service unit cannot be taken into account and only profit of two eligible units shall be taken into account as if it were the only source of income of that unit. (A.Y. 1990-91)

*CIT v. Modi Xerox Ltd. (2010) 41 DTR 50 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Reconstruction of existing business [S. 80I]**

Assessee was not entitled to deduction under sections 80HH and 80I for the current year since the plant and machineries purchased were erected in the earlier year of assessment. No details were furnished as regards machineries installed during the year. (A.Y. 1985-86)

*CIT v. Wipro Ltd. (2010) 41 DTR 81 / (2011) 334 ITR 6 (Karn.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Mechanised house [S. 80J]**

Activity of construction and fabrication of mechanized houses cannot be equated to manufacture or production of articles or things and, therefore, assessee engaged in such activity is not an industrial undertaking entitled to deduction under section 80HH, 80I. (A.Ys. 1980-81, 1981-82)

*CIT v. Punjab Chemi. Plants Ltd. (2010) 43 DTR 322 / 235 CTR 204 (P&H)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Interest – Income dividend**

Interest received from the customers on delay in making payments for the goods purchased from the assessee is an income derived from the industrial undertaking for the purpose of calculating deduction under section 80 HH of the Act. (A.Ys. 1991-92, 1992-93)

*CIT v. Fal Industries Ltd. (2009) 27 DTR 157 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Transport and forwarding**

The amount of transport and forwarding expenses recovered by the assessee from its dealers is said to be made in the process of manufacturing activity undertaken by the assessee and therefore eligible for deduction under section 80HH of the Act. (A.Y. 1991-92 and 1992-93)

*CIT v. Fal Industries Ltd. (2009) 27 DTR 157 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Rectification charges**

Rectification charges received by the assessee from its customers / purchasers is covered by the expression 'income derived from industrial undertaking' for the purpose of deduction under section 80HH of the Act. (A.Ys. 1991–92 & 1992-93)

*CIT v. Fal Industries Ltd. (2009) 27 DTR 157 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Insurance claim**

Insurance claim received on damage of imported component in transit is not an income derived from industrial undertaking for the purpose of deduction under section 80 HH of the Act. (A.Y. 1991-92 and 1992-93)

*CIT v. Fal Industries Ltd. (2009) 27 DTR 157 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Both deductions [S. 80-I]**

The assessee is entitled to claim deduction both under section 80HH as well as under section 80-I of the Act, if otherwise it is entitled to claim such deductions.

*CIT v. Malborough Polychem (P) Ltd. (2008) 14 DTR 15 / 309 ITR 43 / (2009) 177 Taxman 44 (Raj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Sale of empty container**

Receipt from sale of empty containers in which raw material was purchased by the assessee and which added up to the total cost of the product manufactured by the

assessee would be derived from industrial undertaking and eligible for deduction under sections 80HH and 80-I of the Act.

*Dy. CIT v. Core Healthcare Ltd. (2008) 14 DTR 332 / (2009) 221 CTR 580 / 308 ITR 263 (Guj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Job work basis-Beedies [S. 80I]**

Assessee purchased Tendu Leaves and getting them rolled into Beedies by Contract Labourers – Beedies distinct product from Tendu Leaves – Assessee entitled to special deduction under section 80HH, 80-I. (A.Ys. 1984-85, 1985-86)

*CIT v. Prabhudas Kishoredas Tobacco Products P. Ltd. (2007) 295 ITR 61 (Guj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Job work basis**

The assessee engaged in the business of manufacturing fire works on job work basis. The assessee was supplied with raw material by its customers. The Assessee is an industrial undertaking eligible to the benefit of Sections 80HH and 80-I. (A.Ys. 1988-89, 1989-90)

*CIT v. Taj Fire Works Industries (2006) 154 Taxman 380 / 204 CTR 108 / (2007) 288 ITR 92 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Both deductions [S. 80-I]**

Assessee purchased Tendu Leaves and getting them rolled into Beedies by Contract Labourer Beedies distinct product from Tendu Leaves – Assessee entitled to special deduction under sections 80HH, 80-I. (A.Ys. 1984-85, 1985-86)

*CIT v. Prabhudas Kishoredas Tobacco Products P. Ltd. (2006) 282 ITR 568 / 201 CTR 312 / 154 Taxman 404 (Guj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Gross total income [S. 80I]**

Where the assessee is eligible for deduction under sections 80HH & 80-I, deduction under section 80-I is admissible on the gross total income before reducing it by the deduction allowable under section 80HH.

*CIT v. Decora Tubes Ltd. (2006) 195 Taxation 85 (MP)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Refund of excise duty [S. 80-I]**

Refund of excise duty is to be included in the profits for the purpose of computing deduction under sections 80HH and 80-I of the Income-tax Act, 1961.

*CIT v. Siddharth Tubes Ltd. (2006) 195 Taxation 96 (MP)(High Court)*



**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Interest on delayed payments [S. 80I]**

Interest on delayed payments by trade debtors is directly relatable to the amount receivable in the course of business. It is profit and gains derived from the business of industrial undertaking of the Assessee and is eligible for relief under section 80 HH & 80-I. (A.Y. 1993-94)

*CIT v. Indo Matsushita Carbon Co. Ltd. (2006) 205 CTR 493 / 286 ITR 201 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Gross total income [S. 80-I]**

Deduction under section 80-I has to be computed on gross total income without reducing from it the deduction under section 80HH. (A.Y. 1992-93)

*CIT v. Lucky Laboratories Ltd. (2006) 200 CTR 305 / 284 ITR 435 / (2005) 149 Taxman 273 (All.) (High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Refining of oil – Manufacture or processing of goods [S. 80-I]**

The activity of refining of oil purchased from local market amounts to manufacturing or processing of goods and that assessee is entitled to deduction under sections 80HH and 80-I in respect of that activity. (A.Y. 1987-88)

*CIT v. Shiv Oil & Dal Mill (2006) 153 Taxman 27 / 281 ITR 221 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Production – Industrial unit**

De-embarking and seasoning tree trunks and converting same into the logs would amount to production of a new commercial article or thing. (A.Ys. 1983-84 & 1985-86)

*Andaman & Nicobar Islands Forest & Plantation Development Corpn. Ltd. v. CIT (2006) 280 ITR 118 / (2005) 198 CTR 76 / 147 Taxman 160 (Cal.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Thrashing and redrying**

Thrashing and redrying of tobacco leaves which is used in the manufacture of cigarettes is a manufacturing activity. Assessee entitled to deduction under section 80HH.

*CIT v. Premier Tobacco Packers Pvt. Ltd. (2006) 203 CTR 201 / 284 ITR 222 (Mad.)(High Court)*

**S 80HH : Deduction – Newly established industrial undertakings – Backward areas – Gross total income [S. 80I]**

Deduction under section 80-I is allowable on the gross total income without excluding the deduction admissible under section 80HH. (A.Y. 1988-89)

*CIT v. S. B. Oil Industries Pvt. Ltd. (2006) 203 CTR 218 / (2005) 274 ITR 495 / 146 Taxman 594 (P&H)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Production – Industrial unit**

S. 80HH does not require that industrial undertaking should be registered under the factories Act. (A.Y. 1977-78)

*CIT v. Hanuman Rice Mills (2005) 275 ITR 79 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Production – Industrial unit – Poultry [S. 80I, 32AB]**

Poultry farm being not an Industrial undertaking is not entitled to deductions under section 80HH, 80-I and 32AB. (A.Y. 1988-89)

*CIT v. Shivalik Poultry (2005) 274 ITR 529 / 146 Taxman 449 / (2006) 201 CTR 218 (P&H) (High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Production – Industrial unit – Cold storage**

Deduction is not allowable to assessee running a cold storage. (A.Ys. 1981-82, 1982-83, 1983-84)

*CIT v. Janta Cold Storage (2005) 146 Taxman 402 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Production – Construction [S. 80J, 32A]**

Assessee (engaged in activity of construction) could not be said to be industrial undertaking entitled to relief under section 80HH, 80J and 32A.

*CIT v. Jai Prakash Associate (2005) 142 Taxman 72 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Ten or more employees**

Various processes starting from purchase of raw material and till the sale of finished goods form an integral part of manufacturing process and workers and labourers employed in those processes are 'workers employed in manufacturing process'. (A.Ys. 1976-77, 1977-78)

*CIT v. Sultan & Sons Rice Mills (2005) 193 CTR 444 / 272 ITR 181 / 145 Taxman 506 (All.) / CIT v. Hanuman Rice Mills (2005) 275 ITR 79 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Ten or more employees**

For purpose of availing deduction under section 80HH and 80-I, direct employment of stipulated number of workers is relevant and individuals or workers of outside parties, whose services have been availed by assessee in its own manufacturing activities, either on contract basis, job work basis or on per piece basis, are not to be taken into account. (A.Y. 1987-88)

*R & P Exports v. CIT (2005) 279 ITR 536 / 146 Taxman 404 / 196 CTR 45 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Splitting up or reconstruction of business**

Tribunal found that transferred assets did not exceed 20% of total, whether it be a plant and machinery or whole of assets of new unit; that establishment of a new unit at a place was different from old unit; and that item now manufactured was also different from one manufactured earlier, it was justified in setting aside Assessing Officer's order disallowing claim on ground that new concern had been formed by splitting up and reconstruction of a business already in existence and there was transfer of plant and machinery previously used in old concern. (A.Ys. 1990-91, 1991-92)

*CIT v. Mahesh Chand Gupta (2005) 279 ITR 396 / 149 Taxman 169 / (2006) 202 CTR 433 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Liquidated damages**

Liquidated damages received by the assessee from its supplier and purchaser on account of breach of contract by them could not be treated as profits and gains derived from industrial undertaking so as to be eligible for deduction under section 80 HH or 80-I. (A.Ys. 1993-94, 1994-95)

*CIT v. Alpine Solvex Ltd. (2005) 276 ITR 92 / 144 Taxman 67 / 195 CTR 181 (MP)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Set off of losses**

Section 80HH also falls under chapter VI-A. In view of specific definition of 'gross total income' given in section 80B(5) set-off of losses is to be first done before allowing deduction under section 80HH. (A.Y. 1982-83)

*CIT v. Chhata Sugar Co. Ltd. (2005) 277 ITR 256 / 149 Taxman 556 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Audited accounts**

As no separate accounts are required to be maintained for claiming deductions under sections 80 HH and 80-I, assessee company is not required to submit audited account in support of its claim for deduction under section 80HH and 80-I in respect of its new industrial undertaking.

*Bongaigaon Refinery & Petrochemicals Ltd. v. CIT (2005) 274 ITR 379 / (2006) 156 Taxman 255 (Gau.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Brass – Dismantling of guns [S. 80-I]**

Where there was no nexus between brass scrap obtained on dismantling of guns and main activity of assessee of steel re-rolling, separation of brass could not be said to be in process of steel re-rolling, separation of brass could not be said to be in process of manufacture or a product or a by-product of activity of assessee's industrial undertaking, so as to entitle assessee to deduction in respect of income from sale of brass scrap. (A.Y. 1994-95)

*D.P. Agarwal v. CIT (2004) 141 Taxman 626 / 272 ITR 118 / 193 CTR 297 (MP)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Income from sale of Scrap-Income derived**

Scrap not being a necessary by-product in the process of manufacture, the income from the sale of scrap can not be regarded as income derived from industrial undertaking so as to qualify for deduction under section 80HH.

*Pandian Chemicals Ltd. v. CIT (2004) 270 ITR 448 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Goods in transit – Compensation from Insurance company**

Deduction under section 80 HH is not allowable in respect of amount received from insurance company for loss of goods in transit. (A.Y. 1979-80)

*Pandian Chemicals Ltd. v. CIT (2004) 270 ITR 448 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Unabsorbed depreciation – current depreciation – Investment allowance – Net income**

For the purpose of allowing deduction under section 80 HH, the profits and gains of an industrial undertaking should be computed by taking in to consideration unabsorbed depreciation, current depreciation and investment allowance. (A.Ys. 1979-80, 1980-81)

*Vijay Industries v. CIT (2004) 139 Taxman 353 / 270 ITR 175 / 190 CTR 90 (Raj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Cold storage**

Running a cold storage does not come within the purview of industrial undertaking and therefore, deduction under section 80HH is not available. (A.Ys. 1976-77, 1977-78, 1978-79)

*G.T. Cold Storage & Ice Factory v. CIT (2004) 191 CTR 264 / (2005) 275 ITR 340 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Cold storage**

Cold storage is not an industrial undertaking, hence it is not entitled to deduction under section 80 HH. (A.Y. 1978-79)

*Ram Prakash Agarwal (HUF) v. CIT (2004) 141 Taxman 562 / 191 CTR 272 (All.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Allocation of expenses – On presumptions – Research and development expenses**

Allocation of expenses for research and development to a particular unit of assessee on mere presumption, without proper examination of matter, and resultant claim of deduction was not justified.

*Bush Boake Allen (India) Ltd. v. ACIT (2004) 192 CTR 165 / 273 ITR 152 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Processing of goods – Factories of third party**

For the purpose of claiming benefit under section 80HH it is immaterial as to whether the raw cashew is processed for export in the factories of the assessee or in the factories belonging to third parties and what is required is only processing of the goods for export. (A.Y. 1992-93)

*CIT v. G. Satheesh Nair (2003) 264 ITR 377 / 183 CTR 172 / 133 Taxman 601 (Ker.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Manufacture – Processing of prawns**

Processing of prawns does not amount to manufacture.

*CIT v. Poyilakada Fisheries (P.) Ltd. (2003) 133 Taxman 651 / (2004) 186 CTR 234 (Ker.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Cash assistance – Duty draw backs**

Cash assistance, duty drawback and subsidy cannot be treated as income 'derived from' industrial undertaking and included in business income for purposes of deduction under section 80HH. (A.Y. 1986-87)

*CIT v. Viswanathan & Co. (2003) 261 ITR 737 / 133 Taxman 476 / 181 CTR 335 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Depreciation**

Depreciation has to be deducted while computing total income for purpose of deduction under section 80HH. (A.Y. 1976-77)

*Indian Rayon Corpn. Ltd. v. CIT (2003) 128 Taxman 739 / 261 ITR 98 / 182 CTR 247 (Bom.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Initial depreciation**

Initial depreciation has to be deducted for computing deduction under section 80HH. (A.Y. 1983-84)

*CIT v. Cadila Chemicals (P.) Ltd. (2003) 259 ITR 692 / 179 CTR 37 (Guj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Investment allowance**

Investment allowance is to be deducted before allowing deduction.

*CIT v. Abressive India (2003) 133 Taxman 389 (Raj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Enhanced income**

Deduction was not allowable on enhanced income by way of excessive subsidy, which had been claimed by showing bogus purchases and sales in books of account. (A.Y. 1990-91)

*CIT v. Harshwardhan Chemicals (2003) 131 Taxman 813 / 185 CTR 179 / (2004) 270 ITR 309 (Raj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Excise duty incentive**

Excise duty incentive received by assessee does not qualify for deduction under section 80HH. (A.Y. 1986-87)

*CIT v. Sundaram Clayton Ltd. (2003) 130 Taxman 64 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Audit report**

Audit report in Form No. 10C can be filed even after submission of return but before framing of assessment. (A.Ys. 1983-84, 1984-85)

*CIT v. T.M. Abdul Rahman & Sons (2003) 129 Taxman 747 (Mad.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Transfer of goods to another division**

When goods are transferred by industrial undertaking to main division and price at which goods are transferred is not market value, Assessing Officer can substitute market value while computing the deduction. (A.Y. 1994-95)

*Alembic Chemical Works Ltd. v. Dy CIT (2003) 185 CTR 389 / 133 Taxman 833 / (2006) 266 ITR 47 (Guj.)(High Court)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Expansion of Production Capacity [S. 80-I]**

Expansion of production capacity of the existing unit by merely adding some equipments when raw material finished products, employees electric connection, maintenance of books of account etc. are all common and cannot be identified with new or old plant, did not constitute setting up of new industrial undertaking eligible for deduction under section 80HH and 80I. (A.Y. 1992-93)



*Jt. CIT v. Thirani Chemicals Ltd. (2010) 38 DTR 137 / 9 ITR 696 / 130 TTJ 1 / 40 SOT 530 (SB)(Delhi)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – PInterest on delayed payment of purchase price**

The assessee is entitled to deduction under section 80HH on interest on delayed payment of purchase price. (A.Y. 2003-04)

*ACIT v. Biotech Medicals (P) Ltd. (2009) 121 TTJ 858 / 119 ITD 143 / 19 DTR 157 (Hyd.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Computation – Deposited in investment deposit [S. 80I, 32AB]**

Amount deposited under section 32AB cannot be deducted while computing the profits for purposes of section 80HH/80I. (A.Y. 1988-89)

*Bajaj Auto Ltd. v. Dy. CIT (2007) 106 TTJ 333 / 105 ITD 287 (Mum.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Marketing activities**

Marketing activities carried on by the assessee being independent of the activities of the industrial undertaking have to be excluded from the profits and gains of the industrial undertaking for the purpose of allowing deduction under section 80HH. (A.Y. 1998-99)

*USV Ltd. v. Jt. CIT (2007) 106 TTJ 535 (Mum.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Profit from one unit – Loss from another [S. 80-I]**

Assessee earned profit from one unit and suffered loss from another. Deduction under sections 80HH & 80-I will be available in respect of unit having profits but deduction cannot exceed gross Total income. (A.Ys. 1992-93 to 1995-96)

*Dy. CIT v. Ruchira Papers Ltd. (2007) 110 TTJ 995 (Chd.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Windmill – Manufacture or production**

Assessee engaged in the business of generation of power by windmill cannot be said to be carrying on manufacture or production of an article and therefore, it is not entitled to deduction under section 80HH. (A.Y. 1996-97)

*Tamil Nadu Chlorates v. Jt. CIT (2006) 99 TTJ 80 (Chennai)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Period for which deduction is available – Commercial production**

For purposes of section 80HH(4) first year in which deduction under section 80HH was available is year in which commercial production had commenced.

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 TTD 157 (Delhi)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Computation of deduction – Investment deposit [S. 32AB]**

Deduction under section 32AB has to be allowed before granting deduction under sections 80HH and 80-1 (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Computation of Deduction – Common expenses**

Common expenditure incurred by the assessee for marketing the industrial products should be proportionately distributed in respect of each industrial undertaking. (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Production process of third parties**

Deduction under section 80HH & 80I is eligible, even if part of production process is done through third parties.

*Swastik Textiles v. ITO (2003) SOT 327 (Jodh.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Sale of spare parts**

Income from Sale of spare parts and raw materials being condition to or a part of sale as an 'after sales service' or from sale of an own manufactured spare parts, would be treated as income derived from the industrial undertaking eligible for deduction, as same is not an independent activity. (A.Ys. 1992-93 to 1994-95)

*Dy. CIT v. Mira Industries (2003) 87 ITD 475 / 86 TTJ 309 (Ahd.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Cash credits – Eligible [S. 80I]**

The addition representing unexplained cash credits is part of total income for the purpose of computation of deduction under section 80HH & 80I, as assessee had no other source of Income.

*Swastik Textiles v. ITO (2003) SOT 327 (Jodh.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Change in constitution – Reconstruction of business**

On retirement of one partner, and remaining partner taking over the said running business, it would not amount to reconstruction so as to deny deduction under section 80HH.

*Abid & Co. Steels (P.) Ltd. v. ACIT (2003) SOT 605 (Mum.)(Trib.)*

**S. 80HH : Deduction – Newly established industrial undertakings – Backward areas – Interest from debtors**

Assessee is entitled to deduction under section 80HH in respect of Interest derived from various sources like, Interest from debtors, from banks on deposits pledged for obtaining letter of credit/ bank guarantee, Insurance claim receipts for reimbursement of losses etc. (A.Ys. 1992-93 & 1994-95)

*Dy. CIT v. Mira Industries (2003) 87 ITD 475 (Ahd.)(Trib.)*

*Centex Publication (P) Ltd. v. Dy. CIT (2003) 79 TTJ 265 (Delhi)/ 133 Taxman 42 (Mag.)(Trib.)*

*Also refer : Suman Goel (Smt.) v. ITO (2003) SOT 127 (Delhi), where in the matter was restored to file of Assessing Officer for considering deduction under section 80HHC.*

### **Section 80HHA : Deduction in respect of profits and gains from newly established small – scale industrial undertakings in certain areas**

#### **S. 80HHA : Deduction – Newly established small-scale industrial undertakings – Manufacture – Chickens [S. 80I]**

Process of dressing, rearing, defeathering deboning, etc. undertaken by the assessee to produce boneless chickens, etc., in the course of its poultry business does not amount to production of article or thing within the meaning of section 80HHA and 80I of the Act. (A.Y. 1998-99)

*CIT v. J.D. Farms (2009) 31 DTR 342 / 227 CTR 500 / 187 Taxman 151 (Delhi)(High Court)*

#### **S. 80HHA : Deduction – Newly established small-scale industrial undertakings – Audit report – Directory – Filed before assessment**

Sub- section (4) of section 80HHA requiring filing of audit report along with return is not mandatory and if audited accounts are filed by assessee before assessment plausible explanation is given for not filing same along with return deduction cannot be denied. (A.Y. 1983-84)

*CIT v. Shiva Rice and Dal Mills (2005) 196 CTR 78 / 273 ITR 265 / 144 Taxman 836 (P&H)(High Court)*

#### **S. 80HHA : Deduction – Newly established small-scale industrial undertakings – Manufacture – Heating of scrap bitumen**

Heating of scrap bitumen, which only results in separation of oil and water from bitumen does not amount to process of manufacturing.

*CIT v. Sri Meenakshi Asphalts (2004) 136 Taxman 170 / 266 ITR 626 / 189 CTR 138 (Mad.)(High Court)*

#### **S. 80HHA : Deduction – Newly established small-scale industrial undertakings – Small Scale Industrial Undertakings – Explanation retrospective**

Status of assessee as a small-scale industrial undertaking for assessment years 1992-93 and 1991-92 was to be determined in accordance with Explanation (b) inserted with retrospective effect from 1-4-1978. (A.Ys. 1991-92, 1992-93)

*CIT v. Hintannia Plastics (P.) Ltd. (2003) 131 Taxman 473 / 183 CTR 385 / (2004) 267 ITR 114 (Ker.)(High Court)*

### **Section 80HHB : Deduction in respect of profits and gains from projects outside India**

#### **S. 80HHB : Deduction – Projects outside India – Validity of provision [S. 80-O]**

The assessee challenged the constitutional validity of section 80HHB(5), on the ground that as a result of the Supreme Court's decision in Continental Construction Ltd. v. CIT (1992) 195 ITR 81 (SC), sub section (5), would operate to deny the double deduction which is otherwise available to an assessee under the other provisions of that Chapter including section 80-O. The Court upheld the constitutional validity, on the ground that in the instance case of the assessee, the consideration received related only to section 80HHB.

*Continental Construction Ltd. & Anr. v. UOI (2004) 186 CTR 88 / 178 Taxation 395 / (2003) 264 ITR 470 / 8 SCC 4 (SC)*

#### **S. 80HHB : Deduction – Projects outside India – Completed in 1982**

Assessee's overseas project having been completed in 1982, assessee was not eligible for deduction under section 80HHB which came on statute book w.e.f. 1st April, 1983 only. (A.Y. 1998-99)

*Som Datt Builders (P) Ltd. v. Dy. CIT (2006) 100 TTJ 485 / 98 ITD 78 (Kol.)(Trib.)*

### **Section 80HHC : Deduction in respect of profits retained for export business**

#### **S. 80HHC : Deduction – Export business – For purpose of section 115JA/JB – Deduction to be computed as per P & L profit and not normal provisions**

The deduction under section 80HHC is to be worked out not on the basis of regular income tax profits but it has to be worked out on the basis of the adjusted book profits in a case where section 115JA is applicable. Accordingly, the deduction claimed by the assessee under section 80HHC & 80HHE has to be worked out on the basis of adjusted book profit under section 115JA and not on the basis of the profits computed under regular provisions of law applicable to computation of profits and gains of business. (A. Y. 2000-01)

View of Special Bench in Dy. CIT v Syncome Formulations (2007) 106 ITD 193 upheld.

*CIT v. Bhari Information Technology Systems (P) Ltd. (2011) 245 CTR 1 / 62 DTR 337 / (2012) 340 ITR 593 (SC)*

#### **S. 80HHC : Deduction – Export business – Book Profits – Company [S. 115JB]**

Section 115JB is a self contained code. It refers to computation of "book profit" which has to be computed by making upward and downward adjustments. Cl. (iv) of the Explanation to section 115JB seeks to exclude "profits eligible for deduction under section 80HHC". Section 80HHC(1) refers to eligibility whereas section 80HHC(1B) deals with the "extent of deduction". For the purposes of computation of book profit which is different from the normal computation under the Act, the upward and downward adjustments are to be kept in mind and thus cl. (iv) of the Explanation to section 115JB covers full export profits of 100% as "eligible profits" and the same cannot be reduced to 80% by relying on section 80HHC(1B). The argument of the Department that both "eligibility" as well as "deductibility" of the profit have to be considered together for working out the deduction as mentioned in cl. (iv) has no merit. (A.Y. 2001-02)

*Ajanta Pharma Ltd. v. CIT (2010) 44 DTR 1 / 327 ITR 305 / 234 CTR 139 (SC)*

*Editorial:- CIT v. Ajanta Pharma Ltd. (2009) 318 ITR 252 (Bom.) reversed. View of Special Bench in CIT v. Syncome Formations (I) Ltd. (2007) 292 ITR (AT) 144 (SB)(Mum.) is up held.*

#### **S. 80HHC : Deduction – Export business – Fabrication charges from other Exporters**

Assessee being allowed deduction under section 80HHC in respect of the processing / fabrication charges on the goods which were ultimately exported by other exporters for whom processing was undertaken by the assessee, following the earlier decision of the High Court against which no appeal was filed the special leave petition was liable to be dismissed. (A.Y. 1994-95)

*Southern Sea Foods Ltd. v. Jt. CIT (2009) 28 DTR 108 / 184 Taxman 86 / 225 CTR 256 (SC)*

#### **S. 80HHC : Deduction – Export business – Reserve – Extent of deduction**

Apex Court dismissed the appeal of the assessee from the decision of the High Court where it was held that in a case where the reserve created for the purpose of special deduction under section 80HHC was of a lesser amount, then the deduction would be allowed only of the lesser amount supported by the creation of the reserve i.e. Assessee was entitled to deduction under section 80HHC, only to the extent of the amount covered by the reserve created in the Profit & Loss Account. (A.Y. 1987-88)

*Parekh Brothers v. CIT (2009) 309 ITR 446 / 223 CTR 127 (SC)*

#### **S. 80HHC : Deduction – Export business – Telecasting rights – Merchandise**

Telecasting rights fell in the category of articles of trade and commerce and hence within the category of "merchandise" and income thereof was eligible for deduction under section 80HHC.

Under Rule 9A and 9B the word 'lease' is included in the meaning of the word 'sale' and hence rental income was eligible for deduction under section 80HHC. (A.Y. 1993-94)

*CIT v. B. Suresh (2009) 313 ITR 149 / 222 CTR 513 / 178 Taxman 457 / 20 DTR 93 / 211 Taxation 169 / 11 SCC 643 (SC)*

*Editorial:- Judgement of Abdulguffar A. Nadiadwala v. ACIT (2004) 267 ITR 488 / 188 CTR 232 / 137 Taxman 112 (Bom.) affirmed.*

### **S. 80HHC : Deduction – Export business – DEPB license – Negative Profit**

Profits earned by assessee on sale of DEPB license under Foreign Trade (Development and Regulation) Act, 1992 and not under Imports (Control) Order, 1955 and duty drawback under Customs and Central Excise Duties Draw Back Rules, 1995, were includible in business profit while computing deduction under section 80HHC and whether assessee was entitled to claim deduction under section 80HHC where assessee had derived negative profits from export of goods, had not been decided by High Court, matter was restored to High Court for de novo consideration. (A. Y. 2001-02).

*Chotalal Samji v. ITO (2009) 183 Taxman 78 / 224 CTR 364 / 24 DTR 97 (SC)*

### **S. 80HHC : Deduction – Export business – Duty drawback – Cash compensatory support**

Duty drawback and cash compensatory support is eligible for reduction under section 80HHC even though no export is done by assessee during the relevant assessment year, as they are part of business profits (A.Y. 1991-92).

*B. Desraj v. CIT (2008) 171 Taxman 481 / 301 ITR 439 / 7 DTR 54 / 216 CTR 348 (SC)*

### **S. 80HHC : Deduction – Export business – Formula for deduction**

For the assessment year 1990-91, there was no profits on export sales. The Assessing Officer allowed deduction under section 80HHC. The CIT in revision disallowed the deduction but appellate Tribunal on appeal allowed the deduction. On reference, the High Court held that the amount was not deductible. On appeal to the Supreme Court, reversing the decision of the High Court and allowing the deduction the Court held that at the relevant period, the formula for allowing the deduction was simplistic. As was explained in CBDT Circular no 564 dated July 5, 1950, the quantum of deduction was on the basis of a proportion of business profits irrespective of what could strictly be described as "profits derived from the export of goods or merchandise out of India". (A.Y. 1990-91)

*Mysodet (P.) Ltd. v. CIT (2008) 305 ITR 276 / 219 CTR 1 / 174 Taxman 221 / 12 DTR 265 / (2009) 208 Taxation 39 (SC)*

### **S. 80HHC : Deduction – Export business – Sales through export house – Disclaimer certificate**

(i) If the assessee was a supporting manufacturer, the assessee would be entitled to claim the benefit under section 80HHC on production of a disclaimer certificate and  
(ii) fresh computation of deduction was required in view of subsequent judgments of the Supreme Court, i.e. *CIT v. K. Ravindranathan Nair (2007) 295 ITR 228 (SC)*, *A. M. Moosa v. CIT (2007) 294 ITR 1 / 212 CTR 89 / 163 Taxman 741 / (2008) 202*



*Taxation 153 (SC)* and the Judgment of Special Bench in case of *Lalsons Enterprises v. Dy. CIT (2004) 89 ITD 25 (Delhi)*. Decision of the Kerala High Court in *CIT v. Janatha Cashew Exporting Co. (2005) 278 ITR 327 (Ker.)*, set aside and matter remanded. (A.Y. 1992-93)

*Janatha Cashew Exporting Co. v. CIT (2008) 203 Taxation 160 / 214 CTR 11 / 166 Taxman 88 / 1 DTR 46 / (2009) 309 ITR 440 (SC)*

#### **S. 80HHC : Deduction – Export business – Export of tea – Profit on sale**

The Supreme Court held that deduction under section 80HHC was to be allowed only after the appropriation of the income from sale of tea grown by the assessee under Rule 8(1) of the Income Tax Rules and not on the total income.

The Supreme Court further held that important words in section 80HHC are “profits derived from export”. The word derived would mean derived from the source. The source has to be the one covered in section 14. Income covered by section 10(1); i.e., agricultural income which is not chargeable to tax, does not fall under section 14 and therefore will not fall under the various computation sections; i.e., sections 15 to 59.

*CIT v. Williamson Financial Services (2008) 297 ITR 17 / 2 SCC 202 / (2007) 165 Taxman 638 / 213 CTR 612 (SC)*

#### **S. 80HHC : Deduction – Export business – Brokerage – Commission**

The amendment by the Finance (No. 2) Act, 1991, in section 80HHC to the effect that business profit will not include receipts by way of brokerage, commission, interest, service charges, etc., is only prospective and not retrospective in nature. Order of the High Court set-aside and appeal allowed. (A.Y. 1990-91)

*K. K. Doshi and Co. v. CIT (2008) 297 ITR 38 / 215 CTR 114 / 171 Taxman 12 (SC)*

#### **S. 80HHC : Deduction – Export business – Computation – Loss in the export of trading goods – Profit of manufactured goods**

Loss in the export of trading goods has to be adjusted against the profit of manufactured goods. In view of judgment of supreme court in *IPCA Laboratories v. Dy. CIT (2004) 12 SCC 742*, the judgment of Kerala High Court was set aside.

*CIT v. B. Mohan Chandran Nair (2007) 196 Taxation 529 (SC)*

#### **S. 80HHC : Deduction – Export business – Manufacturer – Trader – Profit and Loss – Indirect cost – 10% Adjustment of export incentives**

Assessee engaged in business of export of ‘trading goods’; as per provisions, exporter of trading goods entitled to deduction in respect of export turnover as reduced by direct costs and indirect costs attributable to such export. Assessee claimed 10% adjustment of export incentive against indirect cost of trading goods while allowing deduction under section 80HHC of Act. Claim disallowed by authorities as well as the High Court. Hence, present appeal.

Held, 'Attributable' mentioned in section 80HHC(3)(b) of Act indicates that apportionment (principle of attribution) not omitted from section 80HHC(3)(b) of Act. Accordingly, assessee entitled to claim deduction of expenses incurred by him from export turnover. Estimated 10% adjustment rightly calculated. Thus, assessee's claim for 10% adjustment of export incentive against indirect costs attributable to such exports justified and allowed. Order of the High Court set-aside, appeal allowed. (A.Y.s 1994-95 to 1997-98)

*Hero Exports v. CIT (2007) 295 ITR 454 / 165 Taxman 445 / 213 CTR 291 / (2008) 10 RC 103 / 203 Taxation 144 (SC)*

*Editorial:- Special Bench Judgement in the case of Surendra Engineering Corporation v. ITO (2003) 86 ITD 121 (Mum.)(SB) approved.*

### **S. 80HHC : Deduction – Export business – Supporting manufacturer**

When the supporting manufacturer receives premium from the export houses or trading houses on the F.O.B. value of the goods sold, it would be included in the profits of the business and would be eligible for deduction. The restriction that the receipt should be in foreign exchange applies to direct exporter and not to supporting manufacturer selling goods to export houses or trading houses. (A.Ys. 1992-93 to 1994-95)

*CIT v. Baby Marine Exports (2007) 290 ITR 323 / 209 CTR 183 / 160 Taxman 160 / 199 Taxation 274 (SC)*

### **S. 80HHC : Deduction – Export business – Excise duty and sales tax – Total turnover**

The Supreme Court following its earlier decision of CIT vs. Lakshmi Machine Works 290 ITR 667, held that just as commission received by the assessee is relatable to exports and yet it cannot form part of "turnover", so also excise duty and sales tax do not emanate from the "turnover". (A.Y. 1997-98)

*CIT v. Catapharma (India) Pvt. Ltd. (2007) 292 ITR 641 / 211 CTR 83 / 162 Taxman 455 / 201 Taxation 375 / 11 SCC 145 (SC)*

### **S. 80HHC : Deduction – Export business – Meaning of profit [S. 80AB]**

The word "profit" in sections 80HHC(1) and (3) means a positive profit. Deduction can be permitted only if there is a positive profit in the exports of both self manufactured goods as well as trading goods. If there is a loss in either of the two, then the loss has to be taken into account for the purpose of computation of profits.

Section 80AB is an overriding section with respect to Chapter VIA. Section 80HHC does not provide that its provisions are to prevail over section 80AB or any other provisions of the Act. Section 80HHC would thus be governed by section 80AB. (A.Y. 1992-93)

*A. M. Moosa v. CIT (2007) 294 ITR 1 / 212 CTR 89 / 163 Taxman 741 / (2008) 202 Taxation 153 (SC)*

**S. 80HHC : Deduction – Export business – Processing charges – Total turnover**

Processing charges, which are part of the gross total income, forms an item of independent income like rent, commission, etc. and, therefore, 90% of the processing charges have to be reduced from the gross total income to arrive at the business profit, and therefore, they should also to be included in the total turnover to arrive at the business profit in terms of clause (baa) of the Explanation to section 80HHC(3).

(A.Y. 1993-94)

*CIT v. K. Ravindranathan Nair (2007) 295 ITR 228 / 213 CTR 227 / 165 Taxman 282 / (2008) 203 Taxation 119 (SC)*

**S. 80HHC : Deduction – Export business – Excise duty – Sales tax – Total turnover**

Excise Duty and Sales Tax cannot form part “turnover” for the purpose of calculation of deduction under section 80HHC. It was further held that while interpreting the word “total turnover” in the formulae in section 80HHC, one has to give a schematic interpretation. (A.Y. 1993-94)

*CIT v. Lakshmi Machine Works (2007) 290 ITR 667 / 210 CTR 1 / 160 Taxman 404 / 200 Taxation 254 (SC)*

**S. 80HHC : Deduction – Export business – Gross total income [S. 80AB]**

Section 80AB of the Income-tax Act would apply for determination of profits from the export business for the purpose of deduction under section 80HHC.

Further, in determination of business profits under section 80HHC the unabsorbed business losses of the earlier year under section 72 should be set off. (A.Y. 1995-96)

*CIT v. Shirke Construction Equipments Ltd. (2007) 291 ITR 380 / 161 Taxman 212 / 210 CTR 159 / 201 Taxation 398 (SC)*

**S. 80HHC : Deduction – Export business – Interest – Sales tax set off**

Interest and sales tax set off assessed as business profits hence the amounts includible for computation of special deduction. (A.Y. 1989-90)

*CIT v. Alfa Laval (India) Ltd. (2007) 295 ITR 451 / (2008) 170 Taxman 615 (SC)*

**S. 80HHC : Deduction – Export business – Amendment of 1991 – Prospective**

The assessee carrying on business of export of his own products and was also procuring export contract for other exporters on commission basis, the income derived by him from such activity would be eligible for deduction under section 80HHC. The amendments to section 80HHC by Finance (No. 2) Act, 1991, were prospective in nature. (A.Y. 1990-91)

*P. R. Prabhakar v. CIT (2006) 154 Taxman 503 / 284 ITR 548 / 6 SCC 84 / 195 Taxation 221 / 204 CTR 27 (SC)*

**S. 80HHC : Deduction – Export business – Profits – Manufacturing and trading goods**

It is no doubt true that the term “profits” implies positive profit which has to be arrived at after taking in to consideration profit earned from export of both, self manufactured goods and trading goods and profits and losses in both trades have, thus to be taken in to consideration. If it is found that a loss has occurred, sub-section (3) of section 80HHC will have no application. The expression ‘Profits’ used in section 80HHC, denotes positive profit. Thus for the purpose of section 80HHC, profit has to be arrived at after taking in to consideration the profit earned from export of both self manufactured goods and trading goods. (A.Y. 1994-95)

*ITO v. Induflex Productions (P.) Ltd. (2005) 149 Taxman 687 / 199 CTR 712 / (2006) 280 ITR*

*1 / 6 RC 8 (SC)*

### **S. 80HHC : Deduction – Export business – Cut and polished granite**

Benefit of section 80HHC was available to export of cut and polished granite only with effect from 1-4-1991. (A.Ys. 1984-85, 1987-88, 1989-90)

*GEM Granites v. CIT (2005) 185 Taxation 5 / 1 SCC 289 / (2004) 271 ITR 322 / 141 Taxman 528 / 192 CTR 481 (SC)*

### **S. 80HHC : Deduction – Export business – Computation – Profits**

In arriving at the profits earned from the export of both self manufactured goods and trading goods, profits and losses in both trades have to be taken into consideration and if after such adjustments, there is a positive profit, then assessee will be entitled to deduction. Profit occurring in section 80HHC(3), will mean profits after taking in to account losses if any. (A.Y. 1996-97)

*IPCA Laboratory Ltd. v. Dy. CIT (2004) 266 ITR 521 / 135 Taxman 594 / 187 CTR 513 / 181 Taxation 2 (SC) / 12 SCC 1075*

### **S. 80HHC : Deduction – Export business – Second proviso – Opportunity to comply**

The Supreme Court allowed assessee to comply with the second proviso to section 80HHC, non compliance with which was the only reason for denial of deduction under section 80HHC, assessee was to be allowed deduction. (A.Y. 1987-88)

*Karimjee (P.) Ltd. v. Dy. CIT (2004) 271 ITR 564 / (2005) 143 Taxman 226 / 186 Taxation 630 / 193 CTR 55 (SC)*

### **S. 80HHC : Deduction – Export business – Counter sales – Convertible foreign exchange**

The transactions of counter sales effected by the respondent inconvertible foreign exchange the assessee was held to be entitled for deduction under section 80HHC as such sale involved custom clearance within the meaning of Explan (aa) of section 80HHC. (A.Y. 1996-97)

*CIT v. Silver & Arts Palace (2003) 259 ITR 684 / 174 Taxation 742 / 180 CTR 309 / 129 Taxman 56 (SC)*

**S. 80HHC : Deduction – Export business – Twelfth schedule – Cut and polished granite blocks**

Where assessee was exporting “cut and polished” granite blocks (although not finally cut and preciously polished), as assessee processed rough mineral by cutting and processing which added value to marketable commodity, it was entitled to deduction under section 80HHC in respect of export of granite. (A.Ys. 1991-92, 1993-94)

*CIT v. God Granites (2003) 262 ITR 567 / 129 Taxman 547 / 183 CTR 20 (SC)*

**S. 80HHC : Deduction – Export business – Profits of business – Interest ICDs**

Finding of the authorities below that interest income received by the assessee company on bank deposits and inter-corporate deposits is a part of business profit not having been shown to be perverse, the same cannot be excluded from the business profit while calculating the deduction under section 80HHC.

*CIT v. Sociendade De Fomento Industrial Ltd. (2011) 237 CTR 141 / 49 DTR 161 / 335*

*472 / 199 Taxman 45 (Bom.)(High Court)*

**S. 80HHC : Deduction – Export business – Receipts – Freight – Insurance – Packing charges – Sales tax set off**

90% of receipts from freight and insurance, packing charges, sales tax set off and gross service income was be excluded from the profits of the business in terms of explanation (baa) to section 80HHC of the Income Tax Act. (A. Y. 2003-04).

*CIT v. Dresser Rand India P. Ltd. (2011) 330 ITR 453 (Bom.)(High Court)*

*Editorial:- Refer, CIT v. Dresser Rand India Pvt. Ltd. (2010) 323 ITR 429 (Bom.). In Pfizer Ltd. (2010) 233 CTR 521 / (2011) 330 ITR 62 (Bom.) distinguished.*

**S. 80HHC : Deduction – Export business – Separate books – Profits of all business**

For the purpose of section 80HHC of the Act, even though the assessee had maintained separate books for each business, deduction under section 80HHC is to be computed on the basis of profit derived from all these business. (A. Y. 2003-04).

*G. J. Fernandez v. ACIT (2011) 52 DTR 345 / 241 CTR 100 (Karn.)(High Court)*

**S. 80HHC : Deduction – Export business – Fluctuation in foreign exchange – Export turnover**

Surplus realization due to fluctuation in foreign exchange rates is part and parcel of the export turnover for the purpose of section 80HHC.

*Raghunath Exports (P) Ltd. v. CIT (2011) 240 CTR 79 / 330 ITR 57 / 52 DTR 151 (Cal.)(High Court)*

**S. 80HHC : Deduction – Export business – Composite services**

Professional charges received by the assessee for procuring order and rendering composite services are to be reduced while computing deduction under section 80HHC of the Act as the same do not form part of export sales proceeds. (A. Y. 2001-02).

*Anil Dang v. ITO (2011) 55 DTR 349 (Karn.)(High Court)*

**S. 80HHC : Deduction – Export business – Sale of scrap – Total turnover**

Sale of scrap cannot be excluded from "Total turnover" which shall increase the denominator of the formula for determining the extent of benefit admissible to an assessee under section 80HHC. (A. Ys. 1989-90 to 1991-92).

*CIT v. Bicycle Wheels (India) (2011) 244 CTR 453 / 335 ITR 384 / 61 DTR 243 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Different business – Export turnover – Total turnover**

Assessee carried on the business of growing and manufacturing of tea in its own estates, which was sold in the domestic market as well as export, assessee also maintained separate books of account in respect of exporting of tea purchased by it. It was contended that different businesses of the assessee are required to be considered separately for the purpose of calculating the deduction under section 80HHC of the Act. High Court held that different business of the assessee cannot be considered separately for the purpose of calculating deduction under section 80HHC. The deduction under section 80HHC was required to be computed by aggregating the profits, export turn over and total turnover of all the business and not separately with reference to the profits, export turnover and total turnover of each business. (A. Y. 1991-92).

*Duncans Industries Ltd. v. CIT (2011) 62 DTR 305 / 202 Taxman 677 / 245 CTR 77 (Cal.)(High Court)*

**S. 80HHC : Deduction – Export business – Computation – Total turnover – Two units**

When an assessee runs and manages two separate units, one of which is engaged fully and partially in earning through exports then, in calculation of proportionate deductible profits for the purpose of deduction under section 80HHC the "Total turnover of the business" would include only the turn over of the export business and not that of the domestic business (A. Y. 1997-98).

*CIT v. Padmini Technologies Ltd. (2011) 64 DTR 217 / 245 CTR 611 (Delhi)(High Court)*

**S. 80HHC : Deduction – Export business – Processed – Blending of tea**

Blending of different types of tea comes within the purview of the "processed" under the meaning of section 80HHC(3)(a). Hence, it is the claim is allowable under section 80HHC.

(A. Ys. 1996-97, 1997-98)

*Stewart Holl (India) Ltd. v. CIT (2011) 245 CTR 71 / 338 ITR 194 / 61 DTR 290 (Cal.)(High Court)*



### **S. 80HHC : Deduction – Export business – Other income – Nexus**

Receipts with no nexus to exports have to be excluded for section 80HHC deduction. (A.Y. 2002-03)

*CIT v. Dresser Rand India (P) Ltd. (2011) 220 Taxation 56 / 232 CTR 52 / (2010) 323 ITR 429 / 191 Taxman 339 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Profits of business – Insurance claim – Stock-in-trade**

The insurance claim for loss of stock-in-trade must stand on the same footing as the income that would have been realized by the assessee on the sale of the stock-in-trade. Insurance claim on account of the stock-in-trade does not constitute an independent income or a receipt of a nature similar to brokerage, commission, interest, rent or charges; hence, such a receipt would not be subject to a deduction of ninety percent under clause (1) of Expln. (baa). (A.Y. 2001-02)

*CIT v. Pfizer Ltd. (2011) 330 ITR 62 / (2010) 233 CTR 521 / 42 DTR 32 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Profits of business – Gross or net interest**

While computing deduction under section 80HHC, 90 percent of gross interest is to be reduced from the profits of the business in term of cl. (baa) of Expln. to section 80HHC. (A.Y. 2003-04)

*CIT v. Gem Plus Jewellery India Ltd. (2011) 330 ITR 175 / (2010) 42 DTR 73 / 233 CTR 248 / 194 Taxman 192 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – New industrial undertaking – S. 80IA(9) – Section 80-IA deduction to be reduced for S. 80HHC deduction**

The expression "deduction to the extent of such profits" signifies that if an assessee is claiming benefit of deduction of a particular amount of profits and gains Under section 80IA, to that extent profits and gains are to be reduced while calculating the deduction under Chapter VI A (C). The word "and" is disjunctive and means that the other provision is independent. The provision aims at achieving two independent objectives and cannot be limited to second objective alone thereby annihilating the first altogether and making it otiose. Even under the purposive interpretation, the purpose behind introducing section 80IA(9) is to ensure that an assessee does not get deduction on the amount of profits and gains accorded in one provision.

The argument that where the Legislature intended to deduct the amount out of some other deduction a different phraseology was used is also not acceptable. Merely because section 80-IB is not worded in a similar fashion does not mean that one has to do violence with the plain language of the provision, which is capable of only one meaning.

*Great Eastern Exports v. CIT (2011) 332 ITR 14 / 237 CTR 264 / 49 DTR 33 / 196 Taxman 195 (Delhi)(High Court)*

### **S. 80HHC : Deduction – Export business – Calcined Petroleum Coke – Mineral oil**

Assessee company manufacturing and exporting CPC, would be entitled to deduction under section 80HHC in respect of profits arising out of export of CPC. Calcined Petroleum Coke (CPC), produced from raw petroleum coke by subjecting same to a manufacturing process called as “calcining process” cannot be called “Mineral Oil”.

*Goa Carbon Ltd. v. CIT (2011) 195 Taxman 1 / 332 ITR 209 / 52 DTR 333 / 239 CTR 354 / (2010) Vol. 112 (10) Bom. L. R. 4477 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Netting of Interest**

For explanation (baa) to section 80HHC, netting of income from expenditure is not allowed. (90% of Gross interest to be considered)(A.Y. 2003-04)

*CIT v. Asian Star Co Ltd. (2010) 37 DTR 209 / 231 CTR 1 / 326 ITR 56 (Bom.)(High Court)*

*Editorial: Decision of Special Bench Lalson Enterprise (2004) 89 ITD 25 / 82 TTJ 1048 (Delhi)(SB), not approved. Supreme Court in ACG Associated Capsules (P) Ltd. v. CIT (2012) 247 CTR 372 (SC) has taken contrary view in favour of assessee.*

### **S. 80HHC : Deduction – Export business – Sale of scrap – Total turnover**

Value of scrap cannot be excluded while computing the deduction under section 80HHC.

(A.Y. 1993-94)

*CIT v. Motor Industries Co. Ltd. (2010) 37 DTR 94 / 326 ITR 358 (Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – EEFC A/C – Foreign exchange gain**

EEFC A/c foreign exchange fluctuation and interest not eligible under section 80HHC. (A.Y. 2000-01)

*CIT v. Shah Originals (2010) 191 Taxman 81 / 39 DTR 145 / 327 ITR 19 / 232 CTR 228 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Computation – Direct Cost – Freight & insurance**

While computing the deduction under section 80HHC(3)(b), freight and insurance is not be included in the direct cost.

*CIT v. King Metal Works (2010) 329 ITR 426 / 192 Taxman 294 / 45 DTR 76 / 235 CTR 234 / (2011) 224 Taxation 390 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – DEPB**

The assessee had an export turnover exceeding ` 10 crores and did not fulfil the conditions set out in the third proviso to section 80HHC(3) and therefore, the assessee was not entitled to a deduction under section 80HHC, on the amount received on transfer of DEPB. The contention that profits on transfer of DEPB in section 28(iiid) would not include the face value of the DEPB so that the assessee

gets the deduction under section 80HHC on the face value of the DEPB has no merit. (A.Y. 2003-04)

*CIT v. Kalpataru Colours & Chemicals (2010) 233 CTR 313 / 42 DTR 193 / 328 ITR 451 / 192 Taxman 435 (Bom.)(High Court)*

*Editorial : Supreme Court overruled judgment in Topman Exports v. CIT (2012) 342 ITR 49 (SC)*

### **S. 80HHC : Deduction – Export business – Interest income**

Where the assessee is a one hundred per cent (100%) exporter and it had no other business. Interest earned on fixed deposits made out of business funds for obtaining loan for export business has to be treated as business income and not income from other sources and consequently such interest income is eligible for deduction under section 80HHC of the Income-tax Act, 1961. (A.Y. 1996-97)

*CIT & Anr. v. Hajee Jaffar Shariff (2010) 40 DTR 81 (Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest income**

Interest income earned by the assessee on the fixed deposited placed by it for giving necessary bank guarantees and pledging the same with the Apparel Export Promotion Council (AEPC) to procure quota of export was held to be having direct nexus with the export business of the assessee as such, for the purpose of computing deduction under section 80HHC of the Act the assessee was allowed to adjust the interest received by it against the interest paid to the bank on the credit facilities availed by it.

*CIT v. Shahi Export House (2010) 46 DTR 34 / 195 Taxman 163 (Delhi)(High Court)*

### **S. 80HHC : Deduction – Export business – Distillation charges**

Distillation charges received by the assessee, engaged in the business of export of spices extracts were held to be in nature of any other receipt of similar nature within the meaning of explanation (baa) to section 80 HHC of the Act and therefore, ninety percent of the same should be excluded while computing eligible deduction of export profit under section 80HHC of the Act. (A.Ys. 1994-95, 1995-96)

*CIT v. Plant Lipids Ltd. (2010) 46 DTR 65 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Direct cost – Freight and insurance**

Where the assessee an exporter has already reduced the amount of freight and insurance charges attributable to transportation of exported goods have been excluded while computing export turnover, these charges cannot be again deducted as a part of direct cost while computing deduction under section 80HHC of the Act. (A.Y. 1995-96)

*CIT & Anr. v. HJS Stones Ltd. (2010) 47 DTR 95 / 237 CTR 67 / 335 ITR 500 (Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – Technical service – Computer software**

Amount received by the assessee on account of technical service fees in the course of its export business is not liable to be reduced by ninety percent (90%) as provided in explanation (baa) to section 80HHC of the Act. (A.Y. 1996-97)

*CIT v. Motor Industries Co. Ltd. (2010) 48 DTR 257 / (2011) 239 CTR 541 / 331 ITR 79 (Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – Pro rata domestic business**

Where business of the assessee consists of export business as well as domestic business, then section 80HHC(3)(b) applies and not 80HHC(3)(a). Therefore, deduction is allowable on pro rata basis. Rathore Bros (2002) 254 ITR 656 (Mad.) dissented from; Indian Spices Company (2004) 267 ITR 445 (Ker.) followed.(A.Y. 1988-89)

*CIT v. Jindal Fine Industries (2009) 210 Taxation 1 / (2008) 307 ITR 307 (P&H)(High Court)*

### **S. 80HHC : Deduction – Export business – Separate books**

Where the assessee was maintaining separate books of accounts for its export business and local business deduction under section 80HHC of the Act is to be determined on the basis of the total turnover and profits of export division alone and not on the total turnover and the profits of the entire business of the assessee, including local business. (A.Y 2003-04)

*CIT v. Sivagami Match Industries (2009) 24 DTR 109 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Licence for overseas right**

Licence for overseas exhibition or broadcasting rights for cinematographic films is export of merchandise or goods for the purpose of section 80HHC of the Income-tax Act, 1961.

*CIT v. Firoz Khan (2009) 313 ITR 123 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – RBI – Extension period**

The assessee, an export unit, brought in money during the extended period in terms of approval granted by RBI to the extent of 30% based on the proposed deduction in the export price by the buyer. The Tribunal held that once the RBI had agreed to reduction in the invoice amount the original sale price stood rectified and such rectified price to be taken as actual export value. Such adjusted export value alone was to be included in the export turnover and the total turnover.

*CIT v. Polycott Corpn. (2009) 318 ITR 144 / 222 CTR 328 / 178 Taxman 255 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Margin money**

Interest income received by the assessee on the fixed deposits placed by it as margin money or security for bank guarantee, etc which is taxed under the head income from other source, such interest could not be included while computing deduction under section 80HHC of the Act. (A.Y. 2001-02)

*CIT v. Mereena Creations (2009) 32 DTR 97 / (2011) 330 DTR 199 / (2010) 189 Taxman 71 (Delhi)(High Court)*

**S. 80HHC : Deduction – Export business – Both deductions [S. 80IB(13)]**

The assessee is not entitled to simultaneous deduction of both sections 80HHC and 80IB while computing deduction under section 80HHC, in view of specific exclusion under section 80IB(13) hence, deduction granted under section 80IB has to be excluded.

*Olam Exports India Ltd v. CIT (2009) 184 Taxman 373 / (2010) 229 CTR 206 / 340 DTR 132 / (2011) 332 ITR 40 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Bad debts – Exempt income [S. 14A, 36(1)(vii)]**

The expenditure incurred from the export income could not be held to be for earning income which did not form part of the total income, which concept was dealt with under section 10 of the Act. Section 80HHC deals with deduction of the element of profit derived from export from taxable income. Therefore, the claim of bad debt could not be disallowed. (A.Y. 2005-06)

*CIT v. Kings Exports (2009) 318 ITR 100 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Total turn over – Quality claim**

Amount received by the assessee towards quality claim for raw materials does not form part of the 'total turnover' for the purpose of calculating deduction under section 80 HHC of the Act. (A.Y. 1997-98)

*CIT v. K.R. Ushasree (Smt.) (2009) 18 DTR 113 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Local sales – Total turn over**

For the purpose of computing deduction under section 80HHC of the Act, local sales does not form part of the 'total turnover'. (A.Y. 1992-93)

*CIT v. FAL Industries Ltd. (2009) 17 DTR 308 / 314 ITR 47 / (2010) 189 Taxman 400 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Films songs and music**

The export of master copies of film songs and music along with rights to make copies and sell cassettes outside India is a sale of goods or merchandise for the purpose of deduction under section 80HHC. (A.Y. 1994-95 to 1997-98)

*CIT v. Giza Impese (P.) Ltd. (2007) 293 ITR 301 (Mad.)(High Court)*

**S. 80HHC : Export business – Net interest - Entitled to reduce interest paid by it from interest received by it, while calculating deduction under section 80HHC(4A) read with Explanation (baa).**

Dismissing the appeal of the revenue , the Court held that ; assessee was entitled to reduce interest paid by it from interest received by it, while calculating deduction under section 80HHC(4A) read with Explanation (baa).

**CIT v. Krishan Kumar Aggarwal (2008) 170 Taxman 23 (Delhi) ( HC) ,**

**Editorial :** SLP of revenue is dismissed ; CIT v Krishan K. Aggarwal (2017) 245 Taxman 75 (SC)

**S. 80HHC : Deduction – Export business – Unabsorbed losses [S. 32A, 72A]**

That the unabsorbed losses had to be deducted to arrive at the profits for purposes of calculating the special deduction under section 80HHC. (A.Y. 1991-92)

*CIT v. Ashok Leyland Ltd. (2008) 297 ITR 107 / 215 CTR 187 / 170 Taxman 185 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Excise duty – Scrap sale – Total Turnover – Recovery of return from salaries – Exclusion from export profit**

- i. Excise duty would not form part of the total turnover for the purpose of calculation of deduction under section 80HHC.
- ii. The scrap sales would not be included in the total turnover for the purpose of calculation of deduction under section 80HHC.
- iii. The Tribunal was right in ordering exclusion of the recovery of return made from the salaries of managerial personnel from total turnover for the purpose of calculating relief under section 80HHC.

*CIT v. Ashok Leyland Ltd. (2008) 297 ITR 107 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Gross interest – Commission**

Ninety per cent (90%) of gross interest and commission are to be reduced while computing deduction under section 80HHC of the Act. (A.Y. 2004-05)

*Ambattur Clothing Co. Ltd. v. ACIT (2008) 16 DTR 142 / (2010) 326 ITR 245 / 16 DTR 142 / (2009) 221 CTR 196 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Sub lease charges**

Sub-lease charges received by the assessee were held to be assessable as income from other sources and cannot be reckoned while computing deduction under section 80HHC of the Act. (A.Ys. 1996-97)

*Vallabhdas Kanji Ltd. v. CIT (2008) 13 DTR 154 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Commission**

Commission earned by the assessee, a supporting manufacturer, from export house was an integral part of sale price and constituted profit eligible for deduction under section 80 HHC of the Act. (A.Y. 1994-95, 1997-98)

*CIT v. Aswini Fisheries Ltd. (2008) 11 DTR 350 (Mad.)(High Court)*



### **S. 80HHC : Deduction – Export business – Export premium**

While computing deduction under section 80 HHC of the Act, ninety per cent (90%) of the export house premium is not to be excluded under clause (baa) of Explanation to s. 80HHC of the Act.

*CIT v. Choice Trading Corporation Ltd. (2008) 12 DTR 22 / 174 Taxman 41 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Audit report – Assessment proceedings**

Deduction under section 80 HHC of the Act could not be denied to the assessee where the audit report in Form No. 10 CCAB as prescribed under the Income Tax Rules were filed during the assessment proceeding when the assessee made the claim for deduction under section 80HHC of the Act for the first time by filing audit report.

*ITO v. VXL India Ltd. (2008) 12 DTR 203 / 219 CTR 242 / (2009) 312 ITR 187 (Guj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Short term deposit – Business income**

The assessee was a Private Limited Company engaged in business of export of processed food items. In the process, the assessee received some amounts from its foreign customers by way of advance in respect of the exports to be made by it. The amounts so received were kept in short-term deposits with banks and it had received interest out of those deposits. The assessee treated it as part of its business income and claimed deduction under section 80HHC for all the years.

The Assessing Officer negatived the claim and treated it as income from other sources, but the ITAT treated the same as business income.

On appeal to the High Court, the High Court held that what is business income and what is not business income has to be judged from the main activity of the business of each assessee. In the present case, main activity of the assessee was export business and not that of earning interest on short term fixed deposits. The assessee instead of keeping such funds idle, since it did not require it for its immediate business activity, had deposited the same in Banks and hence interest income derived from such advances was assessable as business income. (A.Ys 1986-87 to 1988-89).

*CIT v. Producin P. Ltd (2007) 290 ITR 598 / 211 CTR 393 (Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – Growing and manufacturing tea**

Deduction under section 80HHC of the Act is allowable on composite income of growing and manufacturing of tea, before application of Rule 8(1) of Income Tax Rule. (A.Y. 1991-92)

*Williamson Financial Service Ltd. v. CIT (2007) 295 ITR 371 / (2008) 168 Taxman 261 (Gau.)(High Court)*

*Editorial : Reversed by Supreme Court in CIT v. Williamson Financial Services and other (2008) 297 ITR 17 (SC)*

**S. 80HHC : Deduction – Export business – Reduction of 10 % – Indirect cost – For earning export incentives, brokerage, miscellaneous income**

Where the assessee for the purpose of deduction under section 80HHC reduced the indirect cost of goods exported by 10% being the expenses for earning export incentives, brokerage and miscellaneous income. The High Court on appeal held that the profits from export of trading goods has been defined to mean export turnover of such goods minus direct or indirect cost attributable to such exports. As such an assessee would not be entitled to claim deduction only on account of expenses without income having been included therein. Accordingly, the assessee would not be entitled to deduct 10% of earning from export incentive etc. as expenses from the indirect cost. (A.Y. 1996-97)

*CIT v.. Hero Exports, (2007) 292 ITR 571 / (2008) 169 Taxman 26 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Freight charges**

Freight charges were incurred by assessee and recovered by it from its foreign buyer, same were liable to be included in expression 'indirect cost' for purposes of calculation of export turnover in terms of section 80HHC[3][b]. (A.Y. 1998-99)

*CIT v. Crown Computerized (2007) 160 Taxman 213 / 208 CTR 94 / 289 ITR 151 (Delhi)(High Court)*

**S. 80HHC : Deduction – Export business – Duty of Assessing Officer**

It was held that the Assessing Officer is duty bound to allow deduction with reference to profits determined in the assessment proceedings.

*CIT v. Bawa Skin Co. (2007) 165 Taxman 102 / 294 ITR 537 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Netting of interest income**

Interest paid by assessee is liable to be reduced from interest received by it while calculating deduction under section 80HHC(1), read with Explanation (baa).

*CIT v. Anand Kumar (2007) 164 Taxman 330 (Delhi)(High Court)*

**S. 80HHC : Deduction – Export business – Surrender – Survey [S. 133A]**

Where the assessee surrendered income as a result of survey on account of excess stock and undisclosed investment in building and claimed the same to be eligible for deduction under section 80HHC of the Act. On appeal High Court held that deduction under section 80HHC of the Act is available only on fulfilment of certain conditions specified under section 80HHC therein. There can be no presumption in such case, that surrender made by the assessee on account of difference in stock at the time of survey represented income from exports.

*Sarla Handicraft P. Ltd. v. Addl. CIT (2007) 201 Taxation 529 / (2008) 296 ITR 94 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Interest**

Income from manufacture and sale of tea – Deduction under section 80HHC is required to be computed before apportionment of income as agriculture and non-agriculture under rule 8. (A.Y. 1990-91)

*Williamson Financial Services Ltd. v. CIT & Anr. (2007) 212 CTR 32 / 290 ITR 385 (Gau.)(High Court)*

### **S. 80HHC : Deduction – Export business – Net interest**

The expression 'profit derived from such exports' occurring in sub-section 3 read with Explanation (baa) of section 80HHC restrict the profits available for deduction under section 80HHC, only to those items of income which are directly relatable to export business.

Expression "interest" in Explanation (baa) connotes gross interests less expenditure incurred by the assessee for earning such interest.

*CIT v. Shri Ram Honda Power Equipment & Ors. (2007) 289 ITR 475 / 158 Taxman 474 / 207 CTR 689 / 199 Taxation 443 (Delhi)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Business income – Income from other sources**

The High Court held that there is no distinction between the interest income, which is, assessed as business income or other interest, which is assessed as income from other sources. Accordingly, the assessee has to reduce 90% of such interest under explanation (baa) while computing deduction under section 80HHC of the Act. (A.Y. 1994-95)

*CIT v. Malwa Cotton Spinning Mills Ltd. (2007) 200 Taxation 150 / (2008) 302 ITR 53 / 166 Taxman 457 (P&H)(High Court)*

### **S. 80HHC : Deduction – Export business – Duty drawback – Cash compensatory**

Duty drawback and cash compensatory support cannot be considered as export profit in order to confer benefit of deduct in under section 80HHC to the assessee in spite of fact that the Assessee has not made any export during the relevant year. (A.Y. 1991-92)

*CIT v. B. Desraj (2007) 207 CTR 81 / 293 ITR 214 / 164 Taxman 498 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Gross or net**

It is the gross interest received which is to be considered and not net interest for the purpose of explanation (baa) to section 80HHC. (A.Y. 1992-93)

*CIT v. Liberty Footwear Company (2007) 207 CTR 185 / (2006) 287 ITR 339 (P&H)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest**

Computation interest and other income not includible under head Profits and gains of business.

*CIT v. Bakelite Hylam Ltd. (2006) 287 ITR 75 / (2007) 207 CTR 584 / 158 Taxman 111 / 2007 TLR 692 (AP)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Export incentive – Octroi refund**

Interest income, export incentive, sales in India, octroi refund did not form part of total profits for the purposes of total turnover and also as qualifying profit under section 80HHC of the Act.

*CIT v. Gaskets & Radiators Distributors (2006) 206 CTR 209 / (2007) 163 Taxman 39 / (2008) 296 ITR 440 (Guj.)(High Court)*

**S. 80HHC : Deduction – Export business – Service charges – Cash discount – Commission – Forwarding charges – Weighment charges – Octroi refund**

Where there is no material to show that income from service charges, cash discount, commission, forwarding, weighment charges and octroi refund have any nexus or are connected with the export activities of the assessee, then, as per clause (baa) of explanation to section 80HHC(4B) such incomes do not qualify for deduction under section 80HHC of the Act. (A.Y. 1992-93)

*Flour & Food Ltd. v. CIT (2006) 195 Taxation 78 / 203 CTR 369 / 154 Taxman 6 / (2007) 292 ITR 29 (MP)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Business income**

Once the income was assessed as income from business or profession, the same had to be taken as such for the purpose of calculation of profits of the business in terms of clause (baa) of section 80HHC, after reducing therefrom 90 per cent of the amount so referred in the clause. (A.Y. 1993-94)

*CIT v. Avery Cycle Inds. Ltd. (2006) 157 Taxman 382 / 206 CTR 347 / (2008) 296 ITR 393 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Duty drawback**

For computing eligible profits of business, cash assistance, duty drawback and import entitlement do not form part of export turnover for the deduction under section 80HHC. (A.Y. 1975-76)

*CIT v. Maganlal Chaganlal (P) Ltd. (2006) 201 CTR 130 / 284 ITR 663 / 150 Taxman 146 (Bom.) (High Court)*

*Khan Intl. Exports (P) Ltd. v. CIT (2006) 201 CTR 165 / 280 ITR 165 (All); CIT v. Himalaya Cattery Works (2006) 201 CTR 167 / 287 ITR 505 (All.)(High Court)*

**S. 80HHC : Deduction – Export business – Unshelled groundnuts**

Unshelled groundnuts which are when processed, the end product namely groundnuts cease to be "agricultural primary commodity" even if they continue to remain agricultural commodity.

The kernels that are ultimately exported after processing of groundnuts did not come within the ambit of the expression agricultural primary commodities appearing in section 80HHC(2)(b)(i) of the Act. (A.Y. 1983-84)

*CIT v. Gujarat State Export Corporation (2006) 280 ITR 62 / 150 Taxman 550 / (2005) 199 CTR 217 (Guj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Export turn over**

The export development allowance is to be computed in the same proportion of the profits and gains of the business as the export turnover bears to the total turnover. (A.Y. 1986-87)

*CIT v. Rolcon Engg. Co. Ltd. (2006) 286 ITR 450 / 193 Taxation 111 (Guj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Cut – Polished granite**

The assessee which exported granite after it was cut and polished was not entitled to claim deduction in respect of profits from the exports for the A.Y. 1989-90 though CBDT w.e.f. 1-4-1991 clearly stated that the benefit of sec. 80HHC would be available to cut & polished granite. (A.Y. 1989-90)

*CIT v. Sunshine Enterprises (2006) 284 ITR 393 / 203 CTR 334 / 160 Taxman 189 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Computation – Profits of business – Hire charges**

Ninety percent of rent and hire charges had to be excluded from computing profits of business. (A.Y. 1992-93)

*Liberty Footwear Co v. CIT (2006) 283 ITR 398 / (2004) 141 Taxman 592 / 191 CTR 378 (P&H)(High Court)*

### **S. 80HHC : Deduction – Export business – Realization of export proceeds – Time limit**

Explanation given by assessee for delayed receipt of proceeds for exports was due to currency crisis in South East Asian countries and devaluation of Hong Kong dollar, Commissioner was not justified in rejecting assessee's application seeking extension of time under section 80HHC(2)(a).

*Kamlesh R. Shah v. CIT (2006) 286 ITR 684 / 154 Taxman 240 / (2005) 195 CTR 323 / 195 CTR 323 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Cut and polished minerals**

Benefit of amendment made in section 80HHC by Finance (No. 2) Act of 1991, (allowing benefit of section 80HHC to cut and polished minerals), w.e.f. 1991 could not have been extended to assessee in relation to assessment year 1984-85.

*CIT v Haryana Minerals Ltd. (2005) 276 ITR 399 / 150 Taxman 161 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Interest of export packing credit**

On the facts of the case the Hon'ble High Court held that interest on export packing credit term loan and depreciation on computers which were directly related to manufacture and export activities of the assessee should not be apportioned proportionately between the manufacturing and trading activities for the purpose of calculating deduction under section 80HHC.

*CIT v. Jyoti Overseas Ltd. (2005) 197 CTR 477 / (2007) 201 Taxation 527 (MP)(High Court)*

**S. 80HHC : Deduction – Export business – Tea company [Rule 8D]**

Deduction under section 80 HHC in respect of profits derived from export of tea out of India would be allowed as permissible deduction before apportionment of non – agricultural income and agricultural income under rule 8D. (A.Ys. 1989-90 to 1994-95)

*Bazaloni Group Ltd. v. CIT (2005) 272 ITR 11 / 143 Taxman 236 / 193 CTR 709 (Gau.)(High Court)*

**S. 80HHC : Deduction – Export business – Realization of export proceeds – Time limit**

Where in identical and similar situation, prayer of extension of time for realization of export proceeds had been granted to other assessee's rejection of petitioner – assessee's application for extension of time under section 80HHC(2)(a) was not justified.

*Mint panchseel Colony v. CIT (2005) 278 ITR 640 (All.)(High Court)*

**S. 80HHC : Deduction – Export business – Sub section (4A), Disclaimer certificate**

Assessee declares that sales are through export houses, it is a mandatory requirement of section 80 HHC(4A) that a disclaimer certificate in Form No. 10 CCAB should be filed along with return. (A.Y. 1990-91)

*S. Ratnam Pillai v. CIT (2005) 273 ITR 295 / 144 Taxman 424 / 195 CTR 418 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Audit report – Directory**

Requirement of filing duly audited report along with return cannot be treated as mandatory and assessee cannot be deprived of benefit of deduction if same is filed before finalization of assessment. (A.Y. 1998-99)

*CIT v. Gupta Fabs (2005) 274 ITR 620 (P&H)(High Court)*

**S. 80HHC : Deduction – Export business – Computation – Loss**

Assessee was not entitled to deduction under section 80HHC where export business resulted in loss. (A.Y. 1990-91)

*CIT v. Prabhakar (2005) 276 ITR 176 / 148 Taxman 231 / 198 CTR 492 (Mad.)(High Court)*



**S. 80HHC : Deduction – Export business – Computation – Freight – Insurance – Export turnover**

Freight and insurance do not form part of direct and indirect costs, same cannot be excluded for arriving at export turnover. (A.Y. 1993-94)

*CIT v. H.M. Exports Ltd. (2005) 195 CTR 154 / 276 ITR 299 / 144 Taxman 557 (Cal.)(High Court)*

**S. 80HHC : Deduction – Export business – Sales tax – Excise duty – Total turnover**

Sales tax and excise duty are not to be included in total turnover while computing deduction under section 80HHC. (A.Ys. 1990-91 and 1992-93)

*CIT v. Wheels India Ltd. (2005) 275 ITR 319 / 146 Taxman 442 / 197 CTR 284 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Computation – Excise duty – Turnover**

Excise duty does not form part of 'total turnover' for purpose of calculation of deduction under section 80HHC.

*CIT v. Sundaram Fasteners Ltd. (2005) 272 ITR 652 / 194 CTR 339 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Computation – Interest – Commission**

Interest received by assessee on fixed deposit, commission received on sale of machinery, etc. is not a business income and consequently, assessee is not entitled to computation of eligible deduction under section 80HHC by including those receipts as business expenditure. (A.Ys. 1991-92, 1992-93)

*G.T.N. Textiles Ltd. v. Dy. CIT (2005) 279 ITR 72 / 195 CTR 506 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Computation – Interest**

Interest received by assessee on bank deposits and assessed as business income was to be treated as income derived from an industrial undertaking. (A.Y. 1990-91)

*CIT v. S.S.C. Shoes Ltd. (2005) 275 ITR 46 / 197 CTR 487 / (2007) 158 Taxman 51 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Out side India – lease right – Beta – cam tapes**

The condition precedent for claiming deduction under section 80HHC is that the transaction must result in export out side India of any goods or merchandise. If the goods are required to be cleared from the customs station either by the purchaser or the seller, it would be an export out side India. Transaction of lease right of exhibition of feature film recorded on beta cam tapes, involving clearance at customs stations is

"export". Beta – cam tapes, which have incorporeal rights are "goods" or "merchandise" for the purpose of section 80HHC. (A.Y. 1996-97)

*Abdulgafar A. Nadiadwala v. ACIT (2004) 188 CTR 232 / 137 Taxman 112 / 267 ITR 488 (Bom.)(High Court)*

*Editorial : Affirmed by supreme court In B. Suresh (2009) 313 ITR 149 (SC)*

### **S. 80HHC : Deduction – Export business – Counter sales to foreign tourists buyers**

The counter sales to foreign buyers/tourists are eligible for exemption under section 80 HHC. Relied on *ITO v. Vaibhav Textiles (2002) 258 ITR 346/ 125 Taxman 245 (Raj).* (A.Y. 1990-91)

*CIT v. Boutique Chic (2004) 187 CTR 38 / 136 Taxman 330 (Raj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Cut and polished granite – Twelfth Schedule**

Only from the date of coming in to force of amendment to clause (ii) of section 80HHC(2)(b), ie. W.e.f 1-11-1991, cut and polished granite would be entitled to benefit of deduction under section. This amendment is not clarificatory. (A.Ys. 1984-85, 1989-90)

*Mithy Garanite (P) Ltd v. ITO (2004) 187 CTR 386 / 135 Taxman 435 / 266 ITR 151 (FB)(Karn.)(High Court)*

### **S. 80HHC : Deduction – Export business – Granites**

The assessee engaged in export of granites is not eligible for deduction under section 80HHC. (A.Y. 1985-86)

*CIT v. Tamil Nadu Minerals Ltd. (2004) 189 CTR 72 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Quarrying of granite**

Assessee engaged in the business of quarrying granite and exporting granite blocks of the sizes is not eligible to deduction under section 80HHC. (A.Y. 1989-90)

*CIT v. Enterprising Exporters (P) Ltd. (2004) 189 CTR 76 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Computation – Manufactured & Trading goods**

Assessee which is exporting both self manufactured goods and trading goods profits for purpose of deduction under section 80 HHC have to be computed in accordance with law as stated in *IPCA Laboratory Ltd. v. Dy. CIT (2004) 266 ITR 521(SC)(High Court).*

*CIT v. Forbes Eswart & Figgies (P) Ltd. (2004) 269 ITR 94 190 CTR 163 / 141 Taxman 307 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Computation – Profit – Loss**

Profit mentioned in proviso to section 80 HHC (3) is clearly a profit and not loss. As there was no profit, the assessee was not entitled to any benefit under section 80 HHC.

*CIT v. A.M. Moosa (2004) 141 Taxman 49 / 191 CTR 441 / 272 ITR 29 (Ker.)(High Court)*

#### **S. 80HHC : Deduction – Export business – Computation – Profit – Loss**

Meaning of word "profit" occurring in section 80 HHC, sub section (1), (3) is the same and that is positive worked out after taking in to consideration losses. Meaning of word "profit" in proviso appended to sub section (3)(c) is no different and carries same meaning. (A.Ys. 1979-80 to 1982-83)

*CIT v. Chidambaram Ct (2004) 270 ITR 341 / 192 CTR 444 / (2005) 144 Taxman 802 (Mad.)(High Court)*

#### **S. 80HHC : Deduction – Export business – Computation – Export business – Profit**

Assessee can not be denied deduction simply because there are no profits from the export business. (A.Y. 1987-88)

*CIT v. Harisons Malayalam Ltd. (2004) 266 ITR 516 / 140 Taxman 10 / 188 CTR 469 (Ker.)(High Court)*

#### **S. 80HHC : Deduction – Export business – Computation – Investment allowance**

For the purpose of computing profits derived from export, profits and gains from business of assessee are to be computed by taking in to account investment allowance. (A.Ys. 1986-87 and 1987-88)

*CIT v. Mewar Oil & General Mills Ltd (No. 2) (2004) 271 ITR 315 / 193 CTR 250 (Raj.)(High Court)*

#### **S. 80HHC : Deduction – Export business – Sales tax collected – Total turn over**

Sales tax collected by assessee on its sales could not be treated as part of "total turnover" for the purpose of calculating deduction under section 80HHC. (A.Y. 1996-97)

*CIT v. Bharat Earth Movers Ltd. (2004) 137 Taxman 421 / 268 ITR 232 / 188 CTR 488 (Karn.)(High Court)*

#### **S. 80HHC : Deduction – Export business – Total turn over – Processing charges**

Processing charges received by assessee for processing raw cashewnuts belonging to third persons, will not come under definition of "total turnover". (A.Ys. 1990-91 to 1993-94)

*CIT v. K. Rajendranathan Nair (2004) 265 ITR 35 / 135 Taxman 360 / 187 CTR 201 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Tea processed**

Benefit of deduction under section 80HHC would be available only on income derived from profit out of business of export of tea processed and manufactured and not out of profit of growing tea which is subject to Agricultural Income-tax Act and outside scope and purview of Act; as such sub-section (4B) of section 80HHC is clarificatory.

*UOI v. Warren Tea Ltd. (2004) 266 ITR 226 / 187 CTR 113 (Cal.)(High Court)*

### **S. 80HHC : Deduction – Export business – Block assessment [S. 158BC]**

Relief under section 80HHC is allowable in block assessment made under Chapter XIV-B.

*Anbu Textiles v. ACIT (2003) 262 ITR 684 / (2004) 187 CTR 646 / 138 Taxman 227 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Amendment not retrospective**

Amendment of section 80HHC(2)(b)(ii) by Finance (No. 2) Act, 1991 was not retrospective in nature. (A.Y. 1988-89)

*CIT v. Pooshya Exports (P.) Ltd. (2003) 127 Taxman 369 / 262 ITR 417 / 179 CTR 557 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Real exporter**

For assessment year 1983-84 assessee which exported goods processed by it either through export houses or through sister concerns could not be allowed deduction. 4, in view of the (A.Y. 1983-84)

*Dy. CIT v. V.I.P. Exports (2003) 130 Taxman 803 / (2004) 190 CTR 151 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Export house**

Where disclaimer certificate was not produced, deduction was not to be allowed to the assessee exporting through export house. (A.Y. 1983-84)

*CIT v. Poyilakkada Fisheries (P.) Ltd. (2003) 133 Taxman 651 / (2004) 186 CTR 234 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Export house**

In view of the decision of the Supreme court in *Sea Pearl Industries v CIT (2001) 247 ITR 578 (SC)*, the assessee is not entitled to deduction under section 80 HHC in respect of exports made through export house.

*CIT v. S. Ratnam Pillai (2003) 129 Taxman 830 / 183 CTR 171 (Ker.)(High Court) / CIT v. Rajini Ice & Cold Storage (2003) 127 Taxman 166 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Counter sales – Convertible foreign exchange**

Transactions of counter sales in convertible foreign exchange and involving customs clearance would be export sales entitled to benefit under section 80HHC.

*Jewels Emporium v. Union of India (2003) 262 ITR 304 / 132 Taxman 83 / 184 CTR 257 (Raj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Counter sales**

Benefit of deduction is allowable in respect of counter sales effected to foreign tourists in assessee's showroom in India in view of Explanation (aa) to section 80HHC. (A.Y. 1992-93)

*CIT v. Rajendra Kasliwal (2003) 133 Taxman 67 / (2004) 271 ITR 448 (Raj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Receipts specified in Explanation [S. 28(iib)]**

All sums /receipts in Explanation (baa)(1) which are included while computing profits of business, are to be reduced and not just any one item. (A.Y. 1994-95)

*Alembic Chemical Works Ltd. v. Dy CIT (2003) 185 CTR 389 / 133 Taxman 833 / (2004) 266 ITR 47 (Guj.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest gross or net**

Ninety percent of interest that is deductible for the claim under section 80HHC is from the gross interest received by the assessee. (A.Ys. 1993-94 to 1995-96)

*Rani Palliwal v. CIT (2003) 185 CTR 333 / (2004) 268 ITR 220 / 136 Taxman 135 (P&H)(High Court)*

### **S. 80HHC : Deduction – Export business – Such profits**

Reference to 'such profits' in clause (1) of clause (baa) of Explanation can be to profits of business computed under the head 'profits and gains of business or profession'.

*K.S. Subbiah Pillai & Co India (P) Ltd. v. CIT (2003) 260 ITR 304 / 179 CTR 522 / 134 Taxman 735 (Mad.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Bank**

Interest income derived by the assessee from deposit made with bank for opening letter of credit and other formalities to enable assessee to export goods to various countries is not eligible for relief under section 80HHC.

*K. Ravindranathan Nair v. Dy. CIT (2003) 129 Taxman 811 / 262 ITR 669 / 181 CTR 310 (Ker.)(High Court)*

### **S. 80HHC : Deduction – Export business – Interest – Business income**

Interest income from bank deposits does not constitute 'business income' for purpose of computation of deduction under section 80HHC. (A.Ys. 1989-90, 1991-92)

*ACIT v. South India Produce Co. (2003) 130 Taxman 1 / 262 ITR 20 / 184 CTR 403 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Deposit**

Interest income earned by assessee on deposits has to be excluded for purpose of calculating the deduction. (A.Ys. 1989-90, 1990-91)

*CIT v. A. S. Nizar Ahmed & Co. (2003) 259 ITR 244 / 133 Taxman 322 / 179 CTR 598 (Mad.)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Short term deposit**

Interest received on short-term deposits is not income from business for purpose of section 80HHC. (A.Y. 1994-95)

*Southern Cashew Exporters v. Dy. CIT (2003) 130 Taxman 203 / 183 CTR 175 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Fixed deposits**

Interest earned on fixed deposits cannot be treated as income from exports. (A.Y. 1993-94)

*Urban Stanislaus Co. v. CIT (2003) 130 Taxman 244 / 263 ITR 10 / 183 CTR 176 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Interest – Sales tax set off**

Amount of interest and sales tax set off received by assessee which is treated as business income, could not be excluded from business profit for purpose of calculating deduction under section 80HHC. (A.Y. 1989-90)

*Alfa Laval India Ltd. v. Dy. CIT (2003) 133 Taxman 740 / (2004) 186 CTR 390 (Bom.)(High Court)*

**S. 80HHC : Deduction – Export business – Advertisement in Journals**

Payment received by assessee from foreigners for advertisement in its journal which was circulated in India as well as abroad, could not be treated as receipt against export of goods so as to qualify for deduction under section 80HHC. (A.Ys. 1991-92, 1992-93)

*Diamond World v. CIT (2003) 133 Taxman 772 / 184 CTR 555 / (2004) 267 ITR 466 (Raj.)(High Court)*

**S. 80HHC : Deduction – Export business – Goods belonging to principals**

Sales turnover of goods belonging to principals made on commission basis, cannot be included as 'turnover' of business of assessee. (A.Ys. 1989-90, 1991-92)

*ACIT v. South India Produce Co. (2003) 130 Taxman 1 / 262 ITR 20 / 184 CTR 403 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Damages – Total turnover**

Damages received for bad quality purchases, though they constitute income, do not form part of the total turnover. (A.Y. 1992-93)



*CIT v. T. C. Usha (2003) 264 ITR 368 / (2004) 136 Taxman 524 / 187 CTR 661 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Loss of trading goods**

For calculating amount of deduction under section 80HHC, loss incurred in export of trading goods cannot be deducted from profits derived from export of own goods, i.e., manufactured goods. (A.Y. 1992-93)

*CIT v. T.C. Usha (Smt) (2003) 136 Taxman 524 / 264 ITR 368 / 187 CTR 661 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Profit of export**

Where assessee was engaged in export of goods as well as local sale of same goods, profit of export business of assessee had to be worked out in accordance with provisions of section 80HHC(3)(b). (A.Y. 1988-89)

*Indian Spices Co. v. CIT (2003) 132 Taxman 291 / 184 CTR 303 / (2004) 267 ITR 445 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Operating income – Labour charges – Interest – Commission**

Labour charges (job-work receipts) received by the assessee stood excluded from the expression "Profits of business" under Explanation (bad) to section 80HHC and 90 per cent of the labour charges ought not to have been excluded from such business profits while computing deduction under section 80HHC.

If the receipt of labour charges (job-work charges), interest, commission, etc., accrues by way of operating income, then it falls outside Explanation (baa). (A.Y. 1992-93)

*CIT v. Bangalore Clothing Co. (2003) 127 Taxman 637 / 260 ITR 371 / 180 CTR 127 (Bom.)(High Court)*

**S. 80HHC : Deduction – Export business – Audit report**

Deduction cannot be disallowed simply because audit report is not furnished along with return.

*CIT v. Magnum Export (P.) Ltd. (2003) 183 CTR 751 / 130 Taxman 702 / 262 ITR 10 (Cal.)(High Court)*

**S. 80HHC : Deduction – Export business – Audit report**

Requirement of filing the declaration along with the return of income contemplated under subsection (4A) of section 80HHC is only directory. (A.Y. 1992-93)

*CIT v. G. Krishnan Nair (2003) 259 ITR 727 / 128 Taxman 1 / 180 CTR 364 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Audit report**

Requirement of furnishing certificate required under section 80HHC(4A) is only directory. (A.Y. 1992-93)

*CIT v. T. Sarala Filial (Smt) (2003) 131 Taxman 471 / 184 CTR 166 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Creation of reserve**

Entitlement to deduction where requisite reserve was created during pendency of first appeal by reopening profit and loss account finalized and approved by annual general body.

*CIT v. Forbes, Ewart & Figgis Ltd. (2003) 131 Taxman 816 / 184 CTR 308 / 267 ITR 153 (Ker.)(High Court)*

**S. 80HHC : Deduction – Export business – Interest on Loan to employees**

Interest earned on loans given to employees is to be treated as part of business income for the purpose of computation of deduction under section 80HHC. (A. Y. 2004-05)

*Kirloskar Ebara Pumps v. Dy. CIT (2011) 138 TTJ 211 / (2010) 48 DTR 348 (Pune)(Trib.)*

**S. 80HHC : Deduction – Export business – Job work charges**

Job work charges could not be excluded from profits of business under clause (baa) of Expl. to section 80HHC. (A.Ys. 2000-01 to 2004-05)

*ACIT v. Wolkem India Ltd. (2011) 142 TTJ 888 / 62 DTR 369 (Jodh.)(Trib.)*

**S. 80HHC : Deduction – Export business – Chapter VI-A [S. 80HHC, 80-IA & 80-IB]**

In order to invoke provisions of section 80-IA(9), it is necessary that deductions under section 80HHC & section 80-IA have to be in respect of the same undertaking. (A.Y. 2001-02 to 2004-05)

*ACIT v. Grasim Industries Ltd. (2010) 35 SOT 249 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Relevant Date**

Date of export out of India. Held that the relevant date was the date when the goods were dispatched and cleared by the customs and not the date as per the bill of lading.

*Dy. CIT v. Vallabh Metal Inc., ITA No. 2564/M/09, BCAJ P. 33, Vol. 41 B Part 4, January 2010 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Computation**

For computing deduction under section 80HHC the amount of deduction allowed under section 80-IB has to be reduced from the eligible profits. (A.Y. 2001-02)

*ITO v. Neetee Clothing (P) Ltd. (2010) 129 TTJ 342 / 35 DTR 362 (Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Counter sale – Foreign tourists**

Deduction under section 80HHC would not be available on the counter sale to the foreigner in convertible foreign exchange unless customs clearance in India is proved by the assessee. (A.Y. 2003-04)

*Tribhuvandas Bhimji Zaveri (Delhi) v. CIT* (2010) 123 ITD 31 / (2008) 119 TTJ 495 / 15 DTR 287 (Mum.)(Trib.)

**S. 80HHC : Deduction – Export business – Interest from Customer**

Interest on late payment received from the customers qualifies for deduction under section 80HHC. (A.Y. 2001-02)

*ACIT v. Choksi Heraeus (P) Ltd.* (2010) 41 DTR 44 (Jodh.)(Trib.)

**S. 80HHC : Deduction – Export business – Book profit – MAT – No regular income – Allowable [S. 115JB]**

The assessee's income was computed under section 115JB as it had no income under the normal provisions of the Act. The assessee claimed that despite the absence of normal profits, it was eligible for deduction under section 80HHC in computing the book profits under Expl. (iv) of section 115JB in accordance with the judgement of the Special Bench in *Syncome Formulations v. Dy. CIT* (2007) 106 ITD 193 (Mum.)(SB) and that the judgement of the Bombay High Court in *CIT v. Ajanta Pharma Ltd.* (2009) 318 ITR 252 (Bom.) (which held that *Syncome Formulations* was overruled) was not applicable. HELD upholding the assessee's plea:

In *Syncome Formulations*, the Special Bench had to consider two questions i.e. (a) method of computation of deduction under section 80HHC and (b) percentage of deduction allowable in each year. As regards the percentage of deduction, the Special Bench held that the assessee would be entitled to 100% deduction. This view was overruled by the High Court in *Ajanta Pharma* where it was held that in view of section 80HHC(1B), deduction was only allowable as per the limits set out therein. However, the first issue as to the method of deduction under section 80HHC was not before the High Court. As per *CIT v. Sun Engineering Works (P) Ltd.* (1992) 198 ITR 297, the observations of a Court have to be read in context. Consequently, the judgement of the Special Bench on this aspect still held good and the assessee was entitled to deduction under section 80HHC even though there were no normal profits. (A.Y. 2004-05)

*Dy. CIT v. Glenmark Laboratories* (2010) 127 TTJ 719 / 32 DTR 183 (Mum.)(Trib.)

**S. 80HHC : Deduction – Export business – Eligible profits**

Assessee is entitled to deduction under section 80HHC on the eligible profits without reducing the deduction given under section 80-IB. (A.Y. 2003-04)

*ACIT v. Sreeja Hosieries* (2009) 122 TTJ 849 / 22 DTR 405 (Chennai)(Trib.)

**S. 80HHC : Deduction – Export business – Non resident – DTAA – India-Singapore [S. 90, 263]**

A plain reading of section 80HHC shows that non-resident assessee is not all eligible for deduction under section 80HHC, exception under cl. (4)(a) of Art. 26 of DTAA between India and Singapore clearly mandates that deduction under section 80HHC which provides for deduction to residents in India cannot be superseded by this non-

discrimination clause of the DTAA. Revision by the commissioner was justified. Deduction under section 80HHC cannot be granted to non-residents. (A.Y. 2004-05) *Mosraq Ahmed v. ADIT (2009) 29 DTR 410 / 126 TTJ 523 / (2010) 124 ITR 312 / 2 DTR 315 (Chennai)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Protocol Export – STC**

Assessee exported rice to Cambodia through the State Trading Corporation of India Ltd. [STC] as supporting manufacturer, the STC had not claimed any export benefit as it was “protocol export” i.e., under a Government-to-Government aid programme and the export consideration was received by the assessee in Indian Rupee from Ministry of External Affairs. Sec. 80HHC. In view of the Circular No. 562 dated May 23, 1990, being a beneficial one, it was held that assessee was eligible to the deduction on the “protocol exports”. (A.Y. 2003-04)

*Shamanur Kallapa and Sons v. ACIT (2009) 124 TTJ 68 / 23 DTR 269 (Bang.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profits of the business – Sales of scrap**

Receipts from sale of scrap cannot be included in the business profits for deduction under section 80HHC. (A.Ys. 2000-01, 2003-04)

*ACIT v. Chennai Petroleum Corp. Ltd. (2009) 126 TTJ 865 / 32 DTR 187 / (2010) 125 ITD 396 / 2 ITR 325 (TM)(Chennai)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profits & Gains of industrial undertaking – After allowing deductions [S. 80-IA(9) 80-IB]**

Deduction under section 80 HHC is to be allowed on profits and gains as reduced by the deduction claimed and allowed under section 80 IB/80-IA. (A.Ys. 2001-02 to 2004-05)

*ACIT v. Hindustan Mint and Agro Products (P) Ltd. (2009) 123 TTJ 577 (SB)(Delhi)(Trib.)*

#### **S. 80HHC : Deduction – Export business – DEPB [S. 28(iiid)]**

Entire amount received on sale of DEPB entitlements does not represent profit chargeable under section 28(iiid). Computation of profit on sale of DEPB entitlements requires an artificial cost to be interpolated. (A.Y. 2002-03)

*Topman Exports v. ITO, (2009) 125 TTJ 289 / 33 SOT 357 / 29 DTR 153 / (2011) 124 ITD 1 (SB)(Mum.)(Trib.)*

*Editorial : Approved by Supreme Court in Topman Export v. CIT (2012) 342 ITR 49 / 67 DTR 185 / 247 CTR 353 / 277 ELT 10 / 3 SCC 593 (SC)*

#### **S. 80HHC : Deduction – Export business – DEPB – Excess provision [S. 41(1)]**

- a) Held, that Assessee is entitled for deduction in respect of DEPB credits utilized by the Assessee itself as per first proviso below sub-section (3) of section 80HHC.
- b) Excess provision written back, and considered as business profits under section 41(1) cannot be considered as in the nature of any other receipt of similar nature

as provided in clause (baa) of explanation to section 80HHC, so as to exclude 90% of such amount for purpose of computing deduction under section 80HHC.  
*Polyplex Corp. Ltd. v. ITO (2009) 176 Taxman 56 (Mag.)(Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Minimum Alternate Tax [S. 115JB]**

Deduction under section 80HHC in the case of MAT assessment is to be worked out on the basis of adjusted book profit under section 115JB. (A.Y. 2003-04)

*ITO v. Amalgamated Bean Coffee Trading Co. (P) Ltd. (2008) 117 TTJ 424 / 19 SOT 1 / 9 DTR 319 (Bang.)(Trib.)*

**S. 80HHC : Deduction – Export business – Reducing deduction [S. 80IB]**

Deduction under section 80HHC is to be allowed on eligible profits after reducing therefrom deduction under section 80IB. (A.Y. 2001-02)

*Bansal Impex v. CIT (2008) 115 TTJ 906 / 23 SOT 344 / 3 DTR 86 (Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Difference in foreign exchange receipt**

Sale proceeds of export received in subsequent year or after end of year, then the difference in foreign exchange rate – gains to be included in the turnover of the relevant year of export and not in the year of such receipt. (A.Ys. 1984-85, 1987-88)

*ACIT v. Prakash L. Shah (2008) 306 ITR 1 (SB)(AT)(Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – DEPB – Interest on EEFC – Interest on FDR**

DEPB credit amount constitutes profits of export business eligible for deduction.

Interest on EEFC account is to be treated as profits and not to be excluded for calculation of deduction under section 80HHC.

Interest on FDR's maintained by way of guarantee for export business is eligible for deduction under section 80HHC. (A.Ys. 2000-01 to 2004-05)

*Shah Originals v. ACIT (2007) 112 TTJ 754 / 19 SOT 568 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Turnover**

Turnover which is related to the profit eligible for exemption under section 10B cannot be included in the export turnover for the purposes of deduction under section 80HHC. (A.Y. 1998-99)

*ACIT v. Mahabir Spinning Mills Ltd. (2007) 112 TTJ 966 / 110 ITD 211 (Chd.)(Trib.)*

**S. 80HHC : Deduction – Export business – Interest**

Interest on overdue account charged to customers for belated payment is outside the purview of Expln. (baa) to section 80HHC. (A.Y. 2000-01)

*Sudarshan Chemical Industries Ltd. v. ACIT (2007) 108 TTJ 28 / 110 ITD 171 (Pune)(Trib.)*

**S. 80HHC : Deduction – Export business – Profits of the business**

Duty free import of inputs under an advance licence by itself does not gave rise to a benefit of income nature for purpose of section 80HHC and therefore profits could not be reduced by the value of advance licence. (A.Ys. 1995-96, 1996-97)

*ACIT v. Wyeth Lederle Ltd. (2007) 108 TTJ 889 / 14 SOT 365 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Write back of excise liability [S. 41(1)]**

Write back of Central excise liability is business profit under section 41(1) and it is not similar to brokerage, commission, interest or rent charges as provided under Explanation (baa) to section 80HHC(4B). (A.Y. 1996-97)

*Extrusion Process (P.) Ltd. v. ITO (2007) 106 ITD 336 / 107 TTJ 100 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Brought forward losses**

Brought forward losses can be set-off for computing profits for the purpose of deduction under section 80HHC. (A.Y. 1991-92)

*Jt. CIT v. Milton's Ltd. (2007) 106 ITD 478 / 112 TTJ 167 / 11 SOT 557 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Export turn over – Trading goods – Direct cost – Total turn over**

For purposes of working out export turnover of trading goods only so much of the direct cost is to be reduced as is attributable to realized trading export turnover.

In arriving at the adjusted total turnover, only the realized sale proceeds of trading export turnover have to be reduced from total turnover. (A.Y. 1995-96)

*ITO v. Artmis Exports (P) Ltd. (2007) 108 TTJ 850 / 108 ITD 1 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Computation [S. 80-IA]**

Profits of business for purposes of section 80HHC have to be reduced to the extent allowed deduction under section 80-IA. (A.Y. 2000-01)

*Leben Laboratories Ltd. v. Dy. CIT (2007) 107 TTJ 1 / 107 ITD 271 / 14 SOT 263 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Marketing receipts**

90 per cent of net marketing receipts are to be excluded as per clause (baa) of Explanation to section 80HHC. Such gross marketing receipts would not form part of total turnover.

*USV Ltd. v. Jt. CIT (2007) 106 TTJ 535 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profit of business – Job work – Operating income**

Receipt by way of job work constitute operating income of the assessee and cannot be reduced by 90 per cent, under Expln. (baa) to section 80HCC for purpose of computing profits of business. (A.Ys. 1995-96 to 1997-98)

*Ahmednagar Forgings Ltd. v. ACIT (2007) 107 TTJ 129 (Pune)(Trib.)*



### **S. 80HHC : Deduction – Export business – Profits of the business – Interest – Rent**

90 per cent of the gross receipts like interest, rent, etc. which are included in business profits has to be excluded while computing the profits of the business for the purpose of deduction under section 80HHC. (A.Y. 1992-93)

*Jt. CIT v. Global Calcium (P) Ltd. (2007) 106 TTJ 179 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – Export sale not realised**

Export sale proceeds not realized up to extended period are includible in total turnover for computing deduction under section 80HHC. (A.Y. 2001-02)

*ACIT v. Ishar International (2007) 110 TTJ 882 / 111 ITD 232 (All.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Quantum – Overlap**

Deduction under section 80HHC cannot be allowed on the profits to the extent of the deduction already allowed under section 80-IA. (A.Y. 2000-01)

*Leben Laboratories Ltd. v. Dy. CIT (2007) 294 ITR 1 (At) / 107 ITD 271 / 107 TTJ 1 / 14 SOT 263 (AT)(Mum.)(Trib.)*

*Editorial : No more good law in view of Associated Capsules P. Ltd. v. Dy. CIT (2011) 332 ITR 42 (Bom.)(High Court)*

### **S. 80HHC : Deduction – Export business – Profits and gains from transfer of DEPB**

By virtue of the amendment made by the Taxation Laws (Amendment) Act, 2005 profit from transfer of DEPB is deemed to be the profit and gains of the business as the amendment is held to be retrospectively effective from 1-4-1998 and therefore, such profit is entitled to deduction under section 80HHC. (A.Y. 2001-02)

*ACIT v. K. S. International (2007) 108 ITD 709 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Book profits [S. 115J, 115JA, and 115JB]**

Deduction under section 80HHC in MAT Scheme is from the taxable income under the scheme; i.e., from adjusted book profit as regular profit under the scheme is the book profit. In such case there is no option to go back to the normal computation of statutory profit which is computed under the regular provisions of law applicable to the computation of profits and gain of business or profession.

*Dy. CIT v. Syncome Formulation (I) Ltd. (2007) 108 TTJ 105 / 106 ITD 193 / 13 SOT 414 (SB)(Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Both deductions [S. 80IB]**

The Tribunal relying on the decision of the Supreme Court in the case of IPCA Laboratory Ltd. and of the Karnataka High Court in the case of RPG Telecom, held that the deduction allowable under section 80HHC cannot be reduced by the amount of deduction under section 80-IB. It was also noted that the assessee had not claimed more than 100% of its income and the decision of the Gujarat High Court in the case

of Sidhpur Isabgul Processing Co. Ltd. also supported the assessee's case. (A.Y. 2001-02)

*Vijay Industries v. ITO, (2007) 112 TTJ 353 (Jp.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Computation of total turnover**

Excise duty does not form part of total turnover for the purpose of deduction under section 80HHC. (A.Ys. 1994-95 to 2000-01)

*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profit of the business – Net interest**

Profits of the business refer to receipt of net interest and not gross interest and therefore it is only 90 per cent of the net interest remaining after allowing set off of the interest paid that can be reduced from the business profit. (A.Ys. 1992-93 and 1993-94)

*Dy. CIT v. Paramount Trading Corpn. (2006) 102 TTJ 403 / 98 ITD 77 (Delhi)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profits of the business – Interest on fixed deposit**

The funds of the two business being inter-twined and interlaced, interest on fixed deposits is to be treated as profits and gains of the business. (A.Ys. 1991-92, 1997-98 and 1998-99)

*ACIT v. P. S. Apparels (2006) 101 TTJ 29 (Chennai)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Sales to foreign tourists**

Counter sales to the foreign tourists against foreign currency should be treated as export sales and deduction under section 80HHC should be allowed. (A.Y. 1997-98)

*Dy. CIT v. Suprint Textiles (2006) 100 TTJ 352 (Jp.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Rebate of customs duty**

Rebate of customs duty on material imported against advance licence is profits of business eligible for reckoning for purposes of deduction under section 80HHC. (A.Y. 1994-95)

*Hero Honda Motors Ltd. v. Dy. CIT (2006) 100 TTJ 394 (Delhi)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profits of the business – Netting of interest**

Benefit of netting of interest is to be allowed to the assessee if it is established that there is a clear business nexus between the interest earned by the assessee-company and interest paid by it while computing the profits of the business for the purpose of deduction under section 80HHC. (A.Ys. 1996-97 and 1997-98)

*West Coast Paper Mills Ltd. v. Jt. CIT (2006) 100 TTJ 833 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Profits of the business – Netting**

For determining profits of the business as per Expln. (baa) to s. 80HHC for computation of deduction under section 80HHC. When the net figure goes into profit, the gross figure, cannot be taken out. (A.Y. 1999-2000)

*Dy. CIT v. Infotech Enterprises (2006) 100 TTJ 610 (Hyd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Turnover – Excise duty – Sales tax**

Turnover does not include excise duty and sales tax. (A.Y. 1999-2000)

*Hygienic Research Institute v. ITO, Mumbai ITAT, Bench 'E', ITA No. 2770/Mum/2003, dated 12th July, 2006 – BCAJ p. 155, Vol. 39-C, Part 2, November 2006 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Exchange gain – Export made earlier year**

Exchange gain pertaining to the exports made in the earlier year could form part of the current year's export turnover. (A.Y. 2001-02)

*ITO v. S. Kumar & Co., Bench 'K', ITA No. 5482/Mum/2004, dated 26th June, 2006 – BCAJ*

*P. 277, Vol. 39-C, Part 2, December 2006 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Brought forward losses**

Brought forward business loss should be set off while computing deduction. (A.Y. 2001-02)

*Dy. CIT v. Suashish Jewellery Ltd., Bench 'A', ITA No.1179/M/04, dated 8th May, 2006 – BCAJ*

*P. 155, Vol. 39-C, Part 2, November 2006 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Foreign exchange – Goods**

Foreign exchange being money cannot be considered as "goods" and assessee is not entitled to deduction under section 80HHC in respect of foreign exchange transferred to bank accounts outside India. (A.Ys. 1989-90 to 1993-94, 1995-96 and 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 ITD 119 / 15 SOT 392 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Export – Valuation of closing stock [S. 145A]**

The Amendment of section 145A has not changed the position of law enumerated by the decision of Bombay High Court in case of *Sudarshan Chemicals Inds. Ltd. 245 ITR 769 (Bom)* as well as ITAT Special Bench of Calcutta Bench in case of *IFB Agro Industries Ltd. 83 ITD 96*. There is also no corresponding amendment in the provisions of section 80HHC. (A.Y. 2001-02)

*ITO v. Dispo Dye Chem, ITA No. 184/Ahd/2005, A.Y. 2001–2002, dated 11th August, 2006 – ACAJ, October 2006 – P. 387 (Ahd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Share business – Loss in share business – Excise duty**

Share business activity being an independent business, loss in share business activity has to be excluded for computing deduction under section 80HHC. Excise duty is to be excluded from the total turnover for the purpose of computation of deduction under section 80HHC. (A.Y. 1998-99)

*Dy. CIT v. Eastern Medikit Ltd. (2006) 100 TTJ 382 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Amalgamation**

When three companies stood amalgamated and the Court approved the scheme with effect from the appointed date i.e., 1st April, 1995, and the assessee (amalgamated company) filed consolidated accounts for the year ending 31st March, 1996, deduction under section 80HHC for asst. yr. 1996-97 was not allowable on the basis of separate accounts of one of the amalgamating companies. (A.Y. 1996-97)

*Dy. CIT v. AIMIL Limited (2006) 99 TTJ 682 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Export – Evidences – Validity – FERA**

Disallowance of deduction under section 80HHC to assessee solely on the basis of assessee's husband's retracted statement under s. 40 of FERA, which was without making any independent enquiry by Assessing Officer and without adducing any corroborative evidence and without considering the voluminous documentary evidence filed by assessee, was invalid. (A.Y. 1995-96)

*Sujata Grover (Smt) v. ACIT (2006) 99 TTJ 837 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Brought to forward losses**

Deduction under section 80 HHC is allowable only after setting off of the brought forward loss as the provisions of section 80AB are applicable. (A.Ys. 1997-98 to 1999-2000)

*A. R. Enterprises v. ACIT (2006) 99 TTJ 85 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – Processing charges**

Processing charges, sale of condemned material, etc. were includible in total turnover. (A.Y. 1991-92)

*Jt. CIT v. Virudhunagar Textile Mills Ltd. (2006) 99 TTJ 500 / 97 ITD 306 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – DEPB and DFRC – Interest – FDR – Margin money**

Departmental authorities having brought the DEPB and DFRC receipts to tax under section 28(iv) and not under cls. (iiia) to (iiic) of s. 28, 90 per cent of these receipts cannot be excluded from the profits of the business.

Interest received by assessee on fixed deposit receipts placed as margin money with the bank for the purpose of availing various credit facilities is to be assessed under

the head 'business' and deduction under section 80HHC is to be allowed after excluding 90 per cent of such interest amount from the profits of the business in view of Expln. (baa) below s. 80HHC. (A.Y. 2001-02)

*Saroj Dassani (Mrs) v. ACIT (2006) 99 TTJ 345 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Discount allowed – Export turn over – Total turn over**

Sec. 80HHC – Deduction of export profit – Treatment of discount allowed on export – Held that the same be reduced from export turnover as well as from total turnover while computing relief under section 80HHC. (A.Y. 1998-99)

*Nice Overseas v. Assessing Officer Bench, Delhi, ITA No. 3303/Del./2003 Order dated 5-8-2005 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Foreign currency**

Exports of foreign currency by an assessee, an authorised dealer in foreign currency carrying on business of money changer, assumes the meaning of trading in goods and merchandise and is eligible for deduction under section 80HHC(3)(b). (A.Y. 1997-98)

*R. R. Sen & Brothers v. Jt. CIT (2006) 150 Taxman 5 / (2005) 95 TTJ 398 (AT)(Mag.)(Kol.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Additional ground [S. 254]**

Deduction under section 80HHC was not allowed on the basis of profits as finally assessed after taking into consideration the additions made on account of closing stock. As the facts relevant and material for allowing the claim was not considered in order of Tribunal which has resulted in a mistake, the said order needs rectification.

*Kuldeep Bishnoi v. ACIT (2006) 154 Taxman 202 (Mag.)(Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Computation of total turnover**

Notional value of by-products could not be included in local sales and turnover for computing deduction under section 80HHC. (A.Y. 2000-01)

*ACIT v. Shiv Shankar Rice Mills (2006) 102 TTJ 1046 / 101 ITD 288 (Chd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Local sales**

Income from local sale of goods imported under duty free licences granted to assessee-exporter in lieu of exports could not be considered as profits derived from export business and the sale is not to be included in total turnover for the purpose of computation of deduction under section 80HHC. (A.Y. 1990-91)

*Seema Silks & Sarees v. ACIT (2006) 103 TTJ 704 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Total turnover – Local turn over**

Assessee's export consisted of production entirely differently from the products sold in the local market – The total turnover would not include the local turnover. (A.Y. 1990-91)

*Seema Silk & Sarees v. ACIT, (2006) 103 TTJ 704 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Sale of export quota [S. 10A]**

Where assessee opted to claim benefit under section 10A in respect of income from sale of export quota and such benefit had been disallowed, assessee could not claim benefit of general tax concessions like deduction under section 80HHC on income so earned. (A.Y. 2000-01)

*Samtex Fashions Ltd. v. ACIT (2005) 92 ITD 535 / 92 TTJ 59 (Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Goods – Merchandise – Money changer**

Profits derived by assessee, money-changer and authorized dealer of foreign currency, by exporting foreign currency abroad and selling such foreign currency in foreign country was eligible for deduction under section 80HHC(3)(b). (A.Y. 1997-98)

*R. R. Sen & Bros. v. Jt. CIT (2005) 95 TTJ 398 (Kol.)(Trib.)*

**S. 80HHC : Deduction – Export business – Export sale – Quota of third party**

Assessee is entitled to claim deduction under section 80HHC in respect of exports made by utilising export quota of a third party. (A.Ys. 1988-89 and 1989-90)

*Burlingtons Exports v. ACIT (2005) 96 ITD 151 / 97 TTJ 83 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Export through trading house**

Where assessee, an exporting manufacturer, exported goods through a trading house, mere fact that at time of issuing of disclaimer certificate, trading house did not get its licence approved for no fault of its own, deduction could not be denied to assessee. (A.Y. 1996-97)

*Dy. CIT v. Arya Exports & Industries (2005) 1 SOT 454 (Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Schedule XII – Mineral oil**

Where assessee was procuring raw petroleum coke (RPC) and calcinating it before exporting same as calcined petroleum coke (CPC), what assessee exported was nothing but 'mineral oil' within meaning of section 80HHC(2) and, hence, assessee was not eligible for deduction under section 80HHC in respect of income derived from export of CPC. (A.Ys. 1993-94 to 2000-01)

*Goa Carbon Ltd. v. Dy. CIT (2005) 2 SOT 152 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Schedule XII – Petroleum products**

Petroleum products like naphtha, diesel and fuel oil would fall under expression 'mineral oil' for purposes of section 80HHC and, therefore, assessee engaged in export thereof would not be entitled to deduction under section 80HHC. (A.Ys. 1986-87 and 1987-88)

*Indian Oil Corpn. Ltd. v. Dy. CIT (2005) 4 SOT 1 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Schedule XII – Soap tone powder**



Where assessee was exporting soaps tone powder, as mineral and ore exported by assessee failed to satisfy specific conditions laid down in Schedule XII, assessee was not entitled to deduction under section 80HHC. (A.Y. 1991-92)

*Golcha Minerals (P.) Ltd. v. Dy. CIT (2005) 3 SOT 476 (Jp.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Proviso to Section 80HHC(1)**

Proviso to sub-section (1) of section 80HHC can be applied to achieve desired results as intended by Legislature, only when trading goods of supporting manufacturer (SM) are same/similar as trading goods exported by export/trading houses after purchasing from open market. (A.Y. 1996-97)

*Torrent Ltd. v. ACIT (2005) 4 SOT 728 (Ahd.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Interest from parties**

Admissibility of deduction in respect of interest received from bank and parties. (A.Ys. 1991-92 to 1993-94)

*Simit Gems v. ITO (2004) 4 SOT 955 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Interest from deposit**

Income derived by way of interest from deposit in bank could not be said to have been derived from export business. (A.Ys. 1993-94 to 2000-01)

*Goa Carbon Ltd. v. Dy. CIT (2005) 2 SOT 152 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Interest on deposit**

Interest on deposits with a bank will, for purposes of deduction under section 80HHC, be considered as 'profits of business' but same will be determined as per Explanation (baa).

(A.Y. 1994-95)

*Technova Imaging Systems Ltd. v. Dy. CIT (2005) 2 SOT 116 / 80 TTJ 215 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Belated sale proceeds**

In view of provisions of section 80HHC(2)(a), read with section 155(13), sale proceeds belatedly received cannot be excluded while computing deduction where ex post facto approval of competent Authority (RBI) had been obtained by assessee. (A.Y. 2001-02)

*Priyanka Gems v. ACIT (2005) 3 SOT 817 / 94 TTJ 557 (Ahd.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Interest**

Where assessee-exporter used to route all its exports through a bank and it made a deposit with said bank out of export proceeds, as deposit made with bank was for

convenience and benefit of assessee with a view to derive higher interest income and it was not deposit made pursuant to any requirement imposed by bank at time of sanctioning of facilities, interest received by assessee could not be treated as income derived from export business so as to be eligible for deduction under section 80HHC. (A.Ys. 1997-98, 1998-99 and 2001-02)

*Dollar Apparels v. ITO (2005) 4 SOT 72 / 95 TTJ 615 (Chennai)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Interest**

Interest earned on investment of surplus funds in inter-corporate deposits has to be excluded from profits of business for purpose of deduction under section 80HHC; however Customs Duty Benefit received under Advance Licensing Scheme is to be included for computing deduction under section 80HHC. (A.Y. 1996-97)

*Hero Honda Motors Ltd. v. Jt. CIT (2005) 3 SOT 572 / 95 TTJ 782 / (2006) 103 ITD 157 (Delhi)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Eligible income – Disclosure in search [S. 132]**

Where following search assessee surrendered certain income which was treated as unexplained investment in property, and claimed deduction under section 80HHC in respect thereof, as assessee had failed to show that such income fell under any of three clauses of section 80HHC(3) or Explanation (baa) thereto, and assessee had not even disclosed nature of income which was kept outside books of account, there was no question of allowing deduction under section 80HHC in respect of such income. (A.Y. 1994-95)

*Sadhu Singh Gurdip Singh v. ACIT (2005) 97 TTJ 1 (Amritsar)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Computation**

Deduction under section 80HHC is to be given after giving due consideration to provisions of section 80A(2) and section 80B(5). (A.Y. 1997-98)

*Hindustan Tin Works Ltd. v. Dy. CIT (2005) 92 ITD 101 / 92 TTJ 828 (Delhi)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Computation – Gross total income**

Deduction under section 80HHC should be allowed on gross total income without allowing deduction under section 80-IB. (A.Y. 2001-02)

*Toshica Creation v. ITO (2005) 96 TTJ 651 (Jp.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Computation – Depreciation**

While computing deduction under section 80HHC, depreciation allowance cannot be excluded from export profits at option of assessee. (A.Y. 1996-97)

*Sonal Garments v. Jt. CIT (2005) 95 ITD 363 / 98 TTJ 1020 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Loss in trading – Profit in manufacturing**

Loss incurred by assessee on export of trading goods should be set off against profits derived from export of manufactured goods for purposes of computing deduction. (A.Ys. 1998-99 to 2000-01)

*ITC Ltd. v. Jt. CIT (2005) 4 SOT 320 / 95 TTJ 1017 (Kol.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Computation – Brought forward loss from export**

For purpose of computing deduction, brought-forward loss from export activities alone can be set off against export profits of current year and not all types of brought-forward losses. (A.Y. 1995-96)

*SKF Bearings India Ltd. v. Jt. CIT (2005) 4 SOT 534 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Computation – Expenses**

Expenses incurred by assessee for earning income other than export profits must be deducted from indirect costs for purpose of computing deduction under section 80HHC. (A.Ys. 1992-93, 1993-94)

*Khimji Visram & Sons v. Dy. CIT (2005) 1 SOT 618 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Computation – Total turn over**

Where first appellate authority directed Assessing Officer to exclude dyeing charges from total turnover and exclude only profit element of dyeing charges from profit of business for purpose of computing deduction under section 80HHC when dyeing charges were excluded from total turnover and profit element was also excluded from profit of business, revenue could not have any grievance at all. (A.Y. 1996-97)

*Jt. CIT v. Kiran Processors (2005) 94 TTJ 511 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – Sub Section (3) – Composite basis**

Wherever there is a composite business and profits of export have to be included for purpose of deduction under section 80HHQ then formula given under section 80HHC(3) has to be applied and whenever profit element from domestic turnover of specified or non-specified goods is included, then domestic turnover of such goods has to be included in total turnover. (A.Y. 1991-92)

*Jt. CIT v. Virudhunagar Textiles Mills Ltd. (2005) 97 ITD 306 / (2006) 99 TTJ 500 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – Sub Section (3) – Negative figure**

In view of decision of Supreme Court in *IPCA Laboratory v. Dy. CIT (2004) 266 ITR 521* Tribunal decision in Lalson's case is no longer good law and if figure as computed under clause (a), (b) or (c) of section 80HHC(3) is a negative figure, assessee would not be entitled to deduction under section 80HHC even if after setting off said negative figure against amount computed under proviso to sub-section (3), there remains a positive figure. (A.Y. 1999-2000)

*B. Sorabji v. ITO (2005) 95 ITD 540 / 96 TTJ 524 (SB)(Mum.)(Trib.)*

*Editorial :- Law's is amended retrospectively.*

### **S. 80HHC : Deduction – Export business – Sub Section (3) – Incentive**

Even if there is no positive profit as computed as per clauses (a), (b) and (c) of section 80HHC(3) and there is a negative profit, same has to be increased by 90 per cent of incentives referred to in clauses (iiia), (iiib), (iiic) of section 28 for purposes of allowing deduction under section 80HHC. (A.Y. 1996-97)

*Sonal Garments v. Jt. CIT (2005) 95 ITD 363 / 98 TTJ 1020 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Export incentive**

Deduction under section 80HHC(I) is available only to an assessee who has derived a positive profit from export of specified goods or merchandise after adjusting losses and not to an assessee who has suffered loss from export; contention of assessee that in view of proviso to sub-section (3), it should be allowed deduction with reference to export incentives ignoring losses suffered by it by taking them to be nil could not be accepted as unless case of assessee falls under section 80HHC(1), benefit of proviso to sub-section (3) could not be extended. (A.Y. 1995-96)

*Mangalya Trading & Investment Ltd. v. Dy. CIT (2005) / 94 TTJ 526 / 2 SOT 480 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Loss**

While construing sub-section (3) of section 80HHC, one cannot exclude losses as computed in main section and consider positive figure of proviso in Isolation. (A.Y. 1999-2000)

*Jindal Exports Ltd. v. ITO (2005) 2 SOT 7 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Indirect cost**

Only indirect cost attributable to export is to be reduced for computing deduction from export of trading goods. (A.Ys. 2000-01 and 2001-02)

*Glaxo Smithkline Asia (P.) Ltd. v. ACIT (2005) 97 TTJ 108 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Explanation (baa) – Interest**

If there is nexus between deposit and business of assessee, then interest receipt may be classified as 'business income' and it may also be included in profits of business'; once interest income is included in business profit, in view of specific provisions contained in Explanation (baa) to section 80HHC, 90 per cent of same has to be excluded for purpose of deduction under section 80HHC. (A.Ys. 1995-96, 1996-97)

*L. VR Dong-In-Stone Ltd. v. ACIT (2005) 4 SOT 597 (Chennai)(Trib.)*

### **S. 80HHC : Deduction – Export business – Explanation (baa) – Net interest income**

Only net interest income should be taken for purpose of applying Explanation (baa).

*Beekay Engg. & Castings Ltd. v. Jt. CIT (2005) 146 Taxman 9 (Mag.)(Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Explanation (baa) – Net Interest**

For purposes of Explanation (baa) to section 80HHC, 90 per cent of net interest can be reduced and not 90 per cent of gross interest. (A.Ys. 1997-98, 1998-99)

*Pathi Designs v. Dy. CIT (2005) 2 SOT 408 (Bang.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Technical services**

Receipts from technical services do not fall under Explanation (baa). (A.Y. 1995-96)

*SKF Bearings India Ltd. v. Jt. CIT (2005) 4 SOT 534 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Interest**

For purpose of applying Explanation (baa) below sub-section (4B) of section 80HHC and while reducing 90 per cent of receipt by way of interest from profits of business, it is only the 90 per cent of net interest that can be reduced and not 90 per cent of gross interest. (A.Y. 1994-95)

*Technova Imaging Systems Ltd. v. Dy. CIT (2005) 2 SOT 116 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Net interest**

Ninety per cent of only net interest received could be excluded in determining business income for purpose of deduction under section 80HHC, as per Explanation (baa) to proviso to section 80HHC.

*Dy. Commissioner v. Sanghavi Exports (2005) 143 Taxman 17 (Mag.)(Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Interest**

Where assessee earned interest on fixed deposit made with bank as collateral security for availing credit facilities from bank for purposes of export business, net interest earned by assessee on such fixed deposit could be subjected to 90 per cent deduction under Explanation (baa) below section 80HHC(4B). (A.Y. 2001-02)

*Priyanka Gems v. ACIT (2005) 3 SOT 817 / 94 TTJ 557 (Ahd.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Interest**

Assessee-exporter's interest income from fixed deposits and earnest money deposits with Apparel Export Promotion Council as margin money to secure quota rights, would be business income for purposes of Explanation (baa). (A.Y. 1997-98)

*ITO v. Midas Touch Exports (2005) 1 SOT 553 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Interest**

Where interest income is earned by assessee-exporter on surplus funds, though it is assessable as income from other sources, it would be reasonable to apportion 10 per cent thereof as expenses, which would increase export profits for purpose of deduction and thus deduction computed by assessee by applying clause (baa) of Explanation to section 80HHC treating such interest income as business profits, shall remain unaffected; Assessing Officer was not justified in reducing deduction under section 80HHC computed by assessee by applying Explanation (baa), by treating interest income as 'income from other sources'. (A.Y. 1998-99)

*Sakay Traders v. Addl. CIT (2005) 96 TTJ 451 (Amritsar)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Royalty**

Royalty income is not income of nature of brokerage, commission, interest, rent or charges; thus, action of revenue authorities in excluding 90 per cent of royalty income could not be sustained. (A.Ys. 2000-01 and 2001-02)

*Glaxo Smithkline Asia (P.) Ltd. v. ACIT (2005) 97 TTJ 108 (Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Forward contracts**

Where assessee, engaged in import of rough diamonds and export of cut and polished ones, entered into forward contracts for foreign exchange but, due to conducive foreign exchange market conditions prevalent at that time, it cancelled said contracts and earned profits thereon, as such profit was integral part of assessee's business, Explanation (baa) to section 80HHC (4B) was not applicable to it and 90 per cent of that profit was not required to be excluded from profits and export business. (A.Y. 1993-94)

*D. Kishorekumar & Co. v. Dy. CIT (2005) 2 SOT 769 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Excise duty – Processing charges**

Where as and when excise duty was paid by the assessee as a temporary measure, amount was debited and similarly, on refund of such excise duty, same was credited to books of account, alleged amount of excise duty either paid or refunded did not affect business profits of the assessee at all and, therefore, there was no reason for excluding 90 per cent of the excise duty refund from profits of business of assessee as per the Explanation (baa) to section 80HHC.(A.Y. 1993-94)

Income earned by assessee on account of processing charges by utilizing plant and machinery, and other manufacturing facilities installed in its industrial undertaking, does not have element of dormant receipts like rent, commission, interest, etc., and, therefore, 90 per cent of such income by way of processing charges cannot be excluded from profits of business under Explanation (baa) to section 80HH(4B).

*Aarti Industries Ltd. v. Dy. CIT (2005) 95 TTJ 14 (Ahd.)(Trib.)*

**S. 80HHC : Deduction – Export business – Explanation (baa) – Insurance claim**

Where insurance claims received by assessee were in relation to various assets of assessee and did not bear any direct relation to turnover of assessee, same were excludible in terms of Explanation (baa).

*Beekay Engg. & Castings Ltd. v. Jt. CIT (2005) 146 Taxman 9 (Mag.)(Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Total turnover – Excise duty and Sales tax**



Excise duty and sales tax would not form part of total turnover. (A.Ys. 1998-99 and 1999-2000)

*Beekay Engg. & Castings Ltd. v. Jt. CIT (2005) 146 Taxman 9 (Mag.) / Wipro Ltd. v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

**S. 80HHC : Deduction – Export business – Export – Total turnover – Excise duty and sales tax**

Excise duty and sales-tax are not includible in 'turnover' of company.

*Continental Device (India) Ltd. v. Jt. CIT (2005) 147 Taxman 77 (Mag.)(Delhi)(Trib.)*

**S. 80HHC : Deduction – Export business – Total Turnover – Excise duty and sales tax**

Excise duty and sales tax were not includible in 'total turnover' whereas other income excluding dividend and property income and interest income, being part of turnover, is includible. (A.Y. 1994-95)

*Technova Imaging Systems Ltd. v. Dy. CIT (2005) 2 SOT 116 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Total turnover – Excise and sales tax**

Amount of central excise and sales-tax is to be excluded in calculation of total turnover for purpose of its computation under section 80HHC; central excise set off is to be reduced under Explanation (baa), treating it as covered within ambit of section 28(iiic); amount of sales-tax setoff not falling under section 28(iiic) would not be excluded from total turnover in terms of Explanation (baa); income-tax refund and profit on sales of assets cannot be deducted under Explanation (baa).

*ACIT v. Atlas Dye Chem Industries (2005) 148 Taxman 63 (Mag.)(Ahd.)(Trib.)*

**S. 80HHC : Deduction – Export business – Total turnover – Excise duty and sales tax**

Excise duty and sales-tax cannot form part of total turnover of assessee. (A.Y. 1995-96)

*SKF Bearings India Ltd. v. Jt. CIT (2005) 4 SOT 534 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Total turnover – Quota premium**

Quota premium has to be excluded from 'total turnover'. (A.Y. 1994-95)

*Anil L. Shah v. ACIT (2005) 95 TTJ 216 (Mum.)(Trib.)*

**S. 80HHC : Deduction – Export business – Export turnover – Exchange rate difference**

Where assessee was in receipt of exchange rate difference in respect of export undertaken by it and while computing deduction under section 80HHC, assessee had treated such receipts as part of export turnover for claiming deduction under section 80HHC, there was a direct nexus between amount realised on account of export sales and exchange rate difference, whether credited by assessee in its books of account as

export sales or as exchange rate fluctuation, but fact remained that all those receipts were on account of export proceeds and, hence, assessee's claim was to be upheld. (A.Y. 2001-02)

*Priyanka Gems v. ACIT (2005) 3 SOT 817 / 94 TTJ 557 (Ahd.)(Trib.)*

### **S. 80HHC : Deduction – Expenditure – Export incentive**

As only 90% of export incentive is considered while computing the deduction, claim of additional 10% by way of Indirect cost was rejected, as same would amount to double deduction. (A.Y. 1997-98)

*Vipul Dye-Chem Ltd. v. ACIT (2004) 82 TTJ 1039 / (2003) 127 Taxman 42 (Mag.) / 86 ITD 851 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Supporting manufacturer**

Deduction under section 80HHC would be available to a supporting manufacturer in the year in which the assessee had sold goods to export house or trading house. There is no compulsion that said goods have to be exported by export house in the year in which it has purchased goods from supporting manufacturer. (A.Y. 1991-92)

*ACIT v. Veer Chemie & Aromatics (P.) Ltd. (2003) 85 ITD 283 / 81 TTJ 164 (Hyd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Processing – factory taken on lease**

Merely because the processing has been carried out in a factory taken on lease from sister concern, it cannot be said that goods had not been processed by the assessee.

*Raymon Gelatine v. ACIT (2003) 133 Taxman 198 (Mag.)(Ahd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Excise duty – Turn over**

Excise duty is not to be treated as part of turnover for computing relief under section 80HHC. (A.Y. 1992-93)

*Jt. CIT v. Groz Backert Asia Ltd. (2003) 86 ITD 291 / (2004) 88 TTJ 401 (Chd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Commission agent – Total turn over**

Assessee exporter of black pepper, and also acting as commission agent for raw rubber, the commission Income would not be considered as part of total turnover for deduction under section 80HHC.

*Suman Goel (Smt) v. ITO (2003) SOT 127 (Delhi)(Trib.)*

### **S. 80HHC : Deduction – Export business – Unabsorbed business loss – Depreciation**

80HHC deduction is to be computed on current year's Income before setting off unabsorbed business loss and unabsorbed depreciation of earlier years.

*ACIT v. Arihant Tiles & Marbles (P.) Ltd. (2003) SOT 595 (Jodh.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Net interest**

Only net Interest would be considered for purpose of deduction when there is a direct nexus of Interest paid and received.

*Raymon Gelatine v. ACIT (2003) 133 Taxman 198 (Mag.)(Ahd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Activity not connected with export**

In case of assessee having Income from transportation business as well as from Exports, Income from transportation business can not be taken into account for computing deduction under section 80HHC. Held, observation contained in Circular No 504 dt 5.7.1990 (184 ITR St 137) is no authority for allowing deduction in respect of profits derived from activities totally unconnected with export activities.

*Dy. CIT v. Trab Enterprise (2003) 131 Taxman 91 (Mag.)(Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Negative profit**

Negative figure is to be ignored while working out the deduction under section 80HHC.

*Sumit Exports v. ACIT (2003) 131 Taxman 131 (Mag.)(Chd.)(Trib.)*

Also refer :

*ACIT v. Sumedh Synthetics (P.) Ltd. (2003) 81 TTJ 804 / 3 SOT 176 (Ahd.)(Trib.)*

*ACIT v. Avon Cycles Ltd. (2003) 86 ITD 156 / (2004) 82 TTJ 127 (Chd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Loss**

The word profit used in the proviso to S. 80HHC(3) will mean only profit and not Loss. (A.Y. 1994-95)

*ACIT v. Avon Cycles Ltd. (2003) 86 ITD 156 / (2004) 82 TTJ 127 (Chd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Composite contract**

In case of a composite contract assessee is entitled to deduction in respect of goods exported. (A.Y. 1991-92)

*Elecon Engg. Co. Ltd. v. ACIT (2003) 81 TTJ 809 (Ahd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Explanation**

Clause (baa) of the explanation to S. 80HHC inserted w.e.f 1.4.92 is applicable for A.Y 92-93 onwards, and not for A.Y 1990-91.

*Rajeev Enterprises v. Assessing Officer (2003) 78 TTJ 330 / 2 SOT 347 (SB)(Jp.)(Trib.)*

### **S. 80HHC : Deduction – Export business – 10% expenditure**

Held, that the contention of net income to be considered and not gross income, while computing deduction has no merit, as there is already an inbuilt provision of allowing 10 % expenditure on receipts in clause (baa). (A.Y. 1992-93)

*Choudhary Garments v. Dy. CIT (2003) 86 ITD 779 / 80 TTJ 774 (Mum.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Similar nature – Charge**

The meaning of the expression "charges" or any other receipt of similar nature, has to be read in light of the words brokerage, commission, interest, rent used in explanation (baa). The concept of ejusdem generis lays down that the meaning of the words used in a phrase shall take its colour from the meaning of the words used earlier in that phrase, and cannot be read in isolation de hors the meaning of the words used beforehand.

*Dy. CIT v. Chaitanya Organics & Intermediates (P.) Ltd. (2003) SOT 414 (Hyd.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Premium – Exim scrips**

Premium paid on surrender of exim scrips falls within expression cash assistance as per sec 28(iiib), hence 90% thereof was includible in computation of profits derived from exports.

*Palam Stove Industries v. ITO (2003) SOT 520 (Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Export – Interest on late payments**

Interest received on late payment of sale proceeds is part of eligible profits for computing deduction under section 80HHC.

*Dy. CIT v. Lubi Electricals Ltd. (2003) 133 Taxman 113 (Mag.)(Ahd.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Foreign exchange difference – Year in which includible**

Foreign exchange difference on sales made during the year realized after the end of the financial year is to be included in the year of sales while computing the deduction under section 80HHC, as right to receive the sale proceeds have already accrued on date of sale itself. The receipt of money on account of exchange fluctuation was only consequential.

*K. Uttam Lal Exports Ltd. v. Dy. CIT (2003) 133 Taxman 198 (Mag.)(Mum.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Interest**

Interest earned on temporary Investments of idle and surplus funds is part of business income and eligible for deduction. (A.Y. 1990-91)

*Rajeev Enterprises v. Assessing Officer (2003) 78 TTJ 330 / 2 SOT 347 (SB)(Jp.)(Trib.)*

Also refer :

*Leatherage v. ITO (2003) 131 Taxman 189 (Mag.) / 78 TTJ 937 / 86 ITD 482 (Luck.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Interest**

Interest earned on temporary advances of idle and surplus funds is not eligible for deduction. (A.Y. 1991-92)

*Sri Mahalakshmi Floor Mills v. ACIT (2002) 77 TTJ 1009 (Bang.)(Trib.)*

#### **S. 80HHC : Deduction – Export business – Sale to export – House – Subsequent year**

Assessee sold goods to the Export-house during the asst. yr. 1991-92 but export took place by the Export-house in the asst. yr. 1992-93 and accordingly, the Export house issued a certificate in Form No. 10CCAB in respect of the asst. yr. 1992-93. On the facts it was held that the deduction should be allowed in the year in which the assessee had sold the goods or merchandise to the export house or trading house as a certificate in the prescribed form had been produced and that there is no compulsion whatsoever that the Export - house has to necessarily export the goods only in that year in which it has purchased the goods from the supporting manufacturer. Therefore, it was held that assessee was entitled to deduction under section 80HHC in the asst. yr. 1991-92 itself. (A.Y. 1991-92)

*ACIT v. Veer Chemie & Aromatics (P) Ltd. (2003) 85 ITD 283 / 81 TTJ 164 (Hyd.)(Trib.)*

### **S. 80HHC : Deduction – Export business – Indirect expenses from export incentives**

As the legislature has impliedly recognized in Explanation (baa) below S. 80HHC that 10 per cent of the export incentives would be incurred by the assessee as expenses to earn the same it was held that that the Indirect expenses should be reduced for the purpose of computing the deduction under section 80HHC(3)(b) and therefore, 10% of the export incentives is to be treated as indirect cost incurred to earn the same and to that extent the indirect expenses should be reduced from the export incentives. (A.Y. 1995-96)

*Surendra Engineering Corporation v. ACIT (2003) 86 ITD 121 / 78 TTJ 347 (SB)(Mum)(Trib.)*

*Editorial :- Approved by Supreme Court in Hero Exports v. CIT (2009) 295 ITR 454 / 213 CTR 291 / 165 Taxman 445 (SC)*

### **S. 80HHC : Deduction – Export business – Profit from business – Interest on fixed deposit**

- (i) Explanation (baa) under the provisions of sec. 80HHC has not made any distinction between 'Business Income' and 'Income from Other Sources'.
- (ii) Only gross receipts and not net receipts have to be taken for the purpose of Explanation (baa). (A.Y. 1992-93).

*Choudhary Garments v. Dy. CIT (2003) 86 ITD 779 / 80 TTJ 774 (Mum.)(Trib.)*

### **Section 80HHD : Deduction in respect of earnings in convertible foreign exchange**

### **S. 80HHD : Deduction – Convertible foreign exchange – Shopping commission – Foreign tourists**

Assessee was receiving the commission from shopkeepers and not in foreign exchange from the tourists directly. Assessee was not eligible for deduction under section 80HHD.

*CIT v. Le Passage to India Tour and Travels (P) Ltd. (2011) 57 DTR 98 / 241 CTR 535 / 335 ITR 69 (Delhi)(High Court)*

**S. 80HHD : Deduction – Tour operator – Convertible foreign exchange – Interest – Foreign tourists**

Interest earned by assessee tour operator by making deposits of advances received from foreign tourists cannot be said to have been derived from the services provided to foreign tourists and, therefore, such interest income did not qualify for benefit of section 80HHD, more so as it was received from banks in India in Indian currency and not in foreign exchange.

*Lotus Trans Travels (P) Ltd. v. CIT (2011) 332 ITR 463 / 241 CTR 530 / 53 DTR 267 (Delhi)(High Court)*

**S. 80HHD : Deduction – Convertible foreign exchange – Travel agent – Receipt**

The assessee, travel agent, computed deduction under section 80HHD by ignoring the receipts of which the assessee issued disclaimer certificates. The quantum of deduction was modified by the Assessing Officer. Hon'ble Court held that in the formula for purposes of computing eligible profit under section 80HHD (business profit x foreign exchange receipts/total receipts) foreign exchange receipts received on behalf of other hotels and in respect of which assessee has issued disclaimer certificate under Form No. 10CCA will be reduced from numerator of multiplier (foreign exchange receipts) and same figure will also be reduced from denominator of multiplier (total receipts). (A.Ys. 1996-97, 1998-99)

*CIT v. Lotus Trans Travels (P.) Ltd. (2007) 161 Taxman 5 / 207 CTR 105 / 290 ITR 1 (Delhi) (High Court)*

**S. 80HHD : Deduction – Hotel – Convertible foreign exchange**

Where the assessee was running two hotels. It had obtained approval for the purpose of deduction under section 80HHD separately for each of two hotels. Accordingly, the assessee claimed deduction under section 80HHD separately and independently in respect of each hotel. High Court held that under section 80HHD deduction with reference to profits and gains of entire business of hotel business is to be determined, instead of determining profits separately for each hotels. (A.Ys. 1992-93 and 1993-94)

*Hotel & Allied Trader P. Ltd. v. Dy. CIT (2007) 201 Taxation 555 / 211 CTR 298 / 294 ITR 67 / 163 Taxman 11 (Ker.)(High Court)*

**S. 80HHD : Deduction – Convertible foreign exchange – Transfer to utilized reserve account**

Mere transfer from '80HHD reserve account' to the '80HHD utilised account' does not stand violation of section 80HHD once it had been utilised for the purposes specified in section 80HHD(4). (A.Ys. 2000-01 and 2001-02)



*Travel Corporation (India) (P). Ltd. v. ACIT (2007) 211 CTR 552 / 165 Taxman 204 / 293 ITR 577 (Bom.)(High Court)*

**S. 80HHD : Deduction – Tour operator – Convertible foreign exchange – Foreign tourist – Boarding & loading – Paid to hotels**

For the purpose of computing deduction under section 80HHD, amount charged by tour operators from foreign tourists payable to hotels for boarding and lodging of tourists are to be reduced from gross receipts in view of sub-section (2A) thereof. (A.Ys. 1996-97 and 1998-99)

*Dy. CIT v. Lotus Trans Travels (P) Ltd. (2006) 100 TTJ 703 / 98 ITD 115 (Delhi)(Trib.)*

**S. 80HHD : Deduction – Tour operator – Convertible foreign exchange – Foreign tourists – Catering & bar services**

Receipts on realization against services provided to foreign tourists by the assessee for catering and bar are eligible for deduction under section 80HHD. (A.Y. 2000-01)

*Dy. CIT v. Hotel Samode Palace (2006) 100 TTJ 1080 / 7 SOT 474 (Jp.)(Trib.)*

**S. 80HHD : Deduction – Hotel – Convertible foreign exchange – Travel agents – Money changer**

Where assessee had a restricted money-changer's licence and had an exchange counter in lobby of its hotel, since assessee was not making any profit from providing such facility and facility was available to its clients in hotel premises itself, said facility could not be said to be 'a sale in any shop owned or managed by person who carries on business of a hotel', and there being no element of sale. Explanation (c) to section 80HHD(6) did not have any bearing whatsoever on said facilities. (A.Y. 1996-97)

*Jt. CIT v. Piem Hotels Ltd. (2005) 1 SOT 382 (Mum.)(Trib.)*

**S. 80HHD : Deduction – Convertible foreign exchange – Unabsorbed depreciation**

Unabsorbed Depreciation is not required to be reduced for arriving at profits of business while computing deduction under section 80HHD.

*Dy. CIT v. ITC Hotels Ltd (2003) 131 Taxman 139 (Mag.)(Bang.)(Trib.)*

**S. 80HHD : Deduction – Convertible foreign exchange – Lapse on the part of auditors**

Assessee could not be denied the deduction on account of lapse on part of auditors when provisions of sub-section 6 were complied with. (A.Y. 1991-92)

*Rambagh Palace Hotel (P) Ltd v. Dy. CIT (2003) 87 ITD 163 / (2004) 82 TTJ 581 (Delhi)(Trib.)*

**Section 80HHE : Deduction in respect of profits from export of computer software, etc.**

### **S. 80HHE : Deduction – Export of computer software – Company – Book profit [S. 115JA]**

In case of assessment under section 115JA deduction claimed under section 80HHE has to be worked out on the basis of adjusted book profit under section 115JA and not on the basis of profits computed under regular provisions applicable to computation of profits and gains of business. (A. Y. 2000-01)

*CIT v. Bhari Information Technology Systems (P) Ltd. (2011) 245 CTR 1 / 62 DTR 337 / (2012) 340 ITR 593 (SC)*

### **S. 80HHE : Deduction – Export of computer software – Depreciation**

The assessee had a contract for design, development and testing of software outside India. Under the contract the scope of work involved the provision of analysis, programming and testing skills. The assessee had deputed qualified personnel under the contract. Held that the assessee was engaged in onsite development of computer software outside India. The nature of work involved was technical services in the development of Software. The assessee was eligible for special deduction under section 80HHE. (A.Ys. 1998-99, 2000-01)

*CIT v. Information Architects (2011) 220 Taxation 311 / (2010) 322 ITR 1 / 232 CTR 235 / 191 Taxman 415 / 40 DTR 85 (Bom.)(High Court)*

### **S. 80HHE : Deduction – Export of computer software – Non-resident – Non-Discrimination – DTAA**

As per Article 26(2) of India-USA DTAA Taxation of a PE of a USA resident shall not be less favorable than the taxation of a resident enterprise carrying on the same activities. Thus exemptions and deductions available to Indian enterprises would also be granted to the US enterprises if they are carrying on the same activities. Therefore, assessee was entitled to section 80HHE deduction as admissible to a resident assessee (*Automated Securities Clearance Inc. v. ITO (2008) 118 TTJ 619 (Pune)* reversed; *Metchem Canada Inc. v. Dy. CIT (2006) 99 TTJ 702 (Mum)* referred to);

Further where the provisions contained in the DTAA are capable of clear and unambiguous interpretation, it is not necessary to refer to the commentary on the OECD Model Convention, the US Technical Explanation or decisions of any foreign jurisdiction (*CIT v. P. V. A. L. Kulandagan Chettiar (2004) 267 ITR 654 (SC)* followed). (A. Ys. 2002-03 to 2004-05)

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

### **S. 80HHE : Deduction – Export of computer software – Export turnover retained abroad**

Benefit of deduction under section 80HHE cannot be denied to the assessee simply because the income certified for deduction is nil in form no 10CCAF for the reason that the computation of total income as per return was loss. Assessee is entitled to deduction under section 80HHE on the amount of export turnover retained abroad to

the extent of its outstanding dues to that company and the amount retained by assessee's foreign branch in respect of expenses incurred by it on behalf of assessee provided there is nexus between the outstanding payable / expenditure incurred abroad and the business of export which has yielded the income. (A. Y. 2002-03).

*3i Infotech Ltd. v. Dy. CIT (2011) 51 DTR 385 / 136 TTJ 641 / 129 ITD 422 (Mum.)(Trib.)*

#### **S. 80HHE : Deduction – Export of computer software – Incidental activities**

Receipts incidental to the activities of the assessee "involving the writing of computer software" i.e. set of instructions, were the eligible receipts, so long as the software was exported outside India or technical services were provided outside India, the provisions do not bar the assessee from claiming deduction on the basis of the actual use or utilization of the said exported software in India. (A.Y. 2004-05)

*Orbitech Ltd. v. Jt. CIT (2010) 35 SOT 46 (URO)(Mum.)(Trib.)*

#### **S. 80HHE : Deduction – Export of computer software – Sending information**

Sending information which was sought by companies situated abroad, said activity amount to export of customized electronic data hence, the assessee is eligible deduction under section 80HHE. (A.Ys. 1999-2000 to 2001-02)

*ACIT v. Malhar Information Services (2010) 122 ITD 421 / (2008) 119 TTJ 346 / 11 DTR 380 (Mum.)(Trib.)*

#### **S. 80HHE : Deduction – Export of computer software – Claim during assessment proceedings**

Claim for deduction under section 80HHE can be made during assessment proceeding even if not made in return of income. (A.Ys. 1998-99 and 1999-2000)

*Wipro Limited v. Dy. CIT (2005) 96 TTJ 211 / 5 SOT 805 (Bang.)(Trib.)*

#### **S. 80HHE : Deduction – Export of computer software – Free trade zone [S. 10A]**

Expression 'such profits' as appearing in sub-section (5) of section 80HHE refers to the profits of a particular assessment year; since both sections 80HHE and 10A allow benefit, assessee would be entitled to take benefit of provision which enables larger benefit being earned by assessee. (A.Ys. 2000-01 and 2001-02)

*Legato Systems India (P.) Ltd. v. ITO (2005) 2 SOT 719 / 93 TTJ 828 (Delhi)(Trib.)*

#### **S. 80HHE : Deduction – Export of computer software – Unabsorbed depreciation – Brought forward loss – Gross total income – Deemed business income [S. 41(1)]**

Deduction under section 80HHE is to be restricted to the extent of gross total income. Deduction under section 80HHE is to be computed after reducing unabsorbed depreciation but brought forward business losses are not to be reduced for computing

profits of business eligible for deduction; amount computed under section 41(1) is not to be excluded from the profits of eligible business. (A.Y. 1996-97)

*Jt. CIT v. Infocon International Ltd. (2005) 2 SOT 444 (Bang.)(Trib.)*

**S. 80HHE : Deduction – Export of computer software – Recruiting, training**

Where activities carried out by assessee-company were in respect of recruitment, training and export of software professionals at the instance of a company and there was no evidence on record to show that it had rendered any services or activities specified in section 80HHE, assessee was not entitled to deduction under section 80HHE. (A.Ys. 1997-98, 1998-99, 1999-2000)

*Cybertech Systems & Software Ltd. v. Dy. CIT (2005) 3 SOT 121 / (2006) 106 TTJ 257 (Mum.)(Trib.)*

**S. 80HHE : Deduction – Export of computer software – Documentation facilities – Technical services**

Where under an agreement, assessee's personnel had rendered technical services for development of computer software for a client abroad, assessee was entitled to deduction under section 80HHE even though evidence to support claim was internal and in nature of documentation of affiliates of company. (A.Y. 1997-98)

*ACIT v. Arthur Anderson & Co. (2005) 94 TTJ 736 / (2006) 5 SOT 393 (Mum.)(Trib.)*

**S. 80HHE : Deduction – Export of computer software – Total turn over of eligible business**

Total turnover of eligible business must be considered and not turnover of other business of company. (A.Ys. 1998-99 and 1999-2000)

*Wipro Limited v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

**S. 80HHE : Deduction – Export of computer software – Total turn over**

Only Total Turnover for the purpose of Sec 80HHE can only mean the total turnover of the computer software both in India and outside India, and it would be incorrect to include any other Turnover not connected with computer software business. (A.Ys. 1991-92 to 1997-98)

*Wipro Ge Medical Systems Ltd. v. Dy. CIT (2003) 81 TTJ 455 (Bang.)(Trib.)*

**S. 80HHE : Deduction – Export of computer software – Interest net or gross**

Held, only net Interest could be excluded from business Income for purpose of working out relief under section 80HHE. (A.Ys. 1997-98 and 1998-99)

*Infotech Enterprise Ltd v. Jt. CIT (2003) 85 ITD 325 / 80 TTJ 589 (Hyd.)(Trib.)*

**Section 80HHF : Deduction in respect of profits and gains from export or transfer of film software, etc.**

**S. 80HHF : Deduction – Export or transfer of film software – Ownership**

Assessee not being the owner of the software that came to be developed as a result of the services provided by it in connection with the production of a film produced by the foreign company, there was no export or transfer of film software by the assessee and therefore, it is not entitled to deduction under section 80HHF in respect of the fixed fee received for the services rendered by it. (A.Ys. 2002-03, 2003-04)

*Kas Movie Makers (P) Ltd. v. CIT (2010) 323 ITR 373 / 231 CTR 361 / 38 DTR 121 (Delhi)(High Court)*

#### **S. 80HHF : Deduction – Export or transfer of film software – Export turnover**

Claim of the assessee that the meaning of “total turnover” in clause (j) of Explanation to section 80HHF should be restricted only to the export turnover of the business of exports and not the entire business is not sustainable. While computing deduction under section 80HHF by multiplying “export turnover” with the “profits of the business” as divided by the total turnover of the business. (A. Y. 2000-2001).

*SRI Adhikari Brothers Television Networks Ltd. v. ACIT (2011) 52 DTR 295 / 137 TTJ 424 / 130 ITD 439 (Mum.)(Trib.)*

#### **S. 80HHF : Deduction – Export or transfer of film software – Service & Music income**

Service income, income from music were operational income hence entitled to deduction under section 80HHF. (A.Y. 2001-02)

*ACIT v. Set India Pvt. Ltd. (2010) 3 ITR 454 (Mum.)(Trib.)*

#### **S. 80HHF : Deduction – Export or transfer of film software – Evidence**

Lack of documentary evidence indicating export out of India not fatal, and hence assessee entitled to deduction. (A.Y. 2001-02)

*ACIT v. J. P. Software and Exports Pvt. Ltd., ITA No. 6191/Mum/2004, Bench – C, dated 2-3-2007 – BCAJ P. 303, Vol. 39-D, Part 3, June 2007 (Mum.)(Trib.)*

#### **S. 80HHF : Deduction – Export or transfer of film software – Exclusive basis**

Assessee having transferred on sole and exclusive basis, DVDs, VCDs and VHS cassette rights of a film to a foreign company it was eligible for deduction under section 80HHF. (A.Y. 2002-03)

*K. R. Films (P) Ltd. v. ITO (2006) 100 TTJ 825 (Mum.)(Trib.)*

#### **Section 80-I : Deduction in respect of profits and gains from industrial undertakings after a certain date, etc.**

#### **S. 80-I : Deduction – New industrial undertakings – Service Charges linked with manufacturing activity**

Assessee manufacturing Urea and Amonia. Supplying ammonia gas to heavy water plant located in its premises and receiving service charges. Ammonia gas returned to assessee after extracting deuterium. Whether there was interdependence. Appellate Tribunal rejecting claim for allowance owing to the paucity of facts. The Supreme

Court remanded the matter to the Appellate Tribunal for a fresh consideration of facts after permitting the parties to produce the relevant evidence. (A.Ys. 1993-94, 1994-95 and 1996-97)

*Krishak Bharati Co-operative Ltd. v. Jt. CIT* (2009) 310 ITR 400 / (2008) 220 CTR 1 / 175 Taxman 71 / 14 DTR 207 (SC)

**S. 80-I : Deduction – New industrial undertakings – Gross income without reduction u/s. 80H [S. 80H]**

Deduction under section 80-I should be allowed on gross total income, without reducing from it the deduction allowed under section 80HH.

*CIT v. K. P. Solvex Ltd.* (2010) 36 DTR 443 (All.)(High Court)

**S. 80-I : Deduction – New industrial undertakings – Deduction under two sections [S. 80HH]**

Assessee would be entitled to relief under section 80-I at rate of 20% of profit without allowing it deduction under section 80HH. (A.Y. 1989-90)

*CIT v. Venus Electricals* (2010) 190 Taxman 89 / (2008) 304 ITR 347 / 4 DTR 263 (Guj.)(High Court)

**S. 80-I : Deduction – New industrial undertakings – Country Liquor – Manufacture**

Assessee engaged in the business of producing country liquor and beer was held to be engaged in manufacturing activity and eligible for deduction under section 80 I of the Act. (A.Y. 1984-85)

*CIT v. Mount Shivalik Breweries Ltd.* (2010) 47 DTR 177 (P&H)(High Court)

**S. 80-I : Deduction – New industrial undertakings – Audit Report – Before completion of assessment**

If the assessee files audit report after filing the return of income but before the completion of assessment, then the assessee's right to rely upon the same cannot be taken away. (A.Y. 1991-92)

*CIT v. Jenson Nicholson India Ltd.* (2009) 23 DTR 289 (Cal.)(High Court)

**S. 80-I : Deduction – New industrial undertakings – Gross total income – Losses of other units**

Gross total income is to be computed in accordance with the scheme of the Act as such the profits of eligible units is to be adjusted against the other units losses and if there is any positive income remaining after such adjustment deduction under section 80 I is to be allowed on the net positive income. (A.Ys. 1987-88 to 1989-90)

*CIT v. Shree Synthetics Ltd.* (2009) 30 DTR 30 / 228 CTR 228 / 188 Taxman 197 (MP) (High Court)

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Chickens**



Process of dressing, rearing, defeathering deboning, etc. undertaken by the assessee to produce boneless chickens, etc., in the course of its poultry business does not amount to production of article or thing within the meaning of section 80HHA and 80-I of the Act. (A.Y. 1998-99)

*CIT v. J.D. Farms (2009) 31 DTR 342 / 227 CTR 500 / (2010) 187 Taxman 153 (Delhi)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Laying railway [S. 80HH]**

Activity of laying railway line does not amount to 'manufacture' or 'produce' for the purpose of allowing deduction under section 80HH and 80I. (A.Ys. 1984-85 to 1987-88, 1991-92)

*CIT v. Indian Railway Construction Co. Ltd. (2009) 226 CTR 49 / 24 DTR 130 / 184 Taxman 299 (Delhi)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Compensation – Foreign collaboration [S. 80HH]**

Compensation received by the assessee from its foreign collaboration upon termination of technical know-how agreement cannot be said to be income derived from the industrial activity. As such the same is not eligible for deduction under section 80HH and 80I of the Act. (A.Y. 1992-93)

*S. Kumats Tyre Manufacturing Co. Ltd. v. CIT (2009) 30 DTR 233 / 227 CTR 204 (MP)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Computation – Unabsorbed loss, depreciation, etc.**

Gross Total income of the assessee has first to be computed in accordance with the Act and thus profit of assessee new unit had first to be adjusted against other unit's losses and if there was no positive income. Deduction under section 80-I could not be allowed. (A.Y. 1987-88, 1988-89, 1989-90)

*CIT v. Shree Synthetics Ltd. (2009) 30 DTR 30 / (2010) 228 CTR 228 / 188 Taxman 197 (MP)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Deductions under two sections [S. 80-I]**

Deduction under section 80-I of the Act is to be computed on gross total income of the assessee without first reducing from it the amount of deduction under section 80HH of the Act. (A.Y. 1991-92)

*Dy. CIT v. Chola Textile (P) Ltd. (2008) 10 DTR 244 / 218 CTR 123 / 304 ITR 256 (Mad.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Banquet hall and marriage place**

The assessee was running banquet hall and marriage place, and catering activities were just ancillary and not main business of the assessee. The High Court following the judgment of the Apex Court in the case of *Indian Hotels Co. Ltd. v. ITO* [(2000) 245 ITR 538 held that the assessee was not eligible for deduction under section 80-I of the Act.

*Vijay Kiran Hotels P. Ltd. v. CIT* (2007) 196 Taxation 336 (P&H)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Interest – Trade debtor**

Interest received from Trade Debtors against late payment of sales consideration is income derived from business of industrial undertaking and thus includible to become part of eligible profits for the purpose of deduction under section 80-I. (A.Y. 1992-93) *Nirma Industries Ltd. v. Dy. CIT* (2006) 202 CTR 198 / 283 ITR 402 / 155 Taxman 330 (Guj.)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Gross total income – Deductions under two sections [S. 80-I]**

Deduction under section 80-I of the Income-tax Act, 1961 is allowable on gross total income without reducing it by deduction under section 80HH of the Income-tax Act, 1961.

*CIT v. Panjon P. Ltd.* (2006) 192 Taxation 851 (MP)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Contract labourers are workers**

The condition of employing certain number of workers for claiming deduction under section 80-I can be satisfied by considering the labourers hired on contract. (A.Ys. 1984-85, 1985-86 and 1986-87)

*CIT v. Prithviraj Bhoorchand* (2006) 152 Taxman 372 / 200 CTR 82 / 280 ITR 74 (Guj.)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Deductions under two sections**

Where the assessee is eligible for deduction under sections 80HH & 80-I, deduction under section 80I is admissible on the gross total income before reducing it by the deduction allowable under section 80HH.

*CIT v. Decora Tubes Ltd.* (2006) 195 Taxation 85 (MP)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Refund of excise duty [S. 80HH]**

Refund of excise duty is to be included in the profits for the purpose of deduction under sections 80HH and 80-I of the

*CIT v. Siddharth Tubes Ltd.* (2006) 195 Taxation 96 (MP)(High Court)

#### **S. 80-I : Deduction – New industrial undertakings – Interest on delayed payments [S. 80HH]**

Interest of delayed payments by trade debtors is the amount directly relatable to the amount receivable in the course of business. It is profit and gains derived from the business of industrial undertaking of the Assessee and is eligible for relief under section 80HH & 80-I. (A.Y. 1993-94)

*CIT v. Indo Matsushita Carbon Co. Ltd. (2006) 205 CTR 493 / 286 ITR 201 (Mad.) (High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Workers [S. 263]**

For the purpose of Factories Act, 1948 the definition of "worker" includes a person employed through a contractor. The assessee had the ultimate control over the affairs of the establishment and was responsible to the workers in case of an accident and that the assessee could let off workers at any time if he so desired. Thus held that the assessee was employing 20 workers in its industrial undertaking as contemplated by clause (iv) of sub-section (2) of section 80-I and as such was entitled to the benefit of the provisions of section 80-I. (A.Ys. 1984-85, 1985-86 and 1986-87)

*CIT v. Prithviraj Bhoorchand (2006) 280 ITR 94 / 152 Taxman 372 / 220 CTR 82 (Guj.) (High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Deductions under two sections**

#### **[S. 80HH]**

Deduction under section 80-I has to be computed on gross total income without reducing from it the deduction under section 80HH. (A.Y. 1992-93)

*CIT v. Lucky Laboratories Ltd. (2006) 200 CTR 305 / 284 ITR 435 / (2005) 149 Taxman 273 (All.) (High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Deductions under two sections**

#### **[S. 80HH]**

Deduction under section 80-I is allowable on the gross total income without excluding the deduction admissible under section 80HH. (A.Y. 1988-89)

*CIT v. S. B. Oil Industries Pvt. Ltd. (2006) 203 CTR 218 / (2005) 274 ITR 495 / 146 Taxman 594 (P&H) (High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Change in constitution of firm – Reconstruction of firm after dissolution**

Erstwhile partners continued with two additional new partners. It is a case of change in the constitution of firm. In the case of change in constitution of firm, only one assessment is to be made for two periods. (A.Y. 1979-80)

*CIT v. Hindustan Motors Finance Co. (2006) 202 CTR 427 / 276 ITR 382 / 142 Taxman 177 (All.) (High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Duty drawback**

Merely because under a scheme to encourage exports duty is refunded subsequently by way of "duty drawback" it can not be regarded as profit or gain "derived" from industrial undertaking for propose of computing deduction.

*CIT v. Ritesh Industries Ltd. (2005) 274 ITR 324 / 142 Taxman 551 / (2004) 192 CTR 81 (Delhi)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Cutting and polishing of granite**

Cutting and polishing of granite slabs before exporting them does not amount to "manufacture". (A.Ys. 1986-87, 1987-88, 1988-89)

*CIT v. Vijay Granites P. Ltd. (2004) 267 ITR 606 / 140 Taxman 371 (Mad.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Deduction under two sections – Export [S. 80HHC]**

Deduction under section 80-I is allowable from gross total income and not from reduced balance after deduction under section 80HHC.

*CIT v. Mittal Appliances (P) Ltd. (2004) 270 ITR 65 / 141 Taxman 610 (MP) / CIT v. Simram Farms Ltd. (2004) 189 CTR 190 (MP)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Plastic – Sixth schedule**

Plastic manufactured by assessee is petro-chemical with in the meaning of Item No 18 of the Sixth Schedule and hence, the assessee is entitled to relief under section 80-I read with section 80-IB(7). (A.Y. 1970-71)

*CIT v. Plastic Products Ltd. (2004) 191 CTR 23 (All.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Qualifying amount [S. 80HH]**

Deduction is to be allowed before allowing deduction under section 80HH

*CIT v. MP State Electronics Dev. Corpn. (2004) 267 ITR 405 (MP)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Deduction under two sections [S. 80HH]**

Profits for purpose of claiming deduction are not be reduced by deduction admissible under section 80HH. (A.Ys. 1980-81, 1981-82, 1982-83)

*CIT v. India Gelatine & Chemicals Ltd. (2004) Tax LR 1010 / (2005) 194 CTR 492 / 275 ITR 284 / 145 Taxman 303 (Guj.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Leasing of factory**

Where assessee does not carry on manufacturing activities itself and has leased out factory to third party and third party carries on manufacturing activity, assessee is not entitled for deduction under section 80-I. (A.Ys. 1983-84, 1984-85, 1985-86)

*CIT v. Rajasthan Steel Rolling Mills (P.) Ltd. (2003) 130 Taxman 194 / 183 CTR 622 / (2004) 270 ITR 72 (Raj.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Printing of lottery**

Assessee engaged in printing of lottery tickets would be an industrial undertaking. (A.Ys. 1991-92 to 1996-97)

*CIT v. A.R.J. Security Printers (2003) 131 Taxman 297 / 264 ITR 276 / 183 CTR 323 (Delhi)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Production of limestone**

In case of assessee engaged in production of limestone even for captive use is entitled to relief under section 80-I. (A.Y. 1972-73)

*CIT v. Dalmia Dadri Cement Ltd. (2003) 263 ITR 364 / 180 CTR 486 / (2004) 134 Taxman 743 (Delhi)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Manufacture – Processing of prawns**

Processing of prawns does not amount to manufacture.

*CIT v. Poyilakkada Fisheries (P.) Ltd. (2003) 133 Taxman 651 / (2004) 186 CTR 234 (Ker.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Fork lift – Plant**

Fork-lift is not a plant and machinery under section 80-I(2). (A.Y. 1991-92)

*CIT v. Popular Art Palace (P.) Ltd. (2003) 133 Taxman 658 (Raj.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Office machine and apparatus – Computer software**

Computers do not fall within words 'office machines and apparatus' used in item 22 of Eleventh Schedule

Income derived by assessee engaged in dealing in computers and computer software is to be treated as income derived from industrial undertaking. Exclusion in Eleventh Schedule would apply to computers whether manufactured prior to 1-4-1988 or after that date. (A.Y. 1988-89)

*CIT v. International Data Management Ltd. (2003) 261 ITR 177 / 182 CTR 336 (Bom.)(High Court)*

**S. 80-I : Deduction – New industrial undertakings – Investment allowance – Computation**

Investment allowance is to be deducted before allowing deduction under section 80-I.

*CIT v. Abressive India (2003) 133 Taxman 389 (Raj.)(High Court)*

### **S. 80-I : Deduction – New industrial undertakings – Reconstruction of business**

Where assessee firm was formed by reconstruction of a business already in existence as a sole proprietary concern, it did not fulfil condition laid down in section 80I(2)(i) and therefore, it was not entitled to deduction under section 80I. In order to claim deduction under section 80I an Industrial undertakings has to fulfil all four clauses under section 80I(2), and if it does not fulfil even one clause thereof, deduction is not allowable. (A. Y. 1992-93).

*ACIT v. Goel Udyog (2011) 45 SOT 444 (Delhi)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Standardization and pasteurization of milk – Manufacture**

Process of standardization and pasteurization of milk does not amount to manufacture / production for purpose of claiming deduction under section 80-I and 80 HHA. (A.Ys. 1986-87, 1987-88 and 1994-95)

*B. G. Chitale v. Dy. CIT (2008) 115 ITD 97 / 116 TTJ 658 / 23 SOT 189 / 9 DTR 41 / 305 ITR 81 (Pune)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Independent undertaking – Manufacture – Existing product [80-IA]**

New units were independent undertaking, though manufacturing the existing product and they are entitled to deduction under sections 80-I & 80-IA. (A.Ys. 1994-95 to 1997-98)

*Jt. CIT v. Associated Capsules (P) Ltd. (2008) 117 TTJ 399 / 114 ITD 189 / 21 SOT 420 / 9 DTR 95 (Mum.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Disclosure in the course of survey [S. 133A]**

Income disclosed during survey / search on account of excess stock of paper is not income 'derived from' industrial undertaking, hence not eligible for deduction under section 80-I. (A.Y. 1992-93)

*ACIT v. Priya Paper Works (2007) 106 TTJ 234 (Jab.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Depreciation [S. 32]**

In computing deduction under sections 80HH and 80-I, depreciation of the eligible unit has to be taken into account notwithstanding introduction of concept of block of assets. (A.Y. 1988-89)

*Bajaj Auto Ltd. v. Dy. CIT (2007) 106 TTJ 333 / 105 ITD 287 (Mum.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertaking – Sale of imported spare parts and tools**



Profits earned from sale of imported spare parts and tools could not be considered eligible for deduction under sections 80HH & 80-I, as same cannot be said to have been derived from industrial undertaking. (A.Y. 1995-96)

*Honda Siel Power Products Ltd. v. Dy. CIT (2007) 112 TTJ 702 / (2006) 157 Taxman 128 (Mag.) (Delhi)(Trib.)*

**S. 80-I : Deduction – New industrial undertakings – Depreciation – Not claimed – To be reduced [S. 80-IA/80-IB]**

Depreciation, though allowable but not claimed in the return for normal computation of income, has to be allowed while computing the deductions under Chapter VI-A viz. sections 80HH, 80-IA, 80-IB, etc. of an Industrial Undertaking. (A.Ys. 1999-2000 to 2002-03)

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

**S. 80-I : Deduction – New industrial undertakings – Manufacture or production – Processing of bajra seeds**

Processing of bajra seeds by treating them with poisonous chemicals amounts to manufacture or production and assessee engaged in such processing is entitled to deduction under section 80-I.

*ACIT v. New Nandi Seeds Corporation (2006) 101 TTJ 725 / 99 ITD 702 (Ahd.)(Trib.)*

**S. 80-I : Deduction – New industrial undertakings – Old machinery – Initial year**

Since the value of old machinery in the A.Y. 1989-90 (initial year) was more than 20 per cent of the total value of plant and machinery, deduction under section 80-I was not allowable during the asst. yrs. 1995-96 to 1997-98 under consideration. (A.Ys. 1996-97, 1997-98)

*Jt. CIT v. Nalco Chemicals (India) Ltd. (2006) 99 TTJ 628 / 97 ITD 348 (AT)(Kol.)(Trib.)*

**S. 80-I : Deduction – New industrial undertakings – Computation – Depreciation [S. 32]**

The profits and gains of the new industrial undertaking are to be computed as if the new industrial undertaking were the only business of the assessee from the date of its establishment and the past year's depreciation and losses are to be set off against the income of the assessee from that undertaking for determining its profits and gains. (A.Y. 1995-96)

*Prasad Productions (P) Ltd v. Dy. CIT (2006) 102 TTJ 456 / 98 ITD 212 (Chennai)(Trib.)*

**S. 80-I : Deduction – New industrial undertakings – Interest income – Money lending**

Interest income earned from money lending business though in the nature of business income, cannot be said to have direct nexus with the industrial activities of

the assessee and, therefore, assessee is not entitled for deduction under section 80-I in respect of said interest income. (A.Ys. 1991-92, 1997-98 and 1998-99)

*ACIT v. P. S. Apparels (2006) 101 TTJ 29 (Chennai)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Interest income**

Interest income earned by the assessee by investing the advances received had no direct nexus with the industrial undertaking and direct source of such income being the investments, the same is not eligible for relief under section 80-I. (A.Y. 1991-92)

*Dy. CIT v. Maruti Udyog Ltd. (2006) 101 TTJ 760 / 99 ITD 666 (Delhi)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Processing by agencies**

Sec 80-I does not provide that the new unit can not manufacture the same articles which are being manufactured by the old unit, or that the new unit can not use the same premises i.e one used by old unit, or that it cannot use the part of the components manufactured by old unit. (A.Y. 1995-96)

*Punjab Tractors Ltd v. Dy. CIT (2003) 128 Taxman 28 / (2004) 89 TTJ 439 (Mag.)(Chd.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – By outside agencies**

Deduction under section 80-I is eligible, even if part of production process is got done by outside agencies on payment of labour/service charges. (A.Y. 1990-91)

*Sond Bharat Pedals (India) v. ITO (2003) 84 ITD 89 / 89 TTJ 492 (Chd.)(Trib.)*

*Neelu Textiles Ltd. v. Addl. CIT (2003) 128 Taxman 93 (Mag.)(Jodh.)(Trib.)*

*Swastik Textiles v. ITO (2003) SOT 327 (Jodh.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Word Produce – Meaning thereof**

The decision explains the word produce as understood in Sec 80-I. (A.Y. 1990-91)

*Kirloskar Electrodynne Ltd. v. Dy. CIT (2003) 87 ITD 264 / 80 TTJ 436 (TM)(Pune)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Manufacture – Deployment of mud**

Activity of deployment of mud logging units for drilling of oil wells at the oil exploration site of the ONGC amounts to manufacture, so as to eligible for deduction under section 80-I.

*Triveni Sperry Sun Ltd. v. ACIT (2003) 133 Taxman 72 (Mag.)(Delhi)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Manufacture – Synthetic detergent**

Business of Manufacturing of synthetic detergents is eligible for deduction under section 80-I.

*Amar Poly Fabs (P.) Ltd. v. ACIT (2003) SOT 426 (Chd.)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Manufacture – Fabrication**

Contract involving supply, fabrication, erection and commissioning of dish antennas amounted to manufacture, and deduction under section 80-I is available. (A.Y. 1990-91)

*Dy. CIT v. V. M. Jog Construction Ltd. (2003) 81 TTJ 856 / 3 SOT 705 (Pune)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Diagnostic Centre**

Running of a diagnostic centre and processing X-Ray films, ultrasound film, ECG Rolls etc. was held to be an industrial undertaking for the purpose of Sec 80 I.

*Sanghi Medical Centre v. Dy. CIT (2003) 126 Taxman 99 (Mag.)(Delhi)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Derived from – Meaning of**

The word “derived from” has been explained in the decision. (A.Y. 1990-91)

*Kirloskar Electrodynne Ltd. v. Dy. CIT (2003) 87 ITD 264 / 80 TTJ 436 (TM)(Pune)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Freight – Sale price**

Surplus arising from freight charged for supply of goods, being part of sale price, is eligible for deduction under section 80-I.

*Universal Magnoflex (P.) Ltd. v. Dy. CIT (2003) SOT 383 (Indore)(Trib.)*

### **S. 80-I : Deduction – New industrial undertakings – Manufacturing or production – developing computer software**

Sales-tax authority treated as development of computer software as a product and sales tax is separately charged. It is treated as customized service-tax but as a packaged software. As it is evident from the Bombay Sales-tax Act, 1959, entry No. 26 (5) specifying the rates of tax on software packages. The use of the software was certified by The Times of India and other newspaper agencies mentioning that software Page No 1 Page No 1 has developed Devnagari typesetting software being used to produce output on Linotronic 300 typesetters. The correspondence with the publishers also indicated that there existed a warranty period and also a condition of training of staff as in the case of any other high technique equipment. It was established that each product is sold in the market with a specific serial number as per purchase order from the customer and dispatched through the delivery challan with a quoted sale price to be utilised by any customer. Hence it was held that it was a manufacturing or producing an article or thing and entitled to the deduction under section 80-I. (A.Y 1992-93).

*R.S. Bhagwat v. ACIT (2003) 78 TTJ 641 (Mum.)(Trib.)*

**Section 80-IA : Deduction in respect of profits and gains of new industrial undertakings [Omitted w.e.f. 31-3-2000] [Please see cases 5112 onwards for new sections 80-IA and 80-IB]**

### **S. 80-IA : Deduction – Industrial undertakings – Revision – High Court order – Reassessment [S. 263]**

In appeal against the order of Tribunal, the High Court set aside the order of Tribunal, against the Order of the High Court the assessee filed an SLP before the Supreme Court. On 5th Jan., 2011 the Apex Court permitted the department to proceed with reassessment, without prejudice to rights and contention of parties. Assessing Officer passed the order disallowing the deduction under section 80IA. Considering the peculiar facts the Apex Court set aside the matter to the file of CIT(A) to decide a fresh uninfluenced by the earlier order of CIT under section 263 as well as impugned order passed by High Court.

*Teknika Components v. CIT (2011) 63 DTR 186 / 202 Taxman 623 / 245 CTR 231 (SC)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturing or Production – Conversions of Raw Marble Blocks into Polished Marble Slabs**

The conversion of raw marble blocks into final product of polished marble slabs or tiles in a factory constitutes “manufacture or production” under section 80-IA(2)(iii) (prior to 1-4-2000) – AY 2001-02. The activity carried out in the present case is not only manufacture but also an activity beyond manufacture that brings about a new product into existence. If it were held not to be “manufacture”, it would lead to disastrous consequences as the assessee would not be liable to pay other taxes like excise duty etc.

“Production” is wider in meaning compared to “manufacture”. Word “production” means manufacture plus something in addition thereto. While every manufacture constitutes production, every production does not amount to manufacture of goods. (A.Y. 2001-02)

*ITO, Udaipur v. Arihant Tiles and Marbles (P) Ltd. (2010) 2 SCC 699 / (2010) 320 ITR 79 / 186 Taxman 439 / (2009) 227 CTR 513 / 32 DTR 161 (SC)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturing – Twisting and texturizing – POY**

Twisting and texturizing of Partially Oriented Yarn (POY), held, applying test in Oracle case (2010) 2 SCC 677, POY *simpliciter* is not fit for being used in manufacture of fabric. It becomes usable only after undergoing thermo-mechanical process that converts POY into texturized yarn, which is used in manufacture of fabric. Hence, it constitutes “manufacture”. Further clarified, however, texturizing or twisting per se in every matter does not amount to manufacture. (A.Y. 1996-97)

*CIT v. Emptee Poly-Yarn (P) Ltd. (2010) 2 SCC 720 / 320 ITR 665 / 229 CTR 1 / 188 Taxman 188 / 34 DTR 121 (SC)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturing – Duplication of master media software [S. 12(b)]**

Duplicating process carried out to prepare a recorded CD from the master media changes the basic character of a blank CD, dedicating it to a specific use and, therefore, the process by which a blank CD is transferred into software loaded disc constitutes "manufacturing or processing of goods" in terms of section 80-IA(12)(b) r.w.s. 33B.

Chapter VI-A and section 80-IA is a code by itself providing special deductions for setting up industrial undertakings in backward areas and for earning profits in foreign exchange. Unlimited deductions are not permissible. Hence, "manufacture or processing of goods" must be interpreted in that background. In present case, process undertaken by the assessee was duplication of master media software on to blank CDs. Said process of duplication may be done at home or for commercial duplication. Department, therefore, should study actual process undertaken and ground realities of business when new technology is involved in a process. (A.Ys. 1995-96, 1996-97)

*CIT v. Oracle Software India Ltd. (2010) 320 ITR 546 / (2010) SCC 677 / 228 CTR 433 / 33 DTR 297 / 320 ITR 546 / 187 Taxman 275 (SC)*

#### **S. 80-IA : Deduction – Industrial undertakings – Duty drawbacks – Profit derived from [S. 80-IB]**

DEPB / Duty drawbacks are incentives which flow from the Schemes framed by Central Government or from section 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business and therefore, do not form part of the net profits of the industrial undertaking for the purpose of section 80-IA and 80IB. (A.Y. 2001-02)

*Liberty India v. CIT (2009) 28 DTR 73 / 317 ITR 218 / 183 Taxman 349 / 225 CTR 233 (SC) / 9 SCC 328*

#### **S. 80-IA : Deduction – Industrial undertakings – Export incentive – Eligible income**

Entitlement to deduction under section 80-IA without reducing the amount of export incentive is a substantial question of law. Question whether the assessee was entitled to deduction under section 80-IA on the amount of entire eligible income without reducing the amount of export incentive from the same is an important question of law and interpretation of section 80-IA arise for determination; High Court directed to decide the same.

*ACIT v. Neo Sack (P) Ltd. (2009) 319 ITR 124 / (2010) 228 CTR 351 / (2010) 33 DTR 233 / 186 Taxman 294 (SC)*

#### **S. 80-IA : Deduction – Industrial undertakings – Manufacture – Production – Coating with oxides of noble metals on titanium metal electrode / anode**

Coating with oxide of noble metals on titanium metal electrode / anode bringing about in its character and use for making it fit for use in the production of chlorine and caustic soda in an electrolytic process is manufacture or production of article or thing within the meaning of section 80 IA and entitled to deduction. (A. Y. 1994-95).

*Titanor Components Ltd. v. CIT (2011) 55 DTR 157 / 241 CTR 255 / 197 Taxman 441 (Delhi)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Transport subsidy**

Source of transport subsidy is not the business of the assessee but the scheme framed by the Central Government and therefore, 'transport subsidy' received from the Government by the assessee cannot be included in profits derived from the industrial undertaking and is not eligible for deduction under section 80 IA.

*CIT v. Maharani Packaging (P) Ltd. (2011) 55 DTR 340 (HP)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Liquidated damages – Interest**

Interest on delayed payment of sale amount is eligible for deduction under section 80IA, further, during the course of the business the assessee receives / pay liquidated damages for not honouring a contract for sale of products and therefore, such income is directly derived from the industrial undertaking, thus eligible for deduction under section 80IA. (A. Y. 2000-01).

*CIT v. Prakash Oils Ltd. (2011) 58 DTR 279 (MP)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Set off of carry forward losses**

After set off of carried forward losses, the income of the assessee was ` 14,57,200/- while the profit from industrial undertaking were ` 98.43 lacs. The Tribunal restricted the deduction to ` 14,57,200. The High Court up held the order of Tribunal. (A.Y. 1996-97).

*CIT v. Tridoss Laboratories Ltd. (2011) 224 Taxation 382 / (2010) 328 ITR 448 (Bom.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Develops and operates or maintains and operates – Industrial park – Information technology park**

Section 80IA(4)(iii), only postulate that section would apply to any undertaking which develops, develops and operates or maintains and operates an industrial park notified by Central Government in accordance with a scheme framed for a period beginning on 1-4-1997 and ending with 31-3-2006. Section does not contain a condition to effect that industrial park must commence operation by 31-3-2006. The Court held that stipulation in para. 3 of Industrial Park Scheme, 2002, that industrial park should be developed, developed and operated or to be maintained and operated for period beginning on 1-4-1997 and ending on 31-3-2006 must be read harmoniously with Para. 9 of scheme which contemplates a situation where commencement of any industrial park is delayed by more than one year from date indicated in application in which a fresh approval has to be granted.

*Silver Land Developers (P) Ltd v. Empowered Committee (2011) 203 Taxman 529 / (2011) Vol. 113 (6) Bom. L. R. 4143 / (2012) 343 ITR 439 / 249 CTR 255 / 70 DTR 15 (Bom.)(High Court)*



### **S. 80-IA : Deduction – Industrial undertakings – Manufacture – Production – Limestone**

Process of converting limestone in to lime powder is a manufacturing activity within the meaning of section 80-IA and 80IB.

*CIT v. Janak Raj Bansal (2010) 329 ITR 417 / 33 DTR 30 / 229 CTR 89 (HP)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest from Customer**

Interest received by the assessee on overdue payments from customers is eligible for deduction under section 80-IA. (A.Y. 1997-98)

*CIT v. Advance Detergents Ltd. (2010) 188 Taxman 15 / 228 CTR 356 / 33 DTR 185 / (2011) 339 ITR 81 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Computation – Loss in other unit**

For the purpose of determining the deduction under section 80-IA, the eligible deduction in terms of section 80-IA(5), has to be reduced from the total income computed under the provisions of the Act, after setting off loss in another unit and if the total income is less than the eligible amount, deduction under section 80-IA has to be limited to such amount. (A.Y. 2000-01)

*CIT v. Accel Transmatic Sysyems Ltd. (2010) 230 CTR 206 / 35 DTR 172 (Ker.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Initial Assessment Year – Trial production – Commercial production**

Initial assessment year for the purpose of section 80-IA is the assessment year relevant to the previous year in which the commercial production is started and not the assessment year in which there was only a trial production. (A.Y. 2003-04)

*CIT v. Nestor Pharmaceuticals Ltd. (2010) 36 DTR 200 / 322 ITR 631 / 231 CTR 337 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Forfeiture of advance from customer**

Amount received by the assessee as advance from customers and later forfeited by the assessee would not be eligible for deduction under section 80-IA of the Act.

*CIT v. Jackson Engineers Ltd. (2010) 36 DTR 168 / 231 CTR 348 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Freight subsidy**

Freight subsidy provided to the industries set up in remote areas where rail facilities are not available is not income derived from the business of the industrial undertaking and cannot be included in the profits eligible for deduction under section 80-IA. (A.Y. 2001-02)

*CIT v. Kiran Enterprises (2009) 32 DTR 111 / (2010) 327 ITR 520 / 228 CTR 101 / 189 Taxman 457 (HP)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Depreciation**

For the purpose of deduction under Chapter VIA, the gross total income has to be computed inter alia by deducting the deductions allowable under section 30 to 43D of the Act, including depreciation allowable under section 32 of the act, even though the assessee has computed the total income under chapter IV by disclaiming the current depreciation. (A.Y. 1997-98)

*Plastiblend India Ltd. v. ACIT (2009) 318 ITR 352 / 227 CTR 1 / 185 Taxman 187 / 30 DTR 194 (FB)(Bom.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Audit Report – Directory – Assessment**

The condition of filing audit report along with the return of income filed by the assessee is not mandatory but directory and if the audit report is filed by the assessee at any time before the completion of assessment the requirement of section 80-IA(7) would be complied with.(A.Y. 2003-04)

*CIT v. Contimeters Electricals (P) Ltd. (2009) 22 DTR 158 / 224 CTR 336 / 317 ITR 249 / 178 Taxman 422 (Delhi)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Transport subsidy**

Transport subsidy received by the assessee to encourage it to set up of industries in remote areas where rail facilities are not available is not income derived from the business of industrial undertaking and not eligible for deduction under section 80 IA of the Act.

*Janak Raj Bansal v. CIT (2009) 32 DTR 119 / (2010) 228 CTR 167 (HP)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Audit Report – Along with return**

For the purpose of claiming deduction under section 80 IA of the Act, the prescribed audit report in Form No. 10 CCD is to be furnished along with the return of income itself. Deduction cannot be allowed to the assessee if the same is filed during the course of assessment proceedings before the assessing officer.

*CIT v. Jyoti Jain (2009) 17 DTR 286 (Raj.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Old unit merging with a larger new unit**

The true test to claim deduction under Section 80-IA is not whether new industrial undertaking connotes expansion of existing business of assessee but whether it is all the same as a new and identifiable undertaking, separate and distinct from existing business. The reconstruction of business or an industrial undertaking must necessarily involve concept that original business or undertaking does not cease functioning and its identity is not lost or abandoned. The Section 80-IA approves a situation in which

an old existing smaller industrial undertaking is absorbed by a new and much bigger industrial undertaking. (A.Y. 1996-97)

*CIT v. Mahaan Foods Ltd. (2009) 177 Taxman 274 / (2008) 216 CTR 148 / 6 DTR 40 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Insurance claim**

Amount received from an insurance company for loss of goods is an income derived from the business of industrial undertaking and therefore, the same is eligible for deduction under section 80 IA of the Act. (A.Y. 1998-99)

Fire Insurance Claim, received from the insurance company, forms part of the eligible profits under section 80-IA. *Raghuvanshi Mills Ltd. (1952) 22 ITR 484 (SC)* relied upon.

*CIT v. Sportking India Ltd. (2009) 27 DTR 187 / 183 Taxman 312 / (2010) 324 ITR 283 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacture – Twisting and texturising yarn**

Partially oriented yarn (POY) has different physical and chemical properties and when POY chips undergo the process of texturising and/or twisting, the yarn, i.e. twisted and/or texturised or both, results in a product having different physical and chemical properties. In other words, the process applied to POY either for the purpose of texturising or twisting, constitutes manufacture as the article produced is recognized in the trade as a distinct commodity.

The process amounts to manufacture as the original commodity loses its identity. The assessee was entitled to special deduction under section 80-IA. (A.Y. 1996-97)

*CIT v. Emptee Poly Yarn P. Ltd. (2008) 305 ITR 309 / 170 Taxman 332 / 218 CTR 657 / 5 DTR 210 (Bom.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Export – Profits not to be deducted**

#### **[S. 80HHC]**

Deduction under section 80 IA of the Act is not to be deducted from profits and gains of the business before computing the amount of deduction under section 80HHC of the Act. (A.Y. 2002-03 and 2003-04)

*SCM Creations v. CIT (2008) 10 DTR 247 / 218 CTR 126 / 304 ITR 319 / 10 DTR 247 (Mad.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Hotel**

When a hotel was granted certificate by prescribed authorities, Income Tax authorities had no jurisdiction to decide on basis of its own criteria that the assessee is not entitled to special deduction under section 80-IA.

*Gujarat Jhm Hotels Ltd v. Director General of I.T. (2008) 305 ITR 386 / (2009) 222 CTR 132 / 18 DTR 93 / (2010) 186 Taxman 321 (Guj.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturing – Sleepers of railway**

Receipts obtained against transportation of sleepers of railway site which is incidental to the assessee's manufacturing activity. Therefore, entitled to deduction under section 80-IA. (A.Ys. 1997-98, 2000-01)

*CIT v. Arvind Construction Co. Ltd. (2008) 215 CTR 363 / 172 Taxman 5 / (2009) 317 ITR*

*276 / 3 DTR 94 (Delhi)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Reconstruction of business**

Assessee having set up industrial undertaking with latest technology and increased capacity with fresh investments ` 104.85 lakhs as against investment of ` 20.86 lakhs in old plant and machinery which was less than 20 per cent of total investment. It could not be inferred that assessee's new unit was a result of reconstruction of old business, hence, entitled to deduction under section 80-IA. (A.Y. 1996-97)

*CIT v. Mohan Foods Ltd. (2008) 216 CTR 148 / 6 DTR 48 / (2009) 177 Taxman 274 (Delhi)(High Court)*

### **S. 80 IA : Deduction – Industrial undertakings – Duty entitlement (DEPB) – Interest**

Duty Entitlement Passbook (D.E.P.B.) receipt and interest receipts on margin money deposits for opening letter of credit is not entitled for deduction under section 80-IA of the Act. (A.Y. 1999-2000)

*RajKumar Impex (P) Ltd. v. Dy. CIT (2008) 15 DTR 118 (Mad.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturer – Cable Joining kit**

Manufacturing cable joining kit used in telecommunication industry. As per Central Excise authorities that there was no manufacture. ITAT's finding that there was production of Article. Assessee entitled to sec. 80-IA. (A.Ys. 1995-96 and 1997-98)

*CIT v. P. Damodaran (2006) 282 ITR 466 / 202 CTR 454 (Mad.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacturer – Civil work [S. 80-I]**

Assessee carrying on contract business for construction of tubular trusses beams, girders and other structural, rolling shutters and other civil works was not entitled to deduction under section 80-I. (A.Y. 1982-83)

*CIT v. Agra Construction Corpn. (2005) 146 Taxman 31 (All.)(High Court)*

### **S. 80-IA : Deduction – Industrial undertakings – Employment of ten or more workers**

#### **[S. 80HH]**

For purpose of availing deduction under section 80HH and 80-I, direct employment of stipulated number of workers is relevant. (A.Y. 1987-88)

*R & P Exports v. CIT (2005) 279 ITR 536 / 146 Taxman 536 / 196 CTR 45 (All.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Gross total income – Deduction under two sections [S. 80HH]**

Deduction under section 80-I is to be computed on total gross income without excluding deduction admissible under section 80HH. (A.Y. 1988-89)

*CIT v. S.B. Oil Industries (P.) Ltd. (2005) 274 ITR 495 / 146 Taxman 594 / (2006) 203 CTR 218 (P&H)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Insurance claim**

Amount of insurance claim received by assessee in respect of raw material destroyed in fire cannot be held to be income derived from industrial undertaking so as to qualify for deduction under section 80-I. (A.Y. 1988-89)

*CIT v. Khemka Container (P.) Ltd. (2005) 275 ITR 559 / 193 CTR 427 / 144 Taxman 109 (P&H)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – 10 or more number of workers**

Assessee purchased yarn from market and gave same to weavers to weave a cloth as per his design and cloth was then got dyed and calendered on job work basis from others, as assessee neither owned any plant or machinery nor had employed 10 or more persons as required in the industrial undertaking, he would not be entitled to relief under section 80-I. (A.Ys. 1982-83, 1983-84)

*Mahender Kumar Aggarwal v. CIT (2005) 277 ITR 71 / 196 CTR 39 / 142 Taxman 617 (All.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Export – Gross total income [S. 80HHC]**

Deduction under section 80-IA is to be allowed on gross total income even when deduction under section 80 HHC has been claimed and allowed. (A.Y. 1995-96)

*CIT v Rochiram & Sons (2004) 271 ITR 444 / 191 CTR 472 (Raj.)(High Court)*

**S. 80IA : Industrial undertakings – Loss which was set off against other income cannot be notionally brought forward and set off against profits of eligible business . [ S. 32 , 80IA (5) ]**

Dismissing the appeal of the Revenue, the Court held that ; loss in year earlier to initial assessment year already absorbed against profit of other business cannot be notionally brought forward and set off against profits of eligible business as no such mandate is provided in section 80IA(5). (AY. 2004-05, 2005-06)

**ACIT v. Velayudhaswamy Spinning Mills (P.) Ltd( 2010) 231 CTR 368 / ( 2012) 340 ITR 477/ ( Mad) (HC)**

**Editorial :** SLP of revenue was dismissed ;ACIT v. Velayudhaswamy Spinning Mills (P.) Ltd. (2017) 244 Taxman 58 (SC)

### **S. 80-IA : Deduction – Industrial undertakings – Absorption of loss – Past & present**

It was held that deduction under section 80-IA has to be computed after deduction of the notional brought forward losses and depreciation of business even though they have been allowed set off against other income in earlier years as concluded by the ITAT Special Bench judgement in ACIT v Gold Mine Shares & Finance (P) Ltd. 113 ITD 209 / 116 TTJ 705 / 9 DTR 282 (Ahd.)(SB) against the assessee. (A. Ys. 2001-01 & 2002-03)

*Hyderabad Chemical Supplies Ltd. v. ACIT (2011) 53 DTR 371 / 137 TTJ 732 (Hyd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Initial year – Substantial expansion – Take over of existing units [S. 80IB]**

Conditions as laid down for claiming deduction under section 80IA / 80IB are to be complied within the initial year and not in all the assessment years in which the assessee is eligible for deduction. Once the assessee has complied with the conditions as laid down in sections 80IA / 80IB in the initial year, expansion or extension of the existing unit by acquiring assets of another units in a subsequent year does not disentitle the assessee to claim deduction under sections 80IA/80IB in respect of increased profit due to such expansion or extension of industrial undertaking. (A. Ys. 2004-05 & 2005-06).

*Aqua Plumbing (P) Ltd. v. ACIT (2011) 59 DTR 22 / 46 SOT 366 / 140 TTJ 496 (Agra)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Profit Chargeable to tax u/s. 41(1) – Assignment of Sales Tax Liability [S. 41(1)]**

Profit made by assessee by assignment of its deferred sales-tax liability being chargeable to tax under section 41(1), is in the nature of business income and the assessee having set up its industrial undertaking in that area in order to reap the benefit of the deferred sales-tax scheme formulated by the State Government, such gain has to be treated as derived from the industrial undertaking and therefore, assessee is entitled to deduction under section 80-IA thereon. (A.Y. 2004-05)

*MIRC Electronics Ltd. v. Dy. CIT (2010) 38 DTR 441 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Trading activity**

The assessee company is not entitled for deduction under section 80-IA on the profits because the trading activities carried on by the assessee are of the assessee company and not of the industrial undertaking. (A.Ys. 1994-95 to 2001-02)

*Emerson Network Power India (P) Ltd. v. ACIT (2009) 122 TTJ 67 / 27 SOT 593 / 19 DTR 441 / 5 ITR 727 (Mum.)(Trib.)*



### **S. 80-IA : Deduction – Industrial undertakings – Interest income**

While calculating the deduction under section 80-IA, if the profit does not include any part of interest income in excess of interest payment, then interest received need not be reduced from income for computing deduction under section 80-IA.

*ITO v. V. Naren Traders & Consultants (2008) 169 Taxman 36 (Mag.)(Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Trial production – Actual production**

Fulfilment of conditions laid down in section 80-IA(3)(ii) r.w. Explanation 2 has to be examined as on date of commencement of actual production, and not as on date of trial production.

*Himachal Fine Blank Ltd. v. Dy. CIT (2007) 164 Taxman 129 (Mag.)(Chd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Carried forward loss**

(i) In view of the provisions of sub-section (5) of section 80-IA carried forward losses and unabsorbed depreciation of the eligible unit have to be kept separate from the other units.

(ii) Quantum of deduction under section 80-IA can not exceed the gross total income defined under section 80B.

(iii) Allocation of common head office expenses on the basis of the turnover of the units is a rational basis. (A.Y. 1998-99)

*Khinvasara Investment (P) Ltd. v. Jt. CIT (2008) 110 ITD 198 / 109 TTJ 341 (Pune)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Processing of data**

Assessee company processing data and analyses same so as to provide market insight, research information and analyses to clients. It amounts to manufacture of article or thing, hence, deduction under section 80-IA can be granted to assessee. 2005 Tax LR 484 (Guj.) and (2005) 95 ITD 23 (ITAT-Mum), Foll.

*MBL Research and Consultancy Group (P) Ltd. v. Jt. CIT (2007) TLR (Nov.) 472 / 108 TTJ 806 / 107 ITD 438 (Hyd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Initial assessment year**

Merely conducting a trial production, the assessee cannot be said to have been set up industrial undertaking in the context of section 80-IA so that it could defer its initial assessment year to the year of commercial production.

*Himachal Fine Blank Ltd. v. Dy. CIT (2007) 164 Taxman 129 (Mag.)(Chd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Survey – Surrender of income [S. 133A]**

Income surrendered during survey not shown by assessee to be his business income is not eligible for deduction under section 80-IA. (A.Y. 2001-02)

*Sushil Kumar Jalani v. ACIT (2007) 108 TTJ 724 / 108 ITD 613 (Jodh.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Market Research and Consultancy**

Assessee collecting data based on particular strategy, processing and analyzing them using sophisticated computers and software is engaged in manufacture or production eligible for deduction under section 80-IA. (A.Y. 1998-99)

*MBL Research & Consultancy Group (P) Ltd. v. Jt. CIT (2007) 108 TTJ 806 / 107 ITD 438 (Hyd.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Interest**

Interest earned on Vikas cash certificate cannot be considered as profits and gains of business derived from industrial undertaking, hence not eligible for deduction under section 80-IA. (A.Y. 1999-2000)

*Sudhir Engineering Co. v. ACIT (2007) 108 TTJ 933 (Delhi)(Trib.)*

**80-IA : Deduction – Industrial undertakings – Manufacture or production – Mining, processing & grinding**

Assessee engaged in integrated activity of mining, processing and grinding of Wollastonite and Calcite products is engaged in manufacture or production eligible for deduction under sections 80-IA and 80IB. (A.Y. 2000-01)

*ACIT v. Wolkem India Ltd. (2007) 107 TTJ 439 (Jodh.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Detergent cake – Manufacturing**

Assessee manufacturing detergent cakes is eligible for deduction under section 80-IA. (A.Ys. 1996-97, 1997-98)

*Dy. CIT v. Balaji Detergents & Chemicals Ltd. (2007) 106 TTJ 480 (Chennai)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Annealing and straightening of steel rods**

Assessee, engaged in activity of annealing and straightening of steel rods, is entitled to deduction under section 80-IA. (A.Ys. 1995-96 to 1997-98)

*Anil Steel Traders v. Dy. CIT (2007) 111 TTJ 747 (Mag.)(Ahd.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Generation of power**

Assessee company was set up to manufacture paper and paperboards etc. In the course of the business it set up four DG sets, power unit, for purpose of generation of power which was used to meet requirement of power in its unit for manufacturing its products. Deduction in respect of the power unit is allowable under section 80-IA. (A.Y. 1999-2000)

*West Coast paper Mills Ltd. v. ACIT (2006) 103 ITD 19 / 105 TTJ 344 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Machinery on lease**

Assessee company having taken over machinery on lease from the erstwhile partnership concern, provisions of section 80-IA(2)(ii) were not violated and assessee was eligible for deduction under section 80-IA. (A.Ys. 1990-91 and 1991-92)

*Indian Herbs Research & Supply Co. v. ACIT (2006) 101 TTJ 786 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Temporary and Casual workers**

Workers employed, temporary and casual apart from permanent, for chain of activities involved in processing should also be counted for knowing as to whether the concern had employed ten or more workers as 'worker' according to section 291) of the Factories Act, 1948, includes a person, who is not only in manufacturing process but also in cleaning any part of machinery or premises used for manufacturing or in any kind of work incidental to or connected with manufacturing process. (A.Y. 1997-98)

*ACIT v. Richa Chadha (Ms) (2006) 282 ITR 1 (AT) / (2005) 97 TTJ 910 / 96 ITD 325 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Carry forward – Business Loss/Profit**

Carried forward business losses have to be set off against business profits before claiming deduction under section 80-IA. (A.Y. 1997-98)

*Punjab Tractors Ltd. v. Jt. CIT (2006) 99 TTJ 782 (Chd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest – Agency income**

Interest and agency income earned by the assessee was not related to the activities of the industrial undertaking and hence not eligible for deduction under section 80-IA. (A.Y. 1995-96)

*Keystone India (P) Ltd. v. Dy. CIT (2006) 99 TTJ 386 (Ahd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Conversion – Part IX – Companies Act**

The firm was genuinely converted under Part IX of the Companies Act into a company as a going concern acquiring all assets, rights, and liabilities of the firm. The eligible enterprise for execution of work on build, operate and transfer basis (BOT basis) was owned by the firm up to completion of construction of the road and till the deduction was not available and therefore, not claimed. But in the relevant previous year the said firm/enterprise stood vested in the company and therefore, toll tax was collected and deduction under section 80-IA was claimed by the company which was allowable in view of the section 80-IA(4)(i)(a). (A.Y. 2001-02)

*Chetak Enterprises P. Ltd. v. ACIT (2006) 281 ITR (AT) 162 / (2005) 92 TTJ 611 (Jodh.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Clubbing the income**

Each unit of the assessee-company being an independent undertaking showing separate profit and loss which has been accepted as such in the past, deduction under section 80-IA is to be computed with respect to each unit separately taking into consideration the profit of that unit only and not by clubbing the income / loss of all eligible units. (A.Y. 1998-99)

*Dy. CIT v. Eastern Medikit Ltd. (2006) 100 TTJ 382 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – DEPB – Export incentives – Dividend**

DEPB Scheme is the scheme of the Government and not the business of the assessee's industrial undertaking, therefore, export incentives cannot be said to have been derived from the eligible industrial undertaking and are not eligible for deduction under section 80-IA. (A.Y. 1998-99)

*Lavrids Knudsen Maskinfabrik (India) Ltd. v. ACIT (2006) 102 TTJ 882 (Pune)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest on margin money**

The scope of 80-IA is larger than 80-I wherein deduction under section 80-IA is allowable on profits and gains derived from business of industrial undertaking as compared to deduction under section 80-I where deduction is allowable on profit and gains derived from industrial undertaking.

*Nucleus Remedies v. ITO, Bench A, ITA 610/Mum/2004 A.Y. 2001-02 dt. 25-4-2006 – BC&J P. 409 Vol 39-B, Part 4 July 2006 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Profit rate of eligible unit is high**

Deduction under section 80-IA could not be reduced by Assessing Officer by recourse to sub-s.(10) thereof merely because the profit rate of eligible unit was substantially higher than overall rate of profit of other units of assessee. (A.Ys. 1997-98 to 1999-2000)

*ACIT v. Delhi Press Patra Prakashan (2006) 103 TTJ 578 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Each unit – Separately**

Deduction under section 80-IA is to be computed with respect to each unit separately taking into consideration the profit of that unit only and not by clubbing the income/loss of all eligible units. (A.Y. 1998-99)

*Dy. CIT v. Eastern Medikit Ltd. (2006) 100 TTJ 382 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Duty draw back**

Duty drawback, if received under Central Excise Act has direct nexus with the industrial activity of the assessee and is eligible for deduction under section 80-IA, but not if it is received as export incentive under the scheme announced by the Government. Assessing Officer is directed to verify the aforesaid fact. (A.Ys. 1991-92, 1997-98, 1998-99)

*ACIT v. P. S. Apparels (2006) 101 TTJ 29 (Chennai)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Exchange rate fluctuation**

Deduction under section 80-IA is allowable in respect of receipt on account of foreign exchange rate fluctuation since it has direct nexus with industrial activities of the assessee. (A.Ys. 1991-92, 1997-98 and 1998-99)

*ACIT v. P. S. Apparels (2006) 101 TTJ 29 (Chennai)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest – Miscellaneous income – Insurance claim**

Deduction under section 80-IA is not allowable in respect of interest and miscellaneous income. (A.Y. 1998-99)

Insurance claim cannot be said to be derived from industrial undertaking for the purposes of deduction under section 80-IA. (A.Y. 1998-99)

*Varindra Agro Chem. Ltd. v. Dy. CIT (2006) 100 TTJ 1114 (Chd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Loss of the undertaking**

Deduction under section 80-I(A) is available with respect to an undertaking, and as long as an undertaking fulfils the requirement of the provisions, the deductions cannot be denied or reduced by adjusting loss of other undertakings. (A.Y. 1998-99)

*Dy. CIT v. Eastern Medikit Ltd. (2006) 100 TTJ 382 / 153 Taxman 48 (Mag.)(Delhi)(Trib.)*

### **S. 80IA : Deduction – Industrial undertakings – Both sections [S. 80HH, 80I]**

Deduction under section 80-I and 80-IA is allowed without taking into consideration any deduction allowed under section 80HH. (A.Ys. 1994-95 and 1995-96)

*Vam Organic Chemicals Ltd. v. Dy. CIT (2005) 96 TTJ 600 / (2006) 6 SOT 775 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest – Bank deposits**

Assessee which was 100% exempted unit under provisions of section 80-IA, its entire income including interest income earned on bank deposits is to be treated as business income, and same is eligible for deduction under section 80-IA. (A.Y. 1997-98)

*Jagdishprasad M. Joshi v. Dy. CIT (2005) 97 TTJ 924 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacture – Ship breaking**

Deduction under section 80-IA is allowable to assessee engaged in ship-breaking business. (A.Ys. 1993-94 and 1995-96)

*ACIT v. Hindustan Steel Industries (India) (2005) 94 TTJ 1094 (Agra)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Manufacture – Demineralised water**

Industrial activity involved in production of demineralised water does not amount to manufacture within meaning of section 80-I. (A.Ys. 1991-92 to 1993-94)

*Acqua Minerals (P.) Ltd. v. Dy. CIT (2005) 96 ITD 417 / 97 TTJ 658 (Ahd.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Tin sheet roll in to small pieces**

Transformation of the tin plates/tin sheet roll into small pieces of 'tin sheet cut to size' and embossing on them by machine with a process which is irreversible and marketing same as commodity different from the raw materialise., tin plates/tin sheet rolls, is definitely a process of manufacture so as to entitle assessee, engaged in such activity, to, deduction under section 80-IA. (A.Y. 1998-99)

*Comet Foods & Metal Ltd. v. ITO (2005) 4 SOT 173 / 95 TTJ 440 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Printing press**

Where assessee-owner of printing press was using machinery, printers, paper, ink and other materials and printing same and end product of said activities came into form of a printing paper or a booklet, as some value was added in raw material and it could be said that end-product was commercially a different identity product, it would amount to manufacture and as such assessee was entitled to deduction under section 80-IA. (A.Y. 1997-98)

*Print Point v. ACIT (2005) 2 SOT 520 (Bang.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Production of TV serials**

Production of TV serial amounts to manufacture and as such assessee engaged in production of TV serials would be entitled for deduction under section 80-IA, and mere fact that assessee did not own any plant or machinery of its own but hired everything, could not disentitle it to exemption under section 80-IA.

Assessee-producer of TV serials was entitled to deduction under section 80-IA. (A.Y. 1996-97)

*Film Shoppe v. ACIT (2005) 4 SOT 370 / 95 TTJ 1056 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Data processing**

Deduction under section 80-IA is allowable to assessee engaged in data processing activities. (A.Ys. 1995-96, 1996-97)

*Datamatics Financial Services Ltd. v. Jt. CIT (2005) 95 ITD 23 / 95 TTJ 944 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Stationery for computers**

Activity of manufacturing continuous stationery for computer printing by using paper rolls, gum, ink, carbon paper, etc., as raw material amounts to 'manufacture' for purposes of section 80-IA so as to entitle assessee to deduction under the section. (A.Y. 1998-99)

*ITO v. Punchline Forms (2005) 96 ITD 393 / 97 TTJ 497 (Mum.)(Trib.)*



**S. 80-IA : Deduction – Industrial undertakings – Manufacture – Visiting cards**

Wherein earlier year Tribunal had held that assessee, engaged in manufacturing of visiting cards, Zerox papers and embossing cards was not engaged in manufacturing activity and that assessee had also violated provisions of section 80-IA(2)(v) and similar position existed in assessment year under consideration, assessee was not entitled to deduction under section 80-IA. (A.Y. 1998-99)

*ACIT v. Mekan J. Gala (2005) 4 SOT 360 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Job work charges – Manufacture – Goods belongs to others**

Where goods belonging to others are manufactured by assessee and it derives profits by way of job charges, assessee is entitled to deduction. (A.Y. 1995-96)

*Warren Laboratories (P.) Ltd. v. Dy. CIT (2005) 3 SOT 638 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Reconstruction – Amalgamation**

Amalgamation cannot be equated with a case of reconstruction and therefore, deduction cannot be denied in respect of unit which had merged with assessee-company in a scheme of amalgamation, by treating it as a case of reconstruction within meaning of section 80-IA(2)(i). (A.Y. 1996-97)

*Dy. CIT v. B.R. Industries Ltd. (2005) 1 SOT 283 / 96 TTJ 962 (Delhi)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Transfer of old assets – WDV – 4%**

Where after shifting factory premises from one place to another, assessee started manufacturing new components for which purpose it installed new machinery at new premises, a fresh licence was obtained and WDV of old machinery which was transferred constituted only 4 per cent of value of new machinery, denial of deduction on ground that it was merely a transfer of old business to new place was not justified. (A.Y. 1995-96, 1997-98)

*Barmatics v. Dy. CIT (2005) 2 SOT 845 (Bang.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Transfer of old assets – Initial year**

Where in initial year of industrial undertaking, machinery which was used was old and its cost was more than 20 per cent of total cost of the plant and machinery, it clearly violated one of conditions which was required to be fulfilled so as to be entitled to deduction under section 80-1 and by adding a few more products in subsequent year assessee could not claim that it had started a new industrial undertaking so as to claim deduction under section 80-I. (A.Ys. 1996-97, 1997-98)

*Jt. CIT v. Nalco Chemicals (I) Ltd. (2005) 97 ITD 348 / (2006) 99 TTJ 628 (Kol.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Number of workers – Substantial part**

All types of workers — those in whose case PF/Insurance is deducted by employer or those in whose case such deduction is not made like casual/ temporary workers — should be considered for purpose of counting requisite number under section 80-IA(2)(v); it is not necessary for purpose of getting benefit under section 80-IA that for all time in financial year, there should be ten or more workers; there would be sufficient compliance of condition laid down in section 80-IA(2)(v) if there are ten or more workers employed for substantial part of working period of factory carrying on manufacturing process. (A.Y. 1997-98)

*ACIT v. Richa Chadha (Ms) (2005) 96 ITD 325 / 97 TTJ 910 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Number of workers – Part of year**

Employment of 10 or more -workers for substantial part of year in sufficient compliance with requirement of section 80-I(2)(iv). (A.Y. 1998-99)

*Yishal S. Ruia v. ITO (2005) 1 SOT 902 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Miscellaneous income**

All sorts of incomes which are inextricably related to carrying on of business of industrial undertaking (interest income and miscellaneous income arising from sale of drums/containers and useless materials) are to be considered for computing deduction. (A.Ys. 1995-96 to 1998-99)

*ACIT v. Maxcare Laboratories Ltd. (2005) 92 ITD 11 / 92 TTJ 179 (Cuttack)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest from customers**

Interest received by a company from buyers on delayed payment by them for supplies made to them is an income derived directly from industrial undertaking and so, such income is eligible for deduction under section 80-IA; however transport subsidy received from Government under transport subsidy scheme, being reimbursement of transport expenditure incurred by assessee, cannot be considered as income and immediate source being a subsidy scheme, and not an industrial undertaking, it is not eligible for deduction under section 80-IA. (A.Ys. 1995-96 and 1996-97)

*Jt. CIT v. Sidheshwari Paper Udyog Ltd. (2005) 94 ITD 187 / 95 TTJ 1 (TM)(Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Interest from customers**

Interest received from customers on delayed payments, interest on deposits as margin money with banks and interest on deposits with MSEB will qualify for deduction as income derived from industrial undertaking. (A.Y. 1998-99)

*Maharashtra Seamless Ltd. v. Addl. CIT (2004) 4 SOT 923 / 89 TTJ 173 (Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Interest**

Interest received by assessee from customers for delayed payment by them of sale proceeds of goods sold to them, does not flow from assessee's industrial undertaking and as such would not qualify for deduction under section 80-I. (A.Y. 1992-93)

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

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

*Editorial : Approved by High Court.*

### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Interest**

Income by way of interest of a hundred per cent exempted unit under section 80-IA has to be treated as business income eligible for deduction under section 80-IA. (A.Y. 1997-98)

*Jagdishprasad M. Joshi v. Dy. CIT (2005) 97 TTJ 924 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Duty draw back – Quota premium**

Profits / gains in respect of duty drawback, insurance and commission are eligible for deduction under section 80-I. (A.Y. 1994-95)

Quota premium, REP licence premium, interest, service charges, sales-tax refund are not profits eligible for deduction under section 80-I.

*Anil L. Shah v. ACIT (2005) 95 TTJ 216 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Insurance claim – Interest – Balance written off**

Insurance claim, interest received from suppliers, sundry balances of suppliers written off and discount received from parties constitute profits of business' for purpose of deduction under section 80-I. (A.Ys. 1993-94 and 1994-95)

*Munjal Showa Ltd. v. Dy. CIT (2005) 94 TTJ 227 / 147 Taxman 69 (Mag.)(Delhi)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Suppliers discount**

Supplier's discount received by assessee is to be taken as profit derived from undertaking. (A.Y. 1998-99 and 1999-2000)

*Wipro Limited v. Dy. CIT (2005) 96 TTJ 211 / (2006) 5 SOT 805 (Bang.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Profit on sale of raw material – Waste material – Transport rent income**

Profit on sale of raw material is not profit and gain derived from industrial undertaking. (A.Y. 1992-93)

Income from sale of bardana and waste material would qualify for deduction under section 80-I.

Transport rent income is not income derived from industrial undertaking; however, net income from transport is to be excluded from profit and gains of business.

Where expenditure incurred by assessee on repairs of vehicles was admittedly more than insurance refund and, in fact, there was no income to assessee in nature of refund from insurance, question of excluding any amount from profit and gains of business for purpose of deduction under section 80-I did not arise.

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

#### **S. 80-IA : Deduction – Industrial undertakings – Reimbursement of expenses**

Income-tax reimbursement received by assessee power-generation company from purchasers of power, could not be treated as income derived from industrial undertaking so as to be eligible for deduction under section 80-IA. (A.Y. 2001-02)

*Neyveli Lignite Corpn. Ltd. v. ACIT (2005) 2 SOT 863 / 93 TTJ 685 (Chennai)(Trib.)*

#### **S. 80-IA : Deduction – Industrial undertakings – Sundry balances written back – Octroi**

Sundry balance written back and octroi refund were to be excluded while computing deduction under section 80-I but scrap generated during course of manufacturing was eligible for deduction. (A.Y. 1993-94)

*Aarti Industries Ltd. v. Dy. CIT (2005) 95 TTJ 14 (Ahd.)(Trib.)*

#### **S. 80-IA : Deduction – Industrial undertakings – Job work – Sale of scrap**

In case of assessee-company engaged in printing of continuous and non- continuous stationery to be supplied at destination as per agreement, miscellaneous income from job work and from sale of paper scrap, generated from printing, was eligible for deduction under section 80-IA. (A.Y. 1995-96)

*ACIT v. Kunal Printers Ltd. (2005) 2 SOT 414 (Ahd.)(Trib.)*

#### **S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Income from publishing of magazines and advertisement**

Income from publishing of magazines and advertisement is an integral part of publishing business and, therefore, such income is eligible for deduction under section 80-I. (A.Ys. 1992-93 and 1993-94)

*Dy. CIT v. Investwel Publishers (P.) Ltd. (2005) 96 ITD 106 / 96 TTJ 994 (Mum.)(Trib.)*

#### **S. 80-IA : Deduction – Industrial undertakings – Extraction of edible oil**

In case of assessee, engaged in extraction of edible oil and export thereof and oil cake processing, income arising from trading in vegetable oil was not eligible for deduction under section 80-IA; however, since oil cake was only a by-product of manufacturing activity of industrial undertaking, income generated from oil cake processing division would be eligible for such deduction. (A.Y. 1995-96)

*Recon Oil Industries Ltd. v. Jt. CIT (2005) 2 SOT 732 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Qualifying income – Manufacture Rice – Trading operation**

Where assessee, engaged in manufacturing rice, also did trading operations in rice, as assessee satisfied conditions of being an industrial undertaking, transactions of sale and purchase of rice were part and parcel of the 'business of industrial undertaking', and hence profits in respect of such trading operations would also qualify for deduction under section 80-IA. (A.Y. 1994-95)

*Dy. CIT v. Chaman Lai & Sons (2005) 93 TTJ 132 / 3 SOT 333 (Amritsar)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Eligible and non eligible business**

Where assessee has income from both business eligible under section 80-IA and non-eligible business, deduction under section 80-IA would be allowed on income from eligible business without same being adjusted/set off by existing/ brought forward expenses / losses /allowances relating to non-eligible business or any other source of income. (A.Y. 1996-97)

*ITO v. Kanchan Oil Industries Ltd. (2005) 92 ITD 557 / 92 TTJ 739 (Kol.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Computation – In house consumption**

Where assessee, engaged in business of manufacture and sale of abrasives of various types, established a plant for manufacture of bonds and almost entire production of bonds was consumed in-house for production of various products, as there were more than one methods of arriving at market value of bonds for purpose of computing deduction under section 80-IA and Assessing Officer had accepted one such method, which had been consistently followed by assessee for years together, order of Assessing Officer could not be said to be erroneous and prejudicial to interest of revenue. (A.Y. 1998-99)

*Grindwell Norton Ltd. v. Dy. CIT (2005) 2 SOT 52 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Unabsorbed losses – Unabsorbed depreciation**

Unabsorbed losses, unabsorbed depreciation, etc., relating to eligible business are to be taken into account in determining quantum of deduction under section 80-IA even though they may have actually been set-off against profits of assessee from other sources. (A.Y. 1998-99)

*Addl. CIT v. Ashok Alco Chem Ltd. (2005) 96 ITD 160 / 96 TTJ 1000 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Depreciation**

Where for assessment year 1996-97 assessee-industrial undertaking had not claimed depreciation, Assessing Officer could not deduct depreciation from income of assessee before allowing deduction under section 80-IA. (A.Y. 1996-97)

*Plastiblends India Ltd. v. ITO (2005) 94 ITD 295 / 95 TTJ 1062 (Mum.)(Trib.)*  
*Editorial : Plastiblends India Ltd. v. ACIT (2009) 227 CTR 1 / 318 ITR 352 / 185 Taxman 187 / 30 DTR 194 (FB)(Bom.)(High Court)*

**S. 80-IA : Deduction – Industrial undertakings – Computation – Depreciation**

If assessee has not claimed depreciation, same cannot be thrust on assessee while computing gross total income for purpose of deduction under section 80-IA. (A.Y. 1998-99)

*Shree Rajasthan Texchem Ltd. v. Addl. CIT (2005) 97 TTJ 91 (Mum.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Common expenditure**

Common expenditure incurred by assessee for marketing industrial products should be proportionately distributed in respect of each industrial undertaking. (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Investment development account**

Deduction under section 32AB has to be allowed before granting deduction under sections 80HH and 80-I. (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Both sections – Computation [S. 80HH]**

Deduction is to be allowed on profit of business without reducing deduction under section 80HH. (A.Ys. 1994-95 and 1995-96)

*Vam Organic Chemicals Ltd. v. Dy. CIT (2005) 96 TTJ 600 / (2006) 6 SOT 775 (Delhi)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Sub Section (9) – More than one section**

Provisions of section 80-IA(9) only regulate deductions allowable under Chapter VI-A and object of said section is not to prevent claim of deduction under more than one section under Chapter VI-A where assessee satisfies conditions of these sections. (A.Y. 2001-02)

*Mittal Clothing Co. v. Dy. CIT (2005) 4 SOT 626 (Bang.)(Trib.)*

**S. 80-IA : Deduction – Industrial undertakings – Sub Section (9) – More than one section**

Where Assessing Officer had failed to establish that assessee had in respect of a new unit understated 'transfers in and overstated 'transfers out' and had, in turn, inflated eligible profits of unit, Assessing Officer would not be justified in adopting rates based on cost of production as it would not be in accordance with provisions of section 80-IA(9); section 80-IA(9) does not at all mandate that market price has to be



necessarily selling price of goods actually sold by assessee. (A.Ys. 1995-96 to 1997-98)

*Jt. CIT v. Cipla Ltd. (2005) 2 SOT 617 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Both sections [S. 80HHE]**

Assessee can claim deduction under section 80-IA as well as under section 80HHE, as both the sections operate in different spheres, even if no separate books of account are maintained. (A.Y. 1997-98, 1998-99)

*Infotech Enterprises Ltd. v. Jt. CIT (2003) 85 ITD 325 / 80 TTJ 589 (Hyd.)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Development of soft ware**

Development of Software amounts to manufacture or production of an article or a thing, for purpose of Sec 80-IA(2)(iv)(a). Further the words produce given in Sec 10A or 10B is limited to those sections only. (A.Y. 1992-93)

*Infotech Enterprises Ltd. v. Jt. CIT (2003) 85 ITD 325 / 80 TTJ 589 (Hyd.)(Trib.)*

Also refer :

*R. S. Bhagwat v. ACIT (2003) 78 TTJ / 641 / 129 Taxman 24 (Mag.)(Mum)(Trib.)*

### **S. 80-IA : Deduction – Industrial undertakings – Computation of Deduction – Two units**

If two units of assessee are functioning independently, then claim would be allowed without setting off the losses of other unit, after considering the provisions of Sec 80A(2). (A.Y. 1992-93)

*Sona Steering Systems Ltd. v. Dy. CIT (2003) 78 TTJ 213 / 129 Taxman 152 (Mag.)(Delhi)(Trib.)*

### **S. 80-IA(5) : Deduction – Industrial undertakings – Initial assessment year – Loss & Depreciation of eligible unit prior to “initial assessment year”, if set-off against other income, not notionally carried forward**

In A.Y. 2006-07 the assessee installed a windmill, the profits of which were eligible for 100% deduction under section 80-IA. Owing to depreciation and loss, the assessee did not claim section 80-IA deduction in A.Y. 2006-07 & 2007-08 and set-off the loss and depreciation against other income. In A.Y. 2008-09, the assessee earned profits from the windmill and claimed deduction under section 80-IA. The Assessing Officer & CIT(A) relied on the Special Bench decision in *ACIT v. Goldmines Shares & Finance (P) Ltd. (2008) 116 TTJ 705 (Ahd)(SB)* and held that in view of section 80IA(5), the loss and unabsorbed depreciation of the eligible unit, though set-off against the other income, had to be “notionally” carried forward for set-off against the profits of the eligible undertaking. On appeal by the assessee, HELD allowing the appeal:

Though in *ACIT v. Goldmines Shares & Finance (P) Ltd. (2008) 116 TTJ 705 (Ahd)(SB)* it was held that in view of section 80IA(5), the eligible unit had to be treated as the only source of income and the profits had to be computed after deduction of the notionally brought forward losses and depreciation of the eligible

business even though they were in fact set-off against other income in the earlier years, the Madras High Court held in *Velayudhaswamy Spinning Mills (P) Ltd. v. ACIT (2010) 38 DTR 57* held that such a notional exercise was not contemplated by section 80IA(5). It was held that the fiction in section 80-IA(5) that the eligible unit is the only source of income begins from the "initial assessment year" which is not the same thing as the year of commencement of activity. The law contemplates looking forward to a period of ten years from the initial assessment and does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off has taken place in an earlier year against the other income, the Revenue cannot rework the set off amount and bring it notionally. The fiction in section 80-IA(5) is for a limited purpose and does not contemplate to bring set off amount notionally. The judgement of a constitutional court has overriding effect over the decision of a Special Bench of the Tribunal and the latter cannot be followed. (A. Y. 2008-09).

*Anil H. Lad v. Dy. CIT (2012) 13 ITR 581 (Bang.)(Trib.)*

**S. 80-IA(9) : Deduction – Industrial undertakings – Restrictions – Gross total income – Interpretation – Both sections [S. 80HHC]**

Section 80-IA(9) cannot be interpreted to mean that section 80-IA deduction has to be reduced for computing section 80HHC deduction. The restriction in section 80-IA(9) relates to the allowance of deduction i.e. seeks to curtail allowance and not computation of deduction. Section 80-IA(9) does not disturb the mechanism of computing the deduction provided under section 80HHC(3). The reasonable construction of section 80-IA(9) is that where deduction is allowed under section 80-IA, then the deduction computed under other provisions under heading 'C' of Chapter VIA has to be restricted to the profits of the business that remains after excluding the profits allowed as deductions under section 80-IA, so that the total deduction allowed under the heading 'C' of Chapter VIA does not exceed the profits of the business. (A.Y. 2003-04)

*Associated Capsules Pvt. Ltd. v. Dy. CIT (2011) 237 CTR 408 / 50 DTR 65 / 197 Taxman 84 / 332 ITR 42 (Bom.)(High Court)*

**S. 80-IA(9) : Deduction – Industrial undertakings – Deduction 80-IA is allowed before computing deduction under section 80HHC – Export [S. 80HHC]**

Restriction is placed on claiming repetitive deductions under the provisions of section 80IA(9) and therefore, deduction under section 80-IA should be claimed from the profits and gains of the business before computing deduction under section 80HHC. (A.Y. 1999-2000 and 2002-03)

*CIT v. Rogini Garments (2007) 111 TTJ 274 / 108 ITD 49 / 294 ITR 15 (AT)(SB)(Chennai)(Trib.)*

### **S. 80-IA(10) : Deduction – Industrial undertakings – Close Connection – Reasonableness**

Provisions of section 80-IA(10), can be invoked only when there is a close connection between assessee carrying on eligible business and any other person and course of business between them so arranged that business transacted between them produces more than ordinary profits to assessee. In the instant case, assessee was generating and transmitting electricity in its own business only and there were no transactions with any other person, hence the provisions of section 80-IA(10), were not applicable to its case. (A.Ys. 2001-02, 2003-04)

*Reliance Energy Ltd. v. Dy. CIT (2010) 40 SOT 314 (Mum.)(Trib.)*

### **Section 80-IA : Deductions in respect of profits and gains from undertakings or enterprises engaged in infrastructure development, etc. w.e.f. 1-4-2000**

#### **S. 80-IA : Deduction – Infrastructure development – Developing, operating and maintaining industrial park – Withdrawal of approval – Writ [Art. 226]**

As per the scheme, what was required to be done by the petitioner was to provide for infrastructural facilities before last date envisaged under the scheme. There after there was no obligation on the part of the petitioner to ensure that industrial units on such plots must also come into existence and commence their production activities, therefore impugned show cause notice for withdrawal of approval of assessee's Industrial Park was quashed and the CBDT was directed to notify the same. Ordinarily Courts do not encourage litigation at the show cause notice state but where the show cause notice is based on premise which is legally not sustainable, writ petition held to be maintainable.

*Ganesh Housing Corporation Ltd. v. Padam Singh Under secretary (2011) 61 DTR 1 / 339 ITR 441 / 24 CTR 194 (Guj.)(High Court)*

#### **S. 80-IA : Deduction – Infrastructure development – Container handling – Developing – Maintaining and operating – Port**

Assessee carrying on the business of container handling Cranes at Jawaharlal Nehru Port Trust can be considered as developing, maintaining and operating an infrastructural facility is entitled to deduction under section 80-IA. (A.Ys. 1997-98 to 2000-01 and 2005-06)

*CIT v. ABG Heavy Industries Ltd. (2010) 322 ITR 323 / 189 Taxman 54 / 231 CTR 127 / 37 DTR 233 (Bom.)(High Court)*

#### **S. 80-IA : Deduction – Infrastructure development – Generation and supply of power – Deemed generation of power**

Assessee entered into agreement for supply of power. Agreement providing that if power not required, compensation charges to be paid. Amount received for deemed generation of power is entitled to deduction under section 80IA as the compensation has direct nexus with the business of generation of power. (A. Y. 2004-05).

*Magnum Power Generation Ltd. v. Dy. CIT (2011) 11 ITR 493 / (2012) 49 SOT 54 (URO)(Delhi)(Trib.)*

**S. 80-IA : Deductions – Infrastructure development – Computation – Electricity**

Electricity generated by assessee, collected by Electricity Board and releases to assessee when ever required. Assessee neither selling nor buying as far as captive consumption of power is concerned. Assessee paid consumption of power more than contribution. Market value to be taken for consumption. Under section 80IA(8) market value means the value determined by market forces. In the captive consumption of power generated by the assessee company no market force was operating. Market forces came in to the picture only when the assessee bought power from Tamil Nadu Electricity Board like any another consumer. The value paid for such consumption was the market value and in the present case it was 3.50 per unit. Therefore the contention of the assessee was to be accepted and the assessing authority was to recomputed the profit and gains of the eligible unit for the purpose of section 80IA on the basis of the unit price of electricity generated by the assessee company at 3.50 per unit. (A.Y. 2007-08).

*Sri Velayidhaswamy Spinning Mills P. Ltd. v. Dy. CIT (2011) 12 ITR 353 (Chennai)(Trib.)*

**S. 80-IA : Deduction – Infrastructure development – Derived from – Fly ash – Generation and sale of electricity – Not eligible**

Assessee was engaged in business of generation of and sale of electricity. Fly ash was a by product generated out of production of electricity. Assessee used Fly ash in making fly ash bricks. Assessee claimed that profit earned on sale of fly ash bricks is also eligible profits for the purpose of claiming of deduction under section 80IA. The Tribunal held that brick making unit of assessee was a separate unit with a distinct set up and process, separate technology and manpower etc., profits derived from manufacture and trade of bricks, could not constitute "operational income" of "Power generating unit" of assessee, therefore assessing officer was justified in rejecting assessee's claim. (A. Ys. 2004-05 to 2006-07).

*ACIT v. Godavari Power & Ispact Ltd. (2011) 133 ITD 502 (Bilaspur)(Trib.)*

**S. 80-IA : Deduction – Infrastructure development – Solid Waste Management – Organisation must participate in the policy making etc. – Cleaning the beaches**

An activity can be considered as a solid waste management activity in a case where an organization involves itself in a comprehensive activity of not only collection, transport and treatment of waste but also participates in the policy making etc. The Activity of the assessee i.e. clearing the beaches, without being involved in control of generation, disposal and policy, making cannot be considered as a solid waste management activity, hence, the assessee is not eligible for deduction under section

80IA though the activity carried on was approved by BMC. (Solid Waste Management Department). (A. Y. 2004-05).

*Anthony Motors (P) Ltd v. ACIT (2011) 64 DTR 470 / 47 SOT 227 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Infrastructure development – Income from power plant – Valuation**

Deduction in respect of profit of power generating undertaking generate by eligible unit captively consumed valuation at market price. Rates charged by the state electricity board, including the electricity tax levied thereon, adopted as a benchmark to arrive at the market value and CIT was not right in excluding the electricity tax to arrive at the market value. (A.Y. 2003-04)

*DCW v. ACIT, 'D' Bench (2010) 132 TTJ 442 / 37 SOT 322 / 42 DTR 369 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Infrastructure development – Adjustment – Brought forward losses – Windmill power generation – Separate undertaking**

Assessee has option to opt for the initial years and the deduction under section 80-IA shall have relevance to that initial year only and conditionality under section 80-IA(5) shall be applicable from such initial year and therefore losses pertaining to year prior to the year in which the assessee opted to claim deduction could not be adjusted against the eligible income.

Co-generation plant (windmill) installed in different years has to be considered as a separate undertaking and the profit/loss cannot be clubbed in order to compute the deduction under section 80-IA. (A.Y. 2006-07)

*Rangamma Steels & Malleables v. ACIT (2010) 43 DTR 137 / 132 TTJ 365 (Chennai)(Trib.)*

### **S. 80-IA : Deduction – Infrastructure development – Payment received for notional treatment – Bio-waste treatment**

Since the entire receipts whether of actual treatment or notional treatment of BMW (Bio Medical Waste treatment) by Municipal corporation of Greater Mumbai (MCGM), which were flowing from contract entered into by assessee with MCGM and direct relation with eligible enterprise and there was no trace of source of income, without eligible undertaking, it could be said that payment in respect of notional treatment of BMW was derived from eligible undertaking and eligible for deduction. (A.Ys. 2004-05, 2005-06 and 2006-07)

*ITO v. E. A. Infrastructure Operations (P) Ltd. (2010) 41 SOT 268 / 48 DTR 200 / (2011) 135 TTJ 239 (Mum.)(Trib.)*

### **S. 80-IA : Deduction – Infrastructure development – Telecommunication**

Assessee engaged in providing international connectivity services to the domestic telecommunication service providers by commissioning telecommunication earth stations. Providing satellite communications is not entitled to the deduction under section 80-IA as the telecommunication services through earth station set up can not

be characterized either with 'basis or cellular'. The earth station and satellite are supplementary to each other and it is entirely distinct and different from cable or cellular system. (A.Y. 1996-97)

*Videsh Sanchar Nigam Ltd. v. CIT (2008) 299 ITR 234 / 111 ITD 190 / (2007) 110 TTJ 948 / 16 SOT 547 (AT)(SB)(Mum)(Trib.)*

#### **S. 80-IA : Deduction – Infrastructure development – Maintenance – Port infrastructure**

Assessee company engaged in operation and maintenance of port infrastructure which was transferred by the developer to the assessee in accordance with the agreement with the specified authorities was eligible for deduction under section 80-IA. (A.Ys. 2000-01 and 2001-02)

*Ocean Sparkle Ltd. v. Dy. CIT (2006) 99 TTJ 582 (Hyd.)(Trib.)*

#### **S. 80-IA : Deduction – Infrastructure development – Sale of electricity – Wind mills**

Where assessee received income from sale of electricity generated by it through windmills and also derived income from consultancy services, its claim for set off of depreciation on windmills against composite income of both businesses, could not be allowed and Assessing Officer was justified in treating depreciation on wind turbines as a deduction from income of power generation and on that basis holding that there was no income from eligible business on which deduction under section 80-IA was to be allowed. (A.Y. 1996-97)

*Dy. CIT v. R.R.B. Consultants & Engineer (P.) Ltd. (2005) 1 SOT 13 / 96 TTJ 806 (Delhi)(Trib.)*

#### **S. 80-IA : Deduction – Infrastructure development – Owning of enterprise – Sub Section (4)**

It is only at time when deduction under section 80-IA is claimed that necessary condition of company owning such enterprise should be fulfilled.

Proviso to clause (c) of section 80-IA(4)(i) makes it clear that ambit of this section is extended to cases where eligible enterprise is transferred, in which situation transferee will become entitled to deduction. 'Enterprise' within meaning of section 80-IA(4)(i) need not necessarily be a company. (A.Y. 2001-02)

*Chetak Enterprises (P.) Ltd. v. ACIT (2005) 95 ITD 1 / 92 TTJ 611 (Jodh.)(Trib.)*

#### **S. 80-IA(3) : Deduction – Infrastructure development – Reconstruction – Formation – Retrospective**

Bar provided under section 80-IA(3), is in relation to the formation of undertaking and once the formation is complete, the development of undertaking cannot be put under restraint of section 80-IA(3). If for Asst. Year 2004-05, the assessee has been granted the claim of deduction under section 80-IA(4)(ii), the same cannot be denied for the subsequent assessment year by applying the restraint of section 80-



IA(3), further the provisions of section 80-IA(3) apply to section 80-IA(4)(ii), only from Asst. Year 2005-06 and not retrospectively. (A.Y. 2006-07)

*Tata Communications Internet Services Ltd. v. ITO (2010) 130 TTJ 509 / 4 ITR 249 / 39 SOT 106 / 39 DTR 17 (Delhi)(Trib.)*

### **S. 80-IA(4) : Deduction – Infrastructure development – Works Contract – Retrospective amendment**

Reopening of assessment beyond 4 years due to retrospective amendment made to section 80-IA by Finance Act, 2009, w.e.f. 1-4-2000 which provided that that section 80-IA would not be made available to an assessee who carries on the work in the nature of works contract. Reassessment after four years held to be not justified.

*Sadhav Engineering Ltd. v. Dy. CIT [SCA 5846 of 2010 (2010) Income Tax Review August P. 81](Guj.)(High Court)*

### **S. 80-IA(4) : Deduction – Infrastructure development – Developer**

The difference between a "developer" and "Contractor" is that the former designs and conceives new projects while the later executes the same.

The intention of the legislature is to provide deduction under section 80IA (4) only to the person directly engaged in developing, maintaining and operating the facility. There should be a complete development of the facility and not just a part of it. (A.Ys 2000-01 & 2001-02).

*B.T. Patil & Sons v. ACIT (2009) 126 TTJ 577 / 35 SOT 171 / 32 DTR 1 / (2010) 1 ITR 703 (Mum.)(Trib.)*

*Belgaum Construction (P) Ltd. v. ACIT (2009) 126 TTJ 577 / 35 SOT 171 / 32 DTR 1 / (2010) 1 ITR 703 (Mum.)(Trib.)*

### **S. 80-IA(4) : Deduction – Infrastructure development – Develops – Contractor**

Relying on the judgement of the Larger Bench in B. T. Patil & Sons Belgaum Construction (P) Ltd. v. ACIT (2009) 126 TTJ 577 (Mum)(TM)(Trib.), the assessee's claim for deduction under section 80-IA(4) was denied by the Tribunal on the ground that the assessee was only a contractor and had not complied with all the conditions specified in sub-clauses (a), (b) & (c) of clause (i) of section 80-IA(4). The order was recalled pursuant to the assessee's MA claiming that the judgement of the Bombay High Court in ABG Heavy Industries Ltd. 322 ITR 323 covered the issue in its favour. HELD deciding the issue afresh:

The contractor who merely develops but does not operate or maintain the infrastructure facility is eligible for deduction under section 80IA(4). Harmonious reading of section 80-IA(4) led to the conclusion that the deduction was available to an assessee who (i) develops or (ii) operates and maintains or (iii) develops, operates and maintains the infrastructure facility. The 2001 amendment made it clear that the three conditions of development, operation and maintenance were not intended to be cumulative in nature. A developer who is only developing the infrastructure facility cannot be expected to fulfill the condition in sub-clause (c) which is an impossibility

and requiring it to be fulfilled will be an absurdity. *B. T. Patil & Sons Belgaum Construction (P) Ltd. v. ACIT (2009) 126 TTJ 577 (TM)(Mum)(Trib.)* impliedly held not good law).

*Laxmi Civil Engineering Pvt. Ltd. v. ACIT (Pune)(Trib.) www.itatonline.org (2011) BCAJ July P. 33 Vol. No 43A, Part 4*

**S. 80-IA(4)(ii) : Deduction – Infrastructure development – Telecommunication**

Assessee ran a proprietary business providing telecommunication services to her subscribers within a limited radius of 500 meters on the basis of an agreement entered with BSNL. In computing her total income for the Assessment years 2002-03 to 2006-07 the assessee claimed deduction under section 80IA(4)(ii) of the Income Tax Act, 1961. The assessing authority held that the assessee herself had not developed any telecommunication service system nor was she operating and maintaining any system independently. Assessee was running the business as a franchise of BSNL. The Tribunal held that the Assessee a private commercial venture not involving development of infrastructure not entitled to special deduction. (A. Ys. 2002-03 to 2006-07).

*ITO v. A. Jayalakshmi (Smt) (2011) 12 ITR 371 (Chennai)(Trib.)*

**S. 80-IA(4)(iii) : Deduction – Infrastructure development – Income from developing, operating or maintaining industrial park**

Assessee having constructed multistoried buildings for the purpose of developing infrastructure facilities as approved by the Ministry of Industry and Commerce and leased out to five /four floors to some tenants who are carrying on their diverse operations as functionally independent units, each floor could be taken as independent unit, and deduction under section 80IA(4)(iii) could not be denied on the ground that all the floors of the same building occupied by same tenant cannot be construed as one unit and that it was not operating five units in Asst. Year 2007-08 and four units in the next year as stipulated in the approval granted by the said Ministry. Once the projects are approved and notifications are made by the appropriate authorities the approval and notification run back to the date of commencement of the activities and therefore, deduction under section 80IA(4)(iii) cannot be declined on the ground that the assessee has started functioning even before the formal order of approval and notification. (A. Ys. 2007-08 & 2008-09).

*Primal Projects (P) Ltd. v. Dy. CIT (2011) 139 TTJ 233 / 56 DTR 291 (Bang.)(Trib.)*

**S. 80-IA(4)(iv) : Deduction – Infrastructure development – Income from generation of power – Captive consumption of electricity**

Assessee is entitled to deduction under section 80IA in respect of notional income from generation of electricity which was captively consumed by itself.

*Tamilnadu Petro Products Ltd. v. ACIT (2011) 338 ITR 643 / 51 DTR 67 / 238 CTR 454 (Mad.)(High Court)*

### **S. 80-IA(4C) : Deduction – Infrastructure development – Telecommunication Services**

While computing deduction under section 80-IA(4C), attributing the income in the ratio of old and new telephone exchanges is not proper, in view of complete revolution after 1995 in the telephone sector, most of the income is attributable to new exchanges and therefore, seventy five percent of the income from various services to be treated as having been served by virtue of new exchanges and 25 percent of the income to be attributed to the old exchanges. (A.Ys. 1998-99 to 2005-06)

*Mahanagar Telephone Nigam Ltd. v. ACIT (2010) 130 TTJ 497 / 39 DTR 57 / 38 SOT 24 (Delhi)(Trib.)*

### **S. 80-IA(8) : Deduction – Infrastructure development – Tariff fixed by MERC for sale of power does not reflect “market value”**

It is held that under section 80-IA(8), the transfer of goods from an eligible business to a non-eligible business is required to be taken at “market value”. But the tariff determined by MERC is based on the concepts of ‘clear profits’ and ‘reasonable return’ and does not reflect the “market value” of the electricity. Further, the tariff is fixed for both activities of generation and distribution of power and may not reflect the true rates with regard to only the activity of generation. Thus, even after the fixation of tariff by MERC, the profits from the business of generation of power has to be worked out on the basis of the price paid to the outside party for purchase of power. (A.Y. 2006-07)

*Reliance Infrastructure Ltd. v. Addl. CIT (2011) 9 ITR 84 / 60 DTR 419 (Mum.)(Trib.)*

### **S. 80-IA(8) : Deduction – Infrastructure development – Generation and distribution of electricity – Captive consumption – Price at which SEB supplied to its consumer to be considered as market price**

Assessee had two undertakings i.e. undertaking engaged in business of generation and distribution of electricity and other one was a steel division. Steel division drew the electricity from the undertaking which generated the electricity. The income of Electricity division is exempt under section 80IA. The assessing found that the assessee has charged more rate than it has charged to State Electricity Board (SEB). The Assessing Officer took the view that the assessee has inflated the profit of eligible undertaking and deflated taxable profits of steel undertaking hence invoked the provision of section 80IA(8). The Tribunal held that price at which SEB supplied to its consumer to be considered as market price in respect of electricity drawn for captive consumption of assessee’s steel division for the purpose of section 80IA(8) and not price at which electricity was sold by assessee to SEB, accordingly upheld the order of Commissioner(Appeals). (A. Ys. 2004-05 to 2006-07).

*ACIT v. Godavari Power & Ispact Ltd. (2011) 133 ITD 502 (Bilaspur)(Trib.)*

### **Section 80-IB : Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings**

### **S. 80-IB : Deduction – Industrial undertakings – Interest – Miscellaneous income**

Interest on deposits would not be allowable towards the deduction under section 80IB. Miscellaneous income (reversal of LD charges), the matter was remanded to the Tribunal for fresh consideration. (A. Y. 2003-04).

*CIT v. Dresser Rand India P. Ltd (2011) 330 ITR 453 (Bom.)(High Court)*

### **S. 80-IB : Deductions – Industrial undertakings – Manufacture or Production – Job work – Compound rubber – Interest from customers – Belated payments**

Production of compound rubber on job work for the tyre manufacturing companies by the assessee amounts to “production of an article or thing” qualifying for deduction under section 80IB. There is nothing in section 80IB to indicate that article or thing produced or manufactured should be final product in itself. If the interest is assessable as business income then only it qualifies for deduction under section 80IB as profit earned. In the absence of relevant details of the interest received by the assessee from the customers for belated payment of job work charges matter remanded to the Assessing Officer for reconsideration.

*Midas Polymer Compounds (P) Ltd. v. ACIT (2011) 237 CTR 401 / 331 ITR 68 / 50 DTR 139 / 197 Taxman 481 (FB)(Ker.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Central excise duty refund – Transport and interest subsidy**

Central Excise Duty refund has inextricable link with manufacturing activity hence eligible for deduction under section 80IB, however, transport and interest subsidies have no direct nexus with the business of industrial undertaking hence not eligible for deduction under section 80IB. (A. Y. 2006-07)

*CIT v. Meghalaya Steels Ltd. (2011) 221 Taxation 79 / 332 ITR 91 / 55 DTR 27 / 241 CTR 384 / 201 Taxman 135 (Mag.)(Gau.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Small scale – Not claimed in initial year – Not a bar**

Registration of an Industrial undertaking as a small scale industrial undertaking under Industries (Development and Regulations) Act, 1951, is not a condition precedent for treating the same as a small-scale industrial undertaking and it is sufficient if it fulfills the eligibility criteria for being regarded as a small scale industrial undertaking for the purposes of said Act. Assessee cannot be deprived the benefit of section 80IB merely because he has not claimed such benefit in the initial year in which he was eligible to claim the benefit. (A. Y. 2004-05).

*Praveen Soni v. CIT (2011) 333 ITR 324 / 54 DTR 334 / 241 CTR 542 / 199 Taxman 26 (Delhi)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture or production – Converting raw fish into finished fish**

Process involved in converting raw fish into tinned fish did not amount to manufacture and therefore assessee was not entitled to deduction under section 80IB. (A. Y. 2004-05).

*CIT v. Gitwako Farma (I) (P) Ltd. (2011) 241 CTR 449 / 55 DTR 124 / 332 ITR 471 (Delhi)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Sale of scrap – Manufacture – Labour charges**

Activity of forging which involves heat treatment of material to produce automobile parts is “manufacture” and therefore, labour charges and job work charges earned by the assessee for doing the job of forging for customers are gains derived from industrial undertakings and the same are entitled for deduction under section 80IB. Sale of scrap which generated in the process of manufacturing activity and proximate there to constitute gains derived from Industrial undertaking for the purpose of computing deduction under section 80IB. (A. Y. 2004-05).

*CIT v. Sadhu Forgings Ltd. (2011) 57 DTR 194 / 242 CTR 158 / 336 ITR 444 (Delhi)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Job work – Miscellaneous receipts**

Deduction under section 80IB is allowable on profits of job work and also on miscellaneous receipts, rebate/discounts and balances written off. (A.Y. 2004-05)

*CIT v. Metalman Auto P. Ltd. (2011) 52 DTR 385 / 336 ITR 434 / 199 Taxman 149 (Mag.)(P&H)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Production – Assembling parts of windmill**

Different parts of windmill when assembled get transformed in to an ultimate product which is commercially known as a “windmill” which amounts to manufacture or production with the meaning of section 80IB(2)(iii). (A. Y. 2005-06).

*CIT v. Chiranjeevi Wind Energy Ltd. (2011) 333 ITR 192 / 243 CTR 195 / 58 DTR 302 (Mad.)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – ‘Production’**

The word ‘production’ is wider in scope than ‘manufacture’ and would include by-products and other residual products resulting during the course of manufacture. Hence the activity of converting boulder into grits/stone chips/powder may not be ‘manufacturing’ but would amount to ‘production’ and therefore the assessee would be entitled to deduction under section 80-IB on the said activity.

*CIT v. Mallikarjun Georesources Associates (2011) 201 Taxman 86 (Mag.)(Uttarakhand)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Refund of Excise Duty – Transport subsidy**

Refund of Excise Duty has a direct nexus to the manufacturing activity of the assessee and hence the same qualifies for deduction under section 80-IB.

Transport subsidy & Interest Subsidy- Transport & Interest Subsidies received by the assessee cannot be said to be derived from the industrial activity and the same would not qualify for deduction under section 80-IB. (A. Y. 2006-07)

*CIT v. Meghalaya Steels Ltd. (2011) 332 ITR 91 / 241 CTR 384 / 55 DTR 27 / 201 Taxman 135 (Mag.)(Gau.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Derived from – Rebate – Discounts – Labour job receipts**

Labour job receipts, miscellaneous income consisting of rebate and discounts and balance written off. etc., were held to be incomes 'derived from' industrial undertaking eligible for deduction under section 80-IB of the Act. (A. Y. 2004-05)

*CIT v. Metalman Auto P. Ltd. (2011) 52 DTR 385 / 336 ITR 434 (P&H)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Job Work**

Amount received on account of job work is not a result of manufacturing or producing article or thing and therefore, the assessee is not entitled to claim deduction under section 80-IA and 80-IB of the Act. (A. Y. 2000-2001)

*Friends Castings P. Ltd. v. CIT (2011) 50 DTR 61 / 238 CTR 377 / (2012) 340 ITR 305 (P&H)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Export – After deduction under section**

#### **80-IA [S. 80HHC]**

Deduction under section 80HHC of the Act is to be allowed after reducing the amount of deduction allowable under section 80-IA of the Act. (A. Y. 2000-01)

*Friends Castings P. Ltd. v. CIT (2011) 50 DTR 61 / 238 CTR 377 / (2012) 340 ITR 305 (P&H)(High Court)*

*Editorial:- Refer the case of CIT v. Associated Capsules Pvt. Ltd. (2011) 332 ITR 42 / 237 CTR 408 / 197 Taxman 84 / 50 DTR 65 (Bom.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Manufacture or production – Job Work – Knitted fabrics**

Where the assessee is engaged in the business of manufacture and sale of knitted fabrics and garments was held to be eligible for deduction under section 80-IB of the Act in respect of job work done by it for others. (A. Y. 2004-05)

*CIT v. Vallabh Yarns P. Ltd. (2011) 51 DTR 236 / 335 ITR 518 (P&H)(High Court)*

### **S. 80IB : Deduction – Industrial undertakings – Manufacture – Number of employees – Job workers (Hired through Contractor) – Condition of section 80IB(2)(vi) complied**



Manufacturing activity was carried out at the factory premises of the assessee with the help of permanent employee and job workers. The total number of workers employed by the assessee directly and those hired through a contractor in the manufacturing activity being more than ten condition set out in section 80IB(2)(iv) stood complied, even though the workers employed by the assessee directly were less than ten. Assessee was held to be entitled to deduction under section 80IB. (A.Y. 1999-2000).

*CIT v. Jyoti Plastic Works (P) Ltd. (2011) 339 ITR 491 / 63 DTR 345 / 203 Taxman 546 / 245 CTR 378 / (2011) Vol. 113(6) Bom.L.R.4083 (Bom.)(High Court)*

#### **S. 80-IB : Deduction – Industrial undertakings – Interest from Customers – Bill discounting charges – Interest on Unsecured Loans**

Bill discounting charges reimbursed by the purchasers to the assessee being a component of interest towards delayed payment of the price of the goods sold form a component of the sale price and it is paid towards the delay which has occurred in the payment of price, hence, the assessee is eligible for deduction under section 80-IB in respect of bill discounting charges. However, interest received by the assessee on unsecured loans cannot be regarded as profits and gains derived from the industrial undertaking. (A.Y. 2000-01)

*CIT v. Vidyut Corporation (2011) 237 CTR 433 / (2010) 324 ITR 221 / 39 DTR 252 (Bom.)(High Court)*

#### **S. 80-IB : Deduction – Industrial undertakings – Reimbursement of Discounting Charges – Interest**

Promissory note drawn by purchaser of goods discounted by assessee with bank. Reimbursement of discounting charges by purchaser with interest. Interest on delayed payment of price of goods sold is part of sale price and derived from industrial undertaking and deduction to be allowed. Interest received from unsecured loans not received from industrial undertaking hence does not form part of business income for deduction under section 80-IB. (A.Y. 2000-01)

*CIT v. Vidyut Corporation (2011) 237 CTR 433 / (2010) 324 ITR 221 / 39 DTR 252 (Bom.)(High Court)*

#### **S. 80-IB : Deduction – Industrial undertakings – Manufacture or production – Crushing Stone into concrete**

Process of crushing of stone into stone concrete i.e., grit, in stone crusher is a manufacturing activity within the meaning of section 80-IB.

*D. J. Stone Crusher v. CIT (2010) 33 DTR 267 / 229 CTR 195 (HP)(High Court)*

#### **S. 80-IB : Deduction – Industrial undertakings – Income surrendered by the Assessee**

Additional income surrendered by the assessee firm having been added to the income of the business itself, it is to be considered while working the deduction under section 80-IB. (A.Y. 2001-02)

*CIT v. Allied Industries (2010) 229 CTR 462 / (2009) 31 DTR 323 (HP)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Export Incentives – Duty draw back – DEPB License – Exchange Rate Difference**

Deduction under section 80-IB is not allowable in respect of duty draw back, export entitlement and DEPB licence.

Exchange rate difference arises out of and is directly related to sale involving export of the industrial undertaking, hence entitled to deduction under section 80-IB. (A.Y. 2002-03)

*CIT v. Rachana Udhyog (2010) 35 DTR 65 / 230 CTR 72 (Bom.)(High Court)*

*Editorial:- Liberty India v. CIT (2009) 317 ITR 218 (SC), considered.*

**S. 80-IB : Deduction – Industrial undertakings – Interest from trade debtors**

Interest income received on delayed realization of sale proceeds becomes part of sale price as it is the direct result of sale of goods and therefore, such income falls within the expression "derived from such industrial undertaking" and is eligible for deduction under section 80-IB. (A.Y. 2002-03)

*CIT v. Poddar Pigments Ltd. (2010) 41 DTR 390 (Delhi)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Job work done by others**

Assessee deriving income from its own manufacturing and from job works done for others, the assessee entitled for deduction under section 80-IB. (A.Y. 2001-02)

*CIT v. Impel Forge and allied Industries Ltd. (2010) 326 ITR 27 / 183 Taxman 38 (P&H)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Transformer – Cold rolled grain**

Activity of making transformer core from Cold Rolled Grain Oriented (CRGO) and Cold Rolled Non-grain Oriented (CRNO) coils involves series of processes as such the same amounts to manufacture and entitled to deduction under section 80-IB of the Act. (A.Y 2001-02)

*CIT v. Alfa Lamination (2009) 22 DTR 161 / 225 CTR 212 / (2010) 329 ITR 348 (Guj.)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Refund of excise duty**

The assessee's undertaking was entitled for exemption from excise duty and hence, assessee received excise duty refund. Held that excise duty refund is includible in the profits entitled for deduction under section 80-IB. (A.Y. 2000-01)

*CIT v. Dharam Pal Premchand Ltd. (2009) 180 Taxman 557 / 221 CTR 133 / 317 ITR 353 (Delhi) (High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Interest subsidy**

Interest subsidy received by the assessee from State Government to encourage it to set up industries in remote areas is not income derived from the business of industrial undertaking and not eligible for deduction under section 80-IB of the Act.

*CIT v. Gheria Oil Gramudyog Workers Welfare Association (2009) 32 DTR 105 / (2010) 228 CTR 94 / (2011) 330 ITR 117 (HP)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Additional income – Assessment**

Additional income offered by the assessee during the assessment proceedings which was added to the business income of the assessee, in absence of any finding by the lower authority that the undisclosed income offered by the assessee was derived from the industrial undertaking the income cannot be considered while computing deduction under section 80-IB of the Act. (A.Y. 2001-02)

*CIT v. Allied Industries Ltd. (2009) 31 DTR 323 / (2010) 229 CTR 462 (HP)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Both sections – Gross total income**

#### **[S. 80HHC]**

The assessee is not entitled to simultaneous deduction of both sections 80HHC and 80-IB while computing deduction under section 80HHC, in view of specific exclusion under section 80-IB(13) hence, deduction granted under section 80-IB has to be excluded.

*Olam Exports India Ltd v. CIT (2009) 184 Taxman 373 / (2010) 229 CTR 206 / (2011) 332 ITR 40 (Ker.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Claim – Revised return**

The Assessee inadvertently not claimed the deduction in its return though documents such as Form No. 10 CCB were furnished during assessment proceeding. Deduction is admissible even in the absence of a revised return. (A.Y. 2003-04)

*CIT v. Ramco Intl. (2009) 221 CTR 491 / 332 ITR 306 / 180 Taxman 584 / 17 DTR 214 (P&H) (High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Duty draw back**

Customs duty drawback is profit derived from business of industrial undertaking, hence, eligible for deduction under section 80-IB. (A.Y. 2001-02)

*CIT v. Eltek SGS (P) Ltd. (2008) 3 DTR 241 / 215 CTR 279 / 300 ITR 6 / 169 Taxman 283 (Delhi)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Manufacturer – Rectified spirit**

Assessee engaged in purchasing rectified spirit and then blending and bottling it into Indian Made Foreign Liquor (IMFL) is said to be engaged in manufacturing for the

purpose of claiming deduction under section 80-IB of the Act. (A.Ys. 2003-04, 2005-06)

*CIT v. Vinbros & Co. (2008) 6 DTR 25 / 218 CTR 634 / 177 Taxman 217 (Mad.)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Excise duty**

Excise duty refund granted by the excise department is pivoted on manufacturing activity carried out by the assessee as such the income received from refunded excise duty is an income derived from industrial undertaking and eligible for deduction under section 80-IB. (A.Y. 2000-01)

*CIT v. Dharma Pal Prem Chand Ltd. (2008) 16 DTR 130 / 221 CTR 133 / 317 ITR 353 / 180 Taxman 557 (Delhi)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Drawback – Derived**

Income of the assessee from duty drawback cannot be held to be income 'derived from' specified business. (A.Y. 2001-02)

*CIT v. Five Star Rugs (2007) 164 Taxman 348 / 293 ITR 553 / 207 CTR 246 (P&H)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Drawback – Derived**

Duty drawback sums do not qualify for deduction under section 80-IB. (A.Y. 2003-04)

*Paramount Impex v. CIT (2007) 165 Taxman 181 (P&H)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Manufacture – Production – Bread**

Conversion of maida, sugar, yeast, etc., into bread amounts to manufacture and production for the purposes of section 80-IB. As the assessee was registered with Directorate of Industries, holding power licence and also registered under Factories Act, it could be said that it was an industrial undertaking. (A.Y. 2001-02)

*CIT v. Pankaj Jain Prop. Aagam Food Industries (2006) 152 Taxman 80 / 200 CTR 11 (J&K)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Manufacture – Bread – Conversion of maida, sugar yeast etc.**

Conversion of maida, sugar, yeast, etc. into bread amounts to manufacturer and production; thus the assessee is entitled to deduction under section 80-IB. (A.Y. 1997-98)

*Anand & Anand v. CIT (2006) 200 CTR 1 / 286 ITR 432 / 152 Taxman 113 (Delhi)(High Court)*

### **S. 80-IB : Deduction – Industrial undertakings – Blending of tea**

Blending of different types of tea by assessee does not amount to production of a thing or an article by an industrial undertaking within the meaning of expression as used in section 80-IB.

*D.D. Shah & Brothers v. UOI (2006) 283 ITR 486 / (2005) 148 Taxman 1 / 197 CTR 1 (Raj.)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Punching lamination**

Operation carried out by the assessee, namely, of punching, lamination and pasting with the glue for purpose of making cartons, is manufacturing process as contemplated under section 80-IB. (A.Ys. 1987-88 to 1997-98)

*CIT v. Supreme Graphics Creations (P.) Ltd. (2005) 276 ITR 668 / 148 Taxman 67 / 197 CTR 657 (Bom.)(High Court)*

**S. 80-IB : Deduction – Industrial undertakings – Payments Disallowed [S. 40(a)(ia)]**

Payments disallowed under section 40(a)(ia), has to be treated as part of “profits and gains of business or profession” and therefore, the same qualifies for deduction under section 80-IB. (A. Ys. 2002-03, 2003-04, 2004-05, 2006-07)

*ITO v. Computer Force (2011) 136 TTJ 221 / 128 ITD 116 / 49 DTR 298 (Ahd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Excise Refund – Subsidy – Despite Liberty India, Excise Refund Eligible for section 80IB**

Following Delhi High Court decision in *CIT v Dharampal Premchand (2009) 317 ITR 353*, it was held that excise duty refund was eligible under section 80-IB on the ground that (a) there was a direct nexus between the refund of excise duty and the undertaking and (b) if the proper accounting methodology was followed for the payment and refund of excise duty, the net effect on the P&L A/c was nil. Also, the refund of excise duty is the assessee’s own money coming back and is not income at all. (A. Y. 2007-08)

*J. K. Aluminium Co. v. ITO, ITA No. 3303/Del/2010 dated 20-4-2011 (Delhi)(Trib.)*  
Source: [www.itatonline.org](http://www.itatonline.org)

**S. 80-IB : Deduction – Industrial undertakings – Processing of Seeds – Manufacture**

Processing of seeds by the assessee which is bought from the agriculturists, does not result in manufacturing of any new article or thing, therefore the assessee is not eligible to claim deduction under section 80-IB. (A. Ys. 2002-03 to 2004-05)

*ITO v. Daftri Agro (2011) 135 TTJ 729 / 50 DTR 215 / 130 ITD 496 (Hyd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Production – Water purification system – Out sourcing – Twenty or more workers**

Assessee himself is making the final product i.e., water purification system, it cannot be said that he is not engaged in manufacture merely because, some material is readily purchased from the market and some raw material is got manufactured by outsourcing, assessee having employed twenty or more workers during the major part of the year, there is substantial compliance of the condition of employment of

minimum number of workers and therefore assessee is entitled for deduction under section 80IB, more so when similar deduction has been allowed in the preceding years. (A. Y. 2001-02).

*P. L. Patel v. ITO (2011) 60 DTR 53 / 142 TTJ 57 (Mum.)(Trib.)*

### **S. 80-IB : Deduction – Industrial undertakings – Job work charges – Apportionment of receipts**

Assessee-HUF was engaged in manufacturing of moulds for ball pens and, supplying same to ball pen manufacturing concerns. It also provided services to buyers by way of repair and maintenance of moulds sold to them and charged job work charges, which included receipt on account of sale of spare parts and repair and maintenance charges. The Tribunal held that income earned by assessee from repairs and maintenance charges could not be equated with income from manufacturing and hence was not eligible deduction in terms of section 80IB. In the absence of records it was not possible to decide how much was for repairs and how much for was job charges. 50% of receipt was thus estimated as job work charges on which the assessee would entitled deduction under section 80IB and balance 50% as receipt on account of repair and maintenance charges on which the assessee would not be entitled to get deduction under section 80IB. (A. Y.2005-06).

*Dy. CIT v. Rajesh Kumar Drolia (2011) 132 ITD 23 / 12 ITR 1 / 141 TTJ 257 / 61 DTR 71 (SB)(Kol.)(Trib.)*

### **S. 80-IB : Deduction – Industrial undertakings – Amalgamation of companies – Subsidiary company**

Subsidiary company carried on business during intervening period from 1st April 2005 till the order sanctioning amalgamation scheme, is deemed to have been carried on for on behalf of the assessee company, as per instruction no F.NO 15/5/63–IT (AI) dt. 13th December, 1963, the assessee is entitled to deduction under section 80IB, if other conditions are satisfied. (A. Y. 2006-07).

*Wrigley India (P) Ltd. v. Addl. CIT (2011) 62 DTR 201 / 142 TTJ 23 (Delhi)(Trib.)*

### **S. 80-IB : Deduction – Industrial undertakings – Derived – MODVAT credit – Is “derived” from industrial undertaking**

The assessee availed/set off Modvat credit of excise duty of earlier years amounting to ` 1.93 crores. The Assessing Officer held that section 80-IB deduction was not admissible on the said Modvat credit on the ground that the “source of the income was government policy imposing excise duty at differential rate” and it was not “derived” from the industrial undertaking. This was reversed by the CIT(A). On appeal by the department, HELD dismissing the appeal:

The payment of central excise duty has a direct nexus with the manufacturing activity and similarly, the refund of the Central excise duty also has a direct nexus with the manufacturing activity. The issue of payment of Central excise duty would not arise in the absence of any industrial activity. There is, therefore, an inextricable link between the manufacturing activity, the payment of central excise duty and its refund.



Consequently, it is "derived" from the industrial undertaking and eligible for section 80-IB deduction (*CIT v. Meghalaya Steels 332 ITR 91 (Gau.) and J.K. Aluminium v. ITO (ITAT Delhi)* followed) (A.Y. 2006-07)

*ACIT v. The Total Packaging Services ITA No. 5364/Mum/2009 dated 4-11-2011 (Mum.)(Trib.)* Source : [www.itatonline.org](http://www.itatonline.org)

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Ginning and processing of cotton – Derived – Interest – Income from weigh bridges etc. – Not eligible**

Assessee engaged in business of manufacturing activity of ginning and processing of cotton, cannot claim deduction under section 80IB with regard to excess cash, interest credited and income earned from weigh bridges, as said items of income could not be said to have been derived from or have nexus with eligible industrial undertaking. (A. Y. 2007-08).

*Maa Vaishno Devi v. Dy. CIT (2011) 48 SOT 399 (Indore)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Reconstruction – New unit**

Assessee having set up a new unit after closing the old unit at a new place for manufacturing new type of telephone instruments by employing new technology in a newly constructed business premises and making substantial investment in plant and machinery, it is not a case of splitting up of old business and therefore claim for under section 80IB could not be disallowed on the ground that the assessee has merely shifted its business from one place to another and not started a new business. (A. Ys. 2002-03, 2003-04, 2004-05 & 2006-07)

*ITO v. Computer Force (2011) 136 TTJ 221 / 128 ITD 116 / 49 DTR 298 (Ahd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Potato Chips – Initial Year**

Conditions precedent for allowability of deduction under section 80-IB are to be examined in the initial year of the claim and if they are found to be satisfied the Assessing Officer cannot ignore that finding in the assessment of a subsequent year and take a different view. The Tribunal held that the CIT(A), was not justified in disallowing deduction under section 80-IB on the ground that the manufacture and sale of dehydrated onion flakers and potato chips is not manufacture or production of article or thing to be eligible to deduction under section 80-IB. (A.Y. 2003-04)

*Janak Dehydration (P) Ltd. v. ACIT (2010) 134 TTJ 1 / (2011) 44 SOT 93 (UO)(Ahd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacturing – Types of sheets and pre-engineering building material**

Assessee had employed high-tech sophisticated machinery, e.g., for marking roof tops, it bought plain sheets and gave them curved and desired shape on cold rolled mill and thereafter, different engineering operations were carried on and thus, ultimately assessee gave technical inputs in respect of tensile strength, long durable

service life and structural quality keeping factors like heat resistance operational requirement, energy consumption and environmental factors in mind. Similarly, for beams columns and rafters, assessee had used high duty shearing machine as against simple fabrication tools employed by others. It had auto-welding machines which gave uniform welding and made all parts uniformly joining and becoming one static body and ultimately improved its tensile strength. In view of above process, there was sea change from raw materials to finished products, hence, the assessee could be said to be engaged in production or manufacture of an article or thing and entitled to deduction under section 80-IB. (A.Ys. 2005-06, 2006-07)

*Steel Fab Building Systems v. ITO (2010) 127 ITD 419 (Mum.)(Trib.)*

#### **S. 80-IB : Deduction – Industrial undertakings – Derived from – Excise duty refund – Interest subsidy – Undertaking**

Excise duty and interest subsidy have no first generation or proximate nexus or source, which is essential for any profit to be treated as 'derived from' the industrial undertaking and therefore such receipts are not eligible for deduction under section 80-IB. (A.Y. 2005-06)

*Shree Balaji Alloya v. ITO (2010) 33 DTR 67 / 127 TTJ 129 (Amritsar)(Trib.)*

#### **S. 80-IB : Deduction – Industrial undertakings – Manufacture – Milling of Wheat In to Rawa**

Milling of wheat into rawa, bran atta and maida can be considered as manufacture or production of distinct article, things for the purpose of deduction under section 80-IB. (A.Y. 2004-05)

*Dy. CIT v. Sri Sai Roller Flour Mills (P) Ltd. (2010) 35 SOT 345 / 2 ITR 490 / 134 TTJ 753 / 47 DTR 440 (Hyd.)(Trib.)*

#### **S. 80-IB : Deduction – Industrial undertakings – Manufacture – Masalas**

Assessee engaged in producing different varieties of masalas using different spices as inputs, for which even machineries were used for processes like grinding, pulping, drying, etc. and then packing and selling the end product which are different from the different spices used in the process, would amount to manufacturing, and not merely processing so as to deny deduction under section 80-IB. (A.Y. 2003-04)

*ACIT v. Empire Spices & Foods Mumbai Ltd. (2010) 188 Taxman 36 (Mag.)(Mum.)(Trib.)*

#### **S. 80-IB : Deduction – Industrial undertakings – Manufacture – Herbal powder – Coconut shell powder**

Assessee purchased various items of herbal products, medicinal plants flowers, roots, etc., which were cleaned dried and grinded to obtain fine powder. After having undergone various processes, identity of original ingredients had been lost, which could never be brought back to its original form. Since there was a complete transformation of original raw materials so as to produce a commercially different product, assessee is entitled to deduction under section 80-IB. (A.Y. 2004-05)

*ACIT v. Vinayagar Silks (P) Ltd. (2010) 39 SOT 51 (Chennai)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Making non-ferrous wires**

Activity of the assessee making non-ferrous wires from the big gauge rods is covered within the meaning of production under section 80-IB. (A.Y. 2003-04)

*ACIT v. Leebo Metals (P) Ltd. (2010) 131 TTJ 34 / 36 DTR 314 / 4 ITR 275 (Mum.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Production of mineral oil [S. 80-IB(9)]**

Assessee producing natural gas is producing mineral oil eligible for deduction under section 80-IB(9). (A.Y. 2001-02)

*ACIT v. Niko Resources Ltd. (2009) 123 TTJ 310 / 22 DTR 225 (Ahd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Interest – Miscellaneous income**

Benefit of deduction under section 80-IB, cannot be allowed on interest income and miscellaneous income surrendered during survey under section 133A, as no nexus had been established by assessee that same has been derived from an industrial undertaking.

*Dy. CIT v. Shiva Fabricators (P) Ltd. (2008) 174 Taxman 155 (Mag.)(Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Survey – Amount disclosed [S. 133A]**

Assessee company claimed deduction under section 80-IB, on profits including the amount surrendered under survey under section 133 A. Held, that when the surrendered amount has not been substantiated with documentary evidence as earned from industrial undertaking deduction under section 80-IB could not be allowed.

*ACIT v. Arora Fabrics (P) Ltd. (2008) 171 Taxman 113 (Mag.)(Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Jewellery – Manufacturing – Control and supervision**

The assessee getting its manufacturing of jewellery under the control and supervision of its employees is an industrial undertaking eligible for deduction under section 80-IB. (A.Y. 2002-03)

*CIT v. Tribhuvandas Bhimji Zaveri (2007) 110 TTJ 942 (Mum.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Duty draw back**

Income earned on account of duty drawback is income derived from industrial undertaking eligible for deduction under section 80-IB. (A.Y. 2001-02)

*ITO v. Paramount Industrial Corpn. (2007) 109 TTJ 295 (Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Mushroom powder**

Filling the mushroom powder in gelatin capsules does not amount to manufacture or production, hence not eligible for deduction under section 80-IB. (A.Ys. 2003-04 and 2004-05)

*DXN Herbal Manufacturing (India) (P) Ltd. v. ITO (2007) 109 TTJ 87 / (2008) 110 ITD 99 (Chennai)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Breaking of big boulders in to gity or bajri**

Assessee engaged in breaking of big boulders into 'gitty' or 'bajri' is not engaged in manufacture or production, hence not eligible for deduction under section 80-IB. (A.Ys. 2001-02, 2002-03)

*ITO v. Jitendra Stone Crushing Co. (2007) 108 TTJ 983 / 105 ITD 52 (Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Duty draw back**

- Duty drawback was part of the profit of the industrial undertaking for the purpose of deduction under section 80-IB.
- Part of the manufacturing activity was carried on by contract workers. The Assessee is entitled to full deduction and not on proportionate basis on the activity done by contract workers. (A.Y. 2001-02)

*Padhrod v. ITO, ITA No. 4191/Mum/2004, Bench-A, dt. 17-8-2007-BCAJ P. 30, Vol. 39-E, Part 1, October, 2007. (Mum.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Duty draw back**

Deduction under section 80-IB is allowable in respect of duty drawback. (A.Y. 2001-02)

*ITO v. Five Star Rugs (2006) 100 TTJ 222 (Delhi)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Inter transfer of intermediate products**

Inter-unit transfer of intermediary product. Assessee was justified in computing deduction under section 80-IB by valuing the inter-unit transfer of NH coke, an import substitute, at notional landed cost. (A.Y. 2000-01)

*Assam Carbon Products Ltd. v. ACIT (2006) 100 TTJ 224 (Kol.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Job work – Letting of machinery**

Assessee having not shown substantial income either from job work or letting of machinery in the relevant period, deduction under section 80-IB cannot be allowed. (A.Y. 2000-01)

*ACIT v. Rajiv Kumar Madan (2006) 100 TTJ 744 (Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Manufacture – Production – Polished marble**

Assessee engaged in the manufacture/ production of polished marble slabs, tiles, table tops, etc. is entitled to deduction under section 80-IB. (A.Ys. 2000-01 and 2001-02)

*Aakash Stone Industries Ltd. v. ACIT (2007) 106 TTJ 128 (Mum.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Welding of a case and glass in to a case set – Not a new product**

Welding of a case and glass into a “case set” with the help of ultrasonic welding machine is not a manufacturing activity as no new product comes into existence and, therefore, assessee is not entitled to deduction under section 80-IB in respect of job work of such welding. (A.Y. 2001-02)

*P. A. Time Industries v. Dy. CIT (2006) 103 TTJ 684 / 101 ITD 132 (Chd.)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Wrong mentioning of section – Mining of lignite for use in generation of power**

Merely because after substitution of section 80-IB for section 80-IA, assessee wrongly made a claim under section 80-IA, same could not be denied for technical reasons if he was entitled for same under section 80-IB. (A.Y. 2001-02)

Mining of lignite for use in generation of power would amount to manufacture or production of article or thing.

*Neyveli Lignite Corpn. Ltd. v. ACIT (2005) 2 SOT 863 / 93 TTJ 685 (Chennai)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Duty draw back**

Deduction under section 80-IB is allowable on duty drawback.

*ACIT v. Vipin Sardana (2005) 148 Taxman 41 (Mag.)(Delhi)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Duty draw back – Not eligible**

Duty drawback received by assessee is not eligible for deduction. (A.Y. 2001-02)

*ACIT v. Liberty India (2005) 4 SOT 93 (Delhi)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Preparation of bread**

Preparation of bread through a mechanised process amounts to manufacture so as to entitle assessee engaged in such activity to deduction under section 80-IB. (A.Y. 2001-02)

*Pankaj Jain v. ITO (2005) 97 TTJ 28 / 104 ITD 152 (Amritsar)(Trib.)*

**S. 80-IB : Deduction – Industrial undertakings – Import entitlement**

Profit from sale of import entitlement is not entitled to deduction under section 80-IB. (A.Y. 2001-02)

*ACIT v. K. S. International (2007) 108 ITD 709 (Delhi)(Trib.)*

**S. 80-IB(iii), (iv) : Deduction – Industrial undertakings – Manufacture – Assembling Activity – Workers – Permanent – Temporary**

Assembling activity of wind mill of the assessee were covered under the definition of “manufacture” and “production”. All workers whether permanent or casual, employed by the assessee in the manufacturing process as well as in subsidiary activities are to be counted for determining compliance with the requirement of Act. If ten or more workers were employed for substantial part of the working period of factory, it would be sufficient compliance with the condition. The section talks of workers and not employees. (A.Y. 2004-05)

*Chiranjeevi Wind Energy Ltd. v. ACIT (2010) 4 ITR 9 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Pre A. Y. 05-06**

A project approved as “housing project” by local authority eligible for deduction under section 80-IB(10) irrespective of extent of commercial user Where the legislature has provided that the deduction under section 80IB(10) is available to all housing projects approved by a local authority, the result is that even projects with commercial user approved as a “housing project” are eligible for deduction. Thus, the Tribunal was justified in confirming the deduction only to projects having commercial area upto 10% of BUA. If the project is approved as a “housing project” deduction under section 80-IB(10) is allowable irrespective of the commercial area. It was further held that the insertion of clause (d) to section 80-IB(10) w.e.f. 1.4.2005 to deny section 80-IB(10) deduction to projects having commercial user beyond the prescribed limits is not retrospective. (A. Y. 2003-04).

*CIT v. Brahma Associates (2011) 333 ITR 289 / 51 DTR 298 / 239 CTR 30 / 197 Taxman 459 / 2011 VOL 113 (2) Bom. L. R. 0995 (Bom.)(High Court)*

**S. 80-IB(10) : Deduction – Development and construction – Housing project – Disallowance on account of non-payment of deduction at source [S. 80AB, 40(a)(ia), 29]**

Where the Assessing Officer makes additions to income of assessee under section 40(a)(ia), for non-compliance of tax deduction at source, such additional income also should be considered for the purpose of allowing deduction under section 80IB(10) as per section 80AB, read with section 29. (A. Y. 2006-07)

*S. B. Builders & Developers v. ITO (2011) 50 DTR 299 / 136 TTJ 420 / 45 SOT 335 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Date of completion**

Tribunal held that what is crucial is not the date of issue of letter by local authority, but date mentioned in the letter certifying completion of the project. Therefore, it rejected the contention of the revenue to the effect that the date of completion shall be taken as the date on which the certificate is physically issued by the local authority.



*D. K. Construction v. ITO (2011) BCAJ Feb., 24 (572) (2011) 42 B. BCAJ (Indore)(Trib.)*

**S. 80-IB(10) : Deduction – Development and construction – Housing project – Joint development agreement – Owners of land**

Assessee developer had entered into joint development agreement with owners of land for construction of residential flats consisting of four wings in consideration of giving 49% of the constructed area to land owners and all other conditions of section 80IB(10) having been found to be fulfilled, deduction under section 80IB(10) could not be denied. (A. Ys. 2005-06 to 2007-08)

*Mudhit Madanlal Gupta v. ACIT (2011) 51 DTR 217 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Development and construction – Housing project – Property developer – Owner – Car parking area**

Assessee a property developer paying full consideration to land owner and building housing project, all work in connection with project done by assessee, assessee is considered as de facto owner of land, assessee is entitled to deduction under section 80IB(10). Car parking area not to be included in reckoning permissible area of residential area. (A. Ys. 2001-02, 2005-06)

*ACIT v. C. Rajini (Smt) (2011) 9 ITR 487 / 140 TTJ 218 / 58 DTR 554 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Development and construction – Housing project – Built up area of two units exceeded 1500 square feet – Assessee not entitled for deduction**

The Assessing Officer conducted spot enquiry and physical inspection revealed that individual residential unit measuring less than 1500 sq. feet in built up area on paper was never meant to be sold as such but was always to be sold together with adjoining unit. The built up area of the two units exceeded 1500 sq. feet. Assessee had only one electricity meter for two adjacent flats. All 104 units have been sold to adjoining pairs to 52 families and the buyers have been shown either same persons or husband and wife and only one entity was shown in the broucher for two flats. The Tribunal held that CIT(A) was justified in confirming the order of Assessing Officer refusing to grant deduction under section 80IB(10). (A. Y. 2003-04).

*Thistle Properties (P) Ltd. v. ACIT (2011) 55 DTR 81 / 138 TTJ 538 / (2012) 134 ITD 6 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Commercial area – Projects commenced prior to 1-4-2005 – Restriction of 5% is not applicable**

The Tribunal noted that the assessee's project had commenced prior to 1-4-2005. It also noted that in the case of Brahma Associates, the High Court held that the amendment to section 80IB is prospective in operation. Since the assessee's project had commenced in December 2003, the Tribunal held that amendment to section

80IB(10) w.e.f. Assessment Year 2005-06, restricting the commercial area to 5% is not applicable to projects commenced prior to 1-4-2005. (A. Y. 2005-06).

*ITO v. Chheda Construction Co., ITA No. 2764/Mum/2009, dt.27-04-2011, 'C' Bench, BCAJ P. 29, Vol. 43-A, Part 3, June 2011 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Pro-rata basis – Residential buildings – Area exceeding 1500 square feet**

Whether deduction should be allowed in the case of flats having built up area not exceeding 1500 sq. ft., even though some of the flats were exceeding 1500 sq. ft. On reference to third member, the third member held that in view of order passed by Calcutta High Court in CIT v Bengal Ambuja Housing Development Ltd. (IT Appeal no 458 of 2006 dated 5-1-2007), assessee was entitled to deduction under section 80IB(10) in respect of flats having built up area not exceeding 1500 square feet and not entitled for deduction in respect of those flats having their built up area exceeding 1500 square feet. The third member also held that in view of CIT v Brahma Associates (2011) 197 Taxman 459 (Bom)(High Court), finding of Vice President on the issue of fixing limit of 10 percent cap does not hold good. (A. Ys. 2005-06 & 2006-07).

*Sanghvi & Doshi Enterprise v. ITO (2011) 131 ITD 151 / 60 DTR 306 / 141 TTJ 1 (TM)(Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Completion of entire project**

For claiming deduction under section 80IB, it is not necessary for assessee to compute entire project and even on partial completion of project, assessee would be eligible for deduction under section 80IB. (A. Y. 2005-06).

*Nagarjuna Homes v. ITO (2011) 46 SOT 287 (Hyd.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Development agreement – Not Owner – Commencement certificate**

Deduction under section 80IB(10) can not be denied on the ground that the assessee is not the owner of the property which he undertakes to develop, nor can it be denied on the ground that development agreement is not registered. Merely because the commencement was obtained prior to 1-10-1998, it does not mean that the assessee has commenced the development and construction of the project unless the assessee has taken some effective steps on the site. (A. Ys. 2003-04 and 2004-2005).

*Essem Capital Markets Ltd. v. ITO (2011) TIOL 196 ITAT–Mum. 171 (2011) 43A – BCAJ (May. P. 31) (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Commercial area 8.8%**

Commercial area of the residential plus commercial project did not exceed 8.8% of total area, further, deduction is eligible to housing project approved by the local authority as such or as "residential plus commercial project" having residential as well as commercial units to the extent permitted under the DC Rules. Assessee is entitled to deduction under section 80IB(10). (A. Y. 2004-05).

*Bhumiraj Homes Ltd. v. Dy. CIT (2011) 60 DTR 65 / 11 ITR 699 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Sale of pair of flats in the name of family members exceeding 1000 square feet –Amendment with effect from 1-4-2010 is prospective in nature**

Under pre-amended section as long as a residential unit has less than specified area, is as per duly approved plans and is capable of being used for residential purposes on stand alone basis, deduction under section 80IB(10), cannot be declined in respect of same merely because end user, by buying more than one such unit in name of family members has merged those residential units in to a larger residential unit of a size which is in excess of specified size. Amendment made to section 80IB(10) with effect from 1-4-2010, is prospective in nature. (A. Ys. 2003-04 & 2004-05).

*Emgeen Holdings (P) Ltd. v. Dy. CIT (2011) 47 SOT 98 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Ownership of Land**

When the assessee has taken possession of land after the payment of full consideration and developed it, the assessee has fulfilled all the conditions laid down in section 80IB(10), therefore entitled to deduction under section 80IB. (A. Ys. 2001-02 & 2005-06)

*ACIT v. C. Rajini (Smt.) (2011) 140 TTJ 218 / 58 DTR 554 / 9 ITR 487 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Joint development**

Assessee entered in to an agreement for jointly developing a housing project on its land, undertaking the responsibility of obtaining all statutory clearance permissions, etc. for putting up the housing project on the land as well as responsibility to remove all structures and unauthorized occupants of the land and agreeing to share the gross sale proceeds the housing project with the other company in an agreed ratio, the activities undertaken by the assessee are activities relating to development of housing project and therefore are activities relating to development of the housing project and, therefore, it is to be treated as a developer entitled to deduction under section 80IB(10). (A. Ys. 2002-03 to 2005-06).

*ACIT v. Bombay Real Estate Development Company (P) Ltd. (2011) 64 DTR 137 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Combined area of flats – Built up area**

When as per the approved plan the assessee has sold each flat under separate agreement which are less than 1000 sq. Ft. deduction under section 80IB cannot be denied to the assessee merely because some of the purchasers have purchased more than one flat and combined the same and area of such flats is more than 1000 sq. ft. of built up area. The definition of "Built up area" as given in sub section 14(a) of section 80IB is inserted by the Finance (No. 2) Act, 2004 w.e.f. 1st April, 2005 and therefore the same is applicable only in respect of the projects approved after 1st April, 2005 and consequently, balcony / terrace cannot be included in the built up area of the flats in the housing projects approved prior to 1st April 2005. (A. Ys. 2005-06 to 2007-08).

*Haware Constructions (P) Ltd. v. ITO (2011) 64 DTR 251 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Land in the name of owner – Not in the name of Developer – Built up area – Open terrace**

Assessee having purchased land and developed a housing project consisting of residential flats having built up area of less than 1500 sq. ft. each by incurring all expenses and taking all the risk involved therein and received entire sale consideration from the buyers after completion of the housing project in its own right, deduction under section 80IB(10) could not be denied on the ground that the permissions and approvals by the local authorities were in the name of the housing society (Land owner) and not in the name of the assessee. As per the definition given in section 80IB(14)(a), built up area means, inner measurement of the residential unit at the floor level including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units. Open terrace is open to sky would not be part of the inner measurement of the residential unit at any floor level. The Assessing Officer was not justified in rejecting the assessee's claim by taking the open terrace, the built up area of each of the 110 units less than 1500 sq. ft., therefore the claim of assessee was allowed. (A. Y. 2006-07).

*Amaltas Associates v. ITO (2011) 64 DTR 329 / 142 TTJ 849 / 131 ITD 142 (Ahd.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Approval and completion of the project**

Stipulation for obtaining completion certificate should not be so interpreted to mean that an assessee can claim exemption under section 80-IB(10) only in the year of completion of the whole of the housing project but the exemption could be claimed, particularly, where the project stretches over a number of years and the assessee return its income based on percentage completion method. (A.Y. 2005-06)

*Ramaniyam Castles (P.) Ltd. v. ACIT (2011) 128 ITD 130 / 136 TTJ 101 / 49 DTR 241 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Different Wings**

Assessee having constructed Wing “E” after obtaining commencement certificate in 2002 and 2003 though similar certificates had been obtained prior to 1998, in respect of A, B, C, and D wing, Wing E was a separate housing project and same having been completed before 31st March 2005, the assessee was entitled deduction under section 80-IB(10) in respect of “E” Wing. (A.Y. 2005-06)

*Vandana Properties v. ACIT (2010) 128 TTJ 89 / 31 SOT 392 / 27 DTR 282 (UO)(Mum.)(Trib.)*

*Editorial : Approved by Bombay High Court in CIT v. Vandana Properties (2012) 206 Taxman 584 (Bom.)(High Court)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Approval in favour of Co-venture**

Assessee having entered in to an agreement with OSHB, lessee of a plot, on principal to principal basis for constructing a multi-storeyed residential complex whereby it was assigned the right to use, develop, construct. sell or transfer the saleable area, it was not a contractor at all and therefore, deduction under section 80-IB(10), is allowable to the assessee, notwithstanding the fact that the approval for developing the housing project was given by the competent authority in favour of OSHB. (A.Y. 2003-04)

*KZK Developers v. CIT (2010) 130 TTJ 57 (UO)(Cuttack)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Proportionate deduction – Condition of Section 80-IB(2)**

Assessee undertaking engaged in development of housing projects could not be denied deduction under section 80-IB, on the ground that it failed to fulfill all conditions of “industrial undertaking”, as prescribed by sub section (2) of section 80-IB. In cases where the built up area of flats exceeded 1000 square feet, the exemption can not be denied entirely, assessee will be eligible for proportionate deduction. (A.Y. 2004-05)

*G. V. Corporation v. ITO (2010) 38 SOT 174 / 43 DTR 329 / 133 TTJ 178 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Proportionate deduction**

Assessee constructing residential units some of which were above specified limit and some below such limit. Assessee entitled to deduction in respect of residential units below specified area. (A.Y. 2005-06)

*SJR Builders v. ACIT (2010) 3 ITR 569 (Bang.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Prorata**



The project had been approved as housing project by local authority, if built of area of some of the housing units being more than 1500 sq. ft. assessee is entitled for deduction under section 80-IB(10), prorata for the housing units having built up area less than 1500 sq. ft. (A.Ys. 2003-04, 2004-05)

*Sreevatsa Real Estates (P) Ltd. v. ITO (2010) 41 DTR 497 / 9 ITR 808 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Amenities – Separate agreement**

Amenities provided by the assessee at the time of construction itself, though by way of a separate agreement, are to be treated as part of the housing project undertaken by the assessee. Deduction under section 80(1B)(10) is allowable in respect of receipts for amenities.

When there is direct nexus between the funds borrowed and funds advanced to sister concerns interest received on amounts advanced can be netted off against interest paid. (A.Y. 2003-04)

*Dy. CIT v. Vimal Builders, ITA Nos. 3646/Mum/2007 & 2730/Mum/2007, dt. 28-7-2009. BCAJ P. 45, Vol. 41A, Part 6, September, 2009 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Residential area more than 1500 sq. ft.**

The eligibility conditions under section 80-IB are that the built up area should not exceed 1500 sq. ft in context of cities other than Delhi, and Mumbai and the profits must be derived in the previous year from the housing project. This restriction is applicable for the entire project. If some of the residential units of the project comprised area exceeding the prescribed limit, the benefit could not be extended to the project. The assessee cannot be granted exemption for the project. (A.Y. 2004-05)

*ACIT v. Viswas Promoters P. Ltd. (2010) 5 ITR 449 / 126 ITD 263 (Chennai)(Trib.)*

*Editorial:- In Sreevatsa Real Estates (P) Ltd. v. ITO (2010) 41 DTR 497 (Chennai), latter judgment, it was held that deduction is available on pro rata basis. Also refer special Bench-Bhrama Associates (2009) 119 ITD 255 / 22 DTR 1 / 30 SOT 155 / 122 TTJ 433 (SB)(Pune)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Percentage completion method**

An assessee developing a housing project and fulfilling all other requirements of section 80-IB(10) can adopt "project percentage method" to arrive at the eligible profits for claiming deduction under the said section. Deduction can not be postponed to alter year that is on completion of project. (A.Y. 2004-05)

*B. K. Patel Enterprises v. Dy. CIT (2009) 28 DTR 451 / 125 TTJ 974 (Pune)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Retrospective**



The restriction put regarding the maximum commercial area to be built up, introduced by Finance (No. 2) Act, 2004, w.e.f. 1-4-2005 would apply only prospectively, and not retrospectively. (A.Y. 2003-04 and 2004-05)

*Arun Excelllo Foundation (P) Ltd. v. ACIT (2007) 108 TTJ 7 (Chennai)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Second project – No exemption claimed – Separate books of account**

Assessee having completed the construction of various wings of the building under approved plan in two different blocks under different certificates of commencement, was eligible for deduction under section 80-IB(10) in respect of one block in respect of which claim for deduction was made and which satisfied the requirement of section 80-IB(10). Claim could not be denied by clubbing the two blocks especially when the second block had been kept separate by assessee and for which deduction under section 80-IB (10) was not claimed. (A.Y. 2005-06)

*Saroj Sales Organisation v. ITO (2008) 3 DTR 494 / 115 TTJ 485 (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Renewal plan approved – Commencement certificate**

The Assessee purchased land in 1996 and wall was constructed. Original plan expired after validity period of one year. Revised plan was approved and commencement certificate issued on 30-9-2000. User of land for non-agricultural purposes was permitted on 28-6-2001. The Assessing Officer disallowed the claim for deduction under section 80-IB(10) on the ground that the condition i.e. commencement of the construction after 1-10-1998 was not satisfied. The Tribunal held that expenses incurred for change of land use and other administrative/ other land development expenses incurred prior to statutory approvals, which have been received after 1-10-1998 cannot result into commencement of the project before 01-10-1998, Hence, deduction under section 80-IB allowed. (A.Y. 2002-03)

*ITO. v. Vimalchand M. Dhoka, ITA Nos. 5520/Mum/2005, Bench – ‘A’, dt. 19-5-2008 - BCAJ P. 23, Vol. 40-B, Part 1, October 2008. (Mum.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Local authority – Residential as well as commercial project**

Housing project approved by the local authority as “residential as well as commercial project” is not a “housing project” eligible for relief under section 80-IB(10). (A.Y. 2002-03)

*Laukik Developers v. Dy. CIT (2007) 108 TTJ 364 / 105 ITD 657 / 11 SOT 278 (Mum.)(Trib.)*

*Editorial:- No more good law in view of Judgment of Bombay High Court in CIT v. Brahma Associates (2011) 333 ITR 389 (Bom.)(High Court)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Proportionate basis**

Project consisted of residential units where the individual flat size varied between 800 sq. ft. and 3,000 sq. ft. The Tribunal noted that the provisions of section 80-IB(10) do not provide for denial of deduction, if a housing complex contains both, the smaller and larger residential units. Hence the assessee allowed deduction computed on proportionate basis. (A.Y. 2002-03)

*ACIT v. Bengal Ambuja Housing Development Ltd., ITA No. 1735/Kol/2005, Bench-C, dt. 24-3-2006, BCAJ P. 546, Vol. 39-D, Part 5, August 2007. (Kol.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Land belong to others**

As per the provisions of section 80-IB(10), it was the undertaking that develops or builds the housing project that was entitled to deduction, irrespective of the fact whether it was the owner or not, or whether it was the contractor thereof. The requirement for claiming deduction was that such an undertaking must develop and build housing project, be it on their own land or on the land of others. (A.Y. 2003-04)

*Radhe Developers v. ITO, (2008) 113 TTJ 300 / 23 SOT 420 (Ahd.)(Trib.)*

**S. 80-IB(10) : Deduction – Undertaking – Development and construction – Housing project – Commencement of project**

Where assessee had started a housing project for which bank account was opened on 29-10-1998, agricultural land was converted into non-agricultural land on 30-1-1999 and building plan was sanctioned on 23-7-1999, assessee could be said to have commenced housing project after 1-10-1998 as required under section 80-IB(10) so as to be entitled to deduction; incurring of expenditure on cleaning of land and pooja before 1-10-1998 and activities, viz., approval of plan, marketing for booking residential units, availing of finance, receipt of advance booking money, etc., could not be construed to mean commencement of development and construction of housing project before 1-10-1998 so as to disentitle assessee for deduction under section 80-IB. (A.Y. 2000-01)

*Nirmithi Construction v. Dy. CIT (2005) 4 SOT 383 / 95 TTJ 117 (Pune)(Trib.)*

**S. 80-IB(10)(b) : Deduction – Undertaking – Development and construction – Housing project – Area set apart for amenities**

In order to allow assessee's claim for deduction under section 80-IB(10)(b), area of one acre available for development of housing project includes area required to set apart for amenities as per norms of corporation. (A.Y. 2003-04)

*Bunty Builders v. ITO (2011) 127 ITD 286 / 139 TTJ 367 / 56 DTR 300 (Pune)(Trib.)*

**S. 80-IB(11A) : Deduction – Development and construction – Housing project – Processing, Packing and packing of fruits – Vegetables**

NRI applicant produces fruit based drink mixes / concentrates derived from fruit juices squeezed from fruits - AAR observed that if the benefits under the section are not extended to the derivatives from the fruits, the benefit intended to be given to agro-processing industries will operate in a very limited sphere - Hence held it is

processing even if there is no preservation and benefit of deduction to be provided if other conditions are satisfied.

*Delna Rustum Boyce, (2009) 185 Taxman 180 / 318 ITR 455 / 227 CTR 46 / 30 DTR 185 (AAR)*

### **S. 80-IB(14) : Deduction – Undertaking – Development and construction – Housing project – Built up area**

Definition of “built-up area” in clause (a) of section 80-IB(14) introduced by Finance Act, 2004, has only prospective effect from 1-4-2005, therefore prior to 1-04-2005 balcony would not form part of built up area, irrespective of area of such balcony. (A.Y. 2003-04)

*ACIT v. Sheth Developers (P) Ltd. (2009) 33 SOT 277 (Mum.)(Trib.)*

### **Section 80-IC : Special provisions in respect of certain undertakings or enterprises in certain special category States**

#### **S. 80-IC : Deduction – Special category States – Conversion of proprietorship concern in to partnership – Not transfer of Capital asset [S. 45(3), 80IA(12)]**

Conversion proprietorship in to a partnership was nether a case of amalgamation nor transfer of capital asset attracting the provisions of section 45(3) for charge of capital gains tax, the assessee would not be denied the deduction section under section 80IC for remaining unexpired period after such conversion (A. Y. 2006-07).

*CIT v. Mega Packages (2011) 203 Taxman 236 (P&H)(High Court)*

#### **S. 80-IC : Deduction – Special category States – Himachal Pradesh**

AAR ruled that conversion of raw castings supplied by principal into machined castings is eligible for deduction as manufacturing process brings into existence commercially new goods and it can be said to have undertaken business activities which amount to manufacture or production of an article different from the raw casting.

*Ramit Kumar Sharma (2009) 309 ITR 344 / 177 Taxman 240 / 221 CTR 621 / 18 DTR 209 (AAR).*

### **Section 80J : Deduction in respect of profits and gains from newly established industrial undertakings or shops or hotel business in certain cases. [Omitted by the Finance (No.2) Act, 1996, w.r.e.f. 1-4-1989]**

#### **S. 80J : Deduction – New industrial undertakings – Use of old parts – Splitting – Reconstruction – Manufacture – Detonators**

Assessee investing huge amount to purchase new machinery to replace out dated unit for manufacturing of basic material. New machinery increasing production as well as enabling the assessee to produce one more product. Assessee using few parts of old machinery the value was less than 10% of new unit. Use of old parts does not

amount to splitting or reconstruction of old unit. Assessee is entitled to deduction under section 80J. (A. Y. 1982-83).

*CIT v. I.D.L. Chemicals Ltd. (2011) TAX L. R. 389 (AP)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Allowed in First Year**

Once the claim for deduction under section 80J has been allowed to the assessee in first year by the Tribunal and also for subsequent two years such deduction is allowable for subsequent year falling within period of five years.

*CIT v. Modi Industries Ltd. (2010) 48 DTR 364 / 327 ITR 570 (Delhi)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Revised return [S. 80HH]**

Claims for deduction under section 80HH of the Act made through Revised Return which had not been claimed in original return – Filing of Audit Report not necessary with the return itself and the claim for deduction is permissible even if Audit Report is filed at a later stage. (A.Ys. 1979-80, 1980-81)

*CIT v. Jagish Ram Krishan Chand (2008) 214 CTR 327 / 304 ITR 45 / 1 DTR 170 (HP)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Manufacture – Construction of flats**

Activity of construction of flats and shops is not a manufacture or production of article or thing and not eligible for deduction under section 80J of the Act. (A.Ys. 1978-79, 1979-80, 1980-81)

*CIT v. Raja Towers P. Ltd. (2008) 9 DTR 166 (Delhi)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Borrowed capital [Rule 19A]**

While computing the relief under section 80J the capital employed should be taken on the basis of the first day of the accounting period. (A.Y. 1971-72)

*CIT v. Modi Industries Ltd. (2007) 212 CTR 309 / 163 Taxman 705 (Delhi)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Manufacture – Bleaching, dying – Printing – Investment allowance**

Bleaching, dyeing and printing of grey cloth amounts to manufacture or production of an article or thing for purpose of sections 32A and 80J.

*CIT v. Shree Lalit Fabrics P. Ltd. (2007) 200 Taxation 133 (P&H)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Registration under Factories Act**

S. 80J does not require that the industrial undertaking should be registered under Factories Act. (A.Y. 1977-78)

*CIT v. Hanuman Rice Mills (2005) 275 ITR 79 (All.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Manufacture – Discs – Knives**

Assessee was engaged in manufacturing and selling of discs and knives and Maintainance were utilized for manufacture of knives, merely because claim was not made in respect of knives in earlier years, it being a separate and distinct unit, it would not debar assessee from claiming it and Tribunal was right in holding that a new industrial undertaking for manufacture of knives had come into existence and was entitled to deduction under section 80J. (A.Y. 1978-79, 1979-80)

*CIT v. Krishi Disc. (P.) Ltd. (2005) 277 ITR 113 / 145 Taxman 485 (All.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Period of deduction**

In case of the assessee- cooperative society, initial assessment year for deduction under section 80J was 1978-79, six year period for claiming deduction would expire with assessment year 1984-85 and for assessment years 1987-88, it was not entitled to set-off relief under section 80J brought forward from assessment years 1987-88 and 1988-89.

*Madurantakam Cooperative Sugar Mills Ltd. v. Dy. CIT (2005) 274 ITR 452 (Mad.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Cold storage**

Cold storage is not industrial company, hence, it is not entitled to deduction under section 80J. (A.Y. 1978-79)

*Ram Prakash Agrwal (HUF) v. CIT (2004) 141 Taxman 562 / 191 CTR 272 (All.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Borrowed capital**

Borrowed capital is to be excluded while computing capital employed.

*CIT v. Jahangani Cold storage (2004) 136 Taxman 321 (All.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Machinery gifted – Liability**

Machinery gifted by Australian Government to Indian Government and showed in balance sheet of the assessee company as liability owned to the Government, was to be included in capital employed. (A.Ys. 1974-75, 1975-76)

*CIT v. Modern Bakeries India Ltd. (2004) 190 CTR 551 / (2005) 273 ITR 237 / 142 Taxman 584 (Delhi)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Borrowed capital**

Borrowed capital can not be included in capital employed. (A.Y. 1977-78)

*CIT v. Vincast Engg (2006) 280 ITR 385 / (2004) 141 Taxman 545 (All.)(High Court)*

### **S. 80J : Deduction – New industrial undertakings – Manufacture – Production of films**

Assessee engaged in Production of films is an industrial undertaking engaged in the manufacture and production of an article within the meaning of section 80J(4)(iii). (A.Ys. 1979-80, 1981-82)

*Filmyug Pvt. Ltd. v. CIT (2003) 261 ITR 263 / 129 Taxman 399 / 182 CTR 395 (Bom.)(High Court)*

**S. 80J : Deduction – New industrial undertakings – Manufacture – Rent by leasing out manufacturing facility**

Merely because assessee receives rent by leasing out manufacturing facility, it cannot be said that income is derived from industrial undertaking.

*CIT v. Titanium Equipment Anode Manufacturing Co. Ltd. (2003) 259 ITR 487 / 134 Taxman 724 (Mad.)(High Court)*

**S. 80J : Deduction – New industrial undertakings – Capital employed – Subsidy**

Subsidy amount should not be deducted in computation of capital employed under section 80J. (A.Y. 1983-84)

*CIT v. Cadila Chemicals (P.) Ltd. (2003) 259 ITR 692 / 179 CTR 37 (Guj.)(High Court)*

**S. 80J : Deduction – New industrial undertakings – Capital employed – Work in progress**

The value of work in progress has to be treated as part of capital employed for the purpose of relief under section 80J. (A.Ys. 1979-80, 1980-81)

*CIT v. Asian Cables Corporation Ltd. (2003) 129 Taxman 588 / 262 ITR 535 / 180 CTR 139 / 262 ITR 535 (Bom.)(High Court)*

**S. 80J : Deduction – New industrial undertakings – Capital Employed – Borrowed capital**

Borrowed capital can not be included in capital employed.

*Anil Metal Industries v. CIT (2003) 130 Taxman 593 (All.)(High Court) / CIT v. Karan Chand Goel (2003) 130 Taxman 597 (All.)(High Court)*

**Section 80JJA : Deduction in respect of employment of new workmen**

**S. 80JJA : Deduction – Employment of New Workmen – Bio-degradable waste – Collecting and processing – Collecting and Processing of Bio-Degradable Waste [S. 80JAA]**

Since in proviso, to clause (I) of Explanation to section 80JAA expression 'existing number of workmen employed' has been used and not expression 'existing number of regular workman employed' for the purpose of computing deduction under section 80JAA, percentage, increase in number of regular workmen has to be determined with reference to existing number of workmen employed in industrial undertaking. (A.Y. 2000-01)



*CIT v. Panacea Biotech Ltd. (2010) 324 ITR 311 / 122 ITD 199 / (2009) 183 Taxman 212 / 29 DTR 110 (Delhi)(Trib.)*

**Section 80L : Deduction for certain interest income [Omitted by the Finance Act, 2005, w.e.f. 1-4-2006]**

**S. 80L : Deduction – Interest – Search & Seizure – Undisclosed income – Below taxable**

When the total income is below the taxable limit after allowing deduction under Section 80L the same, cannot be treated as undisclosed income for the block period. Even if the returns for those years were not filed. (A.Ys. 1987-88 to 1996-97)

*CIT v. Asandas Khatri (2006) 152 Taxman 635 / 283 ITR 346 / 201 CTR 160 (MP)(High Court)*

**S. 80L : Deduction – Interest – Dividend – Income clubbed of minor**

Separate deduction under section 80L is not allowable out of income of minor clubbed with income of parent. (A.Ys. 1997-98 and 1998-99)

*ITO v. Yogi H. Aggarwal (2005) 96 ITD 288 / 97 TTJ 903 (Mum.)(Trib)*

**Section 80M : Deduction for inter corporate Dividends [Omitted by the Finance Act, 2003, w.e.f. 1-4-2004]**

**S. 80M : Deduction – Inter corporate dividends – Gross or Net [S. 36(1)(viii)]**

Deduction under section 80M is allowable on gross amount of dividend without deducting the proportionate deduction available under section 36(1)(viii). (A.Y. 1986-87)

*Dy. CIT v. G. I. I. C. Ltd. (2010) 325 ITR 597 / 37 DTR 207 (Guj.)(High Court)*

**S. 80M : Deduction – Inter corporate dividends – Net Dividend**

Deduction under section 80M is to be allowed on net dividend income and not on the gross dividend income earned by the assessee. (A.Y. 1991-92)

*Williamson Financial Service Ltd. v. CIT (2007) 197 Taxation 457 / (2007) 295 ITR 371 / (2008) 168 Taxman 261 (Gau.)(High Court)*

**S. 80M : Deduction – Inter corporate dividends – Incorporate dividend**

For claiming deduction under section 80M, the dividend should have been distributed before the due date of filing of return under section 139(1). (A.Y. 1995-96)

*Delhi Tourism & TDC Ltd. v. CIT (2006) 205 CTR 471 / 285 ITR 114 / 155 Taxman 10 (Delhi) (High Court)*

**S. 80M : Deduction – Inter corporate dividends – Gross or net – Dividend**

Deduction has to be granted with reference to the gross dividend. Interest on borrowings and other expenses incurred in the trading activity are allowable as

deduction while determining business income and these expense cannot once again be deducted from dividend income for computing deduction under section 80M.

Gross or net dividend – Interest paid by the assessee whose main business is not dealing in shares, on the funds borrowed for the purpose of investment in shares was to be reduced from the gross dividend while granting relief under section 80M. (A.Y. 1981-82)

*CIT v. Emerald Co. Ltd. (2006) 201 CTR 124 / 284 ITR 586 / 150 Taxman 515 (Bom.)(High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Expenses**

When no expenses are incurred to earn dividend income, no notional expenditure can be deducted while allowing deduction under section 80M. (A.Ys. 1984-85, 1985-86)

*Maharashtra Apex Corporation Ltd. v. CIT 203 CTR 45 / 286 ITR 585 / 155 Taxman 53 (Karn.) (High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Interest on borrowings – Expenses**

Interest on borrowing and other expenditure incurred in the course of share trading activity are allowable as deduction while computing the business income and these expenses cannot once again be deducted from the dividend income for the purpose of computing deduction under section 80M. Deduction has to be granted with reference to gross dividend. (A.Y. 1981-82)

*CIT v. Emerald Co. Ltd. (2006) 284 ITR 586 / 201 CTR 124 / 150 Taxman 515 (Bom.)(High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Gross or net [S. 36(1)(viii)]**

Deduction under section 80M has to be worked out on gross dividend income and not after deducting sum allowable under section 36(1)(viii). (A.Ys. 1989-90, 1991-92)

*CIT v. Madhya Pradesh Audyogik Vikas Nigam Ltd. (2005) 274 ITR 625 / (2004) 140 Taxman 388 / 192 CTR 423 (MP)(High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Gross or net**

Deduction under section 80M is based on net dividend received. (A.Y. 1970-71)

*CIT v. Central Bank of India (2003) 130 Taxman 116 / 184 CTR 225 / 264 ITR 522 (Bom.)(High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Dividend or interest**

Amount received by SBI from UTI on its initial contribution to capital of UTI is dividend and not interest. (A.Ys. 1976-77, 1978-79, 1980-81)

*CIT v. State Bank of India (2003) 129 Taxman 409 / 262 ITR 662 / 181 CTR 62 (Bom.)(High Court)*

### **S. 80M : Deduction – Inter corporate dividends – Gross or net**

Assessee company being a development organization having made investment in shares of companies promoted by it and other upcoming companies in its role as development organization and not as an investor to earn dividend income, various activities carried out by the assessee constitute one single indivisible business and therefore no expenditure is to be apportioned to the dividend income of the assessee which is assessable as business income and deduction under section 80M is allowable on gross amount of dividend. (A.Ys. 1994-95, 1995-96)

*Dy. CIT v. Tamil Nadu Industrial Development Corporation Ltd. (2010) 127 TTJ 625 / 34 DTR 233 / 124 ITD 117 / 4 ITR 79 (TM)(Chennai)(Trib.)*

*Editorial:- Omitted by Finance Act 2003, w.e.f. 1-4-2004.*

### **S. 80M : Deduction – Inter corporate dividends – Dividend – Interest and management –Overhead expenses out of inter corporate dividend**

- (i) Deduction under section 80M is allowed on net dividend computed as per the provisions of sections 57 to 59 and not on gross dividend receipt.
- (ii) Net dividend income is to be computed under the head "Other Sources" after deducting expenditure incurred for the purpose of earning, making or realizing dividend income and not after allowing expenditure on general commercial consideration. (A.Y. 1994-95 to 1997-98)

*Punjab State Industrial Development Corporation Ltd. v. Dy. CIT (2007) 292 ITR 268 / 103 TTJ 364 / 102 ITD 1 (AT)(SB)(Chd.)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Borrowed money – Borrowings – Acquisition of shares – Proportionate management expenses**

If the assessee establishes that he has not utilized borrowed money for acquisition of shares, no proportionate deduction towards interest paid on money borrowed shall be deducted, but if the assessee fails to do so, such proportionate amount shall be deducted for computation of deduction under section 80M.

If the assessee establishes that he has not utilized borrowed money for acquisition of shares, no proportionate deduction towards interest paid on money borrowed shall be deducted, but if the assessee fails to do so, such proportionate amount shall be deducted for computation of deduction under 80M.

In computing the deduction under section 80M, the proportionate management expenses have to be deducted. (A.Y. 1994-95)

*Mahavir Spng. Mills Ltd. v. Dy. CIT (2006) 100 TTJ 471 (Chd.)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Dividend income – Gross or Net – Proportionate management expenses [S. 36(1)(iii)]**

Deduction under section 80M is allowed on net, which is computed as per the provisions of sections 57 to 59, i.e. after deducting expenditure actually incurred for the purpose of earning dividend but there is no question of allowing deduction of interest to which the provisions of section 36(1)(iii) are applicable. Proportionate management expenses or interest or other expenses could not be deducted while

computing dividend income for the purpose of allowing deduction under section 80M. (A.Ys. 1994-95, 1995-96, 1997-98)

*Punjab State Industrial Development Corpn. Ltd. v. Dy. CIT, (2006) 102 ITD 1 / 103 TTJ 364 (SB)(Chd.)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Intercorporate dividend [S. 115-O]**

The assessee had complied with the conditions of distribution of dividend before the due date as per section 80M. It further observed that the provisions of section 115-O were prospective in nature, and hence, were not applicable to the assessment proceedings for any year up to A.Y. 1997-98. Further, no amendments had been made under section 80M, which correspond to provisions of section 115-O(5). Further, the restriction had been put under section 115-O(5), only to ensure that share holders did not claim any further deduction in respect of dividend income. It was not to restrict the quantum of deduction as provided in section 80M up to A.Y. 1997-98. Accordingly, the claim of assessee was allowed. (A.Y. 1997-98)

*Eastin Hospital Services Pvt. Ltd. v. Dy. CIT, 'SMC' Bench, ITA No.3985/Delhi/2001, dt. 15-9-2006 - BCAJ P. 523, Vol. 39-C, Part 5, February 2007. (Delhi)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Interest**

Interest on borrowing for investment in shares of joint venture company is deductible under section 36(1)(iii) and consequently deduction under section 80M is allowable with reference to gross dividend. (A.Ys. 1997-98 and 1998-99)

*ATE Enterprises Ltd. v. Jt. CIT (2006) 103 TTJ 810 / 102 ITD 110 (Mum.)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Expenditure**

The expenditure which has nexus with earning of dividend income should be deducted from gross dividend before allowing deduction under section 80M. (A.Y. 1997-98)

*Bank of Baroda v. Jt. CIT (2005) 2 SOT 804 (Mum.)(Trib.)*

### **S. 80M : Deduction – Inter corporate dividends – Proportionate management expenses**

Disallowance of proportionate management expenses were held to be justified while computing deduction under section 80M.

*Punjab Tractor Ltd. v. Dy. CIT (2003) 128 Taxaman 28 (Mag.)(Chd.)(Trib.)*

### **Section 80-O : Deduction in respect of royalties, etc., from certain foreign enterprises (Allowance upto A. Y. 2004-05)**

#### **S. 80-O : Deduction – Royalties – Foreign enterprises**

Assessee having merely converted extensive educational materials in to concise form in CDs and books for better and easy understanding and exported the same to students abroad for coaching them is not entitled to deduction under section 80-O as

no new invention or design is made by the assessee in respect of educational material. (A.Y. 1998-99 to 2001-02)

*P. C. Thomas v. ACIT (2010) 36 DTR 47 / 231 CTR 306/ 326 ITR 386 (Ker.)(High Court)*

#### **S. 80-O : Deduction – Royalties – Foreign enterprises – Architectural designs**

Supply of architectural designs for use outside India, receipt of fee in foreign exchange is entitled to deduction. (A.Y. 2003-04)

*CIT v. Charles M. Correa (2010) 323 ITR 174 / 232 CTR 61 / 39 DTR 76 / 194 Taxman 491 / (2011) Tax L.R. 627 (Bom.)(High Court)*

#### **S. 80-O : Deduction – Royalties – Foreign enterprise – Apportionment of expenses**

Project relocation expenses which could be treated exclusively as domestic expenses and were, therefore, not to be taken into account for apportioning the same between the foreign expenses and domestic expenses while allowing deduction under section 80-O. (A.Y. 1997-98)

*CIT v. KSA Technopak (India) (P) Ltd. (2010) 33 DTR 148 (Delhi)(High Court)*

#### **S. 80-O : Deduction – Royalties – Foreign enterprises – Commercial information**

Supply of information to foreign ship owners and receipt of foreign exchange, the commercial information is provided outside India and consideration earned is in foreign exchange for the use of such information, the Assessee is entitled to benefit under section 80-O, Held Yes. (A.Ys. 1994-95, 1995-96)

*CIT v. Chakiat Agencies (P) Ltd. (2009) 224 CTR 286 / 314 ITR 200 / 24 DTR 26 (Mad.)(High Court)*

#### **S. 80-O : Deduction – Royalties – Foreign enterprises – Commercial information**

For Claiming deduction under section 80-O, it cannot be said that assessee must provide 'technical service', even though assessee receives consideration for only providing commercial information, it would be entitled to deduction. (A.Ys. 1992-93 to 1997-98)

*CIT v. Mittal Corporation (2005) 272 ITR 87 / 142 Taxman 697 / 193 CTR 1 (Delhi)(High Court)*

#### **S. 80-O : Deduction – Royalties – Foreign enterprises – Benefit of services in India**

Effect of CBDT Circular No. 700, dated 23/3/1995(1995) 213 ITR 78 (st), is that the deduction will be allowable even if recipient of service utilizes benefit of such services in India. (A.Y. 1996-97)

*CIT v. Inchcape India (P.) Ltd. (2005) 273 ITR 92 / 193 CTR 290 / 143 Taxman 234 (Delhi)(High Court)*

### **S. 80-O : Deduction – Royalties – Foreign enterprises – With held**

The exemption is available only in respect of an amount which is actually received in convertible exchange in India. Therefore, royalty withheld by payer on account of tax payable in that country would not be entitled to deduction. (A.Ys. 1976-77, 1977-78) *Atlas Cycle Industries Ltd. v. CIT* (2004) 270 ITR 108 / 192 CTR 354 / (2005) 142 Taxman 102 (P&H)(High Court)

### **S. 80-O : Deduction – Royalties – Foreign enterprises – Gross or net**

Gross receipts cannot constitute the basis of deduction under section 80-O. (A.Ys. 1979-80, 1980-81)

*CIT v. Asian Cable Corporation Ltd. (No. 2)* (2003) 129 Taxman 590 / 262 ITR 537 / 180 CTR 293 (Bom.)(High Court)

### **S. 80-O : Deduction – Royalties – Foreign enterprises**

Amount allowable under section 80-O of the Income Tax Act, is restricted to the total income and not to the income computed under the head business.

*CIT v. J. B. Boda & Co. Ltd. ITA No. 3224 of 18-10-2010* 307 (2010) 42-B-BCAJ December 2010 P. 35 (Bom.)(High Court)

### **S. 80-O : Deduction – Royalties – Foreign enterprises – TDS – DTAA – India-Thailand [S. 90, Art. 23(2)]**

TDS in the foreign country is not an amount brought in to India and therefore deduction under section 80-O is not allowable on that amount.

Credit has to be allowed against the Indian Tax payable to the extent of tax which was deducted in Thailand and such credit should be restricted to the tax payable in India. (A.Y. 1996-97)

*Vikram Tannan v. ITO* (2010) 128 TTJ 509 (AT)(Mum.)(Trib.)

### **S. 80-O : Deduction – Royalties – Foreign enterprises – Net receipts**

Deduction under section 80-O is not allowable on gross receipts but on net receipts after reducing the expenditure incurred. (A.Y. 1996-97)

*Blue Star Ltd. v. Jt. CIT* (2007) 108 TTJ 336 (Mum.)(Trib.)

### **S. 80-O : Deduction – Royalties – Foreign enterprises**

Deduction under section 80'O' for technical and professional fees rendered from India, and received by foreign enterprise outside India, would be available, even if benefit of such services by foreign recipient is utilized in India.

*AFM India Ltd. v. Jt. CIT* (2007) 160 Taxman 125 (Mag.)(Delhi)(Trib.)

### **S. 80-O : Deduction – Royalties – Foreign enterprise**

Where services provided by assessee in assessment years 1993-94 and 1995-96 fell under section 80HHE as well as under section 80-O, assessee would have liberty to claim deduction under any provision chosen by it. (A.Ys. 1993-94 to 1995-96)



*Mascon Technical Services Ltd. v. ACIT (2005) 3 SOT 861 (Chennai)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

Services which require purely or predominantly manual or non-technical skill with little or no engineering expertise, would be clearly outside scope of 'technical service' within meaning of section 80-O and mere employment of specialized skill in conducting business or human activity would not convert that business or human activity into a technical service or professional service within meaning of section 80-O; clearing and forwarding business done outside India could not be treated as technical or professional service. (A.Y. 1992-93)

*ACIT v. P.N. Writer & Co. (2005) 94 ITD 446 / 98 TTJ 595 (Mum.)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

Service rendered by assessee in capacity of buying agent to foreign enterprise would not come within ambit of expression 'professional and technical services rendered' and assessee would not be entitled to deduction under section 80-O in respect of commission received for such services. (A.Y. 1997-98)

*V. Elengovan v. Dy. CIT (2005) 97 ITD 187 / 98 TTJ 1079 (Chennai)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

If commission is received in convertible foreign exchange, from a foreign State or a foreign enterprise, in consideration for the use outside India of any information concerning, inter alia, industrial or commercial knowledge, experience or skill provided by assessee seeking deduction and other conditions of section 80-O are also fulfilled, assessee cannot be denied deduction on sole ground that said information, after being used by a foreign enterprise outside India, helped foreign enterprise using such information to procure goods from India in preference to any other country. (A.Ys. 1992-93, 1993-94)

*Khimji Visram & Sons v. Dy. CIT (2005) 1 SOT 618 (Mum.)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

Mere supply of particulars or bio-data of various Indians willing to work abroad and their selection or recruitment accordingly in India is a situation falling far too short of requisites necessary for attracting benefits of section 80-O. (A.Y. 1997-98)

*ITO v. Vivek Prabhakar Kunte (2005) 92 ITD 71 / 92 TTJ 266 (Bang.)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

Where assessee provided crew members for rendering wide range of highly specialized and technical services to an international wet lease airline company, it was entitled to deduction in respect of income from services so rendered. (A.Ys. 1995-96, 1997-98)

*Dy. CIT v. Aircrew Technical Services (P.) Ltd. (2005) 1 SOT 683 (Mum.)(Trib.)*

**S. 80-O : Deduction – Royalties – Foreign enterprise**

Where assessee was appointed as consultant by foreign companies to provide certain information and services which included services of helping Indian buyers in maintenance of machinery in India and was paid commission on basis of franchised products sold by foreign company in India, since a part of services rendered by assessee qualified for deduction under section 80-O, amount which was attributable to supply of information to principal should be allowed as deduction under section 80-O. (A.Ys. 1995-96 to 1997-98)

*Preet Davar v. Jt. CIT (2005) 1 SOT 788 (Delhi)(Trib.)*

### **S. 80-O : Deduction – Royalties – Foreign enterprise**

Where assessee was mainly engaged in rendering a number of services to foreign principal in form of collecting market information, identifying clients in India and their capabilities and potential to import products of foreign principal, as assessee mainly rendered services in India, though some part of it also related to services rendered from India to its clients abroad, only 20 per cent of assessee's receipts in convertible foreign exchange might be treated as eligible for deduction under section 80-O. (A.Y. 1992-93)

*ITO v. K. L. Bhakri (2005) 4 SOT 510 (Delhi)(Trib.)*

### **S. 80-O : Deduction – Royalties – Foreign enterprises – Direct expenses**

Only direct expenses can be deducted, and no estimated expenditure relating to offshore revenue can be deducted. (A.Ys. 1991-92 to 1997-98)

*Wipro Ge Medical Systems Ltd. v. Dy. CIT (2003) 81 TTJ 455 (Bang.)(Trib.)*

## **Section 80P : Deduction in respect of income of co-operative societies**

### **S. 80P : Deduction – Co-operative societies – Interest**

The words "whole of the amounts of the profits and gains of business" must mean that the deduction would be allowed in respect of the operational income of the society and not other income which accrues to the society. Interest income earned from short-term deposit of the surplus money would not be eligible for deduction in case of co-operative society carrying on the business of providing credit facility to the members under section 80P(2)(a)(i) or marketing of agricultural produce of its members under section 80P(2)(a)(ii). (A.Ys. 1991-92 to 1994-95, 1996-97 to 1999-2000)

*Totgar's Co-operative Sale Society Ltd. v. ITO (2010) 322 ITR 283 / 35 DTR 25 / 229 CTR 209 / 188 Taxman 282 (SC)*

### **S. 80P : Deduction – Co-operative societies – Manufacturing cloth through weavers – Members of the primary societies – Claim for deduction by the apex Co-operative Society**

The Assessing Officer ought to have called for the bye-laws of the assessee to determine (i) whether a weaver could have become a member of the apex society, and (ii) whether the assessee was engaged in the cottage industry. The Department

was directed to decide the applicability of section 80P keeping in mind the bye-laws of the assessee and the Scheme.

*CIT v. Rajasthan Rajya Bunkar Sah. Samiti Ltd. (2010) 323 ITR 365 / 190 Taxman 286 / 230 CTR 11 / 35 DTR 154 (SC)*

### **S. 80P : Deduction – Co-operative societies – Income from letting of godowns**

Department is directed to examine the total income of the assessee society and determine the amount allocable as rental income in the composite charge received by it towards ginning and passing charges and godown rent by applying the principle of proportionally instead of adopting an ad hoc measure of attributing 50 percent of the charges as rental income.

*CIT v. Baba Saheb Kedar Ginning & Pressing Co-operative Society Ltd. (2010) 38 DTR 153 / 189 Taxman 197 / (2010) 231 CTR 335 (SC)*

### **S. 80P : Deduction – Co-operative societies – Income derived from letting of Godowns**

The deduction is available only in respect of income derived from letting of godowns or warehouses, where the purpose is for storage, processing or facilitating the marketing of commodities. The Supreme Court confirmed the order of the High Court where it had held that the assessee was storing the goods in the godowns for its own trading activity and hence not eligible for deduction under section 80P. (A.Ys. 1989-90 to 1995-96)

*Udaipur Sahkari Upbhokta Thok Bhandar Ltd. v. CIT (2009) 26 DTR 82 / 315 ITR 21 / 182 Taxman 287 / 224 CTR 538 / (2010) 214 Taxation 88 (SC) / 8 SCC 393*

### **S. 80P : Deduction – Co-operative societies – Interest from members – High Court – Appeal [S. 260A]**

As the decision of the Supreme Court of relevance having not been noticed, the decision of the High Court was set aside and the matter remanded to the High Court for a fresh consideration.

*CIT v. Modern Engineers Construction Co-operative Society Ltd. (2008) 306 ITR 10 / 174 Taxman 419 / 219 CTR 8 / 12 DTR 198 / (2010) 230 CTR 17 (SC)*

### **S. 80P : Deduction – Co-operative societies – Co-operative Bank – Banking business – Approved securities**

Where a co-operative bank carrying on business of banking is statutorily required to place a part of its funds in approved securities, the income attributable under section 80P(2)(a)(i) of the Income Tax Act, 1961 was eligible for deduction. (A.Y. 1994-95)

*CIT v. Nawanshahar Central Co-operative Bank Ltd. (2007) 289 ITR 6 / 208 CTR 438 / 160 Taxman 48 (SC) / (2004) 10 SCC 606*

### **S. 80P : Deduction – Co-operative societies – Marketing agricultural produce of members – Amendment – Retrospective**

The Supreme Court held in an earlier decision that the deduction related to agricultural produce was restricted to "Produced by members". In a subsequent decision it held that the deduction can be in relation to a produce "belonging to members". While considering the retrospective amendment of 1999 to restrict the deduction to the agricultural produce "Produced by members" the Court held that the amendment was valid, however the 1999, amendment could not be construed as authorizing the revenue authorities to reopen those assessments where the reopening was already barred by limitation. The amendment did not seek to touch on the period of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature could not be taken to intend that the amending provision, authorized the Assessing Officer to commence proceedings which before the amendment came unto force, had by the expiry of the period provided, become barred. The 1999 amendment could apply to pending assessments in the sense that it could not revive a power lost by efflux of time.

*National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. v. UOI & Ors. (2003) 260 ITR 548 / 174 Taxation 409 / 181 CTR 1 / 128 Taxman 361 (SC)*

#### **S. 80P : Deduction – Co-operative societies – Income from co-operative bank**

Income received by a co-operative bank from deposits, whether or not they are made to discharge of a statutory obligation or otherwise, being income from banking business would be eligible for exemption under section 80P. (A. Y. 1997-98)

*CIT v. Andhra Pradesh State Co-operative Bank Ltd. (2011) 200 Taxman 220 / 60 DTR 281 / 336 ITR 516 / 244 CTR 86 (AP)(High Court)*

#### **S. 80P : Deduction – Co-operative societies – Interest – Exempted income [S. 14A]**

Deduction under section 80P(2)(d) is available after deducting the expenditure incurred in earning the income. (A.Y. 2002-03).

*The Punjab State Co-operative Milk Producers Federation Ltd. v. CIT (2011) 336 ITR 495 / 245 CTR 432 (P&H)(High Court)*

#### **S. 80P : Deduction – Co-operative Banks – Interest**

Interest earned by co-operative banks on deposits of its non – SLR funds is eligible for deduction under section 80P(2)(a)(i) of the Income-tax Act, 1961. (A.Y. 2002-03)

*CIT v. Muzaffar Nagar Kshetriya Gramin Bank Ltd. (2010) 323 ITR 202 / 40 DTR 307 (All.)(High Court)*

#### **S. 80P : Deduction – Co-operative societies – Interest income**

Where the surplus funds not immediately required for day to day banking were kept voluntarily reserves and invested in KVP / VP, the interest income received from KVP / VP would be income from banking business eligible for deduction under section 80P(2)(a)(i).

*CIT v. Solapur Nagari Audyogic Sahakari Bank Ltd. (2010) 229 CTR 73 / 328 ITR 292 / 182 Taxman 231 / 26 DTR 67 (Bom.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Government securities**

Deduction under section 80P(2)(i) of the Act was allowable with respect to proportionate interest income derived on investment in Government securities in excess of SLR requirement.

*CIT v. Goa Urban Co-operative Bank Ltd. (2009) 29 DTR 158 (Bom.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Interest**

Interest income earned by the assessee a co-operative society engaged in banking business from the funds invested by it, including on the non – SLR funds was held to be attributable to the assessee's banking business and eligible for deduction under section 80P(2)(a)(i) of the Act.

*CIT v. H.P. State Co-operative Bank Ltd. (2009) 31 DTR 210 / 236 CTR 324 / 323 ITR 01 (HP)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Rental income Co-op. Bank**

Rental income earned by a co-operative bank from house property cannot be income attributable nor derived from the business of banking as such the same does not qualify for deduction under section 80P(2)(a)(i) of the Act.

Similarly, interest earned on investment of employee's provident fund being interest not earned from the money in stock-in-trade or circulating capital also cannot be an income attributable nor derived from the business of banking as such the same does not qualify for deduction under section 80 P (2) (a) (i) of the Act. (A.Ys. 1989-90, 1995-96)

*Bihar Rajya Sahkari Bhoomi Vikas Co-operative Bank Ltd. v. CIT (2009) 26 DTR 296 / 226 CTR 201 / 313 ITR 247 / 186 Taxman 54 (Patna)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Interest**

Interest income earned on surplus funds available with the society which are not immediately required by the assessee for its day to day banking business invested in KVP / IVP would be income from banking business eligible for deduction under section 80P(2)(a)(i) of the Act.

*CIT v. Solapur Nagari Audyogic Sahakari Bank Ltd. & Ors. (2009) 26 DTR 67 / 182 Taxman 231 / (2010) 229 CTR 73 / 328 ITR 292 (Bom.)(High Court)*

### **S. 80P : Deduction – Co-operative society – Interest**

Interest income derived from HDFC Bank was treated as income from other sources and the assessee was denied the deduction under section 80P(2)(a)(i) of the Act by the Assessing Officer On appeal High Court following the decision of Apex Court in the case of Mehsana Distt. Central Co-op. Bank Ltd. v. ITO [(2001) 251 ITR 522] held that the income earned from HDFC bank was eligible for deduction under section 80P(2)(a)(i). (A.Y. 1999-2000)

*CIT v. Punjab State Co-operative Bank Ltd. (2008) 202 Taxation 432 / 5 DTR 132 / 300 ITR 24 / 169 Taxman 290 (P&H)(High Court)*

**S. 80P : Deduction – Co-operative societies – Co-operative Bank – Interest fixed deposit**

Interest earned by the assessee, a co-operative bank on fixed deposit with another co-operative bank in compliance with the State Co-operative Societies Act was held to be income derived from banking business eligible for deduction under section 80 P of the Act.

*CIT v. Kangra Co-operative Banks Ltd. (2008) 12 DTR 227 / (2009) 221 CTR 192 / 309 ITR 106 / 183 Taxman 72 (HP)(High Court)*

**S. 80P : Deduction – Co-operative societies – Commission – Godown**

Deduction cannot be claimed by assessee society in respect of income from commission received against storing essential commodities in question in godown as part of its own trading stock. (A.Ys. 1997-98 and 2001-02)

*CIT v. Udaipur Sahakari Upbhokta Thok Bhandar Ltd. (2007) TLR (Oct.) 595 / (2009) 18 DTR 129 (Raj.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Voluntary reserve**

Income arising from utilization of voluntary reserve is attributable to business of banking and hence deductible under section 80P(2)(a)(i). (A.Y. 1995-96)

*CIT v. Baroda Peoples Co-op. Bank Ltd. (2005) 198 CTR 1 / 149 Taxman 509 / (2006) 280 ITR 282 / 2007 TLR 672 (Guj.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Sale of gypsum, seeds and fertilizers – Members – Societies**

Assessee co-operative society sold gypsum, seeds, fertilizers and other items to its member- societies and those goods were intended for agricultural purposes, assessee was entitled to deduction under section 80P(2)(a)(iv) rejection of assessee's claim of deduction on ground that those items had been supplied by assessee to its member society who in turn distributed them to cultivators irrespective of whether such cultivators were members of society or not, justified. (A.Ys. 1977-78, 1978-79, 1980-81)

*CIT v. U.P. Cooperative Federation Ltd. (2005) 148 Taxman 236 / (2006) 203 CTR 186 (All.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Attributable – Interest on deposit**

Interest income earned by assessee cooperative society on deposits with banks and post offices is 'attributable' to activity of cooperative society and as such qualifies for deduction under section 80P(2)(c). (A.Y. 1977-78)

*Chief CIT (Admn.) v. Kisan Sahkari Chini Mills Ltd. (2005) 273 ITR 42 / 196 CTR 220 (All.)(High Court)*



**S. 80P : Deduction – Co-operative societies – Interest – Gross or net**

Deduction under section 80P(2)(d) is allowable on net income from interest and not gross income. (A.Y. 1971-72)

*CIT v. Dugdh Utpadak Sahkari Sangh Ltd. (2005) 277 ITR 35 / 142 Taxman 611 (All.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Interest received from co-operative Bank**

Interest received by co-operative bank from setting apart certain funds as 'reserve' fund is exempt from payment of tax under section 80P(2)(a)(i). (A.Ys. 1989-90, 1991-92)

*CIT v. Grain Merchants Co-OP Bank Ltd. (2004) 134 Taxman 249 / 267 ITR 742 186 CTR 166 (Karn.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Interest – Dividend**

Interest and dividend income derived out of investment of assessee – co-operative bank's surplus or voluntary reserves during course of its ordinary banking business, were eligible for deduction under section 80P(2)(a)(i). (A.Y. 1993-94)

*CIT v. Sri Ram Sahakari Bank Ltd. (2004) 138 Taxman 45 / 186 CTR 734 / 266 ITR 632 / ITO v. Karnataka Central Co-Operative Bank Ltd. (2004) 140 Taxman 247 / 186 CTR 737 / 266 ITR 635 (Karn.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Letting out premises**

Income received by co-operative bank by letting out premises belonging to it was exempt from payment of tax under section 80P(2)(a)(i). (A.Ys. 1989-90, 1991-92)

*CIT v. Grain Merchants Co-operative Bank Ltd. (2004) 134 Taxman 249 / 186 CTR 166 / 267 ITR 742 (Karn.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Sanction of Registrar of co-operative societies**

Investment of reserves, etc. in various securities does not require sanction of Registrar of Co-operative Societies. (A.Y. 1981-82)

*CIT v. Rajasthan State Co-op Bank (2004) 136 Taxman 458 / 135 Taxman 504 / 186 CTR 266 / (2005) 272 ITR 600 (Raj.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Income from investment of reserve**

Income from investment of reserve and other funds in various securities is income from Banking business so as to exempt under section 80P(2)(a)(i). (A.Y. 1981-82)

*CIT v. Rajasthan State Co-op. Bank (2004) 136 Taxman 458 / 135 Taxman 504 / 186 CTR 266 / (2005) 272 ITR 600 (Raj.)(High Court)*

**S. 80P : Deduction – Co-operative societies – Cold storage**

Income of assessee co-operative society from cold storage is exempt under provisions of section 80P(2)(e) as cold storage can be treated as godown or ware house for purposes of that section. (A.Y. 1979-80)

*CIT v. District Co-Operative Federation (2004) 271 ITR 22 / (2005) 193 CTR 99 / 144 Taxman 333 (All.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Plea of exemption in appeal**

Failure of assessee to raise plea of exemption under section 80P before

Assessing Officer cannot disentitle it to the benefit of statutory exemption and the Commissioner (Appeals) would be justified in allowing the assessee's claim for exemption. (A.Y. 1992-93)

*CIT v. Rewari Central Co-operative Bank Ltd. (2003) 263 ITR 598 / (2004) 135 Taxman 183 (P&H)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Banking society**

Income earned by assessee co-operative bank by way of commission / fee for collecting electricity charges for and on behalf of its customers (public sector undertakings) would be income from banking activity and therefore, qualify for deduction under section 80P(2)(a)(i). (A.Ys. 1982-83 to 1991-92)

*CIT v. Ahmednagar Distt. Central Co-op. Bank Ltd. (2003) 132 Taxman 226 / 264 ITR 38 / 185 CTR 336 (Bom.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Banking society**

Deduction under section 80P(2)(a)(i) is allowable in respect of income from investment in purchase of 13.5 per cent PSEB Bonds, 2003 First Series. (A.Y. 1994-95)

*CIT v. Nawanshahar Central Co-operative Bank Ltd. (2003) 263 ITR 320 / (2004) 186 CTR 459 / 138 Taxman 196 (P&H)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Marketing Societies**

Assessee-society would be entitled to benefit of section 80P(2) only in respect of income earned from marketing of agricultural produce of its members and not in respect of that of non-members.

*CIT v. Kota Co-operative Marketing Society (2003) 128 Taxman 212 / 262 ITR 452 / 180 CTR 398 (Raj.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Marketing societies**

Deduction for marketing of agricultural produce is available only if member societies have grown agricultural produce. (A.Y. 1987-88, 1990-91)

*CIT v. Lakshadweep Co-operative Marketing Federation Ltd. (2003) 133 Taxman 653 / (2001) 171 CTR 326 / 252 ITR 668 / 119 Taxman 879 (Ker.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Supplying agricultural implements to members**

Assessee co-operative society, is entitled to claim exemption under section 80P(2)(a)(iv) in respect of receipts from its members by way of interest.

*CIT v. Co-operative Cane Development Union Ltd. (2003) 130 Taxman 603 (All.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Consumer co-operative society**

Assessee-society Supplying coal and diesel to its members, who were manufacturers of bricks and tiles, was not a consumer co-operative society within meaning of section 80P(2)(c)(i). (A.Ys. 1980-81 to 1987-88)

*Tamil Nadu Brick & Tile Mfrs. Industrial Service Co-operative Society Ltd. v. CIT (2003) 129 Taxman 343 / (2004) 265 ITR 332 / 182 CTR 158 (Mad.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Computation – Unabsorbed losses**

Deduction under section 80P should be allowed after set-off of unabsorbed losses of earlier years.

*CIT v. Ganganagar Mills (2003) 131 Taxman 825 / (2004) 186 CTR 407 / 265 ITR 540 (Raj.)(High Court)*

### **S. 80P : Deduction – Co-operative societies – Interest on refund [S. 2(13), 28(i), 56, 244A]**

Interest on refund constitutes gains of business hence eligible for deduction. Income tax refund constitute income from other sources. (A.Y. 2000-01)

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

### **S. 80P : Deduction – Co-operative societies – Banking – Interest on loans – Attributable**

Interest derived by assessee co operative society on loans advanced to non farming sector qualified for deduction under section 80P(2)(a)(i). (A.Y. 2006-07)

*Guru Harsahai Primary Co-op. Agri Development Bank Ltd. v. ITO (2010) 133 TTJ 4 (UO)(Amritsar)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Rental income**

Held, that once the Assessee society's claim under section 80P in respect of primary activity was denied, Assessee is not eligible for deduction under section 80P(2)(e) on its incidental Transport and Rental Income. (A.Ys. 2000-01, 2001-02 and 2002-03)

*Muzaffar Nagar District Co-op. Development Federation Ltd. v. ACIT (2010) 3 ITR 763 / 195 Taxman 46 (Mag.)(Delhi)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Attributable – Interest on fixed deposit**

Since funds kept in bank could be said to be ready for utilization by assessee in its business for providing credit facilities to its members, income from monies kept in bank could be said to be attributable to business of providing credit facilities so as to fall within ambit of section 80P(2)(a)(i). (A.Y. 2006-07)

*Punjab State Co-operative Federation of Housing Building Societies Ltd. v. ITO (2010) 38 DTR 284 / 4 ITR 507 / 134 TTJ 12 (UO)(Chd.)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Deduction of income of business of banking**

Income of co-operative bank from its banking business with non-member is eligible for deduction under section 80P(2)(a)(i). (A.Y. 2002-03)

*The Milli Co-operative Urban Bank Ltd. v. ITO (2007) 109 TTJ 116 / 106 ITD 151 (Hyd.)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Interest – Banking business**

Interest income arising from investment of funds out of reserves in Kisan Vikas Patras, NABARD bonds, State Government securities and IDBI bonds is income from banking business and is eligible for deduction under section 80P(2)(a)(i). (A.Y. 1997-98 and 1998-99)

*ITO v. D. C. C. Bank Ltd. (2007) 107 TTJ 83 / 104 ITD 280 (Bang.)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Interest – Investments income**

Interest income derived from investment out of its reserves in Government securities by an Co-operative Society carrying on banking business is eligible for deduction under section 80P(2)(a)(i). (A.Ys. 1993-94, 1996-97 and 1997-98)

*Kota Central Co-operative Bank Ltd. v. Jt .CIT (2006) 104 TTJ 730 (Jp.)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Schedule Co-operative bank – Interest**

Interest earned by a Scheduled Co-op. Bank registered under Co-operative Societies Act in investments made in compliance with statutory provisions out of the reserve fund is exempt under section 80P(2)(a)(i).

*ITO v. Vasai Vikas Sahakari Bank Ltd. (2006) 155 Taxman 155 (Mag.)(Mum.)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Rebate**

Rebate allowed by assessee, a co-operative society, to its members which reduced the prices of goods sold to the members was allowable as revenue expenditure. (A.Ys. 1993-94 and 1994-95)

*Dy. CIT v. Surendranagar Dist. Co-operative Milk Producers Union Ltd. (2006) 101 TTJ 497 (Rajkot)(Trib.)*

**S. 80P : Deduction – Co-operative societies – Banking business – Credit facilities – Interest income**

Interest from members, interest from bank on FDRs and interest on account of delayed payments by certain members, being attributable to assessee's banking business or providing credit facilities to its members is eligible for deduction under section 80P(2)(a)(i). (A.Ys. 1996-97, 1998-99 and 1999-2000)

Interest on advances to members on FDRs purchased out of sale proceeds of goods of members not claimed by them for availing credit limit from bank is eligible for deduction under section 80P(2)(a)(i). (A.Ys. 1996-97, 1998-99 and 1999-2000)

*Rawatsar K. V. Sahakari Samiti Ltd. v. ITO (2006) 102 TTJ 682 (Jodh.)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Ready forward transactions**

Ready forward transactions formed part of the normal banking business and the profits from such transactions was a part of profits attributable to the business of banking carried on by the assessee and was eligible for deduction under section 80P. Broken period interest was also eligible for deduction under section 80P. (A.Ys. 1990-91 and 1991-92)

*Bombay Mercantile Co-operative Bank Ltd. v. Dy. CIT (2006) 100 TTJ 713 / 7 SOT 549 (Mum.)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Marketing milk**

Assessee, a federal co-operative society, engaged in marketing of milk and milk products, cattle seeds, raw and processed agricultural produce, collection, production and packing of such products and financial and social development of milk producers is entitled to deduction under section 80P. (A.Ys. 1993-94 and 1994-95)

*Dy. CIT v. Surendranagar Dist. Co-operative Milk Producers Union Ltd. (2006) 101 TTJ 497 (Rajkot)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Marketing of controlled items – Levy wheat**

State Government also being a member of the co-operative society, income of co-operative society from marketing of controlled items like levy wheat, levy sugar which are agricultural produce of its farmer members is exempt under section 80P(2)(a)(iii). (A.Ys. 1996-97, 1998-99 and 1999-2000)

*Rawatsar K. V. Sahakari Samiti Ltd. v. ITO (2006) 102 TTJ 682 (Jodh.)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Disallowance and additions [S. 36(1)(va), 43B]**

Deduction under section 80P is allowable in respect of disallowances and additions made under sections 36(1)(va) and 43B. (A.Y. 2001-02)

*Jammu Rural Bank v. ITO (2005) 93 ITD 717 / 92 TTJ 791 (Amritsar)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Purchasing sugar cane from members**

Where assessee was engaged in business of purchasing sugarcane from members and then processing same and manufacturing sugar and other by-products, assessee

would not be entitled to deduction under section 80P(2)(a)(m) as sugar did not belong to members and was not an agricultural produce grown by members within meaning of said section. (A.Y. 1995-96)

*Budhewal Co-operative Sugar Mills Ltd. v. Dy. CIT (2005) 94 TTJ 307 (Chd.)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Members and non members – Proportionate**

Where assessee, a co-operative society, derived income from manufacture and sale of sugar by buying sugarcane from its members and non-members and claimed deduction proportionately under section 80P(2)(a)(iii) in ratio of purchases made from members with total purchase of sugarcane, Assessing Officer was justified in disallowing assessee's claim following order of Tribunal in assessee's own case and also making reference to decision of Supreme Court in *Kerala State Co-operative Marketing Federation Ltd. v. CIT (1998) 98 Taxman 313*.

*Karnal Co-op. Sugar Mills Ltd. v. Dy. CIT (2005) 148 Taxman 13 (Mag.)(Delhi)(Trib.)*

### **S. 80P : Deduction – Co-operative societies – Interest on investment – Interest tax collection**

- (i) Investments by co-operative banks in Government securities attributable to utilisation of its funds from statutory reserves under section 67(2) of Gujarat Co-operative Societies Act, 1961, therefore, the interest income from investment made by way of mandatory minimum banking reserves as required by the relevant provisions of the Banking Regulation Act is eligible for deduction under section 80P(2)(a)(i).
- (ii) Income from hiring of safe deposit vaults are eligible for deduction under section 80P(2)(a)(i).
- (iii) Surplus of interest-tax collected by the co-operative banks is a part of trading receipts. Such amount collected by the co-operative banks from their borrowers/customers was held to be collected in the normal course of banking business and it was integral part of income attributable to banking activities and therefore, qualify for deduction under section 80P(2)(a)(i). (A.Y. 1995-96)

*Surat District Co-Operative Bank Ltd. & ORS. v. ITO (2003) 85 ITD 1 / 78 TTJ 1 (SB)(Ahd.)(Trib.)*

### **Section 80QQ : Deduction in respect of profits and gains from the business of publication of books. [Omitted by the Direct Tax laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

### **S. 80QQ : Deduction – Publishers – Net income**

Assessee was entitled to deduction under section 80QQ at the rate of 20 per cent not on total profits derived from business carried on in India but on the net income after setting off the loss of non-manufacturing division.

*CIT v. MacMillan India Ltd. (2003) 130 Taxman 498 / 186 CTR 561 (Mad.)(High Court)*



**Section 80RR : Deduction in respect of professional income from foreign sources in certain cases (Allowance upto A.Y. 2004-05)**

**S. 80RR : Deduction – Professional income – Foreign sources – Artist – Dress designer**

Work of a dress designer involves a high degree of imagination, creativity and skill and therefore, a dress designer is an artist for the purpose of section 80RR. (A.Ys. 1999-2000 to 2001-02)

*CIT v. Tarun R. Tahlilini (2010) 328 ITR 629 / 232 CTR 289 / 41 DTR 74 / 192 Taxman 231 (Bom.)(High Court)*

**S. 80RR : Deduction – Professional income – Foreign sources – Chartered Accountant**

Income earned by the assessee by exercise of his profession as a Chartered Accountant which has nothing to do with the exercise of his profession as an author is not entitled to deduction under section 80RR. (A.Ys. 1998-99 and 2000-01)

*Dilip K. Sheth v. ITO (2010) 33 DTR 561 / 128 TTJ 41 / 5 ITR 581 (Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Author – Playwrite artist**

The denial of deduction under section 80RR for remuneration received for doing consultancy work, was not justified, on ground that Assessee was neither an author, playwright, artist, musician or actor or a sportsman.

Held, Income derived by an Individual relating to his professional activities, and being derived in exercise of his profession is eligible for deduction under section 80RR.

*Brahma Dev Sharma v. ACIT (2008) 174 Taxman 62 (Mag.)(Delhi)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Artist – Commentator**

The tribunal held that, Assessee, a well-known presenter, commentator and program compeare is not covered as an 'Artist' under provision of section 80RR.

Also the term 'Artist' and 'Artiste' are distinguishable, and assessee can not be artist as appearing in section 80RR, and hence not entitled to deduction. (A.Ys. 1996-97 to 2001-02)

*Harsha Achyut Bhogle v. ITO (2008) 114 TTJ 266 / 2 DTR 114 / 171 Taxman 109 (Mag.)(Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Anchoring the television**

Assessee actor used his skills as an actor or as an artist in anchoring the television game show "Kaun Banega Crorepati", payment received by the assessee for acting as an anchor for the said show was derived by him as an 'artist' and deduction under

section 80RR is allowable in respect of payment received by him from a foreign company. (A.Y. 2002-03)

*Amitabh Bachchan v. Dy. CIT (2007) 106 TTJ 925 / 12 SOT 95 (Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Music director of film**

For purpose of section 80RR, rendering of physical service outside India is not necessary; professional income can be derived by exercising profession in India, but it should be from a foreign source. (A.Y. 1997-98)

*Nadeem Akhtar Saifee v. Jt. CIT (2005) 1 SOT 268 (Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Film director**

Professional fee received by assessee-film director as advance from a foreign based entrepreneur for directing a film was eligible for deduction even though film project was subsequently abandoned. (A.Y. 1997-98)

*David Dhawan v. Dy. CIT (2005) 2 SOT 311 / 92 TTJ 161 (Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Music director**

Where assessee, a music director received certain amount by way of advance for shows to be performed abroad, assessee was entitled to deduction under section 80RR in respect of such income by way of advance, as income received by assessee by way of advance directly flew from exercise of this profession and merely because on account of no fault on part of assessee, organizers cancelled music shows, it could not be said that character of income underwent any substantial change disentitling assessee to deduction. (A.Y. 1997-98)

*Milind C. Shrivastava v. Jt. CIT (2005) 96 ITD 284 / 95 TTJ 953 (Mum.)(Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Author, artist, playwright, actor, musician, sportsman, athlete – cricket Commentator – Filing of Form 10H – Mandatory – Along with return not mandatory**

For entitlement of relief under section 80RR, two conditions must be fulfilled simultaneously: (i) the professional mentioned in that section must project his activity outside India with a view to contributing to greater understanding of India and its culture abroad, and (ii) augment foreign exchange resources of India. A television presenter and cricket commentator not contributing to any understanding of India and its culture abroad, even though augmenting foreign exchange resources, and he was not regarded as an 'artist' or 'actor' as defined in CBDT Circular No. 22 dated 17th July, 1969, nor a 'playwright', 'director' or 'producer' of a film within the meaning of CBDT Circular No. 675 dated 3rd Jan., 1994. Therefore, the assessee was not entitled to relief under section 80RR. (A.Y 1997-98)

The tribunal held filing of Form 10H before the Assessing Officer is mandatory, but filing the same along with return is not mandatory for claiming relief under section 80RR.

(A.Y. 1997-98)

*Harsha Bhogle v. Assessing Officer (2003) 86 ITD 714 / (2004) 87 TTJ 892 / 86 ITD 714 (Mum.) (Trib.)*

**S. 80RR : Deduction – Professional income – Foreign sources – Convertible foreign exchange**

Deduction under section 80RR is available on the amount brought into India in convertible foreign exchange, i.e. On gross amt if no expenses is incurred abroad, and on net amount if amount brought is net of expenses.

*ACIT v. Anup Jalota (2003) SOT 525 (Mum.) (Trib.)*

**Section 80RRA : Deduction in respect of remuneration received for services rendered outside India (Allowance upto A. Y. 2004-05)**

**S. 80RRA : Deduction – Remuneration for services outside India – Physical presence out side India**

Person has to be physically present outside India while rendering services and receipts on account of remuneration has to be in foreign currency. Otherwise the assessee is not entitled to deduction under section 80RRA.

*K. R. Pradeep v. CBDT 203 CTR 147 / 282 ITR 526 / 155 Taxman 207 (Delhi) (High Court)*

**S. 80RRA : Deduction – Remuneration for services outside India – Physical presence out side India**

It is not necessary for a technician to be physically outside India for purpose of claiming deduction for any service rendered by him outside India.

*A. S. Mani v. UOI (2003) 131 Taxman 717 / 264 ITR 5 / 184 CTR 511 (Karn.) (High Court)*

**S. 80RRA : Deduction – Remuneration for services outside India – Tax credit [S. 90, Art. 25]**

The credit could be allowed only against doubly taxed income. Where person is resident is to grant credit for taxes paid in country where income arise but only to extent to which itself levies tax.

There cannot be the payment of tax outside India and claiming refund in India without actually incurring liability for paying taxes in India. (A.Y. 1999-2000)

*Manpreet Singh Gambhir v. Dy. CIT (2010) 123 ITD 16 / (2008) 119 TTJ 615 / 26 SOT 208 / 15 DTR 460 (Delhi) (Trib.)*

**S. 80RRA : Deduction – Remuneration for services outside India – Foreign exchange**

While calculating deduction under section 80RRA, only expenditure directly connected with earning of foreign exchange is to be deducted to arrive at income from foreign exchange earnings. Action of Assessing Officer reducing portion of indirect expenses in addition to direct expenses deleted. (A.Y. 2000-01 and 2002-03)

*ACIT v. Nishit M. Desai (2008) 116 TTJ 681 / 9 DTR 113 / 177 Taxman 61 (Mag.)(Mum.)(Trib.)*

**S. 80RRA : Deduction – Remuneration for services outside India – Form no 10H – Revised return**

Assessee having filed Form No. 10H along with the revised return before the completion of the assessment, deduction under section 80RRA was allowable. (A.Ys. 1997-98 and 1998-99)

*Madanlal Mohanlal Narang v. ACIT (2006) 101 TTJ 1005 / 104 ITD 190 / 11 SOT 75 (Mum.)(Trib.)*

**S. 80RRA : Deduction – Remuneration for services outside India**

For granting deduction under section 80RRA it is not necessary that the assessee should physically remain outside India.

*Madhav Gangadhar Bhanoo v. Jt. CIT (2006) 154 Taxman 83 (Mag.)(Delhi)(Trib.)*

**S. 80RRA : Deduction – Remuneration for services outside India – Netting**

Concept of netting cannot be deployed while working out deduction under section 80RRA in respect of remuneration. (A.Y. 1998-99)

*Mukesh K. Shah v. ITO (2005) 92 ITD 349 / 92 TTJ 1060 (Mum.)(Trib.)*

**Section 80TT : [Omitted by the Finance Act, 1986, w.e.f. 1-4-1987]**

**S. 80TT : Deduction – Lottery winnings – Gross or net – Prior to 1-4-1987 [S. 80 B, 80AB]**

The deduction under section 80TT is applicable on the net winning amount received by the assessee and not on the gross amount of the winning prize. (A.Y. 1986-87)

*Mahaveer Kumar Jain v. CIT (2005) 277 ITR 166 / 142 Taxman 130 / 191 CTR 303 (Raj.)(High Court)*

***D. Other deductions***

**Section 80U : Deduction in case of a person with disability**

**S. 80U : Deduction – Physical Disability – Blindness**

Term 'total blindness' under section 80U means an individual who is unable to perceive light and not that he is totally unaffected by happenings around his surrounding. (A.Y. 1982-83)

*Gurbux Singh v. CIT (2006) 280 ITR 465 / (2005) 147 Taxman 423 / 198 CTR 598 (All.)(High Court)*

**Section 80VV : [Omitted by the Finance Act, 1985, w.e.f. 1-4-1986]**

## **S. 80VV : Deduction – Expenses for certain proceedings under Act – Aggregate**

Deduction under section 80VV has to be restricted “in aggregate” to Rs 5000 only even if the expenditure has been incurred wholly and exclusively for the purpose of business. (A.Ys. 1976-77, 1977-78)

*Atlas Cycle Industries Ltd. v. CIT (2004) 270 ITR 108 / 192 CTR 354 / (2005) 142 Taxman 102 (P&H)(High Court)*

### **CHAPTER VI-B**

#### **Restriction on certain deductions in the case of companies**

#### **Section 80VVA : Restriction on deductions in case of companies. [Omitted by the Finance Act, 1987, w.e.f. 1-4-1988]**

## **S. 80VVA : Deduction – Expenses incurred in respect of Tax Proceeding – Carry forward**

Despite deletion of section 80VVA from statute with effect from 1-4-1998, unallowed portion of deductions relating to preceding years would be allowable in next assessment year in terms of section 80VVA (4). (A.Y. 1989-90)

*CIT v. S.S.C Shoes Ltd. (2003) 127 Taxman 174 / 259 ITR 674 / 181 CTR 317 (Mad.)(High Court)*

### **CHAPTER VII**

#### **INCOMES FORMING PART OF TOTAL INCOME ON WHICH NO INCOME-TAX IS PAYABLE**

#### **Section 84 : Income of newly established industrial undertaking or hotels. [Omitted by the Finance (No. 2) Act, 1967, w.e.f. 1-4-1968]**

## **S. 84 : New industrial undertaking – Electricity duty – Exemption – Expansion [S. 15C, 1922 Act]**

Assessee admittedly used existing crushers, cranes, raw mills, packing machines and old cement mills to complete the process of manufacture of cement in the new unit, the unit was an expansion of an existing undertaking and the respondent was not entitled to exemption from electricity duty in relation there to.

*State of Gujarat & Others v. Saurashtra Cement and Chemical Industries Ltd. (2003) 260 ITR 181 / 175 Taxation 647 / 180 CTR 81 (SC)*

Editorial:- This section was omitted by the Finance Act (No. 2) 1967 w.e.f. 1-4-1968. The provisions contained in the section were incorporated in section 80J, Chapter VI-A.

#### **Section 86 : Share of member of an association of persons or body of individuals in the income of the association or body**

**S. 86 : Share of member of an association of persons – Company Member of an AOP – Eligible for concession [S. 40(ba)]**

There is no bar on a company, which is member of an AOP/BOI, from getting benefits of section 86. The exclusion provided under section 86 by words "other than company or Co-operative society or a society registered under Societies Registration Act, 1860, would be applicable only to an association of persons or body of individuals and not to members thereof.

*CIT v. Ideal Entertainment (P) Ltd. (2010) 194 Taxman 81 / 236 CTR 440 / 47 DTR 163 / (2011) 336 ITR 357 (Mad.)(High Court)*

**S. 86 : Share of member of an association of persons – Beneficiary – Rate purpose – Position prior to 1-4-1993**

The assessee was one of the beneficiaries of a trust, entire income of which was assessed in the hands of the assessee – trustees at maximum marginal rate, share of income of such trust received by the assessee could not be included in the assessee's total income, even for rate purposes. (A.Y. 1985-86)

*CIT v. P. N. Bajaj (2003) 127 Taxman 233 / 262 ITR 593 / 181 CTR 455 (Mad.)(High Court)*

**S. 86 : Share of member of an association of persons – Carryforward loss**

There is no bar for an AOP to carry forward losses in its hands. (A. Y. 1995-96)

*Birla Tyres v. Jt. CIT (2003) 80 TTJ 915 / (2004) 88 ITD 1 (TM)(Kol.)(Trib.)*

**CHAPTER VIII  
REBATES AND RELIEFS**

***A. Rebate of Income-tax***

**Section 88 : Rebate on life insurance premium, contribution to provident fund, etc. (Applicable upto A. Y. 2005-06)**

**S. 88 : Rebate on Life Insurance premium – Interest PPF Account – Not eligible**

Interest credited in PPF account which is not chargeable to tax under the Act is not eligible for rebate under section 88 of the Act. (A. Y. 1996-97)

*Shivkumar v. CIT & Anr. (2009) 30 DTR 191 / 227 CTR 686 (Chhattisgarh)(High Court)*

**S. 88 : Rebate on Life Insurance premium – Tax rebate – Block assessment**

Rebate is allowable in block assessment.

*S. Badrinarayan Kala v. ACIT (2005) 96 TTJ 642 / (2006) 153 Taxman 4 (Mag.)(Chennai)(Trib.)*

**S. 88 : Rebate on Life Insurance premium – Income chargeable to tax**



Scope of the term 'income chargeable to tax' is wide enough to include income of earlier year(s) also, and only requirement is that such sum should form part of assessee's income chargeable to tax. (A. Y. 1992-93)

*ITO v. Manmohan Krishna Gupta (2003) 78 TTJ 578 / 130 Taxman 124 (Mag.)(Jodh.)(Trib.)*

*Editorial : The words 'out of income chargeable to tax have been deleted w.e.f. 1-4-2003 by Finance Act, 2002*

### **S. 88 : Rebate on Life Insurance premium – Provident fund – Income chargeable to tax**

Payments towards PPF etc can be out of accumulated balance of previous year, and need not be out of Income of current year only. (A. Y. 1992-93)

*M. K. Minocha v. ACIT (2003) SOT 515 (Jab.)(Trib.)*

### **Section 88B : Rebate of income tax in case of individuals of sixty – Five years or above. [Omitted by the Finance Act, 2005, w.e.f. 1-4-2006]**

#### **S. 88B : Rebate – Date of birth – Identity card – Election commission**

Date of birth mentioned in the identity card issued by the Election Commission, her affidavit and also as per the certificates issued by SMO she was entitled to rebate under section 88B in A.Y. 2002-03 even though her PAN card shows a different date of birth and lesser age. (A.Y. 2002-03)

*Shakuntla Devi v. ITO (2006) 99 TTJ 917 / 152 Taxman 20 (Mag.)(Chd.)(Trib.)*

### **Section 88E : Rebate in respect of securities transaction tax (Allowable upto A.Y. 2008-09)**

#### **S. 88E : Rebate for Securities transaction tax – Book profit – Company – STT [S. 115JB]**

Rebate under section 88E is allowable in respect of payment of STT even if total income is assessed under section 115JB. (A. Y. 2005-06).

*CIT v. Horizon Capital Ltd. (2011) 64 DTR 306 / 245 CTR 601 (Karn.)(High Court)*

#### **S. 88E : Rebate for Securities transaction tax – Eligible [S. 40(a)(ib)]**

Disallowance of deduction for securities transaction tax under section 40(a)(ib) could not deprive the assessee of rebate under section 88E. (A. Y. 2006-07).

*ITO v. Chunilal T. Mehta (2011) 7 ITR 50 / 136 TTJ 77 (UO) / 51 DTR 378 (Kol.)(Trib.)*

#### **S. 88E : Rebate for Securities transaction tax – No tax payable – Income set off against brought forward losses [S. 87(2)]**

Both the conditions of chargeability of income to tax and liability to pay tax on transactions should co-exist so as to become eligible for relief under section 88E. STT paid by the assessee was not eligible for rebate under section 88E where the income

from speculation business was fully set off against brought forward speculation losses and no income tax was payable in respect of such transactions. (A. Y. 2006-07)  
*Oasis Securities Ltd. v. Dy. CIT (2010) 134 TTJ 649 / 47 DTR 218 (Mum.)(Trib.)*

## ***B. Relief for income-tax***

### **Section 89 : Relief when salary, etc. is paid in arrears or in advance**

#### **S. 89 : Relief for income-tax – Arrears or advance – Voluntary retirement – Termination of employment**

The amount received under the V.R.S., is a compensation received in connection with the termination of employment and as such eligible for relief under section 89 (1) of the Act after availing exemption under section 10(10C) of the Income-tax Act, 1961.

*CIT v. S. Nagaria (2006) 194 Taxation 693 (Karn.)(High Court)*

*CIT v. S. Sundar & Ors. (2006) 194 Taxation 467 / 201 CTR 306 / 284 ITR 687 (Mad.)(High Court)*

#### **S. 89 : Relief for income-tax – Arrears or advance – Voluntary retirement [S. 10(10C)]**

Assessee is eligible to claim simultaneous benefit under section 10(10C) as well as section 89(1) in respect of compensation received under voluntary retirement scheme. (A. Y. 2001-02)

*CIT v. G. V. Venugopal (2005) 273 ITR 307 / 144 Taxman 784 / 193 CTR 661 (Mad.)(High Court)*

#### **S. 89 : Relief for income-tax – Arrears or advance – Voluntary retirement – Profit in lieu of salary [S. 10(10C), 17(3)(i)]**

Amount received by assessee on voluntary retirement in excess of ` 5 lakhs, which is exempt under section 10(10C), would be eligible for relief under section 89 as it is profit in lieu of salary within the meaning of section 17(3)(i). (A. Y. 2001-02)

*CIT v. P. Surendra Prabhu (2005) 279 ITR 402 / 149 Taxman 82 / 198 CTR 209 (Karn.)(High Court)*

#### **S. 89 : Relief for income-tax – Arrears or advance – Voluntary retirement – Ex-gratia payment [S. 17(3)]**

Ex gratia payment received on voluntary retirement is profit in lieu of salary under section 17(3) and therefore, eligible for relief under section 89(1) (A. Y. 2001-02)

*ACIT v. C.L. Bugari (2006) 99 TTJ 185 / 150 Taxman 10 (Mag.)(Jp.)(Trib.)*

*Editorial : The Calcutta High Court has held in CIT v. Ajit Kumar Bose (1987) 165 ITR 90 (Cal.)(High Court) held that ex-gratia payment will fall under section 17(3).*

#### **S. 89 : Relief for income-tax – Arrears or advance – Voluntary retirement – Termination of service**

'Termination of service' includes voluntary retirement for purpose of granting relief under section 89 and, thus, relief under section 89 is to be allowed in respect of taxable portion of compensation received by employees under Voluntary Retirement Scheme. (A.Y. 2001-02)

*S. S. Jain v. ITO (2005) 92 ITD 377 / 93 TTJ 111 (Chd.)(Trib.)*

*Editorial : CBDT letter F. No. 194/6/73 dated 19-4-1973 also takes the same view regarding resignation.*

### **S. 89 : Relief for income-tax – Arrears or advance – Early retirement [S. 10(10C)]**

The payment received under Optional Early Retirement Scheme (OERS)/ Employees Early Severance Scheme (EESS) from Reserve Bank of India qualifies for exemption under section 10(10C) and balance qualified for relief under section 89(1). (A.Y. 2004–05)

*Petric F. Britto v. ITO, ITA No. 4493/Mum/2006, Bench – K, dt. 28-3-2007 – BCAJ P. 165, Vol. 39-D, Part 2, May 2007 (Mum.)(Trib.)*

## **CHAPTER IX DOUBLE TAXATION RELIEF**

### **Section 90 : Agreement with foreign countries**

#### **S. 90 : Double taxation relief – Review – DTAA to prevail over Act – Person residing in both contracting States – DTAA – India-Malaysia – Permanent establishment – Capital gains**

The Department filed a review petition against the decision of the Supreme Court to the effect that where the assessee in Malaysia did not have a permanent establishment in India, income derived from business in Malaysia and income derived from sale of immovable property there would not be liable to tax in India [Refer (2004) 267 ITR 654]. The Supreme Court dismissed the review petition on the ground of delay as well as on the merits.

*CIT v. Kulandagan Chettiar (P.V.A.L.) (2008) 300 ITR 5 (SC)*

*Editorial : See S. 90(2) of IT Act 1961*

#### **S. 90 : Double taxation relief – Dividend income – DTAA – India-Malaysia [Art. 11]**

Under Article 11 of the India-Malaysia DTAA, dividend is taxable only in the contracting state where such income accrues. Therefore, dividend income received from a Malaysian company would not be taxable in the hands of the assessee. (A.Y. 1992-93)

*Dy. CIT v. Torquise Investment and Finance Ltd. (2008) 300 ITR 1 / 168 Taxman 107 / 3 DTR 322 / 205 Taxation 184 / 215 CTR 209 (SC)*

*Editorial:-* The new treaty with Malaysia has become operative from 12th October, 2004 (2004) 210 ITR 62 (St.) earlier treaty (1997) 109 ITR 36 (St.)

**S. 90 : Double taxation relief – DTAA – India-South Korea – Income – Attribution of profits the permanent establishment [S. 4, 5, 9, 44B, Art. 7]**

Since there is no specific provision under the Act to compute profits accruing in India in the hands of the foreign entity, the profits attributable to the permanent establishment of the foreign enterprises is required to be computed as per the normal accounting principles and in terms of the general principles of the Income-tax Act. Further profits of the Permanent Establishment are to be computed treating it as an independent unit. Any profit that accrues to the non-resident for operations carried out outside India would not be taxable in India. (A. Ys. 1987-88, 1988-89)

*CIT v. Hyundai Heavy Industries Co. Ltd. (2007) 291 ITR 482 / 161 Taxman 191 / 210*

CTR

178 / 7 SCC 422 (SC)

**S. 90 : Double taxation relief – DTAA to prevail over Act – Person residing in both contracting States – India-Malaysia – Permanent establishment – Capital gains**

In case of conflict between Income Tax Act and provisions of DTAA, provisions of DTAA would prevail over provisions of Income Tax Act. Tax liability arising in respect of a person residing in both contracting States has to be determined with reference to his close personal and economic relations with one or other. In absence of permanent establishment in India in regard to carrying on of business of rubber plantations in Malaysia, business income earned by assessee out of rubber plantations could not be taxed in India. Capital gains are covered by Tax treaty.

*CIT v. Kulandagan Chettiar (P.V.A.L) (2004) 267 ITR 654 / 137 Taxman 460 / 189 CTR 193 / 181 Taxation 557 (SC)*

*Editorial : Now see S. 90(2).*

**S. 90 : Double taxation relief – Notification – India-Mauritius**

Once a notification (Double Taxation Avoidance Agreement) is issued under section 90, provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. Double Taxation Avoidance Agreement between India and Mauritius is valid in law. Circular no 789 dt. 13-4-2000 clarifying that FIIs, etc which are resident in Mauritius would not be taxable in India on income from capital gains arising on sale of shares, is valid and efficacious.

*UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 / 132 Taxman 373 / 184 CTR 450 (SC)*

**S. 90 : Double taxation relief – Agreement with foreign countries – Liaison office**

Liaison office of a South Korean company carrying on activities of identifying the buyers, negotiating with them, procuring purchase orders, forwarding the same to head office in Korea, following up with the customer for realisation of payments and

offering after sales services was held to be a Permanent Establishment (P.E.) and the profits earned in India through this liaison office are taxable in India as per Article 5 of the DTAA between India and South Korea. (A. Ys. 2001-02 to 2006-07)

*Jebon Corporation India Liaison Office v. CIT (Int. Taxation) & Anr. (2011) 55 DTR 113 / 245 CTR 300 / (2012) 206 Taxman 7 (Karn.)(High Court)*

### **S. 90 : Double taxation relief – Overriding effect – Royalty**

Income from receipt of royalties as set out in sec. 9(1) (vi) are taxable in India whether or not the non-resident has a place of residence, or place of business or business connection in India. However, the correct interpretation of the Double Taxation Avoidance Agreement would be to include the royalties from patents, copyrights or trade marks and the like within the expression "industrial" or "commercial" profits. This income would not be royalties within the meaning of the Double Taxation Avoidance Agreement but would fall under the expression "commercial or industrial profits." In the absence of a permanent establishment, such income would not be taxable in India. (A. Y. 1979-80)

*CIT v. Siemens Aktiengesellschaft (2009) 310 ITR 320 / 177 Taxman 81 / (2008) 220 ITR 425 / 15 DTR 233 (Bom.)(High Court)*

### **S. 90 : Double taxation relief – Income deemed to accrue or arise in India – Management charges – DTAA – India-Sweden [Art. III]**

Income relating to business management or technical management, are not to be treated as commercial profits and they would be outside the scope of exemption under Article III and hence taxable in India. (A. Y. 1988-89)

*CIT v. Swedish Telecoms International AB (2009) 181 Taxman 148 / 224 CTR 418 / 318 ITR 280 / 24 DTR 233 (Bom.)(High Court)*

### **S. 90 : Double taxation relief – Permanent establishment – DTAA – India-UAE [Art. 5(c)(e)]**

Liaison offices do not constitute a P.E. since liaison offices perform auxiliary functions and are thus covered under Art 5 (c) (e) of the Indo-UAE Treaty. The Authority fell in error of law in holding that liaison offices would constitute P.E. since without the acts performed by the liaison offices the non-resident assessee would not have been able to fulfill its part of the contract- this is because, going by this reasoning, every other activity would be required to be performed to enable the non-resident assessee to fulfill its part of the contract. That does not mean that even liaison offices performing auxiliary services would constitute a P.E. (A.Ys. 2000-01 to 2003-04)

*U.A.E. Exchange Centre Ltd. v. UOI & Anr. (2009) 183 Taxman 495 / 223 CTR 250 / 313 ITR 94 / 22 DTR 33 (Delhi)(High Court)*

### **S. 90 : Double taxation relief – Advertisement revenue – DTAA – India-Singapore**

Advertisement revenue received by a Singapore telecasting company through its dependent agent PE in India by way of contracts made outside India on principal to principal basis and paying fee to its agent on an arm's length price basis would not be liable to income tax in India with respect to advertisement revenue received by the assessee. (A.Y. 1999-2000)

*SET Satellite (Singapore) PET Ltd. v. Dy. DIT (2008) 11 DTR 313 / 218 CTR 452 / 307 ITR 205 / 173 Taxman 475 (Bom.)(High Court)*

*Editorial : The High Court followed the Supreme Court Judgment in DIT v. Morgen Stanley & Inc (2007) 292 ITR 416 (SC)*

#### **S. 90 : Double taxation relief – Dividend income – DTAA – India-Malaysia**

DTAA between India and Malaysia – Dividend income earned in Malaysia by Indian Resident is not taxable in India by virtue of provision of DTAA.

*Dy CIT v. Furquoise Investment & Finance Ltd. (2008) 299 ITR 143 / (2006) 202 CTR 395 / 154 Taxman 80 (MP)(High Court)*

#### **S. 90 : Double taxation relief – Dividend income – DTAA – India-Malaysia**

The dividend income earned by the assessee from a Malaysian company is not in taxable India in the light of Agreement for avoidance of double taxation of Income and prevention of fiscal evasion of tax between Government of India and Government of Malaysia.

*Dy. CIT v. Turquoise Investment & Finance Ltd. (2006) 154 Taxman 80 / 202 CTR 395 / (2008) 299 ITR 143 (MP)(High Court)*

#### **S. 90 : Double taxation relief – Remuneration – DTAA – India-Austria [Art. 14(2)]**

Exemption from tax liability in India as per clause (c) of article 14(2) is available if profit or remuneration is subject to tax in Austria. There is no requirement that assessee should have actually paid tax in Austria.

*Emmerich Jaegar v. CIT (2005) 274 ITR 125 / 144 Taxman 203 / 193 CTR 57 (Guj.)(High Court)*

#### **S. 90 : Double taxation relief – Salaries – Non-resident working in India – DTAA – India-Italy**

Salaries of assessee non residents working in India were borne by Italian company 'E' (employer) and such salaries were also paid in Italy by head office there, even though employer company had permanent establishment in India, since expenses on salaries were not borne by permanent establishment of 'E' in India, salaries received by assessee were not liable to tax in India. (A.Ys. 1985-86, 1986-87)

*CIT v. Elitos S.P.A. (2005) 145 Taxman 210 / 196 CTR 638 / 280 ITR 495 (All.)(High Court)*

#### **S. 90 : Double taxation relief – Helicopter services – DTAA – India-Italy**



Indian company (contractor) entered into an agreement with charter ONGC for providing helicopter services for operations of exploration and exploitation of oil and natural gas in off shore and on shore areas in India and in terms of agreement, one helicopter, with pilots and engineers (assessee) to operate and maintain helicopter was provided by contractor to charters, as expenditure in question on payment of salaries to assessee was not borne by permanent establishment in India assessee would not be exigible to tax under Indian taxation laws, in view of article 16(2) of DTAA. (A.Y. 1987-88)

*CIT v Elitos S.P.A. (2005) 148 Taxman 108 / 199 CTR 439 / (2008) 296 ITR 435 (All.)(High Court)*

### **S. 90 : Double taxation relief – Income earned in Malaysia – DTAA – India-Malaysia**

The assessee was engaged in the business of textile, spares and equipment. For the assessment year 1988-89 the assessee was certified under section 143(3) read with section 263 of IT Act 1961 the assessee disputed the assessability of an amount of ₹ 39,20,252/- being fees received for technical and engineering services rendered by the assessee outside India. The Commissioner (Appeals) and Tribunal held that the amount was not assessable in India. On appeal to the High Court, the Court held that income earned from Malaysia is not taxable in India. (A.Y. 1988-89)

*CIT v. Kwaliti Textile Associates Pvt. Ltd. (2005) 272 ITR 371 (Mad.)(High Court)*

### **S. 90 : Double taxation relief – Benefit – Fiscal year – DTAA – India-Malta [Art. 29(2)]**

In view of article 29(2) of DTAA with Malta, benefits of provisions of DTAA could be availed only for fiscal year starting from 1-4-1996 to 31-3-1997, i.e. Asst. year 1997-98, and not in respect of Asst. year 1996-97.

*Norasia Lines (Malta) Ltd. v. Dy. CIT (2005) 279 ITR 268 / 148 Taxman 522 / 199 CTR 377 (Ker.)(High Court)*

### **S. 90 : Double taxation relief – Income deemed to accrue or arise in India – Fees for technical services – Drawings and design – DTAA – India-Germany [S. 9(1)(1), Art VIII-A]**

Engineering fees for supply of drawings and design is fees for technical services with in the meaning of article VIII-A of DTAA with Germany. When there is a special provision dealing with special type of income such a provision should be understood as excluding a general provision dealing with income accruing or arising out of the business connection. Even though section 9 (1)(vii) comprehends the income by way of fees received for technical services rendered as a result of business connection or otherwise, yet it was not possible to apply the provisions of section 9 (1) ((i) because the said section stood excluded as a result of the provisions of the amended DTA Agreement. Therefore, the instant case would be covered by article VIII-A of the amended DTA Agreement. (A.Y. 1984-85)

*AEG Aktiengesellschaft v. CIT (2004) 137 Taxman 1/267 ITR 209 / 188 CTR 497 (Karn.)(High Court)*

*Editorial : However oversight purchase of drawings & designing is not technical fees & not liable to tax in India. See CIT v. Davy Ashmore India Ltd. (1991) 190 ITR 626 (Cal.)(High Court)*

### **S. 90 : Double taxation relief – Interest – Debt – Claims of any kind**

The term 'interest' as used in the article concerning taxation of interest in DTAA means income from debt – claims of every kind, whether or not secured by mortgage and whether or carrying right to participate in the debtor's profits and in particular, income from Government securities and income from bonds or debentures including premiums and prizes attaching to such securities, bonds or debentures. Penal charges for late payment shall not be regarded as interest for the purpose of article. Thus payment of interest by means of irrecoverable letter of credit by the buyer will be considered as an interest paid to seller. (A.Y. 1995-96)

*CIT v. Vijay Ship Breaking Corpn. (2003) 129 Taxman 120 / 261 ITR 113 / 181 CTR 134 (Guj.)(High Court)*

### **S. 90 : Double taxation relief – DTAA – Income derived from Malaysia – Capital gains**

In CIT v. URSRM Firm and others (1994) 208 ITR 400 (Mad) the court held that capital gains arising on sale of property in Malaysia is not taxable in India. Following ratio the court held that Income from Malaysia can not be subject for tax in accordance with the double tax avoidance agreement between India and Malaysia. Therefore, Income derived from Malaysia could not be subjected to tax in India in view of DTAA. (A.Y. 1986-87)

*CIT v. K. Muthu (2003) 130 Taxman 66 (Mad.)(High Court) / CIT v. V.S.S.V. Meenakshi Achi (2003) 129 Taxman 233 (Mad.)(High Court)*

### **S. 90 : Double taxation relief – Process – Royalty – DTAA – India-Singapore [Art. 12]**

Assessee, a Singaporean company, which is engaged in providing international telecommunication connectivity services. The amount received by it from Indian customers is for use of "process" besides for use of or right to use industrial, commercial or scientific equipment and therefore, payments made by Indian customers to the assessee company are royalty within the meaning of Art. 12(3) of the Indo-Singapore DTAA. (A. Ys. 2002-03 & 2003-04).

*Verizon Communications Singapore PTE Ltd. v. ITO (2011) 54 DTR 65 / 45 SOT 263 (Chennai)(Trib.)*

### **S. 90 : Double taxation relief – DTAA – India-Australia – Interest on tax refund – Not "effectively connected" with PE [Art. 11(4)]**

Under Article 11(4) of the DTAA, interest from indebtedness "effectively connected" with a PE of the recipient is taxable under Article 7 and not under Article 11. The

payment of tax was the responsibility of the foreign company and the fact that it was discharged by way of TDS did not establish effective connection of the indebtedness with the PE. In order to be "effectively connected", it is not necessary that the interest income has to be necessarily business income in nature. Even interest assessable under "other sources" can qualify. (A.Y. 2003-04)

*ACIT v. Clough Engineering Ltd. (2011) 138 TTJ 385 / 9 ITR 618 / 55 DTR 34 / 130 ITD 137 (SB)(Delhi)(Trib.)*

**S. 90 : Double taxation relief – Interest on income tax refund – India-German – DTAA**

**[Art. 11, 8(3)]**

Interest on income tax refund is chargeable to tax under Art 11 of Indo-German DTAA, Authorities below were justified in rejecting the contention of the assessee for its inclusion in Art. 8(3) as only interest on funds which are connected with the operation of ships or aircrafts is covered within the ambit of Art. 8(3). (A. Y. 2004-05).

*Hapag Lloyd Container Line GMBH v. ADIT (International Taxation) (2011) 56 DTR 185 / 131 ITD 122 / 141 TTJ 169 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Agent – DTAA – India [Art. 5]**

Even though agents act independently in ordinary course of business, if they devote their activities wholly or mostly on behalf of foreign enterprise, they would be considered as PE of foreign enterprise irrespective of whether they conclude contracts binding on their principal or not. (A. Y. 1997-98).

*Reuters Limited v. Jt. CIT (2011) 62 DTR 322 / 48 SOT 246 / 142 TTJ 457 (Mum.)(Trib.)*

*Editorial: Refer Jt. CIT v. Reuters Limited (2009) 33 SOT 301 / (2010) 133 TTJ 22 / (2011) 7 ITR 422 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Offshore transportation – Installation of pipelines – DTAA – India-Mauritius [Art. 5(2)]**

Activities of offshore transportation and installation of pipelines carried out by assessee, a Mauritian company, through marine vessel amount to assembling. Definition in Art. 5(2) of the Indo Mauritius DTAA includes only those assembly projects which last for more than nine months. Matter was restored to the Assessing Officer to ascertain the period of existence of the assessee in India and thereafter to decide the existence of Permanent Establishment. (A. Y. 2007-08).

*GIL Mauritius Holdings Ltd. v. Asst. DIT (2011) 63 DTR 282 / 197 Taxman 247 / (2012) 143 TTJ 103 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-France – Onus on Assessing Officer – Dependent agent is not PE in absence of finding that transactions are not at ALP [Article 5]**

The assessee, a French company, engaged in the operation of ships in international traffic, claimed that it did not have a PE in India and that no part of its income was chargeable to tax in India. The Assessing Officer & DRP held that as the assessee had an agent in India which concluded contracts, obtained clearances and did the other work, there was a PE in India under Articles 5(5) & 5(6) of the DTAA. On appeal by the assessee, HELD allowing the appeal:

(i) In order to constitute a PE under Article 5(1) & 5(2), three criteria are required to be satisfied viz; physical criterion (existence), functionality criterion (carrying out of business through that place of physical location) & subjective criterion (right to use that place). There must exist a physical "location", the enterprise must have the "right" to use that place and the enterprise must "carry on" business through that place. An "agency" PE will not satisfy this condition because the enterprise will not have the "right" to use the place of the agent. Under Article 5(6) of the India-French DTAA (which is at variance with the UN & OECD Model Conventions), even a wholly dependent agent is to be treated as an independent agent unless it is shown that the transactions between him and the enterprise are not at arms' length. The Department's argument that as the Assessing Officer had not examined whether the transactions were done in arm's length conditions, the matter should be restored to him is not acceptable because the onus was on the Revenue to demonstrate that the assessee had a PE. The onus is greater where the very foundation of DAPE rested on the negative finding that the transactions between the agent and the enterprise were not made under at arms length conditions. A negative finding about transactions with the dependent agent not being at ALP is sine qua non for existence of a DAPE under the India-France DTAA. The Assessing Officer could not be granted a fresh inning for making roving and fishing enquiries whether the transactions were at arm's length conditions or not (*Airlines Rotables Ltd. v. Dy. CIT (2010) 44 SOT 368* followed);

(ii) (Observed, on a conceptual note, taking note of revenue's plea but without deciding) If as a result of a DAPE, no additional profits, other than the agent's remuneration in the source country – which is taxable in the source state anyway de hors the existence of PE, become taxable in the source state, the very approach to the DAPE profit attribution seems incongruous. Further, before accepting the DAPE profit neutrality theory, as per *DIT v. Morgan Stanley and Co. Inc. (2007) 292 ITR 416 (SC)*, the arm's length remuneration paid to the PE must take into account 'all the risks of the foreign enterprise as assumed by the PE'. In an agency PE situation, a DAPE assumes the entrepreneurship risk in respect of which the agent can never be compensated because even as DAPE inherently assumes the entrepreneurship risk, an agent cannot assume that entrepreneurship risk. To this extent, there may be a subtle line of demarcation between a dependent agent and a dependent agency PE. The tax neutrality theory, on account of existence of DAPE, may not be wholly unqualified at least on a conceptual note. (A.Y. 2006-07)

*Delmas, France v. ADIT (2012) 67 DTR 73 / 144 TTJ 273 / 49 SOT 719 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Exemption – Domestic law – DTAA – India-Australia [Articles 7 & 12]**

Where non-resident is taxable under domestic law but there is a provision in treaty between India and country in which non-resident is incorporated to exempt transaction or reduce rigour of taxation to benefit of non-resident, provisions of treaty override provisions of domestic law. (A.Y. 2003-04)

*ACIT v. Paradigm Geophysical Pty. Ltd. (2010) 122 ITD 155 / 1 ITR 178 / 117 ITD 812 / 25 SOT 94 / 11 DTR 174 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Data collection measurement – DTAA – India-UK [Articles 7, 13]**

Work to be undertaken by assessee included data collection measurement of dynamic properties of machines, providing training to engineers nominated by "T" Ltd., etc, it could be concluded that assessee did "make available" technical knowledge, experience, skill and know-how processes to "T" Ltd. within the meaning of paragraphs (4) of Article 13 of DTAA and therefore assessment passed by the authorities were confirmed. As regards the second project since the role of assessee was confined to merely providing independent evaluation of motorcycles prior to their launch and there was no provision for making available any technical knowledge, experience and skill, etc. to 'T' Ltd., no addition can be made. (A.Ys. 2001-02, 2002-03)

*TVS Motor Co. Ltd. v. ITO (2010) 35 SOT 230 (Chennai)(Trib.)*

**S. 90 : Double taxation relief – Transportation of Mail – DTAA – India-USA [Art. 8]**

Transportation of mail or cargo, etc. by the assessee in the international traffic by air as owner / charter / lessee fell within the scope of Article 8 therefore, profits attributable to the same cannot be taxed in India. Benefit of Article 8 cannot be denied to the assessee merely on the ground that the assessee was collecting cargo from its customer's place and transporting the same to airport for the purpose of further transportation in the international traffic and vice versa. (A.Ys. 1998-99 to 2000-01)

*ACIT v. Federal Express Corporation (2010) 35 DTR 425 / 130 TTJ 526 / 4 ITR 338 / 125 ITD 1 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-South Korea [Articles 5, 7]**

Income derived from Korean company from overseas operations cannot be subjected to tax in India in view of Article 5 of DTAA between India and South Korea and since the assessee did not have PE in India its project office cannot be treated as PE. (A.Ys. 1997-98 to 2004-05)

*Dy. CIT v. Hyundai Heavy Industries Co. Ltd. (2010) 128 TTJ 4 (UO) / (2009) 32 SOT 482 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Fees for included services – DTAA – India-USA [Arts. 7 & 12]**

Consideration received for factory acceptance test and project management and engineering support services were not liable to tax in India, because such services were rendered overseas and non resident did not make technical services to Indian party. (A.Y. 1998-99)

*Dy. DIT v. Scientific Atlanta Inc. (2010) 37 DTR 98 / 4 ITR 422 / 130 TTJ 142 / (2009) 33 SOT 220 (Mum.)(Trib.)*

*Editorial : Refer CIT v. Swadish Telecom India Ltd. (2009) 181 Taxman 148 / 224 CTR 418 / 318 ITR 280 (Bom.)(High Court)*

**S. 90 : Double taxation relief – Permanent establishment – Construction – Assembly project – DTAA – India-Mauritius [Arts. 5 & 7]**

For the purpose of determining the applicability of the threshold time-limit under Art. 5(2)(i), of the Indo-Mauritius DTAA, what is to be taken in to account is the duration of the activities of the foreign enterprise on a particular site or a particular project or supervisory activity connected therewith, on a standalone basis and not all the activities in a tax jurisdiction as a whole. (A.Y. 1997-98)

*J. RAY McDermott Eastern Hemisphere Ltd. v. Jt. CIT (2010) 38 DTR 161 / 39 SOT 240 / 130 TTJ 121 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Charter of Air Craft – FDR Interest – DTAA – Indo-US Treaty [Art. 8]**

Activity which is directly related to transportation of passengers by assessee as owners / lessee / charter of aircraft would alone fall within the ambit of para. 2(b) of Article 8 of Indo-US Treaty. Deposit of amount in FDR could not be said to be connected with operation of aircrafts Para. 5 of Article 8 would not apply. (A.Ys. 1992-93 to 1999-2000)

*ADIT v. Delta Airlines Inc. (2010) 124 ITD 114 / (2009) 123 TTJ 266 / 22 DTR 204 / (2008) 26 SOT 514 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-Singapore [Art. 7, 8]**

Income of assessee, a tax resident of Singapore having been taxed in India, denying the benefits of Art. 8, without examining the issue whether the assessee had a PE in India within the meaning of Art. 7, matter remanded for examining the issue of PE and assessment accordingly. (A.Y. 1998-99)

*J. M. Baxi & Co. v. Dy. DIT (2010) 39 DTR 1 / 130 TTJ 625 / 42 SOT 333 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Assets of PE**

Despite cessation of Permanent Establishment, gains on transfer of PE asset taxable under Act and DTAA. (A.Y. 1998-99)



*Cartier Shipping Co. Ltd. v. Dy. DIT (2010) 131 TTJ 129 / 40 DTR 459 / 41 SOT 470 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-UK [Art 5 (1)]**

No PE under DTAA if three criteria are not fulfilled ie. Physical criterion ie. existence of physical location subjective criterion i.e. right to use that place and functionality criterion ie. carrying out of business through that place. It is only when these three conditions are satisfied, a PE under the basic rule can be said to have come into existence. (A.Y. 1998-99)

*Airlines Rotables Ltd. v. Jt. DIT (2010) 40 DTR 226 / 131 TTJ 385 / (2011) 44 SOT 368 (Mum.)(Trib.)*

*Also see decision in Motorola v. Dy. CIT (2005) 95 ITD 269 (SB)(Delhi)(Trib.)*

**S. 90 : Double taxation relief – Reimbursement of salary – Employees deputed – DTAA – India -USA [Art. S. 5(2) & 7]**

No income arises to the foreign company in India in the course of deputing personnel to an Indian company, who work under the control and supervision of the Indian company and thus become employee of the Indian company. Amount of salary of deputed employees reimbursed to the foreign company is not taxable in India. (A.Y. 2003-04)

*Dy. DIT v. Tekmark Global Solutions LLC, (2010) 4 ITR 1 / 131 TTJ 173 / 38 SOT 7 / 40 DTR 452 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Resident of UAE – DTAA – India-UAE [Art. 4, 7 & 12]**

It is not necessary that unless a person be taxed in the UAE that person cannot claim the benefits of Indo-UAE tax treaty in India, what is really relevant to see is whether or not the recipient was resident of the UAE.

*Hindustan Petroleum Corporation Ltd. v. ADIT (2010) 130 TTJ 518 / 38 DTR 485 / 36 SOT 120 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Agent – Income attributable – DTAA – India-Singapore**

Since the agent is only performing the functions of soliciting orders for sale of assessee's products and promoting sales, while all other main or core activities regarding arrangement or acquisition of products are performed in Singapore at least 10 percent of the profit earned from the activities of sale of spares by the assessee company to Indian customers can be said to be attributable to PE in India. (A.Ys. 1998-99 to 2004-05)

*Rolls Royce Singapore (P) Ltd. v. Addl. DIT (2010) 40 DTR 289 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Export – Non-resident [S. 80HHC]**

Deduction under section 80HHC is not available to non-resident. (A.Y. 2004-05)

*Mustaq Ahmed v. ADIT (2010) 124 ITD 312 / 2 ITR 315 / (2009) 29 DTR 410 / 126 TTJ 523 (Chennai)(Trib.)*

*Editorial : But section 5B decision in Rajeev Sureshbhai Gajwani v. ACIT (2011) 129 ITD 145 (SB)(Ahd.)(Trib.) where non-resident was entitled to benefit under section 80HHE by virtue of non-discrimination clause.*

**S. 90 : Double taxation relief – Royalty or technical fees – DTAA – India-Switzerland [Art. 12]**

Assessee was only rendering consultancy services, it did not import any know how to STPL, it retained the experience required to perform the services. Therefore, the receipts in question could not be said to be in the nature of royalty within the meaning of Article 12(3) of India - Switzerland treaty. (A.Ys. 1996-97 to 1999-2000 and 2001-02)

*Dy. CIT v. Preroy A. G. (2010) 39 SOT 187 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Reimbursement – Technical services – DTAA – India-France [Art. 13]**

Payment towards reimbursement of technical expenses to the head office which is not on account of any specific technical services having been "made available" cannot be brought to tax under Art. 13 of Indo-French tax treaty. (A.Ys. 1992-93 to 1999-2000) *ADIT v. Bureau Veritals (2010) 131 TTJ 29 / 39 DTR 145 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – Permanent Establishment – DTAA – India-Singapore [S. 9, 195, 201, Art. 12]**

Where payment of royalty is made by a tax resident of Singapore to another tax resident of Singapore, the same does not arise in India in terms of Art. 12(7) of DTAA between India and Singapore; there being no economic link between the payment of royalty and PE in India, the royalty does not arise in India having regard to the provisions of Art. 12(7) of the treaty. (A.Ys. 2003-04, 2006-07 & 2008-09)

*Set Satellite (Singapore) PTE Ltd. v. Addl. DIT (2010) 43 DTR 311 / 132 TTJ 459 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-UK [Art. 5(2), 7(1)]**

Items specified in clauses (j) and (k) of Art. 5(2) of Indo-UK, DTAA belong to a different genus of PEs i.e. extension of the basic rule set out in Art. 5(1) and thus, these clauses are applicable independent of Art. 5(1). Assessee UK based partnership firm, having rendered legal service to certain clients whose operations extended to India, and fulfilled the 90 days duration test envisaged in Art. 5(2)(k), it did have a PE in India under Art. 5(2)(k), and accordingly profits attributable to the PE are taxable under Art. 7.

Inclusion of "Profits indirectly attributable to PE" in Article 7(1) of Indo UK DTAA clearly incorporates a force of attraction principle in the tax treaty and therefore, in addition to taxability of income in respect of the services rendered to an Indian

Project which is similar to the services rendered by the PE is also to be taxed in India, irrespective of the fact whether such services are rendered through the PE or directly by the general enterprise. Case also holds that partnership will be considered as the resident for UK DTAA purposes despite not being a person under UK law (where partner was taxed, not partnership) (A.Y. 1995-96)

*Linklaters LLP v. ITO (2010) 132 TTJ 20 / 42 DTR 233 / 40 SOT 233 / (2011) 9 ITR 217 (Mum.)(Trib.)*

## **S. 90 : Double taxation relief – Fees for technical services – DTAA – India-Austria**

### **S. 40(a)(i), 195, Art. 7]**

Payment made by the assessee to an Austrian company by way of fees for technical services was not taxable in India as per Art. 7 of the old DTAA of April 1965 as applicable to the relevant assessment year 2002-03, in view of the fact that no portion of the activities were performed by the Austrian enterprise in India, and therefore, provisions of section 195 were not applicable to the payment made by the assessee to the said enterprise and as such fees for technical services is not hit by the provisions of section 40(a)(ia). DTAA entered into between India and Austria clearly shown that DTAA on 5th September 2001 would be applicable in respect of assessment year 2003-04. The DTAA entered into between India and Austria in April 1965 would be the DTAA which is applicable in assessment year 2002-03 (A.Y. 2002-03)

*VA Tech Wabag Ltd. v. ACIT (2010) 133 TTJ 121 / 44 DTR 1 (Chennai)(Trib.)*

## **S. 90 : Double taxation relief – Dividend income – DTAA – India-UK**

If an assessee i.e. Resident of India, desires to get the tax credit in respect of dividend income from a UK company available as per UK law, then he will be treated at par with resident of UK and amount received by assessee would then be deemed to increase by 1/9th of dividend received from UK company for purpose of taxation under Indian Income Tax Act and tax credit can only be adjusted against his tax liability in India but he cannot claim refund, if any, in case his credit is more than his tax liability. (A.Ys. 1999-2000 to 2004-05)

*ACIT v. Homy N. J. Dady (2010) 41 SOT 239 (Mum.)(Trib.)*

## **S. 90 : Double taxation relief – Permanent establishment – Hiring dipper dredger – DTAA – India-Netherlands [S. 9(1)(i), 195, Art. 5, 6]**

Assessee hired a dipper dredger under an agreement from a Dutch company and executed a dredging contract on its own utilising the said dipper dredger, the payment made by the assessee to the Dutch company was nothing but hire charges, and the dipper dredger which was leased to the assessee to be used under its direction, control and supervision can not be construed as PE of the Dutch company and therefore, payment of hire charges made by the assessee to the foreign company is not liable to be tax in India and assessee was not required to deduct tax at source under section 195. (A.Ys. 2006-07, 2007-08)

*Dy. DIT v. Dharti Dredging & Infrastructural Ltd. (2010) 46 DTR 1 / 133 TTJ 692 / (2011) 44 SOT 586 (Hyd.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Income deemed to accrue or arise in India – Business connection – Services rendered through Indian Subsidiary – DTAA – India-USA [S. 5(2), 9(1)(i), Art. 5, 7, 27]**

Assessee a US company, providing IT enabled services to its clients by assigning or sub contracting execution of the contracts to its wholly owned Indian subsidiary EFI and supplying the relevant software and database to the latter free of charge has business connection in India within the meaning of section 9(1)(i) as well as a PE in the form of EFI as per Art. 5 of the Indo-US DTAA, profits attributable to the PE are to be worked out by applying the proportion of Indian assets, including EFI's assets, to the aggregate of global profits and reducing resultant figure by the assessed profits of EFI. (A.Ys. 2000-01 to 2002-03, 2004-05 and 2005-06)

*eFunds Corporation v. ADIT (2010) 45 DTR 345 / 42 SOT 165 / 134 TTJ 1 (Delhi)(Trib.)*

*Editorial : There cannot be double taxation in the hands of Indian subsidiary.*

**S. 90 : Double taxation relief – In absence of “thin capitalization rules”, interest paid to shareholders for loans cannot be disallowed despite capital – Tax – Planning – Non-discrimination [S. 36(1)(iii)]**

In absence of “thin capitalization Rule”, interest cannot be disallowed by characterizing debt equity. Imposing of such rule on assessee in case where domestic companies are not subject to such rule will violate “non-discrimination” provisions under art 24 (5). (A.Y. 2002-03)

Filed Decision of doubtful authority.

*Bexis Kier Dabhaol SA v. DDIT (2010) 134 TTJ 513 / 47 DTR 450 / 131 TTJ 513 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Voyage – DTAA – India-Brazil [Art. 8]**

Where assessee was neither owner nor lessee nor character of feeder vessels carrying cargo from Mumbai port to destination in Durban, profits attributable to such voyage would be outside scope of article 8 of DTAA. (A.Y. 2001-02)

*Dy. DIT v. Cie de Navegacao Norsul (2009) 121 ITD 113 / 124 TTJ 124 / 27 SOT 316 / 24 DTR 50 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – Can not be thrust upon**

- (i) Merely because India has entered into a DTAA with a foreign country, assessee cannot be denied taxability under scheme of Income-tax Act and scheme of DTAA cannot, therefore, be thrust upon assessee.
- (ii) Even when assessee had incurred loss in foreign country [Permanent Establishment (PE) State], it would be eligible to claim taxation in India on basis

of its worldwide income, in disregard of scheme of taxability under DTAA and, in effect, can claim deduction of loss incurred by such PE while computing its total income liable to tax in India. (A.Y. 2001-02)

*Dy. CIT v. Patni Computer Systems Ltd. (2008) 114 ITD 159 / (2007) 109 TTJ 742 (Pune)(Trib.)*

#### **S. 90 : Double taxation relief – Design documentation – DTAA – India-Germany**

Payment for transfer of design documentation. Fee paid for design documentation to German company for outright sale was not royalty as per DTAA or IT Act and German company having no PE in India, same was not taxable in India and assessee was not obliged to deduct tax at source.

*Dy. CIT v. Finolex Pipes Ltd. (2007) 106 TTJ 741 (Pune)(Trib.)*

#### **S. 90 : Double taxation relief – Advertisement – Publicity – Sales promotion – DTAA – India -USA**

Payment for advertising, publicity and sales promotion services. Receipts were neither 'royalty' nor 'fee for technical services' nor 'fee for included services' as envisaged under the IT Act and the DTAA so as to be taxable in India. (A.Ys. 1995-96 to 2000-01)

*Sheraton International Inc. v. Dy. DIT (2007) 106 TTJ 620 / 107 ITD 120 / (2006) 10 SOT 542 (Delhi)(Trib.)*

#### **S. 90 : Double taxation relief – Arbitration award – Permanent establishment – India- Netherlands**

Assessee Company, having executed a project in India in earlier years, it had a PE in India in those years, the amount of arbitration award received by assessee being attributable to said project was taxable in the relevant assessment year; i.e., year of receipt. (A.Y. 2001-02)

*Van Oord Dredging & Marine Contractors BV v. Dy. DIT (2007) 106 TTJ 889 / 105 ITD 97 (Mum.)(Trib.)*

#### **S. 90 : Double taxation relief – Claim during assessment proceedings – DTAA – India-USA**

Assessing Officer may allow the credit for the taxed paid in USA as per the provision of section 90 r/w art. 25(2)(a) of the DTAA between India and USA, whether or not such claim is made in the return or during the assessment proceedings. (A.Y. 1998-99)

*IBM India Ltd. v. CIT (2007) 108 TTJ 531 / 105 ITD 1 (Bang.)(Trib.)*

#### **S. 90 : Double taxation relief – Data processing – Royalty – DTAA – India-Australia**

Payment made for data processing of information supplied, by an Indian company to an Australian company is not covered by the expression 'royalty' under any of the clauses of article 12(3) of the DTAA between India and Australia and it is not taxable in India and consequently the assessee did not have any tax withholding liability in respect of such payment, specify nature of payment.

*Kotak Mahindra Primus Ltd. v. Dy. DIT (2006) 105 TTJ 578 / (2007) 11 SOT 578 (Mum.)(Trib.)*

#### **S. 90 : Double taxation relief – Company – Book profit – Treaty [S. 115JA]**

Once the assessee chooses to be assessed as per provisions of the Act, in preference over the provisions of the tax treaty, it is not open to the assessee to seek treaty protection in respect of MAT under section 115 JA. (A.Y. 1998-99)

*Dresdner Bank AG v. Addl. CIT (2006) 105 TTJ 149 / (2007) 108 ITD 375 / 11 SOT 158 (Mum.)(Trib.)*

#### **S. 90 : Double taxation relief – Overriding effect – Beneficial extent**

Wherever there is a DTAA between India and another country, then the provisions of the DTAA will override those of the Income-tax Act to the extent they are more beneficial to the assessee. (A.Y. 2001-02)

*Western Union Financial Services Inc. v. ADIT (2006) 101 TTJ 56 / (2007) 104 ITD 34 (Delhi)(Trib.)*

#### **S. 90 : Double Taxation Relief – Overriding effect – Trade off – Finance Act**

(i) Wherever the provisions of IT Act are in conflict with the provisions of DTAA, the provisions of the DTAA will prevail.

(ii) The DTAA gets the trade off only with the provisions of the IT Act and unless so specifically provided in a particular DTAA, the rate of tax which is prescribed in an Annual Finance Act cannot give way to the DTAA. (A.Y. 2002-03)

*Chohung Bank v. Dy. DIT (2006) 102 ITD 45 / 104 TTJ 612 / 6 SOT 144 (Mum)(Trib.)*

#### **S. 90 : Double taxation relief – Turkey project – DTAA – India-Finland**

Profits attributable to supply of equipments by assessee, a company incorporated in Finland, under a turnkey project executed in India were not taxable in India. (A.Y. 1989-90)

*Dy. CIT v. Roxon OY (2006) 103 TTJ 891 / 10 SOT 454 / (2007) 106 ITD 489 (Mum.)(Trib.)*

#### **S. 90 : Double taxation relief – Shipping business – Loading petroleum products – DTAA – India-Singapore**

Payment made by assessee to Singapore based shipping company for loading its petroleum products from Chennai was not taxable in India in view of article 8 of DTAA between India and Singapore, and therefore, there is no question of applicability of sections 9, 44B, 195, 201(1) and 201(1A). (A.Y. 2000-01)

*Essar Oil Ltd. v. Dy. CIT (2006) 102 TTJ 614 / 5 SOT 669 (Mum.)(Trib.)*



### **S. 90 : Double taxation relief – Use of transponder – DTAA – India-USA**

Payment for use of transponder capacity. Payment made to assessee, a US company, by non-resident television channels for use of telecommunication satellite (transponder) to transmit signals to Indian viewers does not amount to royalty, but it is payment of "service fee" nor such payment can be considered and taxed as "fees for included services" under Article 124(b). (A. Y. 1997-98)

*Dy. CIT v. PanAmSat International Systems Inc. (2006) 103 TTJ 861 / 9 SOT 100 (Delhi)(Trib.)*

*See also Asia satellite Tele communication Ltd. v. Dy. CIT 85 ITD 478 SB decision in New Skies Satellite v. ADIT (2009) 121 ITD 1 / 30 DTR 289 / 126 TTJ 1 (SB)(Delhi)(Trib.) where contrary view is taken.*

### **S. 90 : Double taxation relief – Permanent establishment – Head office expenditure – DTAA – India-Canada [S. 44C, Art. 24]**

Taxation of a PE of a Canadian company by placing a restriction on deduction of head office expenditure under section 44C which is not applicable in the case of resident companies does constitute less favourable tax treatment to that entity as compared to Indian enterprise carrying on same activities in India and, is hit by specific provisions of art. 24 of the Indo-Canadian DTAA and therefore, the assessee is to be allowed deduction of such head office expenses as can be fairly allocated to the PE. (A.Y. 1993-94)

*Metchem Canada Inc. v. Dy. CIT (2006) 99 TTJ 702 / 100 ITD 251 / 5 SOT 121 (Mum.)(Trib.)*

### **S. 90 : Double taxation relief – Salary – Technicians – Exemption [S. 201(1), Art 14(2)]**

The remuneration paid to expatriate technicians is to be deemed to have been allowed as deduction by necessary implication and therefore salary of technicians was chargeable in India irrespective of their stay in India under art. 14(2) of the DTAA and, therefore, assessee was in default under section 201(1) for not deducting tax at source. (A.Y. 1988-89)

*Pride Foramer S.A. v. ACIT (2006) 99 TTJ 880 / (2005) 97 ITD 86 / 4 SOT 268 (Delhi)(Trib.)*

### **S. 90 : Double taxation relief – Fiscal domicile – Contracting state**

If fiscal domicile of a person is in a Contracting State, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that Contracting State – 'Liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover the cases where the other Contracting State has the right to tax such persons, whether or not such a right is exercised. (A.Y. 1998-99)

*ADIT v. Green Emirate Shipping & Travels (2006) 99 TTJ 988 / 100 ITD 203 / 6 SOT 329 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Commercial and Industrial Information DTAA – India-USA [Art. 12(4)(b)]**

Consultancy services of non-technical nature are not taxable under art. 12(4)(b) of DTAA between India and USA – Geographical specific data and information inputs supplied by the appellant – companies, residents of USA to the Indian branch of a group company were in the nature of commercial and industrial information and, therefore, consideration received for supply of such information cannot be treated as 'fees for included services' and is not liable to be taxed in India under art. 12(4). (A.Y. 2001-02)

*Mckinsey & Co., Inc (Phillippines) v. ADIT (2006) 99 TTJ 857 / 99 ITD 549 / 6 SOT 186 (Mum.) (Trib.)*

**S. 90 : Double taxation relief – Liaison office – Permanent establishment**

Liaison office of the US company engaged in the business of transborder money transfers cannot be regarded as fixed place PE of the company in India, nor the agents appointed by the company in India constitute agency PE as they are independent agents, and therefore, profits, if any, attributable to the Indian operations of the company cannot be assessee as business profits under Article 7 of the DTAA and are therefore, not taxable in India. (A.Y. 2001-02)

*Western Union Financial Service Inc. v. Addl. DIT (2006) 101 TTJ 56 / (2007) 104 ITD 34 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Shipping business – DTAA – India-Singapore**

Payment it made by assessee to Singapore based shipping company for loading its petroleum products was not taxable in India. (A.Y. 2000-01)

*Essar Oil Ltd. v. Dy. CIT (2006) 102 TTJ 614 / 5 SOT 669 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – DTAA – India-Australia [Art. 7]**

Payment made by assessee to Australian Credit rating agency for getting corporate credit rating for itself was a payment for 'professional service' falling under article 7 of DTAA and in absence of Australian company having permanent establishment in India, it was not taxable in India and, hence, assessee was not liable to deduct tax at source from such payment; such payment could not be treated as 'royalty' and taxed in India under article 12(2)(b)(ii) of DTAA with Australia.

*Hindalco Industries Ltd. v. ITO (2005) 96 TTJ 1009 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalties – Fees – DTAA – India-France [Art. 7]**

Rate of tax, so far as royalties and fees for technical services earned by persons covered by Indo-French DTAA after 1-4-1996, are concerned, is 15 percent, in view of

protocol clause 7 of Indo-French DTAA which provides for applicability of concessional rate, if any, provided in any DTAA entered into with an OECD country.

*National Organic Chemical Industries Ltd. v. Dy. CIT (2005) 96 TTJ 765 / (2006) 5 SOT 317 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Foreign companies – DTAA – India-France [S. 80M, Art. 21]**

The provisions of article 21 (non-discrimination clause) of DTAA with France only deal with cases of discrimination on ground of nationality; non-availability of deduction under section 80M to foreign companies, i.e., companies which are not domestic companies, has nothing to do with nationality of a company; accordingly, non-discrimination clause in India-France DTAA cannot be invoked in cases where provisions of Indian Income tax Act are more favourable to domestic companies vis-à-vis foreign companies; thus, there is no merit in contention that in view of provisions of article 21 of DTAA between India and France regarding non-discrimination and in view of fact that provisions of section 80M seek to discriminate against foreign companies by allowing such deduction only to domestic companies, deduction under section 80M is required to be extended to foreign companies covered by India France DTAA. (A.Y. 1991-92)

*Credit Llyonnais v. Dy. CIT (2005) 94 ITD 401 / 94 TTJ 1074 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-France [Art. 14(2)]**

Where assessee had permanent establishment in India and it had accepted that income from manning and management services was to be assessed as business income and it had also agreed to be assessed under section 44BB for manning and management services rendered by it, payment made to expatriate technicians by assessee, irrespective of period of their stay in India, was liable to tax in India and could not be treated as exempt under article 14(2) of DTAA with France. (A.Y. 1988-89)

*Pride Foramer S.A. v. ACIT (2005) 97 ITD 86 / (2006) 99 TTJ 880 / (2005) 4 SOT 268 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Oil rigs – DTAA – India-France [S. 44BB, Art. 16(2)(c)]**

Where assessee-French nationals, employed by Panama-based company, were working on oil rigs of ONGC in India, and remuneration was paid to them by Panama-based company, as Panama-based company was assessed under section 44BB and had a fixed base in India, article 16(2)(c) of DTAA with France was inapplicable and, therefore, salaries received by such foreign nationals were taxable in India. (A.Ys. 1997-98, 1998-99)

*Sedco Forex International Drilling Inc. v. Dy. CIT (2005) 2 SOT 175 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Effective management – DTAA – India-Mauritius [Art. 8]**

Where based on enquiries it was found by Assessing Officer that except for holding meeting of board of directors in Mauritius, effective management of assessee-non-resident shipping company was not in Mauritius but in Dubai, assessee's claim of exemption of gross receipt from such business on basis of article 8 of DTAA with Mauritius as per which such income can be taxed only in Contracting State where 'effective management' of enterprise is situated, was not tenable. (A.Y. 1998-99)

*Integrated Container Feeder Service v. Jt. CIT (2005) 96 ITD 371 / 98 TTJ 69 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Ships visiting Indian ports – DTAA – India-Netherlands [Art. 8A]**

Merely because a ship visits Indian ports at irregular intervals or only as and when required, it cannot be said that such operation of ships in India is no more than 'casual' within meaning of article 8A of India-Netherlands Treaty so as to make profits from operation of ships in international traffic taxable in State in which effective management of enterprise is situated. (A. Y. 1996-97)

*James Mackintosh & Co. (P.) Ltd. v. ACIT (2005) 93 ITD 466 / 92 TTJ 388 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Sale of shares – Capital gains – DTAA – India-Netherlands [Art. 13.5]**

Where assessee-companies, subsidiaries of UK company, sold shares of Indian Bank (HDFC Bank) to a Mauritius company and since assessees were companies incorporated in Netherlands, they claimed that Indo Netherlands Treaty for Avoidance of Double Taxation was applicable and as per article 13.5 thereof, capital gains arising on sale of shares were not subject to Indian Income-tax but were taxable only in State of which transferor was resident, Income-tax Authorities were wrong in rejecting assessee companies' claim for exemption from capital gains on transfer of said shares. (A.Y. 2000-01)

*Nat West Securities B. V. v. Dy. CIT (2005) 1 SOT 503 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – DTAA – India-Russia [Art. 12]**

Where as per agreement of assessee, a Russian company, with Indian company for provision of non-exclusive use of know-how, assessee provided use of drawings and designs to Indian company, payment received for same was taxable as 'royalty' under article 12 of DTAA. (A.Y. 1995-96)

*Dy. CIT v. All Russia Scientific Research Institute of Cable Industry (2005) 92 TTJ 74 / (2006) 98 ITD 69 / 145 Taxman 1 (Mag.)(Mum.)(Trib.)*

**S. 90 : Double taxation relief – Principle of interpretation of DTAA – Technical services –Consultancy services – DTAA – India-Singapore [Art. 12 (4)(b)]**

A tax treaty is an agreement and not a taxing statute. Therefore, principles of interpretation of statutory legislation are not applicable in interpreting treaties. Treaty is to be interpreted in good faith in accordance with the ordinary meaning given in the context and in the light of the object and purpose of the same.

Scope of 'fees for technical services' under article 12(4)(b) of DTAA between India and Singapore does not cover 'consultancy services' unless these services are technical in nature. (A.Y. 1997-98)

*Dy. CIT v. Boston Consulting Group Pte. Ltd. (2005) 94 ITD 31 / 93 TTJ 293 / (2006) 280 ITR 1 (AT)(Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – Computer programme – Deduction of tax at source – DTAA – India-Sweden [S. 195]**

Where assessee had acquired a ready-made off-the-shelf computer programme for being used in its business, no right was granted to assessee to utilize the copyright of the computer programme and assessee had merely purchased a copy of copyrighted article, namely, a computer programme, which is called 'software'; payment made by assessee for use thereof was not 'royalty' within meaning of DTAA and as such, assessee was not required to deduct any tax under section 195 in respect of such, payment. (A.Ys. 1999-2000 to 2001-02)

Now reserved by Karnataka High Court. Karnataka High Court has decided the issue in favour of the Revenue. For contrary view, favouring assessee, see Delhi High Court in *Ericsson*. (A.Ys. 1999-2000 to 2001-02)

*Samsung Electronics Co. Ltd. v. ITO (2005) 94 ITD 91 / 93 TTJ 658 (Bang.)(Trib.)*

*Editorial : Confirmed by the Karnataka High Court (2011) 203 Taxman 477 / 245 CTR 481 / 64 DTR 178. For a contrary view in favour of assessee, please see Ericsson AB v. ADIT (Delhi) (High Court) Source : [www.itateonline.org](http://www.itateonline.org)*

**S. 90 : Double taxation relief – Fees for included services – DTAA – India-Switzerland [Art. 12(4)]**

Payment made by assessee-company to a Swiss company for 'preparation of 22 MSDS (Le., material safety data sheets) in EU format in English', which contained information required as per norms of European Union regulations, was not covered by scope of expression 'fees for included services' under article 12(4) of Indo-Swiss tax treaty, and, hence, assessee was not liable to deduct tax at source at 20 per cent of gross amount.

*National Organic Chemical Industries Ltd. v. Dy. CIT (2005) 96 TTJ 765 / 5 SOT 317 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – DTAA – India-United Kingdom [Art. 13(2)]**

Where under agreement with assessee-U.K. company *inter alia*, Government of India was to obtain a license of proprietary rights to manufacture and assemble and make Jaguar International Aircraft in India and in other specified countries and for purpose of implementing agreement, Government of India appointed Hindustan Aeronautics Ltd (HAL) of Bangalore as its agent, royalty paid by HAL to assessee was on behalf of Government of India, and not on its account, and in view of article 13(2) of DTAA with U.K., tax deductible at source from royalty paid was at 15 per cent and not 20 per cent. (A.Y. 1997-98)

*BAE Systems Pic. v. Jt. CIT (2005) 96 TTJ 585 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Liaisoning activities – Permanent establishment – DTAA – India-United Kingdom**

Where assessee, a foreign company, entered into an agreement with its subsidiary company for rendering services in India which were in nature of liaisoning activities, since said subsidiary company neither had authority to negotiate or conclude contracts on behalf of assessee and nor did it habitually exercise such authority on behalf of assessee, it could not be said to be PE of assessee in India and since assessee did not have a PE in India, its business income was not chargeable to tax in India. (A.Y. 2001-02)

*Rolls Royce Pl. v. ADIT (2005) 148 Taxman 66 (Mag.)(Delhi)(Trib.)*

**S. 90 : Double taxation relief – Fees for technical services – Foreign currency convertible Bonds – DTAA – India-United Kingdom**

Where in connection with issue of Foreign Currency Convertible Bonds convertible into GDR, assessee reimbursed certain expenses to foreign bankers, in view of DTAA with UK, those payments would not fall within definition of 'fee for technical services' and, hence, they were not taxable in India. (A.Y. 1999-2000)

*Gujarat Ambuja Cements Ltd. v. Dy. CIT (2005) 2 SOT 784 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Royalty – Deduction of tax at source – DTAA – India-USA [S. 195, Art 12(3)(a)]**

Payment made by assessee-Indian company to U.S. company for providing access to information available in database maintained by it was not 'royalty' within meaning of article 12(3)(a) of DTAA between India and USA and was not taxable in India; hence, no tax at source under section 195 was required to be deducted from such payment. (A.Ys. 2001-02 to 2003-04)

*Wipro Ltd. v. ITO (2005) 94 ITD 9 / 92 TTJ 796 / 1 SOT 663 (Bang.)(Trib.)*

**S. 90 : Double taxation relief – Technical knowledge – DTAA – India-USA [Art. 12(4)]**

For deciding the issue under article 12(4) of DTAA between India and USA, it is not material as to whether the assessee acquired on outright basis any technical knowledge, know-how, technical plan or design; the term 'transfer' as used in article 12(4) does not refer to the absolute transfer of rights of ownership.



*Gentex Merchants (P.) Ltd. v. Dy. DIT (International Taxation) (2005) 94 ITD 211 / 95 TTJ 956 (Kol.)(Trib.)*

**S. 90 : Double taxation relief – Sale of property – DTAA – India-USA [Art. 12(5)]**

In context of interpretation of article 12(5)(a) of India-US tax treaty, meaning of expression 'sale of property' should be confined to only such a sale which does not lead to taxability of sale proceeds on source-rule basis as in article 12; restrictive meaning that appears proper to expression 'sale of property' should be confined to article 12(5)(a), and it should not extend to connotation of 'sale of property' in article 12(3)(a) which visualizes sale of a property of nature that results in taxability in source country as well

*Hindalco Industries Ltd. v. ACIT (2005) 94 ITD 242 / 94 TTJ 944 / 2 SOT 528 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Professional service – DTAA – India-USA [Art. 15]**

Where assessee was a firm of solicitors based in USA and had rendered predominantly legal services to Indian company, services rendered by the assessee were 'professional services' which fell under provisions of article 15 of the DTAA and, consequently payment received therefor by assessee was not taxable in India. (A.Ys. 1996-97, 1997-98)

*Dy. CIT v. Chadbourne & Parke LLP (2005) 2 SOT 434 / 93 TTJ 734 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Income tax paid in USA – DTAA – India-USA [Art. 25(2)(a)]**

As per article 25(2)(a) of DTAA between India and USA, deduction on account of income-tax paid in USA from income-tax payable in India cannot exceed Indian income-tax liability Indian in respect of such liability; therefore there is no basis for view that taxes paid in USA are to be refunded to assessee in case he has no income-tax liability in respect of income in India. (A.Y. 1993-94)

*Jt. CIT v. Digital Equipments India Ltd. (2005) 94 ITD 340 / 93 TTJ 478 (Mum.)(Trib.)*

**S. 90 : Double taxation relief – Permanent establishment – Supply of GSM equipment – DTAA – India-USA [Art. 5.3(e)]**

Where assessee-'M', incorporated in USA, had entered into supply contracts for supply of GSM equipment to Indian cellular operators and 'MINL', its Indian subsidiary, had entered into installation contracts which Indian operators and Assessing Officer held that it had a fixed place in form of Indian company 'MINL' and had a permanent establishment in India, since 'MINL' only carried out certain preparatory and auxiliary activities in India for assessee, its office could not be considered as permanent establishment of assessee in India in terms of article 5.3(e) of DTAA and, therefore, there was no scope for attributing any income to so-called permanent establishment. (A.Y. 1997-98)

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

**S. 90 : Double taxation relief – Tax credit – DTAA – India-USA**

Resident Indian company was eligible for tax credit of income-tax it paid in United States of America on income earned in United States of America but included in return of income filed in India as per applicable provisions of DTAA between India and USA. (A.Ys. 1998-99 & 1999-2000)

*Wipro Ltd. v. Dy. CIT (2005) 96 TTJ 211 / 5 SOT 805 (Bang.)(Trib.)*

**S. 90 : Double taxation relief – Non-resident – Income not chargeable – DTAA can not be invoked**

If the income of non-resident is not chargeable to tax under the Act, then the question of invoking the provisions of sec 90 would not arise at all. (A.Y. 1997-98)

*Sheraton International Inc. v. Dy. CIT (2003) 85 ITD 110 / (2004) 86 TTJ 126 (Delhi)(Trib.)*

**S. 90 : Double taxation relief – Exemption – Domestic law – DTAA would not be applicable**

If domestic law exempts certain income or if domestic law is inapplicable in given circumstances, DTAA would not be applicable as there is no double taxation. (A.Ys. 1999-2000, 2001-02)

*Wipro Ltd. v. ITO (2003) 80 TTJ 191 / (2004) 1 SOT 758 (Bang.)(Trib.)*

**S. 90 : Double taxation relief – Agreement with foreign countries – Royalty – DTAA – India-Sri Lanka [Art. 7, 12]**

Applicant, a Sri Lankan company having undertaken a contract for dredging from an Indian company and granted non transferrable and non exclusive right to the Indian company to use its proprietary software as part of the agreement in order to transfer the scientific experience in hydrology possessed by the applicant without transfer of intellectual property rights in the software and therefore, consideration received by the applicant falls under the term "royalties" and is liable to tax under Art. 12 of the DTAA between India and Sri Lanka and not under Art 7 thereof.

*Lanka Hydraulic Institute Ltd. (2011) 241 CTR 314 / 199 Taxman 232 / 56 DTR 11 / 337 ITR 47 (AAR)*

**S. 90 : Double taxation Relief – Referral fee DTAA – India-UK [Articles 5, 7, 13]**

Referral fee received by the applicant, a UK company from India-based recruitment agency for referring potential Indian clients and candidates to the latter even if it is in the nature of consultancy services, cannot be considered to be ancillary and subsidiary to the enjoyment / application of the right or information referred in para. 3(a) of Article 13 of the Indo-UK DTAA, nor the activity of providing information would fall within the ambit of making available the technical knowledge and

experience of the service provider, in the absence of PE, the receipts in the nature of referral fee are not taxable even as business profits.

*Real Resourcing Ltd, In Re. (2010) 322 ITR 558 / 230 CTR 120 / 36 DTR 132 / 190 Taxman 151 (AAR)*

**S. 90 : Double taxation relief – Sale of software – India-Japan [S. 9(1)(vi), 90, Articles 7, 12]**

Payment received by the applicant from VARs on account of supplies of software products to the end customers from whom the licence fee is not in the nature of royalty to the applicant. As the VAR cannot be said to be the agents or dependent agents hence the applicant cannot be deemed to have a PE in India therefore the payment received by the applicant from VARs cannot be taxed as business profits in India under Article 7 of Indo-Japan DTAA.

*Dassault Systems K. K. In Re. (2010) 322 ITR 125 / 229 CTR 105 / 188 Taxman 223 / 34 DTR 218 (AAR)*

**S. 90 : Double taxation relief – Income deemed to accrue or arise in India – Royalty – Supply of software – DTAA – India-Netherland [S. 9(1)(vi), 115A(1A), Art. 12.4]**

A Dutch company, having supplied special purpose computer software to ONGC under an agreement stipulated that the copyright embedded in the software would always remain with the owner/licensor and that the licensed product cannot be commercially exploited by the licensee/ customer, the amount payable to the applicant under the contract does not amount to “royalty” within the meaning of Expl. 2 to section 9(1)(vi) or Art 12.4. of the India-Netherlands DTAA nor can it be treated as “fees for technical services” as defined in Art. 12.5 as the applicant has not made available its technical knowledge and expertise to ONGC by supplying software.

*GeoQuest Systems B. V. In Re. (2010) 327 ITR 1 / 234 CTR 73 / 193 Taxman 81 / 43 DTR 129 (AAR)*

**S. 90 : Double taxation relief – Capital gains – India-Mauritius**

Applicant, a resident of Mauritius, is not liable to pay capital gain tax in India in respect of the transfer of shares held in the Indian Company to HSBC, having regard to provisions of the India-Mauritius DTAA.

*E. Trade Mauritius Ltd., In Re. (2010) 324 ITR 1 / 190 Taxman 232 / 230 CTR 428 / 36 DTR 377 (AAR)*

**S. 90 : Double taxation relief – Permanent establishment – Hardware [S. 115A(1)(b)(BB)]**

Except in regard to the payment made to Raytheon for hardware and COTS software that go with hardware, which are not liable to be taxed in India, the payments for other items fall within the scope of Article 12 and therefore, can be taxed in India, irrespective of the fact that Raytheon has no PE in India. The applicant is liable to deduct tax at source on the payment made to Raytheon other than for hardware, the

rate of withholding tax is governed by section 115A(1)(b)(BB) which is more beneficial to the tax payer when compared to the rate prescribed in Article 12 of the treaty.

*Airports Authority of India (2010) 190 Taxman 209 / 323 ITR 211 / 230 CTR 417 / 36 DTR 323 (AAR)*

**S. 90 : Double taxation relief – Capital gains – DTAA – India-Mauritius [S. 2(14), 47(iv), Art. 13]**

Shares held by the applicant as investment in the books of accounts are treated as capital asset. Applicant is not liable to be taxed in India on the proposed transfer of said shares to its wholly-owned subsidiary company in India in view of section 47 (iv) or under Art. 13 of India Mauritius treaties.

*Praxair Pacific Ltd. In RE (2010) 193 Taxman 1 / 326 ITR 276 / 233 CTR 350 / 42 DTR 177 (AAR)*

**S. 90 : Double taxation relief – Royalty – Business support market information – Technical services – Permanent establishment – DTAA – India-Singapore [S. 9(1), Article 12(3)(b)]**

Applicant's group company AXA ARC, Singapore provides various operational services to its affiliates in India in the field of Insurance including certain software support by allowing/licensing the access to its software applications by affiliates for analysis / improvement in actuarial methodologies, etc. - AAR observed that technology will be considered "made available" when the person acquiring the service is enabled to apply the technology; the fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b) - Hence held that services are neither 'fees for Technical services' nor 'Royalty'; also as no PE in India, it cannot be taxed as business income

*Bharati AXA General Insurance Co. Ltd. (BAGI) (2010) 326 ITR 477 / 234 CTR 62 / 194 Taxman 1 / 43 DTR 105 (AAR)*

**S. 90 : Double taxation relief – Technical services – DTAA – India-Australia [S. 9(1)(vii), Articles 5 & 12]**

Applicant, a not-for-profit resident of Australia provides accreditation to Conformity Assessment Bodies ('CABs') in many countries including India whereby it accredits those bodies considered competent and impartial to provide an effective service in various spheres such as Management Systems Certification - AS/NZS ISO 9001, AS/NZS ISO 14001; Production certificate - code mark, watermark; Personnel certification; Inspection; and Greenhouse Gas validation and verification - AAR observed that mere provision of technical services is not enough to attract Article 12(4)(b); it additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc., known to the recipient of the

service so as to equip him to independently perform the technical function himself in future, without the help of the service provider, i.e. it would be regarded as Fee for Technical/included services only if the twin test of the rendering services and making technical knowledge available at the same time is satisfied - Hence held that as there is no transfer of any skills or technical knowledge or experience, or process or know-how to the CABs on account of grant of accreditation, it cannot be taxed either as fees for technical services or royalty; also no permanent establishment can be inferred on account of occasional visits of the applicant's personnel for the purpose of on-site assessment and also as the applicant does not have a fixed place of business or PE in India and the visits of the applicant's personnel were of less than 90 days in a 12 month period.

*Joint Accreditation System of Australia and New Zealand (2010) 326 ITR 487 / 234 CTR 165 / 194 Taxman 11 / 43 DTR 241 (AAR)*

**S. 90 : Double taxation relief – Technical services – Permanent establishment – DTAA – India-USA [Article 12(4)(b)]**

FICCI, the applicant enters into agreement with University of Texas which has specialization in helping out commercialization of technological innovation - Technical or consultancy services rendered by non-resident university is in nature of facilitator and does not make available technical knowledge, experience, skill, etc. - Hence cannot be taxed as fees for technical services - No PE in India, hence cannot be taxed as Business Income

*Federation of Indian Chambers of Commerce and Industries (2010) 320 ITR 124 / 186 Taxman 161 / (2009) 227 CTR 456 / 32 DTR 73 (AAR)*

**S. 90 : Double taxation relief – Amendment in tax rate of royalty – Date of applicability – DTAA – India-Japan [Article 12]**

Applicant, a Japanese company receives royalty payments from Indian subsidiary for transferring technical knowhow – amendment by protocol in tax rate on royalty (TDS rate) in DTAA from 24.2.06; question arose as to the date of applicability of new rate – AAR held that it is clear from the wordings of Article V [2(b)] of the protocol amending Article 12 that new rate is applicable from A.Y. 2008-09.

*Sumitomo Mitsui Construction Co. Ltd. (2009) 227 CTR 318 / 319 ITR 322 / 185 Taxman 433 / 13 DTR 310 (AAR)*

**S. 90 : Double taxation relief – Permanent establishment – Dependant agents – DTAA – India-Germany [Article 5(1) & 5(2)(i)]**

German applicant conducts designing of equipments and supply of critical components from its Germany office whereas study of technical requirements of project and installation of equipment are sub-contracted to Indian sub-contractor. German company would supervise installation and have 2 engineers deputed to India for max. 60 days. Performance guarantee for entire work is given by German applicant - Revenue contended that sub-contractor is nominee of the applicant and therefore workshop of the sub-contractor should be treated as PE of the applicant

contractor - Authority ruled that once PE is characterized as installation PE, minimum period test shall apply irrespective of General PE rule, as specific provision will override the general provision in respect of the PE; further, work place of sub-contractor can be treated as workplace of applicant only if sub-contractor is treated as dependent agent of the applicant - Hence ruled no PE in India and not taxable in India.

*Pintsch Bamag (2009) 226 CTR 1 / 318 ITR 190 / 184 Taxman 122 / 28 DTR 281 (AAR)*

#### **S. 90 : Double taxation relief – Permanent establishment – DTAA – India-South Africa**

Commission is paid for services rendered abroad - As recipient in South Africa had no fixed place of business in India nor he had entered into any contracts in India, Section could not be invoked - hence held not taxable in India. Whether this is affected by newest Expl. to S.9.

*Spahi Projects (P.) Ltd., In Re (2009) 225 CTR 133 / 315 ITR 374 / 183 Taxman 92 / 26 DTR 303 (AAR)*

#### **S. 90 : Double taxation relief – Permanent establishment – Technical knowledge – DTAA – India-USA [Articles 7.1 & 12.4]**

US-based applicant company enters into a Cost Allocation Agreement with Indian company and incurs expenditure in relation to the functions enumerated in the said Agreement for the benefit of the Group as a whole - AAR ruled that there is no service which is in the nature of technical or consultancy services; the services even if they are technical, do not 'make available' the technical knowledge, etc.; further, certain activities undertaken by the applicant are not really services but they are more in the nature of stewardship/shareholder activities; hence amounts received from the Indian Group Co. cannot be taxed in India in the absence of a permanent establishment (PE) *Invensys Systems Inc (2009) 225 CTR 113 / 183 Taxman 81 / 317 ITR 438 / 27 DTR 26 (AAR)*

#### **S. 90 : Double taxation relief – Permanent establishment – AOP – Offshore supply – DTAA – India-Korea [S. 4, 9(1)(vii) Art. 12.4]**

Power Grid Corp. of India gave contract to Korean company covering all the works to be performed outside India including supply of all off-shore equipment and materials and also an onshore supply and services contract that the Korean company assigned to L&T, India - AAR observed that mere collaborative effort and overall responsibility assumed by the applicant for successful performance of the project is not sufficient to constitute an AOP as the contracts, obligations and payments under the contracts are separate and independent of each other; thus it cannot be constituted as an AOP - AAR thus ruled that the applicant does not have a PE within the specific description of Article 5(3) of DTAA; Further, the title to the goods in case of off-shore supply contract shall pass on to Power Grid at FOB Port of shipment; thus income in relation thereto cannot be said to accrue or arise in India



*Hyosung Corporation. (2009) 314 ITR 343 / 224 CTR 329 / 181 Taxman 270 / 25 DTR 17 (AAR)*

**S. 90 : Double taxation relief – Liaison office – Permanent establishment – DTAA – India-Korea [S. 5(2), 9(1) Article 5(4), 12]**

Korean applicant has an Liaison Office in India – enters into agreement with Indian Co. for telecommunication services – Is LO a PE? – held as long as LO does only supporting, aiding or auxiliary work for head office within parameters fixed by RBI which in the instant case includes collecting host of information concerning various Indian companies only as auxiliary activities and it has nothing to do with telecommunication services and network and contracts connected therewith, it is not a PE. But see *In Re Columbia Sportswear*, where less importance is given to RBI guidelines.

*K T Corporation (2009) 181 Taxman 94 / 224 CTR 234 / 23 DTR 361 (AAR)*

**S. 90 : Double taxation relief – Royalty – DTAA – India-Australia [S. 9(1)(vi), Articles 5(2) & 12(3)(g)]**

Non-resident enters into multiple contracts with ONGC and deposes its personnel for different periods in relation to execution of different contracts - Applicant insists contract-wise counting of period of stay of its personnel for determining the question of Service PE – AAR observed that all the contracts were with one party and related to redevelopment of Bombay High South and North off-shore Oil Fields; thus from geographical and commercial point of view also, the services cannot be dissociated from each other for the purposes of Article 5(3)(c) and the duration of totality of services furnished under various contracts between the same parties during the 12 months period has to be taken into account and if the yardstick of 91 days stands satisfied income attributable to the PE will be taxable in India - Further, payment shall be considered as royalties as rendering of services makes available technical knowledge, experience, skills, know-how or processes or there is transfer of technical plan or design - Further held that though the bulk of the work was done from Australia, there is sufficient territorial nexus with India and the profits derived from this contract are liable to be taxed on gross basis at 15% and it is not permissible to split up such royalty income by allocating part of it to work done in Australia

*Worley Parson Services Pvt. Ltd. (2009) 223 CTR 209 / 313 ITR 74 / 180 Taxman 296 / 22 DTR 171 (AAR)*

**S. 90 : Double taxation relief – Technical services – Permanent establishment – DTAA – India-Mauritius [Article 5(2)(i)]**

Non-resident enters into an agreement for laying pipelines under the sea and constructing the structures - AAR observed that whatever technical services are provided were only integral to the performance of the project and hence cannot be constituted as fee for technical services – Further, in order to constitute PE, the fixed place of business must be in existence for a fairly long time but as applicant was in

India for less than 9 months there does not exist any PE in India and hence no liability to pay tax in India.

*Cal Dive Marine construction (Mauritius) Ltd. (2009) 224 CTR 447 / 315 ITR 334 / 182 Taxman 124 / 25 DTR 59 (AAR)*

**S. 90 : Double taxation relief – Remuneration by contracting State – DTAA – India – Republic of Korea [Article 20]**

Remuneration is paid by Korean govt. owned company 'SBC' operating as liaison office in India to its Korean employee; contends it is tax exempt under Article 20(4) of the DTAA whereby tax is payable only in the contracting State for whom service has been rendered - AAR held that the Korean national is an employee of SBC but not the employee of the State; i.e. Government of Republic of Korea. SBC does not appear to be the department of the Government as the applicant guardedly states in the application that the liaison office of SBC 'is similar to a Government department'. A Government undertaking with corporate status cannot obviously be equated to the Government. The fundamental requirement of said Article is that the remuneration should be paid by the Contracting State - hence held not exempt from tax in India.

*Small Business Corporation (2008) 305 ITR 381 / 219 CTR 10 / 173 Taxman 452 / 12 DTR 281 (AAR)*

**S. 90 : Double taxation relief – Fixed base – Service – Permanent establishment – DTAA –India-UAE [Article 5(1)]**

Non-resident applicant is in the business of promoting golf internationally by organizing tournaments in various countries as event organizer; it organized two tournaments in India at Delhi & Bangalore on remote basis by entering into formal Venue Agreements with local golf courses for which it made venue hire payment and by hiring independent third party local contractors and suppliers for other services; it received income by way of sponsorships, management fee and sale of merchandise at the venues - Authority ruled that there is no fixed base PE in India as the mere presence of a non-resident at a particular location does not necessarily make that location a 'place of business.'; what is conspicuously missing is the ingredient of regularity, continuity and repetitiveness as conveyed by the word 'carried on' in order to constitute a business - further ruled that there is no Service PE as the applicant is a mere organizer of an event; also facts do not justify the conclusion that third party contractors are agents of the applicant as their activities are not at all carried out wholly or almost wholly on behalf of the applicant; as such, there does not also exist Agency PE in this case - hence ruled that income not liable to tax in India.

*Golf In Dubai, L.L.C (2008) 219 CTR 513 / 306 ITR 374 / 174 Taxman 480 / 14 DTR 49 (AAR)*

**S. 90 : Double taxation relief – Capital gains – Persons settled in UAE-CBDT Circular No. 734 dt. 24.01.1996: Tax rates applicable to NRI from UAE – DTAA – India-UAE [S. 45, Articles 3, 4, 10, 11, 13]**

NRI working in UAE claims that he is entitled to the benefit of the provisions of the DTAA and is chargeable to lower rates of tax contained in Articles 10 & 11 on income from capital gains, interest & dividend - AAR observed that the definition of 'person' in Article 3(e) includes an individual who is treated as a taxable unit under the taxation laws in force in the respective contracting state. Under the Taxation Law in India an 'individual' is a taxable unit but is excluded from the definition of 'person' under UAE Decree; thus any person who does not pay tax under the laws of a contracting State cannot be treated as a resident of that State and hence is not entitled to claim the benefit of the provisions of the DTAA; further, in terms of article 13(3) and article 4 of the DTAA, the applicant, an individual Indian national, residing in UAE, is liable to capital gains tax in India and further, in terms of article 11 of the treaty between India and UAE read with Circular No. 734 dated 24.1.1996 issued by the CBDT, income receivable by the applicant in India by way of interest or dividends on bonds and deposits with banks and companies are liable to be taxed at the rates mentioned in the circular at 12.5 per cent of the gross amount of the interest received).

*Abdul Razak A. Meman and others (2005) 276 ITR 306 / 146 Taxman 115 / 195 CTR 534 (AAR)*

**S. 90 : Double taxation relief – Supply of testing and commissioning of passenger rolling stock – DTAA – India-Japan [Art. 12(4), 13(4)]**

Pursuant to international tender for design, manufacture, supply, testing and commissioning of passenger rolling stock for Delhi Metro issued by Delhi Metro Corporation (DMRC) in year 1999, applicant consortium offered a tender which was accepted and applicant consortium and DMRC entered into a contract in respect of said work in terms of contract between DMRC and the consortium, the lump sum price for the works of design, manufacture, supply, testing and commissioning of passenger rolling stock of the mass rapid transport system included element of fee for technical services as defined in articles 12(4) and 13(4) of the Treaty between India and Japan and it would not be incorrect to distintegrate the contract for purposes of taxation of each of the component.

*Rotem Co., In re (2005) 279 ITR 165 / 148 Taxman 411 / 198 CTR 33 (AAR)*

**S. 90 : Double taxation relief – Remuneration – Permanent establishment – DTAA – India- Netherlands [S. 44D, 115A, Art. 15]**

Conditions specified under sub-clause (c) of clause 2 of article 15 of Double Taxation Avoidance Agreement between India and Netherlands, viz, that remuneration is not borne by a permanent establishment or fixed base which employer has in other state, relates to taxability of employees and not of applicant employer and is, therefore, not relevant when employer is taxed in India, on presumptive basis under provisions of sec. 44D and sec. 115A.

*DHV Consultants BV, In re (2005) 277 ITR 97 / 147 Taxman 521 / 197 CTR 105 (AAR)*

**S. 90 : Double taxation relief – Business information – Royalty – Business profits – DTAA – India – Spain [Art. 5, 7, 13]**

Income of non resident applicant from sale of business information reports in India through a party in India who is not applicant's agent or permanent establishment, will not be 'royalty' within meaning of article 13 of the DTAA between India and Spain but business profits within meaning of article 7 which could not be taxed in India in absence of applicant's permanent establishment in India within meaning of article 5.

*Dun & Bradstreet Espana S.A., In re (2005) 272 ITR 99 / 142 Taxman 284 / 193 CTR 9 (AAR)*

**S. 90 : Double taxation relief – Business income – DTAA – India-UK [Art. 7]**

Income derived by non-resident UK company from trading in exchange traded derivative instruments in India is 'business income' and not capital gains and, hence, not taxable in India under article 7 of DTAA between India and UK if such company has no permanent establishment in India.

*Morgan Stanley & Co. International Ltd., In re (2005) 272 ITR 416 / 142 Taxman 630 / 193 CTR 161 (AAR)*

*Now see Supreme Court Judgment DCIT v. Morgan Stanley & Co. Inc. (2007) 292 ITR 416 (SC)*

**S. 90 : Double taxation relief – Permanent establishment – DTAA – India-UK [Art. 5]**

An enterprise of a contracting state shall not be deemed to have permanent establishment in other contracting state within meaning of article 5 of DTAA between India and UK merely because it carries on business in that other state through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

*Morgan Stanley & Co. International Ltd., In re (2005) 272 ITR 416 / 142 Taxman 630 / 193 CTR 161 (AAR)*

*Now see Supreme Court Judgement DCIT v. Morgan Stanley & Co. Inc. (2007) 292 ITR 416 (SC)*

**S. 90 : Double taxation relief – Contract for repair of hardware equipment – DTAA – India -USA**

Payments by applicant Indian company to a U.S. company under a contract for repair of hardware equipment for modernization of Air Traffic services, on facts, are not taxable in India but payments for modification and anomaly resolution of software of said system are liable to tax in India.

*Airport Authority of India, In re (2005) 273 ITR 437 / 143 Taxman 129 / 193 CTR 487 (AAR)*

**S. 90 : Double taxation relief – Service element of profit – Indian subsidiary – DTAA – India -USA [Art. 12]**

In view of article 12 of DTA between India and USA, amount payable by Indian subsidiary company to U.S. company for services rendered by latter to it in USA, though having no element of profit, would be subject to tax in India.

*Timken India Ltd., In re (2005) 273 ITR 67 / 143 Taxman 257 / 193 CTR 610 (AAR)*

#### **S. 90 : Double taxation relief – Income deemed to accrue or arise in India – Agreement with UAE**

Taxability of capital gains in hands of a resident of UAE, in India does not depend upon whether it is, as a fact, taxable in UAE.

*Emirates Fertilizers Trading Co. WLL., In re (2005) 142 Taxman 127 / 272 ITR 82 / (2004) 192 CTR 590 (AAR)*

#### **S. 90 : Double taxation relief – Non-resident – Turnkey project – Supply of equipment – DTAA – India-Japan**

The assessee as a resident of Japan is awarded by Petronet LNG a contract of turnkey project for setting up liquefied natural gas receiving, storage and regasification plant in India. Amounts received /receivable by the applicant from Petronet LNG in respect of Off shore supply of equipment and materials is liable to be taxed in India under provisions of Act and the India-Japan Treaty ; amount that would be taxable is so much of profit as is reasonably attributable to operations carried out in India; amount received for Off shore services will also be taxable in India at the rate of 20% of gross amount and the assessee would not be entitled to any deduction in computing income from Off shore services under the Act or the treaty.

*Ishikawajima – Harima Heavy Industries Co. Ltd. In re (2004) 271 ITR 193 / 141 Taxman*

*669 / 192 CTR 289 (AAR)*

*Editorial : See retrospective Expl. to S.9.*

#### **S. 90 : Double taxation relief – Freight income – Shipping business – DTAA – India-Malta**

A company incorporated and registered in Malta and being a resident in Malata assessed to tax (in Malta) on a world wide income basis is not subject to income tax in India on its freight income earned in India from shipping business of operating merchandise vessels in international waters.

*Norasia Container Lines Ltd., In re (2004) 139 Taxman 255 / 267 ITR 722 / 189 CTR 387 (AAR)*

#### **S. 90 : Double taxation relief – DTAA – India-Mauritius – Automatic route – Approval – Ministry of Finance [Art. 11(4)]**

The tax treaty does not define the expression "Government" both under the Constitution of India and general principles, the Reserve Bank of India, which is a Government agency completely owned by the Government of India, can appropriately, be described as "Government" for the purposes of clause (4) of article 11 of the DTAA. Though in common parlance, the RBI may be appropriately described

as "Government" the said propositions may not hold good in all circumstances. There can be exceptions to this proposition by specific exclusions or by implication. ECB under "Automatic route" does not imply tax exemption under article 11 (4). Tax exemption under article 11(4) can be granted only by Department of Revenue in ministry of Finance. Exemption from withholding tax under article 11(4) in respect of ECBs taken through Automatic Route is available only on approval by Ministry of Finance.

*Rockwool (India) Ltd., in re (2004) 138 Taxman 106 / 268 ITR 20 189 CTR 382 (AAR)*

**S. 90 : Double taxation relief – Interest income – DTAA – India-Mauritius [S. 10(15)(IV)]**

Exemption of interest income in article 11 is independent of exemption granted to interest income under various items of section 10 (15)(iv). (A.Y. 2002-03)

*Yu BO Investment Co (P) Ltd., In re (2004) 139 Taxman 277 / 267 ITR 734 / 189 CTR 288 (AAR)*

**S. 90 : Double taxation relief – Liaison offices – Permanent establishment – DTAA – India- UAE.**

The applicant had four liaison offices in India. If the work of liaison offices are significant part of main work of UAE establishment. It follows that the liaison offices of the applicant in India for the purposes of the second mode of remittances of amount, would be a "permanent establishment" within the meaning of the expression in the DTAA. Therefore, so much of the profits as shall be deemed to accrue or arise to the applicant in India, which are attributable to the "Permanent establishment" namely, the liaison offices in India, would be taxable in India even under the DTAA.

*UAE Exchange centre LLC, In re. (2004) 139 Taxman 82 / 268 ITR 9 / 189 CTR 467 (AAR)*

**S. 90 : Double taxation relief – Superannuation fund – Service rendered in India – DTAA – India-USA [Art. 16(1)]**

Amount received by a non-resident working in USA from superannuation fund for services rendered in India is taxable as per DTAA with USA.

*Yogesh Prabhakar Modak, In re (2004) 268 ITR 26 / 138 Taxman 121 / 189 CTR 478 (AAR)*

**S. 90 : Double taxation relief – Feasibility report – DTAA – India-USA [S. 5(2), 9(1)(vi)(vii)]**

Payment made to contractor in USA by Government of USA for preparing feasibility report for assessee – applicant as per assessee's agreement with US Government is not taxable in India under DTAA.

*Airports Authority of India, In re (2004) 269 ITR 355 / 140 Taxman 147 / 191 CTR 1 (AAR)*



**S. 90 : Double taxation relief – Portfolio investments – Permanent establishment – Business income – DTAA – India-USA [Art. 7]**

The assessee resident in USA doing business of portfolio investments in India as an FII through an independent domestic custodian and not having any branch or office in India, could not be said to have a permanent establishment in India. Income of applicant FII, resident in USA, from sale of portfolio investment in India through an independent domestic custodian will be covered with in article 7 of DTAA as business income and therefore, will not be liable to tax in India.

*Fidelity Advisor Series VIII, In re (2004) 271 ITR 1 / (2005) 142 Taxman 111 / (2004) 192 CTR 201 (AAR)*

**S. 90 : Double taxation relief – Fixed place – Permanent establishment – DTAA – India-USA [Art 7(1)]**

Where address of authorized country manager of applicant is fixed place in India from which business of applicant is partly carried on, in terms of DTAA applicant can be said to have a permanent establishment in India.

*Sutron Corporation, In re (2004) 138 Taxman 87 / 268 ITR 156 / 189 CTR 366 (AAR)*

**S. 90 : Double taxation relief – Technical services – Deduction of tax at source – Taxability of Royalty whether on cash or receipt basis – DTAA – India-Sweden [S. 195, Article 12]**

Resident applicant credits payments towards royalties payable to non-residents in its books of accounts without deducting tax at source and contends as per DTAA, royalties are taxable only when 'paid' - Issue is whether income receivable by the non-resident companies is taxable in their hands in India only on cash or receipt basis as per Article 12 of the respective DTAA's and whether TDS is applicable only at time of making actual remittance and not at the time of making a mere provision in the books of accounts of the applicant - AAR observed that para (2) of Article 12 of the DTAA clearly lays down that the amount of such royalties/fees may also be taxed in India, in which they arise, and according to the laws of India. It is thus clear that the provisions of Article 12 of the treaty, discussed above, do not provide that taxability of such royalties/fees in India shall be on cash or receipt basis. Hence such royalties/fees would be taxable according to the law in India which include cash or receipt basis and TDS has to be at the time of making a mere provision thereof in the books of account of the applicant, since the requirement of actual payment of "royalties", is not a pre-requisite or pre-condition for triggering the incidence of income tax under section 195.

*Flakt (India) Limited In re (2004) 267 ITR 727 / 139 Taxman 238 / 189 CTR 359 (AAR)*

**S. 90 : Double taxation relief – Fixed place of business – Permanent establishment – DTAA – India-Singapore [Article 5.1]**

Applicant a Singapore company having entered into agreement with independent service providers (ISPs), in India who are obliged to make adequate space available

to store applicant's products provide other facilities apart from storage, handling, repacking, etc., and deliver the goods to the customers on behalf of the applicant, the demarcated space in the warehouse of ISP constitutes the fixed place of business and the applicant has a PE in India within the meaning of Article 5.1 of the Indo-Singapore DTAA. (A.Y. 1998-99)

*Seagate Singapore International Head Quarters (P) Ltd., In re, (2010) 322 ITR 650 / 230 CTR 110 / 189 Taxman 181/ 35 DTR 242 (AAR)*

*Editorial : But see decision of Mumbai ITAT in Airlines Rotable Ltd. v. ITAT (2010) 131 TTJ*

*385 / 40 DTR 226 / (2011) 44 SOT 368 (Mum.) where it was held on similar facts that no PE existed*

### **Section 91 : Countries with which no agreement exists**

#### **S. 91 : Countries with which no agreement exists – Relief country wise – Double taxation relief**

Scheme of section 91(1) deals with granting of relief calculated on the income country-wise and not on the basis of aggregation or amalgamation of income of all foreign countries. (A.Ys. 1971-72, 1973-74, 1978-79, 1980-81, 1981-82)

*CIT v. Bombay Burmah Trading Corporation Ltd. (2003) 259 ITR 423 / 126 Taxman 403 / 181 CTR 357 (Bom.)(High Court)*

#### **S. 91 : Countries with which no agreement exists – Federal taxes – Foreign state – DTAA – Tax credit**

The view that State taxes cannot be allowed as a deduction and also cannot be taken into account for giving credit is incongruous and results in a contradiction. While section 91 allows credit for Federal & State Taxes, the DTAA allows credit only for Federal Taxes. The result is that the section 91 is more beneficial to the assessee & by virtue of section 90(2) it must prevail over the DTAA. Though section 91 applies only to a case where there is no DTAA, a literal interpretation will result in a situation where an assessee will be worse off as a result of the provisions of the DTAA which is not permissible under the Act. Section 91 must consequently be treated as general in application and must prevail where the DTAA is not more beneficial to the assessee. Accordingly, even an assessee covered by the scope of the DTAA will be eligible for credit of State taxes under section 91 despite the DTAA not providing for the same. (A. Y. 2000-01)

*Dy. CIT v. Tata Sons Ltd. (2011) 9 ITR 154 / 135 TTJ 1 / (2010) 43 SOT 27 / 48 DTR 321 (Mum.)(Trib.)*

## **CHAPTER X**

### **SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX INTERNATIONAL TRANSACTION-TRANSFER PRICING**

## **Section 92 : Computation of income from international transaction having regard to arm's length price**

### **S. 92 : Avoidance of tax – Transfer pricing – Arm's length price – International transaction – Royalty – Deductibility of expenses**

Section 92 does not apply in respect of payments of royalty etc. which are not the part of regular business carried on between a resident and Non resident. (A. Ys. 1997-98 & 1998-99).

*CIT v. Nestle India Ltd. (2011) 57 DTR 65 / 337 ITR 103 (Delhi)(High Court)*

### **S. 92 : Avoidance of tax – Transfer pricing – Arm's length price – International transaction – Constitutional validity of provisions [S. 92A]**

Chapter X dealing with Transfer Pricing was Constitutionally Valid. Article 14 of the Constitution applies even to a taxing statute, it does not prevent the legislature from making classification having intelligible differentia and nexus with the object of classification. (A.Ys. 1998-99, 2001-02, 2002-03 and 2006-07)

*Coca Cola India Inc. v. ACIT (2009) 309 ITR 194 / 221 CTR 225 / 177 Taxman 103 / 17 DTR 66 (P&H)(High Court)*

### **S. 92 : Avoidance of tax – Transfer pricing – Arm's length price – International transaction – Debit balances**

Assessee is engaged in business of marketing of air time available on television programmes, cricket and other events and also in the business of producing television serials. During the year assessee had international transaction with one of its associated enterprises. Said associate enterprise had overdue payment and the assessee did not charge interest on overdue payments. TPO made adjustment of arm's length price for overdue payment. The Tribunal held that:

a continuing debit balance in the account of the Associated Enterprise by itself does not amount to an international transaction under section 92B in respect of which arm's length price adjustment can be made. Even assuming that the continuing debit balances of AEs can be treated as "International Transactions" the right course of applying the CUP method would have been by comparing this not charging of interest with other cases in which other enterprises have charged the interest, in respect of over dues in respect of similar business transactions, with independent enterprises. As no exercise has been carried out addition was deleted. (A. Y. 2004-05).

*Nimbus Communications Ltd. v. ACIT (2011) 43 SOT 695 / 55 DTR 163 / 139 TTJ 214 (Mum.)(Trib.)*

### **S. 92 : Avoidance of tax – Transfer pricing – Arm's length price – International transaction – Advertisement expenses**

As per the agreement "MC" would get same amount of royalty whether advertisement expenditure was borne by assessee or by its franchisers, it could not be said that by agreeing to bear a part of advertisement expenses which was to be borne by franchisers, there was any arrangement between assessee and MC, a non-resident, to

effect that there was no profit to assessee or lesser profit to assessee, therefore section 92 was not applicable with regard to advertisement expenditure and as a consequence, thereof additions confirmed by the CIT(A) was deleted. (A.Y. 2001-02) *McDonalds (India) (P) Ltd. v. ACIT (2010) 36 SOT 240 (Delhi)(Trib.)*

**S. 92 : Avoidance of tax – Transfer pricing – Arm’s length price – International transaction – Block assessment – Undisclosed income [S. 158BC]**

Transaction of sale of shares shown as investment and the income arising from the sale thereof being a capital gain and not profits of the business, conditions precedent for applying the provisions of s. 92 as existing prior to 1st April, 2002, were not satisfied.

*Slocum Investment (P) Ltd. v. Dy. CIT (2006) 101 TTJ 558 / (2007) 106 ITD 1 / (2006) 7 SOT 761 (Delhi)(Trib.)*

**S. 92 : Avoidance of tax – Transfer pricing – Arm’s length price – International transaction – Capital gains [S. 45(3)]**

Restructuring by non-resident of its participating interest in oil exploration block in India by transferring it to a partnership firm to be formed in Canada - AAR observed that said sections apply exclusively to international transactions carried out between associated persons and accordingly, the proposed transfer of the participating interest shall be regarded as an international transaction between two associated enterprises and resulting capital gains can be assessed in accordance with the transfer pricing provision and the provisions of section 45(3) (about recorded book entry) would not prevail over it.

*Canoro Resources Ltd. (2009) 223 CTR 339 / 313 ITR 2 / 180 Taxman 220 / 22 DTR 188 (AAR)*

**S. 92 : Avoidance of tax – Transfer pricing – Arm’s length price – Interest free loan to Indian wholly owned subsidiary [S. 92A, 92B, 92C, 92D, 92E]**

Non-resident extends interest-free loan to Indian wholly-owned subsidiary; question is whether it is required to charge interest as per the principles of arms length price; it contends that charging interest would actually result in erosion of tax revenue of the country and frustrate legislative intent as it would result in reducing income of an assessee - AAR observed, on the basis of opinion of Solicitor General that it has no jurisdiction to order “non-adherence” to statutory provisions i.e. it has no jurisdiction to order that Section 92(1) be not applied or implemented - Hence held provisions of said sections to be applied and thereafter, it is for the assessing officer to decide whether interest of the revenue would be better served by not applying sub-sections (1) and (2) of S. 92 than by adhering to them.

*Instrumentarium Corporation, Finland (2005) 193 CTR 347 / 272 ITR 499 / 143 Taxman 1 (AAR)*

**Section 92A : Meaning of associated enterprise**

### **S. 92A : Avoidance of tax – Transfer pricing – Constitutional validity [S. 92]**

Chapter X dealing with Transfer Pricing was Constitutionally Valid. Article 14 of the Constitution applies even to a taxing statute, it does not prevent the legislature from making classification having intelligible differentia and nexus with the object of classification. (A.Ys. 1998-99, 2001-02, 2002-03 and 2006-07)

*Coca Cola India Inc. v. ACIT (2009) 309 ITR 194 / 221 CTR 225 / 177 Taxman 103 / 17 DTR 66 (P&H)(High Court)*

### **S. 92A : Avoidance of tax – International transaction – De facto control of an unrelated party – Considered “associated enterprises”**

If one enterprise controls the decision making of the other or if the decision making of two or more enterprises are controlled by same person, these enterprises are required to be treated as ‘associated enterprises’. Though the expression used in the statute is ‘participation in control or management or capital’, essentially all these three ingredients refer to de facto control on decision making.

The argument, based on *Dy. CIT v. Quark Systems (P) Ltd. (2010) 38 SOT 307 (SB)*, that exceptionally high and low profit making comparables are required to be excluded from the list of TNMM comparables is not acceptable. Merely because an assessee has made high profit or high loss is not sufficient ground for exclusion if there is no lack of functional comparability. While there is some merit in excluding comparables at the top end of the range and at the bottom end of the range as done in the US Transfer Pricing Regulations, this cannot be adopted as a practice in the absence of any provisions to this effect in the Indian TP regulations. (Benefit of +/- 5% adjustment as directed in *UE Trade Corporation 44 SOT 457* to be given);

The adjustment made by the TPO with regard to the advertisement expenditure incurred by the assessee was without jurisdiction because the Assessing Officer had not made any reference on this issue to the TPO. As the reference to the TPO is transaction specific and not enterprise specific, the TPO Officer has no power to go into a matter which has not been referred to him by the Assessing Officer. Even the CBDT Instructions are clear on this (*3i Infotech Ltd. v. Dy. CIT (2011) 136 TTJ 641* followed) (A. Y. 2006-07).

*Diageo India Pvt. Ltd. v. Dy. CIT (2011) 47 SOT 252 / 63 DTR 33 / 142 TTJ 287 (Mum.)(Trib.)*

### **Section 92B : Meaning of international transaction**

#### **S. 92B : Avoidance of tax – Transfer pricing – International transaction**

Where a transaction is incurred into by AEs being a resident and non resident, transaction shall amount to an international transaction falling under section 92B(1), therefore when either or both of AEs are non-resident, transaction entered into would amount to an international transaction within the meaning of section 92B(1), therefore, it does not matter that transactions in question are not “cross border transaction”. (A. Y. 2006-07).

*ITO v. Tianjin Tianshi India (P) Ltd. (2011) 133 ITD 123 / 142 TTJ 841 / 64 DTR 98 (Delhi)(Trib.)*

**S. 92B : Avoidance of tax – Transfer pricing – Adjustments – Enterprise level profits [S. 92C]**

TNMM does not permit the assessee or the Assessing Officer to compare enterprise level profits and make adjustments; TPO's order is set aside and the matter is restored to the Assessing Officer for fresh adjudication. (A.Y. 2002-03)

*Dy. CIT v. Starlite (2010) 45 DTR 65 / 133 TTJ 425 / 40 SOT 421 (Mum.)(Trib.)*

**S. 92B : Avoidance of tax – Transfer pricing – International transaction – Contribution of shares [S. 45, 195]**

Transfer pricing provisions in Chapter X would not be attracted to the contribution of shares of an Indian company by the applicant, a Bahraini company to its subsidiary in Cyprus without any consideration as no capital gains would be chargeable to tax in India on such transfer. As no capital gains would be chargeable the transferee company would not be obliged to withhold tax under section 195.

*Amiantit International Holdings Ltd. In Re. (2010) 35 DTR 178 / 230 CTR 19 / 322 ITR 678 / 189 Taxman 149 (AAR)*

**S. 92B : Avoidance of tax – Transfer pricing – International transaction – Lending or borrowing**

Lending or borrowing money between two cross boarder AEs comes 'with in the ambit of international transaction and it has to be considered whether the same is at ALP, rate of interest on such loan is an integral part of determination of ALP. When interest free loan is given to an overseas AE, income on account of interest can not be excluded from the arm's length consideration. Notional interest on interest-free loans can be assessed under transfer pricing law. But see Pune ITAT decision in to *Patni Computer Systems Ltd. v. Dy. CIT (Delhi) 141 TTJ 190* (A.Ys. 2002-03 to 2004-05) *Perot Systems TSI (India) Ltd. v. Dy. CIT (2010) 130 TTJ 685 / 5 ITR 106 / 37 SOT 358 / 39 DTR 151 (Delhi)(Trib.)*

**Section 92C : Computation of arm's length price**

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction**

The High Court made certain observations on merits, while remanding the matter to the TPO, virtually concluding the matter. The TPO was directed to proceed with the matter uninfluenced by the observations/directions given by the High Court. (A. Y. 2005-06)

*Maruti Suzuki India Ltd. v. Addl. CIT (2010) 236 CTR 225 / (2011) 335 ITR 121 / 198 Taxman 102 / (2010) 47 DTR 233 (SC)*



**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Alternative Dispute Resolution Mechanism – Pendency of appeal [S. 144C]**

Competent Authority has been directed to decide the matter, notwithstanding the pendency of the appeal before CIT(A).

*Addl. CIT v. HCL Technologies Ltd. (2010) 188 Taxman 72 / (2009) 225 CTR 356 / 28 DTR*

*217 / 184 Taxman 41 (SC)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Erosion of tax revenue – Direction to authorities**

High Court's judgment on transfer pricing in cases not leading to "erosion of tax revenue" nullified. Authorities to decide the issue without being influenced by observations made in impugned judgment. (A.Ys. 2002-03 to 2006-07)

*Coca Cola India Inc. v. ACIT (2010) 48 DTR 249 / 236 CTR 561 / (2011) 336 ITR 1 (SC)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Question of section 40A(2) not examined as exercise is "revenue-neutral". Transfer Pricing Provisions should be extended to domestic transactions to "reduce litigation" [S. 40A(2)]**

The assessee did not have any employee other than a company secretary and all administrative services relating to marketing, finance, HR etc were provided by Glaxo Smith Kline Consumer Healthcare Ltd. ("GSKCH") pursuant to an agreement under which the assessee agreed to reimburse the costs incurred by GSKCH for providing the various services plus 5%. The costs towards services provided to the assessee were allocated on the basis suggested by a firm of CAs. The Assessing Officer disallowed a part of the charges reimbursed on the ground that they were excessive and not for business purposes which was upheld by the CIT(A). However, the Tribunal deleted the disallowance on the ground that there was no provision to disallow expenditure on the ground that it was excessive or unreasonable unless the case of the assessee fell within the scope of section 40A(2). (See 290 ITR 35 (Del.) for facts). The department challenged the deletion. HELD dismissing the SLP:

- (i) The Authorities below have recorded a concurrent finding that the said two Companies are not related Companies under section 40A(2). As far as this SLP is concerned, no interference is called for as the entire exercise is a revenue neutral exercise. Hence, the SLP stands dismissed. For other years, the authorities must examine whether there is any loss of revenue. If the Authorities find that the exercise is a revenue neutral exercise, then the matter may be decided accordingly;
- (ii) The larger issue is whether Transfer Pricing Regulations should be limited to cross-border transactions or whether the Transfer Pricing Regulations be extended to domestic transactions. In domestic transactions, the under-invoicing of sales and over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage such as where one of the related

entities is (i) loss making or (ii) liable to pay tax at a lower rate and the profits are shifted to such entity;

- (iii) Complications arise in cases where the fair market value is required to be assigned to transactions between related parties under section 40A(2). The CBDT should examine whether Transfer Pricing Regulations can be applied to domestic transactions between related parties under section 40A(2) by making amendments to the Act.
- (iv) Though the Court normally does not make recommendations or suggestions, in order to reduce litigation occurring in complicated matters, the question of extending Transfer Pricing regulations to domestic transactions require expeditious consideration by the Ministry of Finance and the CBDT may also consider issuing appropriate instructions in that regard. (A.Y. 2001-02)

*CIT v. Glaxo Smithkline Asia (P) Ltd. (2010) 47 DTR 65 / 236 CTR 113 / 195 Taxman 35 (SC)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Alternative dispute resolution mechanism [S. 144C]**

Competent Authority has been directed to decide the matter, notwithstanding the pendency of the appeal before CIT(A). Parties are advised to resort of alternate Dispute Mechanism in section 144C. The authority directed not to reject the application on the ground that the proposal has come before the cut-off date.

*Addl. CIT v. HCL Technologies Ltd. (2009) 184 Taxman 41 / 225 CTR 356 / 28 DTR 217 / (2010) 188 Taxman 72 (SC)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Transactional net margin method – Attribution of profit to permanent establishment – DTAA – India-USA. [Art. 7]**

The authority was correct in holding that there is no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two were to be held to be at arm's length taking into account all the risk taking functions of the multinational enterprise. There is a difference between the taxability of the permanent establishment in respect of the income earned by it in India which is in accordance with the Income-tax Act, 1961, and the taxability of the multinational enterprise through its permanent establishment in India under Article 7 of the DTAA.

The transactional net margin method was the appropriate method of quantifying the profits of the foreign company in the case of the service permanent establishment because under the transactional net margin method the total operating profit arising from the transaction was appropriated on the basis of sales, cost, assets, etc. (A.Y. 2005-06)

*DIT v. Morgan Stanley & Co. (2007) 292 ITR 416 / 210 CTR 419 / 162 Taxman 165 / 201 Taxation 160 (SC)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Assessing Officer's decision to refer to Transfer pricing Officer must be based on material and not be arbitrary – Transfer pricing officer has no jurisdiction to decide the validity of any such reference**

The assessee entered into transactions with a party named Blue Gems BVBA. In the preceding year, the assessee treated the transactions as an "international transaction" for transfer pricing purposes. However, in the present year, the assessee claimed that though the said party was a "related party", it was not an "affiliated entity" as defined in section 92CA. However, instead of deciding the issue, the Assessing Officer made a reference to the TPO to determine the ALP and the TPO asked the assessee to show-cause why the transaction with the said party was not subject to transfer pricing proceedings. The assessee filed a Writ Petition to challenge the action of the Assessing Officer / TPO. Held by the High Court:

The Assessing Officer has jurisdiction to make a reference to the TPO only if there is an "international transaction". Though the question as to whether there is an "international transaction" may be disputed, the Assessing Officer is not obliged to grant hearing to the assessee, invite and consider the objections with respect to the question whether there was an "international transaction" before making a reference to the TPO. The Assessing Officer's opinion has to be based on available material and would have "ad-hoc" finality. The power cannot be exercised arbitrarily or at whims or caprice. Section 92C(1) has inbuilt safeguards to ensure that the reference is made only in appropriate cases with approval of the higher authority. At the stage of framing the assessment in terms of the TPO's report the Assessing Officer is entitled [despite the amendment to section 92CA(4)] to consider the objections of the assessee that in fact there had been no "international transaction". If the assessee succeeds in establishing such fact, the Assessing Officer would have to drop the entire transfer pricing proceedings. Even the DRP has the power to consider whether there was an international transaction or not and it can annul the computations proposed on the basis of the TPO's order. However, the TPO has no jurisdiction to decide the validity of any such reference and his task is only to determine the ALP. On facts, as the parties were closely related and the assessee had accepted in the preceding year that the transactions were subject to transfer pricing, the Assessing Officer's reference could not be interfered in writ proceedings. (A. Y. 2008-09).

*Veer Gems v. ACIT (2012) 65 DTR 66 / 204 Taxman 16 / 246 CTR 352 (Guj.)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Opportunity of being heard [S. 144C]**

Order was passed by TPO without granting extension of time sought by the petitioner for furnishing more documents and giving an opportunity of personal hearing to it and also documents were not consider which were already on record in their right perspective the impugned order was set aside and TPO was directed to pass an order and also personnel hearing. (A. Y. 2007-08).

*Toyota Kirloskar Motor (P) Ltd. v. Addl. CIT (2011) 52 DTR 393 / 239 CTR 537 / 197 Taxman 477 (Karn.)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Royalty – Business expenditure**

Payment of royalty by assessee company to its US based holding company is not hit by the provisions of section 92 in the absence of any comparable case on record to determine the ordinary profit in similar business and the price fixed has been accepted as ALP by the TPO. Payment of royalty being a business expenditure which is incurred wholly and exclusively for the purpose of business of the assessee, it is to be allowed as business expenditure. (A. Ys. 1999-2000 to 2001-02).

*CIT v. Oracle India (P) Ltd. (2011) 59 DTR 222 / 243 CTR 103 / (2011) Tax L.R. 905 (Delhi)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Selection of comparables**

Held that in the absence of any perversity in the finding of the Tribunal in the selection of a different set of comparables for determination of ALP and recomputation of ratio of operating profit/total cost at 21.97% as against 35.26% adopted by TPO, no interference is warranted. The High court further upheld the decision of the Tribunal of allowing depreciation on administrative assets for determining the operating profits while computing the ALP. (A. Y. 2005-06).

*CIT v. Rakhra Technologies (P) Ltd. (2011) 243 CTR 505 / 60 DTR 159 / 203 Taxman 154 (P&H)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Selection of comparables – Question of law [S. 260A]**

Tribunal having admitted the additional ground for exclusion of Datamatics Technologies Ltd. as comparable and remanded the case to the Assessing Officer directing that the assessee shall be entitled to produce all relevant material for proper determination of ALP and thereafter Assessing Officer having passed an order in favour of the assessee on consideration of the material produced by it, no substantial question of law arises. (A. Y. 2004-05).

*CIT v. Quark Systems India (P) Ltd. (2011) 244 CTR 542 / 62 DTR 182 (P&H)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Air time sale – DTAA – India-United Kingdom [Article 7]**

Assessee was a British company and was part of BBC group. It had appointed an Indian company, BWIPL as its authorized agent in India under an airtime sales agreement to solicit orders for sale of advertisement airtime on channel at rates and on terms and advertising provided by assessee and pass on such orders to assessee

for acceptance and confirmation. In consideration of service provided by BWIPL, it was to receive 15 percent marketing commission of advertisement revenues received by assessee from Indian advertisers. Assessee claimed that since BWIPL had been remunerated from arm's length price no further income was taxable in India. Tribunal has accepted the contention of assessee and allowed the appeal. On appeal the High Court upheld the order of Tribunal. (A. Y. 2002-03).

*DIT v. BBC Worldwide Ltd. (2011) 203 Taxman 554 (Delhi)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Computation – Opportunity of being heard – Alternative Remedy [S. 144, Art. 226 Constitution of India]**

Assessee having afforded proper opportunity and as the alternative remedy of filing objections to the order of the TPO through approaching the Dispute Resolution Panel under section 144C is available, the order of TPO could not be challenged by filing writ petition.

*Messe Dusseldorf India (P) Ltd. v. Dy. CIT (2010) 37 DTR 253 / 191 Taxman 234 / 320*

*ITR*

*565 / 231 CTR 176 (Delhi)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Computation – Use of brand logo of Foreign Company and advertisement expenditure**

Before determining the ALP the TPO / AO needs to give appropriate notice to the assessee conveying the grounds on which the adjustment is proposed to be made, expenditure incurred by domestic entity which is an AE of a foreign entity etc. (A.Y. 2005-06)

*Maruti Suzuki India Ltd. v. Addl. CIT (2010) 233 CTR 105 / 41 DTR 289 / 192 Taxman 317 / 328 ITR 210 (Delhi)(High Court)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction**

Expansion of jurisdiction of TPO by insertion of sub-section (2A) to section 92CA, empowering him to determine arm's length price of any international transaction other than an international transaction referred to him by Assessing Officer under section (1) of section 92CA can only have prospective effect from 1-6-2011, therefore, prior to introduction of sub-section (2A) of section 92CA, jurisdiction of TPO was restricted to computation of arm's length price only those transactions which were specifically referred to him by Assessing Officer. (A. Y. 2006-07).

*CIT v. Amadeus India (P) Ltd. (2011) 203 Taxman 602 / (2012) 65 DTR 85 / (2012) 246 CTR 338 (Delhi)(High Court)*

*Editorial: Refer Amadeus India (P) Ltd. v. ACIT (2011) 52 DTR 378 / 137 TTJ 457 / 8 ITR 187 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Slump sale**

For purpose of transfer pricing in order to determine the ALP in the absence of other identical transactions, the valuation by a registered valuer is the most appropriate means under CUP method. However, as the valuation report filed by the assessee is not reliable, the only option is to adopt the value of the assets sold as per the company law or income-tax WDV. In the sale of a going concern, factors like profitability of the branch office, goodwill, and various other commercial and technical aspects will have a bearing on the ALP. (A. Y. 2004-05)

*Inter Asia Electronics Inc. v. ADIT (2011) 140 TTJ 513 / 52 DTR 442 / 46 SOT 48 (URO)(Bang.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – +/- 5% Variation only if more than one price determined**

The benefit of +/- 5% variation as per the Proviso to section 92C(2) is available only if more than one price is determined. It does not apply where only one price has been determined. CBDT Circular No.12 dated 23.8.2001 provides that "the Assessing Officer shall not make any adjustment to the arm's length price determined by the taxpayer if such price is upto 5% less or upto 5% more than the price determined by the Assessing Officer". Circular was issued considering practical difficulties. As the Circular never came into operation thus, Circular No. 12 is otiose and cannot be relied upon. (A.Y. 2004-05)

*ACIT v. Essar Steel Ltd. (2011) 131 ITD 22 / 136 TTJ 470 / 51 DTR 177 / (2012) 15 ITR 189 (Visakha)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Super normal profit co must be excluded from comparable**

The assessee, engaged in providing software development services reported an OP/Cost Margin of 14.96%. The TPO worked out the average of arithmetic mean of ALP (OP/OC) of 42 comparables at 24.91% and directed that an adjustment of ` 10.40 crores be made. In its objections to the DRP, the assessee claimed that the comparables included three companies which were "super-normal profit making" and that these should be excluded. It was claimed that if the said companies were excluded, the arithmetic mean of OP/OC of the comparables was 17.15% which was within the +/- 5% range permitted by section 92(C)(2). The TPO rejected the contention on the ground that one company was listed and audited and showing consistent growth at the same level and there was no abnormality and that the other company's information was not listed in the database. The third "abnormal" company was not dealt with by the TPO. The DRP dismissed the objections of the assessee by a "very cursory and laconic order". On appeal by the assessee, HELD allowing the appeal:



(i) The TPO rejected the assessee's contention with regard to inclusion of the three super-normal profit companies without any cogent reason. It is undisputed that the three companies have shown super-normal profits as compared to other comparables. Their exclusion from the list of comparable is quite correct. After excluding the three companies the arithmetic mean of the comparables falls within the  $\pm 5\%$  range permitted by section 92(C)(2);

(ii) Despite the voluminous submissions and paper book filed, the DRP passed a very cursory & laconic order without going into the details of the submissions which is quite contrary to the mandate of section 144C. (A. Y. 2006-07)

*Adobe Systems India Pvt. Ltd. v. ACIT (2011) 44 SOT 49 (URO) / 138 TTJ 122 / 50 DTR 481 / (2012) 14 ITR 84 (Delhi)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction Computation – Choice of Method**

Choice of method of determination of ALP is not an unaffected choice on the part of the tax payer and this choice has to be exercised on the touch stone of principles governing selection of most appropriate method set out in section 92C(1), where the Assessing Officer finds that selection of most appropriate method is not correct, he has the powers as well as corresponding duty to select the most appropriate method and compute the ALP by applying that method. (A. Ys. 2002-03 to 2004-05).

*Serdia Pharmaceuticals (India) (P) Ltd. v. ACIT (2011) 50 DTR 98 / 136 TTJ 129 / 44 SOT 391 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Selection of comparables [S. 144C]**

Unless the functional profiles of assessee company are examined minutely and detail. It is very difficult to say that the assessee is engaged in the business of software development as decided by TPO and not in the business of rendering support in respect of engineering designs and drawings as claimed by the assessee. Further DRP has neither examined assessee's contention nor passed speaking and reasoned order. Matter is remanded back to the file of the AO / TPO for fresh adjudication. (A. Y. 2006-07)

*Bechtel India (P) Ltd. v. Dy. CIT (2011) 136 TTJ 212 / 50 DTR 206 / 46 SOT 427 (Delhi)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation**

Where the finding of CIT(A) is based on net profit margin of the assessee company worked out by him at 6.97% on the basis of operating profits/sales, which was within  $\pm 5\%$  range of ALP, there is no reason to interfere in the order of CIT(A). (A. Ys. 2002-03 to 2004-05).

*Osram India (P) Ltd. v. Dy. CIT (2011) 51 DTR 297 / 137 TTJ 749 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – External comparables**

Assessee company having provided same software related services to AE's and unrelated parties, it was not required to make segmental reporting or disclose separate financial information in respect of transactions entered into with AE's and non AEs as per the guidelines provided under AS-17 and therefore, ALP in respect of international transactions undertaken by the assessee with AEs was rightly determined on the basis of international comparison of profit earned from the international transactions with AEs and profit earned from international transactions with unrelated parties and not by recourse to external comparables. (A. Y. 2006-07).

*Birlasoft (India) Ltd. v. Dy. CIT (2011) 51 DTR 353 / 136 TTJ 505 / 44 SOT 664 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Jurisdiction – International taxation**

Though the deputation of three employees by the assessee to its US subsidiary without consideration is covered by the definition of "international transaction" under section 92B (1), it was not necessary for the Assessing Officer to determine the ALP of the said transaction as there would be erosion of tax base of India if the assessee charges the cost of deputation of employees in as much as assessee is remunerating the subsidiary on the cost-plus basis for the services and entire revenue accrues to the assessee. Jurisdiction of TPO is restricted to the transactions referred by the Assessing Officer under section 92CA(1) and therefore, TPO cannot determine the ALP in relation to an international transaction not referred to him by the Assessing Officer under section 92CA(1), further, since the conditions laid down in section 92C(3) were not satisfied the impugned addition cannot also be sustained on the premise that the Assessing Officer as determined the ALP on the basis of material or information or document in his possession. (A. Y. 2002-03).

*3i Infotech Ltd. v. Dy. CIT (2011) 51 DTR 385 / 136 TTJ 641 / 129 ITD 422 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation**

Assessee company entered into international transactions with Byk which comprised of export of intermediates and clinical trial services. Assessing Officer made reference to TPO in order to find out whether international transactions were at arm's length price or not. In regard to clinical trial services performed by assessee-company for Byk, TPO after examining various aspects, concluded that mark up of 5% over cost was not as per arm's length price and same should be 17.4% on basis of comparable cost. On appeal Commissioner (Appeals) concluded that 5% mark up as returned by assessee was fully justified. On appeal by revenue the Tribunal noticed that in course of providing clinical trial service, major part of research activities was carried out by "Byk" itself and function of assessee was only to collect data from various hospitals

and transmit same to "Byk" for which it was suitably reimbursed by mark-up of 5% over cost. It was also noted that profits of assessee were exempt under section 10B and thus, company was in no way benefited by charging 5% mark-up as against 17.4% fixed by TPO. The Tribunal held that on facts there was no infirmity in impugned order passed by Commissioner (Appeals) and the same was upheld. (A. Ys. 2002-03 to 2003-04)

*ITO v. Zyduz Altanta Healthcare (P) Ltd. (2011) 44 SOT 132 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Bad debts written off [S. 10B]**

Bad debts written off cannot be factor to determine the arm's length price of any international transaction. The Transfer Pricing Officer had exceeded his limits in following a method not authorized under the Act or Rules. (A. Ys. 2002-03, 2003-04). *C. A. Computer Associates P. Ltd. v. Dy. CIT (2011) 8 ITR 142 / (2010) 37 SOT 306 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – International transaction – Arm's length price – Report of the TPO is not binding on the Assessing Officer – Proviso substituted w.e.f. 1st October 2009, operate only from Asst. Year 2009-10.**

The report of the TPO is not binding on the Assessing Officer. Assessing Officer can refer the matter to the TPO for determination ALP of an International taxation transaction or he may determine it on his own. Assessing Officer can determine the price of imports of his own. New proviso to section 92C(2) came in to operation from Asst. Year 2009-10 and therefore, did not apply to Asst. Year 2003-04, further, where only one price is determined in the matter of ALP, the option of five percent under proviso to section 92C(2) is not available to the assessee. (A. Y. 2003-04)

*ACIT v. UE Trade Corporation (India) P. Ltd. (2011) 136 TTJ 297 / 50 DTR 379 / 45 SOT 197 / 9 ITR 400 / 44 SOT 457 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction [Rule 10B(1)(e)]**

Under Chapter X of the Income Tax Act, 1961, the determination of the arm's length price of an international transaction has to be only at the transaction level or at a class of transactions. The law does not permit determination of the arm's length price of international transactions, by comparing margins at entity level or by taking overall industry level averages. The matter was set aside. (A. Y. 2002-03).

*Dy. CIT v. Ankit Diamonds (2011) 8 ITR 487 / 43 SOT 523 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – If ALP determined by arithmetical mean, 5% deduction allowable**

In determining the arms' length price for transfer pricing purposes in respect of international transactions relating to 'procurement Support Services', it was held that pursuant to the First proviso to section 92C(2) (pre-amendment by Finance (No. 2) Act, 2009 w.e.f. 1.10.09) which provides that "where more than one price is determined by the most appropriate method, the arms length price shall be taken to be the arithmetical mean of such prices or at the option of the assessee, a price which may vary from the arithmetical mean of an amount not exceeding five per cent of such arithmetical mean" it is clear that the assessee has an option when there is arithmetical mean involved while computing the 'arm's length price' and it happens only if more than one price is determined by the most appropriate method. The First Proviso becomes operational where more than one comparable price is determined. The assessee at his option can make claim of deduction out of the arithmetic mean not exceeding 5%. All the judicial pronouncements (*SAP Labs India Pvt. Ltd. v. ACIT (2010) 6 ITR 81 (Bang.) (Trib.)*, *Sony India P. Ltd. v. Dy. CIT (2009) 315 ITR (AT) 150 (Delhi)*, *UE Trade Corp (Delhi)*, *Essar Steel (Vizag) & Perot Systems TSI (India) Ltd. v. Dy. CIT (2010) 130 TTJ 685 (Delhi)* are uniform in making the proposition that where arithmetic mean is involved, the assessee obtains the eligibility for claim of deduction out of such arithmetic mean. (A.Ys. 2003-04, 2004-05) *Cummins India Limited v. Dy. CIT (2011) 45 SOT 78 (URO) / (2012) 15 ITR 252 (Pune) (Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Prior Years' data cannot ordinarily be relied upon to justify ALP. Non-operating income & expenditure should be excluded while comparing**

It was held that the assessee has to adopt the data available for the TP study at the time of filing of the return. The OECD guidelines are not of binding nature and even the Proviso to Rule 10B(4) provides that any subsequent year data cannot be considered. The contemporaneous data of relevant financial year is to be used for making the comparable analysis for arriving at the ALP unless it is proved otherwise. For arriving at the net margin of operating income, only operating income and operating expenses for the relevant business activity of the assessee has to be taken into consideration. Other income, such as dividend income, profit on sale of assets, donations as well as non-operating expenses which are included in the operating incomes of other comparable companies should be excluded as it effects the net margin of the operating profits of the comparables. Working capital adjustments also have to be considered while arriving at the operating net margins. Also the assessee is entitled to a standard deduction of 5% as provided under proviso to section 92C(2) before making adjustments of the transfer price. (*Schefenacker Motherson Ltd. v. ITO & Others (2009) 123 TTJ 509 (Delhi)* and *SAP Labs India Pvt. Ltd. v. ACIT (2010) 6 ITR 81 (Bang.) (Trib.)* followed). (A. Y. 2002-03) *TNT India Limited v. ACIT (2011) 45 SOT 471 / 61 DTR 81 / (2012) 15 DTR 263 (Bang.) (Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ length price – International transaction – For TNMM, interest on surplus and abnormal costs to be excluded**

Where interest on surplus funds is assessed as “business income”, it has to be excluded in computing the ‘operating profits’ because if it is included, one is computing the “return on investment” which is an inappropriate profit level indicator for a service provider. As the PLI is the Operating Margin on Cost, neither the interest income nor interest expenses is a relevant factor. The essential element is the cost incurred for the operating activity which has to be taken into account. In computing the ALP, abnormal expenses which are not of a routine nature as well as those of a personal nature have to be excluded. The assessee has to demonstrate “exact details, exhibiting the risk born by the comparable vis-à-vis the risk in running the assessee’s business” (*Sony India (P) Ltd. v. Dy. CIT (2008) 114 ITD 448 (Delhi)* where a 20% adjustment was permitted distinguished). The benefit of +/- 5% adjustment is not a ‘standard universal deduction’. This option is available only when assessee is computing the ALP and not when the AO/TPO is computing the ALP. (A.Ys. 2002-03 and 2003-04)

*Marubeni India Private Ltd. v. ACIT (2011) 56 DTR 252 / (2012) 144 TTJ 474 / 15 ITR 297 (Delhi)(Trib.)*

*ACIT v. Marubeni India Private Ltd. (2011) 56 DTR 252 / (2012) 144 TTJ 474 / 15 ITR 297 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ length price – International transaction – Method – CUP method – TNMM**

The assessee sold automobile wipers to its associated enterprise and claimed that as per the “Comparable Uncontrolled Price” (CUP) method, the transactions were at arms’ length basis. The TPO rejected the CUP method on the basis that the comparability of controlled and uncontrolled transactions was not established with certain degree of reasonableness and accuracy and that the conditions prevailing in the market were not established to be identical. The TPO adopted the TNMM and directed that an adjustment be made by adopting the mean profit of comparables. This was confirmed by the DRP. On appeal, HELD:

- (i) Under section 92C read with Rule 10B, the most appropriate method has to be applied for determination of arm’s length price. In principle, the CUP method (the traditional transaction method) is preferable to the other methods because all other things being equal, the CUP and traditional transactional methods lead to more reliable results vis-à-vis the results obtained by applying transaction profit method (*UCB India (P) Ltd. (2009) 121 ITD 131* and *Serdia Pharmaceuticals (2011) 136 TTJ 129* followed);
- (ii) For the CUP method, the focus is on the market in which the products are sold by the assessee and any unique feature of the market in which assessee is situated is of no importance in relative terms. As the goods were sold by the assessee as well as the competitive Chinese manufacturers in the USA market, the market conditions in the territory of sale were the same. The buyer in the USA market will



be more concerned with quality and price rather than economic conditions prevailing in China and India (*SNF (Australia) Pty. Ltd. v COT (2010) FCA 635* referred to);

- (iii) As regards the comparability of the products the assessee has to provide the sale data of the AE in terms of sale price of Chinese and assessee's goods in the USA market and quantitative data of purchase of Chinese and Indian wipers by the AE and the terms of payment and the Assessing Officer shall compute the arm's length price using this data on CUP method. (A.Y. 2006-07)

*Clear Plus India Pvt. Ltd. v. Dy. CIT ITA No. 2944/Del/2010 dated 11-1-2011 (Delhi)(Trib.)*

Source: [www.itatonline.org](http://www.itatonline.org)

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Loss – Making and super – Profit companies are not comparable**

When loss making companies have been taken out from the list of comparables by the TPO, Zenith Infotech Ltd. which showed super profits should also be excluded. The fact that assessee has himself included in the list of comparables initially, cannot act as estoppel, particularly in light of the fact that the Assessing Officer had only chosen the companies which are showing profits and had rejected the other companies which showed loss (*Dy. CIT v. Quark System (P) Ltd. (2010) 38 SOT 307 (SB)* followed). (A. Y. 2006-07)

*Sapient Corporation (P) Ltd. v. Dy. CIT (2011) 56 DTR 465 / 46 SOT 56 (URO)(Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Operational profits – Low turnover**

- (i) The assessee's argument that comparables with a turnover less than 20% of the assessee's turnover should be considered is not acceptable because it is a universal fact that there are lot of differences between large businesses and small businesses operating in the same field. In the case of small business, economies of scale are not available and they are generally less profitable. The fact that such companies were considered comparable in an earlier year is not conclusive for want of facts of that year and also because there is no res judicata;
- (ii) The argument that segmental results of a company engaged in diverse activities should be considered is also not acceptable because it is a common experience that in many such results certain expenditures, particularly relating to interest and head office, are generally not allocated. When direct comparables are available, there is no need to consider segmented results;
- (iii) In principle, should be only the operating profit of the comparables considered. Items like interest income, rent, dividend, penalty collected, rent deposits returned back, foreign exchange fluctuations and profit on sale of assets do not form part of the operational income because these items have nothing to do with the main operations of the assessee. Insurance charges would depend on the



nature of insurance charges. If the insurance charges were on account of loss of some parcel or courier against which courier has made a payment of compensation then such charges would constitute operational income. (A. Y. 2006-07).

*DHL Express (India) Pvt. Ltd. v. ACIT (2011) 46 SOT 379 / 12 ITR 658 / 140 TTJ 38 / 49 DTR 432 / (2012) 70 DTR 162 (Mum.)(Trib.)*

*Editorial: See Also Adobe Systems India (ITAT Delhi) (super-normal profit companies to be excluded) & Marubeni India (ITAT Delhi) (interest on surplus & abnormal costs to be excluded)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Principles on use of multi-year data, turnover filter, risk adjustment & +/- 5% adjustment**

- (i) If the Transactional Net Margin Method ("TNMM") is adopted, the comparison has to be made between the net margin realised from the operation of the uncontrolled parties' transaction and net margin derived by the assessee on similar international transactions. The comparison should be between the net margins on transaction basis and not at enterprise level;
- (ii) Under section 92CA(3), the TPO is entitled to consider material in public domain which, though not available to the assessee at the time of the TP study, is relevant for the financial year;
- (iii) Ordinarily only the data pertaining to the financial year of the transaction can be considered. The proviso to Rule 10B(4) which permits the use of data relating to other than the financial year in which the international transaction has been entered into; being not more than two years prior to such financial year does not mean that one can insist on the use of multi-year data but it has a limited role only when the data of earlier years reveal facts which could have influenced on determination of the TP in relation to the transaction being compared. As the assessee has not made out a case that taking the data for only the current financial year will not present the correct and fair financial result of the comparables, the claim for multi-year data cannot be entertained;
- (iv) While in principle, comparables having an abnormal difference of turnover and distorted operating profits have to be excluded for determining the ALP, the claim that as the assessee revenue is about ` 20 crores, comparables having more than 50 crores and less than 5 crores of turnover should be excluded is not acceptable because no specific fact has been brought on record to show that due to the difference in turnover the comparables become non-comparables. It is accepted economic principle and commercial practice that in highly competitive market condition, one can survive and sustain only by keeping low margin but high turnover. Thus, high turnover and low margin are necessity of the highly competitive market to survive. Similarly, low turnover does not necessarily mean high margin in competitive market condition. Therefore, unless and until it is brought on record that the turnover of such comparables has undue influence on

the margins, it is not the general rule to exclude the same that too when the comparables are selected by the assessee itself;

- (v) The argument that an adjustment should be made for difference in function and risk level is not acceptable because the assessee has not brought on record how such functional difference and risk has influenced the result of the comparables with quantified data. Further, the +/-5% adjustment as the 2nd Proviso to section 92C is intended to adjust for such differences;
- (vi) The department's argument that the amendment by FA 2009 w.e.f. 1.10.2009 to the 2nd Proviso to section 92C with regard to the +/-5% variation from the arithmetic mean of the ALP is clarificatory and procedural and so retrospective is not correct. (A. Y. 2006-07).

*Symantec Software Solutions Pvt. Ltd. v. ACIT (2011) 46 SOT 48 / (2012) 15 ITR 323 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Principles on use of multi-year data, adjustment to operating profits & +/- 5% adjustment**

- (i) The rejection of comparables on the ground of non-availability of current year's financial data is proper because under Rule 10B(4), only the current year's financial data is relevant for determination of ALP except where it is shown that the data of the earlier two years reveals facts which could have an influence on the determination of the transfer price;
- (ii) A selected comparable should be functionally comparable. A company which is majorly dealing in other segments cannot be accepted as functionally comparable;
- (iii) There is no principle of law that if only one comparable remains, the entire exercise would fail;
- (iv) The argument that expenses incurred prior to the commencement of manufacturing activity hence should be excluded from operating expenses under Rule 10B(1)(e)(i) is not acceptable because operational expenses is that which is incurred to earn that income. Expenses with nexus with revenue have to be considered as operational expenses and cannot be excluded only on the ground that the date of occurrence of the revenue is later and expenses have been incurred prior to that;
- (v) The assessee's argument that the margins have to be recomputed after claiming adjustment of capacity utilization is not acceptable. Under the TNMM, the net profit margin actually realized has to be considered and there is no room for any assumption for taking the profit margin. It is not permissible to deviate from the book results on the ground of capacity utilization. Under Rule 10B(3)(ii), there cannot be any deviation in the net profit shown in the books of account and the adjustment, if any, can be made to the same to eliminate the material affects to such differences to the extent of these adjustments are reasonably accurate. As no credible and accurate information with regard to capacity utilization was furnished, adjustment was not allowable;

(vi) The Proviso to s. 92C which gives the assessee the option to adjust the ALP by +/- 5% is applicable only where more than one price is determined by the most appropriate method. In a case where only one price is determined by the most appropriate method, the benefit of +/- 5% is not available to the assessee. (A. Y. 2006-07).

*Haworth (India) Pvt. Ltd. v. Dy. CIT (2011) 131 ITD 215 / 58 DTR 36 / 11 ITR 757 / 140 TTJ 446 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Loss/High – Profit cost need not per se be excluded**

The assessee rendered three services to its AE and while it received a mark-up for "application of technical development services" and "promoting the licensing of technology", it did not receive any mark-up for "application research". The argument that the three activities should be aggregated to determine the ALP is not acceptable because the entire benefit of the "application research" was retained by the AE and not shared with the assessee and so there was no justification for not compensating the assessee;

While in principle, it is correct that if loss making units are excluded, abnormal profit making units should also be excluded, on facts, the TPO had rightly rejected the loss making companies as not being comparable. In principle, neither loss making units nor high profit making units can be eliminated from the comparables unless, there are specific reasons for eliminating the same which is other than the general reason that a comparable has incurred loss or has made abnormal profits. (A.Y. 2006-07)

*Exxon Mobil Company India Pvt. Ltd. v. Dy. CIT (2011) 46 SOT 294 (URO) / (2012) 15 ITR 853 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Comparison – Quality – Size**

Without ascertaining the quality and size of precious stones as sold to Associated Enterprise as compared to other enterprises, the Assessing Officer could not have made any adjustment on account of quality, and therefore, the addition made by Assessing officer on account of ALP was liable to be deleted. (A. Y. 2005-56).

*ITO v. Kanchan Tara Exports (2011) 138 TTJ 592 / (2010) 47 DTR 420 (Jp.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Net margin – Adjusted book profits**

While determining arm's length price, it is profit as per books of account that has to be considered for computing net margin of assessee and not adjusted book profits. (A. Y. 2006-07).

*Geodis Overseas (P) Ltd. v. Dy. CIT (2011) 45 SOT 375 / 57 DTR 191 / (2012) 14 ITR 325 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Selection of comparable [Rule 10B(1)(e)]**

The Assessing Officer had accepted the license fees for the month of February and March, 2003 to be at arm's length. However, the steep increase given from the beginning of the year with retrospective effect has not been accepted. CIT(A) has accepted the computation made by the assessee, based on the comparable as well as department has accepted the method of computation for the Asst. Year 2004-05. The Tribunal restored the matter to the file of Assessing Officer for re working of the transfer pricing adjustments using TNMM on the basis of facts and figures available for Asst. Year 2003-04 in respect of the comparable selected by the assessee. (A. Y. 2003-04).

*ACIT v. NCG Network (India) (P) Ltd. (2011) 56 DTR 1 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation of arm's length price – Provision for import duty**

Provision for import duty made by the assessee which has been reversed in the immediately succeeding year being merely a book entry, is to be excluded for working out the operating profit ratio for computation of ALP (A. Ys. 2005-06 & 2006-07).

*Sony India (P) Ltd. v. ACIT (2011) 56 DTR 156 / 141 TTJ 432 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Comparable – Adjustment**

Transfer Pricing Officer having excluded the loss making companies from the list of comparables in the transfer pricing analysis, one company which showed the super profits is also to be excluded as it is engaged in software product company. Where as the assessee is engaged in rendering soft ware development services in OP/TC of the assessee is within the safe harbour range of +/-5 percent, no adjustment is warranted on account of difference in ALP of the international transaction. (A. Y. 2006-07).

*Sapient Corporation (P) Ltd. v. Dy. CIT (2011) 56 DTR 465 / 46 SOT 56 (URO)(Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Selection of comparables and maintenance of documents [Rule 10D]**

Each transaction of sale made by the assessee to its AE in UK being a separate transaction and there being no subsisting agreement between the assessee and the AE from beginning in 1996, proviso to Rule 10(4) is not applicable to the facts of the case and therefore, assessee was required to maintain documents as per Rule 10D. Cases relied upon by the TPO not being comparable cases, matter is restored to the Assessing Officer to obtain data of comparable cases so as to come to an informed decision as to whether the price charged by the assessee from its AE is arm's length or not. (A.Y. 2006-07).

*Airtech (P) Ltd. v. Dy. CIT (2011) 57 DTR 169 / 139 TTJ 318 / 45 SOT 100 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Comparables – Domestic – External**

Assessee having cited six comparables, TPO / Assessing Officer was not justified in rejecting the same and applying domestic transactions of the assessee when the Assessing Officer / TPO has accepted said six external comparables in the subsequent assessment year and there is similarity of facts in both the years, further the assessee is entitled to economic adjustments in the circumstances of under capacity utilization of the company, matter is set aside for examining the issue de novo. (A. Y. 2006-07).

*Bringtons Carpets Asia (P) Ltd. v. Dy. CIT (2011) 57 DTR 121 / 139 TTJ 177 (Pune)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – One price determined – Concession prescribed in proviso**

The Hon'ble Tribunal held that, where there was shortage of price in respect of transactions entered with AE vis-à-vis NAE the Assessing Officer was right in rejecting the contention that price need not be disturbed as one declared by assessee was less than 5% variation in transaction with AE and NAE relying on CBDT circular No.12 dated 23/8/2011. The Tribunal further observed that Proviso, for which Circular No. 12 was issued had never come into operation and hence, question of administration of said proviso to section 92C(2) did not arise at all. Subsequent amendment brought in Finance Act, 2002, said circular had become otiose therefore the assessee could not place reliance on circular No. 12 and for relevant year under consideration only proviso to section 92C(2) as amended by Finance Act, 2002 was applicable. Since in the instant case, only one price had been determined under "most appropriate method" assessee was not entitled to concession, as prescribed in proviso to section 92C(2), hence, the order of Assessing Officer was confirmed. (A. Y. 2004-05).

*ACIT v. Essar Steel Ltd. (2011) 131 ITD 22 / 136 TTJ 470 / 51 DTR 177 (Visakha.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Selection of comparables**

Exact nature of the business needs to be taken in to consideration vis-à-vis the nature of business activity carried on by other parties so as to ascertain whether the said parties can be selected as comparable cases for transfer pricing analysis; Four companies included by the assessee company, there was no justifiable reason to select the same as comparables; however, exclusion of companies showing supernormal profits as compared to other comparable is fully justified. (A. Y. 2004-05).

*Teva India (P) Ltd. v. Dy. CIT (2011) 57 DTR 212 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Adjustment of 5% to single price determined by the assessee**

Adjustment of 5% is not applicable if a single price is determined by the assessee. Circular No. 12 dated 23-8-2001 does not apply to the case under consideration as the price variation is more than 5%. (A. Y. 2004-05).

*ADP (P) Ltd. v. Dy. CIT (2011) 57 DTR 310 / (2012) 144 TTJ 520 / 15 DTR 203 (Hyd.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Comparables**

In view of the fact that annual reports / data base extracts of three companies which were selected as comparable cases were not available earlier in the public domain and having regard to the fact that these documents are essential for determining ALP, these additional evidences are admitted for consideration: TPO is directed to make a fresh transfer pricing order by taking in to account database of said companies now submitted and also to decide as to whether all the comparables selected by the assessee are proper comparables for the purpose of determining ALP after considering the relevant parameters. (A. Y. 2005-06).

*ACIT v. NIT Ltd. (2011) 57 DTR 334 / (2012) 146 TTJ 379 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – 5% variation in ALP**

When assessee showed the price charged was within  $\pm 5\%$  variation of ALP, no addition was required to be made. (A. Y. 2006-07).

*Capgemini India (P) Ltd. v. Addl. CIT (2011) 48 SOT 137 (URO) / 139 TTJ 211 / 57 DTR 55 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Important principles on comparability &  $\pm 5\%$  adjustment stated**

- (i) The expression "shall" in Rule 10B(4) makes it clear that it is mandatory to use the current year data first and if any circumstances reveal an influence on the determination of ALP in relation to the transaction being compared than other data for period not more than two years prior to such financial year may be used. If the current year's data of comparables is not available at the time of filing the ROI a fresh search of comparables during the transfer pricing proceedings is permissible;
- (ii) The  $\pm 5\%$  tolerance band in section 92C is not a standard deduction. If the arithmetic mean falls within the tolerance band, then there should not be any ALP adjustment. If it exceeds the said tolerance band, ALP adjustment is not required to be computed after allowing the deduction at 5%. That means, actual working is to be taken for determining the ALP without giving deduction of 5%;



- (iii) The transfer pricing rules apply when one of the parties to the transaction is a non-resident, even if the transaction takes place within India. There is no need to find out the legislative intent behind the transfer pricing provision when the provisions were unambiguous. The existence of actual cross border transactions or motive to shift profits outside India or to evade taxes is not a pre-condition for transfer pricing provisions to apply. (A. Y. 2004-05)

*Dy. CIT v. Deloitte Consulting India Pvt. Ltd. (2011) 61 DTR 101 / (2012) 145 TTJ 589 (Hyd.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ length price – International transaction – Disallowance of costs on ground that AE also benefited not permissible**

- (i) A continuing debit balance per se, in the account of the associated enterprises, does not amount to an international transaction under section 92B in respect of which ALP adjustments can be made. It is a result of international transaction. The factum of payment has to be considered vis-à-vis terms of payment set out in the transaction arrangement, and not in isolation with the commercial terms on which transaction in respect of which payment is delayed. (Nimbus Communications followed);
- (ii) Under section 92B(1), the apportionment of cost is permissible only where there exists a “mutual agreement or arrangement” between two or more Associated Enterprises for apportionment of cost incurred in connection with a benefit, service or facility provided to any one or more of such Enterprises. In the absence of such an agreement to share the costs incurred on the McKinsey study, the costs cannot be apportioned. The bare allegation that the AE’s had received “specific and identifiable benefits” is not sufficient to justify apportionment. Further, even assuming that the AEs were liable to compensate the assessee, the TPO ought to have determined the ALP of such “international transaction” after taking into consideration all the rights obtained and obligations incurred by the two entities, including the advantages obtained by the AEs. He ought to have identified comparables and recorded a finding that the consultancy charges were higher than what a similarly situated and comparable independent domestic entity would have incurred. (A. Ys. 2002-03 & 2003-04)

*Patni Computer Systems Ltd. v. Dy. CIT (2011) 60 DTR 113 / 141 TTJ 190 (Pune)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ length price – International transaction – CBDT’s view that +/-5% variation amendment applies to pending proceedings incorrect**

In respect of A.Y. 2006-07, the assessee entered into international transaction with its associate enterprises for a sum of ` 14.33 crores. The TPO applied the TNMM and determined the ALP at ` 15.08 crores and made an adjustment of ` 75 lakhs. The assessee claimed that as the said adjustment was within +/-5% of the ALP, no adjustment could be made under the proviso to section 92C(2) as it stood pre-

amendment by the F (No. 2) Act, 2009. The Department relied on Circular No. F. 142/13/2010-SO (TPL) dated 30.9.2010 (Corrigendum) where the view was expressed that as the amendment came into effect from 1.10.2009, it would apply in relation to all cases in which proceedings are pending before the Transfer Pricing Officer on or after such date. HELD disagreeing with the Department's contention:

While the Finance (No.2) Act, 2009 provides that the substituted Proviso shall come into effect on 1.10.2009 and applies in respect of AY 2009-10 & subsequent years, the Explanatory Notes to the Finance (No.2) Act, 2009 issued vide Circular No.5/2010 dated 3.6.2010 incorrectly states that the amendment comes into effect on 1.4.2009. In the Corrigendum, it is stated that the amendment shall apply to proceedings pending before the TPO on or after 1.10.2009. It is difficult to accept the argument of the Department that retrospective or prospective applicability of a provision should be decided in the manner explained by the CBDT. A procedural provision resulting in creating a new disability or which imposes a new duty in respect of transactions already completed cannot be applied retrospectively. As the amended Proviso brings about a substantial change in the relief available to an assessee, it cannot be treated as being retrospective in nature. *Kuber Tobacco Products (P) Ltd. v. Dy. CIT (2009) 117 ITD 273 (Delhi)(SB) & ITO v. Ekta Promoters (P) Ltd. (2008) 113 ITD 719 (Delhi)(SB)* followed. (A. Y. 2006-07)

*iPolicy Network Pvt. Ltd. v. ITO (2011) 59 DTR 209 / (2012) 14 DTR 375 / 146 TTJ 464 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Despite FAR matching, Loss Co. to be excluded**

From the list of comparables provided by the assessee (after excluding persistent loss-making companies), the TPO rejected some other loss-making companies & determined the ALP applying the TNMM and made an adjustment of ` 2.28 crores. The Tribunal dismissing the appeal held that :

Merely because a company is showing losses, it does not lose its status of comparable if the other criteria depict its status as a comparable because the declaration of loss is an incident of business which is at par with profit. The FAR Analysis of a company indicated the avowed objective of the company and the tools that it sought to employ to achieve that objective but it was the financial result which decided whether that company has been successfully in achieving the objective or not. The TPO held that if the assessee's contention based on FAR analysis only is accepted then the process of choosing comparable will not proceed beyond the matching of FAR. All types of other tests i.e. data base screening, quality and quantitative screening or use of diagnostic with ratios will be rendered meaningless and unnecessary. Comparability has been taken into consideration by the assessee on the basis of FAR analysis and "other aspects" have not been considered. TPO had looked into "other aspects" also. (A.Y. 2002-03)

*Yum Restaurants (India) Pvt. Ltd. v. AICT (2012) 14 DTR 420 / 143 TTJ 332 (UO)(Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – CUP method – TNMM**

TPO having computed the ALP by applying CUP method as against TNMM adopted by the assessee and rejecting the objections raised by the assessee on the ground that all those objections were considered by the TPO in earlier years. The assessee having raised various submissions before the Tribunal which need verification at the level of the Assessing

Officer / TPO matter restored for fresh verification as per law. (A. Y. 2006-07).

*Fulford (India) Ltd. v. Dy. CIT ( 2011) 59 DTR 106 / 140 TTJ 183 / 47 SOT 16 (URO)(Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – CUP method**

Where no data was available in respect of uncontrolled transactions which were similar to transactions of assessee with its foreign associated enterprise, CUP method could not be considered as most appropriate method to determine arm's length price of royalty by assessee to its AE for technology collaboration. Tribunal set a side matter to the file of Assessing Officer with direction to do the exercise of determining the arm's length price by applying the most appropriate method. (A. Y. 2005-06).

*Cabot India Ltd. v. Dy. CIT (2011) 46 SOT 402 / 61 DTR 408 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Interest on loan granted by assessee to AE**

In case of grant of loan by assessee to its foreign subsidiary in foreign currency out of its own funds. For determining ALP, it is the international LIBOR rate that would apply and not the domestic prime lending rate and assessee charging interest at a rate higher than the labor rate, no addition can be made on this count. (A. Y. 2006-07).

*Siva Industries & Holdings Ltd. v. ACIT (2011) 59 DTR 182 (Chennai)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – "Cost Contribution Agreements" – Commercial wisdom not to be questioned**

The assessee entered into a 'cost contribution agreement' with its parent company pursuant to which it paid a sum of ` 10.55 crores as its share of the costs. The TPO, Assessing Officer & DRP disallowed the expenditure. On appeal by the assessee, the Tribunal held that (i) The TPO was not entitled to determine the ALP under the cost contribution agreement at "Nil" on the basis that the assessee did not need the services at all. How an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. The TPO went beyond his powers in questioning the commercial wisdom of the assessee's decision to take benefit of its parent company's expertise. Further, the TPO's argument that the assessee did not benefit from the services is irrelevant because whether there is benefit or not has no bearing on the ALP of the services. The fact that similar services may have been granted in the past on gratuitous basis

is also irrelevant in determining the ALP. The argument that no evidence of services having been rendered was produced is not acceptable because the assessee did produce voluminous evidence before the DRP which was not dealt with. The DRP ought to have dealt with the material and given reasons. Matter remanded to the Assessing Officer to determine actual rendering of services (*Vodafone Essar Ltd. v DRP 240 CTR 263 (Delhi)* followed);

- (ii) A cost contribution arrangement has to be consistent with the arm's length principle. The assessee's share of overall contribution to costs must be consistent with the benefits expected to be received, as an independent enterprise would have assigned to the contribution in hypothetically similar situation.
- (iii) The disallowance of payment under the 'cost contribution agreement' under section 37(1) & 40A(2) is not justified because the payment did not involve mark-up and was at arms length price. The services were for furtherance of the assessee's business interests;
- (iv) The disallowance of payment under section 40(a)(i) for want of TDS is not justified because the payment was not taxable in the AE's hands under Article 5 & 12 of the India-USA DTAA as the AE did not have a PE and the services did not constitute "fees for included services". (*GE India Technology Centre 327 ITR 456 (SC)* followed);
- (v) The TPO's argument that in charging for the services rendered to the AE, a 10% discount could not be given is not acceptable. Discount is a normal occurrence even in independent business situations. The material factor is whether the 10% discount is an arm's length discount and there is nothing on record to suggest that it is not so. (*A. Y. 2006-07*)

*Dresser-Rand India Pvt. Ltd. v. ACIT (2011) 141 TTJ 385 / 61 DTR 265 / 47 SOT 423 / (2012) 13 ITR 422 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Sale of IPRs – Important Principles of Law Explained**

There is nothing in section 92CA that requires the Assessing Officer to first form a "considered opinion" before making a reference to the TPO. It is sufficient if he forms a prima facie opinion that it is necessary and expedient to make such a reference. The making of the reference is a step in the collection of material for making the assessment and does not visit the assessee with civil consequences. There is a safeguard of seeking prior approval of the CIT. Moreover, by virtue of CBDT's Instruction No.3 of 2003 dated 20.5.2003 it is mandatory for the Assessing Officer to refer cases with aggregate value of international transactions more than ` 5 crores to the TPO.

The argument that the "Excess Earning Method" adopted by the TPO is not a prescribed method is not acceptable. A sale of IPR is not a routine transaction involving regular purchase and sale. There are no comparables available. The "Excess Earning Method" is an established method of valuation which is upheld by the U.S. Courts in the context of software products. The "Excess Earning Method" method

supplements the CUP method and is used to arrive at the CUP price i.e. the price at which the assessee would have sold in an uncontrolled condition. (A. Y. 2004-05)

*Tally Solutions Pvt. Ltd. v. Dy. CIT (2010) 130 TTJ 234 / 37 DTR 310 / (2011) 8 ITR 434 / 48 SOT 110 (Bang.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Principles of "Comparable Uncontrolled Transaction" explained**

Under Rule 10B(1)(e)(ii), "the net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transaction is computed having regard to the same base. The term "uncontrolled transaction" is defined in Rule 10A(a) to mean "a transaction between enterprises other than associate enterprises, whether resident or non-resident". The result is that in applying the TNMM, the net profit margin realized from a comparable uncontrolled transaction is to be taken into consideration. The conditions require that a case should not only be comparable but also have uncontrolled transactions. These twin conditions need to be cumulatively satisfied. If a case is only comparable but has controlled transactions or vice-versa, it falls outside the ambit of the list of comparable cases;

The fact whether the comparable has a higher or lower profit rate has not been prescribed as a determinative factor to make a case incomparable. This is because profit is not a factor in itself, but a consequence of the effect of various factors. Only if the higher or lower profit rate results on account of the effect of factors given in Rule 10B(2) read with sub-rule (3), that such case shall merit omission. If however such extreme profit rate is achieved because of factors other than those given in the rule, then such case would continue to find its place in the list of comparables. (A. Y. 2004-05)

*Dy. CIT v. BP India Service Pvt. Ltd. (2011) 133 ITD 526 / 63 DTR 178 / 48 SOT 253 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Methods of computing ALP – Important Principles of Cost Plus, CUP & TNMM Explained**

The assessee, engaged in the business of manufacture and export of studded diamond and gold jewellery, imported & exported diamonds and exported jewellery to associated enterprises. For transfer pricing purposes, the ALP of the imported & exported diamonds was evaluated using the "Comparable Uncontrolled Price" (CUP) method while the exports of jewellery was evaluated using the "Cost Plus Method" (CPM). The TPO & Assessing Officer rejected both methods on the ground that adequate material to support it was not available and instead adopted the TNMM and made an adjustment. On appeal, the CIT(A) upheld the adoption of CPM on the imports & exports of diamonds on the ground that total cost details were maintained and the average margin earned from AE transactions was higher than that earned



from non AE transactions. However, he did not deal with the ALV on export of jewellery. On appeal by the department, HELD reversing the CIT(A):

- (i) As regards the CPM, it had not been correctly applied. The application of CPM provides for (a) ascertaining the direct and indirect costs of property transferred, or services rendered, to the AE; (b) ascertaining the normal mark up of profit over aggregate of costs in respect of similar property or services to unrelated enterprises and (c) adjusting the normal mark up for differences, if any, in the material factors such as risk profile, credit period etc. While the benchmark gross profit can be set by taking into account several transactions with unrelated enterprise on a 'global basis', the benchmark cannot be applied on a global basis but has to be on a transaction basis. Eg. if the benchmark GP is 20% and the assessee charges a mark-up of 2% in one transaction with AE and 38% in another transaction with the AE, both transactions, will meet the ALP test resulting in an incongruity. On facts, while the normal mark up has been computed at 16.31%, and the average of mark up on sales to AEs has been taken at 17.08% and all AE transactions taken to be at ALP, there are individual instances which are less than the benchmark. This is not the correct way to apply the CPM. Also, the costs of inputs have not been verified and it is not shown that the terms of sale to the AEs and all other relevant factors are materially similar to the transactions with independent enterprises. Also, the CPM has been applied by comparing gross profit on sales, whereas the method requires comparison of mark up on costs on transactions with AEs vis-à-vis mark up on costs on transactions with non AEs (matter remanded to CIT (A) for de novo consideration);
- (ii) As regards the CUP for import & export of diamonds (which was not decided by the CIT (A)), the assessee ought to have produced evidence to show that the transactions are at prevailing market prices;
- (iii) As regards the TNMM, International transactions with AEs have three significant areas of impact on the overall profitability i.e. sales of finished goods to AEs, sales of raw materials to AEs and purchase of raw materials of AEs), and if the ALP cannot be reasonably determined by CUP or any other direct method (i.e. CPM and RPM) in respect of even one of these areas, the application of TNMM or other indirect method ( i.e. profit split method) is inevitable. On a conceptual note, when ALP of the transactions with AEs cannot be reasonably ascertained, the profit earned by the assessee entering into these transactions is to be estimated, and that is precisely what TNMM does. When TNMM is applied in the context of sales of finished goods to AEs, it is this figure which is taken as variable figure and it bears the impact of higher margins, and when TNMM is applied in the context of purchases of raw materials from AEs, it is the figure of purchases of raw material from AEs which is taken as variable figure and it bears the impact of higher margins. Beyond that, the cause of invoking TNMM does not make much material difference (point whether TNMM has to be applied to the transactions and not on overall profits left open);
- (iv) The argument, relying on *Dy. CIT v. Indo American Jewellery Ltd. (2010) 41 SOT 1 (Mum.)(Trib.)*, that no ALP adjustment can be made as the assessee enjoys



s. 10A tax benefits and has no "motive" to avoid tax is not acceptable because those observations are "obiter dicta" without binding force and in view of Aztech Software 107 ITD SB 141 where it was held that tax avoidance motives need not be shown before invoking transfer pricing provisions. (A.Y. 2004-05)

*ACIT v. Tara Ultimo Pvt. Ltd. (2011) 63 DTR 333 / 47 SOT 401 / (2012) 143 TTJ 91 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Data – Selection of comparable – +/-5% Adjustments**

The expression "shall" has been used in Rule 10B(4) which makes it abundantly clear that only current year data of an uncontrolled transaction is to be used for the purpose of comparability while examining the international transactions with AEs, unless the case is covered by the proviso i.e. if the data of preceding two years reveals facts which could have an influence on the determination of transfer price. Assessee company being engaged in producing semiconductor integrated circuits is a complex product requiring skilled workforce. TPO was justified in treating it as high end service provider for the purpose of selection of comparables. The fact that the assessee's role is only 2 to 3 percent of the overall operations performed by the group is not at all relevant for deciding whether it is high end performer or low end performer. Assessee having submitted a TP report every year by using different filters for selecting comparables are commensurate to the result declared by it. TPO was justified in rejecting the same and selecting new comparables by applying quantitative as well as qualitative filters. Tolerance band provided in the proviso to section 92C(2) is not to be construed as a standard deduction. If the arithmetic mean of comparables falls within range of said tolerance band, no adjustment is required, if it exceeds then the ultimate adjustment is not required to be computed after reducing the arithmetic mean by 5 percent. (A.Ys. 2003-04, 2004-05, 2006-07).

*ST Microelectronics (P) Ltd. v. CIT (2011) 61 DTR 1 / (2012) 145 TTJ 553 / 15 DTR 410 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Designing, developing and maintenance of websites**

As per agreement between assessee and "KII" assessee was to receive service charges as per specified direct cost plus mark up of 80 percent. Assessing Officer took the view that said method of determining ALP was not reliable and thus he proposed to determine ALP under section 92C(3). Assessing Officer issued the notice to assessee asking to explain as to why net margin of 20 percent should not be taken which was prevalent profit in said line of business. However subsequent to issue of notice, the Assessing Officer himself gathered data in respect of profitability of some companies engaged in providing software services and determined ALP on basis of cost plus mark up of 80 percent. In appeal CIT(A) called for remand report in which Assessing Officer admitted that business of three companies was different. CIT(A)

deleted the addition. The Tribunal held that the Assessing Officer had relied upon uncomparable the CIT(A) was justified in deleting the addition. (A. Ys. 2002-03 and 2003-04).

*ITO v. Kawin Interactive (P) Ltd. (2011) 133 ITD 29 / 64 DTR 33 / 142 TTJ 665 / (2012) 13 ITR 290 (TM)(Ahd.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Most appropriate method – CUP – TNMM**

Simply because the comparable transactions are available only in respect of 9 products, it does not mean that the CUP method is to be rejected. TPO was not justified in adopting CPM and in comparing the gross margin in export segment vis-à-vis gross margins in domestic segment of assessee without appreciating that the CUP or TNMM was the most proper method for determining the ALP. TPO is directed to accept claim of the assessee regarding the ALP based on TNMM which method adopted by assessee in the subsequent year and which has been accepted in the succeeding year. (A. Y. 2006-07).

*Drilbits International (P) Ltd. v. Dy. CIT (2011) 62 DTR 171 / 142 TTJ 86 (Pune)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Cost plus method – Gross profit mark up – 5% adjustments**

Assessee is selling the manufactured products both in the domestic as well as in the foreign market. Assessee is exporting completely finished products in the same manufacturing unit with the same raw material with mostly unrelated cost base, therefore, the cost plus method is most appropriate method to determine the ALP. In respect of assessee's international transactions, internal cost plus method taking profit / direct cost of production as PLI was justified, giving due weightage to the relevant factors including small market and credit risk, Assessing Officer is directed to adopt 60 percent as profit margin mark-up on the direct cost. Regarding applicability of proviso to section 92(C)(2), when variation exceeds 5 percent of the ALP the assessee shall not get benefit. (A. Y. 2006-07).

*Wrigley India (P) Ltd. v. Addl. CIT (2011) 62 DTR 201 / 142 TTJ 23 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Net margin – TNMM – Segmental financial – Bad debts – Foreign exchange fluctuations – Interest on foreign exchange loan – Corporate guarantee**

For computing the net margin of assessee only the cost related to the transactions with AEs has to be considered and accordingly, segmental financials are to be used for arriving at the net margin on international transactions. Bad debts which are not being relatable to the transactions with AEs have to be excluded. Foreign exchange loss should be considered while computing the net margin for the international

transactions. Rate of interest in respect of foreign currency loan in the international market is to be on LIBOR , matter was remitted to the Assessing Officer to verify the actual average LIBOR which prevailed in the financial year under consideration and adopt the same. Corporate guarantee provided by the assessee does not fall within the definition of international transaction, hence no adjustment is required in respect of corporate guarantee transaction, because corporate guarantee is incidental to assessee's business and there are no guidelines provided. (A. Y. 2006-07).

*Four Soft Ltd. v. Dy. CIT (2011) 62 DTR 308 / 142 TTJ 358 / (2012) 16 DTR 73 (Hyd.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Processing charges**

The Tribunal held that the personnel cost of processing has gone up the same cannot be the basis for assuming that the processing income of the assessee also should go up, accordingly the Tribunal deleted the substantial adjustment made by the TPO in the computation of ALP on the basis of labour cost to revenue ratio of the previous year without citing any comparable case. (A. Y. 2005-06).

*Dy. CIT v. Hope (India) Polishing Works (P) Ltd. (2011) 62 DTR 449 / (2012) 49 SOT 138 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Comparables – If TPO does not give cogent reasons to reject a comparable, it must be presumed to be comparable & DR cannot argue to the contrary**

The assessee, a captive service provider rendering back office support services to its AEs, earned an adjusted Net Cost plus Margin of 7.90%. The assessee adopted TNMM and computed the mean of margins earned by the comparables at 7.62%. The TPO held that "No companies were identified as comparables" by the assessee and after selecting 12 companies as comparables, determined an arithmetic mean of 27.80% and made an adjustment of ₹ 10.49 crores. The CIT(A) deleted the addition. On appeal by the department, HELD dismissing the appeal:

- (i) The TPO was wrong in stating that the assessee has not provided any comparables. The initial prerogative of choosing comparable cases is always that of the assessee because it is the best judge to know the exact services rendered by it and finding the comparable cases from the data base. If the TPO wants to exclude any of such comparables, he has to justify the exclusion by adducing cogent reasons and cannot act on whims and fancies. If the TPO fails to show expressly as to how the cases are not comparable, a presumption has to be drawn that those cases are comparable;
- (ii) The department's argument that even if the TPO had not given reasons to exclude the assessee's comparables, the CIT(A) ought to have done so is not acceptable. Going by the presumption of acceptability of such cases, the appellate authority is under no duty to check whether the work was properly done by the Assessing

Officer / TPO to the prejudice of the assessee. The fact that the CIT(A) has the power to enhance does not mean that he has a duty to do so;

- (iii) The Dept. Representative, while arguing the appeal, cannot improve the order of the Assessing Officer / TPO by contending that the TPO was wrong in accepting a particular claim of the assessee. While the DR has the duty to defend the order of the TPO, he cannot find flaws in the order of the TPO in an attempt to show that the TPO failed to do what was required to be done by him. If the DR is allowed to fill in the gaps left by the TPO it would amount to conferring the jurisdiction of the CIT under section 263 to the DR. The DR cannot be allowed to take a stand contrary to the one taken by the TPO. Accordingly, the DR cannot be allowed to argue that certain cases included by the assessee in the list of comparables, were in fact not comparable, when the TPO failed to point out as to how such cases were distinguishable (*Mahindra & Mahindra Ltd. v. Dy. CIT* (2009) 122 TTJ 577 (Mum.)(SB) followed, *Dy. CIT v. Quark Systems* (2010) 38 SOT 307 (Chd.)(SB) distinguished). (A.Y. 2005-06)

*ACIT v. Maersk Global Service Center India (P) Ltd.* (2011) 133 ITD 543 / (2012) 66 DTR 90 / (2012) 14 DTR 541 / 145 TTJ 64 (Mum.)(Trib.)

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Import of coal – Not furnishing any comparable Data**

Assessee has imported Coal from its Associate Enterprise, which according to the Assessing Officer were over invoiced. The assessee has not furnished any comparable data. The Transfer Pricing Officer has worked out the adjustment amount exactly on the basis of price variation between the companies. The Tribunal held that this was most simple and acceptable method. The Tribunal up held the addition. (A. Y. 2006-07).

*Coastal Energy P. Ltd. v. ACIT* (2011) 12 ITR 347 / 46 SOT 286 (URO)(Chennai)(Trib.)

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Cost plus – Mark up – Res judicata – Each assessment is a separate unit**

When the Associated Enterprise is receiving the compensation at FOB value and the assessee which is providing critical functions with the help of tangible and unique intangibles developed over the years and with the help of tangible and management which are important to achieve the strategic and pricing advantages, cost plus 5 percentage mark up is definitely not on arm's length while working out the compensation for the services rendered by the assessee to the Associated enterprise; in such a situation, mark up on the FOB value of the goods sourced through the assessee shall be the most appropriate method to work out the correct compensation at ALP; distribution of compensation received by Associated Enterprise @ 5 percent of the FOB value of the exports between the assessee and Associated Enterprise should be in the ratio of 80:20. (A. Y. 2006-07).

*Li & Fung (India)(P) Ltd. v. Dy. CIT (2011) 64 DTR 73 / 12 ITR 748 / (2012) 143 TTJ 201 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Motive to shift the profits out side India or to evade taxes in India is irrelevant**

Where a transaction is entered in to by Associated enterprise being resident and a non resident, the transaction shall amount to an international transaction falling under section 92B(1) and Chapter X is applicable; once the transactions fall under the category of international transactions the transfer pricing mechanism does get activated and the fact that there is no motive to shift the profits outside India or to evade taxes in India, is irrelevant. (A. Y. 2006-07).

*ITO v. Tianjin Tianshi India (P) Ltd. (2011) 64 DTR 98 / 133 ITD 123 / 142 TTJ 841 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Selection of comparables [Rule 10D]**

The TPO has rejected the companies which are making losses as comparables. This shows that there is a limit for the lower end identifying the comparables. Similarly a big company would also be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. When companies which are loss making are excluded from comparables, then the super profit making companies should also be excluded; for the purpose of classification of companies on the basis of net sales or turnover, a reasonable classification has to be made, matter remanded for reconsideration, after providing an opportunity. (A. Y. 2006-07).

*Genisys Integrating Systems (India) (P) Ltd. v. Dy. CIT (2011) 64 DTR 225 (Bang.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – CUP method – TNM method [Rule 10B]**

Assessee was engaged in manufacturing and supply of additives. Raw materials and finished goods were purchased from foreign Associated Enterprise. Assessee computed arm's length value of purchase of raw materials by adopting CUP method. No proper reason could be found as to why TPO rejected method adopted by assessee and applied TNM method based on financial of a company IIP, however, from financial of IIP it was found that its sales were of ` 14 lakhs against sales of ` 120 Crores of assessee. Said IIP had not paid any excise duty and indirect taxes, but incurred only packaging cost in addition to cost of materials. IIP was not engaged in any major manufacturing activity nor had it a comparable turnover. As there were substantial differences in financial data of two companies which eroded degree of comparability between two. Tribunal held that TPO had not only wrongly adopted TNM method



without rejecting CUP method followed by assessee, but also made improper addition based on financial results of an uncomparable entity. As regards purchases from Associated enterprises the Tribunal held that assessee had committed fundamental mistakes in working out arm's length price based on resale price method and, therefore matter was set back to file of Assessing Officer. Since 70 percent of assessee's sales were out of purchases sourced from associate enterprises, working out gross profit margin internally, after excluding such transactions would be inappropriate due to negligible quantities of balance purchases and sales, hence, in such cases gross profit margin should be taken from comparable uncontrolled transactions entered in to by similarly placed concerns. (A. Y. 2004-05)

*Indian Additives Ltd. v. ACIT (2011) 48 SOT 164 (Chennai)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Ship management – Foreign principals – Comparables**

TPO after examining set of comparables given by assessee held that assessee had erred in including loss making entities in its comparables hence, rejected the comparables and made adjustments to ALP. In appeal Commissioner (Appeals) deleted the addition. On Appeal Tribunal held that assessee in its transfer pricing study analysis had given set of comparables relating to financial years 2000-01 and 2001-02 contending that data for financial year 2002-03 was not available at time TP report was compiled. Tribunal set aside the matter to the Assessing Officer for fresh adjudication with a direction to give sufficient opportunity to assessee to file fresh comparables of financial year 2002-03 so that proper ALP could be determined in accordance with law. (A. Y. 2003-04).

*Dy. CIT v. Mitsui O. S. K. Lines Maritime (India) (P) Ltd. (2011) 48 SOT 155 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Royalty**

Assessee was engaged in business of manufacture of polystyrene and expandable polystyrene. It was wholly owned subsidiary of LG Chemicals India (P) Ltd. (Holding Company). Said holding company was 100 percent subsidiary of another company namely LG Chemicals Ltd. Korea. Assessee entered in to an "Trade mark sub-licence agreement" with its associated enterprise LG chemicals Ltd Korea as per which assessee was given non exclusive sub-licence for use "LG" trade marks for its business. The assessee had paid royalty for use of trade mark. On reference the TPO held that the transaction was a sham one and motive behind same was to shift profits of assessee company out of country. He determined the royalty as nil. Accordingly the assessing Officer disallowed entire payment of royalty. Dispute Resolution panel up held the view of TPO. The Tribunal held that company may use foreign brand / logo for not only increasing its market share, but also for maintaining its existing market share, it was to be held that there was a business necessity for assessee to make impugned royalty payment to its associated enterprise and, TPO/DRP wrongly



concluded that impugned royalty payment to its associated enterprise was a sham transaction. Accordingly the Tribunal set aside the order and directed the Assessing Officer to examine a fresh. (A. Y. 2006-07).

*LG Polymers India (P) Ltd. v. Addl. CIT (2011) 48 SOT 269 / (2012) 16 DTR 240 (Visakha.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Tax haven – Comparison with domestic market**

Assessee was a manufacturer of fabrics. It exported fabrics to its Associated enterprise at Panama at rate of US\$ 1.16 per meter and same fabric was also sold in domestic market at rate of ₹ 72 (US \$ equivalent 1.515). Transfer pricing Officer adopted domestic price as ALP for export sale to Associated Enterprise. The assessee contended that while comparing the domestic price adjustments were required to be made like incentives on export, discount on sales promotion, advertisement expenses etc. The Tribunal held that the Transfer pricing Officer was error in not taking into consideration the above factor hence the method adopted by the Assessee has to be accepted. The Tribunal further held that the fact that the associated enterprise is located in tax heaven has no bearing in so far as method of application of ALP determination is concerned. (A. Y. 2002-03).

*Arviva Industries Ltd. v. ACIT (2011) 48 SOT 418 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – TNMM method – Profit split method**

The assessee is doing business of manufacturing and trading of jewellery and precious and semi precious stones. The assessee applied TNMM to international transactions, where as Assessing Officer held that split method is applicable. While applying profit split method the Assessing Officer has taken value of one dollar at ₹ 78.44. He has not explained how he adopted the said value. The Tribunal held that TNMM is the most appropriate method and the Assessing Officer was not justified in making addition on profit split method. (A. Y. 2004-05).

*ACIT v. Shankar Exports (2011) 64 DTR 409 (Jp.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – International transaction – Computation – Information – Scope, data and comparability [S. 133(6), Rule 19D(4)]**

In a transfer pricing matter, the Tribunal had to consider the following issues (i) whether transfer pricing adjustments have to be restricted to AE transactions only, (ii) whether a turnover filter can be applied and only companies with turnover within the range can be considered for comparison; (iii) whether the TPO is entitled to collect information under section 133(6) for determining the ALP or he is confined to data available in public domain on the specified date, (iv) Whether the +/- 5%

adjustment is a "standard deduction", (v) whether an adjustment to the ALP can be made for "low capacity utilization"? HELD by the Tribunal:

- (i) Under Chapter X, only international transactions between AEs are required to be computed having regard to the ALP. Accordingly, the transfer pricing adjustments have to be restricted to the AE transactions by adopting the operating revenue and operating costs of only those transactions;
- (ii) Though the Act & Rules does not provide for a turnover filter, there has to be an upper and lower limit because size does matter in business. A big company is in a position to bargain the price and attract more customers. It also has a broad base of skilled employees who are able to give better output. A small company may not have these benefits and the turnover would come down reducing profit margin. When are loss making companies are excluded from comparables, super-profit making companies should also be excluded. A reasonable classification of companies on the basis of net sales or turnover has to be made
- (iii) While Rule 10D(4) requires that the information should be "contemporaneous" and exist latest by the "specified date", there is no "cut-off date" upto which only the information available in public domain can be considered by the TPO. Even data that becomes available in the public domain after the specified date can be considered. If the TPO collects information under section 133(6), he is not required to inform the assessee about the process used by him nor is he required to furnish the entire information to the assessee. However, the assessee must be given proper hearing if any information is proposed to be used against it;
- (iv) The +/-5% adjustment is a "standard deduction" and not merely the range within which if the ALP falls that the ALP of the assessee is required to be accepted
- (v) All comparables have to be compared on similar standards and the assessee cannot be put in a disadvantageous position, when in the case of other companies adjustments for under utilization of manpower is given. The assessee should also be given adjustment for under utilization of its infrastructure. (A.Y. 2006-07)

*Genisys Integrating Systems v. Dy. CIT (2011) 64 DTR 225 (Bang.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Custom valuation**

Data for comparison to be data relating to year in which international transaction entered into. Exclusion of reimbursement of advertisement expenditure for determining profit level indicator not proper. Advertisement expenditure of comparables operating profits to be adjusted to bring it at par with tested party. (A.Y. 2002-03)

*Panasonic India Pvt. Ltd. v. ITO (2011) 43 SOT 68 / 135 TTJ 43 / (2010) 6 ITR 502 / 46 DTR 433 (Delhi)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – TNMM**

It is not acceptable that for purpose of computation of ALP, the assessee has the unfettered discretion to adopt the TNMM and the TPO is not entitled to reject that

method without showing deficiencies / defects. Section 92C r.w. Rule 10C requires the “most appropriate” method to be chosen from amongst those specified. The exercise of selecting the “most appropriate” method implies that the appropriateness of method is to be ranked in some order. Accordingly, it is open to the TPO to reject the TNMM and adopt the CUP method on the basis that the latter is “most appropriate” on the facts of the case. (A.Ys. 2002-03 to 2004-05)

*Serdia Pharmaceuticals (I) Pvt. Ltd. v. ACIT (2011) 136 TTJ 129 / 44 SOT 391 / 50 DTR 98 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ Length Price – Computation – Comparable – TNMM**

The Tribunal held that in absence of allegation that the agreement approved by regulatory authority is a sham, the tax authority cannot disregard the same. For transfer pricing analysis internal comparables are preferable over external comparables. While applying TNMM, only profits related to the transaction with AEs should be compared and not profits of the company as a whole. (A.Y. 2004-05)

*Abhishek Auto Industries Ltd. v. Dy. CIT (2011) 50 DTR 257 / 136 TTJ 530 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ Length Price – + 5% variation from ALP not available if only one price is determined**

The assessee undertook international transactions with associated enterprises for export pulses. The Assessing Officer made a reference to TPO for determination of the ALP and concluded by adopting “CUP” method, that in six instances the price paid by the assessee was in excess of quotation in “Agriwatch” database. In appeal the CIT(A) accepted that in respect of the transaction where the variation between the price paid and the price given in “Agriwatch” was less than 5%, no adjustment could be made though he confirmed other additions. On cross appeal before the Tribunal it was held that transfer pricing benefit under section 92C +5 % variation is not available if only one price determined. (A.Y. 2003-04)

*ACIT v. UE Trade Corporation (India) (2011) 136 TTJ 297 / 44 SOT 457 / 44 SOT 197 / 50 DTR 379 / 9 ITR 400 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms’ Length Price – Interest on loan**

TPO in the instant case had not followed the mandate of the Act. No method has been specified. Under these circumstances, the adjustment made by the TPO under section 96A(3) could not be sustained. Even on merits assessee had not charged interest on fees receivable by it from WSN, where as it had charged interest on loan granted to NCWN. On facts charging of interest on loan granted is different from charging interest on bills raised for services rendered. Both are not comparable. Thus additions were deleted. (A.Y. 2003-04)

*Nimbus Communications Ltd. v. ACIT (2010) 38 SOT 246 / 132 TTJ 351 / 42 DTR 395 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price**

Price on which a particular product is available in one country may largely vary from price prevailing in other countries due to host of factors such as climatic conditions and demand and supply factors etc. In such a situation a valid comparison could not be made between price charged by assessee from other countries with that from USA, particularly when quantity exported to USA was on wholesale basis, whereas it was on in smaller lots on retail basis to other countries. In such a situation CUP method adopted by the authorities were set aside. Assessing Officer was directed to get the ALP afresh. (A.Y. 2002-03)

*Gharda Chemicals Ltd. v. Dy. CIT (2010) 35 SOT 406 / 130 TTJ 556 / 39 DTR 130 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price**

There is no provision that the depreciation to be taken into account in all situations. (A.Ys. 2003-04, 2004-05)

*Schefenacker Motherson Ltd. v. ITO (2010) 2 ITR 196 / 123 TTJ 509 / 24 DTR 561 (Delhi)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price**

On the facts of the assessee as there were no details about price at which its associate concerns had supplied raw materials to unrelated customers and thus comparison between price charged by associate concerns from unrelated buyers and price charged from assessee was not possible and assessee was not able to point out any irregularity or discrepancy in profit determined by TPO, the adjustment made by TPO in ALP was confirmed. (A.Y. 2003-04)

*IL Jin Electronics (I) (P) Ltd. v. ACIT (2010) 36 SOT 227 (Delhi)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Computation**

TNM method requires comparison of net profit margins realized by an enterprise from an international transaction and not comparison of operating margins of enterprises as a whole. (A.Y. 2004-05)

*Addl. CIT v. Tej Diam (2010) 37 SOT 341 / 130 TTJ 570 / 39 DTR 185 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Bad Debt Written off. (Rule 10B)**

In view of parameters prescribed in Rule 10B, bad debt written off cannot be a factor to determine arm's length price of any international transaction. (A.Ys. 2002-03 and 2003-04)

*CA Computer Associates (P) Ltd. v. Dy. CIT (2010) 37 SOT 306 (Mum.)(Trib.)*

### **S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Scope of adjustment**

Economic and market conditions of Thailand and Vietnam being totally different, adjustments for volume off take, credit period and credit risk though material are not sufficient to make the sale price to AE in Thailand comparable with the sale price to unrelated party in Vietnam, unless suitable adjustments are made for disparity between the two transactions and therefore, matter is set aside to the CIT(A) for deciding the same afresh. (A.Y. 2002-03)

*Intervet India (P) Ltd. v. ACIT (2010) 38 DTR 422 / 39 SOT 93 / 130 TTJ 301 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Service fee from Principal**

Assessee earned service fees from principal at 12.5% of net advertisement revenue receipt. In the case of principal the same has been accepted at arm's length price. Computation at 15% of gross revenue receipt not justified. (A.Y. 2001-02)

*ACIT v. Set India Pvt. Ltd. (2010) 3 ITR 454 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Comparable**

Assessee's TP study cannot be rejected lightly, "comparables" have to be comparable on all parameters, no incentive to shift profits offshore if tax rates there are higher. (A.Y. 2004-05)

*Dy. CIT v. Indo American Jewellery Ltd. (2010) 40 DTR 386 / 131 TTJ 163 / 41 SOT 1 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Comparable making losses**

Merely because a comparable is making losses, it cannot be excluded for purposes of computation of arm's length price. Even at the stage of appeal before the Tribunal the assessee is entitled to raise the plea that the comparable was wrongly taken. Matter was remanded to Assessing Officer to re do the assessment deno. (A.Y. 2004-05)

*Dy. CIT v. Quark Systems (P) Ltd. (2010) 38 SOT 307 / 42 DTR 414 / 132 TTJ 1 / 4 ITR 606 (SB)(Chd.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – TNMM**

While determining ALP by adopting TNMM against retail price method adopted by the assessee, the tax authorities below have not conducted the independent study by choosing their own comparables and in relying on six comparables out of seven comparables used by the assessee for applying retail price method have not done proper screening of such comparables and therefore, the matter is restored to the Assessing Officer for de novo consideration. (A.Y. 2003-04)

*AXALTO Cards & Terminals India Ltd. v. ACIT (2010) 40 DTR 113 / 131 TTJ 65 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Computation – Applicability of proviso**

For the purpose of computing ALP, 5 percent variation from arithmetical mean is allowed and even after the amended provision, the CBDT circular no 12 of 2001 in this regard being not withdrawn is still applicable. Assessing Officer was not justified in making addition by computing ALP without any material to suggest that price shown by the assessee is not justified. (A.Y. 2005-06)

*Shanker Exporters v. Addl. CIT (2010) 132 TTJ 107 / 42 DTR 441 (Jp.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Comparable cases**

Comparable cases which are in different line of business activity and do not meet the conditions mentioned in Rule 10C, cannot be treated comparable cases for calculating ALP under TNMM. Availability of advance without interest from AE is a material factor determining by taking only one comparable case, proviso to section 92C(2) is not applicable for making adjustment of 5 percent. (A.Y. 2002-03)

*Vedaris Technology (P) Ltd. v. ACIT (2010) 41 DTR 73 / 131 TTJ 309 / (2011) 44 SOT 316 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Sale at 5% discount**

The Tribunal has considered the following circumstances for determining the Arm's length price.

- (1) Turnover and quantity difference.
- (2) Geographical differences.
- (3) Profile of customer
- (4) Business environment of USA and Europe.
- (5) Simple average - over head expenses identified.

The Tribunal confirmed the order of CIT(A), who has deleted the additions made by the assessing. (A.Y. 2004-05)

*ACIT v. Dufon Laboratories (2010) 39 SOT 59 / 47 DTR 20 (Mum.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Computation**

For determining the ALP of international transactions with AEs the TPO should work out the profit disclosed by the assessee on those receipts and compare the result with the comparables of independent cases, and in that exercise the domestic receipts are to be excluded for working out profit level indicator shown by the assessee in respect of the international transactions. (A.Y. 2002-03)

*Dy. CIT v. Starlite (India) (2010) 45 DTR 1 / 40 SOT 421 / 133 TTJ 425 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Operational cost – Comparable**



Comparables of extreme cases both on higher side and lower side to be avoided. Foreign exchange fluctuations cannot be excluded. Income tax refund cannot be included. Donations to be included. Compensation for termination of agreement to purchase property to be excluded. Shifting from one process to another in selection process permissible. (A.Y. 2003-04)

*Sap Labs India Pvt. Ltd. v. ACIT (2010) 6 ITR 81 (2011) 44 SOT 156 (Bang.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Associated enterprise**

Proprietor of the foreign concern being a relative of the two brothers who are controlling the assessee firm, cl. (j) of section 92A(2) is applicable to the facts of the case and the said foreign concern constituted an AE of the assessee. Since the word "or" is appearing between each sub clause of section 92A(2), the requirement of deeming provision is satisfied even if one of the sub clauses is applicable. Items sold by the assessee to the AE not being comparable with the items sold to other enterprises, the GP rate of the sales made to other concerns cannot be applied for computation of ALP. (A.Y. 2005-06)

*ITO v. V. Rajendra Exports (2010) 46 DTR 193 (Jp.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Computation – Payments to personnel deputed by AE and Royalty**

As there was no reason for the TPO to hold that expenditure on the deputation of technical adviser ought to be incurred by AE and not by the assessee, and the fees paid for technology agreement was recovered by assessee from the AE, as part of sale price, such fee paid became revenue neutral, transaction were at ALP hence no addition was called for. On the facts the CIT(A) has rightly deleted the addition of ₹ 43,68,838 made by the Assessing Officer, being the difference in the ALP on account of royalty and payments to personnel deputed by AE. (A.Y. 2004-05)

*ACIT v. Sona Okegawa Precision Forgings Ltd. (2010) 47 DTR 187 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer Pricing – Arms' Length Price – Computation – Adjustment on cess on royalty – Comparison**

Assessee having made payments of royalty to its foreign collaborator for importing the technology, research and development cess is payable by the assessee in terms of section 3(2) of Research and Development Cess Act, 1986 and therefore, no adjustment can be made for the same in the computation of ALP on the basis that such cess is payable by the foreign collaborator. When the terms and the basis of payment of royalty are materially different, the rate at which royalty is paid by the assessee to its foreign collaborator cannot be compared with the rates of royalty paid by other companies and no adjustment is to be made. (A.Y. 2004-05)

*Kirloskar Ebara Pumps Ltd. v. Dy. CIT (2010) 48 DTR 348 / (2011) 138 TTJ 211 (Pune)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' length price – Method of computing profit – Total cost margin under TNMM**

Assessee being engaged in rendering advertising services to its customers/AEs in capacity of an agent receiving remuneration on the basis of fixed commission/charges based on the expenses or cost incurred by it and recovering the payments made to third parties for rendering of advertisement space from the respective customers/AE. For determining the ALP, mark-up is to be applied to the cost incurred by the Assessee in performing its agency function and not to the cost of rendering advertising space to the AEs. (A.Y. 2005-06)

*Dy. CIT v. Cheil Communications India (P) Ltd. (2010) 48 DTR 289 / (2011) 137 TTJ 539 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Computation – Applicability of proviso – Difference upto 5 percent**

Differential rate sales made to associated concern RG and other concerns is below 5 percent and therefore, the Proviso of section 92C(2), is not applicable. (A.Y. 2003-04)  
*Ravi Kumar Rawat v. ITO (2010) 47 DTR 470 / 134 TTJ 634 (Jp.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Penalty – Concealment – Transfer pricing adjustment [S. 271(1)(C)]**

The fact that the assessee had accepted the addition and not challenged the same would not change when the issue is debatable. When there is full disclosure by the assessee and conduct being not mala fide or contumacious Penalty under section 271(1)(c), not justified. (A.Y. 2003-04)

*Dy. CIT v. Vertx Customer Services India (P) Ltd. (2009) 34 SOT 532 / 31 DTR 27 / 126 TTJ 184 (Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Shifting of profits – Exemption [S. 10A]**

Transfer pricing provisions are to prevent shifting of profits outside India and the assessee is claiming benefits under section 10A. The transfer pricing provisions ought not to be applied to the assessee. (A.Y. 2003-04)

*Philips Software Centre (P) Ltd. v. ACIT (2008) 119 TTJ 721 / 26 SOT 226 / 15 DTR 505 (Bang.)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Burden – Tax payer**

- a) Held that initial burden of proving international transaction carried out is at arm's length price is on an taxpayer.
- b) Non referral of question of determination of arms' length price to TPO by an Assessing Officer under instruction No. 3/23 dt 20.5.2003 is only an procedural error. (A.Y. 2004-05)

*Ranbaxy Laboratories Ltd. v. ACIT (2008) 167 Taxman 30 / 114 TTJ 1 / 110 ITD 428 / 3 DTR 33 (Mag.)(Delhi)(Trib.)*

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Reference to Transfer Pricing Officer under section 92CA u/s. 92C**

- (i) Under Chapter X there is no legal requirement, *prima facie*, that the Assessing Officer should demonstrate any tax avoidance before invoking provisions of section 92CA.
- (ii) There is no requirement on the Assessing Officer to demonstrate as to whether any one or more circumstances as set out under section 92C(3) (a), (b), (c) and/or (d) are satisfied before a case is transferred to the Transfer Price Officer under section 92CA.
- (iii) There is no requirement to record any reason/opinion before seeking previous approval of the Commissioner under section 92C(3).
- (iv) The Assessing Officer is not required to give any opportunity of hearing before making reference to the Transfer Price Officer under section 92CA(1). (A.Y. 2002-03)

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

**S. 92C : Avoidance of tax – Transfer pricing – Arms' Length Price – Permanent Establishment – Advance Rulings – Embargo – Article 5 of India-USA Treaty [S. 245R]**

Morgan Stanley ('MS'), a US investment bank, outsources a wide range of high-end support services for its global operations to its captive group company in India ('MSAS') - AAR observed that as MSAS does not carry out the business of MS from India it cannot be considered as a PE in India of MS by virtue of its fixed place of business; further, it is not an agency PE as it has no authority to conclude contracts on behalf of MS; but it is service PE as MS deputes personnel to India for more than 90 days for stewardship, overseeing functioning, perform quality control & risk mgmt.; further question of appropriateness of transfer pricing method not admitted as ruling authority is precluded from determining fair market value of property (hardware on which service was transmitted), and transactions over ` 50m are considered as pending before tax authorities.

*Morgan Stanley and Co (2006) 284 ITR 260 / 201 CTR 67 / 152 Taxman 1 (AAR)*

**Section 92CA : Reference to Transfer Pricing Officer**

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing**

The Assessing Officer is not bound by the arms' length price as determined by the Transfer Pricing Officer. He can always be persuaded by the assessee at that stage to reject the TPO's report and still proceed to determine arms' length price himself.

*Sony India (P.) Ltd. v. CBDT (2006) 157 Taxman 125 / 206 CTR 157 / (2007) 288 ITR 52 (Delhi)(High Court)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – Computation of Arms' Length Price – Out standing more than six months**

Assessee company having an AE in USA, entered into a product development services agreement and a professional services agreement, both separately, with its said AE. Assessing Officer made reference under section 92C to TPO. TPO has accepted prices in respect of transaction entered into between assessee and its AE as ALP compatible. However, TPO noticed that an amount of ` 5.52 crores belonging to assessee was outstanding for more than six months. She opined that by parking this huge amount at disposal of its AE, assessee was depriving funds otherwise available in its hands and adversely affecting its profitability. TPO has calculated interest on aforesaid amount and recommended Assessing Officer to add interest in assessee's taxable income. Assessing Officer made additions. Tribunal upheld the addition made by the Assessing Officer. (A.Y. 2004-05)

*Logix Micro Systems Ltd. v. ACIT (2011) 50 DTR 359 / (2010) 42 SOT 525 / (2011) 136 TTJ 366 8 ITR 159 (Bang.)(Trib.)*

*Editorial : Pune Bench has taken a country view in the case of Patni Computer System v. Dy. CIT (2011) 141 TTJ 190 (Pune)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – International transaction – Computation – Arms' length price – Reimbursement of expenses**

Payment received by the assessee company from its AE / parent company was in the nature of reimbursement of incentives paid to the employees of the assessee and it did not have any element of income and therefore, no adjustment could be made in the computation of ALP by notionally imputing a mark up on that amount, more so when no such adjustment has been made in the earlier or subsequent years wherein also similar incentives were paid and the facts were identical. (A. Y. 2006-07).

*Aricent Technologies (Holdings) Ltd. v. Dy. CIT (2011) 51 DTR 17 / 137 TTJ 209 (Delhi)(Trib.)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – International transaction – Computation – Arms' Length Price – Trader – Resale method**

Assessee engaged in business of import of rough diamonds and selling same in local markets without value addition to goods, resale price method is most appropriate method for determining ALP with respect to AE transaction.

If comparables cited by assessee were not found appropriate, fresh comparables could be searched, but method adopted was not to be rejected. Matter was set aside to Assessing Officer for disposal afresh after finding appropriate comparable and adopting resale price method. (A. Y. 2004-05).

*Star Diamond Group v. Dy. DIT (2011) 44 SOT 532 / 52 DTR 169 (Mum.)(Trib.)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – CUP method will determine ALP of interest-free loan**

The assessee advanced ₹ 7.39 crores to its AE on interest-free terms. For transfer pricing purposes, it claimed that no external comparable uncontrolled price was available for benchmarking the transaction and so TNMM was applicable to determine the arm's length basis of the loan. Applying TNMM, the assessee claimed that the notional interest was factored in the software development income and no separate addition could be made. This was rejected by the TPO & CIT(A) on the ground that the giving of interest-free loans to the AE was an entirely separate transaction not in conjunction with the activity of software development and hence merited a separate analysis. On appeal by the assessee, HELD by the Tribunal:

The assessee was required to comply with the transfer pricing provisions of section 92 to 92F with respect to the transaction of interest-free loan to its subsidiary. The CUP method is the most appropriate method in order to ascertain the ALP of such international transaction by taking into account prices at which similar transactions with other unrelated parties have been entered into. For that purpose, an assessment of the credit quality of the borrower and estimation of a credit rating, evaluation of the terms of the loan e.g. period of loan, amount, currency, interest rate basis, and additional inputs such as convertibility and finally estimation of arm's length terms for the loan based upon the key comparability factors and internal and/or external comparable transactions are relevant. None of these inputs have anything to do with the costs; they only refer to prevailing prices in similar unrelated transactions instead of adopting the prices at which the transactions have been actually entered in such cases, the hypothetical arms length prices, at which these associated enterprises, but for their relationship, would have entered into the same transaction, are taken into account. Whether the funds are advanced out of interest bearing funds or interest free advances or are commercially expedient for the assessee or not, is wholly irrelevant in this context. As the transaction is of lending money, in foreign currency, to its foreign subsidiary, the comparable transaction should also be of foreign currency lending by unrelated parties. (A.Y. 2002-03)

*Aithent Technologies Pvt. Ltd. v. ITO (2012) 134 ITD 521 (Delhi)(Trib.)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – Computation – Arms' Length Price**

Where only one price has been determined under "most appropriate method" for evaluation of ALP, the question of application of proviso to section 92C(2) does not arise, therefore, assessee was not entitled to the concession of 5 percent as prescribed in the said proviso. (A. Y. 2004-05).

*ACIT v. Essar Steel Ltd. (2011) 51 DTR 177 / 136 TTJ 470 / 131 ITD 22 / (2012) 15 DTR 189 (Visakha)(Trib.)*

**S. 92CA : Avoidance of tax – Reference to Transfer Pricing Officer – Transfer pricing – Collaboration agreement – Capital or revenue**

TPO is not concerned, nor is he competent to decide as to whether the payment under collaboration agreement was capital or revenue and on the facts and circumstances, reference to the TPO for determining 'arm's length price' may not be necessary. (A.Y. 2003-04)

*Honda Sael Cars India Ltd. v. ACIT (2008) 9 DTR 14 / (2010) 1 ITR 497 (Delhi)(Trib.)*

## **Section 94 : Avoidance of tax by certain transactions in securities**

### **S. 94 : Avoidance of tax – Transaction in securities – Tax free dividend – Loss on sale of units [S. 10(33)]**

Assessee had purchased certain units of UTI from P on 29-5-1989 at rate of ₹ 14.75 per unit, at the same time assessee entered in to an irrecoverable commitment to sell back those units to P at rate of ₹ 13 per unit on 31-7-1989. The assessee received dividend at the rate of 18 percent on those units. The assessee incurred loss. The assessing officer disallowed the loss holding that the same was predetermined. The High court held that even if it was assumed that transaction was a pre planned one, there was nothing to impeach genuineness of transaction and therefore, assessee was entitled to claim the loss on said transaction. (A. Y. 1990-91)

*Eveready Industries India Ltd. v. CIT (2011) 201 Taxman 278 / 242 CTR 105 / 334 ITR 413 / 56 DTR 107 (Cal.)(High Court)*

### **S. 94 : Avoidance of tax – Transaction in securities – Capital loss – Redemption of units**

When units have been redeemed by assessee, same would constitute transfer for the purpose of section 94(7) and short term capital loss to the extent of dividend is not allowable. CIT(A) was justified in applying the provisions of section 94(7) and setting off dividend income of ₹ 97,90,628 of A. Y. 2002-03 against the short term capital loss of ₹ 1,06,03,428 of the A. Y. 2003-04.

*Administrator of Estate of Late E. F. Dinshaw v. ITO (2011) 52 DTR 23 / 128 ITD 365 / 137 TTJ 182 / 8 ITR 771 (Mum.)(Trib.)*

### **S. 94 : Avoidance of tax – Transactions in securities – Conditions**

Entries and treatment in the assessee's books of account is not relevant. Loss on valuation has no place in section 94(7). Amendment in section 94(7), brought by the Finance Act, 2004 should be applied prospectively is not sustainable. (A. Y. 2005-06).

*Ashok Kumar Damani v. Addl. CIT (2011) 138 TTJ 45 / 130 ITD 287 / 9 ITR 304 / 53 DTR 435 (Mum.)(Trib.)*

### **S. 94(3)(b) : Avoidance of tax – Transactions in securities – Not regular or recurrent**

The court held there had been no systematic efforts by the assessee to avoid the tax. It had been done only once. In the absence of any kind of regular transaction or recurrent transaction, the provisions of sub sections (1) and (2) of section 94 were



not attracted and whole transaction came within exemption under section 94 (3) (b).  
(A.Y. 1994-95)

*CIT v. Vallabh Leasing and Finance Co. Pvt. Ltd. (2004) 265 ITR 1 / 134 Taxman 770 / 187 CTR 20 (MP)(High Court)*

**S. 94(7) : Avoidance of tax – Loss on sale of units of mutual funds – Dividend stripping – Tax planning – Colourable Device [S. 10(33), 14A]**

Assessee purchased units of a mutual fund on the record date, earned dividend, sold all the units ex-dividend on the next working day and claimed set off of loss incurred on the sale of units. Contention of the Revenue that the differential price of the units being the cost of dividend, is expenditure incurred for obtaining exempt income and it should be netted against the dividend income in terms of section 14A cannot be accepted. Mandate of section 14A is to curb the practice to claim deduction of expenses incurred in relation to exempt income against the taxable income while claiming exemption of such income. Words “expenditure incurred” in section 14A refers to expenditure on rent, taxes, salaries, interest, etc. in respect of which allowances are provided for. A payback does not constitute an “expenditure incurred” in terms of section 14A. For attracting section 14A, there has to be a proximate cause for disallowance which has its relationship with the tax exempt income. Payback or return of investment not being such proximate cause, section 14A is not applicable to the facts of the case. Fact that the assessee received tax-free dividend and made use of the provision of section 10(33) cannot be said to be “abuse of law”. Even assuming that the transaction was pre-planned, there is nothing to impeach the genuineness of the transaction. Hence, loss arising in such cases before the insertion of section 94(7) w.e.f. 1st April 2002, cannot be disallowed. However, after 1st April 2002, such loss can be ignored by the Assessing Officer to the extent of dividend received by the assessee in view of section 94(7). Losses over and above the amount of the dividend received are still allowable. Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. If the argument of the Department is to be accepted, it would mean that before 1st April 2002, the entire loss would be disallowed, but after that date a part of it is allowable under section 94(7), which cannot be object of section 94(7) as it is inserted to curb tax avoidance by certain types of transactions in securities.

A citizen is free to carry on its business within the four corners of the law. Mere tax planning, without any motive to evade taxes through colourable devices is not frowned upon. (A.Y. 2000-01 and 2001-02)

*CIT v. Walfort Share & Stock Brokers (P) Ltd. (2010) 41 DTR 233 / 326 ITR 1 / 192 Taxman*

*211 / 233 CTR 42 / (2010) 8 SCC 137 (SC)*

**S. 94 (4): Avoidance of tax – Transactions in securities – Dividend stripping - Provision is not applicable to sale and purchase of units . [ S.80M ]**

Allowing the appeal of the assessee the Court held that ; the provisions of section 94(4) were not applicable on transaction of sale and purchase of UTI units. (AY. 1992-93 )

**Sundaram Finance Ltd v. DCIT( 2012) 211 Taxman 303 ( Mad) (HC)**

**Editorial:** SLP of revenue is admitted; DCIT v Sundaram Finance Ltd. (2017) 245 Taxman 268 (SC)

**S. 94(7) : Avoidance of tax – Transactions in securities – Dividend stripping – Tax planning – Loss incurred in purchase and sale of Units [S. 73]**

Once the transaction is genuine merely because it has been entered into with a motive to avoid tax, it would not become a colourable device and consequently earn any disqualification. Loss incurred on purchase. (A.Y. 1991-92)

*Porrits and Spencer (Asia) Ltd. v. CIT (2010) 329 ITR 222 / 231 CTR 294 / 190 Taxman 174 / 37 DTR 297 (P&H)(High Court)*

**S. 94(7) : Avoidance of tax – Transactions in securities – Dividend stripping – Units purchased and sold beyond three months**

The conditions spelt out in clauses (a), (b) and (c) are cumulative and not alternative. Purchase of units within a period of less than three months from the record date, but sale beyond a period of three months loss cannot be ignored. (A.Y. 2004-05)

*CIT v. Alka Bhosle (Smt.) (2010) 325 ITR 550 / 192 Taxman 174 / 46 DTR 253 / 235 CTR 565 (Bom.)(High Court)*

**S. 94(7) : Avoidance of tax – Transactions in securities – Dividend stripping**

For the purpose of invoking the provisions of section 94(7) of the Act and to disallow the loss on sale of units, condition laid down in clauses (a), (b) and (c) of section 94(7) are to be cumulatively satisfied. Thus, while the units of mutual funds were purchased by the assessee within the statutory period of three months, the sale of said units which is made beyond the statutory period of three months from the record date the provisions of section 94(7) are not attracted and the loss on sale of such units cannot be disallowed. (A.Y. 2004-05)

*CIT v. Shambhu Mercantile Ltd. (2009) 25 DTR 164 / 224 CTR 499 / 183 Taxman 251 / (2010) 325 ITR 535 (Delhi)(High Court)*

**S. 94(7) : Avoidance of tax – Transactions in securities – Purchase of units – Dividend stripping**

Units purchased on the record date falls very much within the period of three months as prescribed under section 94(7), record date of the units purchased by the assessee being 8th Aug., 2003, three months period was to expire on 8th Nov 2003, and therefore, sale of units by the assessee on 7th Nov., 2003, was within three months from the date of record, attracting section 94(7). (A.Y. 2004-05)

*Tube Investments of India Ltd. v. Jt. CIT (2010) 40 DTR 500 / 2 ITR 612 / 131 TTJ 359 (Chennai)(Trib.)*

**S. 94(7) : Avoidance of tax – Sale of units of mutual fund – Dividend Stripping**

Sale of units of mutual fund after realizing tax-free dividends within two days of purchase could not be regarded as a colourable device, and s.94(7) not being applicable in the relevant assessment year claim of short-term capital loss on sale of units was allowable. (A.Y. 2001-02)

*Bhanuben Chimanlal Malavia (Smt) v. ITO (2006) 100 TTJ 337 (Rajkot)(Trib.)*

**S. 94(7) : Avoidance of tax – Transactions in certain securities – Dividend stripping**

Provisions of section 94(7) do not block dividend strippers but only make them squat for a longer period; provisions of section 94(7) are geared towards quick-in-quick-out aspect and not against claim of loss against other income of taxpayer; provisions of section 94(7) have not been given retrospective effect. (A.Ys. 2000-01 & 2001-02)

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

*Editorial : Affirmed by Bombay High Court CIT v. Walfort Share & Stock Brokers (P) Ltd. (2009) 310 ITR 421 and Supreme Court CIT v. Walfort Share and Stock Brokers (P) Ltd. (2010) 326 ITR 1 (SC)*

**CHAPTER XI**

**ADDITIONAL INCOME-TAX ON UNDISTRIBUTED PROFITS**

**Section 104 : Income tax on undistributed income of certain companies**  
**[Omitted by the Finance Act, 1987, w.e.f. 1-4-1988]**

**S. 104 : Additional income tax – Undistributed Profits of certain Companies – Agricultural Land [S. 47(viii)]**

Since section 47(viii) specifically exempts any transfer of agricultural land in India effected before 1-3-1970 from the scope of section 45, compensation which became payable to the assessee as a result of acquisition of its agricultural land in 1962, was totally exempt from section 45, and therefore, could not form part of "gross income" or "distributable income" for purpose of section 104. The word "having regard to" used in section 104 do not restrict the consideration only to two matters indicated in

the section as it is impossible to arrive at a conclusion as to reasonableness by considering only two matters mentioned isolated from other relevant factors. The only guidance is his capacity to put himself in the position of a prudent businessman or the director of a company and his sympathetic and objective approach to the difficult problem that arises in each case. (A.Ys. 1974-75, 1976-77)

*Delhi Farming & Construction (P.) Ltd. v. CIT (2003) 260 ITR 561 / 128 Taxman 374 / 174 Taxation 421 / 181 CTR 12 (SC)*

## **CHAPTER XII**

### **DETERMINATION OF TAX IN CERTAIN SPECIAL CASES**

#### **Section 111A : Tax on short term capital gains in certain cases**

##### **S. 111A : Tax on short term capital gains – Equity shares – Chargeable – Set-off loss – Securities Transaction Tax – Option to set off [S. 70]**

For the Asst Year 2005-06, in view of introduction of section 111A, choice has been left over to the assessee in taking decision about setting off of short term capital loss from one transaction against any other short term capital gain whether with in or outside the cut-off date. (A.Y. 2005-06)

*First State Investments (Hongkong) Ltd. v. ADIT (2010) 40 DTR 415 / (2009) 33 SOT 26 / (2011) 8 ITR 315 / (2010) 132 TTJ 218 (Mum.)(Trib.)*

#### **Section 112 : Tax on long-term capital gains**

##### **S. 112 : Tax on long term capital gains – Security Transaction Tax (STT) not paid – Listed Security [S. 10(38), 45]**

Assessee was a promoter-director of a company "PLL". PLL issued shares for public subscription through initial public offer (IPO) as per SEBI guidelines, which permitted existing shareholders also to sell their shares in IPO for diluting their equity holding. Assessee sold certain share of "PLL" and received certain amount as sale consideration. Assessee claimed that said gains were not includible in his total income. Assessee has not paid Securities Transaction Tax (STT) on said shares. Assessing Officer has not allowed the exemption on the ground that the assessee has not paid STT on said shares and the Shares of PLL were not listed on any stock exchange on the date of sale. The Tribunal confirmed the order of assessing officer and held that the assessee was liable to be taxed at 20 percent. (A. Y. 2006-07).

*Uday Punj v. Dy. CIT (2011) 133 ITD 354 / (2012) 145 TTJ 640 / 70 DTR 123 (Delhi)(Trib.)*

##### **S. 112 : Tax on long term capital gains – Capital gains – Non-resident – Investment – Stock-in-trade [S. 10(38), 45]**

Assessee a non-resident had converted shares purchased earlier years which were held as investment in to stock in trade and out of such shares had sold some shares during the year through recognized stock exchange on which STT was paid, long

term capital gain on sale of such shares would be taxed at a rate of 20 percent in terms of section 112(1)(c). (A. Y. 2006-07).

*Alka Agarwal (Smt) v. ADIT (2011) 48 SOT 493 (Delhi)(Trib.)*

**S. 112 : Tax on long term capital gains – Block assessment – Rate of taxation [S. 113]**

Tax on the undisclosed Long-term Capital Gain is chargeable at 60% and not at 20%. (A.Ys. 1986-87 to 1996-97)

*Parshuram D. Patil v. ACIT (2006) 102 ITD 241 / 103 TTJ 765 (TM)(Mum.)(Trib.)*

**S. 112 : Tax on long term capital gains – Beneficial – Mandatory – Rectification [S. 154]**

Section 112 is not only a beneficial provision but it is also mandatory; benefit of relief under section 112 can be claimed by way of a rectification application under section 154, if not claimed in original return. (A.Y. 2001-02)

*Devinder Prakash Kalra v. ACIT (2005) 97 TTJ 372 (Delhi)(Trib.)*

**S. 112 : Tax on long term capital gains – Computation – Non-resident – Sale of shares – Proviso [S. 48]**

Operation of the proviso to section 112(1), is confined to assets not covered by the first proviso to section 48 and the assets specified in the proviso to section 112(1) itself, therefore, a non-resident is not eligible to avail the benefit of lower rate of tax of 10 percent on the capital gains on the sale of shares.

*Cairn U. K. Holdings Ltd. In Re (2011) 59 DTR 121 / 242 CTR 449 / 337 ITR 131 / 201 Taxman 111 (AAR)*

**S. 112 : Tax on long term capital gains – Non-residents – Sale of shares by Mauritian subsidiary of UK company – Tax residency certificate – Not taxable – Income deemed to accrue or arise in India – DTAA – India-Mauritius [Article 13.4, S. 9]**

The applicant held 50% shares in the capital of Ardex Endura (India) Pvt. Ltd. Indian Company is engaged in manufacturing of flooring adhesives. The applicant is proposing to sell its entire stake to another non-resident group company known as Ardex Beteiligungs – GmbH Germany at fair market value. The applicant seeks ruling mainly on following questions as to whether

- a) the capital gains arising on the proposed sale transaction would be chargeable to Income-tax in India in the hands of the Applicant, having regard to the provisions of paragraph 4 of Article 13 of the India-Mauritius Tax Treaty or whether the applicant can receive the sale proceeds without deduction of income tax at source?
- b) the Applicant would be required to file a return of income in India in respect of the proposed transfer of shares?

Revenue contended that the applicant is wholly owned subsidiary of UK company and it had no income of any nature during the current year or previous year and the only

asset was investment in the Indian company. The funds for purchase of the investments were received from holding company and also the decision regarding the sale of shares was taken by the holding company. Thus the veil should be pierced and India-UK treaty should be applied.

The applicant contended that the company was created in 1998 by a group other than Ardex group. Ardex group was in the business of manufacturing of construction material and it acquired Mauritian company with a view to expand its business. The applicant was a tax resident of Mauritius and the Tax Residency Certificate has to be accepted view of the decision in *Azadi Bachao Andolan* (263 ITR 706).

The authority ruled that the arrangement has not come into existence all of a sudden. It is not clear how far the theory of beneficial ownership could be invoked. Also it was held in *Azadi Bachao Andolan* that treaty-shopping itself is not taboo. As the shares were held for a considerable length of time and sale is effected at Market value, it was held that the capital gains on the proposed sale of shares by the applicant is not chargeable to tax in India. However since the shares to be transferred are the shares of an Indian company, we rule that the applicant is bound to file a return of income in India. Ref: *VNU International BV*, AAR 871 of 2010.

*Ardex Investments Mauritius Ltd. (2011) 203 Taxman 402 / 245 CTR 240 / 63 DTR 257 / (2012) 340 ITR 272 (AAR)*

#### **S. 112 : Tax on long term capital gains – Tax in excess of 10% of capital gains before indexation – AAR [S. 48]**

UK based applicant company sells shares of a listed company - AAR observed that it has consistently ruled in the case of *Timken France SAS*, *McLeod Russel Kolkata Ltd.* and *Burmah Castrol Plc.* that the expression “before giving effect to the second proviso to section 48” only means that the calculation under the 2nd proviso shall not enter into the computation of capital gain, wherever that proviso is applicable; further, it cannot be construed as a condition precedent for availing the benefit under proviso to said section - hence held that it is well settled that benefit under proviso is available to non-residents

*Fujitsu Services Limited, (2009) 182 Taxman 263 / 225 CTR 121 / 26 DTR 169 (AAR)*

#### **S. 112 : Tax on long term capital gains – Relief of lower tax rate cannot be denied to non-residents despite non-applicability of 2nd proviso to S. 48 [S. 48, 55(2)]**

Authority followed the decision in case of *Timken France, SAS* and held that the phrase in section 112(1) “before giving effect to the provisions of second proviso to section 48” means before giving effect to the 2nd proviso wherever it is applicable, but, the non-applicability of the 2nd proviso will not preclude the applicant to avail the relief of lower rate of tax; hence applicable tax rate would be 10% - Further, in the normal course, cost of acquisition of bonus shares allotted without consideration shall be taken as ‘nil’ but in the case of a capital asset answering the description given in sub-clauses (i) and (ii) of clause (b), the rules of computation laid down by those sub-clauses of clause (b) would prevail over the rules in the preceding sub-



clause (aa). And hence cost of bonus shares acquired prior to 01-04-1981 should be fair market value as on 01-04-1981 and not 'nil'.

*Four Star Oil & Gas Co (2009) 21 DTR 50 / 179 Taxman 167 / 223 CTR 121 / 312 ITR 104 (AAR)*

**S. 112 : Tax on long term capital gains – 2nd proviso to S. 48: Benefit of lower tax rate cannot be denied to non-residents – Expenses incurred in connection with transfer [S. 48]**

Applicable tax rate on LTCG on sale of shares by non-resident whether 10% under proviso to S. 112(1) or 20% under S. 112(1)(c)(ii) - AAR followed the ruling in case of Timken France SAS and took the view that the benefit of the proviso to section 112(1) of the Act could not be denied to non-residents even if they are not entitled to relief in terms of the proviso to section 48 of the Act and long term capital gains shall be taxable @ 10%; Further, it ruled that legal expenses distinctly related to and integrally connected with the transfer of shares, is admissible for deduction under section 48(i) of the Act

*Compagnie Financiere Hamon (2009) 221 CTR 734 / 18 DTR 289 / 177 Taxman 511 / 310 ITR 1 (AAR)*

**S. 112 : Tax on long term capital gains – Proviso to S. 48 – Benefit of lower tax rate available to non-residents [S. 48]**

LTCG tax rate applicable to non-resident - AAR observed that proviso to said Section is a special provision and the benefit to non residents/ foreign companies cannot be denied even if they are entitled to another relief in terms of the proviso to section 48 of ITA - hence ruled that LTCG would be payable by non-resident on both original shares and bonus shares @ 10%

*McLeod Russel Kolkata Ltd. (2008) 215 CTR 230 / 168 Taxman 175 / 299 ITR 79 / 4 DTR 81 (AAR)*

**S. 112 : Tax on long term capital gains – Rate of tax – proviso to S. 48: Benefit of lower tax rate of 10% available for both on original and bonus shares [S. 48]**

Non-resident applicant sells entire holding of original and bonus shares in Indian listed company to the Indian promoters giving rise to long-term capital gains - AAR held that the phrase in section 112(1) "before giving effect to the provisions of second proviso to section 48" means before giving effect to the 2nd proviso wherever it is applicable, but, the non-applicability of the 2nd proviso will not preclude the applicant to avail the relief of lower rate of tax. Hence applicable tax rate would be 10%. It further ruled that bonus shares just as original shares are listed securities and the proviso to section 112(1) does not make any distinction between original and bonus shares; hence same interpretation will hold good in the case of bonus shares as well. However, the cost of acquisition of the asset (bonus shares) shall be taken as Nil as per sub-clause (iiia) of clause (aa) of section 55(2).

## **CHAPTER XII**

### **DETERMINATION OF TAX IN CERTAIN SPECIAL CASES**

#### **Section 113 : Tax in the case of block assessment of search cases**

##### **S. 113 : Tax – Block assessment – Search cases – Surcharge [S. 158BB]**

Even in respect of search which was conducted on April 6, 2000, i.e. prior to June 1, 2002, the provisions of the Finance Act, 2001 would be applicable and surcharge would be leviable, on tax payable under section 113.

*CIT v. Rajiv Bhatara (2009) 310 ITR 105 / 178 Taxman 285 / 19 DTR 225 / 222 CTR 209 / 211 Taxation 157 / 13 SCC 315 (SC)*

##### **S. 113 : Tax – Block assessment – Search cases – Surcharge – Referred to larger bench [S. 132, 158BC]**

In relation to block assessment in search cases, a proviso was added with effect from June 1, 2002 to section 113 of the Income Tax Act, 1961, to the effect that the tax shall be increased by a surcharge. On a claim by the Department that proviso was retrospective, the Supreme Court referred the matter to a larger Bench.

*CIT v. Vatika Township (P) Ltd. (2009) 314 ITR 338 / 221 CTR 409 / 213 Taxation 193 / 178 Taxman 322 / 17 DTR 353 (SC)*

##### **S. 113 : Tax – Block assessment – Search cases – Surcharge [S. 158BB]**

The Supreme Court held that surcharge is leviable even in cases of block assessments under section 158BB. It further held that the proviso to section 113 inserted by the Finance Act 2002, is clarificatory in nature and therefore would not change the position prior to the insertion of the proviso.

*CIT v. Suresh N. Gupta (2008) 297 ITR 322 / 214 CTR 274 / 166 Taxman 313 / 1 DTR 354 / 204 Taxation 20 / 4 SCC 362 (SC)*

##### **S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Levy of surcharge in the block assessment of those assessee when search was carried out prior to 1-6-2002 is not justified as the amendment to section 113 was carried out through Finance Act, 2002 came into effect from 1-6-2002 only.

*CIT v. Roshan Singh Makker (2006) 154 Taxman 372 / 203 CTR 125 / 287 ITR 160 (P&H)(High Court)*

##### **S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Nature of proviso to section 113 is not clarificatory or curative since it increases the tax liability of the assessee and hence cannot be applied retrospectively.

*ACIT v. Govind Ram Makhija (ITSSA No. 142/JP/2005) (C.O. No. 95/JP/2005) Block Period 1990 -91 to 7-4-2000 dated 24th January, 2006 (Tax World – April 2006 – Vol XXXV – P. 97) (Jp.)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Section 113 being a specific provision applicable to undisclosed income computed under Chapter XIV-B, capital gain included in the undisclosed income is subject to tax @ 60 per cent and not @ 20 per cent. (A.Ys. 1986-87 to 1996-97)

*Parshuram D. Patil v. ACIT (2006) 103 TTJ 765 / 102 ITD 242 (TM)(Mum.)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Levy of surcharge of 17 per cent by Finance Act, 2001 under section 113 over and above 60 per cent on undisclosed income is not invalid as Parliament has power to prescribe rate of income-tax under article 270 of Constitution of India and also to prescribe rate for purpose of surcharge over and above rate of income-tax, under article 271 of Constitution; merely because there is no reference about Central Act in section 113, it cannot be said that Parliament cannot levy surcharge in respect of tax on undisclosed income by separate enactment. (A.Ys. 1991-92 to 2001-02)

*Raya R. Govindarajan v. ACIT (2005) 96 ITD 1 / 98 TTJ 45 / 3 SOT 192 (Chennai)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Proviso to section 113 is prospective in operation. (A.Y. 1999-2000)

*A.P.L. (India) (P.) Ltd. v. Dy. CIT (2005) 96 ITD 227 / 97 TTJ 187 (Mum.)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Section 113 was amended with effect from 1-6-2002, which has no retrospective effect.

*ACIT v. Mohan Lai Swarnkar (Dr) (2005) 95 TTJ 969 (Jp.)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Under proviso to section 113, surcharge, if any, is applicable only in case of search that is made after 1-6-2002 and not earlier.

*K. Senthilnathan (Dr) v. ACIT (2005) 96 TTJ 637 (Chennai)(Trib.)*

**S. 113 : Tax – Block assessment – Search cases – Rate of tax – Surcharge**

Where search had taken place prior to 1-6-2002, i.e., before proviso to section 113 was inserted, there could be no surcharge on tax on undisclosed income computed for block period.

*ACIT v. Sharda Adhalkha (Dr. Mrs) (2005) 95 TTJ 643 (Amritsar)(Trib.)*

**Section 115A : Tax on dividends, royalty and technical service fees in the case of foreign companies**

**S. 115A : Foreign companies – Tax – Dividends – Royalty – Technical services fees**

Where assessee foreign-company received a certain amount from Indian company on account of technical know-how rendered during relevant assessment years, tax was to be charged at rate of 40 per cent in accordance with section 115A(1)(b)(iii), even if it was by mistake charged at 20 per cent in earlier year by Invoking section 115A(1)(b)(ii). (A.Ys. 1985-86, 1986-87)

*CIT v. Foss Electronic (2003) 130 Taxman 483 / 263 ITR 125 / 182 CTR 542 (Raj.)(High Court)*

**S. 115A : Foreign companies – Tax – Dividends – Royalty – Technical services fees**

Since amendment to section 115A by Finance Act, 1994 is clarificatory in nature, natural consequences would be to tax specified items of income at rate of 20 per cent and not 25 per cent in case of foreign company in respect of years prior to amendment also. (A.Ys. 1987-88 & 1989-90 to 1991-92)

*Sikkim Janseva Pratisthan (P.) Ltd. v. Dy. CIT (2005) 1 SOT 650 / (2004) 90 TTJ 1108 (Delhi)(Trib.)*

**S. 115A : Foreign companies – Tax – Dividends – Royalty – Technical services fees – Sale of shares of Indian company – DTAA – India-Mauritius [S. 90, Art. 13(4)]**

Article 13(4) of DTAA confers the power of taxation of capital gains derived by a resident of a contracting State from the alienation of specified property only in the State of residence, therefore, the applicant, a Mauritian company, is not liable to pay tax in India on the capital gains arising on transfer of shares of an Indian company to another Mauritius based company.

*D. B. Zwirn Mauritius Trading No. 3 Ltd., Mauritius (2011) 333 ITR 32 / 240 CTR 1 / 198 Taxman 295 / 53 DTR 178 (AAR)*

**S. 115A : Foreign companies – Tax – Dividends – Royalty – Technical services fees – Transfer of shares of Indian company to Swiss companies – DTAA – India-Netherland [S. 90, 92, Art. 13(5)]**

Capital Gains earned by a Dutch company, on transfer of shares of an Indian company to Swiss companies are covered by Art. 13(5) of the Indo-Netherlands DTAA and therefore, it is taxable only in Netherlands and not in India hence transfer pricing provisions are not attracted as the transaction of shares is between non resident companies.

*VNU International B. V. In Re (2011) 240 CTR 12 / 198 Taxman 454 / 334 ITR 56 / 53 DTR 189 (AAR)*

**S. 115A : Foreign companies – Tax – Dividends – Royalty – Technical services fees [S. 44D]**

Section 44D and section 115A cannot be read as treating gross receipts of fees for technical services without allowing deduction on account of expenses incurred for earning same, as income.

*DHV Consultants BV, In re (2005) 277 ITR 97 / 147 Taxman 521 / 197 CTR 105 (AAR)*

### **Section 115AD : Tax on income of Foreign Institutional Investors from securities or capital gains arising from their transfer**

#### **S. 115AD : Capital gains – Foreign Institutional Investors – Business income – Short term capital loss from exchange traded derivative transactions – Investment in securities [S. 43(5)]**

Foreign institutional investors (FIIs) can only make investment in securities in country's capital market and they cannot undertake trade in them. Income arising to a FII from transfer of securities falls within ambit of section 115AD, as per which income arising from transfer of such securities is held to be falling under head 'capital gains', it cannot be considered as 'business income' whether speculative or non-speculative. Section 43(5) has no application to FIIs in respect of securities as defined in Explanation to section 115AD, income from sale of securities is to be considered as short term or long term capital gains. In the facts of the case, Income from derivative transactions resulting into loss of ₹ 12.27 crores was to be considered as short term capital loss on the sale of securities which is eligible for adjustment against short term capital gains arising from the sale of shares and not speculation loss. (A. Y. 2004-05).

*LG Asian Plus Ltd. v. Asst. DIT (International Taxation) (2011) 46 SOT 159 / 140 TTJ 668 / 60 DTR 159 (Mum.)(Trib.)*

#### **S. 115AD : Capital gains – Foreign Institutional Investors – Securities – Special provision overrides general provision – No option with FII of opt out of S. 115AD – India-UK DTAA [S. 48, Article 26]**

Authority observed that S. 115AD is a special provision in Chapter XII which deals with "determination of tax in certain special cases" and hence will override the general provisions. There are several decisions of the Hon'ble Supreme Court laying down the law on this aspect. Further, there is no provision in the scheme of 115AD that is available to FIIs to opt out of the same. For the reason that the applicant suffered capital loss in an assessment year, it cannot claim the option to opt out of said section. It is well settled position in law that income includes both profit and loss. In any event said section does not cause any discrimination to a non-citizen as it is more beneficial and hence article 26 of the Treaty is not attracted - Hence held that there is no option available to FIIs to opt out of its operation

*Universities Superannuation Scheme, UK; (2005) 145 Taxman 141 / 275 ITR 434 / 194 CTR 289 (AAR)*

**Section 115BB : Tax on winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever**

**S. 115BB : Winning from lotteries – Cross word puzzles – Races – Horse races – Card games – Gambling – Betting – Tax on winning from Lottery – Scratch Card – Car**

Article viz. car received on basis of scratch card scheme is winning from lottery. (1980) 1 All ER 866 (H. L.) Rel. on.

*D. N. Thakur v. ITO (2007) TLR (Nov.) 442 (Chd.)(Trib.)*

**S. 115BB : Winning from lotteries – Cross word puzzles – Races – Horse races – Card games – Gambling – Betting – TDS – Payment by Government – Refund**

Where State Government had paid TDS on prize won by assessee under its lucky coupon scheme, assessee, in such a case, had no right to claim any refund in respect of tax so paid by Government which was in addition to prize guaranteed under the scheme. (A.Y. 2001-02)

*Gopal Dass v. ITO (2005) 1 SOT 197 / 96 TTJ 469 (Chd.)(Trib.)*

**CHAPTER XII-A**

**SPECIAL PROVISIONS RELATING TO CERTAIN INCOME OF NON-RESIDENTS**

**Section 115C : Definitions**

**S. 115C : Non-residents – Definitions – Investment in NRO account through convertible foreign currency [S. 115E, 115H]**

AAR ruled that income from NRO deposits will get concessional treatment of tax @ 20% + SC + cess as NRO account with a bank which is a public company would be foreign exchange asset and income arising from it would be investment income as defined in S. 115C; also ruled that non-resident has the option for continued treatment of his income from specified asset for concessional rate of tax specified under section 115E until transfer or conversion of asset into money; further, on return to India NRI can avail the benefits of Chapter XIIA so long as his bank account is treated as NRO account by RBI. The moment that account is converted into rupee account, the provisions of this Chapter would cease to apply

*Virindra Kumar Raina (Dr) (2009) 221 CTR 54 / 308 ITR 28 / 176 Taxman 222 / (2008) 16 DTR 393 (AAR)*

**S. 115C : Non-residents – Definitions – NRO deposit – Convertible foreign exchange – Foreign exchange asset – Investment [S. 115E]**

NRO deposit acquired with convertible foreign exchange - AAR observed that even though its maturity proceeds is not repatriable, it falls under the definition of 'foreign exchange asset' under said section - hence ruled that interest thereon is to be treated



as investment income taxable @ 20% under section 115E; also, the bank paying the interest is required to deduct TDS @ 20%

*V. Ravi Narayanan (2008) 215 CTR 234 / 300 ITR 62 / 168 Taxman 65 / 4 DTR 90 (AAR)*

### **Section 115D : Special provision for computation of total income of non-residents**

#### **S. 115D : Non-residents – Computation – Rebate [S. 88, 115E]**

There is no prohibition either in section 115D or in section 115E with regard to allowance of rebate provided under section 88. (A.Y. 1994-95)

*CIT v. K. C. John (2003) 132 Taxman 793 / 185 CTR 352 / 264 ITR 715 (Ker.)(High Court)*

### **Section 115F : Capital gains on transfer of foreign exchange assets not to be charged in certain cases**

#### **S. 115F : Non-residents – Foreign exchange assets – Capital gains – Bonus shares eligible for section 115F relief if original shares acquired in foreign currency**

The assessee, a NRI, purchased shares in foreign currency. On the sale of bonus shares, the assessee claimed relief under section 115F. The department's objection that the assessee has received bonus shares without investing any convertible foreign exchange is not correct because as the original shares were acquired by investing convertible foreign exchange, it cannot be said that the bonus shares were acquired without taking into consideration the original shares. In accordance with Dalmia Investment 52 ITR 567 (SC) the cost of acquisition of the original shares is closely interlinked with the bonus shares. Once bonus shares are issued, the averaging out formula has to be followed with regard to all shares. Accordingly, bonus shares are covered by section 115C(b) and eligible for benefit under section 115F. (A. Y. 2005-06)

*Sanjay Gala v. ITO (2011) 46 SOT 482 (Mum.)(Trib.)*

### **Section 115H : Benefit under Chapter to be available in certain cases even after the assessee becomes resident**

#### **S. 115H : Non-resident – Benefit of chapter – Resident – Interest on investment made out of foreign funds – Concessional rate – Special assets**

Where assessee received interest on investment made out of foreign funds which was chargeable to tax at concessional rate under section 115H, said special treatment could not be extended to interest on interest re-deposited with original sum. (A. Y. 1996-97).

*M. Manohar (Dr) v. ACIT (2011) 339 ITR 49 / 201 Taxman 106 / 62 DTR 148 / 244 CTR 642 (Mad.)(High Court)*

**S. 115H : Non-resident – Benefit of chapter – Resident – Income from foreign exchange asset – Coverable foreign exchange – Special assets [S. 115E]**

If the original source of the deposit is convertible foreign exchange, the transfer of such foreign exchange asset, namely from one bank to another will not affect its identity as a foreign exchange asset, assessee was entitled to concessional rate of tax on the interest earned from NRNR deposits under section 115H read with section 115E.

*CIT v. M. C. George (2011) 60 DTR 166 / 243 CTR 404 / 198 Taxman 466 (Ker.)(High Court)*

**S. 115H : Non-resident – Benefit of chapter – Resident – Available in certain cases even after assessee becomes resident**

Assessee, a non resident, deposited money in non resident account with various banks in India and on his return to India, he claimed concessional rate of tax under section 115H, his claim was to be allowed; there is no merit in contention that in order to get benefit of section 115H assessee should be a non resident and should have been assessed as such in previous year. (A.Y. 1991-92)

*CIT v. N.P. Mathew (2006) 280 ITR 44 / (2005) 147 Taxman 670 / 198 CTR 551 (Ker.)(High Court)*

**CHAPTER XII-B**

**SPECIAL PROVISIONS RELATING TO CERTAIN COMPANIES**

**Section 115J : Special provisions relating to certain companies – Minimum Alternative tax (MAT)**

**S. 115J : Company – Book profit – Depreciation – Larger bench**

Whether for the purposes of computation of minimum alternate tax under section 115J, depreciation could be allowed as per income-tax rules has been referred to the larger bench by the Supreme Court doubting the earlier decision of the Supreme Court in the case of *Malayala Manorma Co. Ltd. v. CIT* 300 ITR 251 (SC). (A.Y. 1990-91)

*Dynamic Orthopedics P. Ltd. v. CIT (2010) 321 ITR 300 / 190 Taxman 288 / 35 DTR 81 / 229 CTR 317 (SC)*

**S. 115J : Company – Book profit – Depreciation**

ITO has no jurisdiction to rework the book profit under section 115J by substitution the rate of depreciation prescribed in Schedule XIV of the Companies Act, 1956, for the rates which have been constantly applied by the assessee. (A.Ys. 1988-89 and 1989-90)

*Malayala Manorama Co. Ltd. v. CIT (2008) 300 ITR 251 / 216 CTR 102 / 169 Taxman 470 / 6 DTR 1 / 206 Taxation 157 (SC)*

**S. 115J : Company – Book profit – Depreciation – Loss – Investment Allowance [S. 32(2), 32A(3), 72(1)(ii)]**

Section 115J does not create any right nor does it serve to allow all the deductions taken into consideration for determining whether the total income should be quantified under section 115J(1) to be carried forward under sub section (2) of section 115J, it allows only the unabsorbed losses, depreciation, investment allowances, etc., which otherwise could have been carried forward to be carried forward. (A.Y. 1989-90)

*Karnataka Small Scale Industries Development Corpn. Ltd. v. CIT (2002) 258 ITR 770 / (2003) 126 Taxman 121 / 172 Taxation 380 / 179 CTR 1 (SC)*

**S. 115J : Company – Book profit – Unabsorbed depreciation – Brought forward losses (Companies Act - S. 205)**

Assessee has shown loss of ` 16,48,74,073/- in the preceding year and claimed depreciation of ` 13,85,66,473/- for the said preceding year. Once the brought forward loss is arrived at after taking into account the depreciation, it is the amount of depreciation which is less than the loss, is to be set off in terms of clause (iv) of explanation to section 115J for computing the book profit. (A. Y. 1990-91).

*Peico Electronics & Electricals Ltd. v. CIT (2011) 61 DTR 401 / 339 ITR 506 (Cal.)(High Court)*

**S. 115J : Company – Book profit – Revised accounts**

Where the revised accounts of the assessee – company were audited by a chartered accountant, the assessing officer has no option but to proceed to determine the book profit under section 115 J of the Act without disturbing the said accounts in any manner. The court further held that the Assessing Officer was not right in holding that for the purpose of computing book profit under section 115J, only that book profit which is approved at the annual general meeting of the shareholders of the company had to be considered. (A.Y. 1989-90)

*Dy. CIT v. Arvind Mills Ltd. (2009) 25 DTR 104 / 228 CTR 208 / 314 ITR 251 / 183 Taxman 189 (Guj.)(High Court)*

**S. 115J : Company – Book profit – Interests [S. 234B, 234C]**

Interest under section 234B and 234C is not chargeable when the income of the assessee is taxed under the provisions of section 115J of the Act. (A.Y. 1990-91)

*CIT v. Nilgiri Tea Estate Ltd. (2009) 26 DTR 164 / 312 ITR 161 / 183 Taxman 194 (Ker.)(High Court)*

**S. 115J : Company – Book profit – Depreciation**

While computing book profit under section 115J of the Act, assessee is entitled to change the method of deprecation from straight line method (SLM) to written down value (WDV). The assessee is entitled to claim the extra amount of depreciation for

the current year and also the arrears of past years arising due to change in method for computing depreciation. (A.Y. 1989-90)

*CIT v. Rubamin P. Ltd. (2008) 10 DTR 278 / 312 ITR 18 / 218 CTR 162 (Guj.)(High Court)*

### **S. 115J : Company – Book profit – Interests [S. 234B, 234C]**

While computing income under the provisions of section 115J of the Act, interest under section 234B and 234C of the Act is chargeable. (A.Y. 1990-91)

*CIT v. United Vanaspati Ltd. (2008) 11 DTR 231 / 218 CTR 524 / (2010) 187 Taxman 20 (HP)(High Court)*

### **S. 115J : Company – Book profit – Interest [S. 234B]**

When income is computed under section 115J of the Act, interest under section 234B of the Act is not chargeable. (A.Y. 1989-90)

*Dy. CIT v. Madhusudan Industries Ltd. (2008) 11 DTR 144 / 218 CTR 493 / (2010) 322 ITR 438 (Guj.)(High Court)*

*Editorial : Now see amendment w.e.f. 1-4-2007 by insertion of clause 9*

### **S. 115J : Company – Book profit – Depreciation**

Claim of depreciation and change in the method of depreciation. Depreciation under new method can be claimed only from the date of change and the arrears of depreciation cannot be deducted for the purpose of computation of Book Profit under section 115J. (A.Y. 1990-91)

*Gilt Pack Ltd. v. CIT (2007) 209 CTR 405 / 163 Taxman 331 (MP)(High Court)*

### **S. 115J : Company – Book profit – Provision for doubtful debts**

For the A.Y. 1990-91 the Assessing Officer while computing book profit under section 115J of the Act added the amount being provision for doubtful debt to the book profit. On appeal before the High Court at the instance of the assessee it was held that accounts of the assessee are being prepared as per Part II & III of the IV Schedule of the Companies Act, 1956 and certified by auditor. Further, the debt being bad is being reasonably assessed by the Board of Director. Under these circumstances, the Assessing is not authorized to scrutinize the accounts duly supported by the audit reports intention of the Board of Directors and approved by the Shareholders.

*Amines Plasticizers Ltd. v. Dy. CIT (2007) 197 Taxation 283 (Gau.)(High Court)*

*Editorial : See amendment*

### **S. 115J : Company – Book profit – Recomputation – Companies Act**

There is no room for the assessing officer to re-determine the book profit and no such enquiry is permissible for purposes re-computing the book profit in absence of any note by the auditor or (A.G.M.) or registrar of companies that the accounts are not prepared in accordance with Part I and Part III of Schedule VI of the Companies Act, 1961. (A.Y. 1990-91)

*Rajasthan Spinning and Weaving Mills v. CIT (2006) 281 ITR 177 / 150 Taxman 205 / (2005) 199 CTR 305 / 192 Taxation 617 (Raj.)(High Court)*

**S. 115J : Company – Book profit – Power of assessing officer – Profit and loss account**

Assessing Officer cannot go behind profit and loss account for computing fictional income under section 115J. (A.Y. 1988-89)

*Nicco Corporation Ltd. v. CIT (2005) 272 ITR 58 / 144 Taxman 135 / 194 CTR 59 (Cal.)(High Court)*

**S. 115J : Company – Book profit – Excise duty liability – Demand notice**

Demand notice in respect of excise duty liability had been received, even though liability was disputed by the assessee, liability towards excise duty was an ascertained liability within meaning of Explanation (c) to section 115J(1). (A.Y. 1988-89)

*CIT v. I.G. Gandhi Silk Mills Ltd. (2005) 274 ITR 274 / 145 Taxman 276 / 195 CTR 253 (Guj.) (High Court)*

**S. 115J : Company – Book profit – Unabsorbed depreciation**

Assessee is entitled to adjust loss or unabsorbed depreciation of earlier years, whichever is less, in computation of book profit (A.Y. 1988-89)

*CIT v. Indo Marine Agencies (Kerela) P. Ltd. (2005) 279 ITR 372 / 196 CTR 383 (Ker.)(High Court)*

**S. 115J : Company – Book profit – Expenditure**

Expenditure incurred on purchase of ring frames by assessee – Mills was to be deducted while computing book profit under section 115J. (A.Y. 1990-91)

*CIT v. Gitanjali Mills Ltd. (2004) 136 Taxman 21 / 265 ITR 681 (Mad.)(High Court)*

**S. 115J : Company – Book profit – Ascertained debt liability**

If the amount of provision for bad and doubtful debt is an ascertained liability, then the said amount can not be added to the net profit in view of section 115J(IA).

*India Pistons Ltd. v. Dy. CIT (2004) 140 Taxman 611 / 188 CTR 282 (Mad.)(High Court)*

**S. 115J : Company – Book profit – Disputed custom duty and Interest payable**

Disputed customs duty payable and funded interest payable to bank, which liabilities pertained to earlier years, could not be allowed as a deduction in computing profits under section 115J. (A.Y. 1990-91)

*CIT v. Essorpe Mills Ltd. (2004) 265 ITR 637 / 139 Taxman 180 / 187 CTR 571 (Mad.)(High Court)*

**S. 115J : Company – Book profit – Transfer from revaluation reserve – Proviso w.e.f 1-4-1988**

In view of provision to clause (i) of Explanation to section 115J introduced with effect from 1-4-1988, for the assessment year 1990-91, the amount transferred from the revaluation reserve to the profit and loss appropriation account could not be deducted from the net profit for the purpose of computation of book profits under section 115 J.(A.Y. 1990-91)

*Stearling Steels and Wires Ltd. v. Dy. CIT (2004) 271 ITR 260 / (2005) 145 Taxman 392 (P&H)(High Court)*

#### **S. 115J : Company – Book profit – Carry forward and set off**

Assessee cannot carry forward and set off income determined under section 115J. (A.Y. 1991-92)

*CIT v. Kalpetta Estates Ltd. (2004) 135 Taxman 413 / 188 CTR 31 (Ker.)(High Court)*

#### **S. 115J : Company – Book profit – Extra shift allowance**

Book profits for the purpose of section 115J are to be computed after deducting extra shift allowance relating to the earlier years and giving effect to clause (iv) of Explanation to section 115J. (A.Y. 1990-91)

*CIT v. Loyal Textile Mills Ltd. (2003) 261 ITR 307 / 181 CTR 124 / 137 Taxman 407 (Mad.)(High Court)*

#### **S. 115J : Company – Book profit – Adjustments – Companies Act**

Assessing Officer cannot make adjustment to book profits beyond what is authorised by the definition given in Explanation to section 115J if accounts are prepared and certified to be in accordance with Parts II and III of Schedule VI to the Companies Act, 1956. (A.Y. 1990-91)

*Kinetic Motor Co. Ltd. v. Dy. CIT (2003) 262 ITR 330 / (2004) 186 CTR 534 / (2003) 133 Taxman 956 (Bom.)(High Court)*

#### **S. 115J : Company – Book profit – Interest on Income tax**

Since interest on income-tax is not mentioned in section 115J(1A)(a), same cannot be added back to work out real quantum of book profits.

*CIT v. Fertilisers & Chemicals Travancore Ltd. (2003) 126 Taxman 145 / 261 ITR 484 / (2002) 178 CTR 461 (Ker.)(High Court)*

#### **S. 115J : Company – Book profit – Carry forward loss**

Carried forward loss determined for the earlier assessment years and allowed to be set off against profit of subsequent years cannot be set off against income computed under section 115J. (A.Y. 1990-91)

*Karimtharth Tea Estates Ltd. v. CIT (2003) 131 Taxman 149 / 182 CTR 307 (Ker.)(High Court)*

#### **S. 115J : Company – Book profit – Zero tax companies**

For the Asst. Year 1988-89, there was no provision in section 115J to compute book profit as per account prepared in a particular manner and therefore, it was open to



assessee to compute book profit either on basis of profit and loss account prepared under provisions of part II and part III of schedule VI of Companies Act, or as per annual accounts placed before AGM. However, after insertion of sub-section (1A) in section 115J from assessment year 1990-91, accounts for the purpose of book profit have to be prepared as per Part II and Part III of Schedule VI of Companies Act. (A. Y. 1988-89).

*Dy. CIT v. Anagram Finance Ltd. (2011) 43 SOT 433 (Mum.)(Trib.)*

#### **S. 115J : Company – Book profit – Depreciation**

While redoing set aside assessment of A. Y. 1989-90 for purpose of computing books profits under section 115J, Assessing Officer had jurisdiction to consider claim for depreciation which was allowable in A. Y. 1989-90 and not in 1990-91. (A.Y. 1989-90)

*Dy. CIT v. Jindal Drilling & Industries Ltd. (2006) 101 TTJ 85 (Delhi)(Trib.)*

#### **S. 115J : Company – Book profit – Method of accounting**

Company can choose to follow any particular method of providing depreciation in its accounts prepared for computing book profit as long as such method provides a true and fair picture of the working and the profits of the company. (A.Ys. 1989-90, 1991-92 to 1993-94, 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

#### **S. 115J : Company – Book profit – Export [S. 80HHC]**

Notwithstanding that gross total income of the assessee-company is a loss, it is entitled to deduction under section 80HHC on the basis of book profit in view of cl. (viii) of Explanation to section 115JA. (A.Ys. 1998-99 to 2000-02)

*Smruthi Organics Ltd v. Dy. CIT (2006) 103 TTJ 546 / 101 ITD 205 (Pune)(Trib.)*

#### **S. 115J : Company – Book profit – Computation**

While determining book profits under section 115JA, Assessing Officer has to accept authenticity of accounts maintained with reference to provisions of Companies Act. (A.Y. 1997-98)

*Oswal Yarns Ltd. v. Dy. CIT (2005) 1 SOT 424 (Chd.)(Trib.)*

#### **S. 115J : Company – Book profit – adjustment on account of revaluation of fixed assets**

In case when the book profit not increased on account of creation of reserve, the book profit can also not be decreased on account of transfer from such a reserve to the P&L a/c unless the entire reserve created during the year is added to book profit. On the facts it was found that the reserve created by assessee on revaluation of fixed assets without routing it through P&L a/c and therefore, it was held that the transfer from the said reserve of certain amount and credit to P&L a/c cannot be excluded from computation of book profit. (A.Y. 1989-90)

*Birla Jute & Industries Ltd. v. Dy. CIT (2003) 85 ITD 400 / (2004) 88 TTJ 335 (Kol.)(Trib.)*

**S. 115J : Company – Book profit – Tax on book profit – Deemed income – Debenture redemption reserve**

Transfer from P&L a/c to debenture redemption reserve being an amount set apart to redeem debentures to meet a known liability and it cannot be considered to be a reserve as it cannot be held to have been set aside to meet unascertained liabilities. Accordingly, the same is not covered by clause (b) or clause (c) of the Explanation to s. 115J(1), and therefore, it was not to be added to the net profit to arrive at the book profit for the purpose of s. 115J. (A.Y. 1988-89).

*IOL LTD. v. Dy. CIT (2003) 81 TTJ 525 (Kol.)(Trib.)*

**Section 115JA : Deemed income relating to certain companies**

**S. 115JA : Company – Book profit – Deemed income – Interest is payable on failure to pay advance tax in respect of tax payable under section 115JA [S. 115JB, 234B]**

Section 115J / 115JA are special provisions. For purposes of advance tax the evaluation of current income and the determination of the assessed income had to be made in terms of the statutory scheme comprising section 115J/115JA. Hence, levying of interest was inescapable. The assessee was bound to pay advance tax under the scheme of the Act. Section 234B is clear that it applies to all companies. There is no exclusion of section 115J/115JA in the levy of interest under section 234B (*Kwality Biscuits Ltd. v CIT 243 ITR 519 (Kar.) (SLP dismissed in 284 ITR 434)* considered

*Jt. CIT v. Rolta India Ltd. (2011) 237 CTR 329 / 49 DTR 346 / 330 ITR 470 / 196 Taxman 594 / 2 SCC 408 / 225 Taxation 366 (SC)*

**S. 115JA : Company – Book profit – Deemed income – Credit to be set off before computing Advance-tax shortfall and liability for section 234B, 234C – Interest**

The scheme of section 115JA(1) and 115JAA shows that right to set-off the tax credit follows as a matter of course once the conditions of section 115JAA are fulfilled. The grant of credit is not dependent upon determination by the Assessing Officer except that the ultimate amount of tax credit to be allowed depends upon the determination of total income for the first assessment year. Thus, the assessee is entitled to take into account the set off while estimating its liability to pay advance tax. The amendment to Explanation 1 to section 234B by FA 2006 w.e.f. 1.4.2007 to provide that MAT credit under section 115JAA shall be excluded while calculating advance-tax liability is to remove the immense hardship that would result if this was not done;

The fact that the Form & Rules provided for set off of MAT credit balance after computation of interest under section 234B is irrelevant because it is directly contrary to a plain reading of section 115JAA(4). (A. Ys. 1998-99 to 2000-2001).

*CIT v. Tulsyan NEC Ltd. (2011) 330 ITR 226 / 49 DTR 129 / 237 CTR 105 / 196 Taxman 181 (SC)*

**S. 115JA : Company – Book profit – Deemed income – Credit for MAT – Interests [S. 234B, 234C]**

As important question of law arose as to whether credit of Minimum Alternative Tax should be given effect to under section 115JA, before charging interest or after charging interest under section 234B and 234C, registry is directed to incorporate in weekly boards and also website.

*CIT v. Lakshmi Sarswati (Armi) (P) Ltd. (2010) 190 Taxman 160 (SC)*

**S. 115JA : Company – Book profit – Deemed income – Provision for doubtful debts**

Provision for bad and doubtful debts being a provision made to cover up the probable diminution in the value of asset i.e. debt receivable by the assessee, it cannot be said to be a provision for liability and therefore, item (c) of the explanation to section 115JA is not attracted and the provision for doubtful debts can not be added back under Cl. (c). Thus it can be concluded that provision for bad and doubtful debt can be added back to the net profit only if item (c) of the explanation to section 115JA is attracted. (A.Y. 1997-98)

*CIT v. HCL Comnet Systems & Services Ltd. (2008) 13 DTR 105 / 305 ITR 409 / 174 Taxman*

*118 / 219 CTR 222 / (2009) 208 Taxation 44 (SC)*

*Editorial : Now see amendment*

**S. 115JA : Company – Book profit – Deemed income – Export – Set off of carried forward – Business loss and unabsorbed business loss – Negative income [S. 80AB, 80AB(5), 80HHC, 115JB]**

The Court held that the assessee is entitled to deduction under section 80HHC computed in accordance with sub-section (3)(3A) of 80HHC because assessment under section 115JB is only an alternative scheme of assessment and what is clear from clause (iv) of the Explanation there to is that even in the alternative scheme of assessment under section 115JB, the assessee is entitled to deduction of export profit under section 80HHC. In other words, the export profit eligible for deduction under section 80HHC is allowable under both schemes of assessment. The restriction contained in section 80AB or section 80B(5) cannot be applied in as much as carried forward business loss or depreciation should not be first set off leaving the gross total income at nil, which would disentitle the assessee for deduction under other provisions of Chapter VIA-C, which includes section 80HHC also. There is no provision in section 80HHC to determine the export profit with reference the profit and loss account maintained under companies Act, Therefore, the assessee would be entitled to deduction of export profit under section 80HHC and the relief is to be granted in terms of sub-section (3) and 3(A) of that section.

*CIT v. Packworth Udyog Ltd. (2011) 331 ITR 416 / 51 DTR 251 / 198 Taxman 10 / 239 CTR 24 (Ker)(FB) / Kerala Chemicals and Proteins Ltd. (2011) 331 ITR 416 / 239 CTR 24 / 51 DTR 251 / 198 Taxman 10 (Ker)(FB) / G.T.N. Industries Ltd. (2011) 331 ITR 416 / 239 CTR 24 / 198 Taxman 10 / 51 DTR 251 / 231 CTR 24 (FB)(Ker.)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Brought forward business loss [S. 154]**

In order to allow deduction of brought forward business loss or unabsorbed depreciation in the computation of book profit under section 115JA, both should be available as per the accounts of the assessee. Since nothing is left after setting off brought forward business loss up to 1994-95 against profit, assessee was not entitled to any relief under clause (b) of Explanation (iii) of section 115JA for assessment year 1997-98. Rectification order passed under section 154 held to be valid. (A. Y. 1997-98).

*CIT v. Carbon & Chemicals India Ltd. (2011) 59 DTR 396 / 243 CTR 399 / 196 Taxman 302 (Ker.)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Capital gains**

Additions and deductions to arrive at book profit have to be made strictly in accordance with Explanation to section 115JA (2). When there is no provision in clauses (i) to (ix) of Explanation to section 115JA(2) to exclude capital gain from profit and loss account, for purpose of book profit it is immaterial whether capital gain included in profit and loss account prepared under companies Act, 1956 is otherwise assessable to income tax or not. Sale proceeds of old and unyielding rubber trees credited by assessee in profit and loss account prepared under provisions of Companies Act is an item covered by clause (ii) of explanation to section 115JA(2) to be excluded from book profit (A. Ys. 1997-98 to 2000-01).

*CIT v. Thiruvambadi Rubber Co. Ltd. (2011) 203 Taxman 63 (Ker.)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Profit on sale of fixed assets – Sale of lease hold right**

Under clause 2 of Part II of schedule VI of the Companies Act, where a company receives an amount of surrender of lease hold rights, it is bound to disclose in the Profit and loss account the said amount as a non recurring transaction or a transaction of an exceptional nature irrespective of its nature whether it is capital or revenue. Further, Profit and loss account shall disclose every material feature including transaction or transaction of an exceptional nature, which includes profits on sale of fixed assets, therefore profit on sale of fixed assets formed part of the book profit under section 115JA. (A.Y. 1997-98)

*GKW v. CIT (2011) 64 DTR 79 / 200 Taxman 396 (Cal.)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Advance tax [S. 234B]**

Failure to pay advance tax as per Book profit the assessee is liable to interest under section 234B. (A.Y. 1997-98)

*CIT & Anr. v. Brindavan Beverages Ltd. (2010) 228 CTR 1 / 321 ITR 197 / 186 Taxman 233 / (2009) 32 DTR 257 (Karn.)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Bad debts**

Bad debts written off by the assessee in earlier years now, recovered by the assessee cannot be included as a part of, 'book profit' under section 115JA as it does not fall within any one of the items enumerated in the explanation to section 115JA(2) of the Act. (A.Y. 1998-99).

*CIT v. Premium Taxcons (P) Ltd. (2010) 34 DTR 115 / 229 CTR 308 (Uttarakhand)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Unabsorbed depreciation**

Brought forward unabsorbed depreciation has to be set off while computing the book profit under section 115JA. (A.Y. 1997-98)

*CIT v. Gokudas Appearels (P) Ltd. (2010) 38 DTR 199 (Karn.)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Interests [S. 234B, 234C]**

Assessment of company under section 115JA, interest under section 234B and 234C is not leviable. (A.Y. 1997-98).

*CIT v. Cortalim Shipyard & Engineers (P) Ltd. (2010) 46 DTR 263 (Bom.)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Interest [S. 234B]**

Interest under section 234B is to be charged even though the income of the assessee is computed under the provisions of section 115JA of the Act. (A.Y. 1997-98)

*Dissented from, Snowcem India Ltd. v. CIT (2009) 313 ITR 170 / 221 CTR 594 / 178 Taxman 478 / 18 DTR 58 (Bom.)(High Court)*

*CIT v. Brindavan Beverages Ltd. (2009) 32 DTR 257 / (2010) 321 ITR 197 / 228 CTR 1 / 185 Taxman 233 (Karn.)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Companies Act**

Assessing Officer cannot disturb the book profit, which has been certified by the auditors drawn as per the provisions of Companies Act, 1956, except to the extent provided in the Explanation to section 115JA of the Act. (A.Y. 1998-99)

*CIT v. C.J. International Hotels Ltd. (2008) 15 DTR 166 / (2010) 325 ITR 313 / (2009) 177 Taxman 39 (Delhi)(High Court)*

#### **S. 115JA : Company – Book profit – Deemed income – Prior period – Expenses**

The Tribunal was correct in law in holding that the Assessing Officer had failed to appreciate that the net profit for the purposes of section 115JA was to be computed only after deducting the prior period expenses/extraordinary items. (A.Y. 2000-01)  
*CIT v. Khaitan Chemicals and Fertilisers Ltd. (2008) 307 ITR 150 / 175 Taxman 195 / 15 DTR 158 / (2009) 221 CTR 501 (Delhi)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Provisions for bad debts**

The provision made for doubtful and bad debt cannot be disallowed for the purposes computing book profit under section 115JA. (A.Y. 1999-2000)

*CIT v. Eicher Ltd. (2007) 159 Taxman 293 / (2006) 205 CTR 469 / 287 ITR 170 (Delhi)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Prior period expenses – Provision for bad and doubtful debt [S. 115JB]**

Prior period expenditure and any provision for bad and doubtful debt, cannot be deducted while computing book profit under sections 115JA, 115JB. (A. Ys. 1997,98 & 2000-01 to 2004-05).

*Singareni Collieries Company Ltd. v. ACIT (2011) 141 TTJ 593 / 133 ITD 213 / 57 DTR 28 (Hyd.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Carry forward and set off losses under the Act – More than 8 years [S. 70 to 79]**

Assessee company's total income was less than 30 per cent of book profit. For purpose of MAT provision, assessee bifurcated its accumulated loss shown in books of account in to business loss and depreciation. As depreciation was less than business loss, he deducted same from profit. Assessing officer deducted business loss from same profits earned. While doing so, applying the provisions of Income-tax Act in respect of carry forward of business loss, he also ignored losses of years which were more than 8 years old as end of year. The Tribunal held that loss incurred in a year cannot be ignored. i.e. it is not possible to omit past; loss from books of account under double entry system of accounting. The Tribunal held that principle prescribed in sections 70 to 79 is not applicable for computing accumulated losses shown in books of account following Accounting principles. There is drastic variation between Income-tax provisions and accounting provisions in respect of carry forward and set off losses. (A. Y. 2000-01).

*Susi Sea Foods (P) Ltd. v. ACIT (2011) 48 SOT 424 (Visakha)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Mineral oil [S. 42]**

Deduction claimed by assessee under section 42 cannot be considered for the purpose of computing its income under section 115JA. (A.Ys. 1997-98, 1998-99)

*Gujarat State Petroleum Corporation Ltd. v. Jt. CIT (2009) 120 TTJ 256 / (2008) 15 DTR 486 (Ahd.)(Trib.)*



**S. 115JA : Company – Book profit – Deemed income – Stock borrowing – Companies Act**

Stock borrowing charges not debited to P & L Account as required under Schedule VI of the Companies Act can be claimed as revenue expenditure even by an assessee who is bound to follow the Accounting Standards. (A.Y. 1998-99)

*ITO v. Cyril Traders Pvt. Ltd., ITA No. 5297/Mum/2004, dated 28-7-2009 – BCAJ P. 43, Vol. 41A, Part 6, September 2009 (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Tax credit – Foreign country**

While computing tax liability under section 115JA credit for tax paid in foreign country is allowable.

*ACIT v. L & T. Ltd., ITA No.4499/Mum/2008, dated 22-7-2009, BCAJ P. 46, Vol. 41A, Part 6, September 2009 (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Interests [S. 234B, 234C]**

Interest under sections 234B and 234C, is chargeable on income computed under section 115JA. (A.Y. 1998-99)

*Kanel Oil & Export Inds Ltd. v. Jt. CIT (2009) 121 ITD 596 / 30 DTR 130 / 126 TTJ 158 (TM)(Ahd.)(Trib.)*

*Editorial : See Bombay High Court - Snowcem India Ltd. v. Dy. CIT (2009) 221 CTR 594 (Bom.)(High Court)*

**S. 115JA : Company – Book profit – Deemed income – Capital subsidy**

Receipt of capital subsidy credited to profit and loss account could not form part of the book profit. (A.Y. 1997-98)

*Pal Synthetics Ltd. v. Jt. CIT, ITA No. 1310/Mum/2003, Bench – E, dated 6-2-2007 – BCAJ P. 31, Vol. 39-D, Part 1, April 2007. (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for bad debts**

For purpose of computing book profits under section 115JA, provision made for bad debts cannot be added back by invoking clause (c) of Explanation to section 115JA. (A.Y. 1998-99)

*IBM India Ltd. v. CIT (2007) 108 TTJ 531 / 105 ITD 1 (Bang.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Companies Act**

Where the amount of profit is worked out in the assessee's P&L a/c. prepared in accordance with the provisions of Companies Act, Assessing Officer cannot substitute the same for the purpose of adjustment under clause (iv) of Explanation to section 115JA. (A.Y. 2000-01)

*Jindal Steel & Power Ltd. v. ACIT (2007) 106 TTJ 943 / (2006) 10 SOT 106 (Delhi)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for doubtful debts**

Provision for doubtful debts and diminution in the value of investment cannot be added to the book profit under explanation (c) to section 115JA. (A.Ys. 1997-98 & 1998-99)

*Peerless Gen. Fin. & Inv. Co. Ltd. v. ACIT (2007) 107 TTJ 186 (Kol.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Credit to Capital Reserve**

Amount received towards transfer of technical know-how, tangible and intangible assets which have been taken directly to the capital reserve account could not be taken into account for computing book profit under section 115JA. (A.Y. 1997-98)

*Dy. CIT v. Indian Syntans Investments (P) Ltd. (2007) 106 TTJ 388 / 107 ITD 457 (Chennai)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for bad debts**

Provision for doubtful debts made after considering specified and identified debts which were not recoverable is to be considered as ascertained liability, and same cannot be added to income by invoking clause (c) of explanation to section 115JA. (A.Y. 1999-2000)

*ACIT v. Eicher Ltd. (2006) 101 TTJ 369 / (2007) 160 Taxman 80 (Mag.)(Delhi)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Advance tax**

Income chargeable by virtue of section 115JA will be subjected to advance tax, Tax paid by the assessee under MAT on the basis of book profits under section 115JA can be equated with advance payment of tax. (A.Y. 2000-01)

*Chambal Fertilisers & Chemicals Ltd v. ACIT, Bench "A", I.T.A. No. 157/JP/2003, dated 28th February, 2006 (Tax World – June 2006 – Vol XXXV – P. 192) (Jp.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Capital reserve**

Profit of sale of shares credited to capital reserve and not to profit and loss account. Assessing Officer increased the book profit by profit so earned. Assessing Officer was not justified in adjusting the book profit. (A.Y. 1998-99)

*Nanabhoy Jeejeebhoy Pvt. Ltd. v. Dy. CIT Bench 'F', ITA No. 1520/Mum/2003, dated on*

*21-3-2006 — BCAJ, June 2006 (39-B) P. 284 (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for doubtful debts**

Provision for bad and doubtful debts is really in the nature of a provision for meeting an ascertained or known liability and cannot be added back while computing book profits under section 115JA. (A.Y. 1999-2000)

*ACIT v. Eicher Ltd. (2006) 101 TTJ 369 (Delhi)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Interest – Pre-operative expenses**

It is permissible for the assessee company to capitalize interest and pre-operative expenses in the accounts prepared for AGM and to charge the same to P&L a/c prepared for the purpose of computation of book profit and no adjustment was called for on that account. (A.Ys. 1989-90, 1991-92 to 1993-94 & 1997-98 to 1999-2000)  
*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Internal consumption – Power generated**

No fictional profit can be reduced under section 115JA(2)(iv) on a account of internal consumption of power generated in assessee's captive power plant. (A.Ys. 1994-95 to 1998-99 & 2000-01)  
*National Aluminium Co. Ltd. v. Dy. CIT (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for bad debts**

Provisions for bad debts is not to be added to net profit while computing book profit under section 115JA. (A.Y. 1998-99)  
*Dresdner Bank AG v. Addl. CIT (2006) 105 TTJ 149 / (2007) 108 ITD 375 / 11 SOT 158 (Mum.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Income tax within the meaning of Explanation (a) to section 115JA(2)**

Interest paid on income-tax cannot be construed to be a part of income tax and it falls outside the scope of the term 'income-tax' as used in the Explanation (a) to section 115JA(2). (A.Y. 1999-2000)  
*Salgaocar Mining Ind. P. Ltd., (2006) 102 ITD 289 / 103 TTJ 824 (Panaji)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Foreign exchange fluctuations – Provision for bad and doubtful debts**

Provision for foreign exchange fluctuation, provision for Bad & Doubtful Debts and provision for loss on sale of Fixed Asset cannot be added while computing profit under section 115JA. (A.Ys. 1998-99, 1999-2000)  
*Gillette India Ltd. v. Jt. CIT (2006) 156 Taxman 236 (Mag.)(Jp.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Provision for doubtful debt**

(i) For the purpose of section 115JA, addition to book profit, i.e. computed as per Parts II and III of Schedule VI to Companies Act, 1956, can be made only if it is permissible by clauses (a) to (f) of Explanation to section 115JA.

- (ii) Merely because deduction of provision for bad and doubtful debt is not allowable in computing total income there would be no ground for including same in book profit as per section 115JA.
- (iii) Adjustments to be made to net profit disclosed in profit and loss account for purpose of section 349 of Companies Act are quite different than adjustment required to be made under Explanation to section 115JA. However, it is not necessary that same is to be included in book profit for purpose of section 115JA merely because some item debited to profit and loss account is required to be added to net profit for purpose of computing director's remuneration under section 349 of Companies Act.
- (iv) Provision for bad and doubtful debt is not a provision for liability but it is a provision for diminution in value of assets and, therefore, clause (c) of Explanation to section 115JA would not be applicable in respect of provision for bad and doubtful debts.
- (v) Provision for bad and doubtful debt, if not proved to be excessive or unreasonable, cannot be considered to be reserve falling under clause (b) of Explanation to section 115JA. Therefore, on facts, provision for bad and doubtful debts would not fall within purview of adjustments under section 115JA.
- (vi) Provision for wealth-tax does not fall under any of items of Explanation to section 115JA and, therefore, no adjustment could be made in respect of same while computing book profits under section 115JA. (A.Y. 1997-98)

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

#### **S. 115JA : Company – Book profit – Deemed income – Interest**

Adjustment for income-tax (interest) payable. IT Act maintains a distinction between "income-tax" and "interest" and, therefore, "interest on income-tax" clearly falls outside the scope of the term "income-tax" as used in cl. (a) Explanation to sub-s. (2) of s. 115JA. (A.Y. 1999-2000)

*Salgaocar Mining Ind. (P) Ltd. v. Jt. CIT (2006) 103 TTJ 824 / 102 ITD 289 (Panaji)(Trib.)*

#### **S. 115JA : Company – Book profit – Deemed income – Computation – Depreciable assets**

A receipt, which is not in nature of income, cannot be taxed as income under section 115JA; therefore, capital gain arising to an assessee under section 50 on a depreciable asset is liable to be excluded from calculation, of deemed profits under section 115JA. (A.Y. 1998-99)

*ITO v. Frigsales (India) Ltd. (2005) 4 SOT 376 (Mum.)(Trib.)*

#### **S. 115JA : Company – Book profit – Deemed income – Computation**

Section 115JA brings 'book profits', and not 'total income', to charge of Minimum Alternate Tax (MAT); accounts of assessee-company as also book profit shown therein which stood certified by statutory auditors of company and accepted and approved by

all concerned under the Companies Act, could not be rescrutinised by Assessing Officer under section 115JA. (A.Y. 1998-99)

*ITO v. Max Well Dyes & Chemicals (P.) Ltd. (2005) 2 SOT 461 (Mum.)(Trib.)*

### **S. 115JA : Company – Book profit – Deemed income – Computation [S. 80IA]**

While computing book profit in terms of clause (v) of Explanation to section 115JA, for purposes of reduction therefrom, profits of industrial undertaking eligible for exemption under section 80-IA must be computed as per books of account and not as per provisions of Income-tax Act, 1961. (A.Y. 1997-98)

*Tushako Pumps Ltd. v. ACIT (2005) 2 SOT 556 (Mum.)(Trib.)*

### **S. 115JA : Company – Book profit – Deemed income – Computation**

Assessing Officer has no jurisdiction to rescrutinise profit and loss account once it is certified by statutory auditors of a company and he can make only those adjustments which are permitted by Explanation to section 115JA(2). (A.Y. 1998-99)

*ITO v. Orson Trading (P.) Ltd. (2005) 2 SOT 503 (Mum.)(Trib.)*

### **S. 115JA : Company – Book profit – Deemed income – Computation – Depreciation**

Where audited accounts of assessee-company showing book profits without deducting depreciation had been accepted and adopted by shareholders in annual general meeting, no adjustment could be made by assessee in said book profits for providing depreciation. (A.Y. 1997-98)

*Dy. CIT v. Thangavel Spg. Mills Ltd. (2005) 97 ITD 262 / 98 TTJ 515 (Chennai)(Trib.)*

### **S. 115JA : Company – Book profit – Deemed income – Computation**

Where assessee is entitled for 100 per cent deduction being industrial undertaking located in backward area, its book profit in accordance with clause (6) of Explanation would come at 'nil' and Assessing Officer could not raise a demand against assessee. (A.Y. 1998-99)

*Shree Rajasthan Texchem Ltd. v. Addl. CIT (2005) 97 TTJ 91 (Mum.)(Trib.)*

### **S. 115JA : Company – Book profit – Deemed income – Revaluation reserve – Bad debt**

Where amount withdrawn from revaluation reserve by assessee and credited to profit and loss account does not have effect of increasing net profit as shown in profit and loss account but has effect of reflecting true working results of company, amounts withdrawn from revaluation reserves cannot be excluded in computing book profits under section 115JA, Explanation (i). A mere provision for bad debt is required to be added back to book profit under Explanation to section 115JA. (A.Y. 2000-01)

*Southern Petro Chemical Industries v. Dy. CIT (2005) 3 SOT 157 / 93 TTJ 161 (Chennai)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Computation – Dividend**

Where assessee-company had not declared any dividend, provisions of section 15JA were not applicable as per CBDT Circular No. 762, dated 18-2-1998. (A.Y. 1997-98)  
*Process Pumps (P.) Ltd. v. Dy. CIT (2005) 3 SOT 200 / 94 TTJ 190 (Bang.)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Computation – Long term capital gain**

Where assessee's income was computed under section 115JA and tax was levied at 40 per cent, assessee's claim that since its entire book profits consisted of long-term capital gain, such income should be taxed at 20 per cent as provided in section 112, had no merit. (A.Y. 1997-98)

*Nafab India (P.) Ltd. v. Dy. CIT (2005) 92 ITD 343 / 93 TTJ 801 (Delhi)(Trib.)*

**S. 115JA : Company – Book profit – Deemed income – Deemed income – Provision for doubtful debts**

Clause (c) of Explanation to s. 115JA(2) is only for provisions with respect to liabilities and that too unascertained liabilities. It does not cover provision made for diminution in value of assets. Therefore, the provision for doubtful debts could not be added back to the net profit as per P&L A/c by invoking clause (c) of Explanation to section 115JA(2). It was, further, provision for doubtful debts and advances could not be held to be a reserve within the meaning of clause 7(2) of Part III of Schedule - VI to the Companies Act, and accordingly, clause (b) of the Explanation is also not applicable to it. (A.Y. 1997-98)

*Usha Martin Industries Ltd. v. Jt. CIT (2003) 81 TTJ 518 (Kol.)(Trib.)*

**S. 115JA : Company – Book profits – Reduction of export profit – Retrospective – Clause (viii)**

Explanation under the Clause (viii) to sec. 115JA inserted by the Finance Act, 1997 w.e.f. 1st April, 1998 is declaratory in nature and has retrospective effect therefore, the book profits calculated under section 115JA had to be reduced to the extent of deduction allowable under section 80HHC for the A. Y. 1997-98 (A.Y. 1997-98).

*Vipul Dye Chem Ltd. v. ACIT (2003) 86 ITD 851 / (2004) 82 TTJ 1039 / 127 Taxman 142 (Mag.) (Mum.)(Trib.)*

**S. 115JA : Company – Book profits – Deemed income – Redemption debentures**

Amount set apart to redeem debentures, a known liability, cannot be added to net profit of assessee to compute book profits. (A.Y. 1988-89)

*IOL Ltd. v. Dy. CIT (2003) 81 TTJ 525 (Kol.)(Trib.)*

**S. 115JA : Company – Book profits – Deemed income – Provision for wealth tax**



Provision for liability to pay Wealth tax can not be added back to net profits by invoking any clause of explanation to Sec 115JA(2). (A.Y. 1997-98)

*Usha Martin Industries Ltd. v. Jt. CIT (2003) 81 TTJ 518 (Kol.)(Trib.)*

**S. 115JA : Company – Book profits – Computation – Unabsorbed brought forward loss**

The unabsorbed brought forward loss could not be reduced from the net profit and computation done under the Explanation to section 115JA(2)(iii) of the Act. The order of the Assessing Officer was up held. (A.Y. 2000-01)

*Metmin Investment and Trading P. Ltd. v. ITO (2010) 5 ITR 378 / (2009) 28 SOT 31 (Mum.)(Trib.)*

**Section 115JAA : Tax credit in respect of tax paid on deemed income relating to certain companies**

**S. 115JAA : Company – Book profit – Deemed income – Tax credit – To be set off before computing Advance Tax shortfall and liability for section 234B, 234C – Interest**

The scheme of section 115JA(1) and 115JAA shows that right to set-off the tax credit follows as a matter of course once the conditions of section 115JAA are fulfilled. The grant of credit is not dependent upon determination by the Assessing Officer except that the ultimate amount of tax credit to be allowed depends upon the determination of total income for the first assessment year. Accordingly, the assessee is entitled to take into account the set off while estimating its liability to pay advance tax. If this interpretation is not given, there will be absurdity.

The amendment to Explanation 1 to section 234B by FA 2006 w.e.f. 1.4.2007 to provide that MAT credit under section 115JAA shall be excluded while calculating advance-tax liability is to remove the immense hardship that would result if this was not done.

*CIT v. Tulsyan NEC Ltd. (2011) 330 ITR 226 / 237 CTR 105 / 49 DTR 129 / 196 Taxman 181 (SC)*

**S. 115JAA : Company – Book profit – Deemed income – Question of Law – Tax Credit – Is to be allowed before Charging Interest [S. 234B, 234C]**

Whether credit for MAT under section 115JAA is to be allowed before charging interest under sections 234B and 234C is a question of law and therefore the judgment of High Court is set-aside to consider the aforesaid question in accordance with law.

*CIT v. Xpro India Ltd. (2008) 215 CTR 400 / 300 ITR 337 / 168 Taxman 181 / 4 DTR 217 (SC)*

**S. 115JAA : Company – Book profit – Deemed income – Brought forward credit – Interest [S. 234B, 234C]**

Credit for MAT brought forward credit under section 115JAA should be given effect before charging interest under sections 234B and 234C. (A.Y. 2004-05)

*CIT v. Roots Multiclean Limited (2010) 327 ITR 65 / (2009) 182 Taxman 13 (Mad.)(High Court)*

**S. 115JAA : Company – Book profit – Deemed income – Tax credit – Interests [S. 234B, 234C]**

Minimum Alternative Tax (MAT) credit under section 115JAA should be given effect to before charging interest under sections 234B and 234C of the Act. (A.Y. 2002-03)

*CIT v. Chemplast Sanmar Ltd. & Ors. (2009) 22 DTR 241 / 224 CTR 211 / 314 ITR 231 / 180 Taxman 335 (Mad.)(High Court)*

**S. 115JAA : Company – Book profit – Deemed income – Tax credit – Refund – Interest [S. 244, 244A]**

MAT payment is not refundable and it can only be used as a credit. The year in which MAT credit is given and credit for other tax payments i.e. TDS, Advance Tax, etc., is also given, refund becomes due, not because of MAT credit but because of other tax payments hence the assessee is entitled interest under section 244 and 244A. (A.Y. 2003-04)

*Hyundai Motor India Ltd. v. Dy. CIT (2010) 123 ITD 445 / 5 ITR 611 / (2009) 32 DTR 321 / 127 TTJ 123 (Chennai)(Trib.)*

**Section 115JB : Special provision for payment of tax by certain companies**

**S. 115JB : Company – Book profits – Revaluation of Reserve**

Amount withdrawn from revaluation reserve & credited to P&L A/c cannot be reduced from book profit even if in year of creation of reserve, the P&L A/c was not debited. It is precisely to tax these kinds of companies that MAT provisions had been introduced. The object of MAT provisions is to bring out the real profit of the companies. The thrust is to find out the real working results of the company. (A.Y. 2001-02)

*Indo Rama Synthetics (I) Ltd. v. CIT (2011) 330 ITR 363 / 237 CTR 217 / 49 DTR 241 / 196 Taxman 25 (SC)*

**S. 115JB : Company – Book profits – Adjustment for Advance Against Depreciation**

Advance against Depreciation is a timing difference, it is not a reserve, it is not carried through Profit & Loss Account, and it is "income received in advance" subject to adjustment in future and therefore clause (b) of Explanation 1 to section 115JB is not applicable. (A.Y. 2001-02)

*National Hydro Electric Corporation Ltd v. CIT (2010) 34 DTR 65 / 320 ITR 374 / 228 CTR 492 / 187 Taxman 193 / 216 Taxation 50 (SC)*

**S. 115JB : Company – Book profits – Deduction – Export [S. 80HHC]**

Section 115JB is a self contained code. It refers to computation of "book profit" which has to be computed by making upward and downward adjustments. Cl. (iv) of the

Explanation to section 115JB seeks to exclude "profits eligible for deduction under section 80HHC". Section 80HHC(1) refers to eligibility whereas section 80HHC(1B) deals with the "extent of deduction". For the purposes of computation of book profit which is different from the normal computation under the Act, the upward and downward adjustments are to be kept in mind and thus cl. (iv) of the Explanation to section 115JB covers full export profits of 100% as "eligible profits" and the same cannot be reduced to 80% by relying on section 80HHC(1B). The argument of the Department that both "eligibility" as well as "deductibility" of the profit have to be considered together for working out the deduction as mentioned in cl. (iv) has no merit. (A.Y. 2001-02)

*Ajanta Pharma Ltd. v. CIT (2010) 44 DTR 1 / 327 ITR 305 / 234 CTR 139 / 194 Taxman 358 (SC)*

*Editorial:- CIT v. Ajanta Pharma Ltd. (2009) 318 ITR 252 (Bom.) reversed.*

*View of Special Bench in CIT v. Syncome Formations (I) Ltd. (2007) 292 ITR 144 (AT)(SB)(Mum.) (Trib.) is up held.*

### **S. 115JB : Company – Book profit – Undertaking – Special categories [S. 80-IC]**

Section 115JB will apply to an assessee being a company, even if it is entitled to deductions mentioned in section 80IC.

*Sidcul Industrial Association v. State of Uttarakhand (2011) 199 Taxman 75 / 241 CTR 156 / 331 ITR 491 / 55 DTR 66 (Uttarakhand)(High Court)*

### **S. 115JB : Company – Book profit – Power of Assessing Officer**

Once the accounts including the profit and loss account are certified by the authorities under the Companies Act, 1956, it is not open to the Assessing Officer to contend that the profit and loss account has not been prepared in accordance with the provisions of Companies Act, 1956. Hence, the Tribunal was right in deleting the addition of 1.98 Crores made by the Assessing Officer while computing the book profits under section 115JB.

*CIT v. Adbhut Trading Co. Pvt. Ltd. (2011) 338 ITR 94 (Bom.)(High Court)*

### **S. 115JB : Company – Book profit – Provision for diminution in value of investments – Change of law**

For the assessment year 2002-03, the Assessing Officer recomputed the book profits of the assessee by making an adjustment for provision for diminution in value of investments on the ground that the provision made by the assessee fell under clause (c) of Explanation 1 to section 115JB (2). The Commissioner(Appeals) deleted the addition which was up held by the Tribunal. In appeal the court held that after amendment by Finance (No. 2) Act, 2009, made effectively from April 1, 2001, clause (i) of Explanation 1 had been inserted in section 115JB(2) of the Act where by any amount or amounts set aside as provision for diminution in the value of any asset would not reduce the book profits of an assessee. The adjustment claimed by the assessee as provision for diminution in value of investment was not tenable and it would be added in

the profit which thereby would enhance the book profits under section 115JB of the Act. (A. Y. 2002-03).

*CIT v. Steriplate P. Ltd. (2011) 338 ITR 547 (P&H)(High Court)*

### **S. 115JB : Company – Book profit – Interest – Retrospective amendment of law – Impossibility of performance**

Provisions relating to payment of advance tax are applicable in a case where the book profit is deemed to be the total income under section 115JB. On the facts of the assessee there was no liability to make payment of the advance tax on the last day of the financial year i.e. 31st March 2001 when its book profit was nil according to section 115JB. Provision of section 115JB having been amended by the Finance Act, 2002, with retrospective effect from 1st April 2001, the assessee cannot be held defaulter of payment of advance tax, where on the last date of the financial year preceding the relevant assessment year, the assessee had no liability to pay advance tax, he cannot be asked to pay interest under section 234B and 234C for no default in making payment of tax in advance which was physically impossible therefore interests under sections 234B and 234C can not be charged. (A. Y. 2001-02).

*Emami Ltd. v. CIT (2011) 63 DTR 301 / 337 ITR 470 / 245 CTR 656 / 200 Taxman 326 (Cal.)(High Court)*

### **S. 115JB : Company – Book profit – Rebate – STT [S. 88E]**

Rebate under section 88E is allowable in respect of payment of STT even if total income assessed under section 115JB. (A. Y. 2005-06).

*CIT v. Horizon Capital Ltd. (2011) 64 DTR 306 / 245 CTR 601 (Karn.)(High Court)*

### **S. 115JB : Company – Book profit – Losses brought forward**

The expression “losses brought forward” in clause (iii) of Explanation (I) to section 115JB(2) would mean loss on last date of immediately preceding year, which is to be brought forward to financial year in question, what happens during course of year is not relevant. (A.Y. 2002-03)

*CIT v. Sumi Motherson Innovative Engg. Ltd. (2011) 195 Taxman 353 / 336 ITR 321 / 243 CTR 442 / 6 DTR 190 (Delhi)(High Court)*

### **S. 115JB : Company – Book profit – Deduction – Export [S. 80HHC]**

For the purposes of cl. (iv) of Expln. 1 to section 115JB (2), the extent of the reduction admissible towards profit exempt under section 80HHC has to be computed strictly in accordance with the provisions of section 80HHC. Submission of the assessee that in applying the formula under sub-section (3) of section 80HHC the expression “profits of the business” would need to be substituted by book profits cannot be accepted. (A.Y. 2003-04)

*CIT v. AL-Kabeer Exports Ltd. (2010) 233 CTR 443 / 193 Taxman 56 / 42 DTR 273 (Bom.)(High Court)*

*Editorial : Reversed by Supreme Court SLP (C) Nos. 3392-3393/2010 dated 3-2-2012*  
*Source : itatonline.org (SC)*

**S. 115JB : Company – Book profit – Advance tax – Interests [S. 234B, 234C]**

Interest cannot be charged under sections 234B, 234C, on the minimum alternative tax levied under section 115JB on the book profit.

*CIT v. Natural Gems Ltd. (2010) 327 ITR 269 (Bom.)(High Court)*

**S. 115JB : Company – Book profit – Interests [S. 234B]**

Interest under section 234B is chargeable though computation of income is made under section 115JB, a difficulty or impossibility as pleaded by the assessee cannot be accepted only because it is a liability under the provisions of section 115JB. (A.Y. 1997-98)

*CIT & Anr. v. Brindavan Beverages Ltd. (2010) 228 CTR 1 / 321 ITR 197 / 186 Taxman 233 / (2009) 32 DTR 257 (Karn.)(High Court)*

**S. 115JB : Company – Book profit – Export – Deduction [S. 80HHC]**

Deduction under section 80HHC of the Act is to be worked out on the basis of the adjusted book profits under section 115JB. (A.Y. 2002-03)

*CIT v. Ambika Cotton Mills Ltd. (2010) 321 ITR 448 / 33 DTR 183 / 230 CTR 311 (Mad.)(High Court)*

*Editorial:- CIT v. Ajanta Pharma Ltd. (2009) 318 ITR 252 (Bom.), dissented.*

**S. 115JB : Company – Book profit – Export [S. 80HHC]**

While computing profit under section 115JB, deduction under section 80HHC is to be allowed on basis of book profits under section 115JB and not on the basis of eligible profits under section 80HHC as per normal computation. (A.Ys. 1998-99 to 2001-02)

*CIT v. Futura Polyester Ltd. (2010) 186 Taxman 51 / SPEL Semiconductor Ltd. (2010) 188 Taxman 130 / 323 ITR 488 (Mad.)(High Court)*

**S. 115JB : Company – Book profit – State Electricity Board**

State Electricity Board is not company bound by the provisions of Companies Act, as to manner of drawing up profit and loss account or obligation to lay before company in general meeting. Provision of section 115JB is not applicable. (A.Ys. 2002-03 to 2005-06)

*Kerala State Electricity Board v. Dy. CIT (2010) 329 ITR 91 / 236 CTR 337 / 47 DTR 265 / (2011) 196 Taxman 1 (Ker.)(High Court)*

**S. 115JB : Company – Book profit – Constitutional Validity [S. 80IB, 115JA]**

Legislature cannot be denied the power to curtail benefits earlier granted, as long as the subject matter of the legislative exercise lies within the domain of the legislative power conferred by the Constitution. Curtailment of the benefit under section 80IB, while enacting section 115JB earlier granted under section 115JA, is valid. (A.Y. 2001-02)

*Jaintia Alloys (P) Ltd. v. UOI (2010) 320 ITR 442 / 45 DTR 22 / 235 CTR 201 (Gau.)(High Court)*



**S. 115JB : Company – Book profit – Diminution in the value of asset**

The amount set aside as provision for diminution in the value of asset is to be added back while computing the book profit under section 115JB of the Act, in view of the clause (i) in Explanation 1 to section 115JB of the Act inserted by Finance Act (No. 2), 2009 with retrospective effect from 1-4-1998. (A.Y. 2003-04)

*CIT & Anr. v. Mysore Breweries Ltd. (2009) 29 DTR 289 / 227 CTR 569 (Karn.)(High Court)*

**S. 115JB : Company – Book profit – Provision for diminution in value**

Reflection of amount of provision for diminution in value of investment separately on liability side of balance sheet or by way of reduction from figure of investment on asset side of balance sheet is totally alien for computing book profit and only requirement is that if any provision for diminution in value of any asset has been debited to profit and loss account same will automatically stand added to amount of net profit for working out book profit. Therefore, once provision is made for diminution in value of any asset, same has to be added for computing book profit, regardless of fact whether or not there is any balance value of asset. (A. Y. 2004-05).

*ITO v. TCFC Finance Ltd. (2011) 131 ITD 103 / 11 ITR 153 / 138 TTJ 439 / 54 DTR 241 (Mum.)(Trib.)*

**S. 115JB : Company – Book profit – Revaluation of assets**

The amount on account of revaluation of assets sold and taken to the balance sheet as revaluation reserved cannot be added to book profits. (A. Y. 2005-06)

*ITO v. Galaxy Saws P. Ltd., (2011) 132 ITD 236 (Mum.)(Trib.)*

**S. 115JB : Company – Book profit – Capital gains – Exemption [S. 54EC]**

Profit on sale of assets credited to profit and loss account cannot be excluded in computing book profit under section 115JB even though capital gain arising from sale of that asset is not subject to tax under normal provisions of Act by virtue of provisions of section 54EC. (A.Y. 2005-06).

*Technicarts (P) Ltd. v. ITO (2011) 46 SOT 294 (Mum.)(Trib.)*

**S. 115JB : Company – Book profit – Provision for gratuity**

Provision for approved gratuity is ascertained liability and cannot be added back while computing the book profit under section 115JB. (A. Y. 2004-05)

*ITO v. Jones Lang Laralle Property Consultants (India) (P) Ltd. (2011) 135 TTJ 94 (UO) / 39 DTR 230 (Delhi)(Trib.)*

**S. 115JB : Company – Book profit – Mutual concern [S. 4]**

When the income is exempt under the principle of mutuality, said income cannot be brought to tax under the provisions of section 115JB. (A.Y. 2003-04)

*Delhi Gymkhana Club Ltd. v. Dy. CIT (2010) 35 SOT 335 / 131 TTJ 329 / 39 DTR 48 (Delhi)(Trib.)*



**S. 115JB : Company – Book profit – Capital gains [S. 54EC]**

Capital gain is part of net profit to be prepared in accordance with the provisions of Part II of Schedule VI to the Companies Act. In the absence of any provision for exclusion of capital gains exempted under section 54EC in the computation of book profit under the provisions contained in Explanation to section 115JB, the assessee is not entitled to the exclusion thereof as claimed. (A.Y. 2002-03)

*Growth Avenue Securities (P) Ltd. v. Dy. CIT (2010) 128 TTJ 426 / 1 ITR 807 / (2009) 30 DTR 448 / (2010) 126 ITD 179 (Delhi)(Trib.)*

**S. 115JB : Company – Book profit – Reserve – Scheme of arrangement**

Amount credited by the assessee company to its P & L account having been withdrawn from the reserve transferred to it by another company under a scheme of arrangement which was originally created by the latter in the year 1993-94, it is deductible from the net profit for computing book profit as per Cl. (I) of Explanation to section 115JA. (A.Y. 1998-99)

*Kopran Drugs Ltd. v. ACIT (2010) 35 DTR 380 / 2 ITR 515 (Mum.)(Trib.)*

**S. 115JB : Company – Book profit – Deduction – Export [S. 80HHC, 80IB]**

Explanation to section 115JB, does not permit any adjustment with reference to deduction under section 80-IB, and therefore deduction under section 80-IB, cannot be reduced from the book profit of the assessee while computing the deduction under section 80HHC in the context of a MAT assessment. (A.Y. 2003-04)

*Cello Pens & Stationery (P) Ltd. v. ACIT (2010) 127 TTJ 723 / 33 DTR 393 (Ahd.)(Trib.)*

**S. 115JB : Company – Book profit – Deduction – Export [S. 80HHC]**

Deduction under section 80HHC is to be computed by taking into consideration 'book profit' and cannot be restricted to the profits of the business as computed under normal provisions of the Act. (A.Y. 2004-05)

*Dy. CIT v. Glenmark Laboratories Ltd. (2010) 127 TTJ 719 / 32 DTR 183 (Mum.)(Trib.)*

*Editorial: - ACIT v. Ajanta Pharma Ltd. (2009) 318 ITR 252 (Bombay) distinguished.*

**S. 115JB : Company – Book profit – Adjustment for capital reserve representing surplus on sale of rights in premises**

When the accounts are not prepared in accordance with Part II of Schedule VI to the Companies Act, the Assessing Officer has power to go beyond the book profit as per audited accounts. Therefore, profit on sale of rights in premises having not been routed through P & L A/c the Assessing Officer was justified in re-working the book profit in the manner provided by Part II of Schedule VI. (A.Y. 2004-05)

*Dy. CIT v. Bombay Diamond Co. Ltd. (2010) 33 DTR 59 (Mum.)(Trib.)*

**S. 115JB : Company – Book profits – Fringe Benefit Tax [S. 2(43)]**

Payment or provision for "fringe benefit tax" is not required to be added back for the purpose of computing book profit under section 115JB as clause (a) of explanation to section 115JB uses the term "income tax" which does not include "fringe benefit tax" (A.Y. 2006-07)

*ITO v. Vintage Distillers Ltd. (2010) 37 DTR 303 / 130 TTJ 79 (Delhi)(Trib.)*

### **S. 115JB : Company – Book profit – Club registered [S. 25]**

A company registered under section 25 of the companies Act, whose income is exempt under principles of mutuality cannot be brought within the purview of section 115JB. (A.Y. 2003-04)

*Delhi Gymkhana Club Ltd. v. Dy. CIT (2010) 39 DTR 48 / 131 TTJ 329 / 35 SOT 335 (Delhi)(Trib.)*

### **S. 115JB : Company – Book profit – Computation – Long term Capital gains – 100% Subsidiary [S.47(iv)]**

The assessee had claimed exclusion of long term Capital Gains which were exempt under section 47(iv) of the Act. Capital Gains on sale of shares having been included in computing the profits presented before the share holders, they should also be included in computing book profit, the assessee was not entitled to the exclusion claimed. (A.Y. 2004-05)

*Rain Commodities Ltd. v. Dy. CIT (2010) 4 ITR 551 / 40 SOT 265 / 41 DTR 449 / 131 TTJ 514 (SB)(Hyd.)(Trib.)*

### **S. 115JB : Company – Book profits – Banks – Minimum alternative tax**

Banks are not liable to pay section 115JB MAT on "book profits". (A.Y. 2004-05)

*Krung Thai Bank PCL v. Jt. DIT (2010) 45 DTR 218 / 133 TTJ 435 (Mum.)(Trib.)*

### **S. 115JB : Company – Book profits – Interest – Retrospective amendment [S. 234B]**

Assessee was not liable to pay interest under section 234B on the incremental amount of tax computed under section 115JB which arose due to retrospective amendment in section 115JB requiring book profit to be increased by the provision for deferred tax. (A.Y. 2005-06)

*JSW Steel Ltd. v. ACIT (2010) 46 DTR 41 / 133 TTJ 742 / 5 ITR 31 (Bang.)(Trib.)*

### **S. 115JB : Company – Book profits – Banking companies**

The provisions of Section 115JB can only come into play when the assessee was required to prepare its profit and loss in accordance with the provisions of Part II and III of Schedule VI to Companies Act. In case of the assessee, being a banking company, the provisions of Schedule VI are not applicable in view of the exemption given under proviso to Section 211(2) of the Companies Act. The final accounts of the banking companies are required to be prepared in accordance with the provisions of Banking Regulations Act. Hence, provisions of section 115JB is not applicable to such companies. (A.Y. 2004-05)

*Krung Thai Bank PCL v. Jt. DIT (2010) 45 DTR 218 / 133 TTJ 435 (Mum.)(Trib.)*

**S. 115JB : Company – Book profits – Business loss – Unabsorbed depreciation**

For the purpose of adjustment under section 115JB, ordinary business loss and statutory depreciation have been differentiated and either the amount of brought forward loss or unabsorbed depreciation, which ever is less is to be deducted and not both. (A.Y. 2004-05)

*Dy. CIT v. Costal Resorts (I) Ltd. (2009) 31 DTR 283 / 126 TTJ 690 / (2010) 125 ITD 170 (Cochin) (Trib.)*

**S. 115JB : Company – Book profits – Provision for warranty**

Provision for warranty is an ascertained liability and it cannot be added while computing book profit under section 115JB. (A.Ys. 2001-02 to 2003-04)

*Sony India (P) Ltd. v. Dy. CIT (2008) 118 TTJ 865 / 114 ITD 448 / 14 DTR 228 (Delhi)(Trib.)*

**S. 115JB : Company – Book profits – Export [S. 80HHC]**

For purpose of section 115JB (2), deduction under section 80HCC has to be computed as per books of account and not as per method of computing profits under the head "Profits and gains of business or profession." (A.Y. 2003-03)

*Banswara Syntex Ltd. v. ACIT (2007) 109 TTJ 274 / 108 ITD 48 (Jodh.)(Trib.)*

**S. 115JB : Company – Book profits – Deferred tax liability – Unascertained liability**

Deferred tax charge was a provision for tax effect of difference between taxable income and accounting income and not the provision for income tax paid or payable and therefore, could not to covered under Explanation (a) to section 115JB(2). Deferred tax cannot be treated as 'Reserve' within the meaning of clause (b) of explanation to section 115JB(2). It cannot be considered as 'unascertained liability' within the clause (c) of explanation to 115JB(2).

*ACIT v. Balrampur Chini Mills Ltd., (2007) 111 TTJ 230 / 109 ITD 146 / 14 SOT 372 (Kol.)(Trib.)*

**S. 115JB : Company – Book profits – Loss by Government agency – Unascertained**

Provision for repairs of building, plant and machinery damaged in earthquake, made on the basis of loss determined by a Government agency was not an unascertained liability falling under cl. (c) of Explanation to Section 115JB(2) and, therefore the same could not be added back for calculating book profit under section 115JB. (A.Y. 2001-02)

*Samay Electronics (P) Ltd. v. Dy. CIT (2006) 100 TTJ 128 / 99 ITD 236 (Rajkot)(Trib.)*

**S. 115JB : Company – Book profits – Business loss – Depreciation**

Assessee's business loss being nil, unabsorbed depreciation was not allowable deduction in computing book profits in view s. 115JB(2), Expln. (iii), as substituted by Finance Act, 2002 w.e.f. 1st April, 2001. (A.Y. 2001-02)

*S. I. J. Chains (P) Ltd. v. ACIT (2006) 102 TTJ 706 / 100 ITD 379 (Amritsar)(Trib.)*

**S. 115JB : Company – Book profits – Provision for repairs**

Provisions for repairs made on the basis of loss determined by a Government agency was not an unascertained liability, therefore, the same could not be added back for calculating book profit under section 115JB. (A.Y. 2001-02)

*Samay Electronics (P) Ltd. v. Dy. CIT (2006) 100 TTJ 128 / 99 ITD 236 (Rajkot)(Trib.)*

**S. 115JB : Company – Book profits – Long-term capital gains [S. 10(38)]**

Applicant, a US company transfers its shareholding in an Indian listed company to its Mauritius company by effecting transaction on BSE making it tax exempt under S. 10(38) of I.T. Act; issue is whether MAT is applicable due to the proviso to S. 10(38) which states: "Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under Section 115JB" - AAR observed that annual accounts, including the P&L Account, cannot be prepared as per the first proviso to Section 115JB(2) in respect of the world income; further, as the applicant did not have a place of business in India it was not required to prepare its accounts under Section 594 read with Section 591 of the Companies Act, 1956 and is therefore of the view that MAT is not designed to be applicable to the case of the applicant, a foreign company, who has no presence or PE in India - Hence held provisions of MAT are not attracted as the applicant is a foreign company and has no place of business or PE in India and is not required to make out annual accounts as per provisions of Companies Act.

*Timken Co., USA (2010) 326 ITR 193 / 193 Taxman 20 / 233 CTR 334 / 42 DTR 161 (AAR)*

**S. 115JB : Company – Book profits – Additions – Interest on borrowed capital [S. 36(1)(iii)]**

Applicant is Govt. company in power distribution in Rajasthan - Additions made by Assessing Officer to book profit on account of interest, prior period items and Depreciation provided as per Electricity Act - AAR observed that loan was for the business purpose of the applicant and it was the liability of the applicant to bear the interest liability, hence allowable under section 36(i)(iii); further, applicant maintaining mercantile system of accounting could not provide certain expenses in the books of accounts on account of its unascertainability, now provided the expenses as "prior period expenses" during the period under consideration; held prima facie applicant is entitled to such relief and addition to the book profit cannot be sustained; further, applicant has provided depreciation as per the Companies Act, 1956 read with principles contained in the statutory rules framed under the Electricity (Supply)

Act; held such a diversion from the Companies Act in providing depreciation and not following the accounting standard 12 deserved proper consideration by Assessing Officer and therefore additions made to profits on account of depreciation is not sustainable. (A.Y. 2004-05)

*Jodhpur Vidhyut Vitran Nigam Limited, (2010) 321 ITR 18 / 186 Taxman 32 / (2009) 227 CTR 322 / 31 DTR 329 (AAR)*

**S. 115JB : Company – Book profits – Set off of the current years profit – Brought forward or Unabsorbed depreciation**

Applicant's question was whether it has discretion to set off the current year's profit, either against the loss brought forward or unabsorbed depreciation or in a manner most beneficial to it and whether such adjustment can be changed from year to year - AAR ruled that both on the interpretation of said section as well as on the principal of consistency of method of accounting, the applicant does not have the option to reduce the current year's profit in a manner different from the manner adopted for determination of "book profit" but the lesser of the two is required to be reduced from the current year's income and certainly not in a manner more beneficial to the applicant; further after making the reduction in one year, the applicant cannot adopt a different method in the subsequent years. (A.Ys. 2004-05, 2005-06)

*Rashtriya Ispat Nigam Ltd. (2006) 155 Taxman 60 / 285 ITR 1 / 204 CTR 153 (AAR)*

**S. 115JB : Company – Book profits – Corporation**

Applicant- corporation is supplying power to various State Electricity Boards at tariff rates notified by Central Electricity Regulatory Commission (CERC) and one of components of tariff is Advance Against Depreciation (AAD), amount of AAD is to be included for computation of 'book profit' under section 115JB in year of receipt and not in year to which depreciation relates.

*National Hydroelectric Power Corpn. Ltd., In re (2005) 273 ITR 171 / 143 Taxman 176 / 193 CTR 594 (AAR)*

**CHAPTER XII-G**

**SPECIAL PROVISIONS RELATING TO INCOME OF SHIPPING COMPANIES**

***B. Computation of tonnage income from business of operating qualifying ships***

**S. 115VA : Shipping business – Operating qualifying ships – Write back of sundry creditors – Interest on loans and advances to employees – Capital gains [S. 41(1), 45, 56]**

Provisions of sections 28 to 43C cannot override computation of profits and gains of under section 115VA hence the Assessing Office cannot make separate additions in respect of write back of sundry creditors, prior period adjustments etc. under section 41(1). Loans were advanced to employees involved in core activity of assessee company hence interest income derived from such activity was taxable under the

head "income from business" and therefore it cannot be brought to tax separately. Income earned by assessee from sale of ships will be taxable under the head capital gains hence, receipt in question cannot be considered as turn over as per provisions of section 115VA thus it was out of purview of Chapter XII-G of the Act. (A. Y. 2007-08).

*Shipping Corporation of India Ltd. v. Addl. CIT (2011) 133 ITD 290 (Mum.)(Trib.)*

## **CHAPTER XII-H INCOME-TAX ON FRINGE BENEFITS**

### ***A. Meaning of certain expressions***

#### **Section 115W : Definitions**

##### **S. 115W : Fringe benefits – Operation of Air transport service – Free and Concessional tickets – Jurisdiction of Officer to conduct enquiry**

Assessee, who was engaged in operation of air transport services was liable to pay fringe benefit tax in respect amount paid to hotels to provide layover to its crew members. Assessee is liable to pay fringe benefit tax in respect of per diem allowances paid to pilots. Assessee is also liable to pay fringe benefit tax in respect of free and concessional tickets provided to its staff. (A.Y. 2006-07)

*King Fisher Training & Aviation Services Ltd. v. ACIT (2010) 41 SOT 279 (Bang.)(Trib.)*

### ***B. Basis of charge***

#### **Section 115WA : Charge of fringe benefit tax**

##### **S. 115WA : Fringe benefits – Charge of tax – Transportation cost – To and from**

The Supreme Court held that the transportation cost incurred in bringing non-resident employees to a place of work in India and back to their home country is liable to Fringe Benefit Tax.

*R & B Falcon (A) Pty. Ltd. v. CIT (2008) 301 ITR 309 / 169 Taxman 515 / 216 CTR 289 / 6 DTR 313 / 206 Taxation 241 (SC)*

##### **S. 115WA : Fringe benefits – Charge of tax – Tax exempt status – Non-resident – Non profit organisation also liable – DTAA – India-USA**

Non-resident applicant is tax exempt in home country under section 501(c)(3) of Internal Revenue Code and hence contends that as per Article 1(2) of DTAA, it is not chargeable to income tax in India including FBT which it contends is chargeable only when the employer is chargeable to income tax in India - AAR observed that said Section mandates that FBT shall be charged for every assessment year in addition to the income-tax charged under the Act; further, sub-section (2) thereof clarifies that



even when no income tax is payable by an employer of his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer - hence held that applicant is liable to pay fringe benefit

*Population Council Inc (2006) 156 Taxman 125 / 286 ITR 243 / 205 CTR 97 (AAR)*

### **Section 115WB : Fringe benefits**

#### **S. 115WB : Fringe benefits – Rent for car parking Area – Revision [S. 263]**

In the present case it was held that the essential facilities attached to a rented building had to be treated as part of building itself and therefore, rent or license fee paid for such facilities should be treated as forming part of rent. It was further held that in view of the above, the rent paid for car parking area did not fall under category of 'running, maintenance and repair expenses of car' and thus assessee was not liable to pay fringe benefit tax on the said amount. (A. Y. 2006-07)

*Hewlett Packard India Sales (P.) Ltd. v. CIT (2011) 43 SOT 124 / 137 TTJ 125 / 51 DTR 173 (Bang.)(Trib.)*

#### **S. 115WB : Fringe benefits – Transportation charges – To and from**

Transportation cost incurred by non-resident applicant in providing transportation for movement of offshore employees from their residence in home country to the place of work in India (on ONGC rig via chopper base in India) and back - AAR ruled that for the journey of the offshore employees from their home countries to the designated city in India, the applicant is providing free (round-trip) tickets; it would, therefore, fall under clause (Q) of sub-section (2) of S. 115WB and for the journeys from the chopper base in India to the rig for which the applicant is providing helicopters, it would amount to the employer providing conveyance and is hence deemed FBT liable to fringe benefit tax.

*R & B Falcon (Aus) Pty Ltd. (2007) 208 CTR 105 / 289 ITR 369 / 159 Taxman 228 (AAR)*

#### **S. 115WB(2)(H) : Fringe benefits – Repairs, running, etc., of Motor Cars – Interest on loan**

Expenditure incurred on payment of salary to driver is to be included in computing the expenses on running of car within the meaning of the provision of section 115WB(2)(H), however, the expenditure on payment of interest on loan taken for purchase of motor cars cannot be included to compute fringe benefits.

*Brihan Maharashtra Sugar Syndicate Ltd. v. Dy. CIT (2010) 134 TTJ 98 / 46 DTR 157 (Pune)(Trib.)*

## **CHAPTER XIII**

### **Income Tax Authorities**

#### ***A. Appointment and Control***

## **Section 116 : Income-tax authorities**

### **S. 116 : Income-tax authorities – Power of CBDT – Ex-gratia amount – VRS [S. 119]**

CBDT Circular dated 23/1/2001 directing that ex-gratia amount paid by assessee for gaining enduring benefit or advantage under Voluntary Retirement Scheme (VRS) is to be treated as capital expenditure is against interests of assessee and therefore ultra-vires CBDT powers under section 119(2).

*Madhura Coats v. Dy. CIT (2005) 273 ITR 32 / 145 Taxman 226 / 195 CTR 139 (Mad.) (High Court)*

### **S. 116 : Income-tax authorities – Power of CBDT – Refund [S. 119, 239]**

Board is competent to admit an application for refund even after expiry of period prescribed under section 239, for avoiding genuine hardship in any case or class of cases. (A.Y. 1995-96)

*Jaswant Singh Bambha v. CBDT (2005) 272 ITR 1 / 142 Taxman 528 / 193 Taxman 184 (FB) (P&H) (High Court)*

## **Section 119 : Instructions to subordinate authorities**

### **S. 119 : Income-tax authorities – Instructions – Investigations – Duty of officer – Passenger travelling by Air – Circular of Board – CBDT**

Guidelines issued by CBDT dated November 18, 2009, to be followed by AIR Intelligence Units or Investigation Units dealing with air passengers with valuables at the airport of embarkment or destination, to avoid any harassment and undue inconvenience to them, keeping confidential any premature disclosure to the media and dropping the passenger at the place he wanted to go, etc.

Air passengers should accept with grace, patience and discipline search and seizure by the authorities.

*Rajendran Chingaravelu v. R. K. Mishra, Addl. CIT (2010) 1 SCC 457 / (2009) 32 DTR 129 / 227 CTR 520 / (2010) 320 ITR 1 / 186 Taxman 305 (SC)*

### **S. 119 : Income-tax authorities – Instructions – Circular – Binding nature – CBDT – Customs Act, 1962 – S. 151A Central Excise Act, 1944 [S. 37B]**

Officers not entitled to issue notice and adjudicate, contrary to instructions in circular. Circulars issued by the Central Board were binding on the department.

*Commissioner of Customs v. Indian Oil Corporation Ltd. & Anr. (2004) 267 ITR 272 / 180 Taxation 637 / 187 CTR 297 / 136 Taxman 491 (SC)*

### **S. 119 : Income-tax authorities – Instructions – Circular – Binding on the court – CBDT**

Circular issued by the Central or State Government represent merely their understanding of the provisions. They are not binding on the courts. It is for the court

to declare what the provisions of the statute say and not for the executive. Therefore, the circular cannot be given effect to in preference to the view expressed by the High Court or the Supreme Court.

*CCE v. Ratan Melting & Wire Industries (2006) 190 Taxation 1 / (2008) 220 CTR 98 / 14 DTR 324 (SC)*

**S. 119 : Income-tax authorities – Instructions – Circular – Binding nature – Seizure of Gold – CBDT**

Circular dated 30-8-1965 issued by CBDT stating that gold seized during search should be given to Gold Control Officer is binding on subordinate income tax authorities.

*Gopaldas Udhavdas Ahuja v. UOI (2004) 268 ITR 273 / 140 Taxman 115 / 190 CTR 1 / 182 Taxation 389 / 7 SCC 33 (SC)*

**S. 119 : Income-tax authorities – Instructions – Circular – CBDT – Binding nature**

As long as circular from CBDT contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to source of powers under section 119, irrespective of its nomenclature. Circular No. 789 dt. 13-4-2000, falls within parameters of powers exercisable by CBDT under section 119.

*UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 / 132 Taxman 373 / 184 CTR 450 (SC)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Circulars – Administrative relief**

Benevolent circulars providing administrative relief to the assessee have to be given effect to even if they are issued subsequent to the decision of an authority under the Act. (A. Ys. 1995-96 & 1996-97).

*Chhabil Dass Agarwal v. UOI (2011) 56 DTR 19 / 241 CTR 331 / 199 Taxman 326 (Sikkim)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Circulars – Binding nature – Conflict in law laid down by High Court or Supreme Court**

If a circular is in conflict with the law laid down by High Courts or Supreme court, the revenue authorities while acting quasi judicially, should ignore such circular in discharge of their quasi judicial functions. (A. Y. 1998-99)

*Bhartia Industries Ltd. v. CIT (2011) 243 CTR 328 / 60 DTR 121 / 201 Taxman 180 (Cal.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Delay in filing return of income – Delay in appointment of statutory auditor – Condonation – CBDT [S. 80]**

Delay in filing Return of Income due to late appointment of statutory auditor must be condoned. (A.Y. 2001-02)

*Bombay Mercantile Co-op. Bank Ltd v. CBDT (2010) 236 CTR 156 / 45 DTR 377 / 195 Taxman 106 / (2011) 332 ITR 87 (Bom.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Waiver application – Reasoned order [S. 234C]**

Board as a quasi judicial authority while exercising the power under section 119(2)(a), would be entitled to entertain application from an individual assessee against the order of the Assessing Officer declining the waiver of interest under section 234C and while doing so it is expected in law to give reasons while considering and passing on such application. (A.Y. 1990-91)

*Precot Mills Ltd. v. CBDT (2010) 40 DTR 54 / 232 CTR 221 / 321 ITR 293 (Mad.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Condonation of delay in filing loss return - Reasonable Cause [S. 139(3)]**

Board has the power under section 119(2)(b) to condone the delay in filing the return having claim of carry forward of losses. Delay of one day was condoned. (A.Y. 2004-05)

*Lodhi Property Company Ltd. v. Under Secretary, Department of Revenue (2010) 234 CTR 99 / 323 ITR 441 / 191 Taxman 74 / 43 DTR 120 (Delhi)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Assessment**

Once the assessee had filed its return of income, the assessing officer has the authority to proceed with the assessment in terms of section 143 of the Act seeking clarification/information in connection with the return of income. Further, there is no bar in law or in executive instruction for selecting the case for scrutiny. The High Court further held that the petitioner was not prejudiced in any manner whatsoever if a regular assessment is framed in its case. (A.Y. 2005-06)

*Atam Valves P. Ltd. v. Addl. CIT (2008) 299 ITR 460 / 172 Taxman 276 / (2007) 200 Taxation 127 (P&H)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Circular – CBDT – Binding nature**

Circulars which are in force during relevant assessment years are circulars that have to be applied and subsequent circulars either withdrawing or modifying earlier circulars have no application. (A.Y. 1999-2000)

*BASF (India) Ltd. v. CIT (2006) 151 Taxman 31 / 201 CTR 198 / 280 ITR 136 (Bom.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Subordinate authorities – Power – Individual assessee – CBDT**

Section 119 does not vest in Board unlimited powers to modify provisions of Act in their application to individual assessee. The court has not accepted the proposition

that CBDT has a duty under section 119 (2)(a) to consider individual grievance and grant relief in individual case.

*Precot Mills Ltd. v. CBDT (2004) 268 ITR 521 / 140 Taxman 662 / 191 CTR 55 (Mad.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Waiver of interest [S. 234A, 234B]**

It is not within hands or power of Chief Commissioner to extend a benefit to an assessee, which is not given or conferred on him under notification issued by CBDT.

*H.M. Sathyanarayana Setty v. Chief CIT (2004) 139 Taxman 108 / 269 ITR 375 / 189 CTR 223 (Karn.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Circular – Binding nature**

Circulars have no statutory force and can not be utilized for altering provisions of Act.

*CIT v. Ruby Traders and Exporters Ltd. (2004) 270 ITR 526 / 192 CTR 618 (Cal.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Waiver of interest [S. 234A, 234B]**

Scope of power of Commissioner under section 119(2) to waive interest under section 234B

*Balkrishna Breeding Farms P. Ltd. v. Chief CIT (2004) 266 ITR 15 / 134 Taxman 314 / 186 CTR 313 (Karn.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – CBDT – Amnesty scheme – Search and seizure**

Amnesty scheme could not be construed in a narrower fashion so as to deprive assessee of its benefit simply because he was subjected to search notwithstanding that there was no detection of any concealment. (A.Y. 1985-86)

*CIT v. Johan Mathew (2004) 192 CTR 17 / (2005) 272 ITR 243 (Ker.)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Award – Informer**

Where information was given by the petitioner in the year 1994 pursuant to which searches were made on 4-10-1994 and 4-3-1995, the Government should finalise the case of reward payable to the petitioner as expeditiously and in any case within five months from the date of the judgment.

*A.K. Dewan v. UOI (2004) 265 ITR 248 / 136 Taxman 516 / (2004) 185 CTR 529 / (2003) 132 Taxman 26 (Delhi)(High Court)*

**S. 119 : Income-tax authorities – Instructions – Powers of CBDT – No power to import ideas [S. 116, 194A]**

CBDT, under the garb of section 119 cannot exercise wider powers than the powers bestowed on it; CBDT has no power to introduce a substantial change or alteration in

the provisions of the Income-tax Act, 1961 by importing the ideas unknown to the Act.

*Jalgaort District Central Co-operative Bank Ltd. v. UOI* (2003) 184 CTR 343 / (2004) 265 ITR 423 / 134 Taxman 1 (Bom.)(High Court)

**S. 119 : Income-tax authorities – Instructions – Powers – CBDT – Extension of time for filing application for refund**

Only ground on which extension of time for filing of application of refund can be granted is genuine hardship. (A.Ys. 1993-94 and 1994-95)

*Deep Narayan Gupta v. CBDT* (2003) 264 ITR 251 / (2004) 186 CTR 91 / 135 Taxman 499 (Patna)(High Court)

**S. 119 : Income-tax authorities – Instructions – Circulars – CBDT – Director of Inspection**

The authority empowered to issue the instructions is the Board, and not the Director of Inspection. (A.Y. 1985-86)

*CIT v. Chidambaram Construction Co.* (2003) 261 ITR 754 / 181 CTR 542 (Mad.)(High Court)

**S. 119 : Income-tax authorities – Instructions – Binding nature – Monetary limit – Filing of appeal**

Section 119 nowhere provides any exception to the income-tax authorities, to not follow the instructions. Section itself mandates that all authorities and persons employed in the execution of the Act shall observe and follow orders, instructions and directions of CBDT.

The exception provided in the proviso is in a case where such instructions interfere with the discretion of the Comm. (Appeals) or with the jurisdiction and power of a particular authority in a particular case. In the instant case as the tax effect was below ` 1 lakh, appeal filed by revenue, ignoring the Instruction No. 1979 dt. 27-3-2000 prescribing monetary limit for filing Appeals, was not maintainable. (A.Y. 1992-93)

*ITO v. Monika Gupta (Smt)* (2007) 159 Taxman 121 (Mag.)(Delhi)(Trib.)

**S. 119 : Income-tax authorities – Instructions – CBDT – Circulars – Binding nature**

Circulars issued by CBDT are not binding on Courts and Tribunals but it is duty of Court to see to it that instructions, which are binding upon revenue authorities, are followed by them. (A.Ys. 1993-94 & 1994-95)

*Dy. CWT v. Nb. Syed Jaffar Ali Khan* (2005) 94 ITD 21 / 95 TTJ 376 / 1 SOT 691 (Hyd.)(Trib.)

**S. 119 : Income-tax authorities – Instructions – CBDT – Circulars – Monetary limit**



Instructions of Board including those prescribing monetary limit for filing appeal before various forums are binding on the Income-tax authorities and law does not draw any distinction between instructions/circulars issued under sub-section (1) or (2) of section 119. (A.Ys. 1983-84 to 1985-86)

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

**S. 119 : Income-tax authorities – Instructions – Contrary to statutory provisions**

Directions issued by the CBDT given by way of circular which are contrary to statutory provisions and adverse are not binding on assessee. (A.Y. 1996-97)

*ACIT v. Norasia Lines (Malta) Ltd. (2007) 107 ITD 301 / 109 TTJ 152 (SB)(Cochin)(Trib.)*

**S. 119 : Income-tax authorities – Instructions – CBDT circulars – Binding nature**

CBDT circulars are not binding on the appellate authorities. While Benevolent circulars are binding on the authorities, the administrative instructions cannot override the statutory provisions. (A.Y. 1994-95)

*ITC Ltd v. Dy. CIT (2003) 86 ITD 135 / 80 TTJ 15 (TM)(Kol.)(Trib.)*

**S. 119 : Income-tax authorities – Instructions – CBDT circulars – Binding nature**

Instructions issued by CBDT under section 119 though do not confer any right on assessee, it will not reduce effect of instructions under provisions of S. 119.

*ITO v. Motilal Rakhabchand (2003) 86 ITD 637 (Indore)(Trib.)*

**S. 119 : Income-tax authorities – Instructions – CBDT's press release – Promissory estoppel**

When any press release is issued by CBDT, and assessee satisfies the conditions of said press release, department is bound by principle of promissory estoppel.

In the instant case the matter was in connection with selection of case for scrutiny, and as the conditions of press release were satisfied, the selection of case was held to be unjustified. (A.Y. 1996-97)

*Nayana P. Dedhia (Smt) v. ACIT (2003) 86 ITD 398 / (2004) 84 TTJ 233 (Hyd.)(Trib.)*

***B. Jurisdiction***

**Section 120 : Jurisdiction of income-tax authorities**

**S. 120 : Income-tax authorities – Jurisdiction – Date of initiation**

Jurisdiction is not dependent on date of accrual of cause of action but on date when it is initiated; it is existence of jurisdiction on date of initiation of proceedings, which is material. (A.Ys. 1983-84, 1985-86, 1987-88)

*West Bengal State Electricity Board v. Dy. CIT (2005) 278 ITR 218 / 147 Taxman 234 / 198 CTR 122 (Cal.)(High Court)*

**S. 120 : Income-tax authorities – Jurisdiction – Non-resident**

Where the assessee claims the status as non-resident, then the Assessing Officer (International Taxation) had the jurisdiction to make the assessment. (A.Y. 2005-06) *Manoj Kumar Reddy v. ITO (2010) 42 DTR 171 / 132 TTJ 328 / (2009) 34 SOT 180 (Bang.)(Trib.)*

**S. 120 : Income-tax authorities – Jurisdiction – JCIT**

Where vide Commissioner's order, Joint Commissioner was empowered to become Assessing Officer in assessee's case and said authority was subsequently upgraded to rank of Addl. Commissioner, assessment order passed by such authority, being Assessing Officer of assessee, could not be assailed on ground of lack of jurisdiction. (A.Ys. 1998-99, 1999-2000) *Shyam Sunder Behl v. Addl. CIT (2006) 99 TTJ 1147 / (2005) 147 Taxman 1 (Mag.)(Amritsar)(Trib.)*

**Section 124 : Jurisdiction of Assessing Officers**

**S. 124 : Income-tax authorities – Jurisdiction of AO – Objection – Could not be raised before the Appellate Authority or Tribunal [S. 127]**

Question of jurisdiction of Assessing Officer could not be raised and entertained by the Appellate Authority or Tribunal for the first time in appeal when the same was not agitated before the Assessing Officer. The Court held that Tribunal was not justified in law in holding that the order passed by the Assessing Officer was invalid for want of Jurisdiction. (A. Y. 1974-75). *CIT v. British India Corporation Ltd. (2011) 63 DTR 246 / 245 CTR 424 / 337 ITR 64 (All.)(High Court)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Principal place of business – Return**

Under Section 124, an assessee cannot be compelled to file its return with the Assessing Officer within whose jurisdiction assessee does not have its principal place of business, meaning thereby, an inappropriate Assessing Officer cannot ask assessee to submit returns and this statutory protection is enjoyed by assessee under section 124. *India Glycols Ltd. v. CIT (2005) 274 ITR 137 / 145 Taxman 549 / 196 CTR 191 (Cal.)(High Court)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Reassessment – Transfer – Fresh notice**

Without fresh issue of notice under section 148, transferee ITO is not vested with jurisdiction of framing assessment. (A.Y. 1996-97)

*ITO v. Sunil Kumar (2006) 153 Taxman 38 (Mag.)(Chd.)(Trib.)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Time limit for objection under section 124(3)**

CIT (A) having annulled the assessment on the basis of legal infirmity that the Assessing Officer who had made the assessment had no jurisdiction over assessee for the relevant assessment year, without considering the requirements of the provisions of section 124(3), i.e., non-raising of objection by assessee within one month, the order of CIT(A) was set aside and the matter was restored for fresh consideration. (A.Y. 1997-98)

*ACIT v. Pragati Caremics (P) Ltd. (2006) 100 TTJ 167 (Nagpur)(Trib.)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Time limit for objection**

Assessee having not raised any objection to the jurisdiction of the Assessing Officer within the time allowed under section 124(3) no fault can be found with the Assessing Officer in assuming jurisdiction and completing the assessment. (A.Y. 2000-01)

*Ram Bhaj & Sons (P) Ltd. v. ITO (2006) 102 TTJ 695 / 100 ITD 93 (Amritsar)(Trib.)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Notice u/s.143(2) – Time limit for objection**

Assessee cannot question jurisdiction of the Assessing Officer after the expiry of one month from the date on which an assessee was served with a notice under section 143(2) and when authorities to whom request to transfer case to other Assessing Officer had rejected. (A.Y. 2000-01)

*Ram Bhaj & Sons P. Ltd. v. ITO (2006) 100 ITD 93 / 102 TTJ 695 (Amritsar)(Trib.)*

**S. 124 : Income-tax authorities – Jurisdiction of AO – Reassessment [S. 147]**

Primary requirement for a person who assumes jurisdiction to reopen an assessment is that he should initially have jurisdiction to assess income. (A.Ys. 1995-96 to 1999-2000)

*N. Kaasivisalam (Smt) v. ACIT (2005) 93 TTJ 537 (Chennai)(Trib.)*

**Section 127 : Power to transfer cases**

**S. 127 : Income-tax authorities – Power to transfer cases – Jurisdiction – Kanpur to Delhi for Centralising case on basis of Search conducted in case of another assessee**

In view of the subsequent events, that the proceedings for the transfer of the file of the appellant from Kanpur to Delhi for centralizing of case for co-ordinated investigation and meaningful assessment had become infructuous, and therefore, the order of transfer of the case of the appellant could not be sustained.

*Unnao Distilleries and Braveries Ltd. v. CIT (2009) 318 ITR 82 / 225 CTR 129 / 186 Taxman  
47 / 27 DTR 153 (SC)*

**S. 127 : Income-tax authorities – Power to transfer cases – Jurisdiction – Block assessment – Search and seizure**

The power under section 127 to transfer cases would also apply to block assessment proceedings as well. The Supreme Court also referred to section 158BH which categorically states that all the other provisions of the Act shall apply to assessment made under the said Chapter. (A.Ys. 1986-87 to 1996-97)

*K. P. Mohammed Salim v. CIT (2008) 216 CTR 97 / 300 ITR 302 / 169 Taxman 464 / 6 DTR 179 / 207 Taxation 81 (SC)*

**S. 127 : Income-tax authorities – Power to transfer cases – Search and Seizure – Block assessment – Jurisdiction [S. 158BD]**

Where the notice issued and return filed pursuant thereto, proceedings dropped on ground of lack of jurisdiction and transferred to another officer. Held that transfer not permissible without following procedure.

*Subhas Chandra Bhaniramka v. ACIT (2010) 320 ITR 349 / (2009) 226 CTR 84 / 25 DTR 226 (Cal.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Opportunity of hearing – Reason**

Assessee must be given an opportunity of being heard before transferring the case, further "administrative convenience and for co-ordinating effective investigation" cannot be said to be the reasons as envisaged in section 127(1). The order was quashed. (A.Y. 2000-01)

*Anil Kumar Kothari v. UOI (2010) 39 DTR 19 / 192 Taxman 23 / 232 CTR 104 / 191 Taxman 203 (Gau.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Reasons – Order quashed**

Impugned order made under sub section (2) of section 127 without reflecting any reasons for transferring the cases from one Assessing Officer to another Assessing Officer cannot be sustained.

*Hemang Ashvinkumar Baxi (Dr.) v. Dy. CIT & Anr. (2010) 45 DTR 38 (Guj.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Reason – Order quashed**

Order under section 127(2) having been quashed and set aside, the transferee officer had no jurisdiction qua the petitioner (assessee) and, therefore, impugned notices under section 153C issued by the said officer cannot be sustained. (A.Ys. 2003-04 to 2008-09)

*Parthasarathy Seshan Iyengar (Dr.) v. Dy. CIT & Anr. (2010) 45 DTR 40 (Guj.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Without notice and reasons – Mandatory**

It is mandatory to record reasons for transferring the case, hence, transfer of case without any notice and reasons quashed.

*Chaitanya v. CIT (2010) 328 ITR 208 (Bom.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Recording of reasons – Opportunity of being heard [S. 153C]**

Not only is the requirement of recording reasons under section 127(1) a mandatory direction under the law, but that non communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee, further, opportunity of being heard has to be provided before making the order of transfer of case.

*Madhu Khurana v. CIT (2010) 47 DTR 289 / (2011) 237 CTR 304 / 200 Taxman 297 (Guj.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Opportunity of hearing – Order mandatory**

In the case of intra city transfers, though opportunity of hearing as postulated in section 127(1) and 127(2) has been dispensed with other statutory formalities which include issuing an order are required to be complied with; Assessing Officer on his own could not transfer an income Tax file to another officer without an order under section 127(3). (A.Ys. 2006-07 to 2008-09)

*Kusum Goyal v. ITO (2010) 329 ITR 283 / 48 DTR 343 / (2011) 237 CTR 390 (Cal.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Natural justice – Objections to be considered**

Where the assessee vide its detailed reply objected to the show cause notice proposing to transfer his case for a coordinate investigation and the Commissioner passed an order under section 127(2) of the Act transferring the petitioners case without considering the reply of the assessee, the impugned order passed by the Commissioner was held to be in breach of principles of natural justice and liable to be quashed.

*Dhoot Developers (P) Ltd. v. CIT & Ors. (2010) 35 DTR 175 / 230 CTR 305 / (2011) 336 ITR 487 (Cal.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Objection – Spacing order**

Order under section 127 of the Act transferring the assessee's case without considering the written objections raised by the assessee to such transfer of its case was liable to be quashed.

*Maritime Merchants (P) Ltd. & Anr. v. CIT (2009) 25 DTR 139/226 CTR 511 (Cal.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer of cases – Opportunity of being heard – Condition for transfer**

Order under section 127 of the Act transferring the assessee's case without affording him opportunity of being heard and also without giving any reason for transfer of case except for stating that the transfer was for administrative convenience, in such case the requirements of section 127 of the Act were held to be not fulfilled and the order transferring the case was liable to be quashed.

*Anand Kumar Arya & Anr. v. CIT (2009) 26 DTR 12 / 314 ITR 324 (Cal.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer of cases – Jurisdiction of High Court**

Jurisdiction in respect of the assessee having been transferred to Delhi lock, stock and barrel under section 127(2) and all the records of the assessee also having been transferred from Lucknow to Delhi, it is only the Delhi High Court that can entertain an appeal under section 260A directed against the order passed by the Tribunal at Lucknow. (A.Y. 1996-97)

*CIT v. Sahara India Financial Corporation Ltd. (2007) 212 CTR 178 / 294 ITR 363 / 162 Taxman 357 (Delhi)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Block assessment – CIT to ITO**

Under section 127, Commissioner can transfer cases relating to block assessment to subordinate officer. (A.Ys. 1986-87 to 1996-97)

*K.V. Kader Haji v. CIT (2004) 140 Taxman 527 / 268 ITR 465 / 189 CTR 313 (Ker.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Centralisation of group cases**

Necessity of centralization of cases for coordinated and effective investigation is a valid ground for transferring cases belonging to a particular group to a single Assessing Officer.

*Rathi & Co v. UOI (2004) 137 Taxman 300 / 267 ITR 295 / 190 CTR 221 (Gau.)(High Court)*

**S. 127 : Income-tax authorities – Power to transfer cases – Reasons – Service**

Reasons for transfer of case have to be served on assessee.

*Takshila Educational Society v. Secretary, CBDT (2004) 188 CTR 601 (Delhi)(High Court)*



### **S. 127 : Income-tax authorities – Power to transfer of cases – Speaking order**

Before transferring the case of an assessee a, notice containing reasons for proposed transfer should be given to the assessee concerned, an opportunity of hearing should be granted and thereafter a speaking order considering the objections raised is to be passed. Besides, such an order has to be communicated to the assessee concerned disclosing reasons for transfer. The dicta laid down by the Apex court in *Ajantha Industries v. CBDT* (1976) 102 ITR 281 (sc) prescribing the Conditions to be fulfilled before transferring case of an assessee, may have to be followed.

*Sarita Jain (Smt) v. CIT* (2003) 261 ITR 499 / 179 CTR 543 / (2004) 134 Taxman 737 (Delhi)(High Court)

### **S. 127 : Income-tax authorities – Power to transfer of cases – Opportunity of hearing – Denial – Invalid**

Transfer of case is unsustainable where opportunity of hearing was not given to petitioner before transfer of its case.

*Melco India (P.) Ltd. v. CIT* (2003) 260 ITR 450 / 179 CTR 242 (Delhi)(High Court)

### **S. 127 : Income-tax authorities – Power to transfer of cases – Search and seizure – Valid**

Where during search and seizure operation conducted in case of 'A' and his concern at New Delhi, department found certain accommodation book entries to beneficiaries of transactions and one of such beneficiaries was petitioner, who was assessed at Bombay, transfer of case of petitioner to New Delhi could not be interfered with.

*One-up Shares & Stock Brokers (P.) Ltd. v. R. R. Singh, CIT* (2003) 129 Taxman 687 / 262 ITR 275 / 183 CTR 254 (Bom.)(High Court)

### **S. 127 : Income-tax authorities – Power to transfer of cases – Firm and partner – Separate orders**

Where HUFs were partners in a firm through their kartas and Commissioner transferred jurisdiction of partners of firm, jurisdiction over individuals (representing HUFs in firm) could not be said to have been transferred. (A.Y. 1989 to 18th Jan 2000)

*Anand Kumar Agarwal, HUF v. ACIT* (2005) 93 TTJ 949 / 146 Taxman 58 (Mag.)(Agra)(Trib.)

### **S. 127 : Income-tax authorities – Power to transfer of cases – Opportunity of hearing**

Under section 127(3) no opportunity of hearing is required to be provided to assessee while effecting transfer of case. (A.Ys. 1987-88 to 1997-98)

*Nikky Enterprises (P.) Ltd. v. Dy. CIT* (2005) 4 SOT 112 (Chennai)(Trib.)

## **C. Powers**

## **Section 131 : Power regarding discovery, production of evidence, etc.**

### **S. 131 : Income-tax authorities – Powers – Discovery – Summons**

The question before the Assessing Officer was whether the assessee is a trader or a commission agent. The Assessing Officer summoned five parties who were in the state, but could not summon other 5 which were outside the State. The five parties within the State came and gave the evidence that the assessee is a commission agent. On the basis of the fact that the other five did not give any evidence the Assessing Officer took the view that the assessee is a trader. The Supreme Court held that the fact that other five parties did not give any evidence would not allow the Assessing Officer to draw the inference that the assessee is a trader and that the assessee could not be held responsible for the non-appearance of the other 5 traders. (A.Y. 1984-85)

*Anis Ahmad & Sons v. CIT (2008) 297 ITR 441 / 214 CTR 457 / 167 Taxman 84 / 2 DTR 81 / 204 Taxation 37 (SC)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Code of Civil Procedure Code, 1908 – Deduction at source – Notice calling for certain details regarding TDS related matters – Details of information [S. 133(6)]**

The assessee challenged the notice in a writ petition saying that the said notice was treated a notice under section 133(6) and prior approval of commissioner being not obtained the notice be quashed. The High Court held that the said notice was not liable to be categorized as a notice issued under section 133(6) and under section 131 the Assessing Officer could call for the information as proceedings were pending. The writ was dismissed.

*Thaliparamba Municipal Vanitha Service Sahakarana Sangam Ltd v. ITO (2011) 225 Taxation 274 / (2010) 329 ITR 609 (Ker.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Impounding of Books – Retention – Approval**

Section 131 of the Act provides that any books, documents, etc. impounded by the Assessing Officer can be retained beyond fifteen days only with the prior approval of superior authorities. This power of extending retention period of books, documents, etc indefinitely or during the pendency of appeal would defeat the very object of impounding with an outer limit of fifteen days. Thus the extension of such retention period can only be a one time exercise and supplementing the outer limit of fifteen days for some more days depending upon the circumstances of a case. The extension of the period should be counted only in days and not in months or years as outer limit is indicated in days.

*Subha & Prabha Builders (P.) Ltd. v. ITO & Anr. (2009) 26 DTR 197 / 318 ITR 29 / 26 DTR 197 / 225 CTR 290 (Karn.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Summons**

The assessee furnished confirmations in support of the commission paid. But was not able to produce the parties for cross examination. Commission was disallowed for non production of parties. If Assessing Officer was not inclined to believe material produced by the Assessee, he should issue summons or carry on independent enquiries before making disallowance. (A.Y. 2001-02)

*CIT v. Genesis Commet (P) Ltd. (2007) 163 Taxman 482 (Delhi)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – DVO**

Section 131(1)(d) does not empower the assessing authority to issue commission to Departmental Valuation Officer. Further, provision of section 142A of the Act are not applicable where the assessment order is passed before 30-9-2004.

*CIT v. K. K. Industrial Ltd. (2006) 190 Taxation 88 (Delhi)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – DVO**

A reference to DVO under provisions of section 131(1)(d) is illegal

*CIT v. Indo-Kenyan Industrial Enterprises (2005) 149 Taxman 570 / 197 CTR 78 (Delhi)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Civil Procedure Code [S. 55A]**

Provisions of section 131(1)(d) empowers Assessing Officer with all powers under Civil Procedure Code for issuing commission, but such power cannot be equated with power under section 55A. (A.Y. 1993-94)

*Hotel Mount View v. CIT (2005) 148 Taxman 532 / 198 CTR 435 / 280 ITR 51 (Cal.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Pendency before AO**

Where no proceedings were pending before Assessing Officer on date on which he made reference to Valuation Officer, he could not have issued commission to DVO under section 131(1)(d). (A.Ys. 1989-90-91-92)

*CIT v. Nevendram Ahuja (2005) 197 CTR 462 / (2007) 290 ITR 453 (MP)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – DVO – Only u/s. 55A**

Assessing Officer has no jurisdiction to take recourse to the provisions of sections 131(1), 133 (6), and 142 (2) for obtaining any report of valuation officer, except in a case of reference made to the Valuation officer under section 55A, and that too in respect of cases enumerated therein for making a reference. (A.Ys. 1997-98-99-2000-01)

*Prakash Chand v. Dy CIT (2004) 137 Taxman 518 / 269 ITR 260 / 188 CTR 1 (MP)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – ITO (TDS) [S. 221]**

Once power under section 221 is conferred by Chief Commissioner on ITO (TDS) which is otherwise not an Assessing Officer of assessee, in respect of assessee, ITO (TDS) becomes Assessing Officer of company and can exercise power under section 131. (A.Y. 1993-94)

*CESC Ltd. v. ITO (2004) 140 Taxman 646 / (2005) 192 CTR 557 / 272 ITR 513 (Cal.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Writ – Notice**

Writ is not maintainable against notice asking assessee to attend income tax office and produce books of account.

*Anil Kumar Agarwal (Dr.) v. UOI (2004) 266 ITR 207 / 140 Taxman 80 (All.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Commission – Valuation officer**

Commission under section 131 (1) (d), read with Order XXXVI, rule 9 of the Code of Civil Procedure, 1908 can be issued to valuation Officer with regard to cost of construction of property.

*Pushpa Kumari (Smt) v. CIT (2004) 269 ITR 366 / 140 Taxman 699 (Patna)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Valuation officer**

Assistant Director (Investigation) cannot refer question of valuation of property to Valuation Officer under section 131. (A.Ys. 1990-91 and 1991-92)

*Avinash Kumar Agarwal (Dr) v. ADIT (Investigation) (2003) 184 CTR 587 / (2004) 269 ITR 388 / 135 Taxman 517 (All.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Production of evidence – Discovery, production of evidence – Jurisdiction**

For invoking the power under section 131, read with section 131(1A), the person to whom the summons is issued need not be within the jurisdiction of the officer concerned. Section 131(1A) empowers officer named therein to invoke power under section 131 if there is any likelihood of concealment of income by any person or class of persons; distributors within State of Kerala would be a class of persons within meaning of that provision.

*Amway India Enterprises v. Union of India (2003) 130 Taxman 204 / 262 ITR 428 / 182 CTR 297 (Ker.)(High Court)*

### **S. 131 : Income-tax authorities – Powers – Discovery – Survey – Inspector**

Survey conducted by Inspector is illegal - Impugned addition deleted. (A.Y. 1997-98)

*Bombay Marble Industries v. ITO (2006) 100 TTJ 927 (Jodh.)(Trib.)*

**S. 131 : Income-tax authorities – Powers – Discovery – Production of evidence – Valuation – Defect – Books of Accounts [S. 69]**

Assessing Officer cannot make reference to DVO under section 131(1)(d) for ascertaining cost of property without pointing out any defect in books of account, and additions made relying on such report of DVO is not justified. (A.Ys. 1991-92 to 1995-96)

*Birmingham Properties Ltd. v. ACIT (2006) 154 Taxman 199 (Mag.)(Kol.)(Trib.)*

**S. 131 : Income-tax authorities – Powers – Discovery – Reference to DVO**

Reference to DVO cannot be made if no proceedings are pending before Assessing Officer.

(A.Y. 1997-98 to 1999-2000)

*Umiya Co-operative Housing Society Ltd. v. ITO (2005) 94 TTJ 392 (Ahd.)(Trib.)*

**S. 131 : Income-tax authorities – Powers – Discovery – Pendency of proceedings**

Where no proceeding under the Act was pending before Assessing Officer on date of making reference to DVO, same could not be treated as a valid reference under section 131(l)(d); merely because some letters were written by a Senior Officer to Assessing Officer, it would not amount to pendency of proceedings before Assessing Officer. (A.Ys. 1990-91 to 1996-97-98-99)

*ACIT v. Baldev Plaza (2005) 93 ITD 579 / 94 TTJ 135 (All.)(Trib.)*

**Section 132 : Search and seizure**

**S. 132 : Income-tax authorities – Powers – Search and seizure – Writ – Jurisdiction [Art. 226]**

Genesis for the entire episode of search seizure and detention having taken place at Hyderabad airport, cause of action arose at Hyderabad and therefore writ petition was maintainable at Andhra Pradesh High Court.

*Rajendran Chingaravelu (Mr.) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 / 227 CTR 520 / 186 Taxman 305 / 32 DTR 129 (SC) / (2010) 1 SCC 457 / 216 Taxation 30 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Jurisdiction – Additional Director – Cash – Jewellery – Books of Account [S. 132B]**

The High Court had decided that the Additional Director (Investigation) did not have the power to issue an authorisation or warrant to the Joint Director to effect search and Seizure in purported exercise of the power under section 132 of the Income Tax Act, 1961, as he did not have any statutory authority to issue such authorisation or warrant (see (2002) 257 ITR 123), Pending an appeal to the Supreme Court, the Commissioner had issued an order under section 132B for release of cash, jewellery and books which were seized in Search conducted under section 132. The Supreme Court held that the question of the Additional Director (Investigation) to issue a

warrant or authorisation became academic and the Supreme Court was not, therefore, required to decide the matter in this appeal but kept the question of law open. (A.Y. 1997-98)

*DIT & Ors. v. Nalini Mahajan (Dr.) & Ors. (2009) 314 ITR 340 / 222 CTR 35 / 181 Taxman*  
*24 / 19 DTR 50 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Block assessment – Interest – Cost – Return of items seized [S. 158BC]**

In the course of search gold, diamond, jewellery and other ornaments were seized. In writ proceedings the High court quashing the proceedings initiated under block assessment and directing the department to return items seized with interest on value of items seized. Supreme Court in appeal by Department not deciding on whether interest was payable. Department directed to pay cost in lieu thereof.

*DGIT v. Diamondstar Exports Ltd. (2006) 156 Taxman 299 / (2007) 293 ITR 438 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Premises of public servant – Wife claiming ownership of money – Prevention of Corruption Act [S. 132(4)]**

Income tax department conducted the search operation in premises of public servant. Wife of public servant claimed the ownership of money and assets, department taxes them in hands of wife. Prosecution launched against public servant for an offence under the Prevention of Corruption Act, 1988 for possession of unaccounted money based on the recovery of huge cash and other assets by the Income Tax department from his house. The prosecution was quashed on the ground that entire amount was taxed in the hands of wife and wife has satisfactorily explained the unaccounted money hence, the appeal of the department was dismissed holding that acquittal was justified.

*Dy. Superintendent of Police, Chennai v. K. Inbasagaran (2006) 282 ITR 435 / 200 CTR 624 / 153 Taxman 326 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Assessment – Officer heading the search party – Acting as Assessing Officer – Valid [S. 120, 124, 133A, 133B, 142, 158BC]**

Income Tax Act, provisions do not impose restriction that the Assessing Officer and Officer gathering information should not be the same. There are no restrictions hence, the assessment order is valid.

*UOI & Others v. Vipin Kumar Jain & Others (2005) 9 SCC 579 / (2003) 260 ITR 1 / 174 Taxation 781 / 181 CTR 24 / 129 Taxman 59 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Block assessment – Condition precedent – Mere information from CBI – Cash found [S. 158BC]**



Mere information from CBI that cash was found in possession of individual, not "Information" for purposes of authorizing Search. A Search based on such information and consequent block assessment not valid. (A.Y. 1986-97)

*UOI v. Ajit Jain & Anr. (2003) 260 ITR 80 / 181 CTR 22 / 129 Taxman 74 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Action violates "human rights" – Officers personally liable to pay compensation**

The income-tax department conducted search and seizure operations under section 132 at the premises of the assessee when interrogation & recording of statement was conducted for more than 30 hours and till the odd hours of the night without any break or interval. The assessee filed a complaint alleging violation of human rights. HELD upholding the plea:

The Commission is of the view that the members of the raiding party may take their own time to conclude the search & seizure operations but such operations must be carried out keeping in view the basic human rights of the Individual. They have no right to cause physical and mental torture to him. If the officer-in-charge of the Interrogation/recording of statements wanted to continue with the process he should have stopped the same at the proper time and resumed it next morning. But continuing the process without any break or interval at odd hours up to 3:30 AM, forcing the applicant and/ or his family members to remain awake when it is time to sleep was torturous act which and cannot be countenanced in a civilised society. It was violative of their rights relating to dignity of the individual and therefore violative of human rights. Even die-hard criminal offenders have certain human rights which cannot be taken away. The applicant's position was not worse than that. In the opinion of the Commission, the Income Tax Department should ensure that the search & seizure operations at large in future are carried out without violating one's basic human rights.

*Rajendra Singh (Bihar Human Rights Commission) Civil writ case no. 10707 of 2011 dated*

*2-2-2012 / (2012) 205 Taxman 232 (Patna)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Warrant of authorisation – Joint names – Block assessment [S. 158BC]**

A warrant of authorization must be issued individually. If it is not issued individually, then the assessment cannot be made in individual capacity. Warrant of authorization issued in joint names of husband and wife. Individual assessment on wife alone not valid. (A. Y. 1995 to 2001)

*CIT v. Vandana Verma (Smt.) (2011) 330 ITR 533 / (2009) 227 CTR 388 / 31 DTR 214 / (2010) 186 Taxation 88 / 186 Taxman 88 (All.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Authorisation under section 132(1) – Notice under section 131(1A) after warrant under section 132(1)**

Section 131(1A) is only an enabling section and it does not in any manner effect the search and seizure operation carried on under section 132. For the purpose of judging the action of the concerned authority with respect to search and seizure, Section 132 alone has to be considered. Section 132 is an independent code itself. Materials collected before search showed that officer concerned could have reason to believe that the petitioner were in possession of money, bullion etc., wholly or partly undisclosed income or asset and therefore there was reason to believe within meaning of section 132(1). Further, after search and seizure operation, the power under section 131(1A) cannot possibly be invoked in view of its plain language and if the power is invoked, it will not in any manner affect the validity of the search and seizure operation. Section 131(1A) and 132 should be interpreted harmoniously.

*V. S. Chauhan (Dr) v. DIT (2011) 200 Taxman 413 / 62 DTR 67 / 336 ITR 533 / 245 CTR 145 (All.)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Warrant of authorisation – Relevant clause to be specified**

The opinion or the belief so recorded must clearly show whether the belief falls under clause (a) or (b) or (c) of section 132(1) of the Act. The satisfaction note should itself show the application of mind and the formation of opinion by the officer ordering the search. In order to justify the action the authority must have relevant materials on the basis of which he can form an opinion that he has reason to believe that action against a person under section 132 of the Act is needed. The belief should not be based on some suspicion or doubt.

*Visa Comtrade Ltd. v. UOI (2011) 338 ITR 343 / 243 CTR 348 / 201 Taxman 413 / 60 DTR 81 (Orissa)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Authorisation – Warrant in joint names – Validity**

What is required to be stated in search warrant is precise details about the assessee and the persons to be searched which contained in the warrants issued in these cases. The warrants authorizing search of a group of concerns by a warrant issued under section 132 is valid.

*Jose Cyriac v. CIT (2011) 238 CTR 207 / 50 DTR 292 / 336 ITR 241 (Ker.)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Warrant of authorization – Validity – Satisfaction**

Warrant of authorization issued based on material and satisfaction note by higher authority cannot be held to be invalid in writ petition under Article 226 of the Constitution of India.

*Dipin G. Patel v. DGIT (Investigation) and others (2011) 339 ITR 636 (Guj.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Appellate Tribunal – Power – Validity – Authorisation [S. 254]**

Validity of search and seizure operation could not be gone in to by the Tribunal in appeal proceedings.

*Brij Mohan Bhatia v. ITAT (2011) 64 DTR 212 / 335 ITR 580 / (2012) 246 CTR 529 (P&H)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Authorisation – Recording of satisfaction – Notice [S. 131(1A), 133(6)]**

If there is sufficient and intangible material available on record, prior to search, based on which the concerned officer has formed the requisite belief under section 132(1), merely because certain other information has been sought for by authorized officer or any other officers mentioned in section 131(1A) the same would not render the search proceedings invalid. It may be possible that notice under section 131(1A) issued after search might itself be invalid but it cannot invalidate search conducted under a valid authorization under section 132(1). In the absence of any specific allegation against any particular officer, notice under section 133(6) cannot be challenged as suffering from malafides.

*Neesa Liesure Ltd. v. UOI (2011) 64 DTR 312 / 245 CTR 634 / 338 ITR 460 / (2012) 204 Taxman 86 (Guj.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Public trusts – Exempt – Income [S. 132(5)]**

It was held, that when a public trust like the petitioner which ran a number of educational institutions had claimed exemption in view of the provisions of sec. 10(22) of the Act, the officer passing orders under section. 132(5) had to find out at least prima facie as to why and how such trust was not entitled to exemption. The order to the extent that he refused to consider the plea of the petitioner for exemption under section 10(22) of the Act was liable to be quashed.

*Anjuman Hami E-Islam and Ors. v. CIT (2009) 310 ITR 37 / (2007) 210 CTR 72 / 159 Taxman 426 (Bom.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Validity – Prima facie case – Reason to believe**

As the assessee being a non trading corporation the existence of condition regarding possession of money, bullion, jewellery or other valuable article or thing is ruled out and there being no summons or notice which the assessee failed to respond, none of the condition prescribed under section 132(1) of the Act were satisfied and therefore the warrant of authorisation was quashed by the High Court.

*Suvidha Association v. L.R. Meena, Addl. Director of Income Tax (Inv.) & Ors. (2008) 9*

*DTR*

*209 / 320 ITR 461 / 220 CTR 382 (Guj.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Retraction of Statement – Summons**

Statement made in the course of search and seizure was retracted only after issue of summons, addition cannot be made merely on the basis of statement.

*CIT v. K. Bhuvanendra and others (2008) 303 ITR 235 (Mad.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Rewards for providing information – Yielding in undisclosed income**

Merely providing information does not make any person eligible to reward unless and until the same yields certain undisclosed income.

*E. Sankaran v. UOI (2007) 288 ITR 578 / (2006) 152 Taxman 620 (Ker.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Loose papers – Presumption [S. 132(4A), 89]**

Search and seizures – Presumption under section 132(4A) – Loose papers found in search was written in English – No addition under section 69 is called for when the assessee has rebutted the presumption and when the Assessing Officer has failed to cross examine the partners or their employees who specifically state that they know no English. (A.Y. 1983-84)

*CIT v. Raj Pal Singh Ram Avtar (2006) 202 CTR 261 / (2007) 288 ITR 496 / (2005) 149 Taxman 32 (All.)(High Court)*

*Editorial : Now see S. 292C*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Material – Bias – Prejudiced**

Disclosure of materials or information to persons against whom action under section 132 is proposed, is not mandatory. Non-recovery of articles would not make search unjustified. Allegation that an Officer is prejudiced or biased would not be sufficient unless evidence is brought on the record leading to positive conclusion that bias is established.

*Takshila Educational Society v. DIT (Investigation) (2004) 141 Taxman 704 / (2005) 193*

*CTR*

*193 / 272 ITR 274 (Patna)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Common authorization – Validity**

There is no legal bar to issuance of a common authorization. The fact that the locker was in the name of other family members of the appellant with regard to which authorization for the search was also issued would not make any difference when the authorization under section 132 also contained the name of the appellant. Where the assessment in assessee's colleague who was an accused on fodder scam case (in Bihar), department had noticed certain investments had been shown in name of assessee's wife, bona fides of income tax authority to initiate search in assessee's case could not be questioned. (A.Ys. 1987-88 to 1997-98)

*Oswald (Dr) Anthony v. CIT (2004) 270 ITR 204 / 141 Taxman 520 / 192 CTR 363 (Patna)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Validity – Reason to believe**

Where there was nothing to show that any relevant material was considered by Director at the time of issuing the impugned warrant of authorisation which led to formation of reason to believe that the assessee had disclosed assets or undisclosed income, and the respondents were trying to justify the seizure on the basis of post search materials it could not be legally done. The fact that the income tax authorities issued notice under section 131 (IA) after the Search and seizure operation under section 132 would show that there was neither reason to believe nor material before the authorising officer on the basis of which he could issue a warrant under section 132.

*Anita Sahai (Dr) (Mrs) v. DIT (Investigation) (2004) 136 Taxman 247 / 266 ITR 597 / 189 CTR 79 (All.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Fixed deposit – Bank – Restraint order [S. 132(8A)]**

Revenue official can not compel the bank to encash fixed deposit and make over proceeds to him under search and seizure. Fresh restraint order on expiry of 60 days in relation to same action previously taken can not be issued in view of sub section (8A).

*Windson Electronics (P) Ltd. v. UOI (2004) 269 ITR 481 / 141 Taxman 419 / 191 CTR 542 (Cal.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Damages – State and officers not liable**

Neither State nor its officers can be held liable to pay damages for initiating an enquiry in to source of deposits and issuing prohibitory order during pendency of enquiry.

*M.V. Ganendra Nath v. UOI (2004) 266 ITR 250 / 134 Taxman 766 / 186 CTR 324 (Karn.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Release of assets – Bearer bonds**

Where bearer bonds seized from assessee were lost by Government, the Court directed the Government to refund of bearer Bonds with interest to the assessee.

*Shanti Sarap Gupta v. ACIT (2004) 190 CTR 564 / (2005) 272 ITR 463 (P&H)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Reason to believe – Material**

Material on basis of which reason to believe by Commissioner/Director is said to exist must be such material which was brought to knowledge of said authority prior to search

*Suresh Chand Agrawal v. DGIT (Investigation) (2004) 269 ITR 22 / 139 Taxman 363 / 191 CTR 274 (All.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Validity of search – Material – Release – Return of asset**

CAG report, till disposed of by concerned Legislature, cannot provide factual or legal material for forming requisite belief as to fact that an assessee has not disclosed any income or property in his return; however consideration of CAG report along with other information cannot altogether obliterate weight of other valid information.

Where seized properties/documents were in custody of authorities at Delhi and Calcutta, no suit for recovery of seized materials could be filed in any civil court subordinate to Gauhati Court.

*M.S. Associates v. UOI (2004) 270 ITR 117 / 192 CTR 125 (Gau.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Release – return of asset**

Assets seized (jewellery) could be retained by revenue where fee was still to be paid to auditor appointed under section 142(2A), even though as per order of Settlement Commission, assets were to be released after taxes and interest were fully paid.

*Pradeep Mishra v. CIT (2004) 192 CTR 412 / 192 Taxman 425 (Delhi)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Prohibitory order – Information – Reason to believe**

Where the bank accounts of persons unconnected with the petitioner and reflected in their return were kept under the prohibitory order even after 60 days, it was bad illegal and should be set a side. when places of persons of diverse activities and unconnected with each other are searched and their bank accounts are frozen by the authority to get or gather materials and information to form a belief that the assessee is avoiding tax, it is wholly outside the scope of the search and seizure.

Condition precedent for search and seizure is 'reason to believe' under section 132 which cannot be equated with 'reason to suspect'.

Likelihood of getting undisclosed things at best can be a 'reason to suspect' but does not form any 'reason to believe'.

Flourishing of business under brand name cannot be the reason to believe evasion of tax law; even requirement of block assessment ipso facto cannot be the 'reason to believe' under section 132.

*Mahesh Kumar Agarwal v. Dy. DIT (2003) 260 ITR 67 / 180 CTR 517 / 133 Taxman 529 (Cal.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Conditions precedent – Opinion not to be questioned [S. 132(1)]**



The Court has to examine whether there is rational connection between the information possessed and the opinion formed. But the Court can not sit in appeal over the opinion formed, if there are materials and opinion is formed on such material. The court would not examine whether the material possessed is adequate or sufficient to form an opinion. The court can not go in into the aptness or sufficiency of the grounds upon which the satisfaction, which is subjective, is based. If the belief is bonafide and is cogently supported, the Court will not interfere with or sit in appeal over it.

*Dy. DIT (Investigation) v. Mahesh Kumar Agarwal (2003) 130 Taxman 674 / 262 ITR 338 / 182 CTR 324 (Cal.)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Information – Mere rumor**

In absence of any material, mere rumor could not constitute information leading to search and seizure operations. Reasons recorded under section 132 were only generalities based on rumors. Entire search and seizure operation held to be illegal.

*Sushil Rastogi (Dr) v. DIT (2003) 128 Taxman 217 / 260 ITR 249 / 182 CTR 194 (All.)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Validity of search – Delhi and Calcutta company**

Where an elaborate network of companies was created in Calcutta and Delhi in which cash was being deposited and was, subsequently, transferred to 5 to 6 intermediary companies on the same day, and it was in that context that searches were conducted in some of the companies in Delhi and Calcutta including the petitioner-company, there was no infirmity or illegality in search of business premises of petitioner-company.

*Bandel Traders (P.) Ltd. v. Union of India (2003) 130 Taxman 428 / 263 ITR 431 / 185 CTR 98 (Delhi)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Validity of search – Survey**

Where necessary order to have survey of business premises of firm 'J' of which petitioners were partners had already been passed, there was no justifiable reason for having a search at residences of petitioners.

*Farshubhai Prabhurambhai Kakkad v. DIT (Investigations) (2003) 132 Taxman 350 / 264 ITR 87 / 184 CTR 720 (Guj.)(High Court)*

### **S. 132 : Income-tax authorities – Powers – Search and seizure – Validity of search – Higher production**

Seizure of incriminating documents allegedly showing actual production as high as five/six times the production recorded in the register would not justify validity and legality of search.

*Ravi Iron Industries v. DIT (2003) 264 ITR 28 / 185 CTR 8 / 134 Taxman 138 (All.)(High Court)*

*Editorial: Supreme Court set aside the order . UOI v. Agarwal Iron Industries ( 2015) 370 ITR 180 (SC)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Validity of search – Disclosure of material**

Where respondents had not disclosed what was the material or information on the basis of which Director/Commissioner entertained belief that the lockers contained valuable jewellery or other articles representing undisclosed income, search proceedings relating to lockers were to be quashed.

*Kavita Agarwal (Smt) v. DIT (Investigation) (2003) 133 Taxman 848 / 264 ITR 472 / 185 CTR 129 (All.)(High Court)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Warrant of authorisation – Common search warrant – Validity**

Common search warrant specifying names and addresses of persons residing at different places, held to be valid. (A. Y. 2005-06)

*Embassy Classic P. Ltd & Another v. ACIT (2011) 7 ITR 287 (Bang.)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Block assessment – Statement of consultant [S. 158]**

Addition of undisclosed income could not be made in the hands of assessee solely on the basis of statement of its tax consultant, more so when the statement was not voluntary statement and has been retracted.

Statement made by a third person at the time of survey or search of another concern could not be relied upon as he is not the controlling person of that concern and no corroborative evidence was found in that search.

*First Global Stock Broking (P) Ltd. v. ACIT (2008) 4 DTR 172 / 115 TTJ 173 (Mum.)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Additions – Statement retracted**

Addition made on the basis of confessional statement made before DDIT (Inv), which was subsequently retracted, and as the additions which are not supported by corroborative evidence cannot be sustained. (A.Ys. 1994-95 to 2000-01)

*ITO v. Bua Dass (2006) 155 Taxman 130 (Mag.)(Amritsar)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Use of material seized – Additions – Marriage expenses estimation**

Agreement to sell seized during search clearly acknowledging receipt of entire sale consideration by assessee including cash of ` 35 lakhs in cash. Assessing Officer was justified in making addition of that amount in the absence of any evidence produced by the assessee proving to the contrary.

As against marriage expenses declared by assessee, estimation of higher expenses by Assessing Officer without bringing any cogent material on record and making addition of difference was invalid in block assessment.

*Narendra Kumar Nagpal v. Dy. CIT (2006) 99 TTJ 1278 (Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Material found – Block assessment**

Assessing Officer having discovered the impugned cash credits only through the bank statement filed by the assessee and not on the basis of material found during the course of search, addition made in the block assessment cannot be sustained as bank statement filed by the assessee cannot be regarded to be material found as a result of search and an evidence relatable to such material.

*Madhavi Finvest (P) Ltd. & Ors. v. ACIT (2006) 99 TTJ 933 (Visakha)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – VDIS – Explained assets**

Assessee and other members of his family having disclosed the gold jewellery under the VDIS 1997 no part thereof could be treated as unexplained more so, in view of Instruction No. 1916, dt. 11th May, 1994 addition rightly deleted

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Validity – Power of ITAT**

The Income Tax Appellate Tribunal has no powers, either express or incidental/implied, to adjudicate upon the issue relating to the validity of the search conducted under section 132 while disposing appeal against block assessment but the only remedy in this matter lies in the form of seeking issue of a writ from the Hon'ble High Court.

*Promain Ltd. v. Dy. CIT (2005) 95 TTJ 825 / 95 ITD 489 / (2006) 281 ITR (AT) 107 (SB)(Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Collect evidence of tax evasion – No interparty rights**

Considering nature of power of search and seizure it cannot be said that it decides any right inter parties or between a person and the authority, power is basically to collect evidence and to prevent tax evasion

*Promain Ltd. v. Dy. CIT (2005) 95 ITD 489 / 95 TTJ 825 (SB)(Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Search warrant – Additional director**

Additional Director is not authorized to sign warrant of search.

*Surjit Tosaria (Dr.) (Mrs) v. Jt. CIT (2005) 92 TTJ 338 / 146 Taxman 32 (Mag.)(Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Search warrant – Locker in joint name – Mother can not be searched**

Warrant issued in name of assessee's husband cannot authorize search of locker which stood in joint names of assessee and her mother.

*Surjit Tosaria (Dr.) (Mrs) v. Jt. CIT (2005) 92 TTJ 338 / 146 Taxman 32 (Mag.)(Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Restraint order under second proviso to section 132(1) – Date of panchnama**

If it is not possible or practicable to take physical possession of any valuable article or thing due to its volume, weight or other physical characteristics, restraint order under second proviso to section 132(1) is issued and such restraint order is deemed to be seizure as per second proviso; in such a case, initial preparation of inventory and panchnama would be relevant for calculating period of limitation for completing block assessment and any action of authorized officer lifting the restraint order would become irrelevant.

*Sarb Consulate Marine Products (P.) Ltd. v. ACIT (2005) 97 ITD 333 / 99 TTJ 732 / (2006) 5 SOT 447 (Delhi)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Possession of evidence – Circumstantial**

In search cases as revenue is already in possession of evidence, collected during the course of search, the question of circumstantial evidence does not arise. (A.Ys. 1992-94)

*ACIT v. Omprakash & Co. (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

**S. 132 : Income-tax authorities – Search and seizure – Adjustment of assets – Tax payable**

The contention of assessee that the amount seized should have been adjusted towards existing liability of advance tax cannot be accepted, as the assets seized under section 132 cannot be dealt with unless an order is made by ITO under section 132(5), or money is appropriated in accordance with S. 132B. (A.Ys. 1989-90, 1990-91)

*ACIT v. Rajesh Cotton Co. (2003) 79 TTJ 202 / 132 Taxman 216 (Mag.)(Mum.)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Investment – Statement of Assessee – Double taxation**

Once the source of Investment has already been taxed, separate addition on account of Investment is not justified, even on basis of statement recorded under section 132(4). (A.Ys. 1987-88 to 1996-97)

*Dy. CIT v. Sanmukhdas Wadhwani (2003) 85 ITD 734 / 80 TTJ 648 (Nagpur)(Trib.)*

**S. 132 : Income-tax authorities – Powers – Search and seizure – Retraction of statement – Involuntary – Non-sustainable**

Addition made by Assessing Officer based on statement of assessee recorded under section 132(4), which was retracted successfully by adducing sufficient corroborating evidences that same was not voluntary, was held to be unsustainable. (A.Ys. 1987-88 to 1996-97)

*Dy. CIT v. Sadhuram Wadhwani (2003) 81 TTJ 839 (Nagpur)(Trib.)*

**S. 132(1)(ii)(b) : Income-tax authorities – Powers – Search and seizure – Auditor laptop**

It is open to the department to copy the data relating to the specified three entities of the assessee group from the two laptops which were seized from the possession of auditor of firm.

*DIT (Inv.) v. S. R. Batliboi & Co. & Ors. (2009) 31 DTR 187 / 186 Taxman 350 / 227 CTR 238 (SC)*

**S. 132(3) : Income-tax authorities – Powers – Search and seizure – Prohibitory order – Bank accounts**

Prohibitory order under section 132(3), cannot be issued indiscriminately and it is not automatic in a search and seizure proceedings ; prohibitory order under section 132(3) issued in respect of bank accounts without forming any belief or without any material on record to conclude that the amount deposited in such bank accounts is either wholly or partly undisclosed income of the petitioner is not sustainable in law.

*Maa Vaishnavi Sponge Ltd. v. DIT (2011) 62 DTR 209 / 244 CTR 603 / 339 ITR 413 (Orissa)(High Court)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement on oath – Delayed Retraction [S. 158BC]**

Assessee voluntarily surrendering certain amount as undisclosed income, retraction after about two years held not permissible.

*ACIT v. Hukumchand Jain (2010) 191 Taxman 319 / 47 DTR 20 / Vol. 40 Tax L.R. 144 / 236 CTR 92 / (2011) 337 ITR 238 (Chhattisgarh)(High Court)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement on oath – Disclosure of income at mid night – Additions – Retraction [S. 132]**

Statement made at odd hours cannot be considered as voluntary statement. Addition made on the basis of statement was deleted. Assessee retracted the same by giving proper explanation.

*Kailashben Manharilal Chokshi v. CIT (2010) 328 ITR 411 / (2008) 174 Taxman 466 / 14 DTR 257 / 220 CTR 138 (Guj.)(High Court)*

*Editorial:– Refer Supreme Court in Vinod Solanki (2009) 233 ELT 157 (SC) / CIT v. Omprakash K.Jain (2010) 322 ITR 362 / (2009) 24 DTR 157 / 178 Taxman 179 (Bom.)(High Court)*

*Instruction No. F. No. 286/2/2003 - IT(Inv) dt. 10-3-2003 (April 2003 AIFTP Journal P. 25)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Assessment – Additions – Retraction of Statement**

Where additions were made on the basis of statement recorded under section 132(4), which was subsequently retracted; order of Tribunal set aside.

*CIT v. Om Prakash K. Jain (2009) 213 Taxation 708 (Bom.)(High Court)*

*Editorial : Vinod Solanki v. UOI (2009) 233 E.L.T. 157(SC)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Disclosure made by partner – Opportunity**

Where mandatory requirement of affording opportunity to appellant- firm to adduce evidence in support of return and explain disclosures made in statement of its partner recorded during search had not been complied with, additions to assessee's income were not justified. (A.Ys. 1992-93-94)

*Greenview Restaurant v. ACIT (2003) 263 ITR 169 / 133 Taxman 432 / 185 CTR 651 (Gau.)(High Court).*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Income from undisclosed sources – Statement on oath – Stamp duty valuation [S. 69]**

Price of the plots paid by the assessee being consistent with the circle rate which the stamp duty has been paid and the department having not found any document or evidence to establish that the assessee has made more payment than that found recorded in his accounts, the statement made by the assessee under section 132(4) surrendering the amount could not have been taken as basis for making addition as unexplained investments in plots. Affidavit which was filed alleging the coercion and pressure upon him by the authorized officer in proceedings under section 132(4) was rejected and not considered. (A. Y. 2006-07).

*ACIT v. Raj Dhairwala (Dr) (2011) 63 DTR 113 / 142 TTJ 391 (Jodh.)(Trib.)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement on oath – Addition – Capitation fee**

The Assessing Officer made addition towards capitation fees alleged collected from the students was solely based on the sworn statement recorded under section 132(4) of a special Officer of engineering College. There was no incriminating evidence regarding the receipt of capitation fee either found or seized. What was found was the number of students who were admitted under different quotas in various courses. The Tribunal held the additions cannot be made in the hands of assessee on the basis of such evidence. The Tribunal held that the Central Board of Direct taxes had issued instructions by Circular no 286/2/ 2003 –IT, wherein it had directed that the search party should not obtain confession. So the admission made under section 132(4) by the Special Officer of the college could not be treated even as a valid piece of evidence. Accordingly the order of Commissioner (Appeals) deleting the addition was confirmed. (A.Y 2008-09).



**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Retraction of statements by two partners – Validity**

Two partners of the assessee-firm having agreed to be assessed in respect of unrecorded transportation charges detected from the records of a third party in their statements which were recorded it cannot be accepted that the surrender was extracted by the Assessing Officer under duress and without giving reasonable opportunity to the said partners to consult other partners – Revenue having not disputed the stand of the assessee that three of the five vehicles were owned by its sister-concern which was being separately assessed, income relating to said three vehicles could not be assessed in the hands of the assessee while income relating to two vehicles owned by the assessee was assessable in its hands, in the absence of anything to substantiate the claim of the assessee that the said vehicles were leased out to the sister-concern. (A.Y. 1996-97)

*ACIT v. Jagat Explosives (2006) 99 TTJ 646 / (2006) 98 ITD 50 (TM)(Jodh.)(Trib.)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement – Evidence – Retraction**

Though statement given under section 132(4) is an important piece of evidence against assessee, statement given under section 132(4) is not conclusive and person giving statement can retract same under certain circumstances; time gap between statement and retraction of statement would be one of important points to be taken into account while deciding whether statement was voluntary or not; the other circumstance is where statement was given under mistaken belief of either fact or law. (A.Y. 1992-93)

*Dy. CIT v. Bhogilal Mulchand (2005) 96 ITD 344 / 98 TTJ 108 / 3 SOT 211 (Ahd.)(Trib.)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement – Retraction**

Ultimate addition to be made in a case would depend on facts and circumstances of case and not purely on the disclosure made under section 132(4) which also stood retracted subsequently, and when there was no supportive material or evidence to justify such addition. (A.Y. 1993-94)

*ACIT v. Anoop Kumar (2005) 94 TTJ 288 / 147 Taxman 26 (Mag.)(Amritsar)(Trib.)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement – Binding**

Statements in nature of declarations covered by provisions of section 115 of Indian Evidence Act, 1872, are binding on declarant; they can neither be retracted nor do they require any corroboration; such declarations can form sole basis of assessment; assessee, having made a voluntary declaration on oath and induced departmental

authorities to act upon same at time of search, cannot be permitted to turn around later and deny truth of said declaration or representations made therein.

*Hiralal Maganlal & Co. v. Dy. CIT (2005) 96 ITD 113 / 97 TTJ 377 (Mum.)(Trib.)*

**S. 132(4) : Income-tax authorities – Powers – Search and seizure – Statement – Retraction**

Where Assessing Officer had made addition merely on basis of statement recorded under section 132(4) at time of search and at time of search no evidence or material or assets, immovable or movable properties were found which supported disclosure, and such disclosure had been retracted by assessee, addition on basis of such disclosure was not justified. (A.Y. 1993-94)

*ACIT v. Jorawar Singh M. Rathod (2005) 94 TTJ 867/ 148 Taxman 35 (Mag.)(Ahd.)(Trib.)*

**S. 132(4A) : Income-tax authorities – Powers – Search and seizure – Presumption – Not for regular assessment**

The presumption under sub-section (4A) of section 132 is for the purpose of search and seizure proceedings only and cannot be raised for framing regular assessments. Wherever the Legislature intended the presumption to extend to other proceedings, it has provided so. In section 132(4A), it has not been provided that the presumption would also be available for framing regular assessment under section 143 as well. (A.Ys. 1981-82, 1982-83)

*P. R. Metrani v. CIT (2006) 287 ITR 209 / 157 Taxman 325 / 206 CTR 290 (SC)*

**S. 132(4A) : Income-tax authorities – Powers – Search and seizure – Presumption – Debatable**

Both assessee and alleged payees having denied to have advanced or received any amount as shown to have changed hands as per the MOU found during search, no addition could be made in block assessment in the absence of any further corroborative facts, the presumptions under section 132 (4A) being a debatable one. No question of law arose out of the order of the tribunal deleting the addition.

*CIT v. Ved Prakash Choudhary (2008) 4 DTR 286 / 218 CTR 99 / 305 ITR 245 / 169 Taxman 130 (Delhi)(High Court)*

**S. 132(4A) : Income-tax authorities – Powers – Search and seizure – Presumption – Genuineness of accounting entries**

Section 132 (4A), is a rule of evidence with regard to the entries in the accounts books which will not relive of the assessee to prove the genuineness of the transaction, ie cash receipts. (A.Y. 1985-86)

*Man Mohan Gupta v. ACIT (2005) 274 ITR 179 / (2004) 189 CTR 331 (Raj.)(High Court)*

**S. 132(4A) : Income-tax authorities – Powers – Search and seizure – Presumption – Admission**

Admission made by assessee under section 132(4) during course of search is not a conclusive evidence and such admission can be used as an evidence provided corroborative evidence is there on record; where Assessing Officer had not brought any cogent material or evidence on record except retracted statement of managing director of assessee and 28 statements of dealers, which were also proved otherwise when opportunity was given to assessee, in absence of it being brought on record to show that books of account and vouchers were not correct, presumption available under section 132(4A) would be in favour of assessee and commission paid to authorized dealers as recorded in regular books of assessee would be presumed to be correct and true and no disallowance of commission could be made simply on basis of retracted statement of managing director of assessee during search. (A.Ys. 1980-81 to 1989-90)

*S.R.M.T. Ltd. v. Dy. CIT (2005) 97 TTJ 580 (Visakha)(Trib.)*

**S. 132(4A) : Income-tax authorities – Powers – Search and seizure – Presumption – Rebuttable**

Presumption under section 132(4A) is a rebuttable presumption and not a conclusive one. The burden to rebut the presumption is upon the person against whom the presumption is applicable. (A.Y. 1985-86)

*Straptex (India) P. Ltd. v. Dy. CIT (2003) 84 ITD 320 / 79 TTJ 228 (Mum.)(Trib.)*

*Prabhudayal S. Agrawal v. ITO (2003) SOT 390 (Mum.)(Trib.)*

**S. 132(5) : Income-tax authorities – Powers – Search and seizure – Order for retaining the assets seized**

The scheme of section 132(5) is different from scheme of Gold (Control) Act, 1968. The power of seizure under section 132(5) is limited to the assets found as a result of the search, where as the power under section 66 of the Gold (Control) Act is omnibus. It is not restricted by any pre conditions. In the circumstances, it must be held that the scheme of section 132(5) is different from the scheme of Gold (Control) Act 1968. *Gopaldas Udhavdas Ahuja v. UOI (2004) 268 ITR 273 / 140 Taxman 115 / 190 CTR 1 / 182 Taxation 389 / 7 SCC 33 (SC)*

**S. 132(5) : Income-tax authorities – Powers – Search and seizure – Assessment – Limitation**

Order under s. 132(5) has to preceed the regular assessment order and, therefore, the period during which the passing of order under section 132(5) is stayed by the High Court is required to be excluded for the purpose of calculating the period of limitation for completing the assessment. (A.Y. 1991-92)

*Dy. CIT v. Arjun Dass Kalwani (2006) 102 TTJ 977 / 101 ITD 337 (Jodh.)(Trib.)*

**S. 132(8A) : Income-tax authorities – Powers – Search and seizure – Prohibitory order – Period of limitation**

Sixty day's period provided under section 132(8A) is mandatory in nature which shall not be in force after the expiry of the period.

*Mahesh Kumar Agarwal v. Dy. DIT (2003) 260 ITR 67 / 180 CTR 517 / 133 Taxman 529 (Cal.)(High Court)*

### **Section 132A : Power to requisition books of account, etc.**

#### **S. 132A : Income-tax authorities – Powers – Requisition of books of accounts etc. – Amnesty scheme**

Disclosure made within stipulated time before detection would be a voluntary disclosure; seizure of assets by customs authority, in absence of any active consideration towards detection of concealment of income by income-tax authority despite the information of seizure being passed on to them, cannot ride out the element of voluntariness.

*CIT v. Bimal Kumar Damani (2003) 129 Taxman 564 / 261 ITR 87 / 180 CTR 452 (Cal.)(High Court)*

#### **S. 132A : Income-tax authorities – Powers – Requisition – Books of account – Assessment**

For invoking jurisdiction under section 153A, not only warrant of authorisation is to be issued in name of assessee but also search shall have to be necessarily conducted or in case of requisition under section 132A, has to be made. (A.Ys. 2003-04, 2004-05)

*Rajat Tradecom India (P) Ltd. v. Dy. CIT (2009) 120 ITD 48 / 124 TTJ 53 / 23 DTR 311 / 3 ITR 321 (Indore)(Trib.)*

#### **S. 132A : Income-tax authorities – Powers – Requisition – Books of account – Police**

Contraband forest produce seized by police while being transported in the trucks of assesseees were rightly requisitioned by IT authorities under section 132A(1)(c). (A.Ys. 1987-88 to 1996-97)

*Jageshwar Rosin & Turpentine Factory v. ACIT (2006) 102 TTJ 670 / 100 ITD 399 (Delhi)(Trib.)*

#### **S. 132A : Income-tax authorities – Powers – Requisition – Books of account**

Officer issuing requisition under section 132A should have information before him which at that time could lead him to have reason to believe that assets in question have either been not disclosed or will not be disclosed if not seized, meaning thereby that satisfaction in each and every case has to be looked into on basis of facts available in a given case.

*Vidit Kumar Ram Krishan Agarwala v. Dy. CIT (2005) 2 SOT 347 / 95 TTJ 117 (Agra)(Trib.)*

### **Section 132B : Application of seized or requisitioned assets**

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Moneys in the bank account is not equivalent to cash cannot be impounded**

Cash in bank is conceptually different from cash in hand and it is not permissible for the department to convert asset to cash and thereafter impound it in case of search conducted under section 132 of the Act.

The relationship between the banker and the customer is not that of trustee and beneficiary but is one of debtor and creditor.

*KCC Software Ltd. & Ors. v. DIT (Inv.) (2008) 298 ITR 1 / 214 CTR 553 / 167 Taxman 248 / 2 DTR 185 / 5 SCC 201 / 204 Taxation 42 (SC)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Delay in payment of refund – Interest**

Delay in paying refund interest payable under section 132B. (A. Ys. 1995-96 and 1999-2000 to 2003-04).

*Vishwanath Khanna v. UOI (2011) 335 ITR 548 / 244 CTR 208 / 61 DTR 318 (Delhi)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Release of seized assets – After expiry of 120 days**

Petitioner having made an application within the permissible time limit for release of seized gold ornaments and jewellery explaining the nature and source of acquisition thereof, respondents have no authority to retain these assets after the prescribed period of 120 days by rejecting the petitioner's application after the expiry period, the respondent authorities are directed to release the seized ornaments and jewellery forthwith.

*Mitaben R. Shah v. Dy. CIT (2010) 42 DTR 124 / 235 CTR 285 / (2011) 331 ITR 424 (Guj.)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Pendency of appeal before High Court**

Where there are no existing liabilities against the assessee, seized jewellery can not be re retained merely on the ground of pendency of an appeal filed by revenue before High Court against Tribunal's order partly deleting addition made to assessee's income.

*Naresh Kumar Kohli v. CIT (2004) 266 ITR 553 / 137 Taxman 438 / 187 CTR 140 (P&H)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Pendency of appeal before Tribunal**

Where pursuant to order of Commissioner (Appeals), there is no existing liability even though appeal from such order is pending before Tribunal, seized assets can not be retained unless an order of stay has been obtained from Tribunal.

*Mukund K. Shah v. DGIT (Investigation) (2004) 269 ITR 529 / 141 Taxman 381 / 191 CTR 553 (Cal.)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Release of assets – Belonging to father**

Jewellery seized from son could not be retained by the income-tax authorities if the same stood accounted for/reflected in the account books of his father's firm, as claimed by his father.

*Jiwan Lai Kapoor v. UOI (2003) 261 ITR 296 / 182 CTR 169 / 138 Taxman 25 (P&H)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Release of assets – FDRS in Bank**

FDRS in bank held by petitioners could not be seized by the Department from bank if these were genuine and petitioners were holders thereof.

*Godrej V. Patel v. UOI (2003) 261 ITR 670 / 133 Taxman 395 (Bom.)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Release of assets – Bank guarantee**

Articles in bank lockers can be released on furnishing of satisfactory bank guarantee.

*Shankuntla Agarwal (Jhunjhunwala) v. State Bank of India (2003) 131 Taxman 608 (Raj.)(High Court)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Block assessment – Interest – Computation**

Since the Assessing Officer completed the block assessment before the expiry of six months period from the date of issue of notice under section 158BC, the assessee was not entitled to any interest under section 132B(4)(b). (A.Ys. 1987-88 to 1997-98)

*Dy. CIT v. M. Bansilal Jain (2006) 101 TTJ 440 / 99 ITD 8 (Chennai)(Trib.)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Interest**

Interest under section 132B(4) is payable to assessee up to date of last order of assessment passed by Assessing Officer if more than one assessment order is passed, consequential to appellate order. (A.Ys. 1989-90 & 1990-91)

*R. M. Saboo (Dr) v. ACIT (2005) 92 ITD 532 / 92 TTJ 1078 (Hyd.)(Trib.)*

**S. 132B : Income-tax authorities – Powers – Application of seized or requisitioned assets – Adjustment**

Retained amount in P.D account in name of a partner can be adjusted against liabilities of firm, for A.Y's covered by search and not for subsequent years. (A.Y. 1990-91)

*ACIT v. Prakash Agricultural Industries (2003) 127 Taxman 51 (Mag.)(Agra)(Trib.)*



## **Section 133 : Power to call for information**

### **S. 133(6) : Income-tax authorities – Powers – Call information – Pendency of proceedings – Not mandatory**

It is not a condition for issuance of a notice under section 133(6) that any proceedings under the Act against the person with respect to whom information is called for, should be pending.

*Kechery Service Co-operative Bank Ltd. v. CIT (2003) 182 CTR 517 / 263 ITR 161 / 129 Taxman 335 (Ker.)(High Court)*

### **S. 133(6) : Income-tax authorities – Powers – Call information – Depositors above ` 50,000 – Co-operatives**

Notice under section 133(6) can be issued to co-operative societies and co-operative banks calling for particulars of various transactions, including names and addresses and other details of depositors who had deposited amounts above ` 50,000.

*M. V. Rajendran v. ITO (2003) 128 Taxman 385 / 260 ITR 442 / 180 CTR 369 (Ker.)(High Court)*

### **S. 133(6) : Income-tax authorities – Powers – Call information – Valuation office – Cost of construction**

Assessing officer cannot make a reference to valuation officer under section 133 in respect of cost of construction of property, and consequently reopen assessment on basis of such report of valuation officer. The reference can be made to valuation officer only when some enquiry or proceeding is pending before Assessing Officer.

*Jay Bee Properties (P.) Ltd. v. ACIT (2003) 84 ITD 698 / (2004) 91 TTJ 474 (Kol.)(Trib.)*

### **S. 133(6) : Income-tax authorities – Powers – Call information – Bank – Pendency of proceedings**

Assessing Officer asking for information from the bank regard to repayment of loans of certain parties. Bank challenging the authority of the Assessing authority to call for such information on the ground that no proceedings were pending. The Court held that the Assessing Officer has the power to call for the information even when no assessment was pending but after obtaining approval of the Director or Commissioner.

*Karnataka Bank Ltd. v. Secretary, Government of India & Ors. / South Canara District Central Co-Operative Bank Ltd. / Gurusiddheswar Co-Operative Bank Ltd. (2003) 172 Taxation 476 / 2003 AIR 2096 / (2002) 255 ITR 508 / 9 SCC 106 / 175 CTR 405 / 123 Taxman 219 (SC)*

### **S. 133(6) : Income-tax authorities – Powers – Call information – Pendency of proceedings**

Income tax authorities have power to issue notices under section 133(6), on any person including private banks, co-operative societies and even nationalized banks calling for information useful or relevant to any enquiry, if no proceedings are pending, such information can be called with prior approval of Director or CIT.

*The Chavassery Service Co-operative Bank Ltd. v. ITO (2010) 37 DTR 102 / 231 CTR 404 (Ker.)(High Court)*

**S. 133(6) : Income-tax authorities – Powers – Call information – Valuation officer [S. 55A]**

The assessing officer has no jurisdiction to take recourse to the provisions of sections 131(1), 133(6), and 142 (2) of the Act, for obtaining any report of Valuation Officer except in a case of reference made to valuation officer under section 55A and that too in respect of the cases enumerated therein for making a reference. (A.Ys. 1997-98 to 2000-01)

*Praksh Chand v. Dy CIT (2004) 137 Taxman 518 / 269 ITR 260 / 188 CTR 1 (MP)(High Court)*

**S. 133(6) : Income-tax authorities – Powers – Call information – Notice to bank**

Notice issued under section 133 (6) to co-operative banks to furnish list of persons who had made deposit of ` 50,000 and above, was valid.

*Alanallur Services Co-Operative Bank Ltd. v. CIT (2004) 135 Taxman 513 / 186 CTR 310 (Ker.)(High Court)*

**S. 133(6) : Income-tax authorities – Powers – Call information – Writ – Evidentially value**

Action on part of Assessing Officer under section 133(6) can be challenged only through writ; Tribunal cannot adjudicate upon validity of action of Assessing Officer under section 133(6). (A.Ys. 1996-97 & 1997-98)

Even if information is called for in contravention of legal provisions, material obtained thereby can still be used by department against persons concerned. (A.Ys. 1996-97, 1997-98)

*Gyarsi Lal Gupta & Sons v. ITO (2005) 94 ITD 329 / 95 TTJ 386 (Jp.)(Trib.)*

**S. 133(6) : Income-tax authorities – Powers – Call information – Reference to valuation officer [S. 142A]**

There is no merit in contention that reference made under section 133(6) to Valuation Officer can be deemed as if made under section 142A. (A.Y. 1990-2000)

*S. Bangarappa (HUF) v. Dy. CIT (2005) 96 TTJ 662 (Bang.)(Trib.)*

**Section 133A : Power of survey**

**S. 133A : Income-tax authorities – Powers – Survey – Retention of documents**

In case of the retention of documents beyond unreasonable period, the Registrar was directed to return the documents to the Respondents within two weeks with the liberty to take out xerox copies of all pages.

*ITO v. U. K. Mahapatra & Co. (2009) 225 CTR 131 / 186 Taxman 181 / 27 DTR 155 (SC)*

**S. 133A : Income-tax authorities – Powers – Survey – Depreciation – Genuineness of purchase of assets – Disclosure – Revised return – Retraction [S. 32]**

During survey assessee admitted that computer software and hardware were not purchased by it, and it filed a revised return withdrawing the claim of depreciation and offered to tax. Thereafter the assessee filed an affidavit retracting the statement made during the course of survey. The Tribunal recorded the finding of fact that during the course of survey neither the assets were found nor the assessee could establish names of the parties from whom computer software and computer hardware were purchased. High Court confirmed the order of Tribunal. (A. Y. 2001-02).

*B.D.P.S. Software Ltd. v. Dy. CIT (2011) 62 DTR 361 / 245 CTR 19 / (2012) 340 ITR 375 (Bom.)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Loose slips found during survey**

Assessee explain the loose slips pad found during survey, as wages paid in earlier. High Court held that as there was no iota of evidence in the form of sale bills, bank account, money or property additions cannot be made.

*CIT v. Atma Valves (P) Ltd. (2010) 216 Taxation 241 / (2011) 332 ITR 468 (P&H)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Statement made at time of survey not conclusive – Retraction – Undisclosed money**

The confession made by the assessee during survey proceedings is not conclusive and it is open to the assessee to establish by filing cogent evidence that the same was not true and correct. Retraction was made after three and half months, no defects were found in the books of accounts, primary evidence in the form of vouchers, gifts etc was produced. Merely on the basis of survey statement no addition can be made.

*ITO v. Vijay Kumar Kesar (2010) 327 ITR 497 / 36 DTR 13 / 231 CTR 165 (Chhattisgarh)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Addition on the basis of statement was deleted – Discrepancy in Stock and Cash**

Statement made under section 133A is not conclusive proof. Assessee was able to explain discrepancy in stock by production of relevant record. Addition was deleted. (A.Y. 2005-06)

*CIT v. Dhingra Metal Woks (2010) 328 ITR 384 / 48 DTR 230 / 236 CTR 621 / (2011) 196 Taxman 488 (Delhi)(High Court)*

**S. 133A : Income-tax authorities – Survey – Powers of ITO (TDS) – Summary [S. 131]**

Prior to 1999, the I.T.O. (T.D.S.) was not empowered to issue notice under section 131 of the Act with respect to the T.D.S. return filed by the assessee. The power to issue notice under section 131 of the Act was only given to T.D.S. officials by the circular issued by C.B.D.T. in 1999. Accordingly, in absence of appropriate authority being given under the statute to the T.D.S. officials, action of the officer, to issue notice under section 131 of the Act was held to be without jurisdiction.

*CESC Ltd. & Anr. v. I.T.O. (TDS) & Ors. (2007) 201 Taxation 105 (Cal.)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Assessment – Addition to income**

Assessing Officer can make additions on basis of materials collected during course of illegal survey.

*CIT v. Kamal & Co. (2008) 168 Taxman 246 / (2007) 213 CTR 200 / (2009) 238 ITR 129 / (2008) 2 DTR 382 (Raj.)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Impounding of documents – Recording of reasons [S. 131(3)]**

Impounding of documents during a survey under section 133A, purportedly under section 131 (3), without recording any reasons, is not permissible.

*Rumena Rahman (Mrs) v. UOI (2004) 265 ITR 16 / 135 Taxman 292 / 187 CTR 50 (Gau.)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Statement – Evidentiary value**

The statement elicited during the survey operation has no evidentiary value. (A.Y. 1998-99, 2000-01)

*Paul Mathews & Sons v. CIT (2003) 129 Taxman 416 / 263 ITR 101 / 181 CTR 207 (Ker.)(High Court)*

**S. 133A : Income-tax authorities – Powers – Survey – Statement – Disclosure – Retraction – Addition**

Addition cannot be made solely on the basis of statement recorded during survey in absence of any corroborative evidence and supporting material in case wherein it has been retracted. (A. Y. 2007-08)

*ACIT v. Prabhu Dayal Kanojia (2011) 8 ITR 45 / 137 TTJ 4 (UO) (Jp.)(Trib.)*

**S. 133A : Income-tax authorities – Powers – Survey – Unexplained investment – Reports of facts – Explanation and reconciliation [S. 69]**

The reports of facts collected at time of survey are always subject to explanation and reconciliation by assessee which can be explained either at the time of survey or after survey before Assessing Officer at the time of assessment, therefore, merely on the

basis of that some differences were found at the time of survey in stock addition cannot be made automatic.

(A. Y. 2005-06)

*Chawala Brothers (P) Ltd. v. ACIT (2011) 43 SOT 651 (Mum.)(Trib.)*

**S. 133A : Income-tax authorities – Powers – Survey – Assessment – Addition – Disclosure in the course of survey – Retraction – Assessment [S. 143]**

Assessee disclosed an amount of ` 25 lakhs vide letter dated 11-2-2005, which was submitted after two months from the date of survey in the light of various documents and papers found at the time of survey. In the return of income the said amount was not disclosed. The Assessing Officer rejected the book results and made addition of ` 25 lakhs. The Tribunal also confirmed the addition on the ground that it was not a case of the assessee that the assessee has wrongly understood the contents of the documents, burden on assessee to explain the contents of the documents as the assessee has not discharged the burden addition was justified. (A.Y. 2005-06)

*Seasons Catering Services (P) Ltd. v. Dy. CIT (2010) 127 ITD 50 / 134 TTJ 554 / 43 DTR 397 (Delhi)(Trib.)*

**S. 133A : Income-tax authorities – Powers – Survey – Addition on the basis of statement – Cross examination [S. 131]**

Addition on the basis of admission during the survey without any supportive material not sustainable, further there was no substantive evidence on record except statement of assessee and third party in support of addition of ` 25 lakhs and ` 2.55 crores made by Assessing Officer for the Asst. Year 2007-08 and 2008-09 respectively. Non providing of cross examination of witness clearly constitutes infraction of the right conferred on the assessee and that vitiated the order of the assessment made against the assessee. (A.Ys. 2007-08, 2008-09)

*B. Ramakrishnaiah v. ITO (2010) 46 DTR 406 / 134 TTJ 600 / 39 SOT 379 (Hyd.)(Trib.)*

**S. 133A : Income-tax authorities – Powers – Survey – Disclosure – Statement**

Confession made during survey cannot be the sole basis for making an addition, without considering the explanation of assessee.

*Babulal Gangwal, v. Addl. CIT (2010) Tax World December, 10 Vol. XLIV, Part-6, P. No. 222 (Jp.)(Trib.)*

**S. 133A : Income-tax authorities – Powers – Survey – Addition on the basis of statement – Income from undisclosed source [S. 69, 145(3)]**

Without any material to correlate, additional income surrendered during survey under section 133A, to any discrepancy, addition cannot be made, when surrender is retracted. (A.Y. 2003-04)

*Dy. CIT v. Premsons (2010) 37 DTR 150 / 130 TTJ 159 (Mum.)(Trib.)*

### **S. 133A : Income-tax authorities – Powers – Survey – Income**

No addition could be made on account of undisclosed profits solely on the basis of the statement of a partner of the assessee firm recorded at the time of survey operation under section 133A which has been retracted and the computer printouts which clearly indicate that the figures of receipts are approximate amounts, and the Assessing Officer has failed to prove that the actual receipts were that recorded in the computer sheet and not as declared in the audited books of account. (A.Y. 1999-2000)

*ACIT v. A.T. Associates (2006) 99 TTJ 74 (Nagpur)(Trib.)*

### **S. 133A : Income-tax authorities – Powers – Survey – Surrender – Material**

Partner of the assessee-firm having surrendered the loss claimed by the assessee in the return at the behest of survey party, was not a voluntary surrender, and the assessee having withdrawn the same soon thereafter, addition could not be sustained in the absence of any material or independent evidence on record to justify the additions. (A.Ys. 1995-96 to 1997-98)

*ITO v. Vardhman Industries (2006) 99 TTJ 509 (Jodh.)(Trib.)*

### **S. 133A : Income-tax authorities – Powers – Survey – Income tax inspector – Power to record statement – Evidentiary value**

Income-tax Inspector is not income-tax authority for purpose of recording statement of any person in course of survey proceedings under section 133A; however, even if statement is prepared by Income-tax Inspector, assessee would still be liable to explain discrepancy in stock inventory prepared in course of survey even though statement recorded was non est, because incriminating material found in course of illegal search is an admissible evidence. (A.Y. 1997-98)

*Harshad L. Thakker v. ACIT (2005) 3 SOT 277 (Mum.)(Trib.)*

### **S. 133A : Income-tax authorities – Powers – Survey – Sworn statement – Evidentiary value**

Sworn statement made by assessee during course of survey has no evidentiary value since Assessing Officer is not authorized to administer oath and record sworn statement. (A.Ys. 1996-97 to 2000-01)

*Kurunnem Velil Financiers (P.) Ltd. v. Dy. CIT (2005) 2 SOT 402 (Cochin)(Trib.)*

### **S. 133A : Income-tax authorities – Powers – Survey – Disclosure – Addition**

Where pursuant to survey operation carried out at assessee's premises, he disclosed certain additional income, and subsequently assessee filed letter of retraction to said disclosure and no evidence/material was found to prove existence of such disclosed income or earning of such income in hands of assessee, no addition could be made on basis of disclosure made by assessee under section 133A. (A.Ys. 1993-94 & 1994-95)

*Ashok Manilal Thakkar v. ACIT (2005) 97 ITD 361 / 99 TTJ 1262 (Ahd.)(Trib.)*

## ***D. Disclosure of information***



## **Section 138 : Disclosure of information respecting assessees**

### **S. 138 : Income-tax authorities – Disclosure of information – Partner – Request for copies**

When a existing partner, competent to sign and verify return, applies for certified copy of profit and loss account of partnership firm or assessment order, same shall be deemed to be made on behalf of assessee-firm and income tax authorities can not refuse to furnish a copy quoting section 138. (A.Ys. 1997-98, 1999-2000)

*K. Muthukrishnan v. ITO (2003) 264 ITR 766 / 138 Taxman 37 / (2004) 187 CTR 55 (Mad.)(High Court)*

### **S. 138 : Income-tax authorities – Disclosure of information – Privilege – Evidence – Requisition by Civil Court [S. 123, 124]**

If income-tax authorities have not claimed privilege, trial court on its own would not be justified to come to a finding that the documents called for by one of the parties could not be summoned from the income-tax authorities because of the restrictions imposed under sections 123 and 124 of the Evidence Act. It does not prohibit the Income tax authorities from producing the assessee's documents before the civil court when directed by the civil court to do so.

*Debasis Sahu v. Nabeen Chandra Sahu (2003) 260 ITR 426 / 181 CTR 427 / 133 Taxman 921 (Orissa)(High Court)*

### **S. 138 : Income-tax authorities – Disclosure of information – Documents sought by non assessee – Trial Court**

Where documents were not sought by assessee but a non-assessee and both parties had adduced sufficient evidence, trial court was justified in not summoning documents.

*New Deccan Hall v. Delight Electrical Works (2003) 260 ITR 337 / 189 CTR 42 / 135 Taxman 150 (AP)(High Court)*

## **CHAPTER XIV**

### **Procedure For Assessment**

## **Section 139 : Return of income**

### **S. 139 : Assessment – Return – Prescription of forms – Non-availability of Forms**

It is for the statutory authority and not for the Court to decide whether the income tax return should be filed in a particular form. The Court cannot do so even if there is paucity of time and the requisite form is not available. (A.Y. 2007-08)

*UOI v. Income Tax Bar Association, Lucknow (2010) 324 ITR 80 / (2008) 215 CTR 297 / (2009) 169 Taxman 38 / (2008) 4 DTR 173 (SC)*

**S. 139 : Assessment – Return – Revised return – Deduction – After return filed**

There is no provision under the Income-tax Act, 1961 allowing the assessee to modify a return without filing the revised return. Therefore, no deduction can be claimed at the assessment stage. It can however be claimed at an appellate stage. (A.Y. 1995-96)

*Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 / 157 Taxman 1 / 204 CTR 182 / 195 Taxation*

*228 / (2006) 157 Taxman 1 (SC)*

*Editorial : This decision seem to be confined only to claims such as under chapter VI-A. It does not apply to deductions to which assessee is admittedly entitled in law, but not claimed in the Return.*

**S. 139 : Assessment – Return – Revised return – Amalgamation of companies – BIFR –Unabsorbed business loss – Sick company – The SICA, 1985 [S. 72A, 80]**

BIFR can specify date from which its scheme becomes effective. Amalgamation in January 1994, Scheme sanctioned by BIFR with effect from February 1, 1992. The assessee filed revised return on 31-3-1994, claiming unabsorbed business loss of sick company. Return held to be valid. Special provisions of the Act has overriding effect over Income Tax Act. (A. Y. 1992-93)

*CIT v. J. K. Corporation Ltd. (2011) 331 ITR 303 / 239 CTR 196 / 52 DTR 172 (Cal.)(High Court)*

**S. 139 : Assessment – Return – Revised return – Intimation – Revision [S. 143(1), 264]**

Assessee filed the original return of income showing the capital gain on full value of consideration of deemed transfer. The Assessing Officer passed the intimation under section 143(1), accepting the return. Assessee filed the revised return within one year of end of assessment year. Assessing Officer has not passed the order on the basis of revised return. Assessee filed the revision petition under section 264 before the Commissioner. Commissioner rejected the petition. On a writ petition, the Court held that, once the revised return is filed within the period of limitation, it is incumbent on the Assessing Officer to process and decide the same within statutory period of limitation and by not doing so the Department cannot be permitted to gain benefit thereof. Accordingly the petition was allowed. (A. Y. 1998-99).

*Saiyad Umarmiya Usmanmiya v. ITO (2011) Tax. L. R. 971 (Guj.)(High Court)*

**S. 139 : Assessment – Return – Loss return – Board's power to condone delay [S. 119(2)]**

Board has the power under section 119(2)(b) to condone the delay in filing the loss return and allow carry forward. (A.Y. 2004-05)

*Lodhi Property Company Ltd. v. Under Secretary, Department of Revenue (2010) 234 CTR 99 / 323 ITR 441 / 191 Taxman 74 / 43 DTR 120 (Delhi)(High Court)*

### **S. 139 : Assessment – Return – Defective Return – Signature – Verification**

Where the return did not bear the signature of the assessee and had not also been verified by her, the return was an invalid return as it had a glaring inherent defect which could not be cured in spite of the deeming effect of section 292B.

*CIT v. Harjinder Kaur (2009) 310 ITR 71 / (2009) 222 CTR 254 / 180 Taxman 23 / 19 DTR 211 (P&H)(High Court)*

### **S. 139 : Assessment – Return – Revised Return [S. 139(5)]**

Return filed under section 139(4) cannot be revised under section 139(5). (A.Y. 1979-80)

*Nelco (India) P. Ltd. v. CIT (2005) 142 Taxman 380 (All.)(High Court)*

### **S. 139 : Assessment – Return – Signing of return – Accounts executive**

Where return originally filed by assessee society was signed by its accounts executive and not its principal officer (General Manager), as by conduct assessee - society had accepted return filed under signatures of accounts executive, by implication, it would be treated as having been signed in capacity as agent of General Manager i.e., Principal Officer, and as such return was valid and assessee was entitled to carry forward loss claimed in such return. (A.Y. 1979-80)

*CIT v. Rudra Bilas Kisan Sahkari Chini Mills (2005) 145 Taxman 497 / 197 CTR 397 / (2006) 280 ITR 249 (All.)(High Court)*

### **S. 139 : Assessment – Return – Revised return – Loss [S. 80]**

Section 139 (3) make it clear that a return of loss filed under section 139(3) may be filed within time allowed under section 139 (1). Once such return is filed all other provisions of the Act shall apply as if such return has been filed under section 139 (1), hence return filed under section 139(3) is deemed to be a return filed under section 139 (1). Section 139 (3) makes it clear that all other provisions of the Act shall apply to such return as if it were under section 139 (1). Accordingly when the return filed was under section 139 (5), provisions of section 139 (3) and section 80 is applicable. (A.Y. 1991-92)

*CIT v. Periyar District Co-op Milk Producers Union Ltd. (2004) 137 Taxman 364 / 266 ITR 705 / 190 CTR 272 (Mad.)(High Court)*

### **S. 139 : Assessment – Return – Defective – Particulars of bank account [S. 54F]**

Assessee's failure to give particulars of bank account for the purpose of making a claim under section 54F; return can not be treated as defective. (A.Y. 1989-90)

*O.P. Gupta v. CIT (2004) 141 Taxman 327 / 190 CTR 391 / (2005) 272 ITR 387 (P&H)(High Court)*

**S. 139 : Assessment – Return – Defect – Non-signing by proper Person – Not invalid**

Defect of not signing the return by proper person makes the return defective and not invalid. The matter restored to remove the defect. (A.Y. 1997-98)

*Morgan Stanley Asset Management INC v. Dy. CIT (2010) 130 TTJ 636 / 39 DTR 240 / 5 ITR 393 / 33 SOT 452 (Mum.)(Trib.)*

**S. 139 : Assessment – Return – Defect – Chance to cure defect [S. 292B]**

Assessing officer is duty bound to give a chance to assessee to rectify defect in return. (A.Y. 1997-98)

*Morgan Stanley Asset Management Inc v. Dy. CIT (2009) 33 SOT 452 / (2010) 130 TTJ 636 / 39 DTR 240 / 5 ITR 393 (Mum.)(Trib.)*

**S. 139 : Assessment – Return – Non-est return – Assessing Officer without jurisdiction**

Return filed with Assessing Officer having no jurisdiction over assessee on date of filing of the Return, could not be treated as valid, and same can not be acted upon by Assessing Officer nor he can frame assessment thereupon. (A.Y. 2003-04)

*Paint Trade Linkers v. ACIT (2008) 171 Taxman 30 (Mag.)(Luck.)(Trib.)*

**S. 139 : Assessment – Return – Revised return – Time Limit**

During the course of assessment proceedings, the assessee claimed long-term capital loss by filing revised return. Applying the provisions of section 139(3), the Assessing Officer rejected the claim. The Tribunal noted that the original return as well as the revised return had been filed within the time limit and hence allowed the appeal. (A.Y. 2001-02)

*Harileela Investrade Pvt. Ltd. v. ITO, ITA No. 2946/Mum/2004, Bench – I, dt. 25-4-2007, BCAJ p. 681, Vol. 39-D, Part 6, September 2007. (Mum.)(Trib.)*

**S. 139 : Assessment – Return – Audit report – Carry forward loss [S. 80]**

Original return filed by the assessee in the prescribed form and verified in the prescribed manner along with non-audited accounts and tax audit report was a valid return and consequently the return filed subsequently disclosing larger loss was a valid revised return under section 139(5), entitling the assessee for carry forward of loss. (A.Y. 1989-90)

*ACIT v. Pratap Rajasthan Special Steels Ltd. (2006) 99 TTJ 67 (Jp.)(Trib.)*

**S. 139 : Assessment – Return – Revised return – Infirm**

Revised return filed by the assessee within the prescribed time-limit could not be ignored merely on the ground that the original return was already processed under section 143(1). There is no restriction that revised return cannot be filed for showing loss for the first time. (A.Y. 2001-02)

*Bhanuben Chimlal Malavia (Smt.) v. ITO (2006) 100 TTJ 337 (Rajkot)(Trib.)*

**S. 139 : Assessment – Return – Form 6 – Extension applied – Interest for Late Filing**

**[S. 139(8)]**

Where delay in filing of the return was less than month and the assessee had also filed Form no 6 to get extension of time for filing of return, there was no default and no interest under section 139 (8) could be charged from the assessee. (A.Y. 2001-02) *Addl. CIT (Asst.) v. Hindalco Industries Ltd. (2005) 4 SOT 757 (Mum.)(Trib.)*

**S. 139 : Assessment – Return – Defective Return – Not signed by proper person**

A return not signed by proper person is a defective return and such defect can be cured.

(A.Y. 1991-92)

*ACIT v. Prime Securities Ltd. (2005) 95 ITD 249 / 96 TTJ 553 (Mum.)(Trib.)*

**S. 139 : Assessment – Return – Interest for late Filing of Return – Opportunity of hearing**

Opportunity must be given to assessee to show cause why Interest should not be levied, or satisfy the Assessing Officer that there is a case for waiver or reduction of Interest.

(A.Y. 1988-89)

*Shankerlal Nebhumal (HUF) v. Dy. CIT (2003) 80 TTJ 69 / (2004) 2 SOT 671 (Ahd.)(Trib.)*

**S. 139 : Assessment – Return – Waiver of interest – Rule 40 and 117A**

Waiver of Interest under rules 117A and 40 can be done only if the case falls under any of the circumstances mentioned therein. (A.Y. 1987-88)

*H.P. State Industrial Dev. Corpn. Ltd. v. Addl. CIT (2003) 87 ITD 551 (Chd.)(Trib.)*

**S. 139 : Assessment – Return – Foreign company – Income not taxable in India – Capital gains – India-Netherlands DTAA [Article 13(5)]**

Applicant transferred 50% shares of its Indian subsidiary to a company incorporated in Switzerland. It submits that such transfer would be governed by said Article of the DTAA and would be taxable only in Netherlands as purchasers are residents of Switzerland. It further submits that it is not required to file a return of income as the said section is merely a machinery section that would apply only where the transaction entered into by the foreign assessee is liable to be taxed in India. Revenue concedes that transfer would not be taxable in India but urged that the whole exercise, from start to finish, of determining the taxability or otherwise of the transfer is carried out under the Act and this requires compliance to the machinery provisions of said section - AAR accepted the views of learned CIT and further observed that as per the third proviso of said section, every company is required to file its return of income, whether it has an income or a loss. Instead of causing

inconvenience to the applicant, the process of filing of return would facilitate the applicant in all future interactions with the Income tax department.

*VNU International B.V., Netherlands (2011) 240 CTR 12 / 198 Taxman 454 / 334 ITR 56 / 53 DTR 189 (AAR)*

### **S. 139(3) : Assessment – Return – Applicability – AOP**

Sec 139(3) applies to all persons including AOP. (A.Y. 1995-96)

*Birla Tyres v. Jt. CIT (2003) 80 TTJ 915 / (2004) 88 ITD 1 (TM)(Kol.)(Trib.)*

### **S. 139(5) : Assessment – Return – Revised return – Intimation [S. 143(1)(a)]**

An intimation under section 143(1)(a) of the Act cannot be equated with an assessment framed under section 143(3) of the Act and the Assessing Officer cannot refuse to process the revised return and modify the intimation in accordance with section 143(1B) of the Act. (A. Y. 1995-96).

*CIT v. Himagiri Foods Limited (2011) 333 ITR 508 / 231 CTR 470 / 38 DTR 201 (Delhi)(High Court)*

### **S. 139(5) : Assessment – Return – Revised return – Limitation – Sanction of Merger Scheme**

Once the scheme of amalgamation had been sanctioned with effect from a particular date, it is binding on every one including statutory authorities and the only course open to the Revenue would be to act as per the scheme sanctioned. The tax authorities are bound to take note of state of affairs of the applicant as on the effective date i.e. 1st Jan., 2004 and a revised return filed reflecting the same cannot be ignored on the strength of section 139(5). (A.Ys. 2001-02 to 2004-05)

*Pentamedia Graphics Ltd. v. ITO (2010) 236 CTR 204 / 43 DTR 256 (Mad.)(High Court)*

### **S. 139(5) : Assessment – Return – Revised return – Change in method of valuation**

The assessee revised its return pursuant to a resolution passed subsequent to the close of the previous year adopting change in method of valuation only for the reason that the new method is more realistic. The Court held that such a revision is not a good reason for the purpose of revised return. (A.Y. 1979-80)

*Golden Insulation and Engg. Ltd. v. CIT (2007) 165 Taxman 105 / 212 CTR 466 / (2008) 305 ITR 427 (Delhi)(High Court)*

### **S. 139(5) : Assessment – Return – Revised return – Method of accounting**

Assessee having filed the original return declaring income on the basis of percentage completion method i.e., method followed by the Assessing Officer in the earlier years to make the assessment, and later filed the revised return on the basis of completed contract method to maintain consistency with the original method followed by it and accepted by Tribunal, there was a bona fide omission and wrong statement in the



original return and consequently the revised return filed by the assessee was in accordance with section 139(5). (A.Ys. 1997-98 to 1999-2000)

*ACIT v. Tata Housing Development Co. Ltd. (2010) 48 DTR 452 / (2011) 139 TTJ 8 / 45 SOT 9 (Mum.)(Trib.)*

**S. 139(5) : Assessment – Return – Revised return – Beyond permissible time**

A. Y. 1994-95 having ended on 31st March, 1995, revised return filed by the assessee on 5th July, 1996 was beyond the prescribed time-limit and was not valid. (A.Y. 1994-95)

*Budhewal Co-operative Sugar Mills v. Jt. CIT (2006) 101 TTJ 548 (Chd.)(Trib.)*

**S. 139(8) : Assessment – Return – Interest – Demand notice – No direction in order [S. 217]**

Where interest calculation was shown in the computation form and demand notice signed by the Assessing Officer, even though there was no direction to charge interest given in the assessment order it was held that interest under section 139(8) & 217 of the Act was rightly charged.

*CIT v. Vijay Yarn & Textile Pvt. Ltd. (2007) 197 Taxation 527 / (2008) 303 ITR 219 (P&H)(High Court)*

**S. 139(8) : Assessment – Return – Interest for Late Filing – Regular assessment [S. 215, 217]**

In view of Supreme Court in *K. Govindan & Sons v. CIT (2001) 247 ITR 191 (SC)*, assessment made for the first time under section 147 is a regular assessment and therefore interest under section 139 (8), 215, and 217 is leviable in such cases. (A.Y. 1984-85)

*CIT v. R. Kamalam (2003) 130 Taxman 388 (Mad.)(High Court)*

**S. 139(8) : Assessment – Return – Interest – Waiver [Rule 117A]**

The ITO could not reject the explanation for delay in filing the return for the purpose of waiver of interest under rule 117A, of 1962 Rules, when the same had been accepted for the purpose of penalty proceedings. (A.Y. 1974-75)

*Leader Engineering Works v. ITO (2003) 264 ITR 65/ 185 CTR 277 / 134 Taxman 257 (P&H) (High Court)*

**S. 139(8) : Assessment – Return – Interest – Regular assessment**

Interest under section 139(8) could not be charged in the case of reassessment. (A.Y. 1984-85)

*Uttam Mitra v. ACIT (2006) 100 TTJ 632 (Cuttack)(Trib.)*

**S. 139(9) : Assessment – Return – Defective return – Signing secretary [S. 140A, 292B]**

A return of income of a Company which is signed by the secretary of the company and not by the managing director as required under section 140 of the Act can be

cured by virtue of section 139 (9) read with section 292B of the Act. Thus, once the defect is removed by the assessee the return should be considered as a valid return under the scheme of the Act. The Court further, held that once the defect is removed by the assessee it will relate back to the original date of filing return. (A.Y. 1991-92) *Prime Securities Ltd. v. Varinder Mehta, ACIT & Anr. (2009) 28 DTR 119 / 226 CTR 247 / 317 ITR 27 / 182 Taxman 121 (Bom.)(High Court)*

**S. 139(9) : Assessment – Return – Signature – Signed by managing director [S. 140, 292B]**

Return of income which is not signed by the person authorised under the Act has to be treated as defective and is amendable to the provisions of sections 292B and 139(9) of the Act. Thereafter, when the assessee files another return duly signed by the authorised person, the return so filed by the assessee cannot be treated as non est return and the refund thereon cannot be denied to the assessee. (A.Ys. 2000-01 to 2002-03)

A return of income is required to be signed mandatorily by managing director of company and in his absence, due to certain reasons, by any director thereof. A return of income which is signed and verified by a person other than one authorised under Act, shall be treated to be defective which would be amenable to provisions of sections 292B and 139(9) and assessing authority, in such circumstances, shall provide an opportunity to assessee to rectify that defect under section 139(9) before treating same to be invalid and non est.

Query : Can this principle be extended to appeal memo signed by person other than MD. See case of 287 ITR 321 post.

*Hind Samachar Ltd. v. UOI & Ors. (2008) 5 DTR 88 / 217 CTR 637 / 330 ITR 266 / 169 Taxman 302 (P&H)(High Court)*

**S. 139(9) : Assessment – Return – Defective – Computation – Assessment**

Merely because computation of income does not tally with profit as per audited profit and loss account, return can not be treated as defective under section 139 (9). Whether there is income or loss, Assessing Officer is bound to finalise assessment for the assessment year, in which the return is filed, not to do so would be travesty of justice. (A.Y. 1992-93)

*Flotech Welding & Cutting Systems Ltd. v. Chander Singh (2004) 137 Taxman 521 / 271 ITR 300 / (2004) 188 CTR 268 (Bom.)(High Court)*

**S. 139(9) : Assessment – Return – Defective return – Extension of time to cure defect**

The Assessee filed return of loss based on un-audited accounts which was considered as defective. The Assessing Officer asked to file audited accounts within 15 days and rectify the defect. The Assessee requested for two months time and filed the accounts within the time requested for. The Assessing Officer without rejecting the Assessee's request, treated the original return as defective return and the revised return filed as

belated return and rejected the loss. Held that the Assessee's request for extension of time was if rejected, the order of rejection was never intimated to the Assessee. Thus the original return was treated as valid return and revised return also valid. (A. Y. 1990-91)

*ITO v. PIC (Gujarat) Ltd., (2008) 199 TTJ 410 / 13 DTR 474 / (2009) 121 ITD 87 (Ahd.)(Trib.)*

### **S. 139(10) : Assessment – Return – Below taxable limit – Return not filed – Depreciation**

In a case where assessee has not filed a return of Income, it does not mean that his Income is below taxable limit, and that any process of assessment has taken place.

Wordings of Sec 139(10) precludes the existence of the Return, and assessment cannot be presumed, and it would mean that depreciation was not actually allowed.

*G.C. Associates v. Dy. CIT (2003) 80 TTJ 539 / (2004) 2 SOT 136 (Pune)(Trib.)*

### **Section 140 : Return by whom to be signed**

#### **S. 140 : Assessment – Return to be signed – Not signed by managing director – Curable defects [S. 292B]**

Return of Company not signed by Managing Director but by person authorized by Board resolution, defect curable under section 292B. (A. Ys. 2001-02 and 2002-03).

*Hind Samachar Ltd. v. UOI (2011) 330 ITR 266 / (2008) 217 CTR 637 / 169 Taxation 302 / 5 DTR 88 (P&H)(High Court)*

#### **S. 140 : Assessment – Return to be signed – Company secretary – Curable defect**

Signing of return by secretary was curable irregularity and when managing director had signed and filed the return, it relates back to date when the original return was filed under the signature of company secretary.

*CIT v. Haryana Sheet Glass Ltd. (2010) 188 Taxman 7 / (2009) 318 ITR 173 (Delhi)(High Court)*

#### **S. 140 : Assessment – Return – Signed by secretary – Curable aspects**

The Assessing Officer treated a return as invalid for it was signed by the Secretary and not the Managing Director. The Court held that such an error can be removed by submission of a fresh return under the signature of the Managing Director.

*Bharat Nidhi Ltd. v. CIT (2007) 165 Taxman 314 / (2008) 306 ITR 230 (Delhi)(High Court)*

#### **S. 140 : Assessment – Return to be signed – Commissioner (Appeals) – Defect in memo of appeal – Rule 45**

The assessee is a limited company. The Assessing Officer passed assessment order under section 143(3) of the Income-tax Act, 1961 for the Asst. Years 1990-91 and 1995-96. Thereafter, assessee filed appeal before CIT(A). However, both the appeal

memos were signed by the assessee's advocate who was not authorized to sign the same. Subsequently, the CIT(A) dismissed the said appeals on the ground that since appeal memo are not signed by the authorized signatory, they are not maintainable. The ITAT allowed assessee's appeals and directed CIT(A) to permit the assessee to sign the memos of appeals so as to make the same in conformity with the requirement of section 146 r. w. Rule 45 and relied on Bombay High Court's judgments in the cases of *Dayabhai Gidshardas v. Babaji Kotwal reported in AIR 1953 Bom. 28* and *Kaluram Pannalal v. Jagannath Kalna reported in AIR 1963 MP 151* in which it was held that not signing of the memo of appeal by the assessee can be regarded as an irregularity and not illegality.

Income Tax Department filed appeals to High Court under section 260A of the Act which were dismissed in limine. (A.Ys. 1990-91, 1995-96)

*CIT v. Hope Textiles Ltd. (2006) 287 ITR 321 / 206 CTR 82 / (2007) 159 Taxman 287 (MP)(High Court)*

### **Section 140A : Self-assessment**

#### **S. 140A : Assessment – Self assessment – Penalty – Failure to pay self assessment tax**

Whether mandatory or discretionary – Failure to pay self assessment tax within a stipulated period based on a reasonable cause – Penalty under section 140A(3) is discretionary.

(A.Y. 1983-84)

*Ramchandra Pesticides (P) Ltd. v. CIT (2006) 204 CTR 133 / 285 ITR 45 / 155 Taxman 111 (Ker.)(High Court)*

#### **S. 140A : Assessment – Self assessment – Failure to pay – Continuing default – Opportunity**

Non payment of self assessment tax is a continuing default. Assessing officer should give reasonable opportunity to the assessee before imposing penalty. (A.Y. 1981-82)

*Rajesh Kumar v. Dy CIT (2004) 137 Taxman 493 / 217 ITR 494 / 186 CTR 663 (Delhi)(High Court)*

#### **S. 140A : Assessment – Self assessment – Block assessment – Application of provision**

##### **[S. 158BC]**

Provisions of section 140A (as amended with effect from 1-6-1999), through which Legislature brought a section of assessee, whose income was subject to be assessed under Chapter XIV-B, under section 140A compelling them to pay self-assessment tax, are prospective in operation; therefore, amended provisions of section 140A(1) could not be made applicable in respect of return filed under section 158BCon 13-11-1996. (A.Ys. 1986-87 to 1996-97)

*ACIT v. S. Dharamchand Jain (2005) 96 ITD 47/ 96 TTJ 1033 (Chennai)(Trib.)*

### **S. 140A : Assessment – Self assessment – Financial stringency – Penalty – Opportunity**

Where assessee submitted that due to financial stringency, it could not deposit tax on self-assessment, but Assessing Officer imposed penalty under section 140A(3) without verifying that fact and without allowing assessee any opportunity to explain reasons for non-deposit of tax, imposition of penalty was not justified. (A.Y. 1987-88) *Jt. CIT v. Dainik Assam (2005) 142 Taxman 38 (Mag.)(Gau.)(Trib.)*

### **Section 142 : Inquiry before assessment**

#### **S. 142 : Assessment – Inquiry before assessment – Special audit – Natural justice – Administrative order**

Even an administrative order or decision in matter involving civil consequence has to be made consistently with the rules of natural justice, unless the statute conferring the power excludes its application by express language. Therefore, assessee would have to be given a reasonable opportunity of being heard before passing an order for special audit under section 142(2A). (A.Y. 2003-04)

*Sahara India (Firm) v. CIT (2008) 300 ITR 403 / 169 Taxman 328 / 7 DTR 27 / 216 CTR 303 / 206 Taxation 180 (SC)*

#### **S. 142 : Assessment – Inquiry before assessment – Special audit – in appreciation of fact**

Where the Assessing Officer after elaborating considering the details and material and after applying his mind ordered for special audit of accounts of the assessee under section 142(2A) of the Act. Such decision of the Assessing Officer according to the High Court, considering the complexity of the assessee's case was not considered to be, whimsical or punitive or arrived at in a mechanical manner.

*M/s. Sahara India Investment v. CIT (2007) 197 Taxation 70 (Delhi)(High Court)*

#### **S. 142 : Assessment – Inquiry before assessment – Auditing of accounts – Block period**

Block periods 1988-89 to 1998-99

Direction for Special Audit – Directions should not be for preparation of New Account Books.

Provisions of sec. 142(2A) of the I. T. Act 1961 do not give any authority to direct the preparation of fresh books of account by referring the matter to an auditor under special audit.

The ITAT held that reference to Special Audit under section 142(2A) was not for the purpose for which the provision was enacted but merely for getting the extended period for completing assessment, which was not allowed in law. On that basis, Special Audit was held to be illegal and assessment order was held to be barred by time.

On appeal to High Court, it was held that the findings given by the ITAT are findings of facts based upon the relevant material and hence no question of law arises.

*CIT v. Bajrang Textiles (2007) 294 ITR 561 / (2006) 205 CTR 287 (Raj.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Special audit – Writ [Art. 226]**

Maintainability of Writ Petition filed challenging the communication of the Assessing Officer directing Special Audit belatedly after the Auditor had done substantial work. Writ petition is dismissed in limine.

*Welspun Gujarat Stahl Rohren Ltd. v. ACIT (2006) 200 CTR 239 (Bom.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Audit of accounts**

Where fees of auditor appointed under section 142(2A) to audit assessee's accounts had been fixed by Commissioner under section 142(2D) as per norms laid down by ICAI and after giving opportunity of hearing to both parties, no interference with order of Commissioner was required.

*Dhanesh Gupta & Co. v. UOI (2005) 272 ITR 482 / 143 Taxman 343 / (2004) 192 CTR 612 (Delhi)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Observation – Non resident**

Any observation of Assessing Officer in notice under section 142 (1) as to assessee's residential status cannot preclude assessee from substantiating his claim in assessment proceedings about non-resident status. (A.Ys. 1989-90, 1992-93, 1993-94)

*Vijay Mallya v. ACIT. (2004) 134 Taxman 146 / 266 ITR 329 / 186 CTR 697 (Cal.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Valuation report [S. 55A]**

The Assessing Officer has no jurisdiction to take recourse to the provisions of section 143 (2) of the Act, for obtaining any report of Valuation Officer except in a case of reference made to Valuation Officer under section 55A and that too in respect of the cases enumerated therein for making a reference. (A.Ys. 1997-98 to 2000-01)

*Prakash Chand v. Dy. CIT (2004) 137 Taxman 518 / 269 ITR 260 / 188 CTR 1 (MP)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Audit of accounts**

It is subjective satisfaction of authority concerned to decide on basis of material on record, as to whether or not accounts are complex in nature. (A.Y. 1985-86)

*CIT v. Vijay Kumar Rajendra Kumar & Co. (2004) 271 ITR 337 / 142 Taxman 21 / (2005) 193 CTR 245 (MP)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Block assessment [S. 158BC]**

Section 142 is also applicable to cases falling under Chapter XIVB; i.e., Special procedure for assessment of search cases. (A.Ys. 1988-89 to 1998-99)



*Suryakant v. Dy. CIT (2003) 129 Taxman 659 / 183 CTR 105 (MP)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Validity of notice – Status**

Notice under section 142(1) taking assessee's status as 'resident and ordinarily resident' and requiring him to furnish details of global income/assets could not be said to be without jurisdiction. (A.Ys. 1992-93, 1993-94)

*Vijay Mallya v. ACIT (2003) 131 Taxman 477 / 185 CTR 233 (Cal.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Validity of notice – Cost of construction [S. 55A]**

Section 142(2) enables the Assessing Officer to refer the question of cost of construction of a building to valuation cell for the limited purpose of gathering information regarding the cost of construction. (A.Y. 1977-78)

*B. Indira Devi v. CIT (2003) 133 Taxman 595 / 184 CTR 441 / 270 ITR 44 (Ker.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Special Audit – Sub-section (2A)**

Before passing an order under section 142(2A), the assessee is entitled to be heard. (A.Y. 1998-99, 1999-2000)

*Dy. CIT v. Muthoottu Mini Kuries (2003) 128 Taxman 240 / 182 CTR 315 / 266 ITR 213 (Ker.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Special audit – Sub-section (2A)**

Merely because no special audit under section 142(2A) had been directed in the past several years or that accounts had already been subjected to statutory audit under section 44AB, Assessing Officer is not denuded of his power to order special audit.

*Gurunanak Enterprises v. CIT (2003) 259 ITR 637 / 130 Taxman 23 / 180 CTR 203 (Delhi)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Special audit – Sub-section (2A)**

Appointment of auditor following issue of notice under section 158BC to audit assessee's books of account, cannot be said to suffer from any legal infirmity.

*Kumar Films (P.) Ltd. v. CIT (2003) 126 Taxman 228 / 179 CTR 39 / 258 ITR 257 (Patna)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Special audit – Sub-section (2A)**

Where the Assessing Officer, after objectively considering material on record, had reached bona fide conclusion, inter alia, that there had been admitted sale out of

account books, that day-to-day balancing had not been done, exercise undertaken by him under section 142(2A) was in conformity with powers conferred on him.

*Shiv Kant & Bros. v. UOI (2003) 128 Taxman 859 / 184 CTR 534 / 270 ITR 499 (Raj.)(High Court)*

**S. 142 : Assessment – Inquiry before assessment – Notice – Jurisdiction of AO – Validity**

**[S. 143(2), 144]**

Assessment made by the Assessing Officer who had no jurisdiction over the assessee, that too without issuing a notice under section 143(2) is null and void and is liable to be quashed. (A.Y. 2005-06)

ITO, Pune issued a notice under section 142(1) to the assessee calling for a return of income. Assessee explained that he was assessed to tax and return was regularly filed in Ward 3(2), Thane. ITO, Pune however, without considering the assessee's reply made an assessment under section 144. It was held that order passed by ITO, Pune is null and void as he had no jurisdiction over the assessee. ITO Pune had no jurisdiction even to issue notice under section 142(1). Also, assessment completed under section 144 without a notice under section 143(2) was null and void. (A.Y. 2005-06)

*Pravin Balubhai Zala v. ITO (2010) 129 TTJ 373 / 36 DTR 290 / (2011) 7 ITR 375 (Mum.)(Trib.)*

**S. 142 : Assessment – Inquiry before assessment – Time limit for audit [S. 142, 153A & 153B]**

It was held that even though the word 'Suo moto' were inserted in the proviso to section 142(2c) w.e.f. from 1-4-2008 vide CBDT's Circular No.1 dated 27-3-2008, the Assessing Officer did not have inherent powers to extend time limit for audit without an application from the assessee. (A.Ys. 1999-2000 to 2005-06)

*Bishan Saroop Ram v. Dy. CIT (2010) 35 SOT 240 (Delhi)(Trib.)*

**S. 142 : Assessment – Inquiry before assessment – Invalid return – No notice within time [S. 139(4), 148]**

No notice having been issued under section 142(1) within time, assessment made on the basis of invalid return filed by assessee beyond time prescribed under section 139(4) without issue of notice under section 148 was a nullity. (A.Y. 1997-98)

*Shaw Wallace & Co. Ltd. v. Dy. CIT (2006) 101 TTJ 258 (Kol.)(Trib.)*

**S. 142 : Assessment – Enquiry before assessment – Notice under sub-section (1)(i)**

A notice calling for return can be issued as per clause (i) of section 142(1) after expiry of period prescribed for furnishing of return under section 139(1) but before expiry of period prescribed for furnishing belated return under section 139(4); thus notice issued under section 142(1)(i), after expiry of period to furnish return under

section 139(1) as well as under section 139(4), calling for return of income, was bad in law. (A.Y. 1999-2000)

*Usha Krishan Kumar (Ms) v. Dy. CIT (2005) 147 Taxman 112 (Mag.)(Delhi)(Trib.)*

#### **S. 142 : Assessment – Inquiry before assessment – Notice – Reassessment [S. 148]**

A period of limitation to issue a notice calling for return under section 142(l)(i) is in-built in scheme of Act; as per said scheme, notice has to be issued after end of period in section 139(1) and before end of relevant assessment year; as soon as assessment year is over and no return is filed by assessee nor any notice is issued to him under sub-section (l)(i) of section 142, income would escape assessment and in such a case notice under section 148 has to be issued and notice under section 142(1)(i) cannot be issued; a notice issued after end of relevant assessment year is invalid. (A.Y. 1997-98)

Contention that notices under sections 142(1)(i) and 148 can be issued simultaneously, both provisions can operate simultaneously and discretion is vested with Assessing Officer to utilize any one of them, is erroneous and cannot be accepted.

*Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 / 96 TTJ 0001 (SB)(Delhi)(Trib.)*

#### **S. 142 : Assessment – Inquiry before assessment – Limitation – Notice under section 142(1)**

If power to assess is lost by expiry of limitation period, notice under section 142(1) cannot be issued. (A.Ys. 1992-93 to 1995-96)

*K. C. Verma (Dr.) v. ACIT (2003) 44 ITD 33 / (2004) 89 TTJ 129 (Delhi)(Trib.)*

#### **S. 142 : Assessment – Inquiry before assessment – Special audit – Binding nature**

The object of appointment of auditors for special audit is to assist Assessing Officer, and the report of special auditor is not binding upon the assessing officer. (A.Y. 1996-97)

*Dy. CIT v. Sahara India Financial Corpn. Ltd. (2003) 81 TTJ 389 / (2004) 2 SOT 733 (Luck.) (Trib.)*

#### **S. 142 : Assessment – Inquiry before assessment – Annulment – Setting aside of assessment**

When the Order is set aside, it is open to Assessing officer to make fresh assessment in accordance with law, where as in case the assessment is annulled the order becomes non-est. (A.Ys. 1976-77 & 1982-83)

*Kanhaiya Ice Factory, Belanganu v. ACIT (2003) 87 ITD 77 / (2004) 87 TTJ 645 (Agra)(Trib.)*

#### **S. 142 : Assessment – Inquiry before assessment – Limitation – Validity of notice – Return [S. 139(4), 148]**

Limitation for issuance of notice is controlled by the words "for the purpose of making an assessment under this Act". If the Assessing Officer has jurisdiction or power notice under section 142(1) can be issued at any point of time. Since the return under section 139(4) clearly included within the meaning of the words "return under section 139" as such notice can be issued even where the return has been filed after the end of the assessment year. Similarly, a notice under section 142(1) can be issued even in respect of a return filed in response to notice under section 148. In such cases notice under section 142(1) would certainly be beyond the period of one year from the end of the assessment year but the Assessing Officer would be within his jurisdiction or power to issue notice under section 142(1). In other words, in such cases notice under section 142(1) can be issued even after the end of one year from the end of the assessment year. (A.Y. 1997-98)

*Sheraton International Inc. v. Dy. CIT (2003) 85 ITD 110 / (2004) 86 TTJ 126 (Delhi)(Trib.)*

### **S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Larger bench**

The Supreme Court has referred the issue of whether the assessee should be given an opportunity of being heard before the Assessing Officer issues a direction for the accounts to be audited under section 142(2A) to a larger bench to reconsider its earlier decision in the case of *Rajesh Kumar v. Dy. CIT (2006) 287 ITR 91 (SC)*. (A.Y. 2003-04)

*Sahara India (Firms) v. CIT (2007) 289 ITR 473 / 161 Taxman 216 / 209 CTR 20 / 199 Taxation 165 (SC)*

*Editorial:- The Finance Act, 2007 has inserted a proviso to section 142(2A) with effect from June 1, 2007, providing for an opportunity to be given to the assessee before issuing a direction under section 142(2A) to get the accounts audited.*

### **S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Natural justice**

A direction under section 142(2A) of the Act for special audit is not an administrative order, but is a quasi-judicial order. The Supreme Court held that under section 136 the entire proceeding before the Assessing Officer is judicial, and therefore special audit being part of it cannot be an administrative order. Therefore the principles of natural justice are to be followed by the assessing officer for making an order for special audit under section 142(2A). Further the power under section 142(2A) cannot be lightly exercised. The satisfaction should be based on objective assessment, regard being had to the nature of accounts.

*Rajesh Kumar v. Dy. CIT (2006) 287 ITR 91 / 206 CTR 175 / 157 Taxman 168 / (2007) 196 Taxation 717 (SC)*

### **S. 142(2A) : Assessment – Inquiry before assessment – Special audit – "Having regard to"**

The expression "having regard to" in section 142(2A) means that in exercising the power the Assessing Officer must give regard to the factor enumerated therein together with all other factors relevant for exercising such power.

*Rajesh Kumar v. Dy. CIT (2006) 287 ITR 91 / 206 CTR 175 / 157 Taxman 168 / (2007) 196 Taxation 717 (SC)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – No evidence that Assessing Officer had found accounts complex – Order for special audit not valid**

No record that the Assessing Officer had considered the accounts and found them to be complex, and in the absence of recording with regards to the complexities of accounts on which he had formed an opinion with regards to the complexities of accounts order passed under section 142(2A) for special audit was held to be not valid. (A. Y. 2005-06)

*Farmsons Fashion Pvt. Ltd. v. Dy. CIT (2011) 332 ITR 115 / 55 DTR 364 / 241 CTR 568 (Guj.)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Remuneration**

The remuneration for special auditor to be fixed by the Commissioner as per the scale approved by the ICAI, subject to maximum of ` 30 lakhs per year. Ad hoc remuneration of

` 20 lakhs fixed by the Commissioner was set aside. (A.Ys. 2002-03, 2003-04)

*Dhanesh Gupta & Co. v. CIT (2010) 42 DTR 7 / 327 ITR 246 / 236 CTR 11 / 194 Taxman 365 (Delhi)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Opportunity of hearing**

Opportunity of being heard vis-à-vis the complexity of accounts. The assessee is not required to be heard before the passing of order under section 142(2A). (A.Y. 2003-04)

*Atlas Copco (India) Ltd. v. ACIT. & Ors. (2006) 202 CTR 361 / 283 ITR 56 / 154 Taxman 307 (Bom.)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Request for extension – Writ**

Assessee requested extension of time to submit report – Subsequently, assessee challenging order for Special audit – Writ was held to be not maintainable.

*Welspun India Ltd. v. ACIT (2006) 282 ITR 395 / 200 CTR 235 (Bom.)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

Before passing order under section 142(2A), show-cause notice or opportunity of hearing is not required to be given. (A.Y. 1996-97)

*U.P. Financial Corpn. v. Jt. CIT (2006) 280 ITR 100 / [2005] 147 Taxman 21 / 199 CTR 155 (All.) (High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

Provisions of section 142(2A) do not contemplate by specific language or necessary implication, issuance of a show-cause notice or grant of comprehensive hearing to the assessee by the Assessing Officer; limited to the extent indicated principles of natural justice would be read into section 142(2A). (A.Y. 2002-03)

*YUM Restaurants India (P.) Ltd. v. CIT (2005) 278 ITR 401 / 146 Taxman 196 / 196 CTR 435 (Delhi)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

Complexity of accounts of assessee is to be determined not only by books of account, but even by other documents which are available, in the course of an assessment and at, any stage subsequent thereto, may become available to Assessing Officer.

*Rajesh Kumar, Prop. Surya Trading v. Dy. CIT (2005) 275 ITR 641 / 144 Taxman 865 / 194 CTR 377 (Delhi)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

Assessee-corporation, on own showing, had stated that it had a huge business of different kinds, part of which was taxable while part of it was exempted from taxation and losses of one were being set off against other without proper bifurcation thereof being shown to Assessing Officer much less to his satisfaction, Assessing Officer was justified in holding that the accounts were complex, so as to justify special audit under section 142(2A).

*Central Warehousing Corpn. v. Secretary, Department of Revenue (2005) 277 ITR 452 / 196 CTR 426 (Delhi)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

There were allegedly benami transactions by a Housing Finance company and its directors, their family members, and shareholders and they were using petitioner-bank to deposit their unaccounted money and from premises of petitioner-bank, documents and voluminous account books had been seized, accounts of petitioner bank were rightly found to be complex in nature and direction to audit accounts of petitioner under section 142(2A) was proper.

*Jharneshwar Nagrik Sahakari Bank Maryadit v. UOI (2005) 147 Taxman 576 / 198 CTR 345 / (2006) 280 ITR 339 (MP)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit**

In their interim report, assessee-State Financial Corporation's statutory auditors had pointed out certain discrepancies and in response to certain queries by Assessing Officer, assessee had taken a stand that it would take months to compile requisite information, Assessing Officer was not unjustified in forming opinion on materials



were before her that nature of accounts was complex and interest of the Revenue would suffer if a detailed audit was not directed. (A.Y. 1996-97)

*U.P. Financial Corpn. v. Jt. CIT (2005) 147 Taxman 21 / 199 CTR 155 / (2006) 280 ITR 100 (All.)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Monetary limit**

Object and purpose of getting audit report under both section 142 (2A) and section 44AB are almost same, special audit under section 142(2A) can be resorted to in a case of any assessee, if conditions mentioned therein are fulfilled, irrespective of limit of annual turnover, where as compulsory audit under section 44AB is required in cases where income of assessee exceeds limit stipulated therein. Assessing Officer must invariably give an opportunity of hearing to assessee to explain away his doubt, further Commissioner should not give any approval mechanically. (A.Ys. 1996-97 to 2002-03)

*West Bengal State Co-Operative Bank Ltd. v. Jt. CIT (2004) 138 Taxman 238 / 267 ITR 345 / 190 CTR 245 (Cal.)(High Court)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Block assessment**

It is an irregularity in directing Special Audit without affording any opportunity to the assessee and not illegality. Assessment without affording any opportunity as such could not be annulled but require to be restored to the file of the Assessing Officer with a direction to frame a fresh assessment order after affording a reasonable opportunity being heard.

*ACIT v. Sushila Milk Specialties P. Ltd. (2010) 122 ITD 48 / 1 ITR 639 / (2009) 126 TTJ 289 / 31 DTR 210 (SB)(Delhi)(Trib.)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Audi alteram**

In view of the judgment of the Supreme Court in case of *Sahara India (Firm) v. CIT [reported in 300 ITR 403]* an order passed directing to get accounts audited under section 142(2A) without affording any opportunity entails civil consequences and therefore, rule of audi alteram is required to be observed before passing any order under section 142(2A).

In view of the judgment in case of *Sahara India (Firm) (supra)* it was held that the said rule of audi alteram partem would apply prospectively i.e. from the date of the said judgment of the Supreme Court i.e. 11-4-2004

*Rajesh Kumar v. Dy. CIT (2010) 122 ITD 395 / (2008) 24 SOT 505 (Delhi)(Trib.)*

**S. 142(2A) : Assessment – Inquiry before assessment – Special audit – Trust complexity**

Where Assessing Officer ordered for special audit as he had doubted that substantial fund of trust was diverted by trustees for other than charitable purposes and directed

special auditor to look into 21 points, it was clear that sufficient complexity did exist on those issues and in interest of revenue, special audit was rightly directed. (A.Y. 1994-95)

*Vellammal Educational Trust v. ACIT (2005) 4 SOT 280 / 95 TTJ 665 (Chennai)(Trib.)*

### **S. 142(2C) : Assessment – Inquiry before assessment – Special audit – Limitation [S. 153]**

Prior to amendment in section 142(2C), the Assessing Officer had no power to suo motu to extend the period for furnishing the report by special auditor and therefore, excluding such period, assessment was barred by limitation, Income tax being a special Act, the General Clauses Act, may not generally apply to limitation period. (A.Y. 2002)

*Dy. CIT v. Ramachandra Dashrath Hande & Co. (2010) 36 DTR 431 / (2011) 10 ITR 117 (Mum.)(Trib.)*

### **S. 142(2C) : Assessment – Inquiry before assessment – Special audit – Time limit**

The amendment to section 142(2C) by insertion of the words 'suo motu or' w.e.f. 1-4-2008 is prospective and prior to this date Assessing Officer could not grant extension of time except on an application by the assessee. (A.Ys. 1999-2000 to 2005-06)

*Bishan Saroop Ram Kishan Agro Pvt. Ltd. v. Dy. CIT, (2010) 35 SOT 240 (Delhi)(Trib.)*

### **Section 142A : Estimate by valuation officer in certain cases**

#### **S. 142A : Assessment – Estimate by valuation Officer – Reference**

Where the assessment is framed by the assessing officer and the appeal is decided by the CIT(A) prior to 30.09.2004 it is not open to the assessing officer to order valuation of property by District Valuation Officer (DVO) as the provision of section 142A are not retrospective.

*CIT v. Naveen Gera (2011) 56 DTR 170 / 328 ITR 516 (Delhi)(High Court)*

#### **S. 142A : Assessment – Estimate by valuation Officer – Scope of provision**

Assessing Officer has no power to make reference to a Valuation Officer under provisions of section 142A for orders which have been finalized before 30-9-2004.

*CIT v. Indo-Kenyan Industrial Enterprises (2005) 197 CTR 78 / 149 Taxman 570 (Delhi)(High Court)*

#### **S. 142A : Assessment – Estimate by valuation Officer – Scope of provision**

Where assessment had become final and it was not revenue's case that said order was liable to be revised and reassessment was required to be made under section 153A, section 142A could not be pressed into service for sustaining addition made by

Assessing Officer on basis of valuation report prepared by Valuation Officer. (A.Y. 1993-94)

*CIT v. Krishan Lal Dua (2005) 277 ITR 477 / 149 Taxman 126 (P&H)(High Court)*

#### **S. 142A : Assessment – Estimate by valuation officer – Cost of construction**

As Assessing Officer has no jurisdiction to make reference to Valuation Officer for determination of cost of construction of property, such reference would be invalid and any addition based on such report of Valuation Officer would also be liable to be deleted.

*CIT v. Sudhish Kumar (2005) 276 ITR 563 / 146 Taxman 612 / 195 CTR 77 (Delhi)(High Court)*

*Editorial : See S. 142A inserted w.e.f. 15-11-72.*

#### **S. 142A : Assessment – Estimate by valuation officer – Rejection of Books [S. 145]**

When books of account are found to be correct and complete in all respects and no defect is pointed out therein, then addition on account of difference in cost of construction of a building cannot be made even if a report from DVO is obtained within the meaning of section 142A. (A.Y. 2006-07)

*Rajhans Builders v. Dy. CIT (2010) 41 SOT 331 (Ahd.)(Trib.)*

#### **S. 142A : Assessment – Estimate by valuation officer – Reference for lower estimate**

A reference to Department valuation officer under section 142A, can be made by assessing officer only in cases where assessee has made more investment or is owner of bullion, jewellery or any other valuable article etc. at a higher figure than that recorded in his books of account, it no where contemplates a situation in which assessee has shown a higher value of assets owned by him, where as in opinion of assessing officer, such value should be at a lower figure, hence, reference made was void *ab initio*. (A.Y. 2002-03)

*Saraswati Devi Gehlot (Smt.) v. ITO (2010) 123 ITD 605 / (2007) 111 TTJ 408 (Jodh.)(Trib.)*

#### **S. 142A : Assessment – Estimate by valuation officer – Reopening**

Section 142A does not empower Assessing Officer to refer matter to DVO for gathering information for reopening of assessment. (A.Ys. 1997-98 to 1999-2000)

*Umiya Co-operative Housing Society Ltd. v. ITO (2005) 94 TTJ 392 (Ahd.)(Trib.)*

#### **S. 142A : Assessment – Estimate by valuation officer – Assessment before 30-9-2004**

Proviso to section 142A is applicable only to those cases where assessments have been made on or before 30-9-2004, and such assessments have become final and conclusive by such date. (A.Y. 1994-95)

*ACIT v. Shakti Builders (2005) 93 ITD 269 / 93 TTJ 425 (Delhi)(Trib.)*

## **Section 143 : Assessment**

### **S. 143 : Assessment – Rejection of books of account – Departmental Valuation Officer**

Assessing Authority could not refer the matter to the Departmental Valuation Officer in a case where there was a categorical finding recorded by the Tribunal that the books of account were never rejected. Decision of the Uttaranchal High Court reversed.

*Saragam Cinema v. CIT (2011) 197 Taxman 203 / (2010) 328 ITR 513 / 241 CTR 179 / (2011) 225 Taxation 88 (SC)*

### **S. 143 : Assessment – Dead person – Legal heirs**

Notice of assessment or reassessment issued and the consequent assessment order passed by the assessing officer on a dead person without bringing all the legal heirs on record was held to be illegal on the well settled legal principle that the case cannot be decided in absence of the affected party. (A.Y. 1972-73)

*Kesar Devi (Smt.) v. CIT (2009) 31 DTR 241 / 227 CTR 621 / 321 ITR 344 (Raj.)(High Court)*

### **S. 143 : Assessment – Admission in return – Fresh claim**

Admission by an assessee, in the return, of disallowance does not debar him from contending that the disallowance is not called for. Assessee can contend that a particular amount is deductible notwithstanding the fact that the assessee himself / itself has not claimed the same in the return. (A.Ys. 1993-94, 1995-96)

*Ester Industries v. CIT (2009) 185 Taxman 266 / 226 CTR 112 / 316 ITR 260 / 20 DTR 233 (Delhi)(High Court)*

### **S. 143 : Assessment – Notice – Defective return**

On removal of defects, the return takes effect from the original date of filing and not from date of removal of defects, therefore, limitation for issuing notice under section 143(2) starts from date of original filing of return.

*Nishmukh Investments & Trading P. Ltd. v. Dy. CIT (2009) 213 Taxation 221 (Bom.)(High Court)*

### **S. 143 : Assessment – Return – Duty of Assessing Officer**

Assessee filing return for A.Y. 2001-02 and claiming exemption under section 10(23C), assessee had earlier made an application for exemption and was under the impression that it was so entitled. But later came to know that it was not so entitled and hence filed revised return, along with audit report, claiming exemption under section 11 since it was registered under section 12A. Assessing Officer treated the second return as non est and made addition of ` 67.28 Lakhs. Held Assessing Officer cannot deny benefit of section 11 because of assessee's mistake. (A.Y. 2001-02)

*CIT v. Lucknow Public Education School (2009) 183 Taxman 62 / 318 ITR 223 / (2010) 231 CTR 407 / 38 DTR 80 (All.)(High Court)*

**S. 143 : Assessment – Breach of natural justice – Cross examination**

With a view to ascertain percentage of silver used by assessee in its product, Assessing Officer sent samples of products to a research institute. On basis of report of such institute, total consumption of silver by assessee was estimated. Assessee filed objections to said report and sought permission to cross-examine analyst. However, Assessing Officer paid no heed to such request and proceeded with assessment order. Whether since correctness or otherwise of report, on basis of which assessment order was passed against assessee, was itself under challenge, said report could not be automatically accepted and Assessing Officer committed violation of principles of natural justice in not permitting cross-examination of analyst and relying upon his report to detriment of assessee. (A.Ys. 1994-95 to 1996-97)

*CIT v. Dharam Pal Prem Chand Ltd. (2008) 167 Taxman 168 / 295 ITR 105 / 212 CTR 253 (Delhi)(High Court)*

**S. 143 : Assessment – Additions to income valuation – Understatement**

Value of land sold by assessee in real estate business was understated and Assessing Officer fixed higher value based on relevant materials, addition on that account was justified. (A.Y. 1994-95)

*Green Valley Builders v. CIT (2008) 296 ITR 225 / (2005) 149 Taxman 671 (Ker.)(High Court)*

**S. 143 : Assessment – Protective assessment – Benami**

The Assessing Officer added the said income in the hands of the assessee by making a protective assessment since the said income according to Assessing Officer belonged to the husband of the assessee.

In view of categorical finding by Assessing Officer in his order that the assessee was not the owner of the said investment, deletion of the said amount by Tribunal was correct. It was not necessary for the Tribunal to record a specific finding as to whom said amount belonged to. (A.Y. 1977-78)

*CIT v. Tara Devi (Smt.) (2007) 292 ITR 539 / 211 CTR 509 / 163 Taxman 391 (Raj.)(High Court)*

**S. 143 : Assessment – Intimation – Revised return filed**

Intimation under section 143(1)(a) was sent on 17-10-1994. Revised Return filed on 31-8-1995, whether valid.

High Court held that even if no notice was served on the assessee under section 143(2) and since no assessment was made pursuant to the original return, the assessee could file a revised return under section 139(5) at any time before the expiry of one year from the end of the relevant A. Y. 1994-95; i.e., before 31st March, 1996 and as the revised return was filed on 31st August, 1995, it was a valid

revised return and assessment made pursuant to the said revised return was a valid assessment. (A.Y. 1994-95)

*CIT v. Omprakash Bagria* (2006) 287 ITR 523 / 202 CTR 583 / 155 Taxman 427 (MP)(High Court)

#### **S. 143 : Assessment – Additions to income – Fall in rate of profit**

Addition on account of steep fall in profits was not justified where assessee claimed that it had to sell goods at lower than market price, because of inability to sell them at normal price. (A.Y. 1992-93)

*CIT v. Lucky Laboratories Ltd.* (2006) 284 ITR 435 / (2005) 149 Taxman 273 / 200 CTR 305 (All.)(High Court)

#### **S. 143 : Assessment – Additions to income – Kar Vivad Samadhan Scheme**

Assessee's wife had been assessed in her own right in earlier assessment years and had declared income in question as her income under KVSS, such income of wife could not be clubbed in assessee's hands. (A.Y. 1994-95, 95-96)

*CIT v. Om Prakash Bhati* (2006) 284 ITR 303 / (2005) 197 CTR 651 (Raj.)(High Court)

#### **S. 143 : Assessment – Proceedings pending – Appellate Tribunal**

When matter is pending before Tribunal by way of an appeal, it means that assessment proceeding is pending. (A.Y. 1980-81)

*CIT v. Mayur Foundation* (2005) 274 ITR 562 / 194 CTR 197 (Guj.)(High Court)

#### **S. 143 : Assessment – Distinction between section 143(3) and 147 – Rubber and coffee**

Benefit of circular issued by Central Board of Direct Taxes, to the effect that no proceedings under section 147 or under section 263 could be initiated for the assessment years prior to the assessment year 2002-03 in case of assessee's earning income from manufacture of rubber/coffee for determining income liable to income-tax if assessee had already paid agricultural income-tax on the whole of such income, can be extended to an assessee in proceedings initiated under section 143(3).

*Harrisons Malayalam Ltd. v. Jt. CIT* (2005) 145 Taxman 358 / 201 CTR 499 (Ker.)(High Court)

#### **S. 143 : Assessment – Notice – Recording of reasons**

There is no need to record reasons for issuance of notice under section 143(2)(b). (A.Y. 1985-86)

*Shyam Sundar Gupta v. CIT* (2005) 276 ITR 592 / 144 Taxman 149 / 194 CTR 527 (MP)(High Court)

#### **S. 143 : Assessment – Additions to income – Notional interest**

Assessing Officer made an estimated addition for notional interest on debit balance in account of subsidiary of assessee-company but Commissioner (Appeals) as also



Tribunal had recorded a categorical finding that it was on account of commercial expediency and on account of continued losses suffered by subsidiary that interest was not charged, and it was found that assessee had not advanced loan out of borrowed moneys, deletion of addition on account of interest was justified. (A.Y. 1978-79)

*CIT v. Dhampur Sugar Mills Ltd. (No. 2) (2005) 274 ITR 370 / (2006) 156 Taxman 248 (All.) (High Court)*

#### **S. 143 : Assessment – Additions to income – On money – Retraction**

Addition on account of 'on money' received by assessee which was admitted during course of search operation, could not be made in absence of further enquiries especially when such admission had been retracted.

*Dy. CIT v. Ratan Corpn. (2005) 145 Taxman 503 / 197 CTR 536 (Guj.)(High Court)*

#### **S. 143 : Assessment – Additions to income – Production loss**

Addition on account alleged excessive production loss was reduced by Tribunal from ₹ 75 lakhs to ₹ 25 lakhs by just holding that it was on higher side but no reasons were recorded, matter was to be remanded to Tribunal for recording a finding on basis of reasons. (A.Y. 1986-87)

*Bharatpur Nutritional Products Ltd. v. CIT (2005) 144 Taxman 494 (Delhi)(High Court)*

#### **S. 143 : Assessment – Additions to income – Ornaments of third party**

Where ornaments found during search of premises of assessee-HUF were claimed by a member as belonging to him, they could not be assessed in hands of assessee-HUF. (A.Y. 1975-76)

*CIT v. Maiku Lal (HUF) (2005) 276 ITR 671 / 145 Taxman 535 (All.)(High Court)*

#### **S. 143 : Assessment – Additions to income – Depreciation on horses**

Where regarding valuation of foals in stud farm of assessee, carrying on business of breeding and maintenance of horses, and assessee's claim for depreciation on horses, concurrent findings of appellate authorities were that manner and methodology of accountancy adopted by the assessee-company was correct and did not violate any provisions of the Act or in any way result in avoidance of payment of tax, addition made by Assessing Officer on account of suppression in valuation of foals born in stud farm and depreciation on horses purchased, was rightly deleted by Tribunal and no substantial question of law arose from its order.

*CIT v. Usha Stud & Agricultural Farms (P.) Ltd. (2005) 276 ITR 25 / 145 Taxman 270 / 195 CTR 237 (Delhi)(High Court)*

#### **S. 143 : Assessment – Additions to income – Loose papers**

Where one of transactions found noted on loose papers found during search was attributed by assessee to her aunt, and Tribunal, on totality of facts and circumstances, accepted assessee's submission that transaction did not concern him,

mere non-appearance of assessee's aunt before Assessing Officer would not justify addition. (A.Ys. 1988-89 to 1998-99)

*CIT v. Kailash Chand Sharma (2005) 146 Taxman 376 / 198 CTR 201 (Raj.)(High Court)*

### **S. 143 : Assessment – Additions to income – Loose papers**

Addition made to assessee's income on basis of paper seized from assessee's premises was rightly deleted by Tribunal believing assessee's plea that paper did not belong to him, entries recorded therein did not relate to him and same were not in handwriting of any of partners or employees or any connected person, and that paper was written in English and none of partners or employees of firm knew English.

*CIT v. Raj Pal Singh Ram Avtar (2005) 149 Taxman 32 / (2006) 202 CTR 261 / (2007) 288 ITR 498 (All.)(High Court)*

### **S. 143 : Assessment – Additions to income – Substantive basis**

Where persons whose income had been included in assessee's income on substantive basis had declared said income as their own income under Kar Vivad Samadhan Scheme and such declaration had been accepted, said income was rightly deleted from assessee's assessment by Tribunal.

*CIT v. Anand Bhati (2005) 197 CTR 653 / 277 ITR 128 / 146 Taxman 743 (Raj.)(High Court)*

### **S. 143 : Assessment – General – Need to inquire**

When an assessment is done under section 143(3), it is expected that Assessing Officer will make a detailed enquiry to find out correct income of assessee and not just take facts placed by assessee on their face value. (A.Y. 1998-99)

*Jagdish Kumar Gulati v. CIT (2004) 139 Taxman 369 / 191 CTR 25 / 269 ITR 71 (All.)(High Court)*

### **S. 143 : Assessment – Scrutiny – Instruction**

In view of Departmental Instruction no 1935 dated 12-3-1996, the department would not have selected the assessee for scrutiny, hence assessment is bad in law. Circular of Board binding on department. (A.Y. 1996-97)

*CIT v. Naryana P. Dedhia (2004) 270 ITR 572 / 141 Taxman 603 / 192 CTR 526 (AP)(High Court)*

### **S. 143 : Assessment – Remand – New issue**

On remand Assessing Officer cannot touch an issue which was not before AAC and on which no direction had been given by AAC.

*CIT v. Mahindra & Co (2004) 260 ITR 426 / 140 Taxman 243 / 181 CTR 427 (Raj)(High Court)*

*Editorial : It will depend as whether it is remand on specific points or assessment orders to set aside.*

### **S. 143 : Assessment – Notice time barred – Disposal of primary objection – Essential**

When an assessee raises an objection that the notice issued by the ITO is time barred, it must be decided before passing final order of assessment.

*Hanuman Sahai Choudhary v. UOI (2004) 136 Taxman 93 / 186 CTR 715 (Raj.)(High Court)*

### **S. 143 : Assessment – Natural justice – Inquiry behind the back of assessee**

Where the addition had been made on the basis of enquiry conducted by the Assessing officer behind the back of the assessee, as it violated the principle of natural justice, the addition was to be deleted. (A.Y. 1990-91)

*CIT v. Raja Ginning Udyog (2004) 268 ITR 383 / 189 CTR 59 / (2005) 144 Taxman 393 (MP)(High Court)*

### **S. 143 : Assessment – Notional interest – Hybrid system of accounting**

Additions of notional interest on debit trade balances of sister concerns of assessee was not justified, where assessee was following hybrid system of accounting for interest on trade balances on receipt basis.

*CIT v. Banswara Fabrics Ltd. (2004) 137 Taxman 486 / 267 ITR 398 / 186 CTR 52 (Raj.)(High Court)*

### **S. 143 : Assessment – Evidence collected by Assessing Officer – Opportunity of being Heard**

Where the Assessing Officer has collected evidence behind the back of assessee and did not disclose the evidence on which he has relied and opportunity to cross examination was not allowed to assessee, the assessment order is against the principles of natural justice and cannot be sustained. (A.Ys. 1995-96 to 1997-98 & 2000-01 to 2002-03)

*Tourism Finance Corp. of India v. Jt. CIT (2010) 128 TTJ 43 / (2009) 31 SOT 495 (Delhi)(Trib.)*

### **S. 143 : Assessment – Addition – Valuation of stock**

On account of quality audit undertaken during the year, dead stock was written off which resulted in lower valuation of a stock, and addition were made on account of under-valuation. Held addition not justified, as the defective sets treated as good sets in earlier year and which were being valued at inflated figures, have now been set right, and the closing stock valuation represents the actual position of saleable goods. (A.Y. 2001-02)

*Salora International Ltd. v. ACIT (2008) 166 Taxman 54 (Mag.)(Delhi)(Trib.)*

### **S. 143 : Assessment – Additions – Bogus claim**

Impugned addition to Income on account of treating job charges and material bills as bogus, cannot be sustained when it has been established by furnishing relevant bills, bank statements etc. and the fact remains that without purchase of such material and

job charges being incurred, the manufacture could not have been possible. (A.Y. 1996-97)

*Hylux Automotive (P) Ltd. v. ITO (2007) 163 Taxman 90 (Mag.)(Delhi)(Trib.)*

### **S. 143 : Assessment – Evidence – Rejection by Assessing Officer**

Assessing Officer is duty bound to falsify the assessee's claim with convincing and appealing evidence, rather than doubting the transaction in the realm of suspicion. Assessing Officer cannot reject the evidence placed without showing how it was not reliable. (A.Y. 1990-91)

*Anilkumar Mahipal v. I.T.O. (2007) 162 Taxman 87 (Mag.)(Jodh.)(Trib.)*

### **S. 143 : Assessment – Issue of notice – Limited scrutiny**

The jurisdiction of Assessing Officer in cases where notice is issued for limited scrutiny, is confined to claims set out in the notice for verification. Assessing Officer has no power to make the entire assessment of income in such limited scrutiny cases. Even Commissioner (Appeals) power cannot be enlarged beyond the power of Assessing Officer in limited scrutiny cases, and decision to consider other claim not covered in the notice for limited scrutiny is contrary to provisions of the Act. (A.Y. 2002-03)

*Rajesh Jain v. I.T.O. (2007) 162 Taxman 212 (Mag.)(Chd.)(Trib.)*

### **S. 143 : Assessment – Amalgamation – Notice**

Issue of Notice and subsequent assessment made in name of amalgamating company subsequent to the amalgamation becoming effective, is bad in law and void ab initio, when such fact was brought to notice of Assessing Officer (A.Y. 1996-97)

*Modi Corp. Ltd. v. JCIT (2007) 162 Taxman 214 (Mag.) / (2006) 105 TTJ 303 (Delhi)(Trib.)*

### **S. 143 : Assessment – Amalgamation – Assessee**

A company stands dissolved consequent upon amalgamation with another company under orders of High Court, and assessment made on such company after such dissolution under section 143(3) had to be struck down as null and void. (A.Y. 2001-02)

*Better Investments (P) Ltd. v. ITO (2007) 161 Taxman 130 (Mag.)(Delhi)(Trib.)*

### **S. 143 : Assessment – Res judicata – Findings in earlier year**

Revenue authorities can examine the issue which was not raised in earlier years, as every Asst Year is an independent Asst. Year. Assessing Officer is not debarred from adjudicating the issue which has not been examined nor revenue had expressed its view on that issue in earlier years. (A.Y. 1994-95)

*Dy. CIT v. Ramgopal & Sons (2006) 155 Taxman 223 (Mag.)(Mum.)(Trib.)*

### **S. 143 : Assessment – Service of notice – Mandatory**

The notice under section 143(2) dated 27-9-2002 was dispatched for service by registered post on 30-9-2002. In absence of proof of service of notice on 30-9-2002, it cannot be presumed that notice dispatched is served on very same day, and thus there was no valid service of notice under section 143(2) and a violation of mandatory requirement of law. (A.Y. 2001-02)

*Case Enterprises v. ACIT (2006) 154 Taxman 204 (Mag.)(Delhi)(Trib.)*

### **S. 143 : Assessment – Additions – Consumption**

Additions which are made on ground of higher consumption of electricity without bringing on record corroborative evidence nor finding any defect in stock register, nor any findings of sales outside the books, held to be not justified. (A.Ys. 1998-99, 1999-2000)

*ITO v. Jai Glass (P) Ltd. (2006) 155 Taxman 163 (Mag.)(Chd.)(Trib.)*

### **S. 143 : Assessment – Admission made by assessee – Counsel**

An admission made by the assessee for the assessment is a material fact unless it is rebutted – A document has to be construed as a whole and a part of it cannot be ignored which is not suitable – Assessee cannot be penalised for the fault of his counsel.

*ITO v. Late Rohit Nanavati, (Jaipur) (Tax World – February 2006 – Vol. XXXV – P. 44)(Jp.)(Trib.)*

### **S. 143 : Assessment – Revised return – Information**

Assessing Officer having merely culled out certain information from the revised return which was admittedly time-barred and invalid, and completed the assessment acting only on the original return and passed the assessment order within the time-limit as per original return, assessment was not vitiated. (A.Y. 1996-97)

*R. Sureshkumar v. ACIT (2006) 99 TTJ 997 (Chennai)(Trib.)*

### **S. 143 : Assessment – Income from undisclosed sources – Addition**

When the statement of assessee's wife was not confronted to the assessee nor he was allowed any opportunity to cross-examine his wife, such statement could not be relied upon to make addition in the hands of the assessee.

*Bhimraj Rajpurohit v. ITO (2006) 105 TTJ 899 (Jodh.)(Trib.)*

### **S. 143 : Assessment – Deceased – Notice to legal heirs**

Assessment made against deceased assessee without bringing on record the legal heirs though made known to the Assessing Officer was void ab initio. (A.Ys. 1997-98 to 2002-03)

*Late A. Y. Prabhakar (Indl.) v. ACIT (2006) 105 TTJ 391 / (2007) 12 SOT 1 (Chennai)(Trib.)*

### **S. 143 : Assessment – Amalgamation – Invalid**

Company having been dissolved by amalgamation under orders of High Court, assessment on it was invalid even though the company itself filed a return. (A.Y. 1996-97)

*Modi Corp. Ltd. v. Jt. CIT (2006) 105 TTJ 303 (Delhi)(Trib.)*

#### **S. 143 : Assessment – Protective assessment – Consequence of substantive assessment**

Once the substantive addition is confirmed by Assessing Officer in the case of another assessee, the protective assessment of same addition made in the case of the assessee cannot stand.

*Parasmal Dangi alias Parasmal Jain v. ACIT (2006) 100 TTJ 608 (Chennai)(Trib.)*

#### **S. 143 : Assessment – Non-resident – Rule of consistency**

The Revenue has continued to determine the income of the member companies on the basis of principles laid down in the settlement even after 31st March, 1987, for subsequent assessment years and therefore, having regard to the rule of consistency and in the absence of better alternative the principles embodied in the settlement would also apply to the assessment years subsequent to assessment year 1995-96 to 97-98).

*Jt. CIT v. Warner Bros. (FE) Inc. (2006) 100 TTJ 109 / 99 ITD 1 (Mum.)(Trib.)*

#### **S. 143 : Assessment – Status of assessee – Block assessment – Search and seizure [S. 158BC]**

Where search had been carried out in cases of individuals and notices under section 158BC had been issued in cases of individuals and assessee furnished returns in status of HUFs, there being no proceedings either under section 132 or under section 158BC in cases of HUFs, returns furnished in status of HUFs were non est and, hence, by completing assessment in status of individual, Assessing Officer could not be said to have changed status of assessee.

*Anand Kumar Agarwal, HUF v. ACIT (2005) 93 TTJ 949 / 146 Taxman 58 (Mag.)(Agra)(Trib.)*

#### **S. 143 : Assessment – Validity of assessment – Jurisdiction**

Return filed by assessee before Assessing Officer not having jurisdiction is non est and Assessing Officer having jurisdiction cannot make assessment under section 143(3), after issuing notice under section 143(2), on basis of such return. (A.Ys. 2000-01 & 2002-03)

*Meenakshi Devi (Smt) v. ACIT (2005) 96 TTJ 813 (Agra)(Trib.)*

#### **S. 143 : Assessment – Validity of assessment – Limitation**

There is no provision under Act to frame fresh assessment order if assessment is held barred by limitation. (A.Y. 1993-94)

*ACIT v. Subhash Chand Goyal (2005) 4 SOT 405 (Agra)(Trib.)*



**S. 143 : Assessment – Res Judicata – rules of consistency**

Though res judicata is not applicable to income-tax proceedings, authorities should not take a different view unless and until some contrary facts are brought on record. (A.Y. 1996-97)

*Jt. CIT v. Silicon Graphics Systems India (P.) Ltd. (2005) 92 TTJ 297 (Delhi)(Trib.)*

**S. 143 : Assessment – On remand – New issues – Order giving effect**

Assessing Officer is not competent to raise a new issue while giving effect to a specific direction given by the Commissioner (Appeals). (A.Y. 1993-94)

*Ellel Hotels & Investments Ltd. v. Jt. CIT (2005) 2 SOT 659 (Mum.)(Trib.)*

**S. 143 : Assessment – On remand – Set aside**

In a set-aside proceeding, review or reappraisal of directions of Commissioner (Appeals) is not permissible at the end of Assessing Officer. (A.Y. 1989-90)

*Vikram M. Kothari v. Dy. CIT (2005) 94 ITD 496 / 96 TTJ 926 (Luck.)(Trib.)*

**S. 143 : Assessment – On remand – Scope – Power of Assessing Officer**

Where Tribunal had restored matter to Assessing Officer to determine income as per provisions of sections 28 to 43C, while completing fresh assessment, there was no scope for Assessing Officer to travel beyond specific directions and he was not justified, while completing fresh assessment, in cancelling registration granted to assessee-firm and determining status of assessee as AOP and enquiring into cash credits being investment made by member of AOP. (A.Y. 1991-92, 1992-93)

*ACIT v. Sri Ranganatha Traders (2005) 94 ITD 227 / 95 TTJ 275 (Hyd.)(Trib.)*

**S. 143 : Assessment – Account – Additions**

Additions made on basis of inference that assessee had understated cost of purchase in books of account, merely on statement of seller, without bringing any material on record, is not justified. (A.Y. 1988-89)

*Raj & Sandeep Ltd. v. ACIT 160 Taxman 129 (Mag.)(Chd.)(Trib.)*

**S. 143(1) : Assessment – Summary assessment – Prima facie adjustment**

Prima facie adjustments, expenditure on issuance of right shares cannot be added without examining object of capital enhancement.

*Lakshmi Auto Components Ltd. v. Dy. CIT 2007 TLR 578 (Chennai)(Trib.)*

**S. 143(1) : Assessment – Return – Revised return – Validity – Intimation**

Revised return filed by the assessee within the prescribed time-limit could not be ignored merely on the ground that the original return was already processed under section 143(1). (A.Y. 2001-02)

*Smt. Bhanuben Chimanlal Malavia v. ITO (2006) 100 TTJ 337 (Rajkot)(Trib.)*

**S. 143(1) : Assessment – Prima facie adjustment – 1-6-1999, onwards**

According to the newly substituted section 143(1) and the omission of sections 143(1A), 143(1B) and 143(5), with effect from 1-6-1999, neither any *prima facie* adjustment can be made nor any additional income-tax can be levied on or after 1st June, 1999. The powers of Assessing Officer under this section are very limited and restricted only to determine tax on the basis of the return of income filed by the assessee. The Assessing Officer cannot look beyond the return but to compute tax or interest after adjustment of pre-paid taxes by the assessee. (A.Ys. 1999-2000-01) *Packers India v. ITO (2006) 99 ITD 383 / 101 TTJ 232 (Ahd.)(Trib.)*

#### **S. 143(1)(a) : Assessment – Adjustment – Debatable issue**

Since there were conflicting decisions at the relevant time on the question whether deduction under section 80-O is allowable on gross income or net income, deduction under section 80-O claimed by the assessee on gross income cannot be reduced by way of *prima facie* adjustment under section 143(1)(a). (A.Ys. 1996-97 and 1997-98) *Kvaverner John Brown Engg. (India) Pvt. Ltd. v. ACIT (2008) 216 CTR 193 / 305 ITR 103 / 170 Taxman 304 / 6 DTR 289 / 207 Taxation 637 (SC)*

#### **S. 143(1)(a) : Assessment – Intimation – Additional tax – Assessed loss**

The High Court had disposed of the tax reference before it, following an earlier decision of that High Court holding that retrospective effect could not be given to the amendment by the Finance Act, 1993, to section 143(IA), of the Income Tax Act 1961, to subject the assessee to additional taxation where the total income of the assessee as a result of adjustment under section 143(1)(a) exceeds the total income declared by the assessee in his return, even where the loss is reduced. On appeal to the Supreme Court the matter was remanded to the High Court for reconsideration in view of the decision of the Supreme Court in *CIT v. J. K. Synthetics Ltd. (2001) 251 ITR 200*. Decision of Gauhati High Court set aside and matter remanded for fresh consideration.

*CIT v. Ashok Paper Mills (2008) 167 Taxman 220 / (2009) 315 ITR 426 (SC)*

#### **S. 143(1)(a) : Assessment – Intimation – Notice [S. 143(2)]**

Intimation under section 143(1)(a) cannot be issued after notice for regular assessment under section 143(2). (A.Y. 1993-94)

*CIT v. Gujarat Electricity Board (2003) 260 ITR 84 / 129 Taxman 65 / 181 CTR 28 (SC)*

*Editorial:- CIT v. Quilon Co-op. Spinning Mills Ltd. (2003) 263 ITR 259 (Ker.) / 182 CTR 114 / 128 Taxman 749, and Gujarat Poly-Avx Electronics Ltd. v. Dy. CIT (1996) 222 ITR 140 / 135 CTR 141/89 Taxman 634 (Guj.) approved.*

#### **S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

Issue as to funding of outstanding interest by a fresh loan would or would not amount to payment of interest is a debatable issue. Disallowance under section 43B cannot be made by way of *prima facie* adjustment under section 143(1)(a) of the Act. (A.Y. 1997-98)

*Vinir Engineering (P) Ltd. v. Dy. CIT (2009) 22 DTR 107 / (2010) 231 CTR 90 / (2009) 313 ITR 154 / (2010) 186 Taxman 72 (Karn.)(High Court)*

**S. 143(1)(a) : Assessment – Adjustment – Debatable issue**

The issue whether the interest income earned by the assessee was assessable under the head 'Profits or gain from business or profession' or 'Income from other sources' was held to be a debatable issue and outside the preview of prima facie adjustment under section 143(1) (a) of the Act. (A.Y. 1994-95)

*CIT v. Hiltop Palace Hotel (P) Ltd. (2008) 15 DTR 105 (Raj.)(High Court)*

**S. 143(1)(a) : Assessment – Adjustment – Issue of notice under section 143(2)**

After issuance of notice under section 143(2) of the Act by the Assessing Officer, it is not open for him to make prima facie adjustment under section 143(1)(a) of the Act. (A.Y. 1997-98)

*Tata Sponge Iron Ltd. v. CIT (2008) 12 DTR 130 / 219 CTR 187 / 307 ITR 441 (Orissa)(High Court)*

**S. 143(1)(a) : Assessment – Adjustment – Debatable issue**

While processing return under section 143(1)(a) of the Act, the Assessing Officer could not make adjustment with respect to incentive bonus received by the assessee, a Development Officer of LIC, as there were divergent decisions of court regarding taxability of the incentive bonus and as such the same was a debatable point.

*CIT v. Manu Bhai M. Patel (2007) 199 Taxation 491 (Guj.)(High Court)*

**S. 143(1)(a) : Assessment – Debatable issue – Prima facie adjustment**

When the issue relating to deduction or disallowance of deduction is debatable, the assessing officer cannot make adjustment in an order under section 143(1)(a) of the Act.

*CIT v. Mahesh Kumar A. Rathod (2007) 198 Taxation 173 (Guj.)(High Court)*

**S. 143(1)(a) – Assessment – Prima facie adjustment – Guest house expenses**

Admissibility of guesthouse expenses, which is a highly debatable issue on account of conflicting judicial pronouncements of various High Courts, disallowance of the same by making adjustment under section 143(1)(a) was held not permissible. (A.Y. 1996-97)

*CIT v. Hughes Escorts Communications Ltd. (2006) 195 Taxation 214 (Delhi)(High Court)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

While processing the return under section 143(1)(a), computation of the amount deductible under section 80HHC cannot be reduced on such points which are

debatable – Assessee has to be allowed an opportunity of hearing before making adjustments under section 143(1)(a). (A.Y. 1990-91)

*CIT v. Pesticides India Ltd. (2006) 283 ITR 304 / 204 CTR 401 (Raj.)(High Court)*

**S. 143(1)(a) : Assessment – Intimation – Notice by Assessing Officer**

Non-issuance of notice by the Assessing authority before the intimation under section 143(1)(a) is sent, would not vitiate the impugned intimation. (A.Y. 1991-92)

*V. P. Patil v. ITO (2003) 130 Taxman 44 / 262 ITR 135 / 181 CTR 473 (Karn.)(High Court)*

**S. 143(1)(a) : Assessment – Intimation – Issue of notice under section 143(2)**

Return cannot be processed under section 143(1)(a), after issuance of a notice under section 143(2). (A.Ys. 1991-92, 1992-93)

*CIT v. A. V. Thomas & Co. (2003) 128 Taxman 735 / 182 CTR 116 (Ker.)(High Court)*  
*/ CIT v. Quilon Co-op. Spinning Mills Ltd. (2003) 128 Taxman 749 / 263 ITR 259 / 182 CTR 119 (Ker.)(High Court)*

*Editorial:- Refer CIT v. Gujarat Electricity Board (2003) 260 ITR 84 / 129 Taxman 65/181 CTR 28 (SC).*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

Where a deduction is claimed and it is somewhat controversial, it can not be treated to be prima facie disallowable. (A.Ys. 1992-93, 1994-95)

Illustrations.

*CIT v. Shikharchand Jain (2003) 263 ITR 221 / 132 Taxman 109 / 183 CTR 500 (MP)(High Court)* / *CIT v. Sanjeev Mehrotra (2003) 184 CTR 592 / 135 Taxman 140 (MP)(High Court)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

Disallowance of loss on an issue as to whether a business was set up or not requires investigation and deliberation and verification of documents. The same can be done only in proceeding under section 143(3), and order disallowing loss while processing the return under section 143(1)(a) was set aside. (A.Ys. 1994-95, 1995-96)

*Hyundai Engg. & Construction Co. Ltd. v. Dy. CIT (2007) 163 Taxman 171 (Mag.)(Delhi)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

Issue relating to deductibility of expenditure incurred on right issue is debatable and therefore it could not be disallowed by way of prima facie adjustment under section 143(1)(a). (A.Y. 1997-98)

*Lakshmi Auto Components Ltd. v. Dy. CIT (2006) 103 TTJ 315 / 101 ITD 209 (TM)(Chennai)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Supreme Court decision – Direction**

Prima facie adjustment under section 143(1)(a) made by the Assessing Officer to disallow the public issue expenses following the law laid down by the Supreme Court was valid. (A.Y. 1996-97)

Direction to verify whether the expenses charged to public issue expenses were relatable to increase in capital only or it included other expenses as well is not permissible in the context of summary assessment under section 143(1)(a).

*Dy. CIT v. Shripet Cybertech Systems Ltd. (2006) 103 TTJ 149 / 101 ITD 201 (Chennai)(Trib.)*

**S. 143(1)(a) : Assessment – Intimation – Not on assessment**

Intimation issued under section 143(1)(a) does not tantamount to an assessment.

*Kamal Industries v. ITO, Tax World – February 2006 – Vol. XXXV – P. 58 (Jp.)(Trib.)*

**S. 143(1)(a) : Assessment – Interest – Book Profit [S. 115JA, 234 and 234C]**

Charging of interest under sections 234B and 234C by Assessing Officer for assessee's failure to pay advance tax in respect of income determined under section 115JA is within the scope of provisions of section 143(1)(a). (A.Y. 1999-2000)

*Lumax Industries Ltd. v. Dy. CIT (2006) 99 TTJ 1125 / (2005) 97 ITD 217 (Delhi)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Investment allowance**

Assessee filed loss return but it claimed investment allowance and investment allowance was disallowed under section 143 (1) (a) on the ground that the assessee had not created any reserve during the relevant assessment year. The Tribunal held that the assessee's claim could not be treated as prima facie wrong and inadmissible and disallowed under section 143 (1)(a) At any rate the claim made by the assessee being debatable and could not be rejected as done by revenue authorities without providing opportunity of being heard to the assessee. The matter was beyond purview of section 143(1) (a). (A.Ys. 1989-90, 1990-91)

*Dy. CIT v. Bifora Watch Co. Ltd. (2005) 94 ITD 203 / 96 TTJ 393 (TM)(Mum.)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Allowance of relief claimed**

An adjustment has not only to be made of figure which is taxable and not offered to tax, but adjustment has to be also of an relief which is not claimed, but which clearly emerges from the record itself.

*Triveni Plenty Engg. Ltd. v. Dy. CIT (2003) 131 Taxman 94 (Mag.)(Delhi)(Trib.)*

**S. 143(1)(a) : Assessment – Adjustment – Past records**

S. 143(1)(a) does not permit consulting past records for the purpose of prima facie adjustments. (A.Ys. 1989-90, 1994-95)

*Dy. CIT v. Nuware India Ltd. (2003) SOT 386 (Delhi)(Trib.)*

*Symonds & Co v. Addl CIT (2003) 86 ITD 417 / 86 TTJ 920 (All.)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Scope**

The scope of prima facie adjustment is restricted only to disallowance of deduction/allowance or relief claimed in the return. There is no power of making an Income adjustment. (A.Y. 1998-99)

*Aquapharm Chemical Co Ltd v. Jt. CIT (2003) 85 ITD 188 / 80 TTJ 235 (Pune)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie Adjustment – Past Notice under section 143(2)**

The addition made under section 143(1)(a) will have to be deleted once the Notice under section 143(2) was issued. (A.Ys. 1994-95, 1995-96)

*Electra India Ltd v. Dy. CIT (2003) 84 ITD 103 (Delhi)(Trib.)*

**S. 143(1)(a) : Assessment – Prima facie adjustment – Debatable issue**

Debatable issues cannot be disallowed by way of Intimation under section 143(1)(a). (A.Ys. 1991-92, 1994-95, 1997-98)

*Bemco Hydraulics Ltd v. Dy. CIT (2003) 78 TTJ 416 / 130 Taxman 40 (Mag.)(Panaji)(Trib.)*

*K Aboo Bakar v. ACIT (2003) 86 ITD 412 / 91 TTJ 484 (Hyd.)(Trib.)*

*P N Hiranandani v. ACIT (2003) 130 Taxman 183 (Mag.)(Delhi)(Trib.)*

**S. 143(1A) : Assessment – Additional Tax – Computation of adjusted income by AO**

Additional tax under section 143(1A) – The adjustment with regard to the disallowance was made only in the adjustment sheet but the same was not taken into account while computing total income. No additional tax could be charged. (A.Ys. 1989-90, 1990-91)

*LML Ltd. & Anr. v. ACIT (2006) 201 CTR 115 / 285 ITR 282 / 151 Taxman 11 (Bom.)(High Court)*

**S. 143(1A) : Assessment – Amendment – Prima facie adjustment**

Where by virtue of the amendment made to section 32, for the assessment year 1991-92, the assessee was entitled to claim only 75 percent of normal depreciation and the assessee, without considering the amendment, claimed full depreciation in the return, the Assessing Officer was entitled to make prima facie adjustment by bringing down the claim to 75 percent of the amount claimed in the return. (A.Y. 1991-92)

*Steel & Industrial Forgings Ltd. v. Dy. CIT (2003) 131 Taxman 192 / 264 ITR 100 / 183 CTR 394 (Ker.)(High Court)*

**S. 143(1A) : Assessment – Additional tax – Adjustment on retrospective law**

Retrospective amendment of law when the return filed by the assessee was correct on the date it was filed and *prima facie* adjustments were made on the basis of



retrospective amendment of a statutory provision the provisions of s. 143(1A) were not attracted. (A.Y. 1990-91)

*Kiran Corpn. v. ACIT (2006) 102 TTJ 375 / 98 ITD 119 (Ahd.)(Trib.)*

#### **S. 143(1A) : Assessment – Human mistake – Additional Tax**

Assessee having written the words "Add : Disallowables" but deducted the same in calculation portion instead of adding such items, additional tax under section 143(1A) could not be levied for such human mistake. (A.Y. 1994-95)

*Dy. CIT v. Patel Filter Ltd. (2006) 103 TTJ 984 (Ahd.)(Trib.)*

#### **S. 143(1A) : Assessment – Rectification – Additional Tax**

Assessing Officer having omitted to levy additional tax under section 143(1A) after making adjustment to the returned income, provisions of s. 154 are clearly applicable. (A.Y.s. 1995-96, 1996-97)

*Rusi N. Billimoria v. ACIT & Anr. (2006) 99 TTJ 1093 (Pune)(Trib.)*

#### **S. 143(1A) : Assessment – Additional tax – Loss to income**

Mere conversion of returned loss into assessed loss as a consequence of adjustments would not come in the way of levy of additional tax. (A.Y. 1993-94)

*Dy. CIT v. Verifone Software Systems (P) Ltd. (2003) 84 ITD 521 / 78 TTJ 791 (Bang.)(Trib.)*

#### **S. 143(2) : Assessment – Notice – Beyond line – Invalid**

Where notice under section 143(2) was served upon the assessee after a period of 12 months from the end of the month in which the return was filed, it was held that the proceedings in pursuance of such notice was invalid and liable to be quashed.

*Dy. CIT v. Maxima Systems Ltd. (2011) 198 Taxman 192 (Mag.) / (2010) 236 CTR 443 / 40 DTR 49 (Guj.)(High Court)*

#### **S. 143(2) : Assessment – Notice – Service – Participation in proceeding**

The assessee having participated in proceedings before the Assessing Officer, the assessment cannot be held to be invalid for non-service of notice under section 143(2). (A. Y. 2002-03)

*CIT v. Ram Narain Bansal (2011) 202 Taxman 213 (P&H)(High Court)*

*Editorial: This view departs from the ratio of the Apex Court in 'Hotel Bluemoon'. This view is also contrary to the one taken by the Special Bench of the Tribunal in Kuber Tobacco & that of the Bombay High Court in Salman Khan's case which are in favour of the assessee and which hold that section 292BB shall apply only from A.Y. 2008-09 onwards.*

#### **S. 143(2) : Assessment – Notice by Affixture – Last day – After office hours**

Notice served by affixture on last date after office hours is not valid service and assessment framed in pursuance of such notice is not valid, it is immaterial that the assessee appeared in the assessment proceedings. (A.Y. 2001-02)

*CIT v. Vishnu & Co. (P) Ltd. (2010) 230 CTR 62 / 217 Taxation 50 / 187 Taxman 316 / (2009) 319 ITR 151 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – No jurisdiction to assets [S. 292B]**

In the absence of service of notice the Assessing Officer had no jurisdiction to make assessment. (A.Y. 1996-97)

*CIT v. Cebon India Ltd. (2010) 34 DTR 119 / 229 CTR 188 / (2009) 184 Taxman 290 (P&H)(High Court)*

**S. 143(2) : Assessment – Notice – Before filing of return – Validity**

Assessment made in pursuance of a notice under section 143(2) issued on 23rd March 2000, when the return was filed on 27th march, 2000 is invalid. (A.Y. 1997-98)

*DIT v. Society for Worldwide Interbank Financial Telecommunications (2010) 40 DTR 17 / 323 ITR 249 / 232 CTR 265 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Limitation**

Notice having been served after the expiry of 12 months from the end of the month in which the return is furnished, Assessing Officer had no jurisdiction to frame the assessment. (A.Y. 1995-96)

*Dy. CIT v. Maxima Systems Ltd. (2010) 40 DTR 49 / 236 CTR 443 (Guj.)(High Court)*

**S. 143(2) : Assessment – Notice – Block assessment – Mandatory**

Service of notice on the assessee under section 143(2), within the prescribed period of time is a prerequisite for framing the block assessment. Non-issuance of notice is not a mere procedural irregularity and the same is not curable.

*Virendra Dev Dixit v. ACIT (2010) 41 DTR 43 / 233 CTR 177 / 331 ITR 483 (All.)(High Court)*

**S. 143(2) : Assessment – Notice – Reassessment [S. 148]**

Provision contained in section 143(2), is mandatory in nature and it is obligatory for the Assessing Officer to apply his mind to the contents of the return filed in response to notice under section 148 and thereafter issue notice under section 143(2), before proceeding to decide the controversy regarding escaped assessment, non issue of notice under section 143(2), after filing of return by assessee vitiated the reassessment proceedings. (A.Ys. 1994-95, 1995-96)

*CIT v. Rajeev Sharma (2010) 232 CTR 303 / 192 Taxman 197 / 40 DTR 129 / (2011) 336 ITR 678 (All.)(High Court)*

**S. 143(2) : Assessment – Notice – Block assessment [S. 158BC]**

Omission on the part of the assessing authority to issue notice under section 143(2), within prescribed time cannot be a mere procedural irregularity and the same not curable, as the notice under section 143(2), was issued beyond the period of limitation, the proceedings initiated pursuant to the notice are vitiated.

*CIT v. Pai Vaibhav Hotels (P) Ltd. (2010) 42 DTR 121 (Karn.)(High Court)*

### **S. 143(2) : Assessment – Notice – Limitation**

Issue of notice under section 143(2) beyond the statutory period of 12 months is invalid. The Assessee filed its return of income on 29.11.1995 the Assessing Officer issued notice under section 143(2) on 29.11.1996, but was served Assessee on 02.12.1996 – Notice having been served after 12 months from the end of the month in which the return if filed becomes invalid, hence, the assessment made is also invalid. (A.Y. 1995-96)

*Dy. CIT v. Maxima Systems Ltd. (2010) 40 DTR 49 / 236 CTR 443 (Guj.)(High Court)*

### **S. 143(2) : Assessment – Notice – Service – Limitation**

Notice under section 143(2) having been served beyond the statutory period of 12 months, the Tribunal was correct in holding that the assessment consequent to the issue of invalid notice becomes invalid.

*Dy. CIT v. Maxima Systems Ltd. (2010) 40 DTR 49 / 236 CTR 443 (Guj.)(High Court)*

### **S. 143(2) : Assessment – Notice – Failure to issue notice**

Failure to issue notice under section 143(2) would result into a void and invalid assessment. (A.Y. 1996-97)

*CIT v. Cebon (I) Ltd. (2009) 184 Taxman 290 / (2010) 229 CTR 188 / 34 DTR 119 (P&H)(High Court)*

### **S. 143(2) : Assessment – Notice – Block assessment [S. 158BC]**

Where Notice under section 143(2) was not issued within one year of filing the return by assessee, block assessment was invalid. No substantial question of law arises.

*CIT v. Ms. Mudra G. Nanawati (2009) 30 DTR 108 / 227 CTR 387 (Bom.)(High Court)*

### **S. 143(2) : Assessment – Notice served after office hours – Authorised person**

Notice under section 143(2), served after office hours on last date, no authorised person was present at the premises to receive, notice was affixed. Notice affixture not valid, though the assessee appeared in person not relevant. Assessment not valid. (A.Y. 2001-02)

*CIT v. Vishnu and Co. P. Ltd. (2009) 319 ITR 151 / (2010) 230 CTR 62 / 187 Taxman 316 (Delhi)(High Court)*

### **S. 143(2) : Assessment – Notice – Time limit in case of defective return – Limitation**

Time limit for issue of Notice under sec. 143(2) is not from date when defect was rectified but from date when return was filed.

In cases where the profit and loss account and balance sheet do not accompany the return of income, it would be regarded as defective in contradistinction to an invalid return. Therefore, a defective return cannot be regarded as an invalid return ipso

facto: It may assume the character of an invalid return if the defect after due notice has not been removed by the assessee. (A.Y. 1989-90)

*CIT v. Sohan Lal Chhajan Mal (2008) 307 ITR 53 / (2009) 222 CTR 190 (P&H)(High Court)*

**S. 143(2) : Assessment – Notice – Service of notice – Date of issue is not date of service**

A notice was sent by speed post one day before the period of limitation was to expire, i.e., on 30-10-2002 and the Department contended that the notice may be deemed to served within the due time. The Hon'ble Court held that what is required by the statute is not merely the dispatch or issuance of notice but its actual service. (A.Y. 1992-93)

*CIT v. Inderpal Malhotra (2008) 171 Taxman 359 (Delhi)(High Court)*

**S. 143(2) : Assessment – Non-service of notice – Registered post**

Notice under section 143(2) sent to the assessee by registered post having been received back undelivered without acknowledgement due, there was no service of notice upon the assessee within the prescribed period and consequently the assessment made by the Assessing Officer is invalid. (A.Y. 2001-02)

*CIT v. Eqbal Singh Sindhana (2007) 212 CTR 341 / (2008) 304 ITR 177 / (2007) 162 Taxman 107 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Service of notice to employee – Authorised person**

Receipt of the notice by employee is not receipt of the notice by the assessee unless he is authorized to receive any summons on behalf of the assessee. (A.Y. 1996-97)

*CIT v. Rajesh Kumar Sharma (2007) 165 Taxman 488 / (2008) 214 CTR 547 / (2009) 311 ITR 235 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Proof of service**

Notice dispatched by registered post on 25-8-1998 which was duly addressed and stamped is to be presumed to have reached the assessee by 28-8-1998 in the absence of any contrary proof. Therefore, the service of notice stood proved.

*CIT v. Shankar Lal Ved Prakash (2007) 212 CTR 47 / (2008) 300 ITR 243 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Service of notice**

Where the assessee was neither able to produce the envelope in which, the notice issued by the department under section 142(2) was sent to the assessee nor the assessee was able to produce a certificate from the post office about the delivery of the notice to him, Under these circumstances, the High Court held that the assessee had failed to discharge the onus of its claim that the notice under section 143(2) was served upon him after the period of limitation prescribed under the act and such, held that the notice was validity served on the assessee within time.

*CIT v. Shankarlal Ved Prakash (2007) 197 Taxation 58 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Time for issue**

Assessment as was declared void ab initio when notice under section 143(2) was issued beyond statutory period of one year from the end of the month in which return was filed. (A.Y. 1997-98)

*Dy. CIT v. Mahi Valley Hotels & Resorts (2006) 201 CTR 308 / 287 ITR 360 (Guj.)(High Court)*

**S. 143(2) : Assessment – Notice – Time for service**

Service of notice after time stipulated under section 143(2) – Assessment in pursuance to that not valid.

There is a clear cut distinction between 'issuance of notice' and 'service of notice'.

According to above proposition, the notice must be served, which was not done and hence, assessment was not valid.

*CIT v. Bhan Textiles P. Ltd. (2006) 287 ITR 370 / (2007) 208 CTR 253 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Scrutiny assessment**

Where assessee received notice to the effect that its case had been taken up for scrutiny as per the Board's instructions to verify correctness of deduction claimed under Chapter VI-A, Court could not interfere with such notice.

*Alken Laboratories Ltd. v. CIT (2003) 262 ITR 192 / 139 Taxman 272 (Patna)(High Court)*

**S. 143(2) : Assessment – Notice – Return below taxable**

Where return was below taxable limit, Tribunal was justified in holding that notice issued under section 143(2) was bad in law.

*Ashok Kumar Karola v. Union of India (2003) 131 Taxman 821 / 185 CTR 622 (Raj.)(High Court)*

**S. 143(2) : Assessment – Notice – Additions to income – Opportunity of being heard**

Assessing Officer cannot take note of any material beyond those contained in return to assess income in excess of that reflected in return or to enhance assessee's tax liability without affording him an opportunity to produce evidence in support of return. (A.Ys. 1992-93, 1993-94)

*Greenview Restaurant v. ACIT (2003) 263 ITR 169 / 185 CTR 651 / 133 Taxman 432 (Gau.)(High Court)*

**S. 143(2) : Assessment – Notice – Service – Proof of service**

In absence of proof as to service of notice under section 142(1), assessment under section 144 would be unsustainable. (A.Ys. 1992-93 to 1995-96)

*CIT v. Dr. K.C. Verma (2003) 132 Taxman 598 / 185 CTR 231 / (2004) 266 ITR 476 (Delhi)(High Court)*

**S. 143(2) : Assessment – Notice – Validity – Service**

In the absence of service of notice under section 143(2) or if the notice is served after the statutory time limit under section 143(2) then the assessment in such circumstances is invalid. (A. Ys. 2004-05 to 2006-07)

*CIT v. Mayawati (Ms.) (2011) 135 TTJ 167 / 42 SOT 59 / 48 DTR 283 (Delhi)(Trib.)*  
*Kiran Bansal (Mrs.) v. ACIT (2011) 135 TTJ 676 / 131 ITD 575 / 10 ITR 180 / 50 DTR 231 (Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Validity – Not pressed before CIT(A) – Gap of five years**

Assessee contended that it did not receive notice issued under section 143(2), Assessee's representative attended and assessee has not raised the issue of service of notice before the Assessing Officer. The ground was taken before the CIT(A) and the same was not pressed. The Tribunal held that the assessee cannot press the ground after gap of five years. (A. Y. 2003-04).

*Thistle Properties (P) Ltd. v. ACIT (2011) 55 DTR 81 / 138 TTJ 538 / (2012) 134 ITD 6 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Notice – Search and seizure [S. 153A]**

While making an assessment under section 153A service of notice under section 143(2), within the prescribed time is mandatory. In the absence of service of such notice, the Assessing Officer cannot make the addition in the income of the assessee and the Assessing Officer is bound to accept the income as returned by the assessee. (A. Y. 2001-02).

*Narendra Singh v. ITO (2011) 138 TTJ 615 / 130 ITD 509 / 54 DTR 209 (Agra)(Trib.)*

**S. 143(2) : Assessment – Notice – Service by affixture**

In the absence of any evidence that any independent person was associated with the identification of assessee's place of business at the time of service under section 143(2) by affixture or that the inspectors of IT had personal knowledge of such place of business service of notice by affixture cannot be treated as valid service. Second notice having been served beyond the period of twelve months was otherwise invalid hence, assessment is annulled. (A.Y. 2005-06)

*Kohli Bros. v. ITO (2010) 42 DTR 113 / 132 TTJ 117 (Luck.)(Trib.)*

**S. 143(2) : Assessment – Notice – Limitation**

Notice under section 143(2), though issued within 12 months but served after the expiry of 12 months from the end of the month in which the return was furnished is invalid and the assessment completed on the basis of such notice cannot be sustained. (A.Y. 2003-04)

*Servite Sisters Society (2010) 37 DTR 371 / 130 TTJ 96 (Indore)(Trib.)*



**S. 143(2) : Assessment – Notice – Valid Service [S. 282, 292BB]**

Notice under section 143(2), having been served on an employee of the assessee firm and not on any partner of the firm, who was not authorized to accept notices on behalf of the assessee, there was no valid service of notice, the assessment is valid. For the Asst. Year 2003-04, section 292BB is not applicable though the assessee participated in the assessment proceedings. (A.Y. 2003-04)

*ACIT v. Vision Inc. (2010) 37 DTR 263 / 130 TTJ 696 (Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Beyond twelve months – Block Assessment [S. 158BC]**

Assessing officer had issued notice under section 143(2), after expiry of twelve months from the end of month in which return was filed, notice issued was barred by limitation and therefore, assessment made in pursuance of said notice was quashed.

*Dy. CIT v. National Refinery (P) Ltd. (2010) 134 TTJ 109 / 38 SOT 36 / 45 DTR 325 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Notice – Reassessment**

Held that an order of reassessment passed under section 147 r.w.s. 143(3) without issue of a valid notice under section 143(2) of the Act is null and void. The amendment to Sec. 148 by the Finance Act, 2006 does not save the reassessment done without issue of notice under section 143(2). Further the provisions of Sec. 292BB are prospective and not retrospective. (A.Y. 2000-01)

*Chandra R. Gandhi v. ITO, (2009) 120 TTJ 786 / 18 DTR 165 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Notice – Appellate Tribunal – Rectification of apparent mistakes**

When an assessment is subject – matter of proceedings under section 143(2), during pendency of such proceedings rectification proceedings under section 154 can not be initiated. Where there can conceivably be two opinions on a particular issue, provisions of section 154 will not be attracted. (A.Ys. 1998-99, 1999-2000)

*M. P. Telelinks Ltd. v. ACIT (2009) 121 ITD 241 / 123 TTJ 145 / 23 DTR 452 (TM)(Agra)(Trib.)*

**S. 143(2) : Assessment – Notice – Power**

As per section 143(2)(i), the Assessing Officer's power was limited. Under the said provision, the Assessing Officer can only allow or reject the claims specified in the notice and make an assessment. If he wants to go further for full scrutiny, then he has to issue notice under section 143(3)(ii). (A.Y. 2001-02)

*ITO v. Pericles Foods Pvt. Ltd., (2007) 17 SOT 602 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Notice – Affixture – Appropriate orders**

Assessing officer must pass appropriate orders for serving the notice by affixture. (A.Y. 1998-99)

*Adeshwar Jain v. ITO Bench, ITA No. 261/JU/2004, dated 20th January, 2006 (Tax World – May 2006 – Vol. XXXV – P. 80)(Jodh.)(Trib.)*

**S. 143(2) : Assessment – Service of notice – Within the year**

Assessment completed on the basis of an invalid service will be null and void – Service of notice under section 143(2) on an unauthorized person cannot be held to be valid.

Notice under section 143(2) has to be issued and served within one year from the date of filing of return for taking up the case for scrutiny. (A.Y. 1992-93)

*Dilip Kumar Balkishan & Co. v. ACIT Bench, ITA No. 430/JU/2005, dated 10th March, 2006 (Tax World – May 2006 – Vol XXXV – P. 142)(Jodh.)(Trib.)*

**S. 143(2) : Assessment – Notice – Block assessment**

Block assessment order passed without issuance of notice under section 143(2) cannot be declared as invalid or void.

*A. P. Shanmugaraj v. Dy. CIT (2006) 100 TTJ 259 / 99 ITD 278 (Chennai)(Trib.)*

**S. 143(2) : Assessment – Notice – Speed post**

Service of notice through speed post is a recognized mode and a presumption can be drawn regarding service of notice sent by speed post within 3-4 days.

*Capital Gem Overseas (P) Ltd. v. ITO (2006) 103 TTJ 285 / 101 ITD 117 (Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Limitation – Director of Commissioner (Appeals)**

Limitation vis-à-vis powers of CIT(A). In the appeal against an intimation under section 143(1)(a), Commissioner (Appeals) had no power to direct the Assessing Officer to pass a fresh assessment order after issue of notice under section 143(2) once the time limit of 12 months for issue of notice under section 143(2) has already expired. (A.Y. 1993-94)

*Babulal Sharma v. ACIT (2006) 103 TTJ 722 (Jodh.)(Trib.)*

**S. 143(2) : Assessment – Notice under section 142(1) – Intimation under section 143(1)(d)**

There is no merit in contention that once a notice under section 142(1) is issued, return cannot be disposed of under section 143(1)(d) and necessarily has to be assessed under section 143(3); even after issuing notice under section 142(1), in case Assessing Officer is of view that there is no scope for addition or excess claim of any deduction, then return can be processed under section 143(1)(a). (A.Y. 1993-94)

*ACIT v. Subhash Chand Goyal (2005) 4 SOT 405 (Agra)(Trib.)*

**S. 143(2) : Assessment – Notice – No valid return**

When there is no valid return in existence, there cannot be any valid issuance of notice under section 143(2) either. When the notice issued under section 143 (2)

has been held to be invalid, it could not have any consequences in law. Section 292B also can not be pressed in to service for holding an assessment valid even on non issue of mandatory notice. Assessment was quashed as the said assessment was contrary to the scheme of the Act. (A.Y. 1993-94)

*S. Kumar Enterprises (Synfabs) Ltd. v. Jt. CIT (2005) 4 SOT 412 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Notice – Proviso – Non service of notice – Reassessment [S. 148]**

Proviso to section 143(2) is applicable in case of a return filed in response to notice under section 148 also and in such a case, no assessment can be made if notice under section 143(2) is not served within time prescribed by proviso to section 143(2). (A.Y. 1995-96)

*Raj Kumar Chawla v. ITO (2005) 94 ITD 1 / 92 TTJ 1245 / 1 SOT 934 (SB)(Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Reassessment [S. 147]**

Assessing Officer does not have jurisdiction to frame an order of assessment under section 147 without complying with the requirement of service of notice under the proviso to section 143(2) within the time prescribed by said proviso. (A.Y. 1999-2000-01)

*Sat Narain v. ITO (2005) 94 TTJ 499 (Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – With in one year – Mandatory**

Where from facts it was clear that mandatory requirement of service of notice within one year from end of month in which return of income was filed had not been fulfilled, assessment order made by Assessing Officer under section 143(3) subsequent to issuance of said notice was bad in law. (A.Y. 1996-97)

*Bhan Textiles (P.) Ltd. v. Dy. CIT (2005) 149 Taxman 10 (Mag.)(Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Service of notice**

Where assessee's case was that notice under section 143(2) was not served within time as per proviso to clause (n) of section 143(2) and revenue's contention that such notice was placed in same envelope as notice under section 143(1), was not verifiable from record, assessment could not be sustained. (A.Ys. 1999-2000 to 2001-02)

*Springer Verlag GmbH v. Dy. DIT (2005) 97 TTJ 269 (Delhi)(Trib.)*

**S. 143(2) : Assessment – Notice – Admission before Narcotics Cell – Addition to income**

Merely on basis of admission made by assessee before Narcotics Cell, addition cannot be made.

*Devshi Ramji Makwana v. ITO (2005) 1 SOT 540 (Mum.)(Trib.)*

**S. 143(2) : Assessment – Addition to Income – Statement before FERA authorities**

Where reassessment proceedings were initiated and addition was made on account of under-invoicing on basis of statement of assessee recorded by FERA authorities, even if charges against assessee were dropped by FERA authorities, material seized by FERA authorities could be used in assessment proceedings for making addition. (A.Y. 1988-89)

*ACIT v. Sachdeva & Sons (2005) 97 ITD 425 / 97 TTJ 1101 (Amritsar)(Trib.)*

**S. 143(3) : Assessment – Opportunity for cross examination – Entire order cannot be set aside**

Where an order had been passed by the Assessing officer without granting the assessee an opportunity to cross examine and the assessee preferred a writ petition. The Apex court held that the High Court ought not to have set aside the order of assessment but to have only granted the assessee an opportunity to cross examine the witness. (A. Y. 2004-05).

*ITO v. M. Pirai Choodi (2011) 334 ITR 262 / 245 CTR 233 / 63 DTR 187 (SC)*

*Editorial: Decision of Madras High Court in M. Pirai Choodi v ITO (2008) 302 ITR 40 (Mad.), set aside.*

**S. 143(3) : Assessment – Liability to tax – Set-aside – Attachment of property**

Liability to pay tax do not exist when assessment order is set-aside.

*Ashwin S. Mehata & Anrs. v. Custodian & Ors. AIR 2006 Supreme Court 795 (SC)*

**S. 143(3) : Assessment – Ad hoc disallowance – Business expenditure**

Ad hoc disallowance without any basis out of carriage, labour and sealing expenses cannot be sustained particularly when the Tribunal has allowed similar expenses in totality in an earlier year. (A. Y. 1992-93)

*Friends Clearing Agency (P) Ltd. v. CIT (2011) 237 CTR 464 / 49 DTR 297 / 332 ITR 269 (Delhi)(High Court)*

**S. 143(3) : Assessment - Additions – Opportunity of cross examination – Natural justice**

Where addition had been made on the basis of a statement of party, behind the assessee's back and without providing any opportunity to cross-examine the party despite being asked for by the assessee, it was held that the matter was to be remanded back to the Assessing Officer for disposal afresh. (A. Y. 1998-99)

*Ashok Lalwani v. ITO (2011) 196 Taxman 82 / (2010) 328 ITR 272 (Mag.)(Delhi)(High Court)*

**S. 143(3) : Assessment – Additions – Offer by assessee**

Where the assessee himself offered ` 20 Lacs as income purportedly on account of deficit in stocks but apart from the assessee's offer, there was no other material pointing towards such deficit, it was held that addition was not justified. (A.Y. 2005-06)

*CIT v. C. Jayantilal (2011) 199 Taxman 34 (Mag.) / 329 ITR 530 (Mad.)(High Court)*

**S. 143(3) : Assessment – Order giving effect to order of Tribunal – Scope – Binding nature [S. 254(1)]**

While giving effect to the appellate order, the Assessing Officer cannot travel beyond the order of Tribunal. Assessing Officer being a quasi judicial authority and subordinate to the Tribunal is bound by the decision of the Tribunal. (A. Y. 2001-02).  
*Lopmudra Mishra v. ACIT (2011) 59 DTR 257 / 243 CTR 66 / 202 Taxman 437 / 237 ITR 92 (Orissa)(High Court)*

**S. 143(3) : Assessment – Notice by affixture – Assessment held to be invalid**

Where notice for assessment had been given only a week prior to the expiry of the limitation period by way of affixture and neither was any other mode of service adopted nor was it shown that the assessee had refused to accept service, it was held that the notice was invalid and consequently the assessment was struck down. (A. Y. 1969-70)

*CIT v. Kishan Chand (2010) 328 ITR 173 / (2011) 196 Taxman 88 (Mag.)(P&H)(High Court)*

**S. 143(3) : Assessment – Shares – Consistency – Capital gains – Business income**

Where a particular position has been accepted by the Department in earlier assessment years, the same should not be deviated from unless there is a change in facts, even though the principle of resjudicata is not applicable.

*CIT v. Gopal Purohit (2010) 188 Taxman 140 / 228 CTR 582 / 34 DTR 52 / (2011) 336 ITR 287 (Bom.)(High Court)*

**S. 143(3) : Assessment – Concession of law – Admission – Binding effect**

Admission or concession by a counsel made inadvertently or under a mistaken impression of law will not only bind on his client, but also same can not ensure to the benefit of other party. Party can resile from such concession. (A.Y. 2000-01)

*Dy. CIT v. K. S. Suresh (2009) 319 ITR 1 / 32 DTR 217 / (2010) 228 CTR 306 (Mad.)(High Court)*

**S. 143(3) : Assessment – Norms to select for scrutiny assessment – Disclosure**

The Assessing Officer is not required to disclose the reason to select the returns for scrutiny assessment. (A.Y. 2002-03)

*Bandi Co-operative Labour & Construction in Society v. CIT (2006) 154 Taxman 479 / 203 CTR 111 / (2008) 300 ITR 107 (P&H)(High Court)*

**S. 143(3) : Assessment – Additions to income – Show Cause notice by Excise authorities**

Where show-cause notice issued by Central Excise Authorities, which was made basis of show-cause notice issued by Income-tax Department to assessee for making addition to income of assessee, had been set aside by High Court, show-cause notice issued by Income-tax Authority could not survive. (A.Y. 1985-86)

*CIT v. Somani Pilkington's Ltd. (2003) 133 Taxman 717 / (2004) 266 ITR 388 / 186 CTR 236 (P&H)(High Court)*

### **S. 143(3) : Assessment – Additions to income – Supporting evidence**

Where assessee was not maintaining proper accounts in respect of toddy business, and no supporting material or evidence with respect to loss in toddy business claimed by it was produced, Tribunal was justified in sustaining disallowance of loss. (A.Y. 1991-92)

*Sree Krishna Trading Co. v. ACIT (2003) 127 Taxman 412 / 179 CTR 467 / 260 ITR 633 (Ker.)(High Court)*

### **S. 143(3) : Assessment – Additions to income – Bogus purchase**

Addition on account of bogus purchases was justified where assessee had failed to discharge onus to prove that purchases were genuine. (A.Y. 1990-91)

*Sree Rajvel & Co. v. CIT (2003) 133 Taxman 565 / 184 CTR 508 / (2004) 268 ITR 267 (Ker.)(High Court)*

### **S. 143(3) : Assessment – Additions to income – Receipt from tenants**

Amount claimed to be received by assessee from tenants of property sold by assessee, for not evicting them, was rightly added to assessee's income where Tribunal found confirmatory letters by such tenants unreliable. (A.Y. 1992-93)

*Joy P. Chungath (Dr.) v. CIT (2003) 131 Taxman 324 / 263 ITR 446 / 184 CTR 146 (Ker.)(High Court)*

### **S. 143(3) : Assessment – Additions to income – Estimated price**

Addition on account of estimated price of eliminated dust could not be said to be justified in case of assessee-manufacturer of steel and ingots. (A.Y. 1988-89)

*Somani Iron & Steels Ltd. v. CIT (2003) 262 ITR 189 / 130 Taxman 480 / 185 CTR 632 (All.)(High Court)*

### **S. 143(3) : Assessment – Additions to income – Unutilised MODVAT**

Following the judgment of Bombay High Court in *CIT v. Indo Nippon Chemical Co Ltd (2000) 245 ITR 384 (Bom)*, unutilized MODVAT can not be added to total income. (A.Y. 1988-89)

*CIT v. International Data Management Ltd. (2003) 261 ITR 177 / 182 CTR 336 (Bom.)(High Court)*

*Editorial : The decision reported in 245 ITR 384 (Bom) is confirmed by the Supreme Court in (2003) 261 ITR 275.*



**S. 143(3) : Assessment – Additions to Income – Write off on account of obsolete items**

Assessee placed the report of auditor before the assessing Officer which justified the valuation of obsolete items at 10 percent of cost, Assessing Officer has not doubted the correctness of valuation by the Auditor, therefore the amount added back as Addition of amount written off on account of obsolete items was deleted. (A.Y. 1989-90)

*Alfa Laval India Ltd. v. CIT (2003) 133 Taxman 740 / (2004) 186 CTR 390 / 266 ITR 418 (Bom.)(High Court)*

*Editorial : Confirmed by Supreme Court in (2007) 295 ITR 451*

**S. 143(3) : Assessment – Additions to income – Nursing home – Clubbing of income**

Income derived by assessee's father from running of nursing home could not be included in income of assessee-doctor (who was a reader in a Medical College) on ground that assessee's father was not a doctor.

*K. P. Srivastava (Dr) v. CIT (2003) 130 Taxman 798 / 262 ITR 299 (All.)(High Court)*

**S. 143(3) : Assessment – Additions to income – Gift – Genuineness**

Where a claim of gift is made by assessee, onus lies on him and mere identification of donor and showing movement of gift amount through banking channels is not sufficient to prove genuineness of gift. (A.Y. 1993-94)

*Sajan Dass & Sons v. CIT (2003) 128 Taxman 621 / 181 CTR 581 / 264 ITR 435 (Delhi)(High Court)*

**S. 143(3) : Assessment – Additions to income – Receipt by purchaser**

No addition could be made in hands of seller merely on basis of amount stated in receipt given to purchaser where consideration agreed upon was shown in sale deed. (A.Ys. 1983-84, 1985-86)

*CIT v. K. C. Agnes (Smt) (2003) 128 Taxman 848 / 262 ITR 354 / 183 CTR 29 (Ker.)(High Court)*

**S. 143(3) : Assessment – Additions to income – Shares – Promoters quota – Difference between quoted price and sale price**

Sale of shares, acquired by assessee-share broker out of promoters' quota, three months prior to their listing on stock exchange at about one third the price quoted on stock exchange on listing, would justify addition on account of difference in sale price and quoted price.

(A.Y. 1991-92)

*ITC Classic Finance Ltd. v. Dy. CIT (2003) 183 CTR 595 / 264 ITR 154 / 133 Taxman 673 (Bom.)(High Court)*

**S. 143(3) : Assessment – Addition to income – Adhoc addition – Self made vouchers**

Adhoc disallowance cannot be made simply holding that self made vouchers cannot be taken as correct and proved, unless some of such vouchers are proved as bogus or fake.

*ITO v. Bajrang Trading Company (2011) Tax World Vol. XLV Part-1 Page 33 (January, 11)(Jp.)(Trib.)*

**S. 143(3) : Assessment – Loose sheets – Unaccounted loan**

Merely on the basis of document recovered from search bearing no signature of assessee or borrower addition cannot be made. (A.Ys. 2000-01 to 2006-07)

*Anil Kumar Bhatia v. ACIT (2010) 1 ITR 484 (Delhi)(Trib.)*

**S. 143(3) : Assessment – Order Sheet – Notice received after statutory time limit – Limitation**

Order sheet is a very important record. As the assessing officer not recorded in the order sheet and the Assessing Officer is not able to show that the notice dt. 08-06-2006, was issued and served, it was to be held received after statutory time limit under section 143(2) and was clearly time barred. (A.Ys. 2004-05 to 2006-07)

*Dy. CIT v. Mayawati (2010) 42 SOT 59 / (2011) 135 TTJ 167 / (2010) 48 DTR 233 (Delhi)(Trib.)*

**S. 143(3) : Assessment – De-novo assessment – No power to enhance [S. 252]**

De-novo assessment pursuant to order of the Tribunal, the Assessing Officer enhanced the income. The Tribunal noted that it did not have power to enhance the assessment. In such situation, the order of the Tribunal restoring the matter to Assessing Officer cannot be construed to grant power include a totally new issue, which has effect of enhancing the income. What cannot be done directly, cannot be done indirectly also.

*ITO v. Jabbal Woodcrafts India, ITA No.803/D/2009, dt.24-09-2010, Mumbai 'D' Bench, BC&A P. 28, Vol. 42-B, Part 3, December 2010. (Mum.)(Trib.)*

**S. 143(3) : Assessment – Issue of notice – Service essential**

Mere issuance of notice could not be deemed to have been served upon the assessee within 12 months from the end of the month in which the return has been filed. In the instant case as notice under section 143(2) had not been served within a statutory period of limitation, assessment framed by Assessing Officer was invalid and was to be quashed.

*Cals Ltd. v. Dy. CIT (2006) 157 Taxman 193 (Mag.)(Delhi)(Trib.)*

**S. 143(3) : Assessment – Revision – Fresh assessment – Scope [S. 263]**

The fact that the Commissioner has set aside the whole assessment while exercising his jurisdiction under section 263, no disallowance of interest could be made in the fresh assessment under section 143(3) as such disallowance was not the subject-matter of the original assessment. (A.Y. 1998-99)

*ITO v. Uma Kant Newatia (2006) 99 TTJ 376 / (2005) 97 ITD 414 (Kol.)(Trib.)*

**S. 143(3) : Assessment – Noting in loose papers – No addition**

Mere notings on loose paper without any corroborative evidence cannot be assessed as 'income' in hands of assessee. (A.Y. 1991-92)

*Malabar Oil Mktg. Co. v. ACIT (2005) 4 SOT 900 / 91 TTJ 348 (Mum.)(Trib.)*

**S. 143(3) : Assessment – Jottings – Found during search – No addition**

Additions based on jottings on a chit found during search, in absence of any corroborative evidence to support it, could not be sustained. (A.Y. 1995-96)

*Addl. CIT v. Prasant Ahluwalia (2005) 92 TTJ 464 (Cuttack)(Trib.)*

**S. 143(3) : Assessment – Quantity of sales – Purchasers are not available – No addition**

Where a quantitative tally of sales is furnished, even if purchasers are not available, no addition can be made merely on assumptions or presumptions or surmises or conjectures. (A.Y. 1993-94)

*ITO v. Surana Traders (2005) 92 ITD 212 / 93 TTJ 875 (Mum.)(Trib.)*

**S. 143(3) : Assessment – Survey – Shortage of stock – Different method of stock – No addition**

Where an addition was made on account of shortage of stock found during survey and so-called discrepancy was on account of reason that assessee had adopted practice of working out stock of various goods in terms of cu. ft. whereas IT authorities had taken same on basis of sq. ft. and assessee had pointed out that fact to revenue, addition was to be deleted. (A.Y. 1994-95)

*ITO v. Sujata Devi (Smt) (2005) 94 TTJ 484 (Jodh.)(Trib.)*

**S. 143(3) : Assessment – Information supplied by Mandi Board – No addition**

Where Assessing Officer, relying upon information supplied by Mandi Board Officials, made addition of certain amount on account of value of alleged excess stock of paddy found at business premises of assessee and on account of alleged profit on sale of various produce obtained from said excess paddy stock, admission made by assessee before Mandi Board Officials did not automatically establish fact of variation in stock and in absence of any concrete material supplied by revenue and Mandi Board Officials, impugned additions made by Assessing Officer were not justified. (A.Y. 1998-99)

*Jai Bharat Rice Mills v. ITO (2005) 148 Taxman 55 (Mag.)(Amritsar)(Trib.)*

**S. 143(3) : Assessment – Regular assessment – Intimation [S. 143(3)]**

Processing Return under section 143(1) does not act as a bar to making assessment under section 143(3) which is regular assessment. (A.Ys. 1993-94 to 1997-98)

*All India Children Care & Educational Development Society v. Jt. CIT (2003) 87 ITD 209 / 81 TTJ 598 (All.)(Trib.)*

**S. 143(3) : Assessment – Additions to income – Failure to inquire**

Failure on the part of assessing officer to make further enquiries as directed by Commissioner (Appeals) while setting aside additions would justify the deletion of additions. (A.Y. 1994-95)

*Sudhadevi Modi (Smt.) v. ACIT (2003) 84 ITD 604 / (2004) 88 TTJ 1109 (Mum.)(Trib.)*

**S. 143(3) : Assessment – Additions to income – Loose sheet – Corroborative evidence**

No addition can be made on the basis of mere entry in a loose sheet without there being further trustworthy/reliable corroborative evidence lending credence to such an entry. (A.Ys. 1990-91 to 1994-95)

*J R C Bhandari v. ACIT (2003) 79 TTJ 1 / 133 Taxman 44 (Mag.)(Jodh.)(Trib.)*

**S. 143(3) : Assessment – Additions to income – Survey – Discrepancy in stock – Gross profit**

In the course of survey when physical stock is found less as compared to book stock, possible addition can be made only in respect of gross profit arising out of suppressed sale.

*Roop Niketan (RF) v. ACIT (2003) 131 Taxman 129 (Mag.)(Mum.)(Trib.)*

**S. 143(3) : Assessment – Additions to income – Seized papers – Total effect**

Assessing Officer cannot make additions on basis of seized papers which were in favour of department, and ignoring entries in favour of assessee on same set of seized papers, at his own convenience and without giving opportunity. (A.Ys. 1992-93 to 1993-94)

*ACIT v. Omprakash & Co (2003) 132 Taxman 99 (Mag.)(Mum.)(Trib.)*

**S. 143(3) : Assessment – Change of status – Issue of notice**

If a Return is filed in the status of Individual, than assessment in status of HUF can not be made without issuing notice. (A.Y. 1987-88)

*Ishwarbhai Rambhai Patel v. ITO (2003) SOT 523 (Ahd.)(Trib.)*

**S. 143(3) : Assessment – Additions to income – Difference in selling price**

No Addition can be made for difference in sale price in bills of two different parties, raised on different dates, on ground that lesser rate is charged to one party. (A.Y. 1990-91)

*ACIT v. Dilip Kumar (2003) 81 TTJ 316 / (2004) 3 SOT 702 (Jodh.)(Trib.)*

**S. 143(3) : Assessment – Appeal to ITAT – Fresh additions – Scope on remand**

Assessing Officer was not justified in making addition of balance 25 per cent of the income which was not subject matter of appeal before Tribunal. (A.Ys. 1995-96 to 2000-01)

*Sheraton International Inc. v. Dy. DIT (2007) 106 TTJ 620 / 107 ITD 120 / (2006) 10 SOT 542 (AT)(Delhi)(Trib.)*

### **Section 144 : Best judgment assessment**

#### **S. 144 : Best judgment assessment – Arbitrary – Honest and fair estimate**

Even though there is always a certain degree of guess work in a best judgment assessment, the authority should try to make an honest and fair estimate of the income and should not act totally arbitrarily.

*Kachwala Gems v. Jt. CIT (2006) 206 CTR 585 / (2007) 288 ITR 10 / 158 Taxman 71 / 196 Taxation 738 / AIR 2007 SC 487 (SC)*

#### **S. 144 : Best judgment assessment – Liquor trade – General principles – Rejection of books of account – Percentage of 40% could not be adopted [S. 145]**

The Assessing Officer rejected the book results and estimated the gross profit at 40% of purchases. This was confirmed by CIT(A). The Tribunal held that the estimation of turnover at eight times the purchase price and 1% there on as profit would be reasonable. The Court held the estimating the net profit at 2% of the estimated sales or 16% of the purchase price would be reasonable. The Court laid down the following general principles (1) The power to levy assessment on the basis of best assessment is not an arbitrary power; it is an assessment on the basis of best judgment of the officer; (2) When best judgment assessment is undertaken it cannot be as per the whims and fancies of the Assessing Officer but should be based on some material either produced by the assessee or gathered by the taxing officer. If for any reason material like books of account produced by the assessee is rejected as unreliable or unsatisfactory, there should be valid reasons for doing so; and (3) whenever best judgment assessment is made, the Court would not call for proof from the officer if there is some nexus between the amount arrived at after some guess work and the facts of the case. (A. Ys. 1993-94 and 1995-96).

*CIT v. R. Narayana Rao and Others (2011) 338 ITR 625 (AP)(High Court)*

#### **S. 144 : Best judgment assessment – Rejection of book results – Estimation of income**

In the absence of books of accounts maintained, presumptive taxation does not become the sole criteria to make addition. There must be something more than suspicion to support the assessment. (A.Y. 1994-95)

*Sajda Parveen (Smt) v. ACIT (2011) 245 CTR 346 / 63 DTR 321 (Chhattisgarh)(High Court)*

**S. 144 : Best judgment assessment – Estimate of income – Depreciation [S. 32, 145(3)]**

Assessee is entitled to depreciation when best judgment assessment is made, and income is estimated. (A.Ys. 1997-98, 1998-99)

*Shri Ram Jhanwar Lal v. ITO (2010) 321 ITR 400 / (2009) 177 Taxman 135 / (2008) 10 DTR 229 (Raj.)(High Court)*

**S. 144 : Best judgment assessment – Assessment – Service of notice by affixture – Not valid**

The Tribunal has held that there was no evidence that there was any refusal by the assessee to accept service of notice. The Tribunal had categorically held that no other mode was adopted and steps for service of notice were taken about a week before the time was expiring. The service by affixture was not proper service. High Court affirmed the order of Tribunal. (A.Y. 1969-70)

*CIT v. Kishan Chand (2010) 328 ITR 173 (P&H)(High Court)*

**S. 144 : Best judgment assessment – Cumulative failure under clauses (a) to (c) – Accounts**

Even though word 'or' is used in clauses (a) to (c) of section 144, a best judgment assessment is called for, only when there is cumulative failure of all conditions including failure to furnish his details of income and to prove same through his accounts and documents. (A.Y. 1994-95)

*Mubarak Trading Company v. CIT (2008) 174 Taxman 339 / (2009) 222 CTR 194 / (2009) 19 DTR 133 (Ker.)(High Court)*

**S. 144 : Best judgment assessment – Without opportunity – Annulment – Set aside**

Best judgment assessment made under section 144 without affording an opportunity to assessee under proviso thereto, cannot be annulled but can be set aside. (A.Y. 1990-91)

*CIT v. Agro Engineers (2003) 130 Taxman 830 / 183 CTR 427 / (2004) 266 ITR 637 (Raj.)(High Court)*

**S. 144 : Best judgment assessment – Counsel – Evidence [Rule 46A]**

The assessee had given all documents/ evidences to its counsel who failed to appear before the Assessing Officer. The Assessing Officer proceeded to make an ex parte assessment under section 144 by treating addition to unsecured loans and share application money as unexplained under section 68. Before the CIT(A) the Assessee filed additional evidence u/r 46A and pleaded that it should not be made to suffer for no lapse on their part. The Tribunal held that CIT(A) was not justified in refusing to admit additional evidence. (A. Y. 2002-03)

*Anmol Colours India (P) Ltd. v. ITO, (2009) 121 TTJ 269 / (2008) 10 DTR 381 (Jp.)(Trib.)*



**S. 144 : Best judgment assessment – Rejection of books – Fair and reasonable estimate**

**[S. 145]**

Tribunal held, that while invoking provisions of section 145(3) and rejecting book results, the Assessing officer cannot make an addition in an arbitrary manner and without any basis. Assessing officer has to make an independent inquiry, refer the past history as well as comparable cases, and is duty bound to make a fair and reasonable estimate, based on evidence and material on record. Assessment has to be made as in manner required under section 144 while invoking the provisions of section 145(3).

*Bathinda Truck Operator union v. ITO (2007) 158 Taxman 148 (Mag.)(Amritsar)(Trib.)*

**S. 144 : Best judgment assessment – Firm – AOP**

Assessment made on the assessee, a firm, as an AOP following its failure to comply with the terms of the notice under section 142(1)/143(2) was in accordance with law. (A.Y. 1998-99)

*Rama Boiled Modern Rice Mill v. ITO (2006) 99 TTJ 607 / (2005) 97 ITD 379 (Hyd.)(Trib.)*

**S. 144 : Best judgment assessment – Liquor business – Licence**

Liquor licence in the name of a partner – Assessee, a firm carrying on liquor business by exploiting licence which was in the name of one of its partners, was assessable as firm and not as AOP in the absence of anything to show that there was factual transfer of licence and violation of the conditions on which licence was granted. (A.Ys. 1993-94 to 1996-97)

*Thodupuzha Wines v. Dy. CIT (2006) 99 TTJ 786 / (2005) 97 ITD 253 (Cochin)(Trib.)*

**S. 144 : Best judgment assessment – Suspicion – Assumption**

Tribunal held, that best judgment assessment on basis of conclusion based on suspicion and false notions and assumption, as per Assessing Officer's own whims and yardsticks, is not justified.

Further it was observed that :

- i) Best Judgment Assessment has to be fair, reasonable and based on material, wherein some guess work cannot be ruled out.
- ii) Once books of account is rejected, then reliance on some entries in those books to make separate addition is not justified.

*ACIT v. Renu Mukerjee (Smt) 177 Taxman 58 (Mag.)(Delhi)(Trib.)*

**S. 144 : Best judgment assessment – Fair and reasonable – Natural justice**

The assessment made without observing the principles of natural justice cannot be sustained. (A.Y. 1994-95)

*Vinod Kumar Pittie v. ACIT (2006) 103 TTJ 504 (Mum.)(Trib.)*

**S. 144 : Best judgment assessment – Adjournment request – Opportunity for hearing**

Best judgment assessment made without rejecting the request of Authorised Representative of assessee for adjournment sought and without giving an opportunity of hearing to assessee is invalid. (A.Y. 1994-95)

*Vinod Kumar Pittie v. ACIT (2006) 103 TTJ 504 (Mum.)(Trib.)*

**S. 144 : Best judgment assessment – Co-operation not extended – Return not filed [S. 148]**

Where no valid return was filed in response to notice under section 148 within time, and also assessee did not co-operate with Assessing Officer and had not complied with statutory notices, Assessing Officer had rightly proceeded under section 144.

*Bisauli Tractors v. ITO (2005) 148 Taxman 6 (Mag.)(Delhi)(Trib.)*

**S. 144 : Best judgment assessment – No notice – Regular books of account [S. 44AD]**

Where in appeal against best judgment, assessee-contractor raised a ground that no notice under section 142(1) was ever served upon him and contended that as he was maintaining regular books of account, his case did not come within purview of section 44AD but on those points no definite finding was recorded by Commissioner (Appeals) while deciding appeal against assessee, matter was to be restored to Assessing Officer for assessment afresh. (A.Y. 1995-96)

*Kaushik Medhi v. ITO (2005) 93 ITD 100 / 93 TTJ 01 (TM)(Gau.)(Trib.)*

**Section 144A : Power of Joint Commissioner to issue directions in certain cases**

**S. 144A : Assessment – Joint Commissioner – Direction – Power to recall the orders**

There is no provision in the Income-tax Act under which the Addl. Commissioner can recall the orders under section 144A. (A.Ys. 1982-83 to 1996-97)

*Sir Shadi Lai Enterprises Ltd. v. Addl. CIT (2003) 264 ITR 403 / 185 CTR 146 / (2004) 134 Taxman 131 (All.)(High Court)*

**S. 144A : Assessment – Joint Commissioner – Direction – Power to issue directions – Binding**

Directions issued by the Joint Commissioner are binding on the Assessing Officer. However, before issuing the directions which are prejudicial to the Assessee, an opportunity be allowed to Assessee, and also the directions issued cannot be on the lines on which an investigation be conducted.

*Viswams v. ACIT (2010) 186 Taxman 25 (Mag.)(Chennai)(Trib.)*

**S. 144A : Assessment – Joint Commissioner– Direction – Power – Chapter XIV**

Tribunal held, that provisions of Section 144A are restricted to assessments to be made in Chapter XIV. (A.Ys. 1988-89 to 1997-98)

*Mitsubishi Corpn. v. Dy. CIT (2003) 85 ITD 414 / (2004) 86 TTJ 139 (Delhi)(Trib.)*

### **Section 144B : Reference to Deputy Commissioner in certain cases [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

#### **S. 144B : Assessment – Direction – Bias in mind – Matter be heard by other person**

Where ITO, without there being any rhyme and reason, condemned tax officers and advocates by saying that these persons were adopting tactics to divert attention from the principal question and by raising frivolous pleas causing obstruction in the judicial process, as there was bias in mind of ITO, direction was to be given that matter should be heard by some other ITO. (A.Y. 1992-93)

*Vimal Chand Gautam Chand v. Union of India (2003) 183 CTR 355 / 267 ITR 377 / 133 Taxman 41 (Raj.)(High Court)*

#### **S. 144B : Assessment – Res Judicata – Application – Same parties – Same issue**

Principle of res judicata applies in a case where between same parties question was in issue directly or substantially in earlier proceeding and had since been decided.

*CIT v. Bimal Kumar Damani (2003) 129 Taxman 564 / 261 ITR 87 / 180 CTR 452 (Cal.)(High Court)*

#### **S. 144B : Assessment – Remand – Power of Assessing Officer**

Order of remand is confined only to the extent it is remanded; Assessing Officer could not sit in appeal over decision by order of remand. (A.Ys. 1968-69 to 1974-75)

*Bidya Devi (Smt) v. CIT (2003) 263 ITR 52 / 131 Taxman 735 / 184 CTR 97 (Cal.)(High Court)*

#### **S. 144B : Assessment – Draft assessment order – IAC – Scope of power**

IAC can issue direction with respect to the matters covered in the objection raised by the assessee and he is not confined or limited to the various items of addition or disallowance made by the ITO in the draft assessment order. (A.Y. 1978-79)

*M. Ct. Muthiah (HUF II) v. CIT (2003) 126 Taxman 63 / 259 ITR 194 / 180 CTR 238 (Mad.)(High Court)*

### **Section 144C : Reference to dispute resolution panel**

#### **S. 144C : Assessment – Reference to dispute resolution panel – Cut-off date**

Parties are advised to resort to Alternate Dispute Resolution Mechanism suggested in section 144C; competent authority is directed not to reject the application made by the assessee on the ground that the proposal has come before the cut-off date and to decide the matter notwithstanding the pendency of the appeal before the CIT (A).

*Addl. CIT v. HCL Technologies Ltd. (2009) 184 Taxman 41 / (2010) 187 Taxman 150 / 188 Taxman 72 / (2009) 225 CTR 356 / 28 DTR 217 (SC)*

**S. 144C : Assessment – Reference to dispute resolution panel – Transfer pricing – Not to have perfunctory approach**

The DRP, is an authority created under a statute and conferred with the powers, which has the obligation to act as a body living to the expectations which the law mandates. It was held that section 144C empowers the Dispute Resolution Panel (DRP) to issue directions to the Assessing Officer and cannot be treated as totally redundant or absolutely inefficacious remedy to the assessee. Thus, no assessee can have any kind of apprehension that the approach to the DRP is perfunctory.

*Ericsson AB v. ADIT (2011) 197 Taxman 321 / (2012) 341 ITR 162 (Delhi)(High Court)*

**S. 144C : Assessment – Reference to dispute resolution panel – Transfer pricing – Order cannot be passed if no transfer pricing adjustments made by TPO [S. 92CA]**

Where no transfer pricing adjustments had been made by the TPO, the assessee was not an "eligible assessee" and the Assessing Officer had no jurisdiction to pass the draft assessment order. (A. Y. 2006-07).

*Pankaj Extraction Ltd. v. ACIT (2011) 198 Taxman 6 / 56 DTR 32 / 241 CTR 390 (Guj.)(High Court)*

**S. 144C : Assessment – Reference to dispute resolution panel – Transfer pricing – Jurisdictional commissioner should not be part of DRP – Reassessment [S. 147]**

Where DIT-II was exercising supervisory functions over the Assessing Officer, the real likelihood of "official bias" cannot be ruled out. Even if the officer is impartial and there is no personal bias or malice, nonetheless, a right minded person would think that in the circumstances, there could be a likelihood of bias on his part. In that event, the officer should not sit and adjudicate upon the matter. He should recuse himself. This follows from the principle that justice must not only be done but seen to be done. In order to ensure that no person should think that there is a real likelihood of bias on the part of the officer concerned, the CBDT is directed to ensure that a jurisdictional Commissioner is not nominated as a member of the DRP under Rule 3(2) of the Rules. By doing this, the principle that justice must not only be done but seen to be done would be ensured. Nonetheless the constitutional validity of section 144C and Rule 3(2) of the Rules was upheld. (A. Ys. 2002-03 to 2007-08)

*Hyundai Heavy Industries Ltd. v. UOI (2011) 60 DTR 145 / 243 CTR 313 / 201 Taxman 237 / 2011 Tax L.R. 744 / (2012) 341 ITR 203 (Uttarakhand)(High Court)*

**S. 144C : Assessment – Reference to dispute resolution panel – Transfer pricing – Direction**

Direction given by the Dispute Resolution Panel to the Assessing Officer to reconsider petitioner's claim for deduction under section 10A after verifying the income from engineering and design services and examining whether the same qualified for deduction or not giving liberty to Assessing Officer to decide the issue, after hearing the petitioner, is not violative of sub section (5) and (8) of section 144C. (A. Y. 2006-07).

*GE India Technology Centre (P) Ltd. v. Dy. CIT (2011) 243 CTR 451 / 60 DTR 322 / 338 ITR 416 / 201 Taxman 191 (Karn.)(High Court)*

#### **S. 144C : Assessment – Reference to dispute resolution panel – Reasoned order**

When a quasi judicial authority deals with a it is obligatory on its part to ascertain cogent and germane reasons as the same is the part and soul of the matter. And further, the same as facilitates application when the order is called in question before the superior forum. The order dated September 30, 2010 passed by Dispute Resolution panel was quashed and matter was remanded to the same authority to adjudicate a fresh.

Dispute resolution panel must give "cogent and germane reasons" in support of section 144C directions.

*Vodafone Essar Ltd. v. Dispute Resolution Panel (2011) 54 DTR 71 / (2012) 340 ITR 352 / 240 CTR 263 / (2011) 196 Taxman 423 (Delhi)(High Court)*

#### **S. 144C : Assessment – Reference to dispute resolution panel – Speaking order**

Where the Dispute Resolution Panel has brushed a side assessee's submissions without even a whisper of the assessee's objections against draft assessment order, and passed a laconic non-speaking order, the matter is remitted to the file of Dispute Resolution Panel for speaking order. (A. Y. 2006-07).

*GAP International Sourcing India (P) Ltd. v. Dy. CIT (2011) 49 DTR 313 / 8 ITR 177 / 135 TTJ 627 / 44 SOT 56 (Delhi)(Trib.)*

#### **S. 144C : Assessment – Reference to dispute resolution panel – Speaking order [S. 92C]**

Where order of DRP is a non speaking order, same cannot withstand test of law. (A. Y. 2006-07).

*Geodis Overseas (P) Ltd. v. Dy. CIT (2011) 45 SOT 375 / 57 DTR 191 / (2012) 14 ITR 325 (Delhi)(Trib.)*

#### **S. 144C : Assessment – Reference to dispute resolution panel – Transfer pricing – Power to "enhance" – Confined to issues raised in draft assessment order – "Future losses"**

Under section 144C(5), the DRP can issue directions only in respect of the objections raised by the assessee and the objections are to be in terms of the variation proposed

in the draft order. Section 144C(8) restricts the powers of the DRP to “confirm, reduce or enhance the variations proposed in the draft assessment order”. Hence, the DRP’s directions have to be with reference to the objections to the variations proposed in the draft order. (GE India Technology Centre v DRP (Kar) followed); As regards the deduction for “future losses”, Accounting Standard AS-7 requires “expected loss” (difference between probable contract costs and contract revenues) to be “recognised as an expense immediately” irrespective of whether work has commenced and the stage of completion of activity. Accordingly, estimated or foreseeable losses are allowable as a deduction. (Jacobs Engineering Private Ltd. (ITAT Mumbai) & Mazagaon Dock 29 SOT 356 followed). (A.Y. 2006-07)  
*Dredging International NV v. ADIT (2011) 64 DTR 1 / 48 SOT 430 (Mum.)(Trib.)*

#### **S. 144C : Assessment – Reference to dispute resolution panel – Reasons – Natural justice**

Dispute resolution panel while issuing directions under section 144C must not pass “laconic” orders but must deal with assessee’s objections. It was held in *Sahara India (Farms) v. CIT 300 ITR 403 (SC)* that even “an administrative order has to be consistent with the rules of natural justice”. (A.Y. 2006-07)  
*GAP International Sourcing India Pvt. Ltd. v. Dy. CIT (2011) 44 SOT 56 / 49 DTR 313 / 135 TTJ 627 / 8 ITR 177 (Delhi)(Trib.)*

#### **Section 145 : Method of accounting**

#### **S. 145 : Assessment – Method of accounting – Accounts – Closing Stock [S. 154]**

Closing stock of earlier year has to be treated as opening stock of current year and therefore where the opening stock of current year shows a lower value than the value of closing stock of earlier year as finally determined by the Assessing Officer, the same is amenable to rectification under section 154. (A.Y. 1996-97)  
*V. K. J. Builders & Contractors (P) Ltd. v. CIT (2009) 318 ITR 204 / (2010) 228 CTR 143 / (2009) 184 Taxman 357 (SC)*

#### **S. 145 : Assessment – Method of accounting – Completed contract method**

Every assessee is entitled to arrange its affairs and follow either the completed contract method of accounting or the percentage completion method of accounting and the same is binding on the department unless it is shown the chosen method distorts the profits. Under the mercantile system of accounting, the matching of expenses and revenue (matching concept) is required to be done on accrual basis. (*Taparia Tools v. Jt. CIT 260 ITR 102 (Bom.) referred with approval.*) (A.Ys. 1991-92 to 1997-98)  
*CIT v. Bilahari Investments (P.) Ltd. (2008) 299 ITR 1 / 168 Taxman 95 / 3 DTR 329 / 215 CTR 201 / 204 Taxation 191 (SC)*

#### **S. 145 : Assessment – Method of accounting – Year of taxability**



When the department wants to assess a particular income in a particular year, it should always ascertain the method followed by the assessee in the past and whether the change in the method of accounting was warranted on the ground that profit is being underestimated under the impugned method of accounting. Unless the officer gives a finding with facts and figures that there is a underestimation the presumption would be that the whole exercise is revenue neutral. (A.Y. 1994-95)

*CIT v. Realest Builders & Services Ltd. (2008) 307 ITR 202 / 170 Taxman 218 / 216 CTR 345 / 7 DTR 97 / (2009) 209 Taxation 132 (SC)*

#### **S. 145 : Assessment – Method of accounting – Valuation of closing stock**

The assessee valued the closing stock at net realizable price being the price quoted on the London Metallic Exchange following the principle of valuation of stock at cost or market price whichever is less. However, the assessee did not value the stock at the domestic market price which was admittedly more than the international price of the stock. The Supreme Court held the valuation to be wrong on the ground that it is merely reduction of prospective profits and not a case of anticipated profits. (A.Y. 1996-97)

*CIT v. Hindustan Zinc Ltd. (2007) 291 ITR 391 / 161 Taxman 162 / 210 CTR 282 / 201 Taxation 335 (SC)*

*Editorial:- Review Petition no 924 of 007 in Civil appeal no 1179 of 2007 dt 3-10-2007 dismissed. Hindustan Zinc Ltd v CIT, 2007) 295 ITR 453 (SC).*

#### **S. 145 : Assessment – Method of accounting – Valuation of the closing stock**

The Supreme Court dismissed the review petition against the order in the case of *CIT v. Hindustan Zinc Ltd. 291 ITR 391*, wherein it had held that the closing stock is to be valued at the cost or the market price, whichever is lower. And, that the assessee was not right in taking the value of the closing stock as per the London Metal Exchange price and not as per the domestic net realizable price.

*Hindustan Zinc Ltd. v. CIT (2007) 295 ITR 453 (SC)*

#### **S. 145 : Assessment – Method of valuation of stock – Valuation of Obsolete Stock**

Valuation of obsolete stock at 10 percent of cost, valuation supported by audit report. Stock actually sold at less than that value in subsequent year, there cannot be under valuation of stock in relevant year. (A.Y. 1989-90)

*CIT v. Alfa Laval (India) Ltd. (2007) 295 ITR 451 / (2008) 170 Taxman 615 (SC)*

#### **S. 145 : Assessment – Method of accounting – Accounting standard**

Section 642 of the Companies Act, 1956, gives power to the Central Government to make rules in addition to the power to alter the schedules and therefore, the rules framed under section 642 adapting AS 22 is not ultra vires. AS 22 requires companies to make provision for deferred tax. This is a means to give effect to the concept of true and fair contemplated under section 211(1) and therefore, it is not inconsistent with the provisions of the Companies Act, including Schedule VI.

*J. K. Industries Ltd. v. UOI & Others (2007) 213 CTR 301 / 165 Taxman 323 / (2008) 297 ITR 176 / 203 Taxation 1 (SC)*

**S. 145 : Assessment – Method of accounting – Valuation of stock – Rejection of accounts**

To attract section 145, it is necessary that the assessee has computed the income in accordance with the method of accounting regularly employed by the assessee. Where the accounts are correct and complete to the satisfaction of the Assessing Officer, but the method employed is such that in the opinion of the Assessing Officer the income cannot be deduced there, then the Assessing Officer may adopt a different method of computation of the income as he may determine.

Permissibility of valuation of stock at market value would be only if market value of stock is lower than cost. Where market value of stock had been taken into consideration while arriving at chargeable income although market value of stock was more than the cost value of stock, rejection of accounts maintained by assessee for valuation of closing stock by Assessing Officer was in accordance with law. (A.Ys. 1992-93, 1993-94)

*Sanjeev Woollen Mills v. CIT (2005) 279 ITR 434 / 149 Taxman 431 / 199 CTR 441 / (2006) 192 Taxation 10 (SC)*

**S. 145 : Assessment – Method of accounting – MODVAT Credit [S. 4]**

Whatever method the Assessing Officer adopts, the method has to be consistent with the accepted principles of accountancy. It is not open to the Assessing Officer to treat outgoings as income under section 145. The view that merely because MODVAT credit is an irreversible credit available to the manufacturer upon purchase of duty, paid raw material, and it would amount to income which is liable to be taxed under the Act, is not the correct view. (A.Y. 1989-90)

*CIT v. Indo Nippon Chemicals Co. Ltd. (2003) 261 ITR 275 / 130 Taxman 179 / 182 CTR 291 / 176 Taxation 1 / 11 SCC 452 (SC)*

*Editorial:- CIT v. Indo Nippon Chemicals Co. Ltd. (2000) 245 ITR 384 (Bom.) / 164 CTR 78 / 112 Taxman 555 and CIT v. Antifriction Bearings Corporation Ltd. (2000) 246 ITR 295 / 117 Taxman 542 / (2001) 165 CTR 126 (Bom.) affirmed.*

**S. 145 : Assessment – Method of accounting – Accounting standard – Advance received in current year for service rendered in subsequent year – Accrued in subsequent year**

Accounting standard provides that income accrues only if the corresponding service has to be rendered during the same relevant year. In an event where amount received in advance for a service is to be performed in subsequent year, the advance could not be taken as income in the year of receipt. (A. Y. 1992-98)

*CIT v. Dinesh Kumar Goel (2011) 331 ITR 10 / 239 CTR 46 / 197 Taxman 375 / 50 DTR 254 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of unquoted Govt. securities – Basis of RBI guidelines – Sustainable**

In case where the securities are not quoted in market, market price is not known under these circumstances Valuation done by assessee of the unquoted Government securities on the basis of Reserve Bank of India guidelines was held to be a sustainable method of valuation. (A. Y. 1994-95)

*CIT v. The Lord Krishna Bank Ltd. (2011) 55 DTR 277 / (2010) 195 Taxman 57 / (2011) 339 ITR 606 (Ker.)(High Court)*

**S. 145 : Assessment – Method of accounting – Assessment – Account – Rejection of books**

Where discrepancy in stock found during the survey was negligible and no other incriminating documents or material was found. The Hon'ble High Court confirmed the order of the Tribunal, that merely because the assessee had not maintained stock register book of accounts maintained by the assessee in the ordinary course of business cannot be rejected. (A. Y. 1999-2000)

*CIT v. Bindals Apparels (2011) 56 DTR 202 / 332 ITR 410 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Hybrid system – Change in system – Compliance with company law – Continue hybrid system for tax purposes**

The assessee was in the business of publishing and was showing income received from subscription of magazines and advertisements on cash basis, while income from sale of magazines, research and software development were shown on mercantile basis and the same was accepted by the department in the earlier years. But the relevant year under consideration, to comply with the Companies Act, the assessee had to follow mercantile system of accounting. The assessee showed the income arising from subscription of magazines and advertisements on mercantile basis, however the assessee claimed a deduction of the income from subscription of magazines and advertisements which had been accounted for, and the same being not received was claimed as a deduction. The Assessing Officer disallowed the deduction, and the same was upheld by the CIT(A) and Tribunal. On appeal to the High Court by the assessee, the High Court while allowing the appeal held that once the Tribunal had accepted that the assessee was following the hybrid system of accounting for income tax purposes and it was only to comply with the Companies Act, that it changed its system of accounting to mercantile system, the Tribunal erred in holding that the assessee's income for the purposes of income tax proceedings could not hark back to the hybrid system, and therefore held that the Tribunal was not justified in disallowing the claim of deduction by the assessee being income from advertisements accrued but not received. (A. Y. 1989-90)

*Cyber Media (India) Ltd. v. CIT (2011) 338 ITR 177 / 53 DTR 1 / 198 Taxman 185 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Expression of dissatisfaction**

Before exercising the power under section 145(3), the Assessing Officer must necessarily express his dissatisfaction about the correctness or completeness of accounts and also note that such system was not regularly followed by the assessee. *CIT v. SAS Hotels & Enterprises Ltd. (2011) 334 ITR 194 / 203 Taxman 90 (Mag.)(Mad.)(High Court)*

**S. 145 : Assessment – Method of accounting – Accrual – Interest – Real income**

Even under Mercantile system of accounting followed by assessee no interest on loan had actually not accrued since loan amount had become irrecoverable and therefore, no interest was assessable.

*CIT v. Eicher Ltd. (2011) 239 CTR 65 / (2010) 320 ITR 410 / 47 DTR 151 / 2010 Tax L. R. 518 / (2009) 185 Taxman 243 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Best judgment – Rejection of accounts**

Assessing Officer rejected the books of account of the assessee on ground that assessee had not maintained indoor patient registers. Assessment completed under section 145 making addition under different head. The CIT(A) deleted the addition on ground that no material was brought on record for estimating the income. The Tribunal and High Court upheld the order of CIT(A). (A.Y. 1994-95)

*CIT v. Bahal (AP) (Dr.) (2010) 322 ITR 71 / (2008) 2 DTR 387 (Raj.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation – Government securities [S. (28(i))]**

Assessee is entitled to change the method of valuation of government securities to market value from cost and claim depreciation on the difference in the diminution of value. (A.Y. 1995-96)

*CIT v. Karur Vysya Bank Ltd. (2010) 33 DTR 244 (Mad.)(High Court)*

**S. 145 : Assessment – Method of accounting – Accrual of income – Non performing assets**

The assessee was not obliged to provide for hire charges and lease rental on non-performing assets in view of R.B.I.'s guidelines, according to which income relating to sub standard assets or non-performing assets which was outstanding for more than six months, was not to be considered as income / profits. Hence, appeal of the department is dismissed. (A.Y. 1997-98)

*CIT v. Kailash Auto Finance Ltd. (2010) 320 ITR 394 / 217 Taxation 274 (All.)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection – Maintenance of Stock Register**

Where Assessing Officer has not pointed out any defects in the books of account and explanation given by the assessee regarding non-maintenance of stock register has

been accepted by the Tribunal while deleting addition made on account of fall in gross profit, the finding of facts cannot be disturbed. (A.Y. 2004-05)

*CIT v. Jas Jack Elegance Exports (2010) 324 ITR 95 / 40 DTR 236 / 233 CTR 398 / 191 Taxman 386 (Delhi)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Rejection of accounts**

Books of account of the assessee could not be rejected by invoking the provisions of section 145(3) of the Income-tax Act, 1961 when no specific defect is pointed out in the books of account regularly maintained by the assessee or the method of accounting regularly employed by the assessee. (A.Y. 2003-04)

*CIT v. Jacksons House (2010) 39 DTR 212 / 195 Taxman 402 (Delhi)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of closing Stock**

Liability to pay Excise Duty occurs only when two events takes place viz, the assessee manufactures excisable goods and the excisable goods are removed from the factory. Thus, excise duty is not includible in valuation of closing stock. (A.Y. 1997-98)

*ACIT v. Narmada Chematur Petrochemicals Ltd. (2010) 39 DTR 120 / 327 ITR 369 / 194 Taxman 103 / 233 CTR 265 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Income – Addition**

Addition could not be made in the case of the assessee carrying on the business of purchase and sale of milk and milk products arbitrarily on the basis of difference in the fat content which is explained by the assessee, when such fat content compared favourably with other dairy units in the same business. (A.Y. 1999-2000)

*Gayatri Dairy Products (P) Ltd. v. ACIT (2010) 42 DTR 19 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Income – Accrual – Advance Receipt**

Where the Tribunal has affirmed the finding of fact of the CIT(A) that the change in the method of accounting with respect to accounting of commission, exchange and discount and locker rent on accrual basis though received in advance was bona fide and consistently followed and as such a change was not detrimental to the interest of the Revenue, no interference was called for. (A.Y. 2002-03)

*CIT v. Bank of Rajasthan Ltd. (2010) 233 CTR 530 / 40 DTR 173 / 326 ITR 526 (Bom.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Year of allowability**

Crystallization of liability vis-à-vis allowability of prior period expenses - Agreement executed wherein liability to pay arose during subsequent period – therefore, the same is crystallized and thus the claim is allowable in the year of crystallization. (A.Y. 2003-04)

*CIT v. Exxon Mobile Lubricants (P) Ltd. (2010) 236 CTR 498 / 328 ITR 17 / 48 DTR 158 (Delhi)(High Court)*



**S. 145 : Assessment – Method of accounting – Mercantile or cash – Foreign company**

Assessee, a foreign company, having maintained its accounts on mercantile basis in respect of all its transactions, it has to determine its taxable income in India only on the basis of mercantile system of accounting. (A.Ys. 1998-99 to 2004-05)

*Rolls Royce Singapore (P) Ltd. v. Addl. DIT (2010) 40 DTR 289 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection – Absence of discrepancy – Audit**

Where the Assessing Officer has not pointed out any specific defect or discrepancy in the account books maintained by the assessee which are duly audited by an independent Chartered Accountant, there was no justification in rejecting the books of accounts and making the addition to the declared income. (A.Y. 2004-05)

*CIT v. Paradise Holidays (2010) 325 ITR 13 / 48 DTR 349 / 195 Taxman 291 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Change of method**

There being genuine difficulties compelling assessee to change over from mercantile to cash system of accounting as regards to interest income, the change was bonafide, hence, the CIT(A) and the Tribunal were justified in setting aside the order of Assessing Officer rejecting the change.

*ACIT v. Coromandal Investment (P) Ltd. (2009) 225 CTR 313 / 316 ITR 104 / (2008) 174 Taxman 194 / 12 DTR 152 (Guj.)(High Court)*

**S. 145 : Assessment – Method of accounting – Accounts – Valuation of stock**

Valuation of slow moving and obsolete items of stock at 10 per cent of the cost was held to be justified especially when some the stock was sold in the subsequent year at 8.43 per cent of the cost. (A.Y. 2000-01)

*CIT v. Wolkem India Ltd. (2009) 18 DTR 190 / 221 CTR 767 / 315 ITR 211 (Raj.)(High Court)*

**S. 145 : Assessment – Method of accounting – Average cost method**

FIFO Method changed to average cost method on account of practical difficulties faced by assessee it was held that it was a reasonable ground for changing method of accounting.

*CIT v. H.P. State Civil supplies Corpn. Ltd. (2009) 309 ITR 102 / 223 CTR 155 / 20 DTR 162 (HP)(High Court)*

**S. 145 : Assessment – Method accounting – Change in method of accounting**

Where there was neither any finding by the Assessing Officer that he was not able to deduce the correct income of the assessee on the basis of the changed method of accounting employed by the assessee, nor there was any evidence to demonstrate that the new method of accounting has not been consistently followed by the assessee, the High Court held that the change in method of accounting from



mercantile to cash system was a bona fide change and the change in method of accounting cannot be rejected per se. (A.Ys. 1984-85, 1985-86)

*Echke Ltd. v. CIT (2008) 5 DTR 1 / 173 Taxman 79 / (2009) 221 CTR 642 / 310 ITR 44 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation**

Where the assessee had valued the rejected goods lying as closing stock at market price on the basis of the quotation of a third party, in absence of any evidence with the Assessing Officer, he could not substitute the valuation of the goods with the price which the assessee realised subsequently on sale of these goods. (A.Y. 1984-85)

*Voltamp Transformers Ltd. v. CIT (2008) 7 DTR 84 / 217 CTR 254 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of closing stock**

Notional brokerage that would be payable on sale of debenture cannot be reduced while working out the value of closing stock of such debenture, on the basis of cost or market value whichever is lower. (A.Y. 1990-91)

*Dy. CIT v. Gujarat State Investment Ltd. (2008) 14 DTR 71 / (2010) 229 CTR 201 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock**

Valuation of closing stock of old and obsolete electronic goods which was estimated by a qualified chartered engineer cannot be disregarded by the Assessing Officer without pointing out defects in the valuation report. (A.Y. 1998-99)

*CIT v. Reliance Electronics Industries India Ltd. (2008) 13 DTR 143 (Delhi)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Net profit**

Where the Assessing Officer adopted net profit rate and estimated the income of the assessee, depreciation was still allowable.

*Shri Ram Jhanwar Lal vs. I.T.O. & Ors. (2008) 10 DTR 229 / (2010) 321 ITR 400 / (2009) 177 Taxman 135 (Raj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Construction Works Contract**

Assessee was following AS-7 Accounting System - The same system followed regularly - Assessee has liberty to follow any recognized method of accounting for his business.

The assessee is a private limited company. The business activity of the assessee is of execution of works contract. For the same business assessee was following Accounting Standard 7 as laid down by the Institute of Chartered Accountants wherein the closing value of Work-in-Progress was determined on the basis of the method prescribed therein. The assessee debited all the expenses incurred in respect of the Work-in-Progress account, and did not determine the profit on the basis of the entire work-in-progress.

The High Court held that the assessee has the option to adopt any recognized method of accounting for his business and the income shall be computed in accordance with such regularly maintained accounting system. (A.Ys. 1991-92 to 1994-95.)

*MKB (Asia) Pvt. Ltd. v. CIT (2007) 294 ITR 655 / (2008) 167 Taxman 256 (Gau.)(High Court)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection of books**

Unaccounted sales in pre-search period. Assessing Officer cannot presume that such unaccounted sales would continue for post-search period. No discrepancy found in books of post-search period. (A.Y. 1995-96)

*CIT v. Anand Kumar Deepak Kumar (2007) 294 ITR 497 / 160 Taxman 206 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Accounts – Waiver of interest**

The assessee changed its accounting system from mercantile to cash system. In assessment for subsequent year Assessing Officer did not allow the assessee's claim for waiver of interest, decompounding and rebate arising as a result of agreement with its customers, as there was change in system of accounting. On appeal the High Court held that there is no provision in law that creates embargo against credit of amount to which an assessee is entitled to after a change in accounting system. The change of system of accounting does not divest the assessee from receiving the benefits which have already accrued to it in previous years.

*CIT v. M. P. Financial Corporation (2007) 201 Taxation 521 (MP)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of books – Estimation of income**

Where no fault was found with the books of account maintained by the assessee or the method of accountancy employed by the assessee and there was no suppression of material facts in the accounts. It was held that, the Assessing Officer cannot embark upon speculative assessment of notional profit.

*Shri Pyarelal Mittal v. ACIT (2007) 197 Taxation 186 (Delhi)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of Books of Account**

Books of accounts maintained by the assessee in its normal course of business cannot be rejected merely on basis of absence of stock register or failure to maintain item wise stock in said register.

*Ashok Refractories P. Ltd. v. CIT (2006) Tax L. R. 195 (Cal.)(High Court)*

**S. 145 : Assessment – Method of accounting – Accrual of interest**

Department passed an order under section 226(3) prohibiting the assessee's debtor from paying the loan amount and interest thereon. A letter written by debtor stating that he would not pay any interest. Assessee followed mercantile system. Held that neither attachment under section 226(3) nor letter from debtor prevented accrual of

Income. Accrual is independent of its receipt. Hence, interest on loan is taxable on accrual basis,

*Sujatha Films Pvt. Ltd. v. CIT (2006) 284 ITR 503 / 202 CTR 553 / (2007) 158 Taxman 208 (Mad.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Accounts**

Excise duty on raw materials as well as finished goods should not form part of value of closing stock.

*CIT v. Lakshmi Mills Co. Ltd. (2006) Tax L.R. 574 (Mad.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Hybrid system of accounting**

Assessment years in question, i.e., 1986-87 to 1988-89, assessee used to maintain mercantile system of accounting in respect of its outgoings, whereas it used to maintain cash system of accounting in respect of receipt of interest against financing of vehicles, a part of its business, and in earlier years this mixed system of accounting was permitted and accepted by revenue, system of accounting could not be questioned

*K.S. Mehta (HUF) v. CIT (2005) 278 ITR 59 / 195 CTR 293 / (2006) 151 Taxman 273 (Cal.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Hybrid system of accounting**

Where Government by its notification directed that section 209(3)(b) of Companies Act shall not apply to a Government company engaged in the business of financing industrial project and approved by the Central Government under section 36(1)(viii) to the extent it relates to income from interest on loans and advances provided that such accrued income, which is not accounted for in the books of account, is disclosed by way of note in the annual accounts and assessee-company, claiming itself to be covered by said Notification, switched over to the mercantile system of accounting from cash system of accounting in respect of all its expenses but retained cash system of accounting in respect of interest income by taking advantage of the exemption given to the assessee-company by the aforesaid notification, Assessing Officer was not justified in refusing to accept hybrid system of accounting

*CIT v. Pradeshia Industrial & Investment Corpn. Ltd. (2005) 149 Taxman 265 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Project completion method**

Where assessee in construction business followed project (percentage) completion method, its claim for deduction of provision for contingencies could not be disallowed in year under consideration when such sum had been offered for taxation in subsequent years. (A.Y. 1982-83)

*CIT v. Advance Construction Co. (P.) Ltd. (2005) 275 ITR 30 / 143 Taxman 61 / 193 CTR 127 (Guj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Application of proviso**

If a method is regularly followed by assessee and even if Assessing Officer is satisfied with correctness and completeness of record, as per proviso, it is within power of Assessing Officer to form an opinion as to whether or not income chargeable under the Act can be properly deduced from accounts so maintained

*K.S. Mehta (HUF) v. CIT (2005) 278 ITR 59 / 195 CTR 293 / (2006) 151 Taxman 273 (Cal.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Rejection of accounts**

Assessee, who was manufacturer and exporter of leather shoes, did not maintain production and raw material consumption register which was necessary for verifying production and also did not maintain proper accounts relating to payment of wages, Assessing Officer was justified in rejecting books of account of assessee and making addition by resorting to provisions of section 145(1)

*Omax Shoe Factory v. CIT (2005) 148 Taxman 517 / 199 CTR 31 / (2006) 281 ITR 268 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Rejection of accounts – Stock Register**

In absence of stock register or failure to maintain item-wise stocks in stock register, books of account could not be rejected unless there was a finding or opinion either that records were incorrect and incomplete or that method of accounting applied was such that income could not be deduced from accounts maintained by assessee. (A.Ys. 1990-91, 1991-92)

*Ashoke Refractories (P.) Ltd. v. CIT (2005) 279 ITR 457 / 148 Taxman 635 / 199 CTR 115 (Cal.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Rejection of accounts**

Payment is to be recorded when it is actually made even if it is either by way of cash or by cheque or draft; where assessee had made entries on date when actual payment was not made, payment having been made by post-dated cheques, books of account maintained by it were unreliable and, therefore, ITO was justified in invoking the provisos to sub-sections (1) and (2) of section 145. (A.Y. 1979-80)

*Oriental Textiles v. CIT (2005) 273 ITR 47 / 142 Taxman 520 / 191 CTR 136 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Sales tax assessment**

Assessing Officer does not have any jurisdiction to go beyond value of closing stock declared by assessee and accepted by Sales-tax Department. (A.Y. 1993-94)

*CIT v. Anandha Metal Corporation (2005) 273 ITR 262 / 152 Taxman 300 (Mad.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock**

From inception of its business, assessee had continuously adopted same method of valuation of closing stock of gold ornaments and no objection was raised by department in any of previous years, for assessment year in question revenue was not justified in holding that method adopted by assessee for valuation of closing stock was legally impermissible. (A.Y. 1981-82)

*CIT v. Sant Ram Mangat Ram (2005) 275 ITR 312 / 145 Taxman 373 / 195 CTR 345 (P&H)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock**

Assessee had not maintained stock details on daily basis, as stock register had not been properly maintained, and it did not depict true and correct picture of stock, ITO was justified in invoking section 145. (A.Y. 1977-78)

*Mohd. Haron & Co. v. CIT (2005) 274 ITR 490 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock**

Where Tribunal held that method adopted by respondent for valuation of closing stock was an arbitrary one and, therefore, a revaluation of closing stock was required but, at same time, opening stock would also have to be adjusted in order to avoid taxing of an income which could not otherwise have been brought to tax, Tribunal was not justified. (A.Y. 1982-83)

*CIT v. Indian National Tannery (P.) Ltd. (2005) 278 ITR 213 / 146 Taxman 329 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Government securities**

Assessee-bank was entitled to change method of valuation of Government securities from cost to market value and claim depreciation on difference. (A.Y. 1986-87)

*CIT v. Karur Vysya Bank Ltd. (2005) 273 ITR 510 / 156 Taxman 251 (Mad.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Average cost price**

It is no doubt true that average cost price of entire stock purchased in course of year can be taken as value of closing stock for determining value of closing stock at end of year but nonetheless it should be either average cost or actual cost; it cannot be, in any way, in between. (A.Y. 1991-92)

*Mahabir Rice Mill v. ITO (2005) 277 ITR 317 / 145 Taxman 245 / 194 CTR 359 (All.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Estimation – Depreciation**

Even where net profit has been applied, the assessee is entitled for deduction on account of depreciation.

*ACIT v. Amar Singh Kishan Chand (2004) 134 Taxman 680 (Raj.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of closing stock – Dissolution – Cost or market price**

In the case of dissolution of firm which has not resulted in closure of business valuation of closing stock should be done at cost. On dissolution same partners carried on business on same profit sharing ratio as an AOP closing stock has to be valued at cost instead of market price. (A.Y. 1989-90)

*CIT v. Mangalore Ganesh Beedi works (2004) 136 Taxman 42 / 265 ITR 658 / 187 CTR 401 (Karn.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of closing Stock – Dissolution – Cost or market price**

For the purpose of valuation of closing stock in a case where there is a dissolution, market value has to be adopted when dissolution is accompanied by discontinuance of business and not otherwise. (A.Y. 1993-94)

*Kwality Steel Suppliers v. CIT (2004) 141 Taxman 177 / 271 ITR 40 / 191 CTR 94 (Guj.)(High Court)*

**S. 145 : Assessment – Method of accounting – closing stock records – Rejection of accounts**

Where Assessing Officer invoked section 145(2) on ground that there was no detail available regarding closing stock and that purchases were made from sister concern at inflated price. (A.Y. 1994-95)

*CIT v. G.H.I Polymers (2004) 192 CTR 477 / 142 Taxman 476 (P&H)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of closing Stock – Consistently**

Tribunal's finding that change in method of valuation of closing stock was bona fide and was subsequently consistently followed, is a finding of fact. (A.Y. 1981-82)

*CIT v. Haryana Minerals Ltd. (2004) 192 CTR 605 / (2005) 274 ITR 487 / 142 Taxman 160 (P&H)(High Court)*

**S. 145 : Assessment – Method of accounting – Mixed System of accounting**

Basically, mixed system of accounting is not to be discarded unless there is loss of income. (A.Ys. 1977-78, 1978-79)

*CIT v. Match Well Electiicals (I) Ltd. (2003) 127 Taxman 159 / 263 ITR 227 / 181 CTR 562 (Bom.)(High Court)*

**S. 145 : Assessment – Method of accounting – Change – Different sources**

An assessee has option to change its method of accounting from one system to another system and further option to adopt different methods of accounting in respect of different sources of income. (A.Y. 1987-88)

*CIT v. Syndicate Bank (2003) 127 Taxman 287 / 261 ITR 528 / 180 CTR 01 (Karn.)(High Court)*



**S. 145 : Assessment – Method of accounting – Change – Bona fide**

An assessee is permitted to change its method of stock valuation honestly and in accordance with the principles of permitted tax avoidance. (A.Y. 1994-95)

*Hela Holdings Pvt. Ltd. v. CIT (2003) 263 ITR 129 / 133 Taxman 16 / 185 CTR 245 (Cal.)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of account – Construction records**

Where expenditure incurred by the assessee relating to construction of commercial building and recorded in the books of account was not supported by bills or vouchers, rejection of accounts was justified. (A.Y. 1990-91)

*S. V. Vijayalakshmi v. ITO (2003) 127 Taxman 408 / 260 ITR 138 / 180 CTR 52 (Ker.)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of account – Incomplete**

Where returns were not filed till search of assessee's premises and account books were found to be incomplete, rejection of books was justified. (A.Y. 1993-94)

*C. B. Aggarwal v. CIT (2003) 185 CTR 284 / (2004) 265 ITR 280 / (2003) 185 CTR 284 (P&H)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of account – Balance sheet of firm**

Rejection of accounts of assessee on basis of balance sheets of firms in which he was partner, found during search of assessee's premises, was not justified. (A.Y. 1987-88)

*CIT v. Vishal Rubber Products (2003) 264 ITR 542 / (2004) 136 Taxman 151 (P&H)(High Court)*

**S. 145 : Assessment – Method of accounting – Rejection of account – Excise Records**

Rejection of accounts was not justified in case of liquor contractor whose profit was based on P-5 certificate issued by Excise Authorities. (A.Y. 1993-94)

*ACIT v. Gendalal Hazarilal & Co. (2003) 263 ITR 679 / 185 CTR 373 / (2004) 134 Taxman 384 (MP)(High Court)*

**S. 145 : Assessment – Method of accounting – Estimation of Profits – Rejection of account**

When book results are rejected, there should be best judgment assessment whereby a reasonable income should be taxed. (A.Y. 1990-91)

*Narsinghdas Ramakishan Pungaliya v. ACIT (2003) 184 CTR 448 / (2004) 138 Taxman 156 / (2005) 272 ITR 469 (Raj.)(High Court)*

**S. 145 : Assessment – Method of accounting – Estimation of Profits – Salary and interest [S. 40(b)]**

Even where profit is computed by applying net profit rate, deduction for salary and interest is separately allowable under section 40(b). (A.Y. 1994-95)

*CIT v. Heera Lal Bhat (2003) 131 Taxman 257 / (2000) 158 CTR 59 (Raj.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Change**

Assessee is not barred by any provision of the law from changing its stock-in-trade valuation method which is followed for one year only (year of commencement of business). (A.Y. 1994-95)

*Hela Holdings Pvt. Ltd. v. CIT (2003) 263 ITR 129 / 133 Taxman 16 / 185 CTR 245 (Cal.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Export profits**

Where while valuing opening and closing stock, entire device adopted by assessee was to inflate deduction under section 80HHC in first year and to suppress profits in second year, Assessing Officer was justified in invoking proviso to section 145(1) applying principle of 'lower of cost or market value'. (A.Ys. 1992-93, 1993-94)

*CIT v. Sanjeev Woollen Mills (2003) 127 Taxman 209 / 264 ITR 68 / 181 CTR 97 (Bom.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Closure of business**

Where business is discontinued, profit of assessee-firm would be ascertained by taking closing stock at market value only. (A.Y. 1991-92)

*Kuttukaran Machine Tools v. CIT (2003) 131 Taxman 690 / 264 ITR 305 / 185 CTR 104 (Ker.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Dissolution of firm**

Fair market value of the closing stock, as against the book value, should not be adopted when the firm was dissolved and dissolution accounts drawn up and assessee had taken the cost which was lower than the market price. (A.Y. 1985-86)

*CIT v. Standard Printing Machinery (2003) 260 ITR 268 / (2004) 135 Taxman 157 (Mad.)(High Court)*

*Editorial : This is true only if there was no cessation of business. Otherwise ALA firm v. CIT (1991) 189 ITR 255 (SC) decision would apply.*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Depreciation**

Allowability of entire amount of deficit claimed by assessee towards depreciation in value of its investments would depend upon correctness of method of valuation adopted in valuing its investments. (A.Y. 1982-83)

*CIT v. Lakshmi Vilas Bank Ltd. (2003) 128 Taxman 645 / 182 CTR 536 / 264 ITR 662 (Mad.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of stock – Opening stock**

Where Deputy Commissioner, taking into account inflated nature of opening stock and other discrepancies, directed to make certain addition to returned income, there was no merit in assessee's claim that there should be corresponding reduction in valuation of closing stock. (A.Y. 1986-87)

*V. K. Moosakutty v. CIT (2003) 130 Taxman 241 / 263 ITR 670 / 183 CTR 313 (Ker.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of stock – Practical difficulties**

Where out of 45 years, assessee had been following a particular method of valuing stock for 43 years to the knowledge of Department, in view of practical difficulties that may arise if method was not accepted, irrespective of merits of case, the method of assessee was to be adopted. (A.Y. 1987-88)

*J. N. Marshall & Co. v. CIT (2003) 183 CTR 599 / (2004) 134 Taxman 711 (Bom.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of stock – Finding by ITAT**

Where there was no finding by the Tribunal that profit of year could be ascertained from method of accounting followed by the assessee, Tribunal was not correct in directing Assessing Officer to accept assessee's valuation of closing stock. (A.Y. 1984-85)

*CIT v. Tamil Nadu Sugar Corpn. Ltd. (2003) 128 Taxman 179 / 182 CTR 61 / (2004) 265 ITR 466 (Mad.)(High Court)*

**S. 145 : Assessment – Method of accounting – Valuation of Stock – Production of film – Rule 9A**

Assessee was engaged in the business of film production. During the relevant accounting year, the assessee produced a movie. However, the distribution rights granted by the assessee on minimum guarantee basis were not sold for certain territories. The Assessing Officer valued the closing Stock of the movie at ` 4,48,279 as against ` 1.45 lakhs declared by the assessee. The Commissioner (Appeals), confirmed the addition. The Tribunal held that there could be many reasons why distribution rights could not be sold in some territories and therefore the assessee was not bound to write off the cost as some territories and therefore, the assessee was not bound to write off the cost as some per the table contemplated by the rule 9A and allowed the second appeal. The court held that ,it is correct to say that the ITO can disregard the table in appropriate cases where it is not practicable to apply the provisions of Rule 9A. For example in a given year the total realization declared

by an assessee is less than the cost of production of the movie, then the table may not be strictly applicable. However, in the instant case, the total realization was ` 32,90,962 and therefore, it was possible for the ITO to value the closing stock as per the table given in rule 9A. Therefore in the instant case sub rule (9)(c) was not applicable. (A.Y. 1979-80)

*CIT v. S.M. Sagar (2003) 128 Taxman 137 / 261 ITR 271 / 182 CTR 54 (Bom.)(High Court)*

#### **S. 145 : Assessment – Method of accounting – Valuation of stock – Completion of contract method – Work in progress**

Assessee having followed percentage completion method consistently which has been accepted in earlier as well as in subsequent years valuation of closing work in progress made by it at historical cost cannot be disturbed particularly when the categorical findings of the CIT(A) highlighting that the assessee has not deviated from the guidelines issued by the ICICI under AS-7 has not been challenged by the revenue. Addition made by the Assessing Officer by reworking the closing work in progress at current rates rightly deleted. (A. Ys. 1998-99, 1999-2000).

*ACIT v. Dharti Estate (2011) 51 DTR 28 / 129 ITD 1 / 136 TTJ 263 (TM)(Mum.)(Trib.)*

#### **S. 145 : Assessment – Method of accounting – Estimation of profits – Survey – Rejection**

For the relevant assessment year the assessee filed the nil income. In the course of survey the Assessing Officer found that there was certain unaccounted stock. The Assessing Officer rejected the books of account under section 145(3) and estimated the net profit and also sales. He also made separate addition were made in respect of unaccounted stock under section 69 as well as disallowances and additions in respect of excess wastages etc. The direction given to the Commissioner (Appeals) to work out the net profit by applying a rate as had been in the immediately preceding assessment year. (A. Y. 2001-02).

*ACIT v. Ratan Industries (P) Ltd. (2011) 131 ITD 195 / 64 DTR 355 / (2012) 143 TTJ 24 (TM)(Agra)(Trib.)*

#### **S. 145 : Assessment – Method of accounting – Despite section 209(3) of the Company's Act, company can follow cash system for tax purposes**

As per section 209(3) of the Company's Act, a company is obliged to follow the mercantile system and that is its' "regular method" for purposes of section 145. It was held that the assessee has regularly employed the cash system of accounting in recording its day to day business transactions. It is not a case where the assessee has been maintaining its accounts of day to day business under the mercantile system of accounting and thereafter prepares accounts in accordance with cash system of accounting for income tax purposes. Section 209(3) of the Companies Act, 1956 does not override section 145 of the Income-tax Act. There was also no valid basis for the Assessing Officer's action in rejecting the books of account and system of accounting followed by the assessee. Further, since the department has accepted

the assessee's system for the past several years, the principles of consistency apply and there should be finality and certainty in litigation in the absence of fresh facts to show that the assessee's system of accounting is arbitrary or perverse. (A.Ys. 2004-05 to 2006-07)

*Dy. CIT v. Stup Consultants Pvt. Ltd. (2012) 13 ITR 468 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Project completion method – Housing project – Enhancement – Power of Commissioner (Appeals) [S. 251(2)]**

Assessee having regularly followed project completion method which is an accepted method of accounting and the Assessing Officer having accepted the same in the preceding as well as in the subsequent assessment years, there was no justification to reject the said method and apply the percentage completion method when the assessee has offered the income in the year of completion of the project. As the Commissioner of (Appeals) has not issued the enhancement notice as required under section 252(2), while enhancing the income, the Commissioner of (Appeals) was not justified in enhancing the income by rejecting the project completion method followed by the assessee. (A.Ys 2005-06 to 2007-08).

*Haware Constructions (P) Ltd. v. ITO (2011) 64 DTR 251 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Project completion method – Income – Accrual – Builder – Slum rehabilitation project – Sale of TDR – Income [S. 5]**

Assessee is in the business of builder, had taken a slum rehabilitation project. Assessee had been allotted TDR in lieu of handing over possession of constructed transit building. Assessee has sold the TDR in two installments. Assessing Officer taxed the receipts of TDR as independent income. Assessee contended that as they are following project completion method as per AS. 7, income from project had to be computed in year of completion. The Tribunal directed the Assessing Officer to compute the income of project after taking into consideration entire expenditure and receipt from beginning of year including TDRs. In case the project was not found complete, Assessing Officer would set off TDR receipts against work in progress and no income would be assessed on account of TDR receipts separately. (A.Ys. 2006-07 and 2007-08).

*ACIT v. Skylark Build (2011) 48 SOT 306 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Valuation of stock – Excess stock found during Survey [S. 133A]**

A survey was conducted at assessee's premises in course of which inventory of stock was prepared. There was discrepancy in value of stock as per books and as per inventory taken at the time of survey. After survey assessee filed its return wherein value of excess stock found at the time of survey was reduced by an amount of ₹ 5.18 lakhs. Assessee contended that assorted or mixed pipes valued at market price were merely scrap, and thus their scrap value was to be taken in to account while

valuing the stock. The Tribunal held that burden lied on assessee for changing value drastically in respect of valuation of stock. As the assessee has not filed any credible or reliable evidence to show that cost or market price was either of items mentioned was not proper at the time of survey, the contention of the assessee was not accepted. (A. Y. 2003-04).

*K. G. Sharma v. Dy. CIT (2011) 133 ITD 112 / 138 TTJ 641 / 55 DTR 358 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Estimation of income [S. 44AE]**

Where the Assessing Officer had rejected the books of account of the assessee and estimated income by making various additions, the income of the assessee should be estimated as per formula prescribed under section 44AE. (A. Y. 2006-07)

*Kesharbhair Ghamarbhair Choudhary v. ITO (2011) 141 TTJ 94 (UO)(Ahd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of Books – Builder**

The rejection of books of Assessee firm engaged in business of builder - realtors, on ground that Assessee had not furnished quantitative particulars, no proper vouchers were available for expenses and labour payments were not supported by verifiable details, was held to be justified.

It was observed that even when all payments were made by cheque and TDS was deducted on every payment to labourer, same can not substitute the necessity of maintaining records and evidences in a proper manner. Also the primary condition to be satisfied was that the working results reflected in the books must be verifiable and beyond dispute, even though the method of accounting and method of recognition of income were acceptable. (A.Y. 2002-03)

*ACIT v. Skyline Builders (2010) 194 Taxman 61 (Mag.)(Cochin)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Builder**

Assessee developer having regularly employed project completion method which is an accepted method of accounting, and the Central Government having not notified AS-7 under section 145(2), Assessing Officer could not reject the accounts under section 145(3) on the ground that the assessee had not followed the percentage completion method. (A.Y. 2005-06)

*Prestige Estate Projects (P) Ltd. v. Dy. CIT (2010) 33 DTR 514 / 129 TTJ 680 (Bang.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection**

When the assessee contractor carried out contract work in three different ways, when the books of account rejected income is estimated, the assessee is entitled to depreciation, remuneration to partners and interest to partners. (A.Y. 2005-06)

*Teja Constructions v. ACIT (2010) 129 TTJ 57 (UO) / 36 DTR 220 (Hyd.)(Trib.)*



**S. 145 : Assessment – Method of accounting – Accounts – Rejection of books of accounts – Addition to specific defects**

Assessing Officer having made separate and distinct additions for all the defects mentioned by him for rejection of assessee's accounts book results could not be rejected more so when the Assessing Officer has relied upon incomparable cases. Turnover and GP declared by the assessee have to be accepted. (A.Y. 2003-04)

*ITO v. Mayur Agarwal (2010) 133 TTJ 1 / 43 DTR 116 / (2011) 128 ITD 55 (TM)(Agra)(Trib.)*

**S. 145 : Assessment – Method of accounting – Valuation of inventory – Old inventory**

Valuation of inventory in accordance with the method of accounting regularly followed. Assessee justified in valuing three years old inventory at nil value.

*Central Electronics Ltd v. AO, ITA Nos. 233 and 1821/Del./2009 BCAJ P. 35, Vol. 41 B Part 4, January 2010 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of books of account – Defects**

Without pointing out any specific defect in the method of accounting regularly employed by the assessee, the books of account could not be rejected. (A.Ys. 1999-2000, 2003-04)

*ACIT v. Shiv Agrevo Ltd. (2009) 123 TTJ 416 / 24 DTR 274 (Jp).(Trib.)*

**S. 145 : Assessment – Method of accounting – TDR – Different method**

The Assessing Officer cannot adopt two methods of accounting, in one and the same project, to determine the income of the assessee. In the case of the assessee following project completion method, and where the road TDR was directly related to the said project the sale proceeds against the TDR were to be recognised as a revenue receipt in the year in which the project was completed and cannot be taxed in the year of sale of TDR. (A. Y. 2000-01)

*ITO v. Chembur Trading Corporation, ITA No. 2593/Mum/2006, dt. 21-1-2009 – BCAJ P. 32, Vol. 41A, Part 5, August, 2009. (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of accounts arbitrary**

Additions made by rejecting the Books of Account, by alleging imagined manipulation without proving the same or without verifying the material available through field enquiry, and only based on own judgment, was held to be not justified. (A. Y. 2004-05)

*ACIT v. Ram Manohar Singh (2009) 178 Taxman 47 (Mag.)(Jab.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Sourcewise**

The Assessee is having more than one source of income under the head 'Business income'. Held that the Assessee has option to follow different methods of accounting in respect of each of different sources of income under the head. (A.Y. 2002-03)

*ACIT v. Mehul J. Somaiya, ITA No. 7118/Mum/2007, Bench – B, dt. 10-12-2008 – BCAJ P. 670, Vol. 40-B, Part 5, February 2009. (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Business expenditure – Prior period expenses**

During the year the Assessee cancelled the MOU and refunded the amounts received under MOU along with interest as per the terms of the MOU. The Assessing Officer disallowed the interest paid for the period covering earlier years on the ground that it was prior period expense. Held that the liability to pay interest had accrued in the year under consideration when the resolution was passed and not prior to that. The liability under consideration was contractual liability and was crystallised and ascertained only when the decision to refund the earnest money along with interest was taken and hence the deduction is allowable. (A.Y. 2003-04)

*Urban Improvement Co. (P) Ltd. v. ITO, ITA No. 3246/Mum/2006, Bench – D, dt. 5-9-2008 – BCAJ P. 667, Vol. 40-B, Part 5, February 2009. (Mum.)(Trib.)*

**S. 145 : Assessment – Methods accounting – Project completion method – Advertisement**

Advertisement expenses of two projects being allocable to individual project have to be capitalized as work in progress and deduction is to be allowed in the year of completion of the project. (A.Y. 2001-02)

*ITO v. Panchvati Developers (2008) 115 TTJ 139 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection [S. 144]**

From asst. year 1997-98 onwards it is mandatory to compute the income in accordance with either cash or mercantile method of accounting. Assessee having continued to maintain books of account as per hybrid method of accounting. Assessing Officer was justified in rejecting the books of account. (A.Y. 1997-98 & 1998-99)

*Dy. CIT v. Allied Construction (2007) 106 TTJ 595 / 105 ITD 1 / 11 SOT 101 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Value of inventory – Bank records**

There was a difference between stock details submitted to bank and value of stock disclosed in the books. Assessing Officer rejected books of account and made addition based on statement filed with bank. Held that apart from relying on the stock statement given to the bank, no other evidence had been brought on record to justify the rejection of books. Hence such addition was deleted. (A.Y. 1995-96)

*Beekay Applicances Pvt. Ltd. v. Dy. CIT, Delhi ITAT Bench 'F', ITA No. 4532/Del/2003, dated 6-10-2006 – BCAJ P. 657, Vol. 39-C, Part 6, March 2007. (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Contract receipts**

Interest income from FDRs cannot be considered as contract receipts for estimation of income by applying net profit rate to the contract receipt. (A.Ys. 1997-98 and 1998-99)

*(Dy.) CIT v. Allied Construction (2007) 106 TTJ 595 / 105 ITD 01 / 11 SOT 101 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Income – Accrual**

Interest and remuneration credited by firm to the accounts of the partners. Interest and remuneration credited by firm to the accounts of partners tantamount to receipts by them and is chargeable in their hands notwithstanding non-withdrawal even though partners are following cash system of accounting. (A.Ys. 1998-99 to 2002-03)

*ACIT v. Vijay Kumar Patni (2007) 107 TTJ 20 / 108 ITD 409 (Nagpur)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Interest**

Interest accrued on Government securities but not due is not chargeable to tax in the relevant years provided the assessee has offered the amount of interest on due basis. (A.Ys. 1995-96 to 1997-98)

*GE Capital Services India v. Dy. CIT (2007) 106 TTJ 65 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Interest on FDRs**

FDRs, though taken under compulsion to obtain contracts, interest income thereon was assessable on accrual basis as income from other sources since the assessee was following mercantile system of accounting. (A.Y. 2003-04)

*Pannalal Construction Co. v. ITO (2007) 107 TTJ 114 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Obsolete stores**

Commissioner (Appeals) was justified in valuing the obsolete stores at 10 per cent of the cost as against 5 per cent shown by assessee. (A.Y. 2000-01)

*ACIT v. Wolkem India Ltd. (2007) 107 TTJ 439 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Deduction – Year allowability**

Dispute relating to a contractual liability of an earlier year having been settled during the year under consideration, same is allowable as deduction in the relevant year. (A.Y. 1999-2000)

*Silicon Graphics Systems (I) (P) Ltd. v. Dy. CIT (2007) 106 TTJ 1153 (Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Yield – Estimate**

Addition made by rejecting book results, and by estimating shortfall in yield, without any findings or pointing out any defect in the books of account or in the method of accounting followed is unjustified. (A.Y. 2000-01)

*Puneet Udyog v. ACIT (2007) 164 Taxman 167 (Mag.)(Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection – Contract completion**

Contract completion method of accounting regularly employed by assessee for decades, not depicting any distorted picture of profits and which conformed to Accounting Standards employed in India and also abroad, could not be rejected. (A.Ys. 1989-90 to 1993-94, 1995-96, 1996-97)

*Dy. CIT v. Elevator Co. (I) Ltd. (2006) 100 TTJ 360 / 99 ITD 73 / 5 SOT 525 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Material supplied – Contractee**

Addition on account of cost of material supplied by contractee not shown in books was not justified since assessee does not earn any income out of the material supplied by the contractee. (A.Y. 1998-99)

*Om Prakash Nargatia v. ITO (2006) 100 TTJ 657 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method of accounting – Additions – Unaccounted sales**

Assessing Officer having not pointed out any specific defect in the books of account regularly maintained by the assessee, he was not justified in making additions on account of unaccounted sales merely on certain presumption / assumption. (A.Y. 1997-98)

*Surat District Co-operative Milk Producers Union Ltd v. Jt. CIT (2006) 99 TTJ 390 (Ahd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – No mistake**

No mistake having been found by the assessing officer either in the books of account or in the statement of purchases, sales and stock maintained quantitatively on day-to-day basis, he was not justified in rejecting the books of assessee. (A.Y. 1998-99)

*ITO v. Girish M. Mehta (2006) 99 TTJ 394 / 105 ITD 585 (Rajkot)(Trib.)*

**S. 145 : Assessment – Method of accounting – Books of accounts – Defects – Rejection**

Assessing Officer having not pointed out any specific defects in the maintenance of books of account by the assessee, rejection of book results only on the ground of fluctuation in GP rate is not tenable. (A.Y. 1995-96)

*Keystone India (P) Ltd. v. Dy. CIT (2006) 99 TTJ 386 (Ahd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Books of account – GP rate**

Assessee having declared higher GP rate than the preceding year, its trading results required acceptance and trading addition required deletion. (A.Y. 2001-02)

*Ajay Goyal v. ITO (2006) 99 TTJ 164 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Additions – Defects**

Assessee engaged in processing of grey cloth having cited practical difficulties and explained the fall in GP rate, no addition could be made in the absence of any specific defects in the books of account of the assessee. (A.Y. 1993-94)

*Madan Lal v. ITO (2006) 99 TTJ 538 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Construction Cost – Average**

Assessee-company having entered into an agreement with a trust whereunder it agreed to construct eight buildings on the land belonging to the latter and hand over two building free of cost to the trust, the construction of every saleable building was loaded with a proportionate cost attributable to construction of two free buildings and, therefore, the proportionate cost of free buildings attributable to the first building constructed by the assessee was deductible while computing taxable income from sale of flats in that building. (A.Y. 1989-99)

*Persepolis Construction Co. (P) Ltd. v. Addl. CIT (2006) 99 TTJ 92 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – MODVAT Credit – Addition of purchase and stock**

Assessee having accounted for both the purchases and closing stock net of MODVAT credit, such credit could not be added for valuing closing stock. (A.Y. 1996-97)

*Dy. CIT v. Venus Wire Industries Ltd. (2006) 99 TTJ 561 / 1 SOT 836 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Vouchers – Details**

Provisions of section 145 cannot be invoked in a case simply because names and addresses upon cash sale vouchers have not been kept

*Kailashchandra Gupta v. Dy. CIT, (Tax World – February 2006 – Vol. XXXV – P. 36)(Jp.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Search and seizure – Mutuality – Project records**

Assessee society having maintained no books of account, never subject to audit and running 16 construction projects at 16 sites, principle of mutuality did not apply and Assessing Officer was justified in estimating profits by applying s. 145, which profits shall be taxed in the hands of persons running the society, who were infact partners of a firm.

*Dy. CIT v. Pahar Ganj Grih Nirman Sahkari Samiti Ltd. & Ors. (2006) 99 TTJ 549 (Jp.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Assessment – Valuation of closing stock**

Assessee having not claimed deduction of the amount of liability for excise duty until the end of the relevant previous year, same could not be included in the valuation of closing stock. (A.Ys. 1993-94 & 1996-97)

*Jt. CIT v. Dalmia Cement (Bharat) Ltd. (2006) 99 TTJ 1109 / 97 ITD 78 (Delhi)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Builder Project completion method**

Assessee builder was following project completion method, and was assessed for earlier years. Assessing officer on noticing that possession of certain flats were given in the year under assessment, adopted percentage of completion method. It was held that once a particular method of computing profits is adopted that would bind him for all subsequent years until project is completed.

It was also observed that general rule in income tax law that each year is distinct and separate could not be strictly applied. (A.Y. 1992-93)

*Bakshi Vikram Vikas Construction Co (P) Ltd. v. Dy. CIT 158 Taxman 61 (Mag.)(Delhi)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Accounts – Rejection**

Tribunal held that additions made merely on noticing the difference between stock as per books and shown to bank, cannot be sustained, when no other evidence was on record that assessee had more stock than shown.

The accounts cannot be rejected for difference between stock details submitted to bank and value of stock disclosed in the books. (A.Y. 1995-96)

*Beekay Appliances (P) Ltd. v. Dy. CIT 158 Taxman 67 (Mag.)(Delhi)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Accounts – Rejection**

In the absence of any material or evidence that the assessee has carried out any sales outside the books of account, addition of ` 3 crores is sustained to cover the impact on profits on account of unverifiable deficiencies in the stock records as against lump sum addition of ` 5 crores made by the Assessing Officer. (A.Y. 2001-02)

*Herbalife International India (P) Ltd. v. ACIT (2006) 103 TTJ 78 / 101 ITD 450 (Chennai)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Accounts – Rejection**

Account Officer having not pointed out any defect in the assessee's books of account and the assessee having explained that the marginal decline in the GP rate was on account of substantial increase in the sales during the year, books of account could not be rejected. (A.Y. 1998-99)

*ITO v. Arun Kumar Gupta (2006) 103 TTJ 134 (Jodh.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Accounts – Valuation of closing stock**

Assessee having consistently followed the same method of valuation of closing stock, and the Revenue having accepted the same all along, Assessing Officer was not justified in making addition in the absence of any material or evidence to show that the assessee had undervalued the closing stock.

*ACIT v. Punjab Bone Mills (2006) 103 TTJ 564 (Amritsar)(Trib.)*



**S. 145 : Assessment – Method of accounting – Accounts – Rejection**

Trading additions made on ground of excessive shortage, without rejecting the books of account and not invoking section 145, in spite of the fact that the books of account had been audited under Companies Act, Income-tax Act, and by the Excise Department and no defect was found in said books and also the sales had been accepted by the Sales Tax department, the addition are not justified. (A.Y. 1997-98) *ACIT Circle 6 v. Mount Malt Bru Ltd. (2006) 155 Taxman 128 (Mag.)(Jp.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Project completion method – Construction business**

Assessing officer, based on the estimation of the work-in-progress made by him, taxed the difference as unexplained investment – Assessee's accounts were audited and all expenditure was duly supported by bills and vouchers – Addition made was deleted. (A.Y. 2001-02)

*Phase Holdings Pvt. Ltd. v. ITO Bench 'F', ITA No. 8566/Mum/2004, dated 23-12-2005 – BCAJ, April 2006 (39-B) P. 26. (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Contract receipts – Material supplied**

Addition on account of cost of material supplied by contractee not shown in books was not justified since assessee does not earn any income out of the material supplied by the contractee. (A.Y. 1998-99)

*Om Prakash Nargotia v. ITO (2006) 100 TTJ 657 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection – Stock records – GP rate**

Assessee having maintained complete books of account including stock records and furnished cogent explanation regarding decline in GP rate as well as the difference in the purchases and sales figures as pointed out by the Assessing Officer there was no justification for rejecting the books of account. (A.Y. 1990-91)

*Kiran Corpn. v. ACIT (2006) 102 TTJ 375 / 98 ITD 119 (Ahd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Stock Register**

Assessee having maintained proper stock register and quantitative details provisions of section 145(3) were not applicable and trading addition was not justified. (A.Y. 1998-99)

*ACIT v. Protinkem (2006) 102 TTJ 604 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method of accounting – Valuation of closing stock – Consistency**

No addition on account of MODVAT credit is to be made in the value of the closing stock where the assessee is consistently following the method of valuing stock-in-trade at its net cost. (A.Ys. 1989-90, 1991-92 to 1993-94, 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. ACIT (2006) 102 TTJ 53 / 6 SOT 497 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection – Contract completion method**

Contract completion method of accounting regularly employed by assessee for decades, not depicting any distorted picture of profits and which conformed to Accounting Standards employed in India and also abroad, could not be rejected. (A.Ys. 1989-90 to 1993-94, 1995-96 & 1996-97)

*Dy. CIT v. Otis Elevator Co. (I) Ltd. (2006) 100 TTJ 360 / 99 ITD 73 / 5 SOT 525 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejections accounts – Addition**

Assessing Officer having made additions on the basis of conjectures and surmises without pointing out any defects in the books, additions made by Assessing Officer and sustained in party by CIT(A) are not justified. (A.Y. 2001-02)

*ITO v. Vikram Proteins (P) Ltd. (2006) 101 TTJ 822 (Jp.)(Trib.)*

**S. 145 : Assessment – Method of accounting rejection – Specific defects**

Assessing Officer having not pointed out any specific defect in the assessee's books of account, there was no basis for rejecting the books of account and applying a higher GP rate without citing any comparable case. (A.Y. 1998-99)

*ITO v. Prakash Chand (2006) 100 TTJ 639 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting GP rate – Marble sawing**

GP rate cannot be uniform in the business of excavation of marble blocks from mines and sawing and, therefore, GP rate of 16 per cent declared by the assessee was reasonable. (A.Y. 1997-98)

*Bombay Marble Industries v. ITO (2006) 100 TTJ 927 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection – Consistency**

Assessing officer cannot reject the method of accounting consistently followed, and when the same was accepted in previous assessment year. (A.Y. 1998-99)

*ACIT v. Chhabra Land & Housing Ltd. (2006) 152 Taxman 68 (Mag.)(Chd.)(Trib.)*

**S. 145 : Assessment – Method of accounting comparable GP rate – Stock records**

It was held in the instant case that Assessing Officer is not justified in rejecting book results, and estimating profit merely by comparing G.P. rate with that of comparable dealer, when assessee had maintained proper books of account, and had furnished full details regarding purchases, sales and stock registers in which no defect whatsoever were pointed out.

It was also held that Income tax provisions nowhere authorises Assessing Officer, nor cast an obligations on assessee to prove a negative result; i.e., to prove that why profit was not at a particular rate. (A.Y. 1998-99)

*ITO v. Girish H. Mehta (2006) 153 Taxman 41 (Mag.)(Rajkot)(Trib.)*

**S. 145 : Assessment – Method of accounting – Stock valuation – Revaluation loss**

Reducing the value on non-moving stores by a fixed percentage is a recognised method and the resultant loss is an allowable expenditure.

*National Aluminium Company Ltd. v. Dy. CIT, (2006) 101 TTJ 948 (Cuttack)(Trib.)*

**S. 145 : Assessment – Method of accounting – Income from undisclosed sources – Addition**

The statement of the assessee admitting suppression of sales, provisions of section 145 were rightly invoked – CIT(A) having allowed partial relief by reducing the addition, no interference is warranted.

*Bhimraj Rajpurohit v. ITO (2006) 105 TTJ 899 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Stock valuation – Uncleared Goods**

Held that addition made on account of excise duty in respect of uncleared finished goods lying in factory premises be excluded from value of the closing stock. (A.Y. 1995-96)

*Honda Sael Power Products Ltd. v. Dy. CIT (2006) 157 Taxman 128 (Mag.)(Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Accounts – Rejection**

Assessee having maintained proper stock register and quantitative details of consumption of raw material, provisions of section 145(3) were not applicable and trading addition was not justified. (A.Y. 1998-99)

*ACIT v. Protinkem (2006) 102 TTJ 604 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method accounting – Revised return – Project completion method**

Where assessee filed original return of income and income was declared on basis of work-in-progress and, by filing revised return, assessee adopted method of accounting as project-completion method for working out profit, assessment had to be made as per revised return. (A.Y. 1995-96)

*Satish H. Patel v. Dy. CIT (2005) 93 TTJ 458 (Pune)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Day to day stock register**

Merely because day-to-day stock register is not maintained by assessee, provisions of section 145 cannot be invoked. (A.Y. 1992-93)

*Sha Devji Keshvji Ginning & Trading Co. (P.) Ltd. v. Dy. CIT (2005) 3 SOT 803 (Bang.)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Stock register**

Assessing Officer was justified in invoking provision of section 145 where assessee did not have any stock register nor correctness of quantitative tally was acceptable and in disallowing part of wastage claimed treating it as excessive.

*ACIT v. Sunder Chemicals & Agarbatti Works (P.) Ltd. (2005) 146 Taxman 11 (Mag.)(Delhi)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Manufacturing concern – Day to day stock register**

In case of manufacturing concern, in absence of stock register, true and correct profits cannot be deduced from method of accounting followed by assessee and in such a case trading results can be rejected though method of accounting is accepted by

Assessing

Officer.

(A.Y. 1999-2000)

*Maruti Udyog Ltd. v. Dy. CIT (2005) 92 ITD 119 / 92 TTJ 987 (Delhi)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – No defects in books**

Where Assessing Officer failed to point towards any defect in accounts whereby he was of opinion that income could not be properly deduced there from, Assessing Officer was not justified in rejecting book results. (A.Ys. 1989-90, 1990-91)

*V. Pinto & Co. v. Dy. CIT (2005) 3 SOT 634 (Bang.)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Sale to partner – Partner sold at a higher amount**

Where assessee sold certain goods to a partner who in turn sold them to another party at a higher amount, as deliberate attempt was made by assessee-firm to divert profits to partner by understating sale consideration, addition on account thereof was justified. (A.Y. 1995-96)

*ITO v. Allied Metal Engg. (2005) 2 SOT 81 (Delhi)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Summons not issued in spite of specific request by the assessee – Books could not be rejected [S. 131, 133 (6)]**

Where assessee had specifically made request to Assessing Officer to summon parties who had got their demand draft discounted through assessee, by exercising powers under section 131, but Assessing Officer ignored assessee's request, called for information under section 133(6) and rejected assessee's accounts, rejection of books of account could not be said to be justified. (A.Ys. 2000-01 & 2001-02)

*Meenakshi Devi (Smt) v. ACIT (2005) 96 TTJ 813 (Agra)(Trib.)*

**S. 145 : Assessment – Method accounting – Rejection of accounts – Hotel**

Where Assessing Officer rejected accounts maintained by assessee-hotel for various reasons and it was found that all reasons recorded by Assessing Officer for rejection of book results did not exist, nor he had pointed out any defect in books but simply chose to ignore them and adopted his own hypothetical exercise to estimate room tariff and restaurant receipts which assessee in his opinion ought to have earned, rejection of accounts was not justified. (A.Y. 2001-02)

*Hotel Hilltone (P.) Ltd. v. ACIT (2005) 97 TTJ 969 (Jodh.)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Rejection of accounts – Spare parts**

Where assessee was engaged in business of sale and purchase of accessories and spare parts, non-maintenance of quantitative details of spare parts could not be a ground for rejection of books of account and Assessing Officer was not justified in rejecting books of account without pinpointing specific defects and thereby making an ad hoc addition when discrepancies which were found by Assessing Officer were duly reconciled before lower authorities. (A.Y. 1995-96)

*ACIT v. L.M.P. Tractors (P.) Ltd. (2005) 148 Taxman 52 (Mag.)(Ahd.)(Trib.)*

#### **S. 145 : Assessment – Method Accounting – Estimation of profits – Defects**

Assessing Officer cannot estimate income at figures which do not bear any relationship with past history of case and without pointing out any specific defects in books. (A.Y. 2001-02)

*ITO v. Somsons & Co. (2005) 148 Taxman 21 (Mag.)(Amritsar)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Estimation of Profits – Comparable GP rate**

Rejection of book results and application of provisions of section 145 was not justified merely on ground that GP shown by some other assessee was better than GP shown by assessee, more so when GP shown by assessee was higher than GP shown in earlier assessment year.

(A.Y. 1994-95)

*ITO v. Sujata Devi (Smt) (2005) 94 TTJ 484 (Jodh.)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Estimation of profits – Decline in GP Rate**

Where quantum of gross profit was much higher as compared to immediately preceding or succeeding assessment year, merely on basis of decline in rate of gross profit alone, adverse inference could not be drawn. (A.Y. 1990-91)

*Vivek Ispat Udyog v. ITO (2005) 2 SOT 65 (Delhi)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Estimation of profits – Onus**

If profits shown by assessee in his return are not accepted, it is for taxing authorities to prove that assessee made more profits and ITO could not proceed to make an arbitrary addition. (A.Y. 1996-97)

*Dy. CIT v. Nikko Auto (P.) Ltd. (2005) 145 Taxman 42 (Mag.)(Delhi)(Trib.)*

**S. 145 : Assessment – Method accounting – Estimation of profits – Reasonable**

When defects are found in accounts, total turnover/sales can be estimated proportionately after invoking provisions of section 145; however, while applying G.P. rate, Assessing Officer is required to make rational estimate having regard to nexus of material on record.

Where while applying higher GP rate in respect of country liquor sold by assessee Assessing Officer relied upon case of a Jaipur dealer, Assessing Officer grossly erred in relying upon case of third party whose premises was situated in Jaipur whereas area of operation of assessee was rural area. (A.Y. 2000-01)

*Rajaram Rajender Bhandari & Party v. ACIT (2005) 95 TTJ 97 (Jp.)(Trib.)*

**S. 145 : Assessment – Method Accounting – Estimation of profits – Jeweller**

Where in case of assessee-jeweller additions were made by invoking section 145 on ground that labour register produced before Assessing Officer was written in one day and, therefore, same was not reliable and in that register assessee had mentioned only names of persons without addresses who had ordered for making of ornaments and, hence, it was also not verifiable, addition was justified. (A.Y. 1994-95 to 1996-97)

*ITO v. Prakashchand Soni (2005) 94 TTJ 631 (Indore)(Trib.)*

**S. 145 : Assessment – Method accounting – Estimation of profits – Garments**

Where in case of retailer of cloth and garments, same Assessing Officer had accepted assessee's gross profit rate in earlier and subsequent years and no other comparable case where Gross Profit rate was higher was shown, addition made by him by substituting his own gross profit rate, was not justified. (A.Y. 1993-94)

*ACIT v. Rakesh Binny Show Room (2005) 147 Taxman 97 (Mag.)(Amritsar)(Trib.)*

**S. 145 : Assessment – Method accounting – Estimation of profits – Project completion method**

Where assessee was consistently following the project-completion method which was accepted by the revenue in the past and subsequent years, in absence of any adverse comments by auditors, who had audited books of account of the assessee, Assessing Officer had no power to rewrite books of account and to estimate income on mere doubts and suspicion, on ground that since assessee was contractor and not builder, it could not follow project-completion method. (A.Y. 1994-95)

*Abode Construction Ltd. v. ITO (2005) 2 SOT 27 / 95 TTJ 35 (Mum.)(Trib.)*

**S. 145 : Assessment – Method accounting – Estimation of profits – Construction**

Where assessee-company undertook a project for construction /development of residential complex and during year under construction modified its method and basis



followed for recognition of profits, from completed-project method, to recognition of profits during currency of project, so as to pay tax during currency of project on estimate basis, such change could not be equated with a change in method of accounting and as such Assessing Officer was not justified in holding that such change was impermissible and in estimating profits on mercantile method of accounting. (A.Y. 1993-94)

*Dy. CIT v. Conwood Agencies (P.) Ltd. (2005) 2 SOT 573 (Mum.)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Estimation of profits – Reasonable**

Where assessee-firm purchased firewood from nearby villages and supplied it to a company using its own lorry, estimation of profit rate of 7.5 per cent of gross receipt would be proper. (A.Ys. 1996-97, 1997-98)

*Dy. CIT v. Nidhish Trading Co. (2005) 3 SOT 486 (Cochin)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Valuation of stock – Accounting Standards**

Since as per Accounting Standard-2, issued by Institute of Chartered Accountants of India, for purpose of valuation of closing stock of finished goods selling price is to be reduced by estimated gross profit, such a recognised method of valuation cannot be disturbed unless it is known that valuation has not been made correctly. (A.Y. 1992-93)

*Artson Engg. Ltd. v. Dy. CIT (2005) 142 Taxman 40 (Mag.)(Mum.)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Valuation of stock – Dissolution**

In a case where on death of one of two partners, firm was dissolved and business was taken over and continued by the sole remaining partner in individual capacity and neither there was any distribution of assets and liabilities of erstwhile firm nor business ceased to continue as one unit, value of stock shown by assessee at average price could not be rejected. (A.Y. 1997-98)

*ACIT v. Kuldip Chand & Sons (2005) 93 ITD 253 / 94 TTJ 1111 (Amritsar)(Trib.)*

#### **S. 145 : Assessment – Method accounting – Valuation of stock – Conversion of proprietary concern in to firm**

Where proprietary concern of assessee is converted into partnership firm and subsequently, business is continued by partnership firm, stock-in-trade should be valued at cost or market price whichever is lower. There was no cessation of business. The Tribunal held that the ratio of *Sakthi Trading Co v. CIT (2001) 250 ITR 871 (SC)*, is applicable in the instant case, therefore the Assessing Officer was directed to value the stock in trade at cost or market value price, which ever was lower after obtaining requisite details from the assessee. (A.Y. 1996-97)

*Bhim Sen Garg v. Dy. CIT (2005) 94 ITD 288 / 93 TTJ 322 (Jp.)(Trib.)*

**S. 145 : Assessment – Method accounting – Valuation of stock – Opening stock**

Where opening stock of assessee was not saddled with excise duty components, closing stock could not be saddled with excise duty while valuing it. (A.Y. 1995-96)  
*Continental Device (India) Ltd. v. Jt. CIT (2005) 147 Taxman 77 (Mag.)(Delhi)(Trib.)*

**S. 145 : Assessment – Method accounting – Valuation of stock – Change**

Where assessee-bank, in order to comply with provisions of Banking Regulation Act, changed method of valuation of closing stock of securities from cost to cost-or-market price and such method was consistently followed afterwards, such change was permissible. (A.Ys. 1982-83 to 1984-85)

*ITO v. J&K Bank Ltd. (2005) 95 ITD 141 / 94 TTJ 836 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method accounting – Valuation of stock – Change**

Where assessee was manufacturing urea in its fertilizer division and sale price of urea was subject to administrative control, as there was uncertainty about receipt of claim for escalation of retention price of fertilizer, change of method of accounting by assessee for closing stock of fertilizer from mercantile to cash, was justified. (A.Y. 2001-02)

*Neyveli Lignite Corpn. Ltd. v. ACIT (2005) 2 SOT 863 / 93 TTJ 685 (Chennai)(Trib.)*

**S. 145 : Assessment – Method accounting – Stock register [S. 44AA(2)]**

Where assessee-liquor-contractor's audit report was a qualified one and it did not maintain stock register and assessee had violated provisions of section 44AA(2), application of provisions of section 145(3) was justified. (A.Y. 2000-01)

*Rajaram Rajender Bhandari & Party v. ACIT (2005) 95 TTJ 97 (Jp.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Overriding effects – Accrual**

Provisions of S. 145 cannot override S. 5. Thus an Income which has neither accrued nor received within the meaning of S. 5, cannot be charged to tax even though an accounting entry has been made in the books. The computation provision of S. 145 cannot enlarge or even restrict the content of taxable Income. (A.Ys. 1993-94 & 1994-95)

*Canara Bank v. Joint CIT (2003) 84 ITD 310 / 79 TTJ 398 (Bang.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Prudential norms of RBI – NBIC**

Assessing Officer cannot ignore the provisions of Chapter IIIB of the RBI Act, and the prudential norms issued by it, as same has an overriding effect on provisions of the Income Tax, Act including S. 145. In view of the same it was held that Income of assessee, a NBFC, from non performing assets will not be assessed on accrual basis, even in mercantile system of accounting. (A.Y. 1998-99)

*TEDCO Investment & Financial Services (P.) Ltd. v. Dy. CIT (2003) 87 ITD 298 / 82 TTJ 259 (Delhi)(Trib.)*

*Editorial : See Southern Technologies Ltd. v. Jt. CIT (2010) 320 ITR 577 (SC)*

**S. 145 : Assessment – Method of accounting – Matching concept of accounting – Consultancy Firms**

Matching Concept of Accounting does not work in case of consultancy firms. (A.Y. 1992-93)

*Credit Rating Information Services of India Ltd. v. Dy. CIT (2003) 84 ITD 247 / 79 TTJ 219 (Mum.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Project completion method – Consistency**

Department cannot reject the Project completion method which is regularly followed and accepted in past, and distort the whole assessment which may also impact the other years. (A.Y. 1997-98)

*Nandi Housing (P.) Ltd. v. Dy. CIT (2003) 80 TTJ 750 / 2 SOT 395 (Bang.)(Trib.)*

*ACIT v. Magnum International Trading Co. (P.) Ltd. (2003) 84 ITD 113 / 79 TTJ 552 (TM)(Delhi)(Trib.)*

**S. 145 : Assessment – Method of accounting – Hybrid Method Consistency**

The Interest Income which was regularly taxed on receipt basis, cannot be taxed on accrual, by Assessing Officer, on ground that assessee is following Hybrid method, since in one year expenditure was claimed on accrual basis. (A.Ys. 1989-90 & 1991-92)

*ITO v. Panchsheel Co-Op. House Building Society Ltd. (2003) SOT 618 (Chd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Change – S. 209 of Companies Act**

Change adopted perforce in view of amendment to S. 209 of Companies Act, 1956 and being consistently followed in subsequent years was held to be bonafide. (A.Y. 1989-90)

*ACIT v. Marg Marketing & Research Group (2003) 87 ITD 662 (Mum.)(Trib.)*

*Dy. CIT v. ITC Hotels Ltd. (2003) 131 Taxman 139 (Mag.)(Bang.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of accounts – Suitable alternative**

S. 145 can be invoked only when the method of accounting followed does not disclose the true picture of profits. Further while applying S. 145, Assessing Officer is required to give suitable and proper alternative system of accounting, rather than mere disallowing the particular item. (A.Y. 1996-97)

Method of accounting suggested by ICAI should not be easily upset by lower authorities, as the guidance notes issued by ICAI is drafted by expert committee, and that too after due research, public debate and opinion from various quarters. (A.Y. 1996-97)

*Jt. CIT v. Pact Surities & Financial Ltd (2003) 86 ITD 115 (Hyd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of books – Disallowance**

When books of account are rejected, revenue cannot rely on same set of books and disallow specific items of expenditure.

*Jaswant Singh & Co. v. ACIT (2003) SOT 545 (Amritsar)(Trib.)*

**S. 145 : Assessment – Method of accounting – Rejection of books – GP rate and consumption**

In absence of any specific defects being pointed out, no addition can be made. Low G.P or excessive consumption of raw material can only be grounds of making in-depth inquiries, and not be reason for rejecting the books. (A.Ys. 1991-92, 1992-93)

*Sangrur Vanaspati Mills Ltd v. ACIT (2003) 133 Taxman 37 / (2004) 88 TTJ 979 (Mag.)(Chd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Non-maintenance of stock register**

S. 145(2) can not be invoked merely for non maintenance of stock register, when purchase and sales were fully vouched and made to railway department. (A.Y. 1992-93)

*Ganesh Foundry v. ACIT (2003) 78 TTJ 736 / 130 Taxman 172 (Mag.)(Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Non-maintenance of day-to-day records**

Held, rejection of accounts were justified when true results can not be ascertained in absence of maintenance of day-to-day records. (A.Y. 1990-91)

*International Guwar Gum & Chemicals v. ITO (2003) SOT 240 (Jodh.)(Trib.)*

**S. 145 : Assessment – Method of accounting – Estimation of profits – NP rate – Depreciation, salary and interest**

Tribunal held, on estimation of Income under section 145 by applying the net profit rate on total receipts, benefit of depreciation and salary and interest to partners has to be given.

*Narula Transport Co v. ACIT ITO (2003) 127 Taxman 163 / (2004) 87 TTJ 803 (Mag.)(Amritsar)(Trib.)*

**S. 145 : Assessment – Method of accounting – Estimation of profits – Reasonable**

Even when books of account are rejected, the assessing officer is duty bound to make a fair and reasonable estimate of Income based on evidence and material on record. (A.Ys. 1991-92 & 1992-93)

*Sangrur Vanaspati Mills Ltd v. ACIT (2003) 133 Taxman 37 / (2004) 88 TTJ 979 (Mag.)(Chd.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Estimation of profits**

When there is a net Loss, then there is no justification in making addition on basis of profit. And if the Loss is not genuine then Assessing Officer should determine the addition afresh examining entire evidence after providing reasonable opportunity. (A.Y. 1994-95)

*P C Mundra v. ACIT ITO (2003) 80 TTJ 945 (Jp.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Estimation of profits**

In absence of any comparable case for application of higher Gross profit rate, addition made by rejection of books was not justified. (A.Y. 1982-83)

*Jupiter Textile v. ITO (2002) 77 TTJ 735 (Jodh.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Estimation of profits**

Tribunal held that as no omission, irregularities and positive evidence of any defect has been pointed out, and only on basis of routine observation without any specific instance or material to support, S. 145(2) cannot be invoked. It was said that Business is not mathematics and it would only be natural to expect the variation in the trading conditions from time to time. (A.Y. 1995-96)

*Badshah Construction Co v. Dy. CIT (2003) 127 Taxman 153 (Mag.)(Indore)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Valuation of stock – Governing principles**

The decision lays down various principles governing valuation of closing stock. (A.Y. 1991-92)

*Deutsche Bank A.G v. Dy. CIT (2003) 86 ITD 431 (Mum.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Valuation of stock – Loss business suspended**

When the business is suspended and there are no trading activities, there is no occasion for drawing a trading account and revaluing the Stock, and no loss can be claimed on basis of fall in price. (A.Y. 1996-97)

*Jt. CIT v. Shyama Prasad Agarwal (2003) 85 ITD 529 (Kol.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Valuation of stock – Change – Rejection**

Merely for the reason of reduction of income, the change in method of valuation of stock can be rejected, on ground of non bona fide change. (A.Y. 1989-90)

*Punjab communication Ltd. v. Dy. CIT (2003) 84 ITD 505 / (2004) 88 TTJ 436 (Chd.)(Trib.)*

### **S. 145 : Assessment – Method of accounting – Chapter XIVB-Block assessment – Search cases**

Provisions of section 145 could not be applied while assessing undisclosed income under the Chapter XIV-B. (A.Y. 1986-87 TO 1995-96 AND 1996-97).

*Babros Machinerery Mfr (P.) Ltd. v. Dy. CIT (2003) 84 ITD 91 / 78 TTJ 0857 (TM)(Ahd.)(Trib.)*

**S. 145 : Assessment – Method of accounting – System of accounting – RBI norms**

Prudential norms of RBI to NBFC, provisions of Chapter III-B of RBI Act have overriding effect over the Income Tax Act & therefore, income as per the Income Tax Act, under mercantile system of accounting, could be recognised only subject to the prudential norms. (A.Y. 1998-99).

*Tedco Investment & Financial Services (P) Ltd. v. Dy. CIT (2003) 87 ITD 298 / (2004) 82 TTJ 259 (Delhi)(Trib.)*

*Editorial : Now see Southern Technology v. Jt. CIT (2010) 320 ITR 577 (SC)*

**Section 145A : Method of accounting in certain cases**

**S. 145A : Assessment – Method of accounting – Accounts – Valuation of closing stock – Excise duty**

Excise duty on sugar manufactured but not sold is not to be included in the value of closing stock. In respect of excisable goods manufactured and lying in stock excise duty liability would get crystallized on date of clearance of goods and not on date of manufacture and therefore, till date of clearance of excisable goods, assessee cannot be said to have incurred excise duty liability. (A. Y. 2001-02).

*CIT v. Loknete Balasaheb Desai S.S.K. Ltd. (2011) 200 Taxman 238 / 59 DTR 169 / 243*

CTR

*181 / 339 ITR 288 (Bom.)(High Court)*

**S. 145A : Assessment – Method of accounting – Valuation – Valuation of stock**

For the purpose of valuation of closing stock, section 145A of the Act provides that only taxes duties, cess or fees actually paid by the assessee to bring the goods to place of its location would form part of the value stock. Accordingly, there is no justification on the part of the Assessing Officer to add excise duty to the price of the raw material, etc. while computing the value of goods in closing stock, as the goods had not left the premises of the assessee.

*ACIT v. D & H Secheron Electrodes P. Ltd. (2008) 5 DTR 279 / 173 Taxman 188 (MP)(High Court)*

**S. 145A : Assessment – Method of accounting – Valuation – Valuation of stock – Addition to opening stock**

Section 145A begins with a non obstante clause and therefore to give effect to sec. 145A, if there is a change in the opening stock as on March 31, 1999, there must necessarily be a corresponding adjustment made in the opening stock as on April 1, 1998. (A.Y. 1999-2000)



*CIT v. Mahavir Aluminium Ltd. (2008) 297 ITR 77 / 214 CTR 45 / 168 Taxman 27 (Delhi)(High Court)*

**S. 145A : Assessment – Method of accounting – Valuation of closing stock – Raw material – Excise duty [S. 145]**

Where by applying provisions of section 145A, Assessing Officer computed excise duty proportionate to closing stock of raw material, without considering similar adjustment in value of opening stock of raw material, Commissioner (Appeals) was justified in directing Assessing Officer to recompute adjustment under section 145A making necessary adjustment to closing stock of finished goods, opening stock of raw material and MODVAT credit.

*ITO v. Mehra Electric Co. (2005) 148 Taxman 37 (Mag.)(Kol.)(Trib.)*

**Section 146 : Assessment – Reopening at the instance of the assessee. [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

**S. 146 : Assessment – Reopening – Condonation of delay – Limitation Act**

There is no express provision under the Income tax Act, 1961, making the provisions of section 5 of the Limitation Act, for condonation of delay, applicable to an application filed under section 146 of the Act. (A.Ys. 1977-78 and 1978-79)

*CIT v. Bajrang Dal Mills (2006) Tax L. R. 95 / 282 ITR 44 / 202 CTR 332 (All.)(High Court)*

**Section 147 : Income escaping assessment**

**S. 147 : Reassessment – Exempted income – Proviso to S. 14A – Validity**

For A.Y. 2000-01, the assessee filed a return on 30.11.2000. As section 14A was inserted subsequently by FA 2001 (w.r.e.f 1.4.62) and was tabled in Parliament on 28.2.2001, the assessee did not make any disallowance under section 14A. The Assessing Officer also did not make a disallowance in the section 143(3) order passed on 7.3.2003. After the expiry of 4 years, the Assessing Officer sought to reopen the assessment to make a disallowance under section 14A. The assessee challenged the reopening on the ground that (i) under the Proviso to section 14A, a reopening under section 147 for A.Y. 2001-02 & earlier years was not permissible, (ii) as section 14A was not on the statute when the ROI was filed, there was no failure to disclose & (iii) as the Assessing Officer had also sought to rectify under section 154, he could not reopen under section 147. The High Court (197 TM 415) dismissed the Writ Petition inter alia on the ground that "the Proviso to section 14A bars reassessment but not original assessment on the basis of the retrospective amendment. Though the ROI was filed before section 14A was enacted, the assessment order was passed subsequently. The Assessing Officer ought to have applied section 14A and his failure has resulted in escapement of income. The object and purpose of the Proviso is to ensure that the retrospective amendment is not made as a tool to reopen past cases

which have attained finality". On appeal by the assessee to the Supreme Court, HELD dismissing the SLP:

In our view, the re-opening of assessment is fully justified on the facts and circumstances of the case. However, on the merits of the case, it would be open to the assessee to raise all contentions with regard to the amount of `98.46 lakhs being offered for tax as well as it's contention on section 14A of the Income Tax Act, 1961. (A.Y. 2000-01)

*Honda Siel Power Products Ltd. v. Dy. CIT (2012) 340 ITR 64 / 67 DTR 56 / 247 CTR 316 (SC)*

*Editorial: Honda Siel Power Products Ltd. v. Dy. CIT (2011) 197 Taxman 415 / 52 DTR 353 / (2012) 247 CTR 322 (Delhi)(High Court)*

### **S. 147 : Reassessment – Reason to believe – Report of DVO [S. 148]**

Opinion of DVO per se is not an information for the purpose of reopening assessment under section 147. Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon.

*ACIT v. Dhariya Construction Company (2011) 197 Taxman 202 / (2010) 328 ITR 515 / 236 CTR 226 / 47 DTR 288 / (2011) 225 Taxation 89 (SC)*

### **S. 147 : Reassessment – Reason to believe – Wrong claim of deduction [S. 80I]**

On the facts of the case, the Tribunal was directed to examine the validity of the impugned notice under section 148 in appeal before it. (A.Y. 1997-98)

*Swaraj Engines Ltd. v. ACIT (2010) 38 DTR 1 / 231 CTR 217 (SC)*

### **S. 147 : Reassessment – Change of opinion – Cir. No. 549 – Post 1989 amendment**

Under Circular No. 549 dated 31-10-1989, the Assessing Officer has no power to review but only to reassess. After amendment of 1989, the Assessing Officer can reopen assessment provided he has "reason to believe" that income has escaped assessment, based on tangible material. Mere "change of opinion" does not empower the Assessing Officer to review assessment in the garb of reassessment. Assessing Officer deemed to have applied his mind if facts are on record and reopening of assessment under section 147 is not permissible even within four years. (A.Y. 1987-88)

*CIT v. Kelvinator of India Ltd. (2010) 2 SCC 723 / 320 ITR 561 / 228 CTR 488 / 187 Taxman 312 / 34 DTR 49 / 216 Taxation 41 (SC)*

### **S. 147 : Reassessment – Direction of Higher Authority – Nullity [S. 148]**

The Assessing Officer for assessment year 2000-01 recorded a specific note in the assessment order which indicated that the assessment order was passed under the dictates of the Commissioner. The Supreme Court in the challenge to the reopening for the same assessment year held that the assessment order passed on the dictates

of the higher authority, being wholly without jurisdiction, was a nullity. (A.Y. 2000-01)

*CIT v. Green World Corporation (2009) 314 ITR 81 / 181 Taxman 111 / 23 DTR 185 / 224 CTR 113 / (2010) 214 Taxation 441 (SC) / 7 SCC 69*

### **S. 147 : Reassessment – Reopening – Jurisdiction of High Court**

The Commissioner (Appeals) confirmed the order of the Assessing Officer that the income is to be assessed as income from house property for the A.Y. 1997-98. The CIT(A) also directed that the A.Y. 1992-93 to 1999-00 should be reopened. The Tribunal reversed the order of the CIT(A) and held that the income is in the nature of business income and not income from house property. The High Court in the challenge to the reopening allowed the petition of the assessee.

On an appeal by the department, the Supreme Court held that it was not open for the High Court to direct by an omnibus order that all subsequent years were connected years and that all income should be treated as business income. The Supreme Court further held that the unit for assessment was a 'year' and this was not a case of block assessment. (A.Ys. 1992-93 to 1999-2000)

*Dy. CIT v. Divya Investment P. Ltd. (2009) 313 ITR 363 / 171 Taxman 92 / 4 DTR 188 / 215 CTR 301 (SC)*

### **S. 147 : Reassessment – Change of opinion – Intimation [S. 143(1)]**

The intimation under section 143(1) cannot be treated as an order of assessment. The distinction between intimation and assessment is also brought out by the statutory provision as they stood at different points of time. Prior to April 1, 1989, the assessing officer had to pass an assessment order if he decides to accept the return, but under the amended provision, the requirement of passing the order has been dispensed with and instead only an intimation is required to be send.

As there is no assessment, the question of change of opinion does not arise.

Further, what is required at the time of the issue of notice under section 147 is reason to believe that the income has escaped assessment but not the established act of escapement of income. (A.Y. 2001-02)

*ACIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 / 210 CTR 30 / 161 Taxman 316 / 201 Taxation 184 (SC)*

### **S. 147 : Reassessment – Notice after expiry of four years – No failure of assessee [S. 148]**

Assessment cannot be reopened to treat income from manning and management contracts as fee for technical services while original assessment was treated as business income, notice issued after expiry of four years from the end of relevant assessment year was barred by limitation. (A.Ys. 1988-89 to 1990-91)

*CIT v. Foramer France (2003) 264 ITR 566 / 129 Taxman 72 / 185 CTR 512 (SC)*

### **S. 147 : Reassessment – Scope – Items unconnected with notice [S. 148]**

If in the course of reassessment, it comes to the notice of the Assessing Officer that any item or items other than the item of escaped income for which original assessment was reopened, have also escaped assessment, he is bound to assess such items of income also in the course of reassessment. (A. Y. 2001 to 2003)

*CIT v. Best Wood Industries & Saw Mills (2011) 237 CTR 404 / 331 ITR 63 / 50 DTR 143 (FB) (Ker.)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – After four years – Deduction**

##### **[S. 80IA, 80IB]**

Assessee having claimed deduction under section 80IA, in respect of the profits made by its captive power plant disclosing the computation of profits and explaining the break up thereof and disclosed the basis on which it was claimed deduction under section 80IB, in respect of the refinery expansion project and lube unit, it cannot be said that there was a failure on the part of the assessee to disclose fully all material facts necessary for the assessment and therefore reopening of assessment beyond the period of four years from the end of the relevant year was not justified. (A. Y. 2002-2003)

*Hindustan Petroleum Corporation Ltd. v. Dy. CIT (2011) 238 CTR 28 / (2010) 328 ITR 534 / 192 Taxation 178 / 42 DTR 262 (Bom.)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – After four years – Change of opinion**

Assessing Officer having reopened the assessment on the sole basis that the system of accounting adopted by the assessee which has been accepted while framing the original assessment is not appropriate, without making any allegation that there was non-disclosure of material facts by the assessee at that time of original assessment, It is a case of mere change of opinion and therefore, reopening of assessment after expiry of four years from the end of the relevant assessment years was not valid. (A. Ys. 1995-96 and 1997-98)

*CIT v. Manish Ajmera (2011) 51 DTR 117 / 238 CTR 469 (Raj.)(High Court)*

#### **S. 147 : Reassessment – Reason to believe – Subsequent Supreme Court decision [S. 10(29)]**

Judgment of the Supreme Court holding that exemption under section 10(29) is available only to that part of income which is derived from letting of godowns or warehouses and not the income derived from other sources constituted a valid basis for reopening the assessments. The Tribunal having not touched upon the question as to whether or not this very issue was discussed in the original assessment to the assessee whether it was a case of change of opinion, order of Tribunal is set aside and the matter is remitted back to the Tribunal for fresh consideration only on this aspect. (A. Ys. 1995-96 and 1997-98).

*Central Warehousing Corporation v. ACIT (2011) 51 DTR 198 / 239 CTR 460 (Delhi)(High Court)*

*Editorial : Refer ACIT v. Central Warehousing Corporation (2012) 67 DTR 356 (Delhi)(Trib.)*

**S. 147 : Reassessment – Beyond four years – No failure on the part of assessee – Bad Debts**

Allowance of bad debt was specifically raised in the original assessment proceedings and on receiving explanation from assessee the claim of assessee was allowed, reassessment held to be invalid. (A. Y. 2004-05)

*Yash Raj Films P. Ltd. v. ACIT (2011) 332 ITR 428 / (2012) 65 DTR 363 / 204 Taxman 386 (Bom.)(High Court)*

**S. 147 : Reassessment – Compensation on acquisition – Enhancement by Supreme Court**

Initiation of the reassessment proceedings in respect of escaped income due to acquisition of petitioner's land was not vitiated as Assessing Officer had reasons to believe that the income chargeable to tax had escaped assessment. (A. Ys. 1989-90 to 1994-1995 and 1998-99).

*Maya Rastogi (Smt) v. CIT (2011) 52 DTR 237 / 241 CTR 67 / 196 Taxman 283 (All.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Block assessment [S. 158BC]**

Once the Assessing Officer proceeds to make block assessment under section 158BC based on materials gathered during search under section 132, he cannot proceed to make reassessment under section 147 on the basis of the same material, after block assessment is cancelled by the first appellate authority. Assessing Officer has no jurisdiction to assess the very same amount, which was considered and given up while making block assessment. (A. Y. 1992-93)

*CIT v. C. Sivanandan (2011) 52 DTR 428 (Ker.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Investment – Business income**

Where assessment was completed holding that the income from conversion of equity share from stock-in-trade to investment was business income. Reassessment proceedings initiated merely by taking view that income should be taxed under the head short term capital gain amounted to a mere change of opinion as such liable to be quashed. (A. Y. 2005-06)

*Ritu Investment P. Ltd. v. CIT (2011) 51 DTR 162 (Delhi)(High Court)*

**S. 147 : Reassessment – Search and seizure – Same material – Block assessment invalid [S. 158BC]**

Once materials are gathered during the search proceedings under section 132 of the Act it is up to the Assessing Officer to make either block assessment under sections 158BC or assessment under section 147 of the Act whichever he finds appropriate. However, once the assessing officer proceeds to make assessment under section

158BC which is cancelled by the appellate authority. The Assessing Officer cannot proceed to make assessment under section 147 of the Act on the basis of the same material. (A. Y. 1992-93)

*CIT v. C. Sivanandan (2011) 52 DTR 428 (Ker.)(High Court)*

### **S. 147 : Reassessment – Change of opinion – Same material**

Change of opinion leading to 'reason to believe' – opinion formed on a claim at the time of framing original assessment cannot be changed subsequently on the same set of materials available in record. In the absence of any substantive additional materials, it will amount to change of opinion; therefore, re-opening of assessment is bad-in-law. (A. Y. 1995-96).

*Gujarat Power Corporation Ltd. v. Jt. CIT (2011) 238 CTR 91 / 202 Taxman 303 / 48 DTR 226 (Guj.)(High Court)*

### **S. 147 : Reassessment – Withdrawal by CBDT – Donation u/s. 35(1)(ii) – Reasons don't survive [S. 35, 148]**

The assessee was granted deduction for donation to an institute which was approved under section 35(1)(ii). CBDT withdrew the approval to the institution, on the basis of which the assessee assessment was reopened. Subsequently the notification was quashed by the Allahabad High Court, the High Court held that reasons for reopening the assessment under section 147/148 does not survive.

*Ultra Marine Air Aids (P) Ltd. v. ACIT (2011) 332 ITR 273 (Delhi)(High Court)*

### **S. 147 : Reassessment – Full and true disclosure – Beyond four years – EOU [S. 10B]**

When there was no failure to disclose fully and truly all material facts by assessee, presumption on the part of the Assessing Officer that the assessee has failed to achieve 82 percent value addition in order to be treated as hundred percent EOU required for availing deduction under section 10B was incorrect and reopening of the assessment beyond four years was bad in law. (A. Y. 2003-04).

*Jayant Agro Chemicals Ltd. v. ITO (2011) 241 CTR 424 / 55 DTR 361 (Bom.)(High Court)*

### **S. 147 : Reassessment – Reasons not asked – Power of ITAT – Direction to AO**

While the Assessing Officer is required to record reasons, Law does not mandate the Assessing Officer to suo moto supply the reasons to the assessee. It is for the assessee to demand the reasons and raise objections to the reopening which the Assessing Officer is required to dispose of by passing a speaking order. As the assessee did not ask for the reasons and instead participated in the reassessment proceedings, the Tribunal could not have restored the matter back to the file of the Assessing Officer and give another opportunity to the assessee to raise objections to the "reasons to believe" recorded by the Assessing Officer. It is trite that what cannot be done directly, it is not allowed indirectly as well. This novel and ingenuousness



method adopted by the Tribunal in setting aside the reassessment orders on merits cannot be accepted.

However, also held that as the assessee had challenged the validity of reassessment before the CIT(A), it ought to have been provided with the reasons and so the matter was remitted for supply of reasons. (A.Ys. 1996-97 and 1997-98)

*CIT v. Safetag International India P. Ltd. (2011) 332 ITR 622 / (2012) 67 DTR 316 (Delhi)(High Court)*

#### **S. 147 : Reassessment – No reassessment based on reasons – Invalid**

Though Explanation 3 to section 147 inserted by the F.A. 2009 w.e.f 1.4.1989 permits the Assessing Officer to assess or reassess income which has escaped assessment even if the recorded reasons have not been recorded with regard to such items, it is essential that the items in respect of which the reasons had been recorded are assessed. If the Assessing Officer accepts that the items for which reasons are recorded have not escaped assessment, it means he had no “reasons to believe that income has escaped assessment” and the issue of the notice becomes invalid. If so, he has no jurisdiction to assess any other income. (Jet Airways 331 ITR 236 (Bom) followed).

*Ranbaxy Laboratories Ltd. v. CIT (2011) 242 CTR 117 / 336 ITR 136 / 200 Taxman 242 / 57 DTR 281 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Despite “Wrong Claim” – Invalid if failure to disclose not alleged**

It is necessary for the Assessing Officer to first state that there is a failure to disclose fully and truly all material facts. If he does not record such a failure he would not be entitled to proceed under section 147. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts.

*Titanor Components Limited v. ACIT (2011) 60 DTR 273 / 243 CTR 520 (Goa)(Bom.)(High Court)*

*Editorial:- Hindustan Lever v. R.B. Wadkar (2004) 268 ITR 332 / 190 CTR 166 / 137 Taxman 479 (Bom.) followed.*

#### **S. 147 : Reassessment – Reason to believe – Supreme Court**

Decision of Supreme Court forming the law from the very beginning of the existence of provision forms the material belief on escapement and therefore, becomes a valid reason to reopen. (A. Ys. 2005-06 & 2006-07).

*Kartikeya International v. CIT (2011) 241 CTR 489 / 329 ITR 539 (All.)(High Court)*

#### **S. 147 : Reassessment – Change of opinion – Details furnished [S. 80-IB]**

On the claim of 80-IB, the Assessee had furnished all the informations during assessment proceeding regarding the alleged manufacturing process involved on the basis of which the assessment was concluded by the Assessing Officer. On the same set of facts and materials, the Assessing Officer cannot take a different view by taking

recourse to section 147 which will amount to change of opinion. (A. Ys. 1998-99 to 2001-02)

*Amrit Feeds Ltd. v. ACIT (2011) 239 CTR 82 / 196 Taxman 244 / 51 DTR 315 (Cal.)(High Court)*

#### **S. 147 : Reassessment – After four years – Internal auditor**

Notice issued after expiry of four years from the end of the relevant assessment year merely based on the report of the internal auditors was held to be bad in law when all the particulars were duly disclosed by the Appellant during the original assessment proceedings under section 143(3) of the Act. (A.Y. 1997-98).

*CIT v. Simbhaoli Sugar Mills Ltd. (2011) 333 ITR 470 / 55 DTR 233 / 241 CTR 249 (Delhi)(High Court)*

#### **S. 147 : Reassessment – After four years – Exemption**

Notice issued under section 148 of the Act to reassess the income of the assessee after expiry of four (4) years was held to be bad in law where the assessee had duly disclosed all the fact relating to sale of shares, working of capital gain and exemption claimed under section 54F of the Act in his return of income and in the course of original assessment proceedings under section 143(3) of the Act. (A. Y. 1996-97).

*Vikram Kothari (HUF) v. State of Uttar Pradesh & Ors. (2011) 56 DTR 43 / 242 CTR 179 / 200 Taxman 152 (Mag.)(All.)(High Court)*

#### **S. 147 : Reassessment – Merger – Deduction – With in four years [S. 80HHC, 80I, 80IA]**

Where the assessing officer after due application of his mind allowed the assessee's claim of deduction under section 80HHC, 80I and 80IA of the Act after some modification, for which assessee preferred an appeal before the appellate authority. Reopening the assessment within four (4) years on the ground that deduction under section 80HHC, 80I and 80IB of the Act was excessive was held to be bad in law for the reason that the assessment order has merged with the order of the CIT(A) and had no independent existence. (A. Y. 1996-97).

*United Phosphorus Ltd. v. Addl. CIT (2011) 56 DTR 193 (Guj.)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – After four years – Change in Shareholding [S. 79]**

Assessing Officer reopened the assessment only on the ground that there is a change in the share holding more than 51% in the assessment year 2001-02 in which the loss was incurred and therefore the loss incurred in the assessment year 2001-02 cannot be allowed to be set off in the assessment year 2003-04. The Court held that the effective shareholding of Ned Bank Nihilent Technologies (P) Ltd. in the assessee company has gone down below 51% having been specifically brought to the notice of the Assessing Officer by the assessee, there was no failure to disclose fully and truly all material facts necessary for the purpose of assessment and reassessment proceedings could not be initiated after four yeas. (A. Y. 2003-04).

*Nihilent Technologies (P) Ltd. V. Dy. CIT (2011) 59 DTR 281 / 243 CTR 77 (Bom.)(High Court)*

**S. 147 : Reassessment – Valuation of closing stock – CST and Excise duty [S. 145A]**

Assessee had not included CST and excise duty paid on closing stock ,while making its valuation thereby claimed excess loss. The Court held that the Assessing Officer had sufficient reason to form belief that income of assessee had escaped assessment, hence reassessment held to be valid. (A. Ys. 2000-01, 2001-02).

*Ginni Filaments Ltd. v. CIT (2011) Tax. L. R. 538 (All.)(High Court)*

**S. 147 : Reassessment – Notice – Validity – Status – HUF [S. 292B]**

Assessee and also his counsel through their respective letters having submitted that return which had already filed in the capacity of HUF may be treated to have been filed in pursuance to the notice issued under section 148. The said notice issued by the Assessing Officer without specifying the status of the assessee did not render the proceedings invalid, as the said defect stood cured by operation of section 292B. (A. Ys. 1976-77 to 1978-79).

*CIT v. Rajbir Singh (2011) 59 DTR 285 / 243 CTR 185 (P&H)(High Court)*

**S. 147 : Reassessment – Notice – Validity – Service [S. 292B, 292BB]**

Assessee having filed return stating that the same is filed in response to notice under section 148 and no objection was raised before the Assessing Officer regarding validity of service of notice under section 148, in view of section 292BB it cannot be contended that there was valid service of notice. Section 292BB is applicable to all proceedings pending on 1st April, 2008. (A. Y. 1998-99)

*CIT v. Panchvati Motors (P) Ltd. (2011) 59 DTR 289 / 243 CTR 189 (P&H)(High Court)*

**S. 147 : Reassessment – Beyond four years – Retrospective amendment [S. 80HHC]**

During the course of assessment proceedings for A. Y. 2001-02 & 2002-03, assessee's claim for deduction under section 80HHC was allowed. After the expiry of four years from the end of relevant assessment year an amendment to section 80HHC was brought with retrospective effect from 01-04-1998. It was admitted position that the conditions were not therein at the time of filing of return nor at the time of original assessments. Assessing Office issued notice under section 148. The Tribunal, on examination of material on record, concluded that all the relevant facts were available on record and that it cannot be said that assessee had failed to disclose fully and truly all material facts, and thus no reopening could be done. Held that, the Tribunal rightly concluded that proviso to section 147 could not be invoked merely because there was an amendment in future which was introduced retrospectively and covered period in question, and thus Tribunal order has to be confirmed. (A. Y. 1984-85)

*CIT v. Ganesh Rice Mills (2011) 202 Taxman 96 (Mag.) / 330 ITR 173 (All.)(High Court)*

**S. 147 : Reassessment – Income escaping assessment – Search – No seizure**

During the search no books of account or documents or money or bullion or jewellery or any other valuable articles or things were found. It was a solitary statement of the assessee, which too was retracted immediately thereafter. Furthermore, apart from the statement there were no particulars coming forward namely who were the dummy subscribers, whether shares from the so-called dummy subscribers were transferred in the name of the assessee or assessee remained the benami owner thereof and was in the control and possessions of those shares, etc. No such questions were even put by the Assessing Officer to the assessee after recording the statement. Thus the only material for issuance of notice under section 148 was the statement recorded under section 132(4). Even if the statement was to be believed, that would have been the basis for issuing the notice for A. Y. 1995-96 and not A. Y. 1994-95. It was merely a figment of imagination on the part of the CIT(A) that statement should not be believed to the extent that that cash was paid in the current financial year i.e. 1994-95 as normally such cash is paid at the time of purchase of shares by the so called dummy subscribers. It was not even recorded in the 'reasons to believe' by the Assessing Officer. Therefore, the order of the CIT(A) on that aspect was clearly erroneous and justifiably set aside by the Tribunal. (A. Y. 1994-95)

*CIT v. Bela Jain (Smt) (2011) 202 Taxman 90 (Mag.) / 225 Taxation 426 (Delhi)(High Court)*

**S. 147 : Reassessment – “Full & true disclosure of material facts” means “specific” disclosure of “each” fact – Long term capital gain [S. 54EC]**

The assessee entered into an agreement in July, 2001 for sale of development rights for ` 39 crores. The transfer was in December, 2003. The assessee computed LTCG of ` 23.19 crores. The assessee invested in eligible bonds between Feb., & June 2002 (after the agreement to sell but before the transfer) and claimed exemption under section 54EC. During the assessment proceedings, the Assessing Officer asked for a copy of the agreements with the purchaser and other details which the assessee furnished. A copy each of the section 54EC bonds (which gave the dates of investments) was also furnished. The Assessing Officer allowed the deduction as claimed. After the expiry of 4 years from the end of the assessment year, the Assessing Officer issued a notice under section 148 claiming that as the investments were made prior to the date of transfer (Dec., 2003), section 54EC deduction was not admissible. The assessee filed a Writ Petition to challenge the reopening on the ground that there was no failure on its part to make a full and true disclosure of material facts. HELD dismissing the Petition:

- (i) “Full and true disclosure of material facts” means that the disclosure should not be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with the Assessing Officer. The assessee must act with

candor. A full disclosure is a disclosure of all material facts which does not contain any hidden material or suppression of fact. It must be truthful in all respects;

- (ii) On facts, though the Assessing Officer enquired into the matter and the assessee furnished a copy of the section 54EC bonds (from which the dates of allotment/ investment were evident), there was no (specific) reference by the assessee to the dates on which the amounts were invested in the section 54EC bonds. Also, it was evident that the Assessing Officer had not applied his mind to the issue of section 54EC exemption. Accordingly, the Assessing Officer was justified in reopening the assessment.

*The Indian Hume Pipe Co. Ltd. v. ACIT (2012) 246 CTR 31 / 65 DTR 26 (Bom.)(High Court)*

**S. 147 : Reassessment – Retrospective amendment does not mean failure to disclose material facts – After four years [S. 80HHC]**

After the expiry of four years from the end of the assessment year, the Assessing Officer re-opened the assessment under section 147 by relying on the retrospective amendment to section 80HHC by the Taxation Laws (Amendment) Act, 2005 w.e.f. 1.4.1998. The CIT(A) and Tribunal (included in file) struck down the reopening. On appeal by the department, HELD dismissing the appeal:

The assessment was sought to be reopened on account of retrospective amendment to section 80HHC introduced by the Taxation Laws Amendment Act, 2005 with effect from 1st April, 1998. If the legislature amends the provisions of the Act with retrospective effect, it cannot be said that there was failure on the part of the assessee to disclose fully and truly all material facts relevant for the purpose of assessment.

*CIT v. K. Mohan & Co. (Exports) ITA No. 1263 of 2011 dated 1-7-2011 (Bom.)(High Court)*

Source : [www.itatonline.org](http://www.itatonline.org)

**S. 147 : Reassessment – Non disclosing of primary facts – Exemption – Change of opinion – Within four years**

Assessee company was engaged in domain name registrations and website hosting services. For the Assessment years 2002-03 and 2004-05, it claimed deduction under section 10A. Assessing officer disallowed the said claim. In appeal Commissioner (Appeals) allowed the claim, which had become final. On the basis of that the Assessing Officer allowed the claim for the Assessment years 2004-05 to 2006-07. For the Assessment year 2007-08 the assessee did not make the claim as the returned income was loss. Subsequently the Assessing officer issued notice under section 148 on the ground that domain registration service did not fall under category of web site services. The Court held that since reasons furnished for reopening of assessment did not contain any new tangible material or a reference to any new facts which had come on record and which were not present to mind of Assessing Officer when earlier assessments were finalized, it could be said that Assessing Officer sought to reopen the assessment for assessment years 2006-07 and 2007-08 purely



on basis of a change of opinion which is not sustainable in law. Accordingly notice under section 148 dated 18th March 2011 was set aside. (A Ys 2006-07 & 2007-08).  
*Direct Information (P) Ltd. v. ITO (2011) 203 Taxman 70 (Bom.)(High Court)*

**S. 147 : Reassessment – Non disclosure of primary facts – Change of opinion – Share from AOP – Survey – With in four years [S. 167B(2)]**

Assessing Officer after considering all relevant documents passed assessment order. However, thereafter Assessing Officer issued notice for reopening assessment on ground that documents seized during survey at assessee's premises revealed that assessee had received its share from gross sale proceeds and not from share of profits against surrender of development rights in land. The Court held that when the revenue had evidently treated AOP as a valid entity in law and had brought it to tax in order of assessment for assessment year 2007-08 and material relied upon by Assessing Officer for reopening assessment had been submitted during original assessment proceeding, reopening of assessment was unjustified. (A. Y. 2007-08).  
*Sanand Properties (P) Ltd. v. Jt. CIT (2011) 203 Taxman 127 / (2012) 343 ITR 388 (Bom.)(High Court)*

**S. 147 : Reassessment – Failure to disclose – Lapses by Assessing Officer – Assessing Officer must specify what facts are failed to be disclosed – Lapse by Assessing Officer no ground for reopening if primary facts disclosed**

In A.Y. 2001-02, the Assessing Officer assessed advances of ₹ 1.56 crores received from a group concern as "deemed dividend" under section 2(22)(e). In appeal, the CIT(A) held that the advances received in earlier years could not be assessed. The Assessing Officer thereafter reopened the assessment for A.Y. 1999-00 (after 4 years from the end of the AY). Though the Assessing Officer alleged that there was a failure on the part of the assessee to disclose full and true material facts, he did not specify what that failure was. The reopening was upheld by the CIT(A) & the Tribunal. On appeal to the High Court, Held allowing the appeal:

- (i) In AY 1999-00, the Assessing Officer inquired into the details of advances received but did not make any addition under section 2(22)(e). If the Assessing Officer fails to apply legal provisions, no fault can be attributed to the assessee. The assessee is merely required to make a full and true disclosure of material facts but is not required to disclose, state or explain the law. A lapse or error on the part of the Assessing Officer cannot be regarded as a failure on the part of the assessee to make a full and true disclosure of material facts;
- (ii) Though the recorded reasons state that the assessee had failed to fully and truly disclose the facts, they do not indicate why and how there was this failure. Mere repetition or quoting the language of the proviso is not sufficient. The basis of the averment should be either stated or be apparent from the record;
- (iii) Explanation (1) to section 147 which states that mere production of books is not sufficient does not apply a case where the Assessing Officer failed to apply the law to admitted facts on record.



(iv) The allegation that the assessee did not disclose the true and correct nature of payment received from the sister concern nor disclosed the extent of holding of the sister concern so as to enable the Assessing Officer to apply his mind regarding section 2(22)(e) is not acceptable. The assessee had filed statement of accounts of each creditor and indicated them to be sister concerns. The primary facts were furnished. The law does not impose any further obligation of disclosure on the assessee (CIT v Burlop Dealers Ltd. 79 ITR 609 (SC) followed). (A. Ys. 1999-2000 & 2000-01)

*Atma Ram Properties Pvt. Ltd. v. Dy. CIT (2011) 203 Taxman 408 / (2012) 72 DTR 177 (Delhi)(High Court)*

**S. 147 : Reassessment – Non-resident – Long term capital gains – Proviso – Rate of tax [S. 48, 112]**

Assessing Officer taxed long term capital gains at the rate of ten percent in the hands of the non resident assessee by invoking proviso to section 112, reopening of assessment on the ground that the long term capital gain was erroneously taxed at the rate of ten percent under the proviso to section 112(1) instead of twenty percent is not valid in the absence of any reason recorded to the effect that proviso to section 112 is not applicable to the case of the assessee, or that the long term capital gains earned by the assessee do not fall in any of the categories specified in the proviso to section 112. (A. Y. 2001-02).

*DIT (International Taxation) v. May & Baker Ltd. (2011) 62 DTR 257 / 244 CTR 569 / (2012) 345 ITR 87 (Bom.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Revenue audit – Registration [S. 11, 12AA]**

Assessing Officer allowed the exemption after taking into consideration the registration granted under section 12AA, by the CIT and after considering the explanation of assessee, reopening of assessment on the basis of audit objection by revenue audit was not justified. (A. Y. 2006-07).

*Agricultural Produce Market committee v. ITO (2011) 63 DTR 7 (Guj.)(High Court)*

**S. 147 : Reassessment – Reasons held to be not valid – Additions of other items not part of reasons recorded – Cannot be made**

Once the reasons recorded by the Assessing Officer to reopen the assessment were not found valid and no additions were ultimately sustained on that, the additions in respect of other items which were not part of reasons to believe cannot be made. (A. Y. 1999-2000).

*CIT v. Adhunik Niryat Ispat Ltd. (2011) 63 DTR 212 (Delhi)(High Court)*

**S. 147 : Reassessment – Change of opinion – Revised statement beyond the statutory period under section 139(5) [S. 139(5), 148]**

On receipt of notice under section 142(1), the assessee filed a revised statement of total income at ` 99,45,288, which included capital gains of ` 95,14,653 as against the originally declared income of ` 1,34,47,493 and capital gain of ` 1,30,21,230/-. The assessment was completed accepting the revised statement. The assessment was reopened on the ground that the assessee was not entitled to file revised statement beyond the statutory period under section 139(5). The Court held that an opinion having been formed on the very issue on which the assessment is sought to be reopened and that too only issue, it can only be viewed as a change of opinion on the part of the successor Assessing Officer, hence reopening is valid. (A. Y. 2006-07). *Rotary Club of Ahmedabad v. ACIT (2011) 63 DTR 388 / 336 ITR 585 (Guj.) (High Court)*

**S. 147 : Reassessment – Reason to believe – Absence of new material – Assessment under section 143(3)**

Assessing Officer reopened the assessment on the ground that business expenses claimed by the assessee could not be allowed as no business was carried on in the relevant assessment year. It was found that earlier years the expenses were allowed under section 143(3), therefore in the absence of any fresh material before the Assessing Officer, reopening of assessment on the basis of material which was already taken in to consideration by the Assessing Officer at the time of original assessment was not valid. (A. Y. 2001-02).

*CIT v. Trimurti Builders (2011) 64 DTR 91 / (2012) 246 CTR 308 (MP) (High Court)*

**S. 147 : Reassessment – Failure to disclose material facts – After four years – Limitation – Effect of section 149(1)(b). [S. 149(1)(b)]**

Section 149 of the income-tax Act 1961, merely prescribes the maximum time limit for issuance of notice under section 148 of the Act based upon the amount involved. The provision does not in any manner override the proviso to section 147 of the Act, after the expiry of four years from the end of the relevant assessment year unless the conditions stipulated there under are satisfied, therefore even in those cases falling under clause (b) of sub-section (1) of section 149 of the Act, if the notice under section 148 is issued beyond a period of four years but within a period of six years from the end of the relevant assessment year, for the purpose of invoking section 147 of Act, the requirements of the proviso, namely, that there should be failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment still requires to be satisfied. (A. Y. 2003-04).

*Sayaji Hotels Ltd. v. ITO (2011) 339 ITR 498 (Guj.) (High Court)*

**S. 147 : Reassessment – Audit objection – If Assessing Officer disputes Audit objection, she cannot use that as “reason to believe”**

The Revenue Audit raised an objection that the assessee had made remittances to foreign parties without deduction of TDS under section 195 and that the expenditure ought to have been disallowed under section 40(a)(i). In reply, the Assessing Officer wrote back stating that as the amounts remitted to the foreign parties were not

chargeable to tax in India, the assessee was under no obligation to deduct tax under section 195 and that the expenditure was not disallowable under section 40(a)(i). However, she still issued a notice under section 147 and reopened the assessment to disallow the said expenditure. The assessee filed a Writ Petition to challenge the reopening. Held allowing the Petition:

Under section 147, it is only the Assessee Officer's opinion with respect to the income escaping assessment which is relevant for the purpose of reopening an assessment. While it is true if the audit party brings certain aspects to the notice of the Assessing Officer and thereupon, the Assessing Officer forms his own belief, it may be a valid basis for reopening assessment, the mere opinion of the Audit Party cannot form the basis for the Assessing Officer to reopen an assessment. On facts, the Assessing Officer had categorically come to the conclusion that the objection of the audit party was not valid and that the assessee's explanation with respect to non-requirement of collection of TDS was required to be accepted. Accordingly, the Assessing Officer could have no "reason to believe" that income had escaped assessment and so the section 148 notice was without jurisdiction.

*Cadila Healthcare Ltd. v. ACIT (2012) 65 DTR 385 (Guj.) (High Court)*

#### **S. 147 : Reassessment – Change of opinion – Permanent establishment**

During the course of the original assessment proceedings, the assessee was called upon to give information and details regarding the nature of business activities in India, it was stated in the letter that the assessee does not have any Permanent establishment in India. Assessing Officer in original assessment accepted the contention of assessee. Reassessment on the ground that the assessee had permanent establishment in India on the same facts was not justified and liable to be quashed. (A. Y. 2002-03).

*Tractebel Industry Engineering v. ADIT (2011) 64 DTR 344 / 198 Taxman 408 (Delhi) (High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – Disclosure made in notes forming accounts – Change of opinion – Beyond four years**

During the year under review assessee has entered in to financial restructuring with lenders, according to which the lenders have agreed to waive / forego accumulated finance cost to the tune of ` 20,58,24,991. This accumulated finance cost was credited to the work in progress account to that extent the company has contingent liability the amount of which is unascertainable. The assessment was completed under section 143(3), after detailed scrutiny. Assessing Officer reopened the assessment, on challenge before the High Court, the High Court held that Assessing officer reopened the assessee's assessment without referring to any failure on the part of the assessee to disclose material facts or making any allegation of suppression on the part of the assessee, and in fact, relying upon a disclosure made in one of the notes forming part of the accounts as stated in the reasons recorded by him, Assessing Officer clearly acted in excess of his jurisdiction in reopening the assessment beyond four years. (A. Y. 2004-05).

**S. 147 : Reassessment – Sanction – Commissioner – Joint Commissioner – Not a curable irregularity – Sanction of Commissioner instead of Joint Commissioner renders reopening invalid. [S. 148, 151(2), 292B]**

The Assessing Officer issued a notice under section 148 to reopen an assessment. As section 143(3) order had not been passed & 4 years had elapsed, the Assessing Officer ought to have obtained the sanction of the Joint / Additional CIT under section 151(2). Instead, he routed the file through the Additional CIT and obtained the sanction of the CIT. On appeal by the assessee, the Tribunal struck down the reopening on the ground that correct sanction had not been obtained. On appeal by the department, Held upholding the Tribunal:

(i) Section 151(2) requires the sanction to be accorded by the Joint/Additional CIT. The Assessing Officer sought the sanction of the CIT. Though the file was routed through the Addl. CIT, the latter only made an endorsement "CIT may kindly accord sanction". This showed that the Addl. CIT did not apply his mind or gave any sanction. Instead, he requested the CIT to accord approval. This is not an irregularity curable under section 292B;

(ii) The different authorities specified in section 116 have to exercise their powers in accordance with law. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. If the statute requires a thing to be done in a certain manner it has to be done in that manner alone. Also, the designated authority should apply his independent mind to record his satisfaction and it should not be at the behest of a superior authority.

*CIT v. SPL's Siddhartha Ltd. (2012) 70 DTR 133 (Delhi)(High Court)*

**S. 147 : Reassessment – Block assessment – Reopening possible**

Block assessment framed under chapter XIV-B of the Act can be reopened under section 147 of the Act. (A. Y. 1995-96).

*CIT & Anr. v. Rinku Chakraborty (2011) 56 DTR 227 / 242 CTR 425 (Karn.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Development agreement – Capital gains [S. 148]**

Assessee entered in to development agreement on 17-9-2004, on a consideration of ` 4 crores. As the developer failed to pay the agreed consideration, of ` 30 lakhs before 31-10-1994, the assessee terminated the agreement. Thereafter issuing the cheques for ` 30 lakhs on 30-6-2005, the development agreement was restored. In view of further default on the part of developer, on 19-5-2010, the development agreement was once again terminated. The developer has filed the suit before Bombay High Court, which was ultimately settled on 2-5-2011, where in the consideration was

enhanced from 4 crore to 7.5 crores. It was ordered the possession of the property to the developer on 2-5-2011. In the mean while the Assessing Officer issued notice under section 148 dated 25-3-2010, proposing to tax the capital gain tax arising from development agreement in the Asst. year 2005-06. In a petition filed by the assessee the Honourable Bombay High Court allowed the petition and quashed the notice issued under section 148.

*Amar R. Shanbag v. ITO (W.P. No. 552 of 2011 dt 18-7-2011 (593 (2011) 43A BCAJ – August P. 29)(Bom.)(High Court)*

#### **S. 147 : Reassessment – Notice – Writ**

Maintainability of Writ – failure of Assessee to disclose fully and truly all material facts necessary for assessment leading to escapement of income – Notice under section 148 valid – Writ Petition to quash the notice under section 148 not maintainable. (A. Ys. 2003-04 to 2007-08)

*Little Angels Education Society v. ITO (2011) 245 CTR 445 / 336 ITR 413 (AP)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – Reassessment after four years**

Assessee having fully and truly disclosed all the material facts necessary for its assessment insofar as it had a bearing on dividend income and the Assessing Officer having specifically applied his mind to the question as to whether the dividend income could be claimed as exempt without disallowance under section 14A, impugned notice under section 148 seeking to reopen the assessment after expiry of four years is set aside. (A.Y. 2002-03)

*Indian Oil Corporation Ltd. v. Dy. CIT (2011) 238 ITR 283 / (2010) 41 DTR 200 / 327 ITR 272 / 194 Taxman 398 (Bom.)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – After expiry of four years – Issue subject matter of appeal**

Where there was a full and true disclosure of the facts by the assessee and a due application of mind by the Assessing Officer, the condition precedent to the exercise of the jurisdiction to reopen the assessment beyond four years from the end of the relevant assessment year has not been fulfilled. Further very issue on which the assessment is sought to be reopened was canvassed in appeal and was determined in the appellate proceedings by the CIT(A), and therefore, in terms of the second proviso to section 147 the assessment could not have been reopened. (A.Y. 2002-03)

*Prashant Projects Ltd. v. ACIT (2011) 333 ITR 368 / 238 CTR 289 / (2010) 42 DTR 257 (Bom.)(High Court)*

#### **S. 147 : Reassessment – Rectification – Not valid [S. 154]**

Section 147 reopening for rectifying mistakes are invalid. (A.Y. 2004-05)

*Hindustan Unilever Ltd. v. Dy. CIT (2011) 237 CTR 287 / (2010) 38 DTR 91 / 191 Taxman*  
*119 / 325 ITR 102 (Bom.)(High Court)*

**S. 147 : Reassessment – Assessing Officer raised specific and pointed queries in section 143(3) assessment – Assessing Officer cannot be said to have formed any opinion if explicit opinion not recorded**

The question of change of opinion arises when the Assessing Officer forms an opinion and decides not to make an addition and holds that the assessee is correct. Here, though the Assessing Officer had asked specific and pointed queries there was no discussion, ground or reason why addition was not made in spite of the assessee's failure to furnish confirmation and details to that extent. The argument that when the assessment order does not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance.

The term "failure" on the part of the assessee is not restricted only to the income-tax return but extends also to the assessment proceedings. If the assessee does not disclose or furnish to the Assessing Officer complete and correct information and details it is required and under an obligation to disclose, there is a failure on its part.

*Dalmia Pvt. Ltd. v. CIT (2011) 64 DTR 417 / 202 Taxman 372 (Delhi)(High Court)*

**S. 147 : Reassessment – Income escaping assessment – Block assessment**

In block assessment of the assessee, the Tribunal had deleted the additions, holding the same to be not assessee's undisclosed income. Thereafter section 147 was invoked on the ground that the very same items had escaped assessment. It was held that once the Tribunal had held it to be not assessee's undisclosed income, it cannot be treated as escaped income under section 147. (A.Ys. 1996-97, 1997-98)

*Vishwanath Prasad Ashok Kumar Saraf v. CIT (2010) 195 Taxman 19 / 235 CTR 367 / 327 ITR 190 (All.)(High Court)*

**S. 147 : Reassessment – After four years – Disclosure of material facts**

In the absence of any specific averment by the assessing officer that full and complete particulars were not disclosed by the assessee, the notice issued under section 148 of the Act after four years from the end of the relevant assessment year was held to be not sustainable. (A.Ys. 1986-87 to 1990-91)

*CIT v. Xerox Modicorp Ltd. (2010) 47 DTR 1 / (2011) 221 Taxation 230 (Delhi)(High Court)*

**S. 147 : Reassessment – Change of opinion – Capital or Revenue**

Where the expenditure incurred by the Appellant to expand its product range was treated as revenue expenditure in original assessment while the assessing officer in the reassessment proceedings treated the same expenditure as capital in absence of any new material. (A.Y. 1999-2000)



*CIT v. Eicher Ltd. (2010) / 47 DTR 151 / 2010 Tax L. R. 518 / (2011) 239 ITR 65 (Delhi)(High Court)*

**S. 147 : Reassessment – Assessment – Intimation – Time to issue notice under section 143(2) [S. 143(1)]**

Where the return of the assessee is processed under section 143(1) of the Act even though there is time available for issuance of notice under section 143(2) of the Act notice under section 148 can be issued for reassessment of income. (A.Y. 2004-05)  
*CIT v. Indra Devi Jindal (Smt.) (2010) 236 CTR 421 / 47 DTR 256 (P&H)(High Court)*

**S. 147 : Reassessment – Intimation under section 143(3) – Misconception not a reason to believe [S. 143(1)]**

Where from the perusal of the evidence available on record it is evident that the assessing officer while processing the return under section 143(1) of the Act and framing assessment under section 143(3) of the Act but not considered under that misconception – Notice under section 148 is not valid. (A.Y. 1995-96)  
*Gujarat Power Corporation Ltd. v. Jt. CIT (2010) 48 DTR 226 / (2011) 238 CTR 91 (Guj.)(High Court)*

**S. 147 : Reassessment – Full and true disclosure – Change of opinion**

Reopening under section 147 not valid if there is no finding regarding failure to disclose material facts. (A.Y. 2002-03)  
*Bhavesh Developers v. Assessing Officer (2010) 329 ITR 249 / 229 CTR 160 / 34 DTR 125 / 188 Taxman 123 (Bom.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Irrelevant and Non-Existing reasons [S. 148]**

Assessing Officer having arrived at the conclusion that the amount received by the assessee–partner on his retirement from the firm of solicitors has escaped assessment on the basis of wrong interpretation of clause 35 of the deed of partnership which in fact not applicable to the asseesee's case and wrongly opined that the said amount was taxable under section 28(iv), there was no tangible material before the Assessing Officer to form the belief that the income had escaped assessment and therefore, reopening of assessment under section 147 was not valid. (A.Y. 2004-05)  
*Balakrishna Hiralal Wani v. ITO (2010) 36 DTR 161 / 321 ITR 519 / 230 CTR 243 (Bom.)(High Court)*

**S. 147 : Reassessment – Condition precedent – Need for material [S. 148]**

No material to show escapement of income from tax – Notice of reassessment not valid. (A.Ys. 1995-96, 1996-97, 1997-98)  
*Shankarlal Nagji & Co. & Ors. v. ITO (2010) 322 ITR 90 / (2009) 20 DTR 116 (Guj.)(High Court)*

**S. 147 : Reassessment – Full and true disclosure – After four years [S. 149(1)]**

When there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, the reopening of assessment was not valid. Power to reopen an assessment beyond a period of four years but up to six years under section 149(1)(b) is also subject to the requirement spelt out in the proviso to section 147. (A.Y. 2003-04)

*Anil Radhakrishna Wani v. ITO (2010) 36 DTR 185 / 323 ITR 564 / 219 Taxation 74 / 232 CTR 243 (Bom.)(High Court)*

**S. 147 : Reassessment – Reasons to believe – Scope – Assessment under section 143(1)(a)**

Even if there is no assessment under section 143(3), reopening under section 147 is bad if there are no proper "reasons to believe". Assessing Officer cannot go beyond the recorded reasons. (A.Ys. 2005-06, 2006-07)

*Prashant S. Joshi v. ITO (2010) 189 Taxman 1 / 324 ITR 154 / 230 CTR 232 / 36 DTR 227 (Bom.)(High Court)*

**S. 147 : Reassessment – After four years – Disclosure of material facts [S. 148]**

Assessing Officer having reopened assessee's assessment after expiry of four years from the relevant assessment year by placing reliance on a commencement certificate of housing projects undertaken by the assessee which was furnished to the Assessing Officer in the course of assessment proceedings under section 143(3) itself and was already on record, it cannot be said that the assessee had failed to disclose relevant documents or material facts and therefore recourse to the provisions of section 147 cannot be sustained. (A.Y. 2001-02)

*Mistry Lalji Narsi Development Corporation v. ACIT (2010) 323 ITR 194 / 34 DTR 273 / 229 CTR 359 (Bom.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Assessment u/s. 143(3) [S. 80-IA]**

Assessee was allowed deduction under section 80IA in the original assessment under section 143(3), then Assessing Officer cannot resort to proceedings under section 147 on the basis of mere change of opinion.

*Northern Strips Ltd. v. ITO (2010) 186 Taxman 360 / 31 DTR 225 / 331 ITR 224 (Delhi)(High Court)*

**S. 147 : Reassessment – Change of opinion – Disclosure of fact**

The assessee had set apart certain amount under the directive of a statutory authority in each of the assessment years that is A.Y. 1997-98 to 1999-2000. This fact was disclosed by the assessee in the return of income. In all the assessment years, during original assessment proceedings the issue with respect to the fund was specifically noticed by the Assessing Officer. On these facts the Court held that

reopening of assessment of all the years on the ground that the amount spent out of the fund was not an allowable deduction amounted to a mere change of opinion which is not permissible. The Court further observed that, the assessing officer has been given power to reassess under section 147 upon certain conditions being satisfied, and the assessing officer does not have power to review. If such a change of opinion were to be permitted as a ground of reassessment then it would amount to granting a licence to the assessing officer to review his decision for which he does not have under the provision of section 147. (A.Ys. 1997-98, 1998-99, 1999-2000)

*D. T. & T. D. C. Ltd. v. CIT (2010) 324 ITR 234 / 36 DTR 1 / 232 CTR 260 (Delhi)(High Court)*

### **S. 147 : Reassessment – After four years – Disclosure of material facts [S. 80IB]**

Where the deduction under section 80IB of the Act was allowed in the original assessment under section 143(3) of the Act after considering the audit report in Form 10CCB and the other details, it cannot be said that there was a failure on the part of the assessee to disclose fully and truly all the facts for the assessment so as to invoke the provisions of section 147 for re-examining the deduction under section 80 IB of the Act, after expiry of four years from the end of the assessment year. (A.Y. 2003-04)

*Purity Techtexile (P) Ltd. v. ACIT & Anr. (2010) 35 DTR 257 / 325 ITR 459 / 218 Taxation 691 / 230 CTR 157 (Bom.)(High Court)*

### **S. 147 : Reassessment – Failure to disclose full and true material facts – Bad debts**

Where complete details of the bad debts claimed by the assessee under section 36(1)(viii) were furnished in the return of income and also during the original assessment proceedings it cannot be said that there was a failure on the part of the assessee to disclose fully and truly all the facts for the assessment so as to invoke the provisions of section 147. (A.Y. 1996-97)

*CIT v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. (2010) 325 ITR 583 / 35 DTR 267 / 186 Taxman 131 / 230 CTR 167 (All.)(High Court)*

### **S. 147 : Reassessment – Direction of commissioner – Sanctioning authority**

The assessment of the assessee was reopened upon the direction of the Commissioner and there was no independent application of mind on the part of the Assessing Officer, the reopening of the assessment was held to be bad in law. The Court further, observed that the reassessment proceeding is also to be held invalid for the reason that the sanction for reopening the assessment was obtained from the Commissioner whereas the authority for granting the sanction for reassessment was the Joint Commissioner only. (A.Y. 1991-92)

*CIT & Anr. v. Aslam Ulla Khan (2010) 321 ITR 150 / 34 DTR 58 / 229 CTR 295 (Karn.)(High Court)*

### **S. 147 : Reassessment – Application of mind – Change of opinion**

Where the original assessment of the assessee was completed by the assessing officer after due application of mind with respect to the issue of allowance of an item of expenditure, notice issued under section 148 of the Act stating the said expenses were not allowable by merely relying upon the existing records only was held to be invalid. (A.Ys. 2002-03, 2003-04)

*Legato Systems (India) (P) Ltd. v. Dy. CIT (2010) 34 DTR 154 / 231 CTR 526 / 187 Taxman 294 (Delhi) (High Court)*

### **S. 147 : Reassessment – Reason to believe – Change of opinion – Depreciation on obsolete assets**

Assessing Officer having disallowed the depreciation claimed by the assessee on obsolete assets @ 20 percent in the assessment, the reason recorded for reopening the assessment that depreciation was to be disallowed @ 25 percent as rate of depreciation under item III(i) of Part A to Appendix I was then provided but the issue was claim of depreciation on absent asset. Therefore, it constitutes a mere change of opinion as there was no tangible material before the Assessing Officer to hold so and therefore, reopening of assessment on this ground is not sustainable. (A.Y. 2004-05)

*Aventis Pharma Ltd. v. ACIT (2010) 37 DTR 353 / 323 ITR 570 / 233 CTR 258 (Bom.) (High Court)*

*Editorial:- Reference made to CIT v. Jagdish C. Sheth (2007) 101 ITD 360 (Mum.) (2007) 106 TTJ 911 (Mum.). The Tribunal held that even if an asset is discarded or becomes defunct, it would still form part of block assets and entitled depreciation.*

### **S. 147 : Reassessment – Subsequent amendment retrospectively – Change of opinion**

#### **[S. 115JB]**

Computation of book profit under section 115JB, on the basis of the Supreme Court and other High Courts, reopening of the assessment on the grounds that the provisions of doubtful debts, advances etc. were not considered in the process of computing book profit can not be justified on the basis of subsequent retrospective inserting cl. (i) in explanation 1 to section 115JB w.e.f. 1st April, 2001. (A.Y. 2004-05)

*Rallies India Ltd. v. ACIT (2010) 37 DTR 33 / 323 ITR 54 / 190 Taxman 1 / 218 Taxation 590 / 232 CTR 143 (Bom.) (High Court)*

### **S. 147 : Reassessment – Beyond four years – Disallowance of such expenses in later years**

Only on the basis that some disallowances were made in later years the reopening of assessment beyond four years is bad in law as there was no failure on the part of the assessee to disclose fully and truly. (A.Y. 2002-03)

*Multiscreen Media (P) Ltd. v. UOI (2010) 324 ITR 54 / 38 DTR 8 / 218 Taxation 603 (Bom.) (High Court)*

**S. 147 : Reassessment – Valuation report subsequent to the passing of the order**

Notice under section 147 / 148 could not be issued on the basis of valuation report received subsequent to the passing of the order. (A.Y. 2006-07)

*Hotel Regal International v. ITO (2010) 320 ITR 573 / 231 CTR 205 / 37 DTR 360 (Cal.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Explanation furnished – Claim of loss**

Assessing Officer having made the assessment, after obtaining elaborate explanation of the assessee regarding, its claim of loss vis-à-vis nil surplus/deficit as reflected in form I, reopening of assessment on the same ground in the absence of any tangible material was based on mere change of opinion and therefore is not sustainable. (A.Ys. 2002-03, 2003-04)

*ICICI Prudential Life Insurance Co. Ltd. v. ACIT (2010) 37 DTR 322 / 325 ITR 471 / 218 Taxation 697 / 231 CTR 233 (Bom.)(High Court)*

**S. 147 : Reassessment – Full and true disclosure – Claim of unabsorbed depreciation**

In original assessment, set off of unabsorbed loss/depreciation was disallowed under section 115JB. In CIT(A), order was confessed as the said claim was duly exhausted in A.Y. 2003-04 (i.e. in earlier years) whereas the Tribunal reversed the order of the CIT(A) holding it is allowable in A.Y. 2004-05. On these facts reopening under section 148 was done but the Hon'ble High Court quashed the notice under section 148 holding that there was no failure or omission on the part of the petitioner vis-a-vis A.Y. 2004-05. It was further held that the Department could have filed appeal against the order of the Tribunal but reopening is not permissible. (A.Y. 2004-05)

*Vodafone Essar Gujarat Ltd. v. ACIT (2010) 37 DTR 259 / 231 CTR 203 (Guj.)(High Court)*

**S. 147 : Reassessment – Beyond four years – Failure to disclose necessary facts**

Receipt of interest on tax refund and netting against section 220 interest was disclosed in the return and details were furnished in reply to query by assessing officer. No failure to disclose material facts. Reassessment proceedings on ground that part of income had escaped assessment not valid. (A.Y. 2003-04)

*Arthur Anderson and Co. v. ACIT (2010) 324 ITR 240 / 190 Taxman 279 / 231 CTR 422 / (2011) 221 Taxation 174 (Bom.)(High Court)*

*Editorial:- Amin's Pathology Laboratory (Dr.) v. P. N. Prasad (2001) 252 ITR 673 (Bom.), distinguished.*

**S. 147 : Reassessment – Recorded reasons – Furnishing reasons**

Once the assessee requests for supply of reasons recorded for issuance of notice under section 148, Assessing Officer is bound to furnish the same within reasonable

time. The matter restored back to the Assessing Officer with the direction to follow the procedure laid down by the Apex Court. (A.Y. 1996-97)

*CIT v. Sangeetha Granites Ltd. (2010) 326 ITR 324 / 42 DTR 42 / 233 CTR 566 (Karn.)(High Court)*

#### **S. 147 : Reassessment – Beyond four years – Interest income – Other income**

Where the assessee had reflected the interest income earned under the head 'Other Income' in the statement of account which was considered by the assessing officer while framing assessment under section 143(3) of the Income-tax Act, 1961. The notice issued by the assessing officer under section 148 of the Income-tax Act, 1961 to reopen the assessment of the assessee after four years was quashed as there was no failure on the part of the assessee in disclosing fully and truly all material necessary for assessment. (A.Y. 2003-04)

*Eagle Fashion (P) Ltd. v. Dy. CIT (2010) 40 DTR 1 (Guj.)(High Court)*

#### **S. 147 : Reassessment – Beyond four years – Material facts**

Reopening beyond 4 years on basis of Supreme Court's judgement not justified if assessee has not failed to disclose material facts. (A.Y. 1999-2000)

*CIT v. Baer Shoes (India) (P) (Ltd.) (2010) 45 DTR 181 / 235 CTR 194 (Mad.)(High Court)*

#### **S. 147 : Reassessment – Full & true disclosure of facts – Writ Jurisdiction – Maintainability**

Question as to whether in view of the failure to disclose the fact that exemption under section 10B had been allowed to the other EOU of the petitioner, the disclosure made by the petitioner can be said to be a true disclosure vis-à-vis its claim for exemption under section 10B in respect of the alleged new unit can conveniently dealt with in the proceedings under the IT Act, rather than a writ petition under Art. 226 of the Constitution of India. (A.Y. 2002-03)

*Sociedade De Formento Industrail (P) Ltd. v. ACIT (2010) 43 DTR 167 / 235 CTR 322 (Bom.)(High Court)*

#### **S. 147 : Reassessment – Reasons recorded – Scope**

If Assessing Officer does not assess income for which reasons were recorded under section 147, he cannot assess other income under section 147. (A.Ys. 1994-95, 1995-96)

*CIT v. Jet Airways (I) Ltd. (2011) 331 ITR 236 / (2010) 195 Taxman 117 / 239 CTR 183 / 52 DTR 71 (Bom.)(High Court)*

#### **S. 147 : Reassessment – Intimation under section 143(1) – Reopening on mechanical basis void even where section 143(3) assessment not made**

For purpose of reopening of assessment under section 147, Assessing Officer must form and record reason before issuance of notice under section 148. The reasons so



recorded should be clear and unambiguous and must not be vague. There can not be any reopening of assessment merely on the basis of information received without application of mind to the information and forming opinion thereof. (A.Y. 2003-04) *Sarthak Securities Co. (P.) Ltd. v. ITO (2010) 329 ITR 110 / 195 Taxman 262 (Delhi)(High Court)*

**S. 147 : Reassessment – Full and true disclosure – Notice after expiry of four years [S. 148]**

There is no mention in recoded reasons that the escapement of chargeable income was due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment and therefore notices under section 148 are wholly without jurisdiction and they are liable to be quashed. (A.Ys. 1991-92, 1992-93, 1993-94)

*Sri Sakthi Textiles Ltd. v. Jt. CIT (2010) 46 DTR 191 / 193 Taxman 216 / 235 CTR 494 (Mad.)(High Court)*

**S. 147 : Reassessment – Notice – Within four years – Based on Supreme Court decision [S. 148]**

The decision of the Supreme Court which declares the law from the very beginning of the existence of the provision itself would constitute material to reopen the proceeding under section 147 of the Income Tax Act, 1961. Reassessment notice issued within four years based on Supreme Court decision is held to be valid. (A.Ys. 2005-06, 2006-07)

*Kartikeya International v. CIT (2010) 329 ITR 539 / (2011) 241 CTR 489 (All.)(High Court)*

**S. 147 : Reassessment – After four years – Amount received on retirement**

Petitioner on retirement from law firm got first installment of ₹ 17,01,562/- as per partnership deed for not practicing as a lawyer for three years. During original assessment proceedings all the relevant material was disclosed. After four years the assessment was reopened to tax the amount. The Court held that all the relevant particulars were disclosed, assessment cannot be reopened under section 147 after four years. (A.Y. 2003-04)

*Anil Radhakrishna Wani v. ITO (2010) 36 DTR 185 / 323 ITR 564 / 219 Taxation 74 / 232 CTR 243 (Bom.)(High Court)*

**S. 147 : Reassessment – Retrospective amendment – Disclosure of material facts – After four years**

Reopening beyond 4 years on basis of retrospective amendment of law not justified if assessee has not failed to disclose material facts. (A.Ys. 2003-04 and 2004-05)

*Sadbhav Engineering v. Dy. CIT (2011) 333 ITR 483 / 239 CTR 258 / 45 DTR 103 (Guj.)(High Court)*

*Editorial:- Refer, Rallies India Ltd. v. ACIT (2010) 323 ITR 54 / 232 CTR 143 / 140 Taxman 1 / 37 DTR 33 (Bom.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Direction of Higher Officer**

Mere information received from the Dy. Director of IT (Inv.) and directions of the said officer and Addl. CIT to initiate proceedings under section 147 can not constitute valid reasons for initiating reassessment proceedings in the absence of anything to show that the Assessing Officer has independently applied his mind to arrive at a belief that income has escaped assessment. (A.Y. 1998-99)

*CIT v. SFIL Stock Broking Ltd. (2010) 325 ITR 285 / 41 DTR 98 (Delhi)(High Court)*

**S. 147 : Reassessment – Notice – Objection**

Reassessment order passed without considering the objections lodged by the assessee is not sustainable. Assessing Officer is directed to consider the objections filed by the assessee and pass fresh orders after hearing the assessee. (A.Y. 2004-05)

*IOT Infrastructure & Energy Services Ltd. v. ACIT (2010) 329 ITR 547 / 233 CTR 175 / 41 DTR 122 (Bom.)(High Court)*

**S. 147 : Reassessment – Full and true disclosure – Notice after four years**

Revenue has failed to establish that there was failure on the part of the assessee to disclose fully and truly all the material facts necessary during the course of relevant assessment, statutory condition precedent to validity exercise the power to reopen an assessment beyond the stipulated four years period was not satisfied, the notice of reassessment was liable to be quashed. (A.Y. 2002-03)

*3i Infotech Ltd. v. ACIT (2010) 329 ITR 257 / 41 DTR 377 / 192 Taxman 137 / 235 CTR 240 (Bom.)(High Court)*

**S. 147 : Reassessment – Validity – Disclosure of material facts**

Where the assessment was completed by the revenue under section 143(3) of the Act and the assessee had disclosed all the material facts pertaining to the goodwill in its balance sheet and the notes forming part of the accounts for the year. The reassessment notice issued to verify the nature of goodwill, after the expiry of four year from the assessment year and the consequential order passed by the assessing officer under section 147 r.w.s. 143(3) both were held liable to be quashed and set aside. (A.Y. 2002-03)

*Supreme Treves (P) Ltd. v. Dy. CIT (2009) 23 DTR 215 (Bom.)(High Court)*

**S. 147 : Reassessment – After four years – Change of opinion**

Where the assessing officer while passing order under section 143(3) of the Act allowed the assessee claim of deduction under section 80IA of the Act after considering the reply of the assessee on the issue of 80IA. The action of the assessing officer reopening the assessment after the expiry of four years from the end of the assessment year was held to be not justified, as it was a mere change of opinion on

the part of the assessing officer, and there was no failure on the part of the assessee to disclose the material particulars. (A.Y. 2001-02)

*Northern Strips Ltd. v. ITO (2009) 31 DTR 225 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Audit objection – Need for fresh material**

Reopening on the basis of the Revenue Audit report that the deduction under section 80HHC was not correctly allowed was held to be a mere change of opinion as no fresh or new material was available for reopening the assessment with the assessing officer. (A.Y. 2002-03)

*Carlton Overseas P. Ltd. v. ITO & Ors. (2009) 29 DTR 262 / 229 CTR 439 / 318 ITR 295 / 188 Taxman 11 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Information – Investigation wing – More presumption – Suspicious not a basis**

The assessing officer initiated the reassessment proceeding on the basis of the information received from the investigation wing that the payments made by the assessee to a company were bogus. Assessing Officer has to be satisfied on the information so as to form a reason to believe any expenditure of income more presumption or suspicion cannot be the basis for account. This information was found to be factually incorrect as the payments made to the said company were duly taxed by the department, the Tribunal was held to be justified in quashing the reassessment proceedings. (A.Ys. 1998-99, 1999-2000, 2000-01)

*CIT v. Raine Singh (2009) 30 DTR 105 / (2010) 189 Taxman 202 / (2011) 237 CTR 473 / 330 TTR 417 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Notice under section 143(2) – Time**

Proceedings under section 147 could not be held to be vitiated merely because the Assessing Officer had right to proceed under section 143(2). (A.Y. 2004-05)

*CIT v. Shakuntala Devi (Smt.) (2009) 227 CTR 618 / 318 ITR 273 / 32 DTR 90 (P&H)(High Court)*

#### **S. 147 : Reassessment – ‘Reasons to believe’ – Satisfaction of another Assessing Officer**

Re-opening is not permissible on borrowed satisfaction of another Assessing Officer.

*CIT v. Shree Rajasthan Syntex Ltd. (2009) 212 Taxation 275 / (2008) 217 CTR 209 / 313 ITR 231 / 178 Taxman 33 / 7 DTR 393 (Raj.)(High Court)*

#### **S. 147 : Reassessment – Notice – Open issues**

Points not decided while passing assessment Order under section 143(3) not a case of change of opinion – Assessment reopened validly. (A.Y. 1996-97)

*Yuvraj v. UOI (Bombay) (2009) 315 ITR 84 / 225 CTR 283 / 25 DTR 185 (High Court)*

### **S. 147 : Reassessment – Change of head of income – Disclosure of facts**

Reassessment proceeding initiated by the Assessing Officer, to assess income under the head 'Profits and gains of business or profession' instead of Capital Gains' as declared by the assessee, was held to be invalid as the assessee had made disclosure of all the material facts in its return of income which included summary of capital gain. (A.Y. 2001-02)

*Gujarat Fluorochemicals Ltd. v. Dy. CIT (2008) 15 DTR 1 / 223 CTR 398 / 319 ITR 282 (Guj.)(High Court)*

### **S. 147 : Reassessment – Block Assessment – Validity of**

Where the block assessment order was held not sustainable in law by the Appellate Authority due to technical reason, the reassessment proceedings initiated for the same period by merely mentioning that income has escaped assessment without giving any details of income escaping assessment was held to be incorrect.

The Hon'ble High Court further held that the reasons or the notice for reopening the assessment can be questioned by way of writ petition even in cases where the assessee had filed return in pursuance of the impugned notice. (A.Ys. 1989-90, 1997-98)

*Mira Ananta Naik (Mrs.) & Ors. v. Dy. CIT (Investigation) & Ors. (2008) 15 DTR 8 / 221 CTR 149 / 183 Taxman 40 (Bom.)(High Court)*

### **S. 147 : Reassessment – Disclosure of material facts – After four years**

Where there was no omission or failure on the part of the assessee to disclose the material facts correctly and the assessment was completed under section 143(3) of the Act after providing all the necessary details and information called for by the Assessing Officer during the assessment proceedings, reassessment notice under section 148 of the Act issued by the Assessing Officer after the expiry of four years from the end of the relevant assessment year was held to be without jurisdiction. (A.Ys. 1992-93, 1993-94)

*Priyanka Carbon & Chemical Industries (P) Ltd. v. Dy. CIT (2008) 15 DTR 31 (Guj.)(High Court)*

### **S. 147 : Reassessment – Suspicion – Belief – Reason to believe**

Where the reasons recorded by the Assessing Officer for reopening the assessment did not disclose any reason to believe that any income chargeable to tax has escaped assessment, but a mere belief on the part of the Assessing Officer that certain issues required a 'deeper scrutiny', such belief on the part of the Assessing Officer not enough to invoke the provisions of section 147 of the Act. (A.Y. 1996-97)

*CIT v. Batra Bhatta Company (2008) 13 DTR 115 / 220 CTR 531 / 321 ITR 526 (Delhi)(High Court)*

### **S. 147 : Reassessment – Earlier years – Survey**

The assessments for earlier years were reopened by the Assessing Officer for the reasons that such discrepancies (as found in survey) existed in earlier years also. The

dismissing the appeal of the department the High Court held that a mere suspicion of the Assessing Officer that such discrepancies might have existed in earlier years also cannot be a valid reason to believe to initiate action under section 147 of the Act. (A.Ys. 1999-2000, 2001-02)

*CIT v. Gupta Abhushan (P) Ltd. (2008) 16 DTR 76 / (2009) 312 ITR 166 / 178 Taxman 473 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Recording of failure to disclose – Four years**

Where the notice under section 147 of the Act was issued by the Assessing Officer after the expiry of four years from the end of the relevant assessment year and in the reasons recorded by the assessing officer for reopening the assessment there was no mention that the assessee had failed to disclose fully and truly all the material facts. The High Court held that the assessing officer acted without jurisdiction and the notice so issued by him under section 147 of the Act, as well as, the proceeding pursuant thereto was liable to be quashed. (A.Y. 2000-01)

*Wel Intertrade (P) Ltd. & Anr. v. ITO (2008) 13 DTR 204 / (2009) 308 ITR 22 / 178 Taxman 27 (Delhi)(High Court)*

#### **S. 147 : Reassessment – Full and True Disclosure – Four years**

Even if it was a case of deemed escapement of income within meaning of Explanation 2(c)(ii) of section 147, there being no fault on the part of assessee in making full and true disclosure, reopening of assessment after expiry of four years was barred by limitation under proviso to section 147. (A.Ys. 1991-92 to 1995-96)

*CIT v. Saipem SPA (2008) 1 DTR 21 / 300 ITR 133 / 214 CTR 138 (Uttarakhand)(High Court)*

#### **S. 147 : Reassessment – Change of opinion – Disclosure of facts**

Notice under section 148 of the Act issued beyond four years was held to be bad in law and without jurisdiction where the revenue authorities failed to demonstrate that there was failure on the part of the assessee to disclose fully and truly all material facts relevant for the assessment. (A.Y. 1992-93)

*Nikhil K. Kotak v. Mahesh Kumar, Assessing Officer (2008) 10 DTR 20 / (2009) 319 ITR 445 (Guj.)(High Court)*

#### **S. 147 : Reassessment – Full and true disclosure – Change of opinion – Note to computation of income**

Where the assessee had fully and truly disclosed the facts with respect to its claim of interest and capital gain in the form of a note to its computation of income which were very much in knowledge of the Assessing Officer while framing the original assessment, reopening of assessment thereafter, was held to be a mere change of opinion which is not the reason for reopening of the assessment under section 147 of the Act. (A.Y. 1997-98)

*CIT v. Tube Investment of India Ltd. (2008) 11 DTR 73 (Mad.)(High Court)*

**S. 147 : Reassessment – Recorded reasons – Different Assessing Officer – Full & true disclosure – Change of opinion**

Notice under section 148 issued by the Assessing Officer other than the one who recorded reason to believe was held to be invalid.

Reopening of assessment proceeding on the basis of finding of another Assessing Officer in a later year suffered from change of opinion and held to be invalid. (A.Ys. 1990-91, 1991-92)

*Hynoup Food & Oil Industries Ltd v. CIT (2008) 11 DTR 241 / 307 ITR 115 / 219 CTR 124 / 175 Taxman 331 (Guj.)(High Court)*

**S. 147 : Reassessment – Reasons recorded – Scope**

Income alleged to have escaped assessment in reasons recorded not having been actually found to have escaped assessment in the course of reassessment proceedings, Assessing Officer has no jurisdiction to add other sources of income found to have escaped assessment. (A.Ys. 1994-95, 1998-99)

*CIT v. Devendra Gupta (Dr.) (2008) 12 DTR 235 / 220 CTR 629 / 174 Taxman 438 (Raj.)(High Court)*

**S. 147 : Reassessment – Revised return – Consequences**

Where the assessee withdrew the excess claim of depreciation by filing revised return under section 139 (5) of the Act within time, the reason to believe for reopening the assessment, became non-existent and the action of the Assessing Officer making reassessment and consequential additions on account of other items was held to be invalid. (A.Y. 1998-99)

*CIT v. Raj Finlease Ltd. (2008) 9 DTR 81 / 220 CTR 306 (Mad.)(High Court)*

**S. 147 : Reassessment – Later Supreme Court decision – After four years – Full & true disclosure [S. 80HH and 80-I]**

Where while framing assessment under section 143 (3) of the Act the Assessing Officer allowed deduction under section 80HH and 80I as per the prevailing law, the assessment cannot be reopened after the expiry of four years on the basis of subsequent Supreme Court decision. (A.Ys. 1990-91, 1991-92, 1993-94)

*Austin Engineering Co. Ltd. v. Jt. CIT (2008) 9 DTR 268 / 312 ITR 70/223 CTR 405 (Guj.)(High Court)*

**S. 147 : Reassessment – After four years, valid – Audit report and annexures**

Prima facie to claim benefit under section 80-IB of the Income-tax Act, 1961, on the relevant date one of the requirements was that the size of the plot of land should be a minimum of one acre. The size of the land was not mentioned in the return. Hence, there was no true disclosure of the exact size of the plot when the new construction commenced. In order to invoke the extraordinary jurisdiction of the court the petitioner must also make out a case that no part of the relevant material had been kept out from the Assessing Officer. The information was in the annexures and



consequently Explanation 2(c)(iv) of section 147 would apply. The reassessment proceedings after four years were held to be valid. (A.Y. 2001-02)

*Girilal and Company v. S.L. Meena, ITO & Others (2008) 300 ITR 432 / 214 CTR 186 / 1 DTR 180 (Bom.)(High Court)*

**S. 147 : Reassessment – After four years – Full & true disclosures – Work done – TDS certificates**

Assessment of an assessee cannot be reopened after four years, only on the ground that as per T.D.S certificate the work done was shown at a higher amount than the work done shown in the return of income filed by the assessee. The T.D.S. certificate is not concerned with the work done by the assessee. As such, it cannot be said that there was no failure on the part of the assessee to disclose truly and fully all the material information with respect to the particulars of its income.

*Ganesh Valabhai Family Trust v. Dy. CIT (2008) 5 DTR 317 / 306 ITR 221 / 217 CTR 588 (Guj.)(High Court)*

**S. 147 : Reassessment – Service of notice – Proof of service**

Where revenue had not been able to produce any material to show that any notice under section 148 was served upon assessee before framing assessment under section 147, Tribunal was justified in annulling that assessment as invalid. (A.Ys. 1987-88, 1989-90)

*CIT v. Laxmi Narain (2008) 168 Taxman 128 / 1 DTR 209 (P&H)(High Court)*

**S. 147 : Reassessment – Notice – Change of opinion**

Issuance on mere change of opinion or on ground which is totally vague is invalid.

*Vijaykumar M. Hirakhanwala HUF v. ITO 2007 TLR 755 / (2007) 207 CTR 345 (Bom.)(High Court)*

**S. 147 : Reassessment – Direct evidence – Disclosure of facts**

Failure on part of assessee to disclose fully and truly all material facts. Income received on sale of waste residue shown in account books. No direct or circumstantial evidence to show that said income was more than what was declared. Re-opening of assessment on presumption that assessee might have recovered higher sale price is not justified. (A.Y. 1981-82)

*Dy. CIT v. Devidayal Rolling Mills 2007 TLR 718 / (2006) 285 ITR 514 / 204 CTR 38 / 155 Taxman 585 (Bom.)(High Court)*

**S. 147 : Reassessment – Purchase price – Change of opinion**

Mere change of opinion, purchase price of properties disclosed by assessee not accepted and treated as undisclosed income, subsequent reassessment under section 147 is not valid on ground of mere change of opinion.

*Hanemp Properties Pvt. Ltd. v. ACIT 2007 TLR 598 (Delhi)(High Court)*

**S. 147 : Reassessment – Notice after expiry of four years – Original assessment [S. 143(3)]**

Original assessment having been made under section 143(3), reassessment based on the same material after four years from the end of the relevant assessment year was barred by proviso to section 147, there being no failure on the part of assessee to make full and disclosure. (A.Y. 1997-98)

*CIT v. Tamil Nadu Transport Development Finance Corporation Ltd. (2007) 212 CTR 53 / (2008) 306 ITR 136 / 172 Taxman 248 (Mad.)(High Court)*

**S. 147 : Reassessment – Notice of expiry of four years – Proof of failure [S. 143(3)]**

Reopening of assessment made under section 143(3) after expiry of four years from the end of relevant assessment year was barred by proviso to section 147 in the absence of any finding by Assessing Officer that there was failure on the part of assessee to disclose fully and truly all material facts. (A.Y. 1990-91)

*CIT v. A. V. Thomas Exports Ltd. (2007) 212 CTR 164 / 163 Taxman 718 / (2008) 296 ITR 603 (Mad.)(High Court)*

**S. 147 : Reassessment – Audit objection – Independent opinion**

Pursuant to audit objection on the claim of depreciation cannot be said that the Assessing Officer had formed his own opinion that income has escaped assessment since in the very claim was allowed in regular assessment and the reopening is based on mere change of opinion, the same is not valid. (A.Y. 2003-04)

*Investment Managers Ltd. v. ITO (2007) 209 CTR 1 / (2008) 298 ITR 32 (Bom.)(High Court)*

**S. 147 : Reassessment – After 4 years – S. 143(1) – Change of opinion**

Notice issued after expiry of four years not amounting to change of opinion by the Assessing Officer who had accepted the claim of the assessee under section 80-O and had processed the return under section 143(1)(a) on the basis of details furnished by assessee. Notice under section 148 cannot be said to be merely on the change of opinion. But since the assessee had made true and full disclosure of facts for claiming deductions, the issue of notice after four years is wholly illegal and beyond jurisdiction since there was no reason to believe that the alleged claim of the assessee is false. (A.Ys. 1992-93 to 1997-98)

*Universal Subscription Agency (P) Ltd. v. Jt. CIT (2007) 207 CTR 62 / 293 ITR 244 / 159 Taxman 64 (All.)(High Court)*

**S. 147 : Reassessment – Validity – Third party statement**

On the basis of third party statements, reassessment preceding was initiated. In spite of specific request made to cross examine the said party, the Assessing Officer did not heed to the request. Held, the reassessment is not valid.

*CIT v. Pradeep Kumar Gupta (2007) 207 CTR 115 / 303 ITR 95 (Delhi)(High Court)*

### **S. 147 : Reassessment – Fishing Inquiry – Source of funds**

No Reason to believe that income has escaped assessment – Assessing Officer wanted to inquire about source of funds of an immovable property purchased by assessee – No reason to issue notice for reassessment. (A.Y. 1988-89)

*CIT v. Maniben Velji Shah (2006) 283 ITR 453 / 204 CTR 249 (Bom.)(High Court)*

### **S. 147 : Reassessment – Third party – Protective assessment**

Notice under section 148 issued on the basis of protective assessment of third person was issued beyond four years period – No failure to disclose material facts for assessment. Notice was not valid.

*Tanna Builders P. Ltd. v. Neela Krishnan (2006) 283 ITR 448 / 154 Taxman 427 / (2005) 198 CTR 541 (Bom.)(High Court)*

### **S. 147 : Reassessment – Application of mind before approval – By CIT**

While granting approval to reopen assessment it was obligatory on Commissioner's part to verify whether there was any failure on part of assessee to disclose full and true relevant facts in return of income and whether or not power to reopen was being invoked within a period of 4 years from end of the relevant assessment year. (A.Ys. 1997-98, 1998-99)

*German Remedies Ltd. v. Dy. CIT (2006) 152 Taxman 269 / 287 ITR 494 / 202 CTR 369 (Bom.)(High Court)*

### **S. 147 : Reassessment – Satisfaction of authority – Approval**

If assessment has been made under section 143(3) or section 147 and proceedings for reassessment are to be initiated after period of four years, then notice can be issued only after Chief Commissioner or Commissioner has recorded his satisfaction and given his sanction for issuance of notice as provided under proviso to section (1) of section 151. (A.Ys. 1990-91 to 1994-95)

*Shashi Kant Garg (Dr.) v. CIT (2006) 152 Taxman 308 / 285 ITR 158 / 203 CTR 75 (All.)(High Court)*

### **S. 147 : Reassessment – Assessing the income in another person – Not an impediment**

Merely because certain amount has been taxed in hands of another, that cannot preclude Assessing Officer from assessing same in hands of right person by reopening assessment of such person. (A.Y. 1986-87)

*Sunil Kumar Jain v. ITO (2006) 284 ITR 626 / (2005) 284 ITR 626 / 147 Taxman 463 / 198 CTR 472 / 1284 ITR 626 (All.)(High Court)*

### **S. 147 : Reassessment – Change of opinion [S. 143(1)]**

The assessee's returns were processed under section 143(1) and returned income was accepted. Subsequently, the Assessing Officer being of view that investment in purchase of NSCs had been made after raising loans and not out of income chargeable to tax, issued notice under section 148 for reopening assessment. Mere

change of opinion by Assessing Officer was not sufficient for invoking provisions of section 147 read with section 148. (A.Y. 1985-86)

*CIT v. Binda Devi (Smt.) (2006) 150 Taxman 95 / (2005) 197 CTR 447 (P&H)(High Court)*

#### **S. 147 : Reassessment – Basis – Conjecture and surmises**

Where reopening of assessment was based on conjectures and surmises and same was sought to be justified by ignoring binding decisions, reopening of assessment was liable to be quashed and set aside. (A.Ys. 1999-2000, 2000-01)

*German Remedies Ltd. v. Dy. CIT (2006) 150 Taxman 398 / 201 CTR 193 / 285 ITR 26 (Bom.)(High Court)*

#### **S. 147 : Reassessment – After four year – Disclosure of facts**

Full and true disclosure – Notice under section 148 after 4 years – Assessee had furnished full details to determine the quantum of depreciation – Period of limitation applicable for reopening – Therefore, impugned notice is illegal and without jurisdiction and the reassessment was barred by limitation. (A.Ys. 1992-93, 1993-94)

*CIT v. Elgi Finance Ltd. (2006) 205 CTR 241 / 286 ITR 674 / 155 Taxman 124 (Mad.)(High Court)*

#### **S. 147 : Reassessment – Reason to believe – DVO's report – Own opinion**

Reason to believe – based on Report of DVO determining the value of construction raised by Assessee – This could not form the reason to believe opinion about escapement of income must be the Assessing Officer above and not else underdisclosed the cost of construction in the relevant years and ITAT was right in holding that reassessment proceedings was without jurisdiction. (A.Ys. 1993-94 to 1996-97)

*CIT v. Sohan Devi Sodani (Smt.) (2006) 205 CTR 466 / (2008) 303 ITR 342 / 165 Taxman 596 (Raj.)(High Court)*

#### **S. 147 : Reassessment – Two views – Change of opinion**

Reassessment proceeding cannot be sustained in the case of change of opinion or when there is the possibility of two views. (A.Y. 2000-01)

*Apollow Hospital & Enterprises Ltd. v. ACIT (2006) 206 CTR 426 / 287 ITR 25 / 157 Taxman 289 (Mad.)(High Court)*

#### **S. 147 : Reassessment – Notice after 4 years – Disclosure**

In the absence of any material to show that there is failure on the part of the assessee to disclose fully and truly all material facts, reopening beyond the period of 4 years was not justified. Merely because there is a protective assessment in some other cases cannot be a global for reopening. (A.Y. 1985-86)

*Ajay Oxychloride Florings v. CIT (2000) 203 CTR 232 / 283 ITR 169 / 155 Taxman 306 (Bom.) (High Court)*

### **S. 147 : Reassessment – VDIS – Validity**

Income disclosed under VDIS for which certificate is issued by the authority. Reassessment proceeding in respect of such disclosed income is not valid.

*Uma Corporation v. ACIT & Ors. (2006) 204 CTR 282 / 284 ITR 67 (Bom.)(High Court)*

### **S. 147 : Reassessment – Change of opinion – Disclosure**

Reopening purely relying on the materials which are already on record. Not sustainable when there is no charge that the assessee has failed to disclose truly and fully all material facts. Explanation to section 147 cannot be invoked. (A.Ys. 1998-99, 1999-2000)

*Jashan Textile Mills (P) Ltd. v. Dy. CIT (2006) 205 CTR 22 / 284 ITR 542 / 164 Taxman 243 (Bom.)(High Court)*

### **S. 147 : Reassessment – Writ – Alternative remedy**

Writ against reassessment notice cannot be allowed as assessee can raise objections in course of reassessment, and later challenge reassessment in appeal. (A.Y. 1999-2000)

*Mangalam Publications (India) (P.) Ltd. v. Dy. CIT (2005) 148 Taxman 621 / 194 CTR 210 (Ker.)(High Court)*

### **S. 147 : Reassessment – Jurisdiction – Revision**

Even if an order under section 264 upholding reopening is issued independently, it forms basis and part of reassessment under section 147 and it is open to assessee to challenge said order in appeal filed against reassessment; Commissioner (Appeals) would be free to go into reopening of assessment de hors findings of Commissioner in revisional order under section 264. (A.Ys. 1996-97 to 2001-02)

*Toja Tyres & Treads (P.) Ltd. v. Dy. CIT (2005) 272 ITR 522 / 194 CTR 208 (Ker.)(High Court)*

### **S. 147 : Reassessment – Invalid notice – Return filed in pursuance of such notice**

Where fresh reassessment notices were issued because notices earlier issued were invalid notices, such notices were to be set aside on ground that those were issued at a point of time when assessee had already submitted returns for those periods pursuant to an earlier invalid notice and so long as those returns were not assessed in accordance with law, there was no scope for issuing further notice under section 148. (A.Ys. 1974-75, 1975-76)

*Indian Tube Co. Ltd. v. ITO (2005) 272 ITR 439 / 198 CTR 360 (Cal.)(High Court)*

### **S. 147 : Reassessment – Supreme Court Judgment – Overruled subsequently**

If notice is issued on basis of a Supreme Court decision and said decision is subsequently overruled by Apex Court itself, very foundation of notice having disappeared, it would be invalid. (A.Ys. 1995-96 to 1997-98)

*Farrukhabad Gramin Bank v. ITO (2005) 273 ITR 113 / 194 CTR 67 (All.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Relevant material for formation of belief**

It is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant formation of belief relating to escapement of income of assessee from assessment; reason for formation of belief must be held in good faith and should not be a mere pretence. (A.Ys. 1973-74, 1980-81, 1981-82)

*Peerless General Finance & Investment Co. Ltd. v. Dy. CIT (2005) 273 ITR 16 / 146 Taxman*

*475 / 195 CTR 161 (Cal.)(High Court)*

**S. 147 : Reassessment – Non disclosure of facts – Failure to examine books**

Materials relied on for reopening assessment should not be vague but should be definite, specific, relevant and reliable. (A.Ys. 1972-73 to 1977-78)

*CIT v. Sulochana (Smt.) (2005) 272 ITR 529 / 145 Taxman 215 (Mad.)(High Court)*

**S. 147 : Reassessment – Non disclosure of facts – Writ**

Where there was no omission or failure on part of assessee to disclose truly and fully all material facts in return and Assessing Officer sought to reopen assessments due to wrong interpretation of accounts by Assessing Officer, Notice of 148 quashed. Writ petition was justified. (A.Ys. 1992-93, 1993-94)

*Amiya Sales & Industries v. ACIT (2005) 274 ITR 25 / 195 CTR 598 (Cal.)(High Court)*

**S. 147 : Reassessment – Error in assessment – Failure to examine books**

Income escaping assessment as a result of failure to examine account books produced by assessee would be sufficient justification for making reassessment. (A.Y. 1993-94)

*Precot Mills Ltd. v. CIT (2005) 273 ITR 347 / 195 CTR 135 (Mad.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Full & true disclosure – Wrong interpretation**

Where Department was of view that in terms of decision of Gauhati High Court in *Jorehaut Group Ltd. v. Agrl. ITO (1997) 226 ITR 622*, assessees were entitled to deduction of cess on green leaves only from 60 per cent of composite agricultural income and, therefore, 40 per cent of cess amount allowed as deduction in determining composite income under rule 8(2) of Rules, was an income which had escaped assessment within meaning of section 147, since there was no decision in *Jorehaut's case (supra)* that cess was allowable only on 60 per cent of income from tea leaves, reassessment proceeding, relying on said judgment was not valid

*Assam Co. Ltd. v. Union of India (2005) 275 ITR 609 / 197 CTR 659 / 150 Taxman 571 (Gau.)(High Court)*



**S. 147 : Reassessment – Change of opinion – Head of income [S. 143(1)]**

Originally an intimation was issued under section 143(1)(a) accepting rental income received from letting out of warehouses as business income and Assessing Officer issued a notice under section 148 on premise that as said income did not fall within ambit of 'business income' and should be 'income from other sources' income chargeable to tax had escaped assessment, it could not be said to be a case of change of opinion as at time of intimation under section 143(1)(a) question of examination of material by Assessing Officer did not arise. (A.Ys. 2002-03, 2003-04)

*Aditya & Co. v. CIT (2005) 279 ITR 47 / 195 CTR 258 / (2006) 54 Taxman 65 (P&H)(High Court)*

**S. 147 : Reassessment – Non disclosure of facts – Non-inclusion of wives income under section 64(1)(i)**

Assessee was partner in a firm representing his HUF, he was not obliged to disclose income of his wife from firm in which she was also partner, in his individual assessment; as such assessee's assessment could not be reopened on ground that he had failed to disclose such income of his wife.

*CIT v. H.K. Anand (2005) 276 ITR 296 / (2006) 150 Taxman 15 (All.)(High Court)*

**S. 147 : Reassessment – Non disclosure of facts – Valuation report**

Proceedings under section 147 initiated solely on report of Valuation Officer are unsustainable

*CIT v. Darshan Singh (2005) 272 ITR 650 / 194 CTR 242 (P&H)(High Court)*

**S. 147 : Reassessment – DVO's report – Non disclosure of facts**

Reading of reassessment order passed by Assessing Officer showed that he had issued show-cause notice to assessee under section 147 solely on basis of Department Valuer's report showing difference between cost of construction declared by assessee and that estimated by Valuation Officer, reassessment was not justified. (A.Y. 1971-72)

*CIT v. Suresh Kumar (2005) 275 ITR 253 / 196 CTR 507 (P&H)(High Court)*

**S. 147 : Reassessment – Reason to believe – Non disclosure of facts – Scientific Research claim [S. 35]**

Reopening without mentioning any reason but merely on ground that deduction claimed under section 35 had been wrongly allowed not permissible. (A.Y. 1994-95)

*ABP Ltd. v. Jt. CIT (2005) 278 ITR 627 / 199 CTR 404 / (2006) 151 Taxman 161 (Cal.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Counter sales**

Counter sales made against foreign exchange which are subjected to customs clearance, are entitled to deduction under section 80HHC and as such reassessment notice issued to withdraw such deduction cannot be sustained. (A.Y. 1996-97)

*Marble Men v. CIT (2005) 272 ITR 81 / 142 Taxman 357 (All.)(High Court)*

### **S. 147 : Reassessment – Non disclosure of facts – Beyond four years**

Assessment completed under section 143(3) was sought to be opened after expiry of four years from end of assessment year for verification of correctness of the clause under section 80IA, for this he requires the assessee to furnish P & L a/c. depreciation chart for assessment year 1995-96. The Court held that failure of the Assessing Officer to do so in original assessment cannot be treated at par with failure of the assessee to disclose full and true material facts for its assessment and though the initiation of proceedings under section 147 after expiry of four years from the end of assessment year is wholly without jurisdiction. (A.Y. 1997-98)

*Winsome Textiles Industries Ltd. v. Union of India* (2005) 278 ITR 470 / 199 CTR 466 / (2006) 150 Taxman 420 (P&H)(High Court)

### **S. 147 : Reassessment – Validity – Closed assessment as NA [S. 144]**

Where assessee had not filed return of income for assessment year 1988-89 and Assessing Officer closed assessment as NA, in view of fact that assessee had no taxable income from 1984-85 onwards, such order of Assessing Officer amounted to an order under section 144 and as such Tribunal was justified in law in holding that assessment was validly reopened under clause (c) of Explanation 2 to section 147; mere fact that Assessing Officer's order closing assessment as NA was not communicated to assessee would not make such assessment recorded in order sheet illegal and therefore reopening of such amount was held to be valid under section 147 read with Explanation 2(c). (A.Y. 1988-89)

*CIT v. Indo Marine Agencies (Kerala) (P.) Ltd.* (2005) 279 ITR 372 / 196 CTR 383 (Ker.)(High Court)

### **S. 147 : Reassessment – Disclosure of facts – Satisfaction – Jurisdiction**

If facts are correctly disclosed and a claim has been laid for deduction or exemption, which in Assessing Officer's view may not be sustainable in law, it does not make assessee guilty to disclosure truly and correctly all material facts so as to attract extended period of limitation as per proviso to section 147. (A.Y. 1996-97)

*Banswara Syntex Ltd. v. ACIT* (2005) 272 ITR 154 / (2004) 138 Taxman 275 / 188 CTR 457 (Raj.)(High Court)

### **S. 147 : Reassessment – Revision- Set a side [S. 263]**

Where Commissioner has set a side assessment under section 263 and directed Assessing Officer to reframe assessment and assessment pursuant to order under section 263 is yet to be made, assessment can not be reopened on ground that income has escaped assessment. (A.Y. 1996-97)

*Ador Techmo[ack Ltd. v. Zakir Husseein (Dr.) Dy. CIT* (2004) 140 Taxman 16 / 271 ITR 50 / 191 CTR 500 (Bom.)(High Court)

### **S. 147 : Reassessment – Valuation report obtained subsequently – No power [S. 55A, 148]**

Assessing Officer has no jurisdiction to reopen concluded assessment under section 148 on the basis of valuation report obtained subsequently, without exercising powers conferred under section 55A. (A.Ys. 1997-98 to 2000-01)

*Prakash Chand v. Dy. CIT (2004) 137 Taxman 518 / 269 ITR 260 / 188 CTR 1 (MP)(High Court)*

**S. 147 : Reassessment – Information not connected with reasons – Scope**

Assessing Officer cannot call upon assessee to furnish information not connected with reasons on basis of which reassessment notice had been served on assessee. (A.Y. 1998-99)

*Amrinder Singh Dhiman v ITO (2004) 269 ITR 378 / 192 CTR 351 / 142 Taxman 322 (P&H)(High Court)*

**S. 147 : Reassessment – Remand order – Commissioner (Appeals) [S. 148]**

Where Commissioner (Appeals) passed an order of remand assessment could not be said to be pending before the Assessing Officer, hence the notice issued was held to be invalid. (A.Y. 1990-91)

*Jhunjhunwala Vanspati Ltd. v. ACIT (2004) 137 Taxman 335 / 266 ITR 664 / 189 CTR 46 (All.)(High Court)*

**S. 147 : Reassessment – Non disclosure of primary facts – Change of opinion – Beyond four years**

In the absence of any failure on part of assessee to disclose fully and truly all material facts, reopening of the assessment beyond period of four years can not be sustained. (A.Ys. 1996-97 and 1997-98)

*Grindwell Norton Ltd. v. Jagdish Prasad Jangid ACIT (2004) 138 Taxman 33 / 267 ITR 673 / 186 CTR 530 (Bom.)(High Court)*

*Hindustan Lever Ltd. v. R.B. Wadkar (2004) 138 Taxman 40 / 268 ITR 339 / 190 CTR 275 (Bom.)(High Court)*

*Biswanath Tea Co. Ltd. v. Dy CIT (2004) 267 ITR 687 / 140 Taxman 568 / 190 CTR 186 (Cal.)(High Court)*

**S. 147 : Reassessment – Reasons recorded – Failure on the part of assessee**

If recorded reasons does not show any reason for failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment, reopening of assessment under proviso was not justified, merely on the allegation of escapement of income. (A.Y. 1995-96)

*Duli Chand Singhania v. ACIT (2004) 136 Taxman 725/ 269 ITR 192 / 188 CTR 90 (P&H)(High Court)*

*Mahavir Spinning Mills Ltd. v. CIT (2004) 270 ITR 290 / (2005) 193 CTR 90 (P&H)(High Court)*

**S. 147 : Reassessment – Change of law – Applicable on the date of filing of return**

For the purpose of deciding question under section 147 as to whether assessee had disclosed fully and truly all material facts necessary for relevant assessment year, law applicable would be law as stood on date of filing of the return. (A.Y. 1983-84)  
*Denish Industries Ltd. v. ITO (2004) 140 Taxman 456 / 271 ITR 340 / 190 CTR 485 (Guj.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Loss of revenue – Full and true disclosure – Erroneous view**

Where full and true disclosure of facts is made by an assessee and revenue authority has drawn its reference, department cannot reopen assessment even if there is loss of revenue or even legal inference drawn by assessing authority is erroneous in first place. (A.Y. 1996-97)

*Mahalaxmi Motors Ltd. v. Dy. CIT (2004) 134 Taxman 219 / 265 ITR 53 / 186 CTR 739 (AP)(High Court)*

**S. 147 : Reassessment – Failure on the part of assessee – Legal inference**

Due to legal inference drawn that the depreciation was not allowable, it can not be said that there was failure on the part of assessee to disclose material facts, hence reassessment is bad in law. (A.Ys. 1996-97, 1997-98)

*ICICI Bank Ltd. v. K.J. Rao, Dy. CIT (2004) 136 Taxman 669 / 268 ITR 203 / 188 CTR 380 (Bom.)(High Court)*

**S. 147 : Reassessment – Depreciation – Information – Denial by the seller**

If person concerned, from whom material had been purchased by the assessee on which the assessee had claimed depreciation, himself stated subsequently before the authorities that transaction was not genuine and Assessing Officer received this information, that could be a grounds for reopening of assessment. (A.Y. 1992-93)

*Raunaq Finance Ltd. v. Jt. CIT (2004) 141 Taxman 72 / 272 ITR 210 / 191 CTR 215 (Raj.)(High Court)*

**S. 147 : Reassessment – Prima facie evidence – Reason to believe**

Sufficiency or correctness of the material is not a thing to be considered at the stage of issuing of notice, but where there was no prima facie evidence to hold that there was transfer of asset, Assessing Officer could not reopen assessment to bring capital gains to tax. (A.Y. 1991-92)

*Zurari Estate Development & Investment Co (P) LTD v. J.R. Kanekar, Dy CIT (2004) 139 Taxman 209 / 271 ITR 269 / 191 CTR 189 (Bom.)(High Court)*

**Editorial:** Judgment of High Court was set aside and matter was remanded to Tribunal to decide on merit Dy.CIT v. Zurari Estate Development & Investment Co (P) LTD ( 2015) 373 ITR 661 (SC)

**S. 147 : Reassessment – Report of DDI (Investigation) – Purchase of shares**

Where transactions in sale and purchase of shares were found to be false, pursuant to report of DDI (Investigation) reopening of assessment was justified. (A.Y. 1996-97)  
*Shri Pal Jain v. ITO (2004) 136 Taxman 699 / 267 ITR 540 / 140 Taxman 410 / 188 CTR 82 (P&H)(High Court)*

**S. 147 : Reassessment – Report of inspector – Relevancy to the facts**

Initiation of reassessment proceedings, on the basis of report of Inspector where report submitted by Inspector did not have any relevant material to point out that any income had escaped assessment, was not valid. (A.Ys. 1993-94, 1994-95)  
*Indra Prastha Chemicals (P) Ltd. v. CIT (2004) 271 ITR 113 / 142 Taxman 205 / 191 CTR 125 (All.)(High Court)*

**S. 147 : Reassessment – Change of opinion – Valuation report Sanction under section 151(2)**

Original assessment was completed after detailed inquiry. Reopening was based on valuation report for cost of construction therefore not justified. Reopening after 4 years – Sanction under section 151(2) was not obtained notice under section 147 was illegal.

*Girdhar Gopal Gulati v. UOI (2004) 269 ITR 45 / 140 Taxman 312 / 188 CTR 532 (All.)(High Court)*

**S. 147 : Reassessment – Reasons recorded – No allegation as to failure of true and full disclosure**

Deductions allowed after detailed investigation after considering the details furnished by the assessee can not be disallowed after expiry of four years from the relevant asst years for the alleged failure on the part of the assessee to disclose fully and truly all material facts. (A.Ys. 1986-87 to 1991-92)

*Desai Bros Ltd. v. Dy. CIT (2004) 138 Taxman 171 / 188 CTR 375 / (2005) 272 ITR 335 (Bom)(High Court)*

**S. 147 : Reassessment – To withdraw deduction – Export – Counter sales [S. 80HHC]**

Reopening to withdraw deduction allowed under section 80HHC, in respect of counter sales effected against convertible foreign exchange, was not justified. (A.Y. 1996-97)  
*Marble Men v. CIT (2005) 272 ITR 81 / (2004) 192 CTR 58 / 142 Taxman 360 (All.)(High Court)*

**S. 147 : Reassessment – Reason to believe – Deduction – Export [S. 80HHC]**

Reassessment on the grounds that certain details were not furnished, held to be flimsy grounds and held to be invalid. (A.Ys. 1998-99 to 2000-01)

*Ajanta Pharma Ltd. v. ACIT (2004) 135 Taxman 246 / 267 ITR 200 / 186 CTR 521 (Bom.)(High Court)*

### **S. 147 : Reassessment – Refundable and Non-Refundable deposits – Beyond four years**

Figures were disclosed in the returns, returns were accompanied by the balance sheets wherein these figures were disclosed, on the facts it can not be said that the assessee failed to disclose full and true income in its return. Reassessment beyond four years held to be invalid. (A.Ys. 1982-83, 1983-84)

*Bhogwati Sahakari Sakhar Karkhana Ltd. v. Dy CIT (2004) 269 ITR 186 / 188 CTR 393 (Bom.)(High Court)*

### **S. 147 : Reassessment – Disallowed in original assessment – Can not be re agitated**

Claims which have been disallowed in original assessment proceeding cannot be permitted to be re-agitated on assessment being reopened for bringing to tax certain income which had escaped assessment. (A.Y. 1974-75)

*CIT v. Keshoram Industries Ltd. (2004) 271 ITR 353 / (2005) 193 CTR 116 / 144 Taxman 1 (Cal.)(High Court)*

### **S. 147 : Reassessment – Reason to believe – AOP**

Reassessment to treat income earned by way of lottery prize won by appellants on tickets purchased by them jointly and assessed in their hands individually as income of AOP, was not justified. (A.Y. 1984-85)

*Jaswant Kaur Sehgal (Smt) v. CIT (2004) 271 ITR 475 / (2005) 193 CTR 530 / 144 Taxman 243 (Gau.)(High Court)*

### **S. 147 : Reassessment – Reason to believe – Investigation wing – Bogus purchases**

As a result of investigation made by Investigation Wing of Department, relevant and very material facts had come before Assessing Officer that assessee was concealing his income by indulging in bogus transactions, issue of notice of reassessment was justified. (A.Y. 2001-02)

*Brij Mohan Agarwal v. ACIT (2004) 268 ITR 400 / 140 Taxman 317 / 188 CTR 562 (All.)(High Court)*

### **S. 147 : Reassessment – Reason to believe – Non disclosure of primary facts**

Where it was held that there was no non-disclosure of primary facts by assessee but from the case record itself certain conclusions were sought to be drawn, reassessment was not justified. (A.Y. 1997-98)

*Caprihans India Ltd. v. Tarun Seem Dy. CIT (2004) 266 ITR 566 / (2003) 132 Taxman 123 / 185 CTR 157 (Bom.)(High Court)*

### **S. 147 : Reassessment – Reason to believe – Information – Position prior to 1/4/1989 – Audit – Certain facts**



If the audit points out certain facts which were not in the knowledge of the ITO when he made the original assessment, it would constitute information under section 147(b). (A.Y. 1975-76)

*Nagrath Chemicals Works P. Ltd. v. CIT* (2004) 265 ITR 401 / (2003) 185 CTR 15 / 137 Taxman 382 (All.)(High Court)

#### **S. 147 : Reassessment – Information – Change of opinion**

Where the Assessing Officer issued notice under section 148 of the Act after recording reason that, the assessee had claimed excess relief under section 80HHC of the Act. The Tribunal held that there was no information for taking action under section 148 of the Act and the action under section 147 was taken only due to change opinion. On reference, High Court held that in case of excessive relief claimed, under section 80HHC, action under section 147 can be taken and it was not a case of change of opinion.

*CIT v. Hindustan Tools & Forgings P. Ltd.* (2003) 306 ITR 209 / 179 Taxman 11 (P&H)(High Court)

#### **S. 147 : Reassessment – Validity of proceedings – Facts existing on date of jurisdiction**

Validity of proceedings has to be judged on the basis of facts as existed on date of assumption of jurisdiction and not on the ultimate result of any reassessment proceeding. (A.Ys. 1968-69 to 1973-74)

*ITO v. Electro Steel Castings Ltd.* (2003) 264 ITR 410 / 185 CTR 300 (Cal.)(High Court)

#### **S. 147 : Reassessment – Revision of partner's share – Not permissible [S. 155(1)]**

Revision of partner's share of income in firm is permissible under section 155(1) and not under section 147.

*Shyama Charan Gupta v. ACIT* (2003) 128 Taxman 669 (All.)(High Court)

#### **S. 147 : Reassessment – Full and true disclosure – Conditions Precedent – No substantial change from 1-4-1989 – Jurisdiction issue – Non taxable – Supreme court Judgment**

There is no substantial change after amendment of provisions from 1-4-1989 in principle on which assessment can be reopened. (A.Ys. 1984-85 to 1989-90)

Failure to respond to notice under section 148 will not attract the mischief excepted in proviso to section 147 where very jurisdiction to issue notice under section 148 has been challenged.

Where certain amounts were disclosed but claimed to be non-taxable, and assessment was reopened on the basis of a Supreme Court decision, it could not be said to be a case of non-disclosure of primary facts within meaning of proviso to section 147. (A.Ys. 1984-85 to 1989-90)

*Simplex Concrete Piles (India) Ltd. v. Dy. CIT (2003) 262 ITR 605 / 183 CTR 47 / 134 Taxman 74 (Cal.)(High Court)*

**S. 147 : Reassessment – Conditions precedent – Limitation – Agreement**

If limitation period has not expired, amended provisions of section 147 will be applicable. (A.Ys. 1986-87 to 1989-90)

If agreement which goes to root of issue under consideration is not placed on record during assessment, reopening of assessment will be justified. (A.Ys. 1986-87 to 1989-90)

*Shree Mahaveer Financiers v. CIT (2003) 130 Taxman 443 / 261 ITR 751 / 180 CTR 239 (Raj.)(High Court)*

**S. 147 : Reassessment – Conditions precedent – No conscious consideration**

On the pretext that there was no conscious consideration of the pointed facts at the time of the assessment, reopening of the assessment is not legally permissible by virtue of proviso to section 147. (A.Ys. 1991-92 to 1994-95)

*ONGC Ltd. v. Dy. CIT (2003) 262 ITR 648 / 133 Taxman 27 / 187 CTR 462 (Uttaranchal)(High Court)*

**S. 147 : Reassessment – Conditions precedent – Beyond four years**

Where the revenue could not satisfy that there was any failure on the part of the assessee as envisaged by proviso to section 147, or in any manner by suppression or omission he took advantage and escaped assessment, reopening of assessment beyond the period of four years was not permissible. (A.Ys. 1989-90 to 1994-95)

*McDermott International Inc. v. Addl. CIT (2003) 259 ITR 138 / 180 CTR 492 / 134 Taxman 39 (Uttaranchal)(High Court)*

**S. 147 : Reassessment – Conditions precedent – Representative assessee**

There cannot be any escapement of assessment at the hands of the representative assessee when the principal assessee is being assessed and is available before the Assessing Officer. (A.Y. 1998-99)

*CESC Ltd. v. Dy. CIT (No. 2) (2003) 131 Taxman 751 / 263 ITR 402 / 183 CTR 124 (Cal.)(High Court)*

**S. 147 : Reassessment – Explanation 2 – Reopening after four years – No failure on the part of assessee to disclose fully and truly material facts**

Where the assessee had filed its annual report before the Assessing Officer indicating spread over of Rs 10,02, 23,735 relating to Voluntary Retirement Scheme over a period of 60 months and the Assessing Officer acted on that report by granting deduction to the extent of Rs 33,40,818 for the year ending 31-3-1996, there was no failure on the part of the assessee to disclose fully and truly all the material facts and therefore, the reopening of assessment after the expiry of four years was not justified..Explanation 2 to section 147 has to be read with section 147 in its entirety including the proviso. (A.Y. 1996-97)

*Bhor Industries Ltd. v. ACIT (2003) 183 CTR 248 / 267 ITR 161 (Bom.)(High Court)*

**S. 147 : Reassessment – Explanation 2 – Unless the excess relief on account of failure on part of assessee**

Although under Explanation 2 to section 147, grant of excess relief can be a ground for reopening the assessment, unless grant of excess relief is on Account of failure on part of assessee to disclose fully and truly all material facts, concluded assessments cannot be reopened. (A.Y. 1994-95)

*Parikh Petrol Chem. Agencies (P.) Ltd. v. ACIT (2003) 129 Taxman 574 / 183 CTR 243 / 266 ITR 196 (Bom.)(High Court)*

**S. 147 : Reassessment – Subsequent years information – Valid**

If in the course of carrying on the assessment proceeding for subsequent years, some items of information come to the notice of the Assessing Officer from which the Assessing Officer may have reasons to believe that there has been escapement of income, in that case the Assessing Officer can proceed under section 147. (A.Ys. 1968-69 to 1973-74)

*ITO v. Electro Steel Castings Ltd. (2003) 264 ITR 410 / 185 CTR 300 (Cal.)(High Court)*

**S. 147 : Reassessment – Family settlement – Intimation**

Reopening of assessment to bring to tax amount which was claimed by assessee as having gone out of its hands under a family settlement, was justified, where earlier assessment was made under section 143(1). (A.Ys. 1983-84 to 1985-86)

*Kesrimal (Deed.) v. ITO (2003) 129 Taxman 694 / 264 ITR 119 / 182 CTR 431 (MP)(High Court)*

**S. 147 : Reassessment – Depreciation – Valuation – Computation of depreciation – Disclosure of facts**

Assessment cannot be reopened to change basis of computation of depreciation from valuation at which company had acquired the asset, to the written down valuation in the books of account of its predecessor firm. (A.Ys. 1981-82 to 1985-86)

Where only reason for reopening assessments was change in the basis of computation of depreciation of the asset, and no satisfaction about any non-disclosure of material fact by the assessee had been recorded, assessment could not be reopened beyond four years under proviso.

*Marudhar Hotels (P.) Ltd. v. Dy. CIT (2003) 259 ITR 509 / 128 Taxman 65 / 181 CTR 253 (Raj.)(High Court)*

**S. 147 : Reassessment – Investment allowance – Withdrawal**

Reassessment to disallow investment allowance on non-disclosure of sale / transfer of machinery prior to stipulated period was justified.

*Mamta Type Setting Works v. ACIT (2003) Tax LR 91 / (2004) 187 CTR 151 / 267 ITR 623 / 134 Taxman 34 (Guj.)(High Court)*

### **S. 147 : Reassessment – Commission paid to firm – Disclosure of facts**

Where assessment was reopened, on ground that commission paid to firm by assessee-company was not a genuine deduction, it could not be said that by mere disclosure of the sole-selling agency agreement, all the facts relevant to assessment were truly and fully disclosed by the assessee. (A.Ys. 1968-69 to 1973-74)

*ITO v. Electro Steel Castings Ltd. (2003) 264 ITR 410 / 185 CTR 300 (Cal.)(High Court)*

### **S. 147 : Reassessment – Omission to deal with disallowance – Cash payments [S. 40A(3)]**

Omission to deal with question of disallowance of cash payments under section 40A(3) in assessment order cannot be construed to bring it within the exception provided in proviso to section 147 for reopening the assessment. (A.Y. 1995-96)

*G. N. Shaw (Wine) Pvt. Ltd. v. ITO (2003) 260 ITR 513 / 177 CTR 116 / 130 Taxman 622 (Cal.)(High Court)*

### **S. 147 : Reassessment – Intimation – Presumptive taxation**

Reopening of assessment in a case where assessment was completed under section 143(l)(a) and assessee's case was covered by presumption under section 44AD, on the ground that in contract business carried on by the petitioner net profit ranged from 8 percent to 12 per cent as against net profit rate of 3 percent declared by assessee was justified. (A.Y. 1995-96)

*Soman Steels v. Union of India (2003) 127 Taxman 353 / 269 ITR 412 (Raj.)(High Court)*

### **S. 147 : Reassessment – Details before Assessing Officer – Agricultural land**

Where all facts regarding takeover of certain purportedly agricultural land of assessee by Government were before Assessing Officer at time of original assessment, reassessment to bring capital gains from such transfer to tax on ground that lands transferred included non-agricultural lands also, was not valid. (A.Y. 1966-67)

*CIT v. Maharashtra Sugar Mills Ltd. (2003) 263 ITR 180 / 132 Taxman 782 / 186 CTR 616 (Bom.)(High Court)*

### **S. 147 : Reassessment – Non-inclusion of income of minor – Share from firm [S. 64]**

Non-inclusion of minors' income from firm by assessee under section 64 in her income would justify assessment. (A.Ys. 1976-77 to 1984-85)

*CIT v. A. S. Rukmani Ammal (2003) 127 Taxman 149 / 260 ITR 391 / 181 CTR 109 (Mad.)(High Court)*

### **S. 147 : Reassessment – Cash credits – Search and seizure**

Where during search, cash credits were discovered and there was no satisfactory explanation regarding them, reassessment proceedings were justified. (A.Ys. 1987-88 to 1991-92)

*Nandlal Khanchand Khatri v. CIT (2003) 260 ITR 318 / 185 CTR 555 / 139 Taxman 51 (MP)(High Court)*

#### **S. 147 : Reassessment – Reason to believe – Deduction [S. 80-I]**

It was found that deduction under section 80-I had been wrongly allowed in original assessment, notice of reassessment was valid. (A.Y. 1997-98)

*Swaraj Engine Ltd. v. ACIT (2003) 260 ITR 202 / 185 CTR 584 / 135 Taxman 381 (P&H)(High Court)*

#### **S. 147 : Reassessment – Reason to believe – Income escaping assessment – Discrepancy in stock**

Discrepancy between stock disclosed in assessee's stock register and that found hypothecated with bank would be valid ground to reopen assessment. (A.Y. 1977-78)

*Devgon Rice & General Mills v. CIT (2003) 263 ITR 391 / 184 CTR 575 / 134 Taxman 448 (P&H) (High Court)*

#### **S. 147 : Reassessment – Reason to believe – Information – Position prior to 1/4/1989 – Audit report – Possible view**

Once a possible view has been taken while allowing the liability on the basis of the provision made for leave, salary and pension, and the other view is also possible, that does not constitute 'information'. When it is change of opinion only on the audit report, it does not constitute 'information' within the meaning of section 147(b). (A.Y. 1972-73)

*CIT v. Sambhar Salt Ltd. (2003) 262 ITR 675 / 131 Taxman 241 / 183 CTR 350 (Raj.)(High Court)*

#### **S. 147 : Reassessment – Reason to believe – Information – Position prior to 1/4/1989 – Audit report**

Where the assessee in its audit report furnished the information regarding law and communicated it to the assessing authority. The assessing authority had applied its mind on that law and, therefore, reassessment was justified. (A.Ys. 1976-77, 1977-78)

*CIT v. Juhi Metal Works (2003) 263 ITR 287 / 187 CTR 344 / 132 Taxman 887 / 140 Taxman 306 (All.)(High Court)*

#### **S. 147 : Reassessment – Notice for reassessment – Rectification [S. 155, S. 148]**

Assessment of the assessee- partner following reassessment of firm can be modified under section 155 and not under section 148.

*CIT v. Shyama Charan Gupta (2003) 261 ITR 362 / 128 Taxman 669 / 134 Taxman 378 (All.)(High Court)*

**S. 147 : Reassessment – Non issue of notice – Not valid [S. 143(2)]**

It is mandatory not merely procedural for the Assessing Officer to issue notice under section 143(2). If the notice is not served within the prescribed period, the assessment order is invalid (CIT v. Pawan Gupta (2009) 318 ITR 322 (Delhi), ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC) & CIT v. C. Palaniappan (2006) 284 ITR 257 (Mad.) followed).

*UKT Software Technologies v. ITO ITA No. 5293 & 5294/Del/2010 dated 11-2-2011 (Delhi)(Trib.)* Source : [www.itatonline.org](http://www.itatonline.org)

**S. 147 : Reassessment – Reason to believe – Finding of subsequent year [S. 148]**

Information obtained in the assessment of a subsequent assessment year can be a good to initiate proceedings under section 147/148. Disallowance of interest expenditure made in assessment of subsequent assessment year on the basis that the interest free advances constituted prima facie material for the Assessing Officer to form a reasonable belief that certain income had escaped assessment in the present year. (A. Y. 1999 -2000).

*Maruti Civil Works v. ITO (2011) 51 DTR 257 / 136 TTJ 448 (Pune)(Trib.)*

**S. 147 : Reassessment – Beyond four years – Revaluation of assets [S. 45, 50]**

Assessee firm having duly disclosed the fact of revaluation of assets, creation of self generated asset. viz., goodwill and also that the difference between the cost and revalued amount of the assets has been transferred to partners' capital accounts and the same was followed by dissolution of firm, all primary facts stood disclosed by the assessee in the original assessment proceedings itself and therefore, assessment could not be reopened after expiry of four years from the end of the relevant assessment year on the ground that difference between WDV of the assets and the value thereof after revaluation is taxable under the provisions of section 45 read with section 50 which has escaped assessment. (A. Y. 1986-87).

*Industrial Lining v. Dy. CIT (2011) 52 DTR 233 / 45 SOT 60 / 137 TTJ 129 (TM)(Ahd.)(Trib.)*

**S. 147 : Reassessment – Assessment under section 143(1) – Within four years – Reasons to believe – Not valid [S. 143(1)]**

Original assessment order was made under section 143(1) and the re opening of the assessment was initiated within a period of 4 years, it was still necessary that there should be reasons to believe that income had escaped assessment and such reasons are subject to judicial scrutiny. There essentially have to be valid reasons to believe that income has escaped assessment and these reasons on standalone basis must be considered appropriate for arriving at the conclusion arrived at by the officer recording the reasons. In view of the above the initiation of reassessment



proceedings in the instant case by the Assessing Officer was held bad in law and the proceedings were quashed. (A. Y. 2001-02)

*Pirojsha Godrej Foundation v. ADIT (2011) 44 SOT 24 (URO)(Mum.)(Trib.)*

**S. 147 : Reassessment – Settlement commission – Disclosure of facts [S. 254D(4)]**

Settlement Commission having already accepted the undisclosed income as shown by the assessee which covered all the issues arising out of the seized papers including rental income, order under section 245(D)(4) was passed. In the absence of any new document or material to come to a different conclusion than that was accepted by the Department, assessments of the relevant period could not be reopened by the Assessing Officer by taking a different view regarding assessability of rental income. (A. Ys. 2004-05 to 2006-07).

*Jammula Shyam Sundar Rao (HUF) v. ACIT (2011) 138 TTJ 602 / 54 DTR 294 (Cuttack)(Trib.)*

**S. 147 : Reassessment – Rectification pending – Invalid [S. 154]**

When proceedings under section 154 were pending on the same issue and not concluded, parallel proceedings under section 147 initiated by the Assessing Officer are invalid ab inito, especially when except the return and its enclosures, no other material or information was in the possession of the assessing Officer. (A. Y. 2004-05).

*Mahinder Freight Carriers v. Dy. CIT (2011) 56 DTR 247 / 139 TTJ 422 / 129 ITD 278 (Mum.)(Trib.)*

**S. 147 : Reassessment – Double taxation avoidance – India-Malaysia [S. 90]**

Assessee having permanent establishment in Malaysia. Income earned in Malaysia is taxable there under the provisions of Double taxation Avoidance Agreement between India and Malaysia. No Tax actually levied because amount had not been brought in to Malaysia. The Amount not taxable in India. Reassessment proceedings to tax amount in India not valid. There is no Rule that assessee should pay tax in at least one jurisdiction to be eligible for relief. (A. Ys. 2001-01 to 2002-03 and 2005-06).

*Sivagami Holdings P. Ltd. v. ACIT (2011) 10 ITR 48 (Chennai)(Trib.)*

**S. 147 : Reassessment – Reason to believe – Change of opinion – With in period of four years**

Once an assessment has been completed under section 143(3) after raising a query on a particular issue and accepting assessee's reply to the query. Assessing Officer has no jurisdiction to reopen the assessment merely because the issue in question is not specifically adverted in the assessment order, unless there tangible material before the Assessing Officer to come to the conclusion that there is escapement of income. (A. Y. 1998-99).

*ACIT v. Rolta India Ltd. (2011) 57 DTR 370 / 139 TTJ 385 / 132 ITD 98 (TM)(Mum.)(Trib.)*

**S. 147 : Reassessment – Income from house property – Co-owner – Assessment [S. 22]**

Scheme of the Act does not envisage that annual value of co owned property, upon being determined in assessment of AOP, is to be divided amongst co-owners in pre determined ratio. In hands of AOP was wholly academic infructuous. Quantification of annual value of co-owned property in course of assessment of AOP consisting of co-owners is not a condition precedent for taxability of individual share of such income in hands of co-owners. The very initiation of reassessment proceedings in hands of AOP of co-owners was unsustainable by law. (A. Y. 2002-03).

*Sujeer Properties (AOP) v. ITO (2011) 131 ITD 377 / 138 TTJ 684 / 55 DTR 282 (Mum.)(Trib.)*

**S. 147 : Reassessment – Issue is subject matter of appeal – Tribunal [S. 148]**

Once an issue is subject matter of appeal before Tribunal, issuance of notice of reassessment on said ground has to be considered bad in law. (A. Y. 2000-01).

*Chika Overseas (P) Ltd. v. ITO (2011) 131 ITD 471 / 50 DTR 426 (Mum.)(Trib.)*

**S. 147 : Reassessment – Additions not made on the basis of reopening – Reassessment bad in law [S. 148]**

If no addition is made on the basis of recording of reasons, the reassessment is bad in law. (A. Y. 2000-01).

*ITO v. Bidbhanjan Investment & Trading Co. (P) Ltd. (2011) 59 DTR 345 / 132 ITD 51 / (2012) 145 TTJ 54 (Mum.)(Trib.)*

**S. 147 : Reassessment – Valuation of property – Inspectors report**

Merely because the stamp valuation authority has adopted certain valuation for payment of stamp duty on the property purchased by the assessee, the same cannot be the basis to conclude that assessee's income has escaped assessment, particularly when no tangible material has been brought on record to suggest escapement of income except the inspector's report which could not be relied upon to ascertain the market value of property, hence, reassessment quashed by the CIT(A) was up held. (A. Y. 2005-06).

*ITO v. Shiv Shakti Build Home (P) Ltd. (2011) 141 TTJ 123 / 61 DTR 37 (Jodh.)(Trib.)*

**S. 147 : Reassessment – Housing project – Not for benefit of assessee [S. 80IB(10)]**

As the reassessment proceedings are aimed at taxing the income which has escaped assessment, these cannot be taken as a tool for putting the assessee in a better position than in which it was before such proceedings. (A. Y. 2004-05)

*Bhumiraj Homes Ltd. v. Dy. CIT (2011) 60 DTR 65 / 11 ITR 699 (Mum.)(Trib.)*

**S. 147 : Reassessment – Non-disclosure of primary facts – Prima facie reason – Assessment under section 143(1) [S. 14A, 143(1)]**

What is necessary to reopen an assessment is not final verdict but a prima facie reason. Once reason is recorded by Assessing Officer and subject to other conditions laid down in enabling provision, Assessing Officer assumes jurisdiction to issue notice under section 148. Merely because for earlier assessment years issue in dispute has been decided by Commissioner (Appeals) in favour of assessee cannot be a fetter to Assessing Officer in exercising his jurisdiction under section 147. (A. Y. 1999-2000). *ACIT v. Tube Investments of India Ltd. (2011) 133 ITD 79 / (2012) 143 TTJ 658 / 13 ITR 619 / 66 DTR 153 (TM)(Chennai)(Trib.)*

**S. 147 : Reassessment – Brought forward business loss – Unabsorbed depreciation – Deduction – Export – Manner of computation [S. 80HHC]**

Assessee's claim for deduction under section 80HHC was allowed on amount of income before reducing brought forward business loss and unabsorbed depreciation hence, the Assessing Officer was justified in reopening assessment on that issue. Once assessment is reopened under section 147 on more than one point and one such point is finally taken in to consideration while determining the total income under section, read with section 147, it cannot be held that initiation of reassessment was illegal. Similarly when no escapement of income is found to have taken place on account of reasons which led to issuance of notice under section 148, then the Assessing Officer cannot assessee or reassess any other income which comes to his knowledge during course of reassessment proceedings, however if escapement of income is found in respect of any of reasons basis of which notice under section 148 was issued, then the jurisdiction of Assessing Officer to reassess any income which earlier escaped assessment and now comes to his notice during course of reassessment proceedings cannot be held to be invalid. In order to justify initiation of reassessment it is sine qua non that there must be some income which escaped assessment. Where the manner of computation done by assessee is incorrect but does not reduce total income or ultimate tax liability, it cannot be a case of escaping assessment covered under section 147. (A. Ys. 1999-2000 and 2000-2001). *Priya Ltd. v. ITO (2011) 133 ITD 38 / 58 DTR 166 (Mum.)(Trib.)*

**S. 147 : Reassessment – First time before Tribunal – Possible**

Assessee's appeal allowed by the CIT(A) on merits. Held that the assessee can challenge the validity of reassessment proceedings in the appellate proceedings *Dy. CIT v. Duratex Exports, ITA No. 3088/M/10, dated 15-6-11, BCAJ, December – 2011, P. 34, Vol 43-B, Part 3 (Mum.)(Trib.)*

**S. 147 : Reassessment – Reason to believe [Expln. 2 to S. 147]**

On the basis of definite information that a certain bank account in the bank in the name of the assessee was used to provide accommodation entries, the Assessing

Officer had a prime facie belief that assessee's income had escaped assessment and therefore reopening was sustainable.

*Rishi Grover v. ACIT (2010) 33 DTR 309 / 127 TTJ 527 (Amritsar)(Trib.)*

#### **S. 147 : Reassessment – Export – Reassessment proceedings [S. 80HHC]**

Assessee having not claimed deduction under section 80HHC, in its return because it had only income from other sources and no business income. Subsequently the assessing officer initiated 147 proceedings and made disallowances under section 43B and 14A. As a result business income turned into positive. Head claim under section 80HHC has to be allowed despite there being no claim in original return. (A.Ys. 2001-02, 2002-03)

*ITO v. Tamil Nadu Minerals Ltd. (2010) 128 TTJ 386 / 124 ITD 156 / 35 DTR 1 / 6 ITR 698 (TM) (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Information – Compensation**

Reassessment proceedings initiated on the basis of specific information that Assessee had not offered to tax, the enhanced compensation received with Interest was held to be justified. Further it was held that even though quantum of enhanced compensation which was disputed in Appeal, and though pending before Supreme Court, the same would be assessed in the year in which amount has been received.

*Jagpal Singh v. ITO (2010) 186 Taxman 26 (Mag.)(Delhi)(Trib.)*

#### **S. 147 : Reassessment – Protective addition – Validity**

Assessment cannot be reopened for making protective addition and also on mere suspicion. (A.Y. 1995-96)

*Dy. CIT v. Bullion Investments & Financial Services (P) Ltd. (2010) 123 ITD 568 / (2009) 20 DTR 325 (Bang.)(Trib.)*

#### **S. 147 : Reassessment – Time limit for issue of Notice – Not expired [S. 143(2)]**

When time limit for issue of notice under section 143(2) has not expired, Assessing Officer cannot initiate proceedings under section 147. (A.Y. 2002-03)

*Super Spinning Mills Ltd. v. Addl. CIT (2010) 37 DTR 1 / 129 TTJ 305 / 38 SOT 14 / 3 ITR 258 (TM)(Chennai)(Trib.)*

#### **S. 147 : Reassessment – Disallowance of expenditure – Exempted Income [S. 14A]**

Assessing Officer has no jurisdiction to reopen case prior to assessment year beginning on or before 1st April, 2001. (A.Y. 1998-99)

*Jt. CIT v. Bombay Dyeing Mfg. Co. Ltd. (2010) 2 ITR 733 / 123 ITD 1 / (2009) 125 TTJ 263 / 30 SOT 461 / 28 DTR 190 (Mum.)(Trib.)*

#### **S. 147 : Reassessment – Full and true disclosure – Notice after expiry of four years – Non-disclosure of sale of rig**

Non-disclosure of fact about sale of rig, used in the PE and on which depreciation was claimed by non-resident assessee amounted to failure in disclosing fully and truly all material facts hence, justified in reopening of assessment. (A.Y. 1998-99)

*Cartier Shipping Co. Ltd. v. Dy. DIT (2010) 131 TTJ 129 / 40 DTR 459 / 41 SOT 470 (Mum.)(Trib.)*

#### **S. 147 : Reassessment – Validity – Jurisdiction [S. 292B]**

Where reopening proceedings are initiated by the Assessing Officer not having jurisdiction, the reassessment made in pursuance to such notice by the Assessing Officer is illegal and invalid. (A.Y. 2001-02)

*K. B. Kumar (Dr.) (Mrs.) v. ITO (2010) 41 DTR 423 / 131 TTJ 511 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Block assessment [S. 158BC]**

Once assessment has been framed under section 158BC in relation to undisclosed income of the block period as a result of search, Assessing Officer cannot issue notice under section 148 for reopening such assessment. (A.Ys. 1997-98 to 1999-2000)

*Mangal Singh (HUF) v. ACIT (2010) 42 DTR 58 / 36 SOT 394 / 132 TTJ 0017 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Jurisdiction – Second round of litigation before the Tribunal [S. 253]**

The assessee in the first round of litigation did not raise the issue of reassessment, before the Tribunal although it was in appeal before the Tribunal on merits. The Tribunal held that, it is now well established that the issue of jurisdiction of the authorities is fundamental and is like the root of the proceedings or matter. The matter had not reached the finality and the dispute or defect as regards the jurisdiction got inbuilt in to the order and should, therefore always be subject matter for legal scrutiny, when questioned. After all the jurisdiction to authorities cannot be conferred by acceptance or negligence of the parties to the dispute. It can always be agitated or questioned when the assessee gets some opportunity over the issue. In a way that issue is always open to challenge even if the round is second or third. As long as the issue has not reached the finality, it is always open to question or challenge in judicial proceedings. (A.Y. 2001-02)

*Hemal Knitting Industries v. ACIT (2010) 127 ITD 160 / 48 DTR 393 / (2011) 135 TTJ 143 (TM) (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Reason to Believe – Within four years**

Reassessment could be initiated within four years from the end of the relevant assessment year if the Assessing Officer has 'reason to believe' that the income has escaped assessment notwithstanding the fact that there was full disclosure of material facts on record. The assessee, in such cases, cannot defend the initiation of action on the ground that the material facts were disclosed on record and that the Assessing Officer must have or ought to have considered them during the original assessment. The powers to make assessment or reassessment, where the initiation has been made within four years from the end of the relevant assessment year, would be

attracted even in cases where there has been complete disclosure of material facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings. (A.Y. 2000-01)

*Lakshmi Machine Works Ltd. v. ACIT (2010) 126 ITD 343 / 1 ITR 92 / 127 TTJ 487 / 23 DTR 443 (Chennai)(Trib.)*

#### **S. 147 : Reassessment – After four years – Supreme Court judgement**

Assessee having disclosed all the primary facts before the Assessing Officer at the stage of original assessment, re-opening of assessment after expiry of four years from the end of relevant year merely on the basis of a subsequent decision of the Supreme Court was not valid. (A.Ys. 1991-92 to 1993-94)

*ACIT v. Prestige Foods Ltd. (2009) 32 DTR 283 / 127 TTJ 226 / 2 ITR 101 (Indore)(Trib.)*

*Editorial Note:- Full bench of Delhi High Court in CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 / 174 CTR 617 / 123 Taxman 433 (Delhi) affirmed.*

#### **S. 147 : Reassessment – Change of opinion – Possible for S. 143(1) intimation**

Where the original assessment is framed under section 143(3) and subsequently, it comes to the notice, of Assessing Officer, that still some income chargeable to tax has escaped assessment, he can get assistance of provisions of section 147, provided it does not amount to change of opinion.

*M. P. Ramachandran v. Dy. CIT (2009) 32 SOT 592 / (2010) 129 TTJ 190 / 34 DTR 450 / (2011) 8 ITR 655 (Mum.)(Trib.)*

#### **S. 147 : Reassessment – Change of opinion – Within 4 years**

Where the assessee has disclosed material facts, merely from the pursual of the records available the Assessing Officer is not empowered to reopen the assessment completed under section 143(3) though within four years as this amounts to mere change of opinion. Reopening was not therefore sustainable. (A.Ys. 1998-99, 1999-2000)

*Glaxo SmithKline Pharmaceuticals Ltd. v. ITO (2009) 27 DTR 124 / 125 TTJ 764 / (2010) 126 ITD 323 / (2011) 10 ITR 631 (Mum.)(Trib.)*

#### **S. 147 : Reassessment – Infrastructure undertaking [S. 80-IA]**

Assessee an industrial undertaking set up in A.Y. 1997 – 98 claimed deduction under section 80-IA, and which was duly allowed as per Order under section 143 (3). Subsequent assessments of A.Y. 1998-99 to A.Y. 2001-02 were also passed under section 143 (3) or 143 (1) (a). Reassessment proceedings initiated thereafter for A.Y. 1998-99 to 2000-01, on ground that product of menthol oil is not manufactured for the purpose of section 80-IA. In absence of fresh facts or change in law, merely based on whims and fancies reopening was held to be without jurisdiction and unsustainable as same was not backed by any higher judicial opinion or otherwise.



*ITO v. Essential Motto (2009) 183 Taxman 148 (Mag.) / 17 DTR 281 (Chd.)(Trib.)*

**S. 147 : Reassessment – Change of opinion – Absence of new material vis-a-vis full and true disclosure**

Assessee having furnished all the original bills and vouchers in respect of additions made to the assets and also cost allocation on the basis of which proportionate allocation of foreign exchange fluctuation was made and the assessment having been completed on the basis of papers and documents submitted by the assessee, there was no failure on the part of the assessee to disclose fully and truly all material facts relevant for assessment and therefore, the reopening of assessment to disallow the additional depreciation on account of foreign exchange fluctuation was not valid. (A.Y. 1999-2000)

*Dy. CIT v. A.P. Gas Power Corpn Ltd. (2009) 31 DTR 530 / 126 TTJ 975 / (2010) 125 ITD 259 / 1 ITR 71 (Hyd.)(Trib.)*

**S. 147 : Reassessment – Pendency of assessment [S. 148]**

During pendency of valid return, initiation of reassessment proceeding held to be invalid.

*Handloom Intensive Development Project Ltd. v. ACIT (2008) 1 DTR 116 / 114 TTJ 0416 (Lucknow) (Trib.)*

*ACIT v. Cannon Steels (P) Ltd. (2008) 1 DTR 170 / 113 TTJ 608 (Mum.)(Trib.)*

**S. 147 : Reassessment – Not a substitute for S. 143(2) [S. 143(1)]**

Section 147 can not be used as a substitute for section 143(2) particularly when return of income was filed and the assessment was done under section 143(1). In other words provisions of section 147 can not be opted when notice period to make the general enquiry under section 143(2) has lapsed. (A.Ys. 1996-97, 1999-2000, 2001-02)

*ACIT v. Muthoot Leasing & Finances Ltd. (2008) 21 SOT 281 (Cochin)(Trib.)*

**S. 147 : Reassessment – Explanation 2(b) – Pendency of proceedings**

Initiation of reassessment proceedings during pendency of valid return was invalid in law in spite of Explanation 2(b) to section 147.

*Handloom Intensive Development Project (Bijnore) Ltd. v. ACIT (2008) 114 TTJ 416 / 1 DTR 116 (Luck.)(Trib.)*

**S. 147 : Reassessment – Re-opening – Acceptance under section 143(1) – Note to computation**

Assessee HUF filed Return without disclosing Capital Gain arising on sale of an agricultural land. However, Assessee disclosed the same by way of Note, below the Capital Account, stating that Capital Gain is not taxable, as deduction under section 54B is available on Gain being investment in another agricultural land, Return was originally accepted under section 143(1)(a), and later same was re-opened under section 148 on ground that Capital Gain is not included in the Return of Income. Held,

that as original assessment was completed under section 143(1)(a), no opinion was formed therein, and it can not be said that reassessment was on basis of change of opinion, and thus re-opening was justified.

Section 54 B : It was held that deduction under section 54B is available to all the Assessee. The word "assessee" is not qualified by any class of Assessee and HUF is eligible for deduction under section 54 B.

*K. S. Jain & Sons (HUF) v. ITO (2008) 173 Taxman 114 (Mag.)(Delhi)(Trib.)*

#### **S. 147 : Reassessment – Scope of fresh assessment – Entire return**

The whole proceedings would start afresh where the assessment is reopened and the previous assessment is set aside. (A.Y. 2000-01)

*Sella Synergy (I) Ltd. v. ACIT (2008) 117 TTJ 110 / (2009) 117 ITD 264 / 10 DTR 374 (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Scope – Only for favour of the revenue**

Re-opening is only to favour the revenue and cannot be used to favour the assessee.

*Sella Synergy (I) Ltd. v. ACIT (2008) 117 TTJ 110 / (2009) 117 ITD 264 / 10 DTR 374 (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Limitation [S. 153]**

Proviso to section 147 does not have effect of curtailing limitation period for passing order under section 147 as prescribed under section 153(2). (A.Y. 1996-97)

*Gujarat Credit Corpn. Ltd. v. ACIT (2008) 113 ITD 133 / 116 TTJ 619 / 9 DTR 121 (SB)(Ahd.)(Trib.)*

#### **S. 147 : Reassessment – Re-opening – Reasons to believe not a reason to suspect**

Jurisdiction to re-open the assessment is totally based on the information which should be relevant and material. Reason to suspect is not reason to believe. In the instant case when Return was filed in wrong jurisdiction and when there was no material information which could lead to believe that income had escaped assessment, re-opening can not be upheld.

*Paint Trade Linkers v. ACIT (2008) 171 Taxman 31 (Mag.)(Luck.)(Trib.)*

#### **S. 147 : Reassessment – DVO's report – construction cost**

Re-opening of Assessment in Assessee's case, who was engaged in construction activities, relying on the report of DVO, determining cost of construction at a higher value than that declared by assessee, without pointing out any defect or discrepancy nor pointing out any material defect in the books of account, was held to be invalid. (A.Y. 1983-84)

*Vrindaban Real Estate (P) Ltd. v. ACIT (2008) 173 Taxman 21 (Mag.) / 7 DTR 326 / (2009) 219 CTR 605 / 311 ITR 258 (Agra)(Trib.)*

#### **S. 147 : Reassessment – Re-opening – Search [S. 132]**

The material gathered during search under section 132, can not be a reason to re-open the concluded assessment.

*R. Rajeswari (Smt.) v. ITO (2008) 172 Taxman 40 (Mag.)(Chennai)(Trib.)*

**S. 147 : Reassessment – Reopening – Beyond four Years – Full and true disclosure**

Re-opening of Assessment completed after 4 years from end of relevant Assessment Year was bad in law and invalid, as it was not established that failure or omission was on part of assessee to disclose fully and truly all material facts.

It was further held that it was merely change of opinion on same set of facts available at time of original assessment.

Non specification of amount of income escaped, nor disclosure of reasons to reassess is material and would vitiate the notice issued under section 148.

*ACIT v. Bhagat Industrial Corp. Ltd. (2008) 173 Taxman 55 (Mag.)(Amritsar)(Trib.)*

**S. 147 : Reassessment – Change of opinion [S. 143(1)(A)]**

After assessments completed under section 143(1)(a), Assessing Officer having found that interest to partners allowed in the assessment of firm was not being offered for taxation by partners, he had reason to believe that income chargeable to tax has escaped assessment and reopening was valid. (A.Ys. 1998-99 to 2002-03)

*ACIT v. Vijay Kumar Patni (2007) 107 TTJ 20 / 108 ITD 409 (Nagpur)(Trib.)*

**S. 147 : Reassessment – Change of opinion [S. 195(2), 148]**

Assessee having filed no return, there is no question of change of opinion while issuing notice under section 148 and any opinion expressed under section 195(2) is not conclusive and cannot be construed as opinion expressed in regular assessments. (A.Ys. 1995-96 to 2000-01)

*Sheraton International Inc. v. Dy. DIT (2007) 106 TTJ 620 / 107 ITD 120 / 10 SOT 542 (Delhi)(Trib.)*

**S. 147 : Reassessment – Disclosure – Failure – Expiry of four years [S. 148]**

There being no failure on the part of assessee to disclose material facts, notice under section 148 issued after expiry of four years from the end of the relevant assessment year was barred by limitation. (A.Ys. 1995-96 to 1997-98)

*Ahmednagar Forgings Ltd. v. ACIT (2007) 107 TTJ 129 (Pune)(Trib.)*

**S. 147 : Reassessment – Information – Valuation Report**

Valuation Officer's report does not constitute information under section 147(b) for purposes of reopening of assessment. (A.Y. 1997-98)

*ITO v. L. N. Memorial & Hospital Research Center (2007) 107 TTJ 291 (Jodh.)(Trib.)*

**S. 147 : Reassessment – Reason to believe – DVO's report**

DVO's report showing fair market value of assessee's plot far in excess of sale consideration constituted reason to believe that there was a gift which has escaped assessment and, therefore, reopening of assessment was valid. (A.Y. 1998-99)

*Yash Pal Bajaj v. GTO (2007) 107 TTJ 294 (Trib.)*

**S. 147 : Reassessment – Reason recorded (148) – Basis thereof – Direction by CIT(A) – Fresh notice**

In the absence of anything to show that the reasons recorded by the Assessing Officer are not based on facts of the case and are mere pretence, initiation of proceedings under section 147 was valid. CIT (A) having deleted certain additions made by Assessing Officer he could not issue any direction to the Assessing Officer to assess the same by issuing a fresh notice under section 148. (A.Y. 2000-01)

*Jindal Steel & Power Ltd. v. ACIT (2007) 106 TTJ 943 / (2006) 13 SOT 233 (TM)(Delhi)(Trib.)*

**S. 147 : Reassessment – Scope – Benefit of revenue**

Proceedings under section 147 are for the benefit of Revenue and not for the assessee. Assessing Officer should have dropped the proceedings instead of framing the assessment at loss and therefore, the 4T rightly cancelled the reassessment order by invoking section 263. (A.Y. 1991-92)

*Videocon Leasing & Ind. Fin. Ltd. v. Jt. CIT (2007) 106 TTJ 524 / (2006) 103 ITD 309 (Ahd.)(Trib.)*

**S. 147 : Reassessment – No notice under section 143(2) – Validity [S. 143(2), (148)]**

Where notice under section 143(2) is not served on the assessee at all, amended proviso to section 148 is not applicable and reassessment proceedings are not valid. (A.Y. 1997-98)

*Dy. CIT v. Indian Syntans Investments (P) Ltd. (2007) 106 TTJ 388 / 107 ITD 457 (Chennai)(Trib.)*

**S. 147 : Reassessment – Jurisdiction – Challenged in rectification**

A reassessment without jurisdiction though not appealed against can be challenged in appeal against rectification of such reassessment. (A.Y. 1994-95)

*Indian Farmers Fertiliser Co-operative Ltd. v. Jt. CIT (2007) 107 TTJ 98 / 105 ITD 33 (Delhi)(Trib.)*

**S. 147 : Reassessment – Same set of facts – Change opinion**

Re-opening of Assessment made on appraisal of same set of facts available at the time of original assessment, would amount to mere change of opinion, and same is impermissible even under provisions of amended section 147.

*ACIT v. Yamuna Syndicate Ltd. (2007) 162 Taxman 167 (Mag.)(Chd.)(Trib.)*

**S. 147 : Reassessment – Intimation – Audit objection – Notice under section 143(2) not issued – Valid**

An assessment made under section 143(1)(a) could be validly reopened on the basis of factual error pointed out by internal audit party.

Even though time for issue of notice under section 143(2) had not expired, same could not operate as a bar for reopening of assessment under section 147. (A.Y. 1999-2000)

*Sudhir Engineering Co. v. ACIT (2007) 108 TTJ 933 (Delhi)(Trib.)*

**S. 147 : Reassessment – Income escaping assessment – Copy of reasons**

As the Assessing Officer failed to supply the copies of reasons recorded for reassessment, assessment order framed under section 147/143(3) were set aside, with a direction to frame assessment order de novo after supplying copies of reasons and after seeking objections against same.

*Dr. S. R. Giri v. I.T.O. (2007) 160 Taxman 77 (Mag.) / 106 TTJ 504 (Jodh.)(Trib.)*

**S. 147 : Reassessment – Rectification pending – Validity**

Initiation of reassessment proceedings during pendency of rectification proceeding on the same issue is invalid. (A.Y. 1997-98)

*Jethalal K. Morbia v. ACIT (2007) 109 TTJ 1 (Mum.)(Trib.)*

**S. 147 : Reassessment – Reason to believe – Change of opinion**

Assessee having disclosed all the primary facts which have been discussed in the original assessment, reopening the assessment was merely a change of opinion and, therefore, the reopening was bad in law.

*Dy. CIT v. Indian Syntans Investments (P) Ltd. (2007) 106 TTJ 388 / 107 ITD 457 (Chennai)(Trib.)*

**S. 147 : Reassessment – Return not filed – No presumption**

Merely because the assessee had not filed its return of income, one cannot infer that the deposit made in the bank account was chargeable to tax and therefore, had escaped assessment.

*Saraf Gramdyog Sansthan v. ITO, (2007) 108 ITD 115 (Agra)(Trib.)*

**S. 147 : Reassessment – Non disclosure of primary facts – Explanation 1**

Explanation 1 to section 147 cannot be applicable to the documents which the assessee is obliged to file along with the return, such documents cannot be considered as produced for purpose of explanation 1 of section 147.

The explanation refers to the books of account or other evidence produced during the course of assessment.

*Otis Elevator Co. (India) Ltd. v. Dy. CIT (2007) 159 Taxman 128 (Mag.)(Mum.)(Trib.)*

**S. 147 : Reassessment – Reopening – Application of mind [S. 148]**

Reopening of assessment based only on the belief of DDIT (Inv) that Capital Gains transaction might be bogus, and notice issued without application of mind by Assessing Officer and without recording of any separate reasons disclosing his satisfaction was quashed, and assessment made in pursuance thereof was annulled.

*Vinita Jain (Mrs.) v. ITO (2007) 158 Taxman 167 (Mag.)(Delhi)(Trib.)*

#### **S. 147 : Reassessment – Seized material – Independent Information**

Seized material cannot be used for purpose of Re-opening the assessment. Reopening has to be based on an independent information available justifying prima facie escapement of Income.

*ITO v. T. Mohan Rao (2007) 158 Taxman 35 (Mag.)(Chennai)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Benami**

The bank account through which draft was received by assessee was benami, which was sufficient to form a belief that income of assessee had escaped assessment and therefore, initiation of reassessment proceedings was valid. (A.Y. 1998-99)

*Badri Vishal Aggarwal v. Dy. CIT (2006) 105 TTJ 418 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Change of opinion – After four years**

Reopening of assessment after 4 years from end of relevant Assessment year; i.e., beyond the time laid down, as well as on ground of merely change of an opinion can not be sustained. (A.Ys. 1994-95 and 1995-96)

*C. P. Kukreja & Associates (P) Ltd. v. Dy. CIT (2006) 156 Taxman 184 (Mag.)(Delhi)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Complaint**

Notice u/s 148 issued on basis of tax evasion complaint cannot be sufficient material for formation of belief that income had escaped assessment. In the instant case as there was no reason to believe, the assumption of jurisdiction under section 147 were not justified, and as initiation of proceedings under section 147 are invalid, the reassessment order is liable to be set aside.

*Dr. Dinesh Kumar Dwivedi v. ITO (2006) 156 Taxman 132 (Mag.)(Luck.)(Trib.)*

#### **S. 147 : Reassessment – Explanation 2 – Book profit**

- (i) Incorrect determination of Investment Allowance to be carried forward to the succeeding years is an escapement of income by virtue of clause (c)(iv) of Explanation 2 to section 147.
- (ii) Validity of reopening does not depend upon quantum of finally assessed income. Therefore, merely because the 'Book Profit' computed under section 115J was still higher, after the reassessment, then the income computed under the normal provisions of the Act will not invalidate the reopening under section 147. (A.Y. 1990-91)

*Jt. CIT v. D. C. Polyester (P.) Ltd., (2006) 102 ITD 394 / 105 TTJ 773 (Mum.)(Trib.)*



### **S. 147 : Reassessment – Loss – Negative figure**

- (i) Income for the purpose of reassessment cannot be a negative figure.
- (ii) Assessing Officer to close the reassessment proceedings on satisfying with the returned income, where the assessee had declared loss, as he cannot determine loss and allow thereby giving assessee a right to claim set-off in subsequent year to detriment of revenue and such act will be contrary to object, scope and ambit of section 147. (A.Y. 1991-92)

*Videocon Leasing & Ind. Fin. Ltd. v. Jt. CIT, (2006) 103 ITD 309 (2007) 106 TTJ 524 (Ahd.)(Trib.)*

### **S. 147 : Reassessment – New Material – Enhancing**

In absence of any new material discovered or found by Assessing Officer, the re-opening of assessment and re-framing the assessment, by enhancing the addition made was held as not sustainable.

*Jt. CIT v. Akhil K. Dalal (2006) 156 Taxman 82 (Mag.)(Mum.)(Trib.)*

### **S. 147 : Reassessment – Intimation – Reopening permissible**

Where assessment is made under section 143(1)(a) reopening of assessment is permissible.

*Late A. Y. Prabhakar (Indl.) v. ACIT (2006) 105 TTJ 391 / 12 SOT 1 (Chennai)(Trib.)*

### **S. 147 : Reassessment – VDIS – Finality**

No material being available with the Department to show that income declared under VDIS, 1997, pertained to A. Y. 1998-99, re-opening of assessment for that year was invalid, so also consequent addition under section 69A.

*Inder Kumar Bachani (HUF) v. ITO (2006) 101 TTJ 450 / 99 ITD 621 (Luck.)(Trib.)*

### **S. 147 : Reassessment – Change of opinion [S. 143(1)(a)]**

Processing of return under section 143(1)(a) does not amount to expression of opinion on an issue and hence, there was no question of change of opinion. (A.Ys. 1994-95 to 2001-02)

*Cascade Enterprises v. ACIT (2006) 101 TTJ 277 (Delhi)(Trib.)*

### **S. 147 : Reassessment – Change of opinion [S. 80HHB]**

Assessing Officer was justified in reopening the assessment for withdrawing deduction under section 80HHB wrongly allowed to assessee on the basis of objection made by Revenue Audit and it could not be said to be a case of change of opinion. (A.Y. 1998-99)

*Som Datt Builders (P) Ltd. v. Dy. CIT (2006) 100 TTJ 485 / 98 ITD 78 (Kol.)(Trib.)*

### **S. 147 : Reassessment – Fresh claim – Benefit of Revenue**

Assessee cannot raise a fresh claim during the reassessment proceedings since section 147 is meant for the benefit of the revenue and not the assessee. (A.Ys. 1986-87 and 1987-88)

*M/s Jaipur Bottling Co. v. ACIT (2006) 101 TTJ 192 (Jp.)(Trib.)*

**S. 147 : Reassessment – Prevailing law – Change of opinion – Subsequent SC decision**

When an assessee follows the law as per the interpretation given at a particular point of time by a competent court then inability to predict a future event cannot constitute as failure so as to put the case within the ken of the proviso to section 147. (A.Y. 1990-91)

*A.V. Thomas Exports Ltd. v. Dy. CIT (2006) 99 ITD 745 / 283 ITR 13 (AT)(Chennai)(Trib.)*

**S. 147 : Reassessment – Notice [S. 143(2)]**

Assessment framed under section 147/148 can not be upheld, when no notice under section 143(2) was issued during the reassessment proceedings.

*St. Fidelis School v. ACIT (2006) 152 Taxman 40 (Mag.)(Agra)(Trib.)*

**S. 147 : Reassessment – Reason to believe – Not for covering failure to issue notice [S. 143(2)]**

Assessing Officer having failed to verify the return by making an enquiry by issuing notice under section 143(2) within the time allowed, he could not take recourse to the provisions of s. 147 for that purpose — Assessing Officer having no information on the basis of which he could entertain a "reason to believe", CIT(A) was justified in annulling the reassessment. (A.Y. 1998-99)

*ACIT v. Malli Chand Baid (2006) 99 TTJ 1016 (Nagpur)(Trib.)*

**S. 147 : Reassessment – Reason to believe – TDS Certificate**

In view of TDS certificate available on record which indicated that interest accrued to the assessee in the financial year relevant to the assessment year under consideration and not in the subsequent year as shown by assessee. Assessing Officer was justified in forming opinion on that basis that interest income had escaped assessment in the relevant year. (A.Y. 1999-2000)

*Ganga Prashad Parshotam Lal v. ITO (2006) 99 TTJ 201 (Amritsar)(Trib.)*

**S. 147 : Reassessment – Scope of reassessment [S. 292B]**

Allowing excess deduction towards remuneration to partners over and above the agreed amount is sufficient to bring the case within Expln. 2 to s. 147 — Once reassessment proceedings are initiated, Assessing Officer need not confine himself only to items in respect of which reassessment is initiated but can also assess other items which have escaped assessment — Technical defect in notice under section 148 is saved by s. 292B. (A.Y. 1998-99)

*Rama Boiled Modern Rice Mill v. ITO (2006) 99 TTJ 607 / (2005) 97 ITD 379 (Hyd.)(Trib.)*

**S. 147 : Reassessment – Validity – Fishing and roving inquiry**

Reopening on the basis of letter of Enforcement Director containing details of deposit allegedly made by assessee and her husband was valid — However, additions made by the Assessing Officer in consequence of general inquiry or roving and fishing inquiry cannot be sustained and have to be deleted. (A.Y. 1994-95)

*Poonam Rani Singh v. Dy. CIT (2006) 99 TTJ 1167 / (2005) 97 ITD 390 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Information**

General information contained in a letter of Assistant Commissioner, Investigation Circle, is not relevant material for initiation of reassessment proceedings under section 147(a). (A.Ys. 1982-83 and 1983-84)

*Durga Prashad Goyal v. ITO (2006) 98 ITD 227 / 101 TTJ 1 (SB)(Amritsar)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Information**

In the absence of any finding that the assessee, power of attorney holder, was in fact the owner of the land in question and had constructed the flats thereon as alleged, there was no material with the Assessing Officer for formation of belief that the assessee had made unexplained investment in the property and, therefore, reopening of assessment was illegal. (A.Ys. 1991-92, 1992-93, 1994-95, 1995-96)

*Rajesh Mehta v. ITO (2006) 100 TTJ 453 (Amritsar)(Trib.)*

#### **S. 147 : Reassessment – Change of opinion – Valuation report**

Reassessment initiated after addition was deleted by Tribunal by holding that the matter falls in the domain of regular assessment. Contention that in the absence of direct evidence the valuation report of the Department valuer cannot lead to assessment of any undisclosed income is not sustainable and therefore the provisions of section 150(1) more attracted. Thus, the reopening was justified. (A.Y. 1997-98)

*Hanemp Properties (P) Ltd. v. ACIT (2006) 102 TTJ 1083 / 101 ITD 19 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Limitation – Validity [S. 149]**

Agent of the assessee; a non-resident company, who has been filing returns in respect of income of the assessee was an agent of non-resident under the deeming fiction of s. 163 and, therefore, notice for reopening the assessment of the assessee could not be validly served upon it beyond two years from the end of the relevant assessment year in view of section 149(3). (A.Y. 1996-97)

*Dy. Director of IT v. R. Lines Ltd. (2006) 103 TTJ 849 / 106 ITD 211 / 10 SOT 512 (Mum.)(Trib.)*

#### **S. 147 : Reassessment of 143(1)(a) order – Validity – Expiry of period for issuing 143(2) notice**

Reopening of assessment made under section 143(1)(a) by issuing notice under section 148 after expiry of period for issuing notice under section 143(2) was invalid.

*Rawatsar K. V. Sahakari Samiti Ltd. v. ITO (2006) 102 TTJ 682 (Jodh.)(Trib.)*

#### **S. 147 : Reassessment – Unexplained investments [S. 69]**

Reopening of assessment solely relying upon the report of DVO, when the assessment was completed under section 143(3) held to be invalid.

*ACIT Circle 1, Bhatinda v. D. D. Cotton (P) Ltd. (2006) 155 Taxman 219 (Mag.)(Amritsar)(Trib.)*

#### **S. 147 : Reassessment – Audit Objection [S. 148]**

When complete disclosure of accounting system as regards accounting of interest due from subsidiary Co. on receipt basis was made in notes on accounts filed with Return, which was available while framing original assessment, Assessing Officer cannot re-open the assessment subsequently merely on basis of audit objection without bringing any new material to support that finding. (A.Y. 1987-88)

*Lucky Valley Investments & Holdings Ltd. v. Dy. CIT (2006) 154 Taxman 116 (Mag.) / (2005) 98 TTJ 491 (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Validity [S. 14A]**

Sec. 14A prohibits deduction of expenditure incurred only in relation to exempt income and it cannot be applied to the provisions of Chapter VI-A where deductions are to be allowed in computing the total income. (A.Ys. 1996-97, 1997-98 & 1999-2000)

*ACIT v. Tamil Nadu Silk Producers Federation Ltd. (2006) 103 TTJ 716 / 105 ITD 623 (Chennai)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Change of opinion – Examination in assessment**

Assessing Officer having not applied his mind to the correctness of the profits reopening of assessment to modify the deduction under section 80HHC cannot be said to be based on change of opinion and, therefore, reopening was valid.

*Jt. CIT v. S. C. Chemicals (2006) 100 TTJ 1072 / 99 ITD 41 (Ahd.)(Trib.)*

#### **S. 147 : Reassessment – Change of opinion – Full & true disclosure**

In original account deduction under section 80HHC on the basis of Form 10 ACC was allowed despite of loss but subsequently, the assessing officer came to know that, in fact, there was a loss as trading goods and it was neither a case that the assessee had disclosed these facts nor clarified nor consented that any loss as such is to be ignored for the purpose of deduction of 80HHC. Therefore, as the facts it was held that the reopening was justified. (A.Y. 1994-95)

*ACIT v. Champdany Industries Ltd. (2005) 95 ITD 169/ 97 TTJ 41 (Kol.)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Addition on account of escaped assessment – Condition**

Under section 147 addition on account of 'escaped income' is made only on account of the income on which reason to believe was based and no addition on account of any other income chargeable to tax can be made. (A.Ys. 1993-94 to 1997-98)

*Janki Prasad Garden Enclave (P.) Ltd. v. ACIT (2005) 92 ITD 47 / 93 TTJ 123 (Luck.)(Trib.)*

**S. 147 : Reassessment – Second reassessment notice – Possibility**

Where Assessing Officer issued a second reassessment notice though assessment reopened earlier was pending, as earlier assessment was not pending in respect of item of income covered by second reassessment notice, such pendency of earlier assessment was no bar to issue of second reassessment notice. (A.Y. 1988-89)

*ACIT v. Sachdeva & Sons (2005) 97 ITD 425 / 97 TTJ 1101 (Amritsar)(Trib.)*

**S. 147 : Reassessment – Only for the benefit of revenue – No new relief**

Reopening an assessment could only be for benefit of revenue and all items of disallowance or relief claimed by the assessee which are not relevant to the items which are the subject-matter of the enquiry during reassessment, cannot be considered at the stage of reassessment. (A.Ys. 1996-97 and 1997-98)

*Gyarsi Lai Gupta & Sons v. ITO (2005) 94 ITD 329 / 95 TTJ 386 (Jp.)(Trib.)*

**S. 147 : Reassessment – Report of DVO – Validity**

Where reference to DVO is invalid being outside scope of power under section 131(l)(d) initiation of proceedings under section 148 solely on basis of report of DVO on such invalid reference would also be invalid. (A.Y. 1990-91 to 1996-97 & 1998-99)

*ACIT v. Baldev Plaza (2005) 93 ITD 579 / 94 TTJ 135 (All.)(Trib.)*

**S. 147 : Reassessment – Reason to believe – Valuation officer [S. 131]**

Where during course of regular assessment proceedings, Assessing Officer made a reference to Valuation Officer under section 131 to estimate cost of construction of building owned by assessee, reopening of assessment on basis of Valuation Officer's report was illegal as reference under section 131 made to DVO was itself illegal and amounted to mere change of opinion. (A.Ys. 1993-94 to 1997-98)

*Janki Prasad Garden Enclave (P.) Ltd. v. ACIT (2005) 92 ITD 47 / 93 TTJ 123 (Luck.)(Trib.)*

**S. 147 : Reassessment – Information – Reason to believe – Valuation Officer [S. 131]**

Report of Valuation Officer relating to investment in construction cannot be material for formation of belief that income chargeable to tax has escaped assessment; where no addition was made on basis of valuation report, which was basis for formation of belief that income chargeable to tax had escaped assessment, no addition could be made in reassessment proceedings by disallowing other items of expenditure.

*Dubey Lands & Finance Ltd. v. ITO (2005) 149 Taxman 11 (Mag.)(Luck.)(Trib.)*

**S. 147 : Reassessment – Valuation report after assessment [S. 131]**

Valuation report obtained after the assessment cannot be a basis for issue of notice under section 148. (A.Y. 1987-88)

*ITO v. Chothmal Idanji (2005) 94 TTJ 766 (Jodh.)(Trib.)*

**S. 147 : Reassessment – Reference to valuation officer [S. 142A]**

Section 142A does not empower Assessing Officer to refer matter to DVO for gathering information for reopening of assessment; making reassessment and reopening of assessment are two different things; even after insertion of section 142A Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment. (A.Ys. 1997-98 to 1999-2000)

*Umiya Co-operative Housing Society Ltd. v. ITO (2005) 94 TTJ 392 (Ahd.)(Trib.)*

**S. 147 : Reassessment – Intimation [S. 143(1)(a)]**

Processing of a return under section 143(1)(a) cannot be equated with an assessment and it cannot be said that Assessing Officer, who had processed return under section 143(1)(a), had formed an opinion and as no opinion is formed, it cannot be said that there is a change in opinion if Assessing Officer subsequently reopens assessment completed under section 143(1)(a) based on information given by audit. (A.Y. 1999-2000)

*N. Sandeep Reddy v. ACIT (2005) 95 ITD 33 / 96 TTJ 315 (Hyd.)(Trib.)*

**S. 147 : Reassessment – Intimation [S. 143(1)(a)]**

There is no merit in plea that Assessing Officer having issued an intimation under section 143(1)(a) and having not issued a notice under section 143(2), within period of 12 months specified in the proviso to section 143(2), there resulted an order of assessment accepting return of income filed by assessee and such assessment cannot be reopened by Assessing Officer on a mere change of opinion and without forming requisite belief about escapement of income. (A.Y. 1994-95 to 1997-98)

*NQA Quality Systems Registrar Ltd. v. Dy. CIT (2005) 2 SOT 249 / 92 TTJ 946 (Delhi)(Trib.)*

**S. 147 : Reassessment – Intimation [S. 143(1)(a)]**

Once return filed by assessee is processed under section 143(1)(a), it cannot be said that assessment proceedings were pending so as to bar issue of reassessment notice. (A.Ys. 2000-01 & 2001-02)

*Jyoti Pat Ram v. ITO (2005) 92 ITD 423 / 96 TTJ 947 / 92 TTJ 199 (Luck)(Trib.)*

**S. 147 : Reassessment – Intimation – Notice time under section 143(2) not expired**

**[S. 143(1)(a)]**

When a valid return is already on record, action under section 148, without first framing assessment under section 143(3), cannot be held a valid action; where Assessing Officer had issued intimation under section 143(1)(a) and thereafter instead of issuing notice under section 143(2) for which time-limit had not expired, he issued notice under section 148 on basis of same information received by him, such notice was invalid. (A.Y. 1993-94)



*ACIT v. Subhash Chand Goyal (2005) 4 SOT 405 (Agra)(Trib.)*

**S. 147 : Reassessment – Intimation – Notice under section 143(2) not expired [S. 143(1)(a)]**

Non-issue of notice within 12 months under section 143(2) does not bar Assessing Officer from reopening case under section 148. (A.Y. 1999-2000)

*N. Sandeep Reddy v. ACIT (2005) 95 ITD 33 / 96 TTJ 315 (Hyd.)(Trib.)*

**S. 147 : Reassessment – Rectification of mistake [S. 154]**

Assessing Officer has no jurisdiction to initiate proceedings under section 147 for taxing same income, which Assessing Officer had made subject-matter of proceedings under section 154, because an assessee cannot be subject to two types of proceedings at one time. (A.Y. 1996-97)

*Anil Gupta v. Assessing Officer (2005) 96 TTJ 798 (Delhi)(Trib.)*

**S. 147 : Reassessment – Rectification of mistake [S. 154]**

It is not necessary for Assessing Officer to exhaust other remedies available under Act before taking recourse under section 147 and, therefore, merely because proceedings under section 154 were dropped, reopening of assessment could not be said to be bad in law. Section 147 also empowers the assessing officer to assess such income which has escaped and which comes to his notice in the course of proceeding under section 147. (A.Y. 1998-99)

*Rama Boiled Modern Rice Mill v. ITO (2005) 97 ITD 379 / 99 TTJ 607 (Hyd.)(Trib.)*

**S. 147 : Reassessment – Rectification of mistake [S. 154]**

Mere fact that Assessing Officer had issued notice under section 154 and had not passed any order under said section is not sufficient for excluding jurisdiction of Assessing Officer under section 147.

*Dy. CIT v. Khushi Ram Behari Lal (2005) 146 Taxman 7 (Mag.)(Delhi)(Trib.)*

**S. 147 : Reassessment – Further Disclosure – Deduction – Netting [S. 80-I, 80 HH]**

Where assessment was reopened on ground that deduction under sections 80-I and 80HH was not properly computed as assessee also had interest income which was not considered at time of original assessment, since interest paid by assessee was more than interest earned and after netting, assessee had no positive income by way of interest, it could not be said that any income liable to tax had escaped assessment so as to justify reassessment as there was no failure on the part of assessee to disclose full and true material facts for assessment. (A.Ys. 1995-96 to 1997-98)

*Chem Crown Exports Ltd. v. ITO (2005) 93 TTJ 710 (Cal.)(Trib.)*

**S. 147 : Reassessment – Exemption – Nexus between reasons recorded and income escaped [S. 10(23C)]**

Where assessee-stock-exchange had been allowed exemption under section 11 in original assessment, and subsequently assessment was reopened on basis of applicability of section 10(23C), issue relating to section 10(23C) could not be considered as a reason for coming to conclusion about escapement of income as assessee did not claim exemption under that section; there was absence of nexus between reasons recorded and belief about escapement of income; and, therefore reassessment was invalid. (A.Ys. 1996-97 to 2001-02)

*Bhubaneswar Stock Exchange v. ACIT (2005) 96 ITD 480 / 95 TTJ 1033 (Cuttack)(Trib.)*

#### **S. 147 : Reassessment – General – Non-Disclosure of primary Facts**

Where Assessing Officer reopened assessment on presumption that donation shown as corpus donations were received by assessee without any specific direction and on ground that donations received prior to date of registration under section 12A were taxable, as both reasons assigned by Assessing Officer before invoking provisions of section 147 were in total defiance of legal provisions in that regard, reassessment was not justified. (A.Y. 1998-99)

*Bigabass Maheshwari Sewa Samiti v. ITO (2005) 96 TTJ 385 (Jodh.)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Charge of opinion**

Where full facts and information regarding claim of depreciation at higher-rate on commercial vehicles were furnished by assessee and Assessing Officer had consistently taken a view that higher depreciation was allowable, he could not reopen assessments subsequently under section 147 on mere change of opinion that higher depreciation was not available.

*Pressman Advertising & Marketing Ltd. v. ACIT (2004) 90 TTJ 483 / (2005) 142 Taxman 17 (Mag.) (Kol.)(Trib.)*

#### **S. 147 : Reassessment – General – Non-Disclosure of primary facts**

Where Assessing Officer reopened assessment for assessment year 1999-2000 in view of Boards Circular No. 739, dated 25-3-1996 and made addition on account of salary paid by assessee to its partner as per clauses of partnership deed, since Board's Circular was dated 25-3-1996, it could not be said that while passing assessment under section 143(1) for relevant assessment year, Assessing Officer was not aware of said circular and moreover since salary paid to one partner who was working partner in firm was allowable under section 40(b), reopening of assessment was bad in law.

*National Cloth House v. ITO (2005) 146 Taxman 1 (Mag.)(Delhi)(Trib.)*

#### **S. 147 : Reassessment – Disclosure of primary facts – Validity – Presumption**

Where Assessing Officer reopened assessment under section 147(l)(a) on basis of information from investigation wing that some drafts were being prepared by one 'V' who was not associated with firm during assessment year but was a partner in firm during subsequent assessment years, which were not reflected in any of books of

account by 'V' presumption that income of assessee-firm 'S' had escaped assessment was not justified. (A.Ys. 1985-86 to 1987-88)

*ITO v. Varun Steel Industries (2005) 1 SOT 464 / 91 TTJ 382 (Chd.)(Trib.)*

#### **S. 147 : Reassessment – Validity – Reason to believe**

Where reassessment proceedings were initiated on basis of report of DDIT, who, in turn, had summoned assessee on basis of some Tax Evasion Petition (TEP) but neither any addition had been made regarding such undisclosed income nor allegations regarding tax evasion had been substantiated, report of DDIT could not form a reason to believe that income of assessee had escaped assessment. (A.Ys. 1994-95 to 1998-99)

*Devendra Gupta (Dr.) v. ITO (2005) 97 ITD 581 / 97 ITD 581 / 97 TTJ 561 (Jodh.)(Trib.)*

#### **S. 147 : Reassessment – Validity – Reason to believe – Fishing & roving inquiry**

On basis of letter of Enforcement Directorate to Joint Secretary of Foreign Tax Division, which contained specific details relating to deposits allegedly made by assessee and her husband, Assessing Officer was justified in having reasons to believe that income of assessee chargeable to tax had escaped assessment. (A.Y. 1994-95)

*Poonam Rani Singh v. Dy. CIT (2005) 97 ITD 390 / 99 TTJ 1167 (Delhi)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Change of opinion**

Where assessee had received gifts from donors residing in U.K. and department had no material to doubt capacity of donor or address of donor, reopening of assessment merely on ground that donor was not borne on tax records or electoral records of U.K. or did not own property in U.K., was not justified. (A.Ys. 1995-96 & 1996-97)

*Ramesh K. Shah v. Dy. CIT (2005) 93 TTJ 556 / 147 Taxman 34 (Mag.)(Bang.)(Trib.)*

#### **S. 147 : Reassessment – General – Non-Disclosure of primary facts**

On basis of statement of assessee's partner recorded by FERA authorities regarding under-invoicing of exports, Assessing Officer was justified in reopening assessment. (A.Y. 1988-89)

*ACIT v. Sachdeva & Sons (2005) 97 ITD 425 / 97 TTJ 1101 (Amritsar)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Change of opinion**

Where in original assessment Assessing Officer allowed assessee's claim under sections 80HHC and 80-IA in respect of short-term capital gains and interest on refund and, subsequently, Assessing Officer issued notice under section 148 to disallow excess relief, reassessment notice issued by Assessing Officer under section 148 was not on basis of change of opinion but on basis of excessive relief allowed to assessee and, therefore, was valid.

*Dy. CIT v. Khushi Ram Behari Lai (2005) 146 Taxman 7 (Mag.)(Delhi)(Trib.)*

### **S. 147 : Reassessment – Validity – Change of opinion**

Where Assessing Officer had allowed deduction under section 80HHC on basis of audit report without discussing provisions of law or Schedule XII to Act, it could be said that he had not applied his mind and, therefore, subsequent reopening of assessment to withdraw that deduction did not fall under category of change of opinion so as to be invalid. (A.Y. 1991-92)

*Golcha Minerals (P.) Ltd. v. Dy. CIT (2005) 3 SOT 476 (Jp.)(Trib.)*

### **S. 147 : Reassessment – Reason to believe – Condition precedent – Order of Commissioner under section 263 – Withdrawal of relief**

Reopening of assessment to withdraw relief under section 80-IA merely by putting reliance on Commissioner's order under section 263 and without mentioning that there was escapement of income, was not justified. (A.Ys. 1995-96, 1997-98)

*Barmatics v. Dy. CIT (2005) 2 SOT 845 (Bang.)(Trib.)*

### **S. 147 : Reassessment – Opinion of Commissioner under section 263**

Reassessment proceedings initiated on basis of opinion held by Commissioner under section 263 could not be said to be justified. (A.Ys. 1992-93 & 1993-94)

*Sutlej Industries Ltd. v. ACIT (2005) 148 Taxman 28 / (2004) 88 TTJ 1084 (Mag.)(Delhi)(Trib.)*

### **S. 147 : Reassessment – Seized documents considered in original assessment – Change of opinion**

Where seized document had been already considered by Assessing Officer while making original assessment under section 143(3), reopening of assessment to make addition on basis of seized document was a mere change of opinion which was not permissible even as per amended provisions of section 147 or section 148.

*Dy. CIT v. Hindustan Iron Store (2005) 145 Taxman 41 (Mag.)(Delhi)(Trib.)*

### **S. 147 : Reassessment – Bad debts – Disclosure of facts**

Where assessment completed under section 143(3) was reopened on ground that bad debts claimed in profit and loss account were wrong on account of absence of any outstanding debt in balance sheet of immediately preceding year, since Assessing Officer, at time of original assessment proceedings was aware of such 'bad debts', it could be said that Assessing Officer did not have reason to link escapement of income from assessment with non-disclosure by assessee of material facts at time of original assessment and, therefore, proceeding initiated after expiry of four years from end of relevant assessment year was barred by limitation.

*Space Capital Services Ltd. v. ITO (2005) 148 Taxman 44 (Mag.)(Delhi)(Trib.)*

### **S. 147 : Reassessment – Auditors report – Disclosed in the original assessment**

Where auditor's report was duly considered by Assessing Officer in original assessment and disallowances were also made on basis thereof, reopening of assessment on noticing from auditor's report that assessee had changed method of valuation of closing stock of sugar, was not justified. (A.Y. 1996-97)

*M. P. State Civil Supplies Corpn. Ltd. v. ACIT (2005) 1 SOT 208 / 89 TTJ 786 (Indore)(Trib.)*

#### **S. 147 : Reassessment – Fair market value of property – Non-Disclosure of Primary Facts**

Where original assessment was made under section 143(3), reassessment made to adopt different fair market value of property sold by assessee which was sought to be justified on basis of report of Sub-Registrar as to fair market of value received after issuing notice under section 148, was not justified. (A.Y. 1995-96)

*B. Subhadra (Smt.) v. ITO (2005) 92 ITD 285 / 92 TTJ 405 (Hyd.)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Disclosure on the basis of VDIS – Jurisdiction**

Where assessment was reopened for assessment year 1998-99 on basis of assessee's declaration under VDIS but in fact with regard to said assessment year, no declaration of undisclosed income was made under VDIS and, moreover, while return for such assessment year was filed at Ahmedabad, it was Assessing Officer at Surat who assumed jurisdiction, reopening of assessment was null and void. (A.Y. 1998-99)

*Kamini Hanskamal Grover (Smt.) v. ITO (2005) 95 TTJ 363 (Ahd.)(Trib.)*

#### **S. 147 : Reassessment – Reason to believe – Satisfaction**

Validity of notice issued under section 147 has to be judged on basis of materials available on record at time of initiation of proceedings and not with reference to materials or events becoming available after initiation; there is, therefore, no merit in contention that reassessment proceedings cease to be valid as soon as Assessing Officer finds that income which he wanted to tax through notice under section 147/148 was not taxable.

*Simit Gems v. ITO (2004) 4 SOT 955 (Mum.)(Trib.)*

#### **S. 147 : Reassessment – Household expenses – Change of opinion**

Concluded issues cannot be reopened under section 147.

In the instant case, it was held that as household withdrawals shown were accepted, no addition can be made in reassessment on account of low withdrawals. (A.Y. 1992-93)

*Dy. CIT v. Ranjit Kaur (Smt.) (2003) 81 TTJ 269 / 25 SOT 523 (Chd.)(Trib.)*

#### **S. 147 : Reassessment – Review – Not possible**

Re-opening of Assessment under the garb of "reason to believe", to review its own decision or of predecessor on same set of facts, is not permissible even under amended S. 147.

*Dy. CIT v. Smithkline Beecham Consumer Brands Ltd. (2003) 126 Taxman 104 (Mag.)(Chd.)(Trib.)*

*ITO v. Ratnesh Enterprises (P.) Ltd. (2003) 87 TTJ 618 (Jp.)(Trib.)*

**S. 147 : Reassessment – Validity – Reopening of block assessment – Applicability**

S. 147 cannot be applied in the context of block assessment. (A.Ys. 1986-87 to 1996-97)

*Western India Bakers (P.) Ltd. v. Dy. CIT (2003) 87 ITD 607 / 84 TTJ 223 (Mum.)(Trib.)*

**S. 147 : Reassessment – Reasons – Information**

Held, re-opening is not justified when reasons recorded are not based on any information but on presumption and assumptions. (A.Ys. 1993-94 to 1995-96 & 1997-98)

*All India Children Care & Educational Development Society v. Jt. CIT (2003) 87 ITD 209 / 81 TTJ 598 (All.)(Trib.)*

**S. 147 : Reassessment – Reason to believe – Non-existent**

If the grounds on which the reassessment notice is issued are not found to exist, Assessing Officer does not get jurisdiction to make reassessment.

*ACIT v. Anil Kumar (2003) SOT 294 (Amritsar)(Trib.)*

**S. 147 : Reassessment – Full and true disclosure – Information – Records**

If the information was already on record before the date of completion of assessment, issue of notice under section 148 was held to be invalid. (A.Y. 1985-86)

*Jai Marwar Co. (P) Ltd. v. ACIT (2003) 79 TTJ 178 / 131 Taxman 191 (Mag.)(Jodh.)(Trib.)*

**S. 147 : Reassessment – Four years – Disclosure of facts**

Re-opening of assessment beyond period of four years, where there was no non-disclosure of primary facts by the assessee was not justified.

*Ramlal Agrawal v. Dy. CIT (2003) 78 TTJ 123 / 129 Taxman 28 (Mag.)(Nagpur)(Trib.)*

**S. 147 : Reassessment – Reason to believe – DVO's report – Review**

Re-opening of Assessment only on basis of valuation report of DVO, when Income & Expenses shown were accepted, was held to be unjustified. (A.Ys. 1991-92 to 1993-94)

*ITO v. Vinita Baid (2003) – 79 TTJ (Kol.) 986 / 132 Taxman 177 (Mag.)(Trib.)*

*Jay Bee Properties (P.) Ltd. v. ACIT (2003) 84 ITD 698 / (2004) 91 TTJ 474 (Kol.)(Trib.)*

**S. 147 : Reassessment – Reason to believe – DVO's Report – Opinion**



Re-opening merely on basis of DVO's report is not sustainable, as said report is only an opinion of valuer, and neither it amounts to information nor reason to believe that assessee had failed to disclose his Income fully and truly. (A.Ys. 1994-95 to 1995-96) *ACIT v. Smt. Saranga Aggarwal* (2003) SOT 307 (Mum.)(Trib.)

Also refer :

*Leatherage v. ITO* (2003) 131 Taxman 189 / 86 ITD 482 / 78 TTJ 937 (Mag.)(Luck.)(Trib.)

### **S. 147 : Income escaping assessment – After four years – On the basis of Supreme Court's decision**

Reopening after expiry of four years from end of the relevant assessment years on the basis of a decision of the Supreme Court and not on account of failure on the part of the assessee to disclose fully and truly all material facts was held to be bad in law as there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. (A.Ys. 1982-83 to 1984-85)

*DY. CIT v. Nedungadi Bank Ltd.* (2003) 85 ITD 1 / (2004) 89 TTJ 711 (Cochin)(Trib.)

### **S. 147 : Reassessment – Information – Audit objection**

Pointing out the failure to apply the law and the interpretation of the provision, by an audit party to Assessing Officer is clearly barred, and would not constitute Information. (A.Ys. 1986-87 to 1996-97)

*Western India bakers(P) Ltd. v. Dy. CIT* (2003) 87 ITD 607 / (2004) 84 TTJ 223 (Mum.)(Trib.)

## **Section 148 : Issue of notice where income has escaped assessment**

### **S. 148 : Reassessment – Notice – Transfer pricing – Jurisdiction – Writ petition [S. 92C, Art. 226 of the Constitution]**

Hon'ble Court observed that as fundamental facts have to established ,the assessee ought not to have filed the writ petition. Accordingly the assessee relegated to proceedings pending before Authorities. (Judgment of High Court (Coca Coala India Inc. v. ACIT (2009) 309 ITR 194 / 221 CTR 225 / 177 Taxman 103 / 17 DTR 66 (P&H). (A. Ys. 1998-99 to 2006-07)

*Coca Cola India Inc. v. Addl. CIT* (2011) 336 ITR 1 / 236 CTR 561 / 48 DTR 249 (SC)

### **S. 148 : Reassessment – Notice for reassessment – Reason to believe – Wrong claim for deduction [S. 80I]**

Assessing Officer issued notice under section 148 for A.Y. 1997-98 on discovery that the assessee had started production of engines in the period relevant to the A.Y. 1989-90 and consequently it was not entitled to benefit of section 80I during the A.Y. 1997-98. Writ petition filed by the assessee dismissed giving liberty to the assessee to raise all objections, including the one relating to jurisdiction of the Assessing Officer to issue notice, before the proper forum. Order of the Assessing Officer, however, reversed by the CIT(A) against which order, appeal is pending before the

Tribunal. The Tribunal was directed to also examine the validity of the impugned notice under section 148 in the appeal pending before it. (A.Y. 1997-98)

*Swaraj Engines Ltd. v. ACIT (2010) 38 DTR 1 / 231 CTR 217 (SC)*

**S. 148 : Reassessment – Notice for reassessment – Reasons for issue of Notice – Filing of Return – Procedure to be adopted by the assessee – Speaking Order [S. 143(2)]**

When a notice under section 148 of the Income Tax Act 1961 is issued the proper course of action for the assessee is to file the return and if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file the objections to issuance of notices and the Assessing Officer is bound to dispose of the same by passing a speaking order. (A.Ys. 1992-93 to 1998-99)

*GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 / 173 Taxation 50 / 179 CTR 11 (SC)*

**S. 148 : Reassessment – Notice – Sanction of commissioner – Application of mind [S. 151]**

A material fact which is not in existence right up to the time of assessment cannot possibly be disclosed. Therefore, a fact which comes into existence subsequent to the making of the assessment cannot be a material fact within the purview of section 147. The duty to disclose material facts necessarily postulates existence of a thing or material. If a material is not in existence or if a material is such of which the assessee had no knowledge there would be no duty to disclose such material (CIT v. Tirath Ram Ahuja (HUF)( ) 306 ITR 173 (Delhi) followed);

*Central India Electric Supply Co. Ltd. v. ITO (2011) 333 ITR 237 / 51 DTR 51 (Delhi)(High Court)*

**S. 148 : Reassessment – Validity – Notice – Amendment – Finance Act, 2006 [S. 143(2), 153(2)]**

As per Finance Act, 2006, with retrospective effect from 1st Oct. 1991, all such notices which have been served under sub (2) of section 143, after expiry of 12 months, have been saved. Thus, notices under sub section (2) of section 143, in respect of return furnished during the period commencing from 1st day of October, 1991 and ending on 30th Sept, 2005, have been saved provided such a notice is issued before the expiry of time – limit for making the assessment or reassessment as specified in sub section 2 (of section 153, hence reassessment held to be valid. (A.Ys. 2000-01 to 2002-03)

*Dy. CIT v. Gopal Ramnarayan Kasat (2011) 240 CTR 266 / 54 DTR 228 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice – Old address – Participates in assessment proceedings [S. 149, 292BB]**

When assessee does not raise objection regarding non issue of notice and appears before the Assessing officer and assessing officer gives copy of notice under section 148, Assessee participates in the assessment proceedings. The service of notice even at the old address of the assessee constitutes service of notice with in ambit of section 148. What is contemplated under section 149 is the issue of notice under section 148 and not the service thereof on the assessee and the service of notice under section 148 is only required before assessment, reassessment or recomputation. (A. Y. 1999-2000).

*CIT v. Three Dee Exim (P) Ltd. (2011) 55 DTR 147 (Delhi)(High Court)*

**S. 148 : Reassessment – Notice – Assessee Officer entitled to drop notice issued under section 154 & issue notice under section 148 [S. 154]**

Though the principle of constructive res judicata was made applicable by the Madras High Court in EID Parry 216 ITR 489 (Mad.) that the Assessing Officer having initiated rectification proceedings under section 154 should stick to the same only and cannot drop that and proceed under section 147 is not acceptable. But the fact that the Assessing Officer invoked section 154 and dropped it does not affect the validity of re-assessment under section 147.

*CIT v. India Sea Foods (2011) 332 ITR 424 / 54 DTR 223 / 242 CTR 550 (Ker.)(High Court)*

**S. 148 : Reassessment – Notice – “issued” in time, date of handing over by Assessing Officer to post office to be seen [S. 148]**

For purposes of section 149, the expression “notice shall be issued” means that the notice should go out of the hands of the Assessing Officer. Merely signing the notices on a particular date cannot be equated with “issuance of notice” as contemplated under section 149. The date of issue would be the date on which the same was handed over for service to the proper officer, which in the present case would be the date on which the notices was actually handed over to the post office for the purpose of booking for the purpose of effecting service on the assessee. Till the point of time the envelopes are properly stamped with adequate value of postal stamps, it cannot be stated that the process of issue is complete.

*Kanubhai M. Patel HUF v. Hiren Bhatt (2011) 334 ITR 25 / 237 CTR 544 / 43 DTR 329 (Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Assessment [S. 143(1)]**

Issue of notice under section 148 vis-à-vis notice under section 143(2) – When the original return was processed under section 143(1), the power under section 147 can be invoked without resorting to the provisions of 143(2). (A.Y. 2004-05)

*CIT v. Indra Devi Jindal (Smt.) (2010) 236 CTR 421 / 47 DTR 256 (P&H)(High Court)*  
*Editorial:- Refer - ACIT v. Rajesh Jhaveri Stock Broker P. Ltd. (2007) 291 ITR 500 / 210*

CTR

30 / 161 Taxman 316 (SC)

**S. 148 : Reassessment – Notice for reassessment – Sanction – Approval [S. 151(2)]**

Notice issued without approval of concerned authority is without jurisdiction.

*CIT v. Suman Waman Chaudhary (2010) 321 ITR 495 (Bom.)(High Court)*

*Editorial: - SLP rejected on 12-2-2008 SLP No. 6757 of 2009 (2009) 312 ITR (St) 339*

**S. 148 : Reassessment – Notice for reassessment – Dead Person – Limitation [S. 147]**

Notice issued on the name of dead person held to be illegal. Notice issued to legal representatives beyond period of limitation hence not valid, being beyond time.

*Kesar Devi (Smt.) v. CIT (2010) 321 ITR 344 (Raj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Revenue audit – Change of opinion**

Revenue Audit providing some opinion. No fresh materials brought in by the Assessing Officer. Change of opinion cannot form the basis for reopening of assessment. Proceeding becomes invalid. (A.Y. 2002-03)

*Carlton Overseas (P) Ltd. v. ITO (2010) 229 CTR 439 / (2009) 318 ITR 295 / 29 DTR 262 (Delhi)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Jurisdiction – Rectification – Issue of notice**

Rectification proceedings having been dropped by Assessing Officer after considering assessee's submissions, notice under section 148 could not have been issued on the same grounds. In absence of any fresh or new materials Assessing Officer lacked jurisdiction to issue notice for reassessment. (A.Y. 1999-2000)

*Berger Paints India Ltd. v. ACIT (2010) 40 DTR 258 / TLR 223 Vol. 40 Part 469 / 322 ITR 369 / 232 CTR 338 (Cal.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Time available for issue of Notice**

**[S. 143(2)]**

Notice under section 148 cannot be issued for making reassessment, when time limit is available for issue of notice under section 143(2) for making an assessment under section 143(3). (A.Y. 2000-01)

*CIT v. TCP Ltd. (2010) 44 DTR 31 / 323 ITR 346 / 235 CTR 414 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Service**

Reassessment made without service of a notice under section 148 is vitiated as service of requisite notice on the assessee is a condition precedent to the validity of reassessment; impugned order is set aside and matter remanded to the respondents to proceed after issuing notice under section 148. (A.Y. 1994-95)

*S. Nachiar (Smt.) v. ITO (2010) 48 DTR 61 / 236 CTR 506 / 326 ITR 77 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Change of opinion – Non disposal of assessee's objections on merits**

Assessing Officer having failed to apply his mind to the merits of the objections raised by the assessee that there was no fresh material before the Assessing Officer and that he was seeking to reopen the assessment only on the basis of a mere change of opinion, the impugned order is quashed and set aside and the proceedings are remanded back to the Assessing Officer to pass a fresh order. (A.Y. 2004-05)

*Skol Breweries Ltd. v. Dy. CIT (2010) 236 CTR 555 / 47 DTR 369 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Opportunity to cross examine**

There was reassessment on basis of statements made by certain individuals. Assessee was not given opportunity to cross examine those individuals. It was held that proceedings were valid up to the point of time of recording statements, and the proceedings after recording statements of individuals were set aside. (A.Y. 1996-97)

*CIT v. Sanjeev Kumar Jain (2009) 310 ITR 178 / 20 DTR 225 / 183 Taxman 371 (P&H)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Service of Notice**

Service of notice under section 148 of the Act upon the assessee is the precondition for framing assessment under section 147 of the Act. Thus, where the notice was not served upon the assessee for reassessment for the year 2001-02 the reassessment framed under section 147 of the Act was held to be bad in law. The court further held that the provisions of section 292 BB of the Act cannot be invoked by the revenue in the assessee's case as the provisions were introduced from 1-4-2008 which were not applicable to assessment year under consideration. (A.Y. 2001-02)

*CIT v. Mani Kakar (2009) 18 DTR 145 / 178 Taxman 315 (Delhi)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Primary objections**

Reassessment framed by the assessing officer without disposing of the primary objection raised by the assessee to the issue of reassessment notice issued by him was liable to be quashed. (A.Y. 2001-02)

*MGM Exports v. Dy. CIT (2009) 23 DTR 356 / 323 ITR 331 (Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Validity**

In the absence of new material brought in by the Assessing Officer, recourse to reassessment proceeding becomes invalid for it being a clear case of change of opinion – The Assessee had claimed deduction under section 80-O which was allowed by the Assessing Officer after examining the entire particulars. As Assessee has not suppressed any material, the re-opening is bad-in-law. (A.Ys. 1994-95, 1995-96)

*CIT v. Chakiat Agencies (P) Ltd. (2009) 224 CTR 286 / 314 ITR 200 / 24 DTR 226 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Change of opinion  
Explanation 1**

Where the assessment order does not contain any discussion on a particular issue, the same may be rendered without application of mind, and in that case, there is no question of change of opinion, in such cases mere production of books of account is also not sufficient as per section 147, Explanation 1 and therefore, reopening would be valid. (A.Y. 2000-01)

*Ema India Ltd. v. ACIT (2009) 30 DTR 82 / 226 CTR 659 (All.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Change of opinion [S. 143(1)]**

When original return was accepted under section 143(1) in a summary manner, it cannot be said that the Assessing Authority has formed any opinion relating to assessment. Therefore, there is no infirmity in the reassessment proceeding. (A.Ys. 2000-01 to 2002-03)

*Desh Raj Udyog v. ITO (2009) 227 CTR 636 / 318 ITR 6 / 188 Taxman 73 / 32 DTR 182 (All.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Limitation – If there is no failure on the part of assessee – Assessment cannot be reopened after four years**

It was clear that there was no fault of the assessee. Even if it were deemed to be escaped assessment within the meaning of Explanation 2(c)(ii) of section 147, in view of the undisputed fact that there was no fault of the assessee, the delay could not be condoned. Limitation was applicable under the proviso appended to section 147. Limitation of four years had already expired. The reassessments were barred by time. The application of section 147 is subjected to the proviso as the proviso is qualified with the words "provided that". Therefore, by virtue of the proviso, the whole application of section 147 is dependent on the failure on the part of the assessee for the escaped assessment. It was not available where the fault was of the Assessing Officer and that could be corrected under section 154 where also the limitation of four years is provided for its application. Therefore, even the correction, if not termed as reassessment, was also barred by time. (A.Ys. 1991-92 to 1995-96)

*CIT and Another v. Saipem Spa (2008) 300 ITR 133 / 214 CTR 138 / 1 DTR 21 (Uttarakhand)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – When original assessment was available and assessment was completed under section 143(3) – Reassessment is not valid**

There was no failure on the part of the assessee to disclose voluntarily and truly all material facts and the issue of scrap was generated during the manufacturing process was before the Assessing Officer. The Tribunal had accepted the manner in which the scrap generated was disposed of and the Tribunal had accepted the material of accounts when the scrap was finally sold. Stock register of the scrap generated was



not maintained. But this information was available with the Assessing Officer when the assessment was made under section 143(3) of the Act. There was no reason warranting the reopening of the concluded assessment. (A.Ys. 1977-78, 1978-79)

*Niba India and Another v. Smt. Arti Handa, ACIT and Other* (2008) 300 ITR 283 / 215 CTR

121 / 2 DTR 224 (Bom.)(High Court)

**S. 148 : Reassessment – Notice for reassessment – Retractment – Not valid**

Statement of third party that loan to him from assessee was not genuine. There was retraction of statement and subsequent death of third party. It was held that notice based on such statement was not valid. (A.Ys. 1974-75 to 1981-82)

*Indian Express Newspapers (Bombay) P. Ltd. and Another v. UOI* (2008) 300 ITR 351 / 214 CTR 429 / 2 DTR 89 (Bom.)(High Court)

**S. 148 : Reassessment – Notice for reassessment – Service – Condition proceeding**

Where the assessee was not served with the notice under section 147 and 148 of the I.T. Act 1961, the proceedings for the A. Y. 1996-97 were void. (A.Y. 1996-97)

*CIT v. Harish J Punjabi* (2008) 297 ITR 424 / 166 Taxman 245 (Delhi)(High Court)

**S. 148 : Reassessment – Notice for reassessment – Change of opinion – Different interpretation**

Issue of notice on varied interpretation of same provisions by the later Assessing Officer in the subsequent years assessments or relying on the decision of Tribunal amounts to mere change of opinion and not "reason to believe" in order to justify the re-opening. (A.Y. 2001-02)

*Seimens Information Systems Ltd. v. ACIT* (2008) 214 CTR 16 / 295 ITR 333 / 168 Taxman 209 (Bom.)(High Court)

**S. 148 : Reassessment – Notice for reassessment – Limitation – Notice**

When notice under section 148 was issued and the return was filed in response thereto, notice under section 143(1) issued beyond 12 months from the date of filing of return but before expiry of time limit for making assessment, the reassessment or re-computation under section 153(2) shall not be invalid – matter remanded for reconsideration.

*CIT v. C. Malathy (Mrs.)* (2008) 214 CTR 173 / (2007) 294 ITR 532 (Mad.)(High Court)

**S. 148 : Reassessment – Notice for reassessment – Change of opinion – Sufficiency of reasons**

The reasons recorded by the Assessing Officer for reopening the assessment showed that neither was the explanation given by the assessee erroneous nor was there any other material/information on the basis of which a prima facie opinion was formed to the effect that by not increasing the book profit with the amount of the provision for

deferred taxation, income chargeable to tax had escaped assessment. Thus, the reopening of the assessment was not based on any material but merely on change of opinion without any basis. The notice under section 148 was not valid and was liable to be quashed. (A.Y. 2003-04)

*M. J. Pharmaceuticals Ltd. v. CIT (2008) 297 ITR 119 / 216 CTR 130 / 167 Taxman 136 / 2 DTR 25 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Kar Vivad Samadhan Scheme, 1998 – Effect**

Once amount is paid under KVS Scheme and certificate obtained, assessment can not be reopened. (A.Y. 1985-86)

*A. Ramamurthy v. ITO (2008) 305 ITR 260 / 222 CTR 414 / 6 DTR 104 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Assessment not finalised – Valid**

When the valid assessment is pending, the Assessing Officer cannot issue notice under section 148 for the purposes of reopening under section 147. (A.Y. 1997-98)

*CIT v. K. M. Pachayappan (2008) 304 ITR 264 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Block period – Validity**

When assessment has been framed under section 158BA in relation to undisclosed income for the Block Period, no. notice under section 148 could be issued for reopening of such assessment. Notice under section 148 quashed.

*Cargo Clearing Agency (Gujarat) v. Jt. CIT (2008) 218 CTR 541 / 307 ITR 1 / 12 DTR 50 (Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording reasons – Mandatory**

Notice issued by the Assessing Officer without recording reasons, which is mandatory requirement of section 148 of the Act, the entire proceeding and consequential orders passed by the Assessing Officer are void ab initio.

*Kavee Enterprises (P) Ltd. v. CIT (2008) 10 DTR 106 / 218 CTR 176 / 301 ITR 156 / 170 Taxman 264 (Jharkhand)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording reasons – Mandatory**

Assessing Officer is bound to record reasons for reopening the assessment before issuing any notice under section 148 of the Act. This is a mandatory requirement, and the Assessing Officer is not permitted to record the reasons between the date of issue of notice and service. (A.Y. 1993-94)

*Rajoo Engineers Ltd. v. Dy. CIT (2008) 10 DTR 173 / 218 CTR 53 (Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – DVO's report – Void**

The report framed by DVO cannot constitute a reason to believe that the income has escaped assessment. Hence, reassessment proceeding initiated on the basis of DVO's Report is invalid and void ab initio. (A.Ys. 1995-96 to 1998-99)

*CIT v. Smt. Meena Devi Mansinghva* (2007) 212 CTR 23 / (2008) 303 ITR 351 (Raj.)(High Court)

#### **S. 148 : Reassessment – Notice for reassessment – Service of notice – Affixation**

There was no valid service of notice nor was it tendered to the assessee nor the same was refused by them. No effort was made by the Assessing Officer to locate the assessee before affixation and the notice sent by registered post was not accompanied by due acknowledgement. Held, reassessment was bad-in-law.

*CIT v. Hotline International Pvt. Ltd.* (2007) 212 CTR 207 (Delhi)(High Court)

*ACIT v. Official Liquidator of Mineral Oil & Industries Ltd.* (2007) 210 CTR 445 / 290 ITR 643 / 163 Taxman 1 (Guj.)(High Court)

#### **S. 148 : Reassessment – Notice for reassessment – Revision – Pendency**

If notice under section 148 is issued when revision proceeding is pending, the Assessing Officer is free to complete the reassessment proceeding. (A.Y. 2001-02)

*Inductotherm (India) Pvt. Ltd. v. ACIT* (2007) 212 CTR 195 / 212 CTR 195 / 294 ITR 341 (Guj.)(High Court)

#### **S. 148 : Reassessment – Notice for reassessment – Issue of notice – Second notice**

The Assessee filed returns in response to notice under Section 148(1). The Assessment proceedings were initiated by issuing a notice Under Section 143(2). Without passing an order, another notice Under Section 148(1) was issued. The Hon'ble Court held that pending the assessment proceedings no notice under Section 148(1) can be issued. It is not permissible to invoke provisions of Section 147 to enlarge the time available for framing the assessment. (A.Ys. 2002-03 to 2003-04)

*KLM Royal Dutch Airlines v. ADIT* (2007) 159 Taxman 191 / 208 CTR 33 / 292 ITR 49 (Delhi)(High Court)

#### **S. 148 : Reassessment – Notice for reassessment – Reasons recorded to issue notice – Objections**

The Assessee files objections against the issue of notice under section 148(1). The Assessing Officer has to dispose of such objections by passing a speaking order before proceedings with assessment.

*Smt. Kamlesh Sharma v. B. L. Meena, ITO* (2007) 159 Taxman 330 / 205 CTR 569 / 287 ITR 337 (Delhi)(High Court)

#### **S. 148 : Reassessment – Notice for reassessment – Change of opinion – True and full disclosure**

Issue of notice under section 148 after four years – No failure on the part by the Assessee to make full and true disclosure of all materials necessary for assessment. Reopening of assessment beyond four years on the basis of subsequent decision of jurisdictional High Court was not justified. (A.Y. 1991-92)

*Sesa Goa Ltd. v. Jt. CIT & Ors (2007) 213 CTR 579 / 294 ITR 101 / 168 Taxman 281 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Objection by assessee – Disposal**

Validity – Reassessment made without considering the objections filed by the assessee challenging the validity of notice and the absence of valid reasons, held to be not valid. (A.Y. 2000-01)

*K.S. Suresh v. Dy. CIT (2006) 200 CTR 392 / 279 ITR 61 / 150 Taxman 269 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Pendency of assessment – Validity**

Notice under section 148 – Pendency of assessment proceedings – Notice under section 148 could not be issued during the pendency of appeal filed by the Department before ITAT against the order of CIT(A) allowing relief to Assessee. (A.Y. 1999-2000)

*Metro Auto Corporation v. ITO (2006) 206 CTR 581 / 286 ITR 618 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Validity – Name of assessee**

Where name of assessee was not correctly mentioned in notice issued under section 148, such notice was vague and not valid and, therefore, consequent reassessment proceedings were null and void. (A.Ys. 1968-69 to 1976-77)

*Sri Nath Suresh Chand Ram Naresh v. CIT (2006) 280 ITR 396 / (2005) 145 Taxman 186 / 196 CTR 416 (All.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Condition precedent**

Requirement to record reasons before issuing notice is mandatory and where it was clear from contradictions in note-sheet recording reasons, that reasons were not recorded before issuing notice but were ante-dated, reassessment in pursuance of such notice was without jurisdiction

*CIT v. Shiv Ratan Soni (2005) 146 Taxman 392 / 279 ITR 261 (Raj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Condition precedent**

Notice issued prior to recording of reasons, is invalid. (A.Y. 1981-82)

*CIT v. K.G. Madan, Prop. Madan Estate Sales Corpn. (2005) 275 ITR 294 / 143 Taxman 336 / 193 CTR 550 (P&H)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Format**

No specific form for recording reasons under section 148 has been prescribed under Act or Rules made thereunder and if an assessee voluntarily filed a return, for which omission had been detected in assessment proceedings in subsequent assessment year and taking note of revised return, a notice under section 148 was issued, reasons would be sufficient. (A.Y. 1981-82)

*Bharat Rice Mill v. CIT (2005) 278 ITR 599 / 148 Taxman 145 / 200 CTR 481 (All.)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Objections of assessee – Need for disposal**

If assessee objects to reasons for reopening assessment, any order passed by Assessing Officer without considering assessee's objection would have to be quashed. (A.Y. 2000-01)

*K.S. Suresh v. Dy. CIT (2005) 279 ITR 61 / 200 CTR 392 / 150 Taxman 269 (Mad.)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Validity of notice – AOP**

Reassessment order was proposed to be made and had been made in status of AOP consisting of two persons while, admittedly, notice was issued to AOP consisting of three persons, such notice could not be made basis for making reassessment of AOP consisting of two persons. (A.Y. 1986-87)

*CIT v. Ashok Kumar Bharti & Vijay Kumar Goel (2005) 149 Taxman 247 / 198 CTR 260 / 282 Taxman 496 (All.)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Service – Branch**

Notice was issued to assessee-branch and not head office and it was found that in partnership deed assessee itself stated two names of itself and that assessee was running business in two names, notice could not be faulted on ground that it should have been issued in name of head office. (A.Y. 1971-72)

*Hari Prasad Gopi Krishna v. CIT (2005) 278 ITR 592 / 145 Taxman 266 / 197 CTR 676 (All.)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Service – Legal heirs**

Reassessment notice was served on four sons of deceased assessee and one of whom filed return without raising any objection and pursued matter till passing of assessment order, non-issuance of notice to some of legal heirs of deceased assessee was merely an irregularity and same did not affect validity of reassessment orders. (A.Ys. 1979-80 to 1986-87)

*CIT v. Hukam Singh (2005) 276 ITR 347 / 198 CTR 92 (P&H)(High Court)*

### **S. 148 : Reassessment – Notice for reassessment – Service – Husband**

No personal notice was served on assessee under section 148, notice was served on husband of assessee and assessee had participated in proceeding before Assessing Officer, reassessment could not be said to be invalid. (A.Y. 1998-99)

*CIT v. Kanti Devi Gupta (Smt) (2005) 274 ITR 526 / 156 Taxman 77 (MP)(High Court)*

#### **S. 148 : Reassessment – Notice for reassessment – Service – HUF**

Where it was found that reassessment notice was issued to assessee in his individual capacity and income sought to be reassessed was that of HUF of which assessee was a Karta, notice was not a valid notice. (A.Ys. 1965-66 to 1972-73)

*CIT v. Ram Das Deokinandan Prasad (HUF) (2005) 148 Taxman 203 / 277 ITR 197 / 193 CTR 453 (All.)(High Court)*

#### **S. 148 : Reassessment – Notice for reassessment – Service – Objections**

Once assessee has been informed of reasons for reopening and is also enabled to file its objections and concerned officer on examination of same has passed an order and has indicated that matter requires further examination and action in accordance with statutory provisions, law should be allowed to run its course; in such a case order passed dealing with objections of assessee to reopening of assessment cannot form an independent proceeding which can again be tested before High Court (by filing writ) or elsewhere. (A.Ys. 1996-97 to 2001-02)

*Karnataka Golf Association v. Dy. DIT (2005) 275 ITR 297 / 145 Taxman 334 / 195 CTR 143 (Karn.)(High Court)*

#### **S. 148 : Reassessment – Notice of reassessment – Writ alternate – Remedy**

By filing writ, assessee cannot be allowed to short-circuit the proceeding prescribed by law. (A.Y. 1996-97)

*ACIT v Banswara Syntex Ltd. (2005) 272 ITR 642 / (2004) 191 CTR 330 / 144 Taxman 292 (Raj.)(High Court)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Nexus with information**

In case the validity of notices is challenged, firstly one has to consider whether reasons recorded have any relevant nexus with formation belief by the Assessing Officer for taking action under section 147. (A.Y. 1996-97)

*Banswara Syntex Ltd. v. ACIT (2005) 272 ITR 154 / (2004) 138 Taxman 275 / 188 CTR 457 (Raj.)(High Court)*

#### **S. 148 : Reassessment – Notice of reassessment – Objection of assessee – Disposal**

When an assessee raises an objection for issuance of notice the same has to be disposed of first, by Assessing Officer before proceedings with assessment. (A.Ys. 1996-97 to 2001-02)



*Tolins Rubbers v. ACIT (2004) 135 Taxman 454 / 270 ITR 280 / 186 CTR 614 (Ker.)(High Court)*

**S. 148 : Reassessment – Notice of reassessment – Writ Jurisdiction – Article 226 – Sufficiency of reasons**

High Court, under article 226 is entitled to go in to relevance of reasons for reopening assessment as also to scrutinize as to whether there was reasonable cause. (A.Ys. 1993-94, 1994-95)

*Indra Prastha Chemicals (P) Ltd. v. CIT (2004) 271 ITR 113 / 142 Taxman 205 / 191 CTR 125 (All.)(High Court)*

**S. 148 : Reassessment – Notice of reassessment – Writ – Sustainable**

The decision of the Apex Court in *GKN Driveshafts (India) Ltd. (2003) 259 ITR 19 (SC)*, does not lay down any proposition of law that no circumstances, the writ petition against issuance of notices under section 148 can be entertained. (A.Y. 1994-95)

*Grindwell Norton Ltd v. Jagdish Prasad Jangid, ACIT (2004) 138 Taxman 33 / 267 ITR 763 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice of reassessment – Abuse of power – Writ possible**

When exercise of powers by authority under section 148 ex facie appears to be without jurisdiction, writ can be entertained. (A.Ys. 1998-99 to 2000-01)

*Ajanta Pharma Ltd. v. ACIT (2004) 135 Taxman 246 / 267 ITR 200 / 186 CTR 521 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Objection – Disposal**

Effect of Supreme Court's decision in *GKN Driveshafts (India) v. ITO (2003) 259 ITR 19*, is that, first assessee has to lodge preliminary objection to notice before Assessing Officer, who is bound to decide it and if order on preliminary objection is still against assessee, can file writ petition challenging it. (A.Y. 1996-97)

*Garden Finance Ltd. v. ACIT (2004) 137 Taxman 49 / 268 ITR 48 / 188 CTR 316 (FB)(Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Objection – Disposal**

Objections of assessee to notice should be disposed of before passing assessment order pursuant to notice.

*Delhi Tourism and Transport development Corpn. Ltd. v. ACIT (2004) 141 Taxman 361 (Delhi)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Writ Remedy**

Writ against show-cause notice is not maintainable. (A.Ys. 1998-99 to 2000-01)

*Pushpa Devi (Smt) v. ITO (2004) 141 Taxman 437 / 195 CTR 344 (Raj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Writ Remedy – Supreme Court decision**

Effect of decision in GKN Driveshafts (India) Ltd.'s case. (A.Ys. 1993-94 to 1994-95)  
*Nestle India Ltd. v. Dy. CIT (2004) 140 Taxman 627 / 189 CTR 70 (Delhi)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Communication**

The assumption of jurisdiction under section 147 depends upon the existence of the reasons followed by communication thereof to the assessee and if the notice is challenged, the assessing Officer can not proceed with the assessment under section 147 unless reasons are communicated. (A.Y. 1999-2000)

*Berger Paints India Ltd. v. ACIT (2004) 139 Taxman 200 / 266 ITR 462 / 188 CTR 150 (Cal.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Affidavit – Oral submission**

Reasons recorded by Assessing Officer can not be supplemented by filing affidavit or making oral submission. (A.Y. 1996-97)

*Hindustan Lever Ltd. v. R.B. Wadkar ACIT (2004) 137 Taxman 479 / 268 ITR 332 / 190 CTR 166 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Subsequent reasons – Additional affidavit not relevant**

While judging the validity of notice, only reasons recorded in notice are required to be considered and not any subsequent reasons given in additional affidavit. (A.Y. 1996-97)

*Garden Finance Ltd. v. ACIT (2004) 137 Taxman 49 / 268 ITR 48 / 188 CTR 316 (FB)(Guj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Issue and Service – Limitation [S. 148]**

The only requirement for taking action of issuance of notice under section 148, and it is not necessary that the said notice is also served within the period of limitation period. (A.Ys. 1995-96 to 1996-97)

*Dharam Pal Singh Rao v. ITO (2004) 271 ITR 223 / 191 CTR 158 (All.)(High Court)*

**S. 148 : Reassessment – Notice of reassessment – Communication of reasons – Objection**

Where assessee seeks reasons for issuing notice, the Assessing Officer is bound to furnish reasons within a reasonable time enabling the assessee to file his objections, if any.

(A.Y. 1993-94)

*Fisher-Xomox Sanmar Ltd. v. ACIT (2004) 271 ITR 393 / (2003) 130 Taxman 247 / 184 CTR 185 (Mad.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Communication of reasons – Need to furnish**

Assessee can seek reasons for issuing notice and Assessing Officer is bound to furnish reasons within a reasonable time. (A.Y. 1999-2000)

*Gehna v. UOI (2004) 267 ITR 782 / (2003) 132 Taxman 592 / 184 CTR 446 / 267 ITR 782 (Raj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Communication of reasons – Need to furnish**

Assessee is first required to file return of income pursuant to notice issued under section 148, and subsequently, on that basis, it can seek reasons for issuing such a notice. (A.Y. 1997-98)

*Caprihans India Ltd. v Tarun Seem Dy. CIT (2004) 266 ITR 566 / (2003) 132 Taxman 123 / 185 CTR 157 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – To HUF**

Notice under section 148 to HUF to assess capital gains arising on alleged sale of the HUF property was not sustainable in law when on date of sale of property HUF was not in existence. (A.Y. 1976-77)

*CIT v. Vishwas D. Ranade (2004) 266 ITR 713 / (2003) 127 Taxman 218 (Bom.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Validity – Agent – Non-Resident principal**

Where notice had been issued on agent during pendency of return submitted by principal non-resident, such notice was invalid. (A.Y. 1998-99)

*CESC Ltd. v Dy. CIT (No. 2) (2003) 263 ITR 402 / 183 CTR 124 / 131 Taxman 751 (Cal.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Writ remedy**

Order under section 148 cannot be interfered with in exercise of court's power under article 226 in face of alternative effective remedies available to petitioner. (A.Ys. 1996-97 to 2001-02)

*Tolin Rubbers (P.) Ltd. v. ACIT (2003) 264 ITR 439 / 184 CTR 241 / 130 Taxman 546 (Ker.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Writ remedy**

Writ against notice would not lie merely on ground that assessee apprehended that the Assessing Officer was likely to make the assessment without dealing with the objections raised.

*Kanti Prasad Garg v. Addl. CIT (2003) 133 Taxman 55 / 183 CTR 242 (P&H)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Writ remedy**

Where writ against show-cause notice under section 148 was dismissed on ground of laches on part of petitioner as well as the ground of availability of alternative remedy. *Ram Niwas Choudhary v. UOI (2004) 269 ITR 449 / (2003) 132 Taxman 594 / 185 CTR 549 (Raj.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Time limit [S. 149]**

The period at the time of reassessment has to be looked into and if by time of reassessment entire assessment is not barred as per the provisions, then the period of limitation at the time of reassessment will apply. (A.Ys. 1986-87 to 1988-89) *ITO v. Smt. Nilofer Hameed (2003) 262 ITR 281 / 184 CTR 247 / 133 Taxman 722 (Ker.)(High Court)*

**S. 148 : Reassessment – Notice for reassessment – Signature of official**

Where it was wrongly assumed that certain investments were not disclosed and document on basis of which notice was issued did not bear signature of official, notice under section 148 was not valid. (A.Ys. 1984-85, 1985-86) *Khem Singh Sankhla v. Union of India (2003) 133 Taxman 767 / 181 CTR 380 / 266 ITR 485 (Raj.)(High Court)*

**S. 148 : Reassessment – Non-supply of 'Reasons for Reopening' within the limitation period time – Reopening void**

Where the notice has been issued within the said period of six years but the reasons have not been furnished within that period is hit by the bar of limitation because the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. A notice under section 148 without the communication of the reasons therefore is meaningless inasmuch as the Assessing Officer is bound to furnish the reasons within a reasonable time. The expression 'within a reasonable period of time' as used in GKN Driveshafts 259 ITR 19 (SC) cannot be stretched to such an extent that it extends even beyond the six years stipulated in section 149. (A.Y. 2001-02)

*Balwant Rai Wadhwa v. ITO ITA No. 4806/Del./2010 dated 14-1-2011 (Delhi)(Trib.)*

Source :

[www.itatonline.org](http://www.itatonline.org)

**S. 148 : Reassessment – Service of notice – Second notice – Validity of assessment – Limitation from first notice**

It was held that first notice sent by speed post as permitted by section 282 is presumed to have been duly served upon the assessee and was valid. As the first section 148 notice was valid and reassessment proceedings were pending, the second section 148 notice is not an irregularity but a nullity. (*Ranchhodas Karsandas v. COT*

*(1954) 26 ITR 105 (SC) and CIT v. Jaidev Jain (1997) 227 ITR 302 (Raj.)* followed. Thus, the limitation period reckoned with reference to the first notice. (A. Y. 1945-46) *Sanjay Kumar Garg v. ACIT (2012) 134 ITD 82 / 66 DTR 281 / 144 TTJ 77 (Delhi)(Trib.)*  
*ACIT v. Sanjay Kumar Garg (2012) 134 ITD 82 / 66 DTR 281 / 144 TTJ 77 (Delhi)(Trib.)*

**S. 148 : Reassessment – Service of notice – On Chartered Accountant [S. 282]**

Service of notice under section 148 on a chartered accountant who was not empowered to receive such notice on behalf of the assessee company or any other person who was not authorised to receive was not a valid service of notice on the assessee, more so when it was not shown that the assessee was keeping out of way for the purpose of avoiding service of notice or that there was any other reason that the notice could not be served on the assessee in the ordinary way and therefore, assessment completed pursuant to said notice was bad in law. (A. Y. 1999-2000).

*Harsingar Gutkha (P) Ltd. v. Dy. CIT (2011) 138 TTJ 318 / 129 ITD 315 / 54 DTR 122 (Luck.)(Trib.)*

**S. 148 : Reassessment – Notice – Sanction to issue – Chief Commissioner – After four years [S. 151]**

Original assessment was completed under section 143(3) on 29-1-2001. Subsequently, Assessing Officer who of rank of Assistant Commissioner (ACIT) initiated proceedings under section 147 vide notice dated 24-3-2005 issued under section 148, after obtaining approval from Joint Commissioner (Jt. CIT). As proceedings under section 147 were initiated after 4 years from relevant assessment year, assessee objected to jurisdiction of Assessing Officer in issuing notice under section 148 on ground that Assessing Officer had not obtained sanction of Chief Commissioner (CCIT) or Commissioner (CCIT). In view of *Shashi Kant Garg (Dr.) v. CIT (2006) 285 ITR 158 (All)*, objection raised by assessee was to be up held and consequently, impugned notice was quashed. (A. Y. 1998-99).

*ITO v. Bhavesh Kumar (2011) 131 ITD 1 / 59 DTR 145 / 140 TTJ 257 (TM)(Agra)(Trib.)*

**S. 148 : Reassessment – Notice – Reasons recorded**

When notice under section 148 is issued, Assessing Officer is bound to furnish reasons recorded with in a reasonable time after return has been filed so that assessee could file the objections if any. When so such reasons are furnished to assessee either along with notice under section 148 or at time when hearing are conducted but furnished only before assessment order is passed, such assessment is to be set aside and remanded back for re-adjudication after supplying copy of reasons recorded. (A. Y. 2005-06).

*Kaushalendra Pratap Singh v. ITO (2011) 133 ITD 111 (Kol.)(Trib.)*

### **S. 148 : Reassessment – Notice for reassessment – Validity – Jurisdiction**

The reassessment notice issued to the assessee by the Assessing Officer at Agra who had no jurisdiction over the assessee assessed at Delhi, not being an 'AO' qua the assessee within the meaning of section 2(7A) was void ab initio and was no notice within the meaning of section 148(1). Section 292BB is applicable w.e.f. 1st April 2008 and it does not apply to the year under consideration, i.e. A. Y. 2001-02. Further, section 292BB does not cure the jurisdictional defect in the notice. Reassessment notice being void ab initio, the assessee cannot be said to have acquiesced in any proceeding or enquiry within the meaning of section 292BB and, therefore, this defect is incapable of being cured by recourse to the provisions of section 292BB. (A.Y. 2001-02)

*Income tax Officer v. Naseman Farms (P) Ltd. (2010) 47 DTR 33 / 134 TTJ 472 (Delhi)(Trib.)*

### **S. 148 : Reassessment – Notice for reassessment – Jurisdiction – Without Jurisdiction**

Reassessment completed by an Assessing Officer on the basis of a notice under section 148 issued by another Assessing Officer who had no jurisdiction over the assessee is not valid.

*K. B. Kumar (Dr.) (Mrs.) v. ITO, 'D' Bench, ITA No. 4436/Del./2009, decided on 20-1-2010 (BCAJ 42-A, June 2010 P. 348)(Delhi)(Trib.)*

### **S. 148 : Reassessment – Notice for reassessment – After four years**

Once the assessee has disclosed fully and truly all material facts then notice under section 148 after four years is not valid. (A.Y. 1989-90)

*C. D. Singh v. ITO (2010) 129 TTJ 495 / 34 DTR 94 (Ahd.)(Trib.)*

### **S. 148 : Reassessment – Notice for reassessment – Not furnishing the recorded reasons before passing of the order – Order held to be illegal – Set aside**

When a notice is issued under section 148, first the assessee has to file the return of income and then ask for reasons recorded for issue of such notice. Once assessee requests for supply of reasons recorded, the assessing officer bound to supply the same within reasonable time. On the facts the assessing officer completed the assessment under section 143(3) / 147 without supplying the recorded reasons. As the assessing Officer has not followed the guidelines of the Apex court in GKN Driveshafts (India) Ltd. vs. ITO (2003) 259 ITR 19 (SC), the assessment order said to be invalid and the matter is set aside. (A.Y. 2004-05)

*Bhabesh Chandra Panja v. ITO (2010) 41 SOT 390 / 131 TTJ 663 / 42 DTR 42 (TM)(Kol.)(Trib.)*

### **S. 148 : Reassessment – Notice for reassessment – Mandatory [S. 144]**

Where the Assessing Officer is not satisfied with the return filed by the assessee, assessment cannot be made validly unless notice under section 143(2) is issued. Assessing Officer having tinkered with the return filed by the assessee without issuing



notice under section 143(2), the assessment is invalid and void ab-initio, more so when the Assessing Officer had sufficient time to adhere to the mandatory requirement of service of notice under section 143(2) as well as for completing the assessment after dismissal of the writ petition filed by the assessee.

*Dy. CIT v. Mayawati (Ms.) (2010) 48 DTR 65 / 237 CTR 16 (Delhi)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of Reasons – Jurisdiction**

##### **[S. 292B]**

Reassessment made on the basis of notice under section 148 issued by an ITO who did not have jurisdiction over the assessee and non recording of reason by the Jurisdictional ITO and fresh notice from the latter is not valid. Provision of section 292B cannot be resorted to for curing such a jurisdictional defect. (A.Y. 2001-02)

*ITO v. Rajendra Prasad Gupta (2010) 48 DTR 489 (Jodh.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Notice – Service – Approval**

##### **[Ss. 147, 148, Civil Procedure Code – Order 5 Rule 20]**

The notice was served only by affixture without attempting to serve notice on the assessee and there was not any noting in the record by the Assessing Officer that the assessee had refused to accept the notice through affixture. The Assessing Officer has not served the notice on the assessee in compliance with the provisions of Order 5 rule 20 of the Code of Civil Procedure, 1908, hence reassessment is bad in law. On the facts the notice was issued in March, 2003 and approval was obtained in October 2003. (A.Y. 1996-97)

*Dy. CIT v. K. G. Singhanian (2010) 1 ITR 205 / 126 TTJ 373 / 29 DTR 289 (Amritsar)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment by affixture – Urgency – Conditions**

In the absence of anything to show that there was any urgency to serve the notice under section 148 on the very next day after it was issued or any material on record to show or suggest that any effort was made by the Assessing Officer to serve the notice in the normal course before issuing the directions to serve the same by affixture was not valid service. Section 292BB inserted w.e.f 1st April 2008, has not retrospective operation and therefore, it was no application for A. Y. 2001-02.

*Arun Lal v. ACIT (2009) 30 DTR 178 / 126 TTJ 346 / 124 ITD 85 / 1 ITR 1 (TM)(Agra)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Pendency of assessment proceedings – Second notice**

Where the return was filed in response to notice under section 148 and the assessment is pending, the second notice under section 148 is invalid. (A.Y. 1994-95)

*ITO v. Tarsem Singh (2009) 122 TTJ 861 / 22 DTR 476 (Amritsar)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service [S. 143(2)]**

On the facts and circumstances, the Reassessment was held to be invalid as no Notice under section 143(2) was issued.

*ITO v. R. K. Gupta (2009) 308 ITR 49 (AT)(Delhi)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service [S. 282(1)(a)]**

Report of Inspector who allegedly served the notice under section 148, being undated and the lady on whom the notice was served not having been identified by Inspector, there was no valid service of notice on the assessee as per provisions of section 282 and order 5 Rule 18 CPC, hence, CIT (A) was justified in annulling the assessment. (A.Y. 1996-97)

*ITO v. Bedi Enterprises (2008) 3 DTR 112 / 114 TTJ 706 (Luck.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Reason to believe**

No reopening is permissible merely on the ground that Balance Sheet revealed some NRI gifts and where there was no investigation or any evidence having any live link or nexus with the reason to believe that there was escapement of income. Reopening on such facts is void ab initio and bad-in-law. (A.Y. 1995-96)

*ACIT v. O. P. Chawala (2008) 114 ITD 69 / 306 ITR 328 (AT) / 8 SOT 242 (TM)(Delhi)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service – Participation in proceedings**

Assessing Officer could not have assumed any jurisdiction to complete assessment / reassessment unless legal and valid notice in accordance with the provisions of law was issued and served. Mere participation in the reassessment proceedings cannot be validated the reassessment proceedings. (A.Ys. 1995-96, 1996-97)

*Anil Kumar Goel v. ITO (2008) 115 ITD 245 / 116 TTJ 239 / 7 DTR 416 (Luck.)(Trib.)*

**S. 148 : Reassessment – Intimation – Validity of reassessment [S. 143(1), 148]**

When initial assessment is made under section 143(1) then the notice under section 148 cannot be questioned. (A.Y. 2000-01)

*Sella Synergy (I) Ltd. v. ACIT (2008) 117 TTJ 110 / 10 DTR 374 / (2009) 117 ITD 264 (Chennai)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Suspicion – Inquiring**

Notice under section 148 cannot be issued on the basis of mere suspicion or to make further investigation. (A.Ys. 1995-96 to 2001-02)

*ACIT v. Heera Lal (2007) 106 TTJ 114 (Jp.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Reason to believe – Information from Sales Tax Department – Validity**

On the basis of information from Sales Tax Department, the Assessing Officer examined the books of account and found that the purchases and sales made by the assessee were not verifiable. Therefore, the reasons for reopening of assessment were valid. (A.Ys. 1999-2000)

*Jagdamba Trading Company v. ITO (2007) 107 TTJ 398 (Jodh.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Second notice – Validity**

Unless and until the earlier proceedings commenced on issuance of notice under section 148 were disposed of, subsequent notice under section 148 cannot be issued. (A.Y. 1993-94)

*The National Leather Mfg. Co. v. Dy. CIT, ITA No.2369/M/2003, Bench–G, dt. 16-10-2007, BCAJ P. 271, Vol. 39-E, Part 3, December, 2007. (Mum.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service – Condition**

As no proper service of notice was done, the assessment proceedings conducted consequent thereon was held to be invalid.

*Vijay Kiran Hotels (P) Ltd. v. ITO (2007) 161 Taxman 204 (Mag.)(Chd.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service – Wrong address**

The notice under section 148 having been served on wrong address, and that the notice under section 148 issued was without the approval of Joint Commissioner, as required in accordance with section 151(2), the proceedings held to be bad in law.

*Cals Ltd. v. Dy. CIT (2006) 157 Taxman 193 (Mag.)(Delhi)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Reason to believe – Prima facie belief**

It is only necessary to reach a prima facie conclusion that income chargeable to tax has escaped assessment. At the time of issue of notice the Assessing Officer is not expected to build a fool-proof case before proceeding to issue the notice. (A.Y. 1993-94)

*ITO v. Smt. Gurinder Kaur, (2006) 102 ITD 189 / 105 TTJ 198 (Delhi)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Furnishing reasons – Condition**

Non-furnishing of the reasons for initiation of the proceedings is a valid ground for terminating the proceedings and declaring the reassessment proceedings as illegal. (A.Y. 1995-96)

*Mafatlal Fabrics Pvt. Ltd. v. ITO, Bench 'D', ITA No. 341/Mum/2004, dated 29th May 2006 – BCAJ P. 22, Vol. 39-C, Part 1, October 2006 (Mum.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Second notice – Validity**

Assessment under section 143(3) on the first notice under section 148 having been annulled by the CIT(A), second notice under section 148 on the same grounds was invalid being based on a mere change of opinion.

*R. K. Nagpal v. ACIT (2006) 103 TTJ 554 (Nagpur)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Joint names – Status [S. 292B]**

Notice issued under section 148 in the name of three brothers jointly without describing status is not invalid. Defect, if any, was curable under section 292B.

*ITO v. Govindbhai Mamaiya & Ors. (2006) 102 TTJ 712 / 100 ITD 265 (Rajkot)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Notice without status – Validity**

Return of Income filed in status of AOP which was processed under section 143(1)(a). Assessing Officer issued notice under section 148 but he did not mention the status in said notice. It was held that Assessment Order framed in status of “Registered Firm” without issuing notice under section 148 to registered firm itself was illegal and such assessment order had to be cancelled.

*Puspa International v. ITO (2006) 154 Taxman 107 (Mag.)(Luck.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Pendency of proceedings – Validity**

Assessing Officer having issued a notice under section 148 during the pendency of proceedings pursuant to the earlier notice under section 143(2) but passed the assessment order under section 143(3) without making any reference whatsoever to section 147, it cannot be said to be a reassessment order under section 147 and cannot be held to be void. (A.Y. 1991-92)

*Dy. CIT v. Arjun Dass Kalwani (2006) 102 TTJ 977 / 101 ITD 337 (Jodh.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Service of valid notice – Condition**

Service of valid notice is a pre-requisite condition for initiating proceedings under section 147. Assessment made without effecting valid service of notice under section 148 could not be sustained.

*Sudev Industries Ltd. v. I.T.O. (2006) 154 Taxman 86 (Mag.)(Delhi)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Limitation vis-a-vis second notice**

Second Notice under section 148 served on the assessee within limitation period, as per the amended law giving 35 days time to the file return, was valid and such second notice during pendency of reassessment proceedings in view of first notice, does not invalidate the first notice and reassessment made in pursuance of second notice cannot be held to be without jurisdiction. (A.Ys. 1986-87, 1987-88)

*Jaipur Bottling Co. v. ACIT (2006) 101 TTJ 192 (Jp.)(Trib.)*

**S. 148 : Reassessment – Notice for reassessment – Reopening – Confession of third party**

Reopening is invalid on basis of confession by alleged creditor that he was a name lender to some parties, when the name of the assessee is not appearing in the said list.

*Mogi Printing Works v. ITO (2006) 153 Taxman 9 (Mag.)(Jodh.)(Trib.)*

#### **S. 148 : Reassessment – Reassessment – Assessment pending [S. 143(3)]**

Issuance of notice under section 148 when assessment proceedings under section 143(3) are pending was illegal and invalid and, hence, reassessment proceedings were void ab initio. (A.Y. 2000-01)

*Fateh International v. Dy. CIT, Mumbai ITAT, Bench 'B', ITA No. 1036/M/2005, dated 26th April, 2006 – BCAJ P. 20, Vol. 39-C, Part 1, October 2006 (Mum.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of Reasons – Sufficiency**

Reasons recorded for sake of formality to do so will not satisfy requirement of law; reasons should be exhaustive and should adequately justify re-opening of assessment. (A.Ys. 1993-94 to 1997-98)

*Janki Prasad Garden Enclave (P.) Ltd. v. ACIT (2005) 92 ITD 47 / 93 TTJ 123 (Luck.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of Reasons – Quantification**

It is necessary for Assessing Officer to quantify escaped assessment at stage of recording of reasons in order to know that assessee enjoyed taxable income. (A.Ys. 1996-97 to 1998-99)

*ITO v. Satya Narayan Parwal (2005) 96 ITD 362 / 98 TTJ 432 (Jp.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of Reasons – Communication**

Non-communication of recorded reasons despite assessee's specific request would make reassessment invalid. (A.Y. 1990-91)

*S. Prasad Raju v. Dy. CIT (2005) 96 TTJ 832 (Hyd.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Validity of Notice – Notice affixed – Photo copy**

Mere fact that notice affixed is a photocopy would not render reassessment proceedings void. (A.Y. 1993-94)

*Angoori Devi Jain (Smt.) v. ITO (2005) 1 SOT 413 (Delhi)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Validity of notice – Name of partner**

Where notice issued under section 148 clearly mentioned GIR No. allotted to firm and reflected intention of Assessing Officer to reopen assessment of firm, mere fact that

said notice was issued in name of partners, would not make notice invalid. (A.Y. 1998-99)

*Rama Boiled Modern Rice Mill v. ITO (2005) 97 ITD 379 / 99 TTJ 607 (Hyd.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Validity of notice – Status**

Where assessee filed return in status of AOP and was assessed as such, but reassessment order was passed in status of registered firm, as order of reassessment had been passed in status of registered firm, initiation of proceedings under section 148 had no co-relation with assessment order passed in status of AOP and on that very ground itself, assessment order passed by Assessing Officer suffered from infirmity. (A.Ys. 1997-98 to 1999-2000)

*Pushpa International v. ITO (2005) 96 TTJ 631 (Luck.)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Service of Notice – Condition**

Where notice under section 148 was served purportedly on manager and power of attorney holder of deceased-assessee but it was found that such person was neither a legal representative nor could be said to be manager and attorney holder of the deceased nor he had not been authorised as such by all the legal heirs with respect to estate of the deceased, issuance of notice in his name could not be held to be a valid notice to tax estate of deceased. (A.Ys. 1989-90, 1990-91)

*Mohan Singh v. ITO (2005) 95 TTJ 309 / 148 Taxman 50 (Mag.)(Amritsar)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Service – Participation – Status – Validity**

Mere acceptance, acquiescence and participation in response to notice issued beyond period of statutory limitation cannot remedy the defect, and confer any authority to Assessing Officer. (A.Ys. 1981-82 to 1986-87)

Notice without any mention of Status, would be invalid notice, and assessments made in pursuance of such notice must be quashed.

*Jashua Gootam v. ACIT (2003) 85 ITD 727 / 80 TTJ 658 (Visakha)(Trib.)*

#### **S. 148 : Reassessment – Notice for reassessment – Recording of reasons – Notice in wrong name**

Recording the reason to believe in correct name but issue of notice under section 148 in wrong name results in to illegality in the proceedings under section 148 and therefore, consequential reassessment order is null and void. (A.Ys. 1993-94 to 1995-96 & 1997-98)

*All India Children Care & Educational Development Society v. Jt. CIT (2003) 87 ITD 209 / 81 TTJ 598 (All.)(Trib.)*

#### **Section 149 : Time limit for notice**

#### **S. 149 : Reassessment – Time limit for notice – Income Escaping Assessment**



Proceedings for imposing tax or reopening assessment for assessment years which have attained finality under existing law due to bar of limitation, cannot be revived by amendment of law which has no express provision of retrospective effect. (A.Ys. 1979-80 to 1984-85)

*Varkey Jacob & Co. v. CIT (2005) 275 ITR 146 / 146 Taxman 665 / 196 CTR 391 (Ker.)(High Court)*

#### **S. 149 : Reassessment – Time limit for notice [S. 149]**

Where reason for reopening assessment was that claim of deduction of ` 87,746 /- was disallowable, Assessing Officer was not justified in recording satisfaction that income escaped to the tune of ` 1 lakh merely to overcome limitation in section 149. (A.Y. 1995-96)

*Mohinder Singh Malik v. CCIT (2004) 267 ITR 716 / (2003) 132 Taxman 477 / 183 CTR 237 (P&H)(High Court)*

#### **S. 149 : Reassessment – Time limit for notice – Subject to S. 151(1)&(2)**

There is no merit in contention that in view of section 151, embargo of clause(b) of section 149(1) is subject to section 151(1) and (2). (A.Ys. 1984-85 to 1989-90)

*Simplex Concrete Piles (India) Ltd. v Dy. CIT (2003) 262 ITR 605 / 183 CTR 47 / 134 Taxman 74 (Cal.)(High Court)*

#### **S. 149 : Reassessment – Time limit for notice – Beyond four years [S. 150(2)]**

Section 150(2) could not save the limitation for reassessment when the limitation had already expired on the date of reopening on such facts and circumstances, any notice under section 148 for reopening the assessment beyond four years was barred by limitation. (A.Y. 1976-77)

*Spences Hotels (P.) Ltd. v Dy. CIT (2003) 263 ITR 263 / 130 Taxman 741 / 183 CTR 508 (Karn.)(High Court)*

#### **S. 149 : Reassessment – Time limit for notice – Issuance [S. 148]**

Section 149 only requires issuance of notice under section 148, within limitation period and it can be served on proper person subsequently, i.e. after expiry of limitation period. (A. Y. 1998-99).

*ITO v. Sikandar Lal Jain (2011) 45 SOT 113 (TM)(Agra)(Trib.)*

#### **S. 149 : Reassessment – Time limit for notice – Delayed service**

Reassessment in view of the time barred notice under section 148 can not be sustained merely because the assessee accepted and participated in the reassessment proceedings it can not remedy the defect of not issuing the notice within the period of limitation and that does not confer on the Assessing Officer to assume jurisdiction. (A.Ys. 1981-82 to 1986-87)

*Jashua Gootam v. ACIT (2003) 85 ITD 727 / 80 TTJ 658 (Visakha)(Trib.)*

## **Section 150 : Provision for cases where assessment is in pursuance of an order on appeal, etc.**

### **S. 150 : Assessment – Order on appeal – Reassessment – Appeal effect – Limitation – Finding or Direction [S. 149]**

Assessment having not been reopened to give effect to the order of the CIT(A). According to the Assessing Officer because of giving effect to the order made by the CIT(A), will result in to escapement of income. The Court held that section 150 did not apply. As there was no failure on the part of assessee to disclose fully and truly all material facts, reassessment is clearly time barred. (A. Y. 1988-89).

*Harsiddh Specific Family Trust v. Jt. CIT (2011) 58 DTR 149 (Guj.)(High Court)*

### **S. 150 : Assessment – Order on appeal – Reassessment – Appeal effect – In pursuance of an order or Appeal – Beyond limitation period**

Where assessee admitted before Tribunal that certain income was taxable in a particular year, pursuant to direction of Tribunal, assessment of that income could be made beyond time limit. (A.Y. 1988-89)

*Vijay Johar v. CIT (2004) 140 Taxman 453 / 190 CTR 352 (Raj.)(High Court)*

### **S. 150 : Assessment – Order on appeal – Reassessment – Appeal effect – Finding – Direction – Limitation [S. 149]**

Since no findings or directions had been given in assessment year 1992-93 to tax the receipt in question in assessment year 1994-95 under appeal which is also inherently impossible in view of the findings that it is capital receipt, provisions of section 150 would apply in the case of the assessee and reopening of the assessment made after a period of six years from the end of the assessment year was clearly time barred. (A. Y. 1994-95).

*Vadilal Dairy International Ltd. v. ACIT (2011) 140 TTJ 371 / 58 DTR 323 / (2012) 136 ITD 151 (Ahd.)(Trib.)*

### **S. 150 : Assessment – Order on appeal – Reassessment – Appeal effect – Power of Appellate Authority – Direction**

Section 150 does not enable or require an appellate authority to give any directions for reopening of assessment, but it deals with a situation in which a reassessment is to be initiated to give effect to finding or direction of appellate authority or Court. (A. Y. 2002-03).

*Sujeer Properties (AOP) v. ITO (2011) 131 ITD 377 / 138 TTJ 684 / 55 DTR 282 (Mum.)(Trib.)*

## **Section 151 : Sanction for issue of notice**

### **S. 151 : Reassessment – Sanction for issue of notice – Limitation**

In cases covered under section 151, the notice is to be issued by the Assessing Officer and the only requirement is that the Jt. CIT should be satisfied on the reasons

recorded by the Assessing Officer. There was no satisfaction of the Jt. CIT for the Asst. Year 1989-90 to 1994-95, hence, notices for these years are invalid. (A. Ys. 1989-90 to 1994-95 and 1998-99).

*Maya Rastogi (Smt.) v. CIT (2011) 52 DTR 237 / 241 CTR 67 / 331 ITR 116 / 196 Taxman 283 (All.)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice – Application of Mind [S. 148]**

Merely affixing a 'yes' stamp and signing underneath suggested that the decision was taken by the Board in a mechanical manner as such, the same was not a sufficient compliance under section 151 of the Act. (A. Ys. 1965-66 & 1979-80)

*Central India Electric Supply Co. Ltd. v. ITO (2011) 51 DTR 51 / 333 ITR 237 (Delhi)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice – CBDT [S. 147]**

Tribunal quashed notice under section 147 issued eight years after completion of assessment proceedings holding that CBDT had mechanically granted sanction to issue of notice, and file containing order of Board was not available before High Court, Court could not upset finding of Tribunal. (A.Y. 1961-62)

*CIT v. Attri Devi (Smt) (2005) 276 ITR 532 (P&H)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice [S. 147]**

Section 151 may have application only in respect of section 149 and it cannot stretch its application to section 147, proviso, in relation to cases other than assessee's default. (A.Ys. 1984-85 to 1989-90)

There is no merit in contention that in view of section 151, the emargo of clause (b) of section 149 is subject to section 151 (1) and (2). (A.Ys. 1984-85 to 1989-90)

*Simplex Concrete Piles (India) Ltd. v Dy. CIT (2003) 262 ITR 605 / 183 CTR 471 / 134 Taxman 74 (Cal.)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice – Additional CIT**

Section 151 does not bar Addl. CIT to accord the sanction as the Addl. CIT is higher officer than JCIT and this section does not disqualify the higher officer who issued the sanction.

*Udaipur Mineral Development Syndicate P. Ltd. v ACIT, 2003 Tax LR 669 (Raj.)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice – Mandatory [S. 147]**

Grant of sanction/ permission under section 151 does not dispense with conditions as mandated by the proviso to section 147. (A.Ys. 1989-90 to 1994-95)

*McDermott International Inc. v. Addl. CIT (2003) 259 ITR 138 / 180 CTR 492 / 134 Taxman 39 (Uttaranchal)(High Court)*

#### **S. 151 : Reassessment – Sanction for issue of notice – CBDT**

Notice issued after expiry of 8 years but before expiry of 16 years from relevant assessment year without prior sanction of CBDT is invalid. (A.Ys. 1976-77 to 1982-83)

*Kanhaiya Ice Factory, Belanganu v. ACIT (2003) 87 ITD 77 / 87 TTJ 645 (Agra)(Trib.)*

**S. 151 : Reassessment – Sanction for issue of notice – Commissioner [S. 148]**

Sanction of Commissioner to notice issued under section 148 is a must for reopening assessment after four years. (A.Y. 1992-93)

*ACIT v. M. P. Export Corpn. Ltd. (2009) 120 ITD 460 / 117 TTJ 417 / 7 DTR 346 (Indore)(Trib.)*

**Section 153 : Time limit for completion of assessments and reassessments**

**S. 153 : Assessment – Reassessment – Time limit – Interpretation – Proviso [S. 142(2A), 142(2B), 142(2C)]**

Amendment of proviso to section 142(2C) inserting the words “suo motu” by Finance Act, 2008, w.e.f. 1st April 2008, is purely clarificatory and suo motu power extended the period for submitting the audit report is also to be read in sub section (2C) and therefore, the entire period from the date on which the Assessing Officer directs the assessee to get its accounts audited under section 142(2A) and ending with the last date on which the assessee is required to furnish the report of such audit including the period suo motu extended by the Assessing Officer (Not exceeding 180 days), is to be excluded in computing the period of limitation to make assessment as per clause (iii) of Explanation 1 to section 153.

Function of a proviso is to qualify the generality of the main enactment by providing an exception and taking out from the main enactment a portion which, but for the proviso, would fall within the main enactment. (A. Y. 2003-04).

*Ghaziabad Development Authority v. CIT (2011) 244 CTR 397 / 201 Taxman 252 / 61 DTR 270 (All.)(High Court)*

**S. 153 : Assessment – Reassessment – Time limit – Limitation**

Time limit of two years for completion of assessment is applicable under provision to sec. 153(2) as amended w.e.f. 1-6-2001, only in cases where notice under section 148 was served on or after 1-4-1999 but before 1-4-2000. (A.Y. 1998-99)

*CIT v. Anchi Devi (Smt.) (2008) 218 CTR 16 / 171 Taxman 228 / 5 DTR 306 (P&H)(High Court)*

**S. 153 : Assessment – Reassessment – Time limit – Fresh assessment – 1999-2000**

Assessing Officer was right in passing fresh assessment within the time limit prescribed under section 153(2A) of the Act and he was not supposed to wait till the Tribunal decided Department's appeal on 4th April, 1997. (A.Y. 1990-91)

*Bhatia Motor Stores v. CIT (2007) 288 ITR 31 / 200 CTR 385 / 152 Taxman 89 (MP)(High Court)*

**S. 153 : Assessment – Reassessment – Time limit – Scope**

Section 153 as well as Explanation 1 to section 153 are confined to computation of period of limitation prescribed under section 153 only.

*CIT v. Ramesh Chand Soni (2005) 194 CTR 84 (Raj.)(High Court)*

**S. 153 : Assessment – Reassessment – Time limit – Notice**

Time limit is not applicable to orders passed in consequence of order of Settlement Commission. (A.Ys. 1974-75, 1975-76)

*V.B. Desai v. Administrative Officer, Settlement Commission for IT and WT (No. 1) (2003) 260 ITR 273 / 132 Taxman 632 (Karn.)(High Court)*

**S. 153 : Assessment – Reassessment – Time limit – Limitation – Some of the additions set aside [S. 153(3)(ii)]**

When several additions have been made by the Assessing Officer and the appellate authority sets aside one or more of the issues to the file of the Assessing Officer, that situation would not give rise to a "fresh assessment" and in that cases section 153(3)(ii) would apply and not section 153(2A). (A. Ys. 1989-90 to 1999-2000)

*S. M. Dalvi v. ACIT (2011) 53 DTR 105 / 137 TTJ 581 / 44 SOT 11 (Mum.)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Limitation – Finding or Direction in Appeal [S. 150, 149]**

Reassessment made to tax the unexplained investment for earlier year in pursuance of a finding or direction in the order of Tribunal was saved by Expln. 2 to section 153 and not barred by limitation. (A.Y. 1997-98)

*Maina Shetty (Mrs.) v. Dy. CIT (2010) 37 DTR 457 / 131 TTJ 377 (Bang.)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Sub Section (2) – Service of order**

Section 153(2) prescribes time-limit for passing an order under section 147; there is no provision that that order must also be served within such time-limit. (A.Ys. 1991-92 to 1997-98)

*Dewas Silk Mills v. CIT (2005) 93 ITD 31 / 92 TTJ 481 (TM)(Indore)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Sub Section (2A)**

Time-limit for making fresh assessment referred to in section 153(2A) is not lifted by section 153(3).

For purpose of applicability of section 153(2A), it is not necessary that whole assessment should be set aside to complete same de novo.

*W.C. Shaw (P.) Ltd. v. ACIT (2005) 93 ITD 535 / 94 TTJ 169 (Kol.)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Sub Section (3)**

Where assessee received enhanced compensation and interest in respect of acquired land after 15 years as per order of Court, he took a plea that neither he was liable to show tax payable beyond a period of ten years nor same could be deducted by ITO beyond a period of ten years, such plea had no merit in view of provisions of section 153(3)(ii). (A.Y. 2001-02)

*Tej Ram v. ITO (2005) 93 ITD 1 / 92 TTJ 1185 (Chd.)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Explanation 2 & 3 – Finding or Direction**

Merely because provisions of sections 150(1) and 153(3) do not provide for any specific time-frame, it cannot be said that Assessing Officer is empowered to reopen assessments and complete them after abnormal delay.

Explanation 2 and 3 to section 153 (3) also can not come to the rescue of revenue to reopen the assessment beyond normal period of limitation prescribed under section 149. (A.Ys. 1980-81 to 1985-86)

*S. Sankara Reddy, In re (2005) 92 ITD 84 / 92 TTJ 223 (Hyd.)(Trib.)*

**S. 153 : Assessment – Reassessment – Time limit – Explanation 2 & 3 – Finding or Direction**

Where Tribunal had given a finding that deduction on account of expenditure incurred by assessee-company on acquiring plots to be given to workers was to be allowed in year(s) in which plots were finally transferred to workers, Assessing Officer had power, under section 153(3) to recompute income of that subsequent year to give effect to Tribunal's finding. (A.Y. 1997-98)

*Markwell Hose Industries (P.) Ltd. v. Jt. CIT (2005) 95 ITD 271 / 98 TTJ 403 (Mum.)(Trib.)*

**S. 153(2) : Assessment – Reassessment – Time limit**

Section 153(2) is procedural and therefore, amendment to the section would have retrospective effect. (A.Y. 1996-97)

*ITO v. O.M. Shahul Hameed 106 ITD 342 / 108 TTJ 977 (Chennai)(Trib.)*

**S. 153(3) : Assessment – Reassessment – Time limit [S. 142(2A)]**

The period commencing from the date on which the Assessing Officer directed the assessee to get its accounts audited under section 142(2A) and ending with date on which the assessee furnished report was liable to be excluded. (A.Y. 1984-85)

*N. C. John & Sons Ltd. v. CIT (2003) 264 ITR 645 / 128 Taxman 857 / 176 Taxation 471 / 183 CTR 32 (SC)*

**Section 153A : Assessment in case of search or requisition**

**S. 153A : Assessment – Search or requisition – Special procedure for assessment – Validity – Search warrant [S. 132]**



Person, in respect of whom search under section 132 is initiated, is the same person against whom notice under section 153A is to be issued for making assessment; if there is any illegality in the search warrant, the same will invalidate the search assessment proceedings initiated under section 153A, the matter was remanded to the Tribunal. (A. Ys. 2000-01 to 2006-07).

*Siksha "O" Anussandahn v. CIT (2011) 244 CTR 515 / 62 DTR 161 / 336 ITR 112 (Orissa)(High Court)*

**S. 153A : Assessment – Search or requisition – Settlement commission [S. 245(D)(4)]**

Where the proceedings are pending before the Settlement Commission the assessing officer is not required to pass assessment order by virtue of section 245(D)(4) of the Act. However, Finance Act, 2007 with effect from 01.06.2007 provided that the pending proceedings before the Settlement Commission would be abated in case the final order under section 245(D)(4) of the Act was not passed by the Settlement Commission by 31.03.2008 in respect of disclosure made by the assessee following search and seizure operation. In order to give lease of life to such assessments it was provided that, the assessment order in such case must be past within the enlarged period that is within one year that is upto 31.03.2009. Accordingly, assessment order not passed within the enlarged period by the assessing authority, if the proceedings before the Settlement Commission are abated the assessment order passed was held to be barred by limitation and liable to be quashed.

*Rajendra Kumar Verma v. DGI (Inv.) & Ors. (2010) 46 DTR 329 / 237 CTR 86 / 345 ITR 32 (All.)(High Court)*

**S. 153A : Assessment – Search or requisition – Search took place in August 2006. Assessment for the A.Y. 2004-05 pending on date of search – Assessment proceedings under section 153A not valid. Assessment order is void in view of circular No. 7 dated 5-9-2003**

The assessee filed his return of income Voluntarily under section 139(1) of the I.T Act, 1961 for the A.Y 2004-05 on 17-5-2004.

On 24th August, 2006 Search and Seizure operations were carried out at the office premises as well as at the residence of the assessee.

Held, that admittedly no notice as required under section 153A was issued for Six Assessment Years; i.e., from 2001-02 to 2006-07. On the date on which the search was initiated, the assessment proceedings were pending on the basis of the return filed by the assessee under section 139(1) of the Act. Consequently, the pending assessment proceedings stood abated by virtue of second proviso to Sec. 153A. Instead, Assessing Officer proceeded with the pending Assessment proceedings for the A.Y. 2004-05 and passed assessment order during the pendency of the writ petition. The entire action of Assessing Officer in proceeding with the assessment after search in contravention of the provisions of Sec. 153A was vitiated in law, and hence, Assessment Order dated 28-12-2006 purportedly passed under section 143(3)

in a pending Assessment Proceedings which stood abated was a nullity. (A.Y. 2004-05)

*Abhay Kumar Shroff v. CIT (2007) 290 ITR 114 / 210 CTR 602 / 162 Taxman 429 (Jharkhand) (High Court)*

**S. 153A : Assessment – Search or requisition – Special procedure for assessment – On money payment – Company – Director**

Merely on the basis of entry in seized material not supported by corroborative evidence, and contradictions in statement of purchaser of property, additions made in the hands of company on substantive basis and addition in the hands of Director on protective basis was deleted. (A. Y. 2005-06).

*Embassy Classic P. Ltd. & Another v. ACIT (2011) 7 ITR 287 (Bang.)(Trib.)*

**S. 153A : Assessment – Search or requisition – Special procedure for assessment – Validity –Absence of notice under section 143(2) – Service of notice prior to issue of notice for filing of return [S. 143(2)]**

Compliance of the provisions of section 143(2) can happen only after the receipt of return or documents as specified under section 142(1)(ii), hence, issue of notice under section 143(2) prior to such stage does not serve any purpose, hence, redundant; as no notice under section 143(2) was served on the assessee after the filing of return, the assessment proceedings are quashed as null and void. (A. Ys. 2003-04 & 2005-06)

*ACIT v. G. M. Infrastructure (2011) 49 DTR 151 / 135 TTJ 469 (Indore)(Trib.)*

**S. 153A : Assessment – Search or requisition – Special procedure for assessment – Requisition**

Once the warrant of authorization or requisition is issued and search is conducted, Panchanama is drawn, all the relevant six assessment years would get reopened irrespective of any incriminating material is found or not in respect of any particular assessment year falling within the relevant six assessment years. (A. Ys. 2002-03 to 2005-06).

*Mansukh Kanjibhai Shah (Dr.) v. ACIT (2011) 129 ITD 376 / 41 DTR 353 (Ahd.)(Trib.)*

**S. 153A : Assessment – Search or requisition – Search and seizure – Special procedure for assessment – Abatement – Assessment pending**

Only the assessments pending before the Assessing Officer for completion shall abate and under section 153A the issues decided in the assessment can not be reconsidered and readjudicated unless there is some fresh material found during the course of search in relation to such points. (A. Ys. 2003-04 to 2005-06 & 2007-08).

*Guruprerana Enterprises v. ACIT (2011) 57 DTR 465 (Mum.)(Trib.)*

**S. 153A : Assessment – Search or requisition – Abate [S. 153C]**

Record maintained by a person for his own purpose though referable to the assessee cannot be said to be belonging to the assessee within the meaning of section 153C. Where none of the assessments are pending on the date of action under section 153C, such assessments do not abate. (A.Ys. 2000-01 to 2004-05)  
*Meghmani Organics Ltd. v. Dy. CIT (2010) 129 TTJ 255 / 36 DTR 187 / 6 ITR 360 (Ahd.)(Trib.)*

#### **S. 153A : Assessment – Search or requisition – De novo assessment**

Section 153A does not authorize de novo assessment. Non-pending assessments do not abate. Additions must be confined to search material. (A.Ys. 2000-01 to 2006-07)  
*Anil Kumar Bhatia v. ACIT (2010) 1 ITR 484 (Delhi)(Trib.)*

#### **S. 153A : Assessment – Search or requisition – Joint Warrant [S. 132]**

Joint warrant in name of assessee and another party is permissible. (A.Ys. 2003-04, 2004-05)  
*Rajat Tradecom India Pvt. Ltd. v. Dy. CIT (2010) 3 ITR 321 / (2009) 124 TTJ 53 / 120 ITD 48 / 23 DTR 311 (Indore)(Trib.)*

#### **S. 153A : Assessment – Search or requisition – Retraction – Warrant [S. 132]**

Section 153A order void if search warrant in improper status. Assessee can retract admission of undisclosed income. (A.Ys. 2001-02, 2002-03)  
*Mansukh Kanjibhai Shah (Dr.) v. ACIT (2010) 41 DTR 353 / 235 CTR 336 / 333 ITR 547 / 194 Taxman 175 (Ahd.)(Trib.)*

#### **S. 153A : Assessment – Search or requisition – Warrant of authorization**

Warrant of authorization being issued in the name of trust and assessee being managing trustee of the trust, but no search operation was conducted in the premises of the assessee and in the warrant of authorization, the place to be searched is not the address of the assessee individual, no panchnama is also drawn in pursuance with the warrant of authorization in the case of the assessee, no documents were seized or impounded as such during the course of search from the assessee, the Assessing Officer was not justified in initiating proceedings or assuming valid jurisdiction under section 153A against the assessee. (A.Ys. 2001-02, 2002-03)  
*Mansukh Kanjibhai Shah (Dr.) v. ACIT (2010) 41 DTR 353 / 235 CTR 336 / 333 ITR 547 / 194 Taxman 175 (Ahd.)(Trib.)*

#### **S. 153A : Assessment – Search or requisition – Assessment of Third Party – Neither books of account nor documents belonging to assessee was seized [S. 153C]**

No amount of money, bullion, jewellery or other valuable article or thing or books of account or documents seized belonged to assessee. Assessing Officer does not assume jurisdiction for framing assessment under section 153C. (A.Ys. 1999-2000 to 2003-04)  
*ACIT v. Gambhir Silk Mills (2010) 6 ITR 376 (Ahd.)(Trib.)*

**S. 153A : Assessment – Search or requisition – Search and seizure – Material as a whole**

When Assessment is made based/relying on materials collected during search, then said materials should be read in wholesome and continuous manner, and not in a piecemeal manner by cutting chain of events, but in a logical & continuous manner from beginning to end so as to reach a lawful conclusion. (A.Y. 1999-2000)

*ACIT v. Hotel Harbour View (2009) 184 Taxman 42 (Cochin)(Trib.)*

**S. 153A : Assessment – Search and seizure – Penalty – Concealment**

Additional income declared in returns filed in response to notice under section 153A, did not fall under category of return mentioned in Explanation 5(2) to section 271(1)(c), assesses were not entitled to immunity from penalty. (A.Y. 2002-03)

*ACIT v. Kirti Dahyabhai Patel (2009) 121 ITD 159 / 125 TTJ 145 / 28 DTR 380 (TM)(Ahd.)(Trib.)*

**S. 153A : Assessment – Search or requisition – Assessment – limitation – service of order**

Assessment order passed on 28th Dec., 2007, but served on 2nd Jan., 2008, beyond the period of limitation of 31st Dec., 2007, was barred by limitation and thus non est in law. (A.Ys. 2000-01 to 2006-07)

*Shantilal Godawat & Ors. v. ACIT (2009) 126 TTJ 135 / 30 DTR 413 (Jodh.)(Trib.)*

**Section 153C : Assessment of income of any other person**

**S. 153C : Assessment – Income of any other person – Search and seizure – Loose papers**

Notice under section 153C, can be issued only where the money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned actually belong to assessee. Notice issued on the basis of loose papers which bear the name of assessee actually not belong to assessee was without jurisdiction. (A.Ys. 2001-02 to 2006-07)

*Vijaybhai N. Chandrani v. ACIT (2010) 38 DTR 225 / 231 CTR 474 / 333 ITR 436 (Guj.)(High Court)*

**S. 153C : Assessment – Income of any other person – Search and seizure – Assessment sans “speaking” & “incriminating” documents void [S. 132]**

For purpose of attracting section 153C, the document seized must not only be a ‘speaking one’, but also prima facie ‘incriminating one’. The documents cannot be said “incriminating one”, merely because it contains the notings of entries which are already recorded in books of accounts or is subjected to scrutiny of Assessing officer in the past in regular assessment under section 143(3) of the Act.

*Sinhgad Technical Education Society v. ACIT (2011) 57 DTR 241 / 140 TTJ 233 (Pune)(Trib.)*

**S. 153C : Assessment – Income of any other person – Search and seizure – Computation of undisclosed income – Cash credit**

Where the assessee has proved identity of the person the genuineness of the transaction as well as the capacity of the lenders and departmental authorities have not found any falsity in the evidences no addition could be made under section 68. (A. Ys. 2003-04 to 2005-06 & 2007-08).

*Guruprerana Enterprises v. ACIT (2011) 57 DTR 465 (Mum.)(Trib.)*

**S. 153C : Assessment – Income of any other person – Search and seizure – Computation of undisclosed income – Presumption – Project completion method – On money [S. 292C]**

Assessee suo motto offered the entire alleged receipts of on money of ₹ 9.02 crores in its return of income filed under section 153C. The additions made by the revenue on estimate made for the A. Ys. 2002-03 to 2005-06 was deleted. (A. Ys. 2006-07 to 2008-09).

*Fort Projects (P) Ltd. v. Dy. CIT (2011) 63 DTR 145 / (2012) 145 TTJ 340 (Kol.)(Trib.)*

**Section 154 : Rectification of mistake**

**S. 154 : Assessment – Rectification of mistake – Subsequent Decision of Supreme Court**

Subsequent decision of the Supreme Court resolving conflict of opinion does not obliterate decision taken prior to it. Section 154 cannot be invoked to rectify the same. (A.Ys. 1993-94, 1994-95)

*Mepco Industries Ltd., Madurai v. CIT (2010) 1 SCC 434 / (2009) 319 ITR 208 / 227 CTR 313 (SC)*

*Editorial. Circular no 68 dt 17-11-1971 (1972) 83 ITR (ST)6, the Board clarified that subsequent judgement of Supreme court can be considered as mistake apparent from record.*

**S. 154 : Assessment – Rectification of mistake – Settlement commission – Interest [S. 234A, 234B, 234C, 245C]**

Once proceedings are concluded, thereafter interest under section 234B cannot be levied by way of rectification of an order passed by Settlement Commission.

*Brij Lal and Others v. CIT (2010) 46 DTR 153 / 328 ITR 477 / (2011) 1 SCC 1 / 235 CTR 417 / 194 Taxman 566 (SC)*

**S. 154 : Assessment – Rectification of mistake – Law in force when order was sought to be revised was made – Change of opinion**

The assessee claimed the power subsidy as capital receipt. Assessee's claim was not accepted by the Assessing Officer. However, under section 264, the CIT held that power subsidy was a capital receipt, as per order dt. 30-4-1997. Subsequent to

revision order, a Supreme Court judgment in Sahney Steel & Press Works Ltd. was delivered on 19-9-1997 holding that incentive subsidy linked to production was a revenue receipt. There upon the CIT made rectification under section 154 of his revision order passed under section 264 and consequently held that power subsidy was a revenue receipt. Assessee filed a writ petition before the High Court which was dismissed by the High Court. The Supreme Court held that the judgment in Sahney Steel Works was delivered after passing the revision order on 30-3-1997 by the CIT and that each case has to be examined in light of the facts of the case to determine the applicability of its decision in Sahney Steel's case. The rectification made under section 154 was held to be not valid. The High Court's order was set aside and assessee's appeal was allowed.

*Metro Industries Ltd. v. CIT (2010) 216 Taxation 113 (SC)*

**S. 154 : Assessment – Rectification of mistake – Settlement commission – Interests [S. 234A, 234B, 234C]**

Question as to whether Settlement Commission can reopen concluded proceedings by having recourse to section 154 so as to levy interest under section 234A, 234B, 234C, though it was not done in original proceedings, should be considered by the Constitution Bench.

*Brij Lal v. CIT (2005) 279 ITR 432 / 199 CTR 716 / (2006) 192 Taxation 213 / 150 Taxman 106 (SC). Please see 328 ITR 477 (SC)*

**S. 154 : Assessment – Rectification of mistake – Intimation under section 143(1)(a) cannot be rectified after order passed under section 143(3)**

Rectification order under section 154 cannot be passed to rectify an intimation given under section 143(1)(a) after final assessment order under section 143(3) is passed. (A. Y. 1994-95).

*Tamil Nadu Magnesite Ltd. v. CIT (2011) 196 Taxman 271 (Mad.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Setting aside of assessment**

Where assessment order passed under section 143(3) / 147 has been set aside, consequential order under section 154 has also to be set aside. (A. Y. 1997-98).

*CIT v. DCM Financial Services Ltd. (2011) 196 Taxman 439 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistakes – Overlooking statutory provision**

Overlooking of statutory provision is clearly a mistake on record and on that basis, rectification under section 154 is clearly admissible. (A. Y. 1985-86).

*CIT v. Steel Strips Ltd. (2011) 200 Taxman 368 (P&H)(High Court)*

**S. 154 : Assessment – Rectification of mistakes – Salaries – Perquisites – Tax paid by employer – Merger [S. 15, 17]**

While computing assessee's original assessment, Assessing Officer did not include tax payment by employer to exchequer on behalf of employee as part of salary for



computing value of rent free accommodation perquisite under Rule 3. On appeal, Tribunal quashed of Assessing Officer for financial years 1995-96 to 1997-98, after grossing up income under section 195A and directed Assessing Officer to recomputed tax liability for said financial years. Order giving effect was also passed. However thereafter, Assessing Officer rectified assessment under section 154 by recomputing value of perquisite in rest of rent free accommodation after including tax element in gross salary. Assessee challenged the order on the ground that the issue being debatable and original order being merged with the order of Tribunal the Assessing Officer did not have jurisdiction to rectify the mistake under section 154. High Court held that when an earlier occasion, Tribunal had not at all considered aforesaid issue, doctrine of merger would not be applicable in instant case. When jurisdictional Court and other Courts had held at relevant time that income tax paid by employer on behalf of employee is part of salary, issue could not be said to be debatable and therefore, there was legal error apparent from record which was rightly corrected by Assessing Officer under section 154. (A. Ys. 1996-97 to 1998-99).

*Mitsubishi Corporation v. CIT (2011) 200 Taxman 372 / 337 ITR 498 / 62 DTR 265 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Subsequent decision of Supreme Court**  
**[S. 10(10C)]**

In view of subsequent judgment of the Supreme Court setting aside the judgment of the High Court, the assessee is entitled to exemption under section 10(10C), and therefore Assessing Officer is directed to rectify the assessment order to allow exemption under section 10(10C).

*K. R. Alagappan & Ors. v. ACIT (2011) 59 DTR 295 / 243 CTR 85 / 332 ITR 517 (Mad.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Book profit – Not considering the statutory provision [S. 115JA]**

When original assessment is completed without reference to the statutory provision and in clear violation of the same, such assessment could be rectified under section 154. In order to allow deduction of brought forward business loss or unabsorbed depreciation in the computation of book profit under section 115JA, both should be available as per the accounts of the assessee. Since nothing is left after setting off brought forward business loss up to 1994-95 against profit, assessee was not entitled to any relief under clause (b) of Explanation (iii) of section 115JA for assessment year 1997-98. (A. Y. 1997-98).

*CIT v. Carbon & Chemicals India Ltd. (2011) 59 DTR 396 / 243 CTR 399 / 196 Taxman 302 (Ker.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Capital losses – Block assessment**

The issue as to whether the capital losses incurred by the assessee could be set off against the income assessed by the assessing officer under the block assessment under section 158BC of the Act is a debatable issue and accordingly beyond the scope of rectification under section 154 of the Act.

*CIT v. Soora Subramanian (2010) 34 DTR 76 / 230 CTR 92 (Mad.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Subsequent decision of High Court or Supreme Court – Failure to Contest**

If the assessee does not challenge the order of assessment in which Assessing Officer has refused the relief by filing an appeal, the assessment order becomes final and the rectification application under section 154 cannot be entertained in such case, to grant relief on the basis of a subsequent decision of the High Court or the Supreme Court. (A.Y. 1993-94)

*CIT v. Krone Communication Ltd. (2010) 41 DTR 206 / 233 CTR 203 (Karn.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Assessment based on a Supreme Court decision – Retrospective Amendment of Law – Levy of Interest [S. 234B]**

Assessment based on the Supreme Court decision cannot be rectified on subsequent retrospective amendment of law. Order of rectification under section 154, for the Asst. Year 1998-99, levying interest for the first time under section 234B in view of retrospective amendment of section 234B was not valid. (A.Y. 1989-99)

*Shriram Chits (Bangalore) Ltd. v. Jt. CIT (2010) 325 ITR 219 / 233 CTR 199 / 41 DTR 366 / 195 Taxman 382 (Karn.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – Withdrawal of MAT Credit – Interest [S. 234A, 234B]**

Charging interests under section 234B and 234C in rectification proceedings for withdrawal of excess MAT credit is a debatable issue and therefore, it cannot be done by invoking the provisions of 154. (A.Y. 1999-2000)

*CIT v. Salora International Ltd. (2010) 329 ITR 568 / 45 DTR 213 / 191 Taxman 145 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Interest – Intimation [S. 143(1)(a)]**

Intimation issued under section 143(1)(a) of the Act cannot be rectified by the assessing officer under section 154 of the Act after issue of notice under section 143(2) to frame regular assessment.

*CIT v. Nicco Corporation Ltd. (2009) 24 DTR 271 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Service of notice – Validity**

Failure to serve notice before passing order of rectification violates the requirement of section 154(3), hence order is bad in law. (A.Ys. 1989-90, 1994-95)

*Mintri Tea Company P. Ltd. v. CIT (2009) 319 ITR 264 / 223 CTR 241 / 21 DTR 17 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue [S. 80-IA]**

Question whether export incentive would qualify for deduction under section 80-IA is a highly debatable matter as there are contrary judgements on this issue and therefore it does not come within the purview of section 154. (A.Y. 1994-95)

*CIT & Anr. v. TTK Prestige Ltd. (2009) 227 CTR 565 / 322 ITR 390 / 184 Taxman 18 / 31 DTR 181 (Karn.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Non consideration of provision of Act [S. 115JA & 80-IA/IB]**

The Assessing Officer had not taken into consideration clause (v) of the Explanation to sub sec. (2) of sec. 115JA of the Act. The assessee being industrial undertakings located in a backward state or district were entitled to 100 per cent, exemption in terms of sec. 80IB and 80IA of the Act. The orders passed by the assessing officer suffered from error apparent on the face of the record having been passed without considering the provisions of the Act. (A.Ys. 1998-99 to 2002-03)

*CIT v. Kushal Bagh Minerals P. Ltd. (2009) 310 ITR 125 / 6 DTR 175 / 216 CTR 269 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – Surcharge [S. 153]**

The Assessing Officer, after passing the Assessment Order realized that surcharge leviable on tax under section 113 has not been charged. The Assessing Officer passed an order under section 154 levying the surcharge. The order passed under section 154 was upheld in appeal by CIT(A). On an appeal, Tribunal vide its order dated 6-5-2005 held that non charging of surcharge could not be stated to be a mistake apparent from record, and that any issue which was debatable one, could not be subject matter of an order under Section 154. On an appeal by the Department the department relied on the decision of the Apex Court in the case of CIT vs. Suresh N. Gupta (2008) 297 ITR 322 (SC). The Hon'ble Court held that when the Tribunal passed the order the issue before it was a debatable one. Therefore, Tribunal order did not require any interference.

*CIT v. Kirti kumar Shah (2009) 176 Taxman 29 / 12 DTR 344 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – Depreciation & losses**

Issue regarding unabsorbed depreciation and losses while computing deduction under section 80 HHC of the Act is a debatable issue and therefore the Assessing Officer has no jurisdiction to pass order under section 154 of the Act to recompute deduction under section 80HHC of the Act. (A.Y. 1990-91)

*Royal Cushion Vinyal v. CIT (2009) 28 DTR 22 / 227 CTR 663 / 180 Taxman 208 (Bom.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Merger – Limitation**

Once appeal is decided the order of Assessing Officer, merges with the order of Appellate authority. Limitation under section 154(7), would be calculated with reference to date of appeal effect order.

*CIT v. Tony Electronics Ltd. (2009) 185 Taxman 121 / (2009) 32 DTR 348 / 228 CTR 364 / 320 ITR 378 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Surcharge – Block assessment [S. 113]**

The issue regarding levability of surcharge under the proviso to section 113 of the Act with respect to search action conducted prior to 1-6-2006 was a debatable issue, as such the same was not amendable to rectification jurisdiction under section 154 of the Act.

*CIT v. M.S. Aggrwal (2008) 14 DTR 351 / 308 ITR 69 / 178 Taxman 311 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Book profit – Interest [S. 115JA, 234B & 234C]**

Powers of rectification cannot be exercised by the Assessing Officer under section 154 of the Act for charging interest under sections 234B and 234C of the Act where the income is assessed under the provisions of 115JA as the same was held to be a debatable issue as various High Courts had expressed conflicting views on the issue. (A.Y. 1998-99)

*Abhishek Industries Ltd. v. CIT & Anr. (2008) 15 DTR 254 / 319 ITR 98 177 Taxman 335 (P&H)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Cannot be made to nullify effect of Tribunals order – Ex-parte order [S. 144]**

Assessment completed under section 144 in status of registered firm. Assessing Officer disallowed interest and salary paid to partners, Tribunal allowed deduction. Subsequently the Assessing Officer noticed that as assessment was made under section 144 the status of the firm should have been taken as AOP and again disallowed interest and salary. It was held that, Assessing Officer could not change status of assessee to association of persons and withdraw deduction in rectification proceedings after decision of Tribunal. (A.Y. 1996-97)

*CIT v. Kartar Singh and Co. (2008) 302 ITR 66 / 218 CTR 197 / 3 DTR 259 (P&H)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Appeal against order under section 154 – Scope**

While disposing of the appeal against the order under section 154 passed by the Assessing Officer rectifying certain mistakes in the order passed by him under section 143(3) of the Act the CIT (A) cannot set aside assessment order passed by the Assessing Officer made under 143(3) of the Act which had attained finality, as no appeal was preferred against the order under section 143 (3) passed by the Assessing Officer. (A.Y. 1989-90)

*R. B. L. Banarsi Dass & Co. P. Ltd. v. CIT (2008) 7 DTR 388 / 316 ITR 212 / 170 Taxman 419 (P&H)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Trading loss [S. 80HHC]**

The Assessing Officer rectified the order under section 154 of the Act on the ground that deduction under section 80HHC of the Act was calculated without taking into account the loss suffered by the assessee from export of trading goods. At the time of rectification under section 154 there were divergent decision of High Court on the issue, which was finally decided in favour of the revenue by the Supreme Court. The High Court held that Assessing Officer's action in rectifying the order under section 154 was in accordance with the Supreme Court as the assessee before the Assessing Officer did not raise the question of debatable nature of the issue.

*CIT v. Rovy Indl. Corporation (2006) 195 Taxation 422 (P&H)(High Court)*

#### **S. 154 : Assessment – Rectification of mistakes – Assessment – Nature of proceeding**

When proceedings are taken for rectification of assessment under section 154, those proceedings must be held to be proceedings for assessment. (A.Y. 1988-89)

*Nicco Corporation Ltd. v. CIT (2005) 272 ITR 58 / 144 Taxman 135 / 194 CTR 59 (Cal.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Each assessment year is an independent unit**

Each year of assessment is an independent unit and orders passed in subsequent assessment year cannot and should not form basis for taking recourse to proceedings under section 154. (A.Ys. 1972-73 to 1975-76)

*CIT v. Wajid Sons (P.) Ltd. (2005) 278 ITR 392 / 144 Taxman 848 / 198 CTR 602 (All.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Effect of tribunal's order**

It cannot be said that if a claim which was based on certain factual aspects has been disallowed in assessment year in question on basis of similar disallowance in preceding year, which stood ultimately allowed by Tribunal, there is a mistake in order disallowing such claim. (A.Y. 1978-79)

*Bithal Das Modi v. CIT (2005) 147 Taxman 609 / 199 CTR 167 (All.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Subsequent judgment of Supreme Court**

Subsequent declaration of law by Apex Court would no doubt constitute existence of a mistake apparent on record but that declaration of law by Apex Court should be available at time when proceedings for rectification had been initiated. (A.Y. 1979-80) *CIT v. Himalaya Cold Storage & Iron Industries (2005) 147 Taxman 90 / 197 CTR 129 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Waiver of interest-subsequent Judgment of Supreme Court**

One cannot take advantage of subsequent pronouncement of a superior court in a closed and settled matter, particularly in the matter decided and settled four years back, in the guise of rectification; order of waiver of interest passed by Settlement Commission on 16-3-1999 could not be rectified on basis of subsequent Supreme Court decision in Hindustan Bulk Carrier's case there being no mistake in order of Settlement Commission when it was passed. (A.Ys. 1989-90 to 1994-95) *Smriti Properties (P.) Ltd. v. Settlement Commission (IT&WT) (2005) 278 ITR 274 / 149 Taxman 386 / 199 CTR 261 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Withdrawal of investment allowance – Subsequent Judgment of Supreme Court**

Rectification order to withdraw investment allowance could not be justified on basis of Supreme Court decision which was not there either on date on which allowance was granted or on date on which it was withdrawn and at that time, issue was debatable. (A.Y. 1987-88) *CIT v. Mahavir Drilling Co. [2005] 273 ITR 201/ 142 Taxman 663 (MP)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Doctrine of Merger – Scope [S. 154(1A)]**

If point in issue was directly and substantially an issue before an appellate or revisional authority, or effective decision of appeal or revision, as the case may be, phrase 'any matter' in section 154(1A) will embrace it, and principle of merger will be attracted. (A.Y. 1978-79) *CIT v. Prakash Kirana Co. (2005) 146 Taxman 468 / 197 CTR 388 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Period of limitation – Effect of Amendment**

Period of limitation for rectification under unamended statute had not expired when amendment was made in statute with effect from 1-10-1984 to extend period of limitation, extended period of limitation would apply. *CIT v. Super Cast Alloy Foundries Ltd. (2005) 275 ITR 199 (Guj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Other mistakes – Firm – Partner [S. 155]**

When ITO passes an order in conformity with order passed by appellate authority and treats firm as a registered firm (earlier it was treated as an unregistered firm) and



consequently orders refund of excess income-tax paid by it, it is part of assessment proceeding of firm and as a consequence partner's share and liability to pay tax could be rectified under section 155.

*CIT v. Sanjai Kumar Gupta (2005) 276 ITR 73 / 146 Taxman 462 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Recalling the order – Failure to pay admitted tax – Appeal – Commissioner (Appeals)**

Noticing of assessee failure to pay admitted tax on returned income as per section 249(4) will not justify recall of entire order passed by Commissioner (Appeals).

*Om Prakash Bholu v. CIT (2005) 142 Taxman 200 (Delhi)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Intimation – Notice [S. 143(1)(a), 143(2)]**

Rectification of intimation under section 143(1)(a) after issue of notice under section 143(2) is not permissible.

*CIT v. Udaipur Distillery Co Ltd. (2004) 137 Taxman 38 / 267 ITR 366 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake - Revision (S. 264) S. 152 of CP Code**

Language used under section 154 appears to be verbatim to section 152 of the Code of Civil Procedure, 1908, therefore section 154 does not take with in its ambit an act to reconsider a revision application dismissed under section 264.

*Mohan Lal Agrwal v. CIT (2004) 134 Taxman 230 / 187 CTR 43 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Settlement commission – Power [S. 245F]**

Settlement Commission can pass an order of rectification under section 154.

*Sanjaybhai R. Patel v. Assessing Officer (2004) 135 Taxman 210/267 ITR 129 (Guj.) / Queens Saree Collection v. Additional Bench Settlement Commission (2004) 140 Taxman 235 / 270 ITR 401 (Karn.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Provident fund and employees 'State Insurance Contribution – Beyond dates**

Rectification on ground that certain payment by way of provident contribution and Employees 'State Insurance Contribution was made by assessee beyond due dates was not permissible where without holding enquiry, it was not possible to say that contributions were paid after due dates. (A.Y. 1996-97)

*Jagatdal Jute & Industries Ltd v. CIT (2004) 139 Taxman 117 / 266 ITR 587 / 188 CTR 593 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Deduction – New Industrial undertaking  
[S. 80I]**

Relief granted to assessee under section 80-I could not be withdrawn by taking recourse to section 154. (A.Y. 1992-93)

*CIT v. Krishak Bharati Co-Operative Ltd. (2004) 266 ITR 208 (Delhi)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – After 4 years – Notice held to be bad in law**

Where notice under section 154 was issued long after expiry of four years from the end of the assessment on the ground that assessee could not be assessed as non-resident for relevant assessment year by reason of Explanation (b) under section 6 (1) (c), following the decision in *Vijay Mallya v. ACIT (APOT NO 735 of 2002)*, it was held that the notice was illegal, invalid, bad in law and without jurisdiction. (A.Ys. 1989-90, 1992-93, 1993-94)

*Vijay Mallya v. ACIT (2004) 134 Taxman 146 / 266 ITR 329 / 186 CTR 697 (Cal.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Subsequent decision of Supreme court in another case – Settlement commission – Waiver of interest**

A subsequent decision of Supreme Court in another case could not be basis for any rectification proceedings.

Where Settlement Commission's order waiving interest under section 234A/ j 234B/234C was sought to be rectified on ground that Supreme Court Anjum Mohammed Hussein Ghaswala, In re (1998) 230 ITR 1 (AT) (SB) held that interest under said sections cannot be waived.

*ITSC v. Netai Chandra Rarhi & Co. (2004) 271 ITR 514 / 193 CTR 430 / 142 Taxman 446 (Cal.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Order 47 of the Code of Civil Procedure – Applicability**

Explanation added to rule 1 of Order 47 of the Code of Civil Procedure in order to define an error or mistake apparent on the face of the record is equally applicable to section 154. (A.Ys. 1988-89, 1989-90)

*Geo Miller & Co. Ltd. v Dy. CIT (2003) 262 ITR 237 / 184 CTR 119 / 134 Taxman 554 (Cal.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Connotation of 'record' – Accompanying document**

'Record' for the purpose of S. 154 does not merely, mean the assessment order; things which accompany return are also part of the record. (A.Y. 1982-83)

*Annamallais Agencies v. CIT (2003) 260 ITR 478 / 189 CTR 73 / 134 Taxman 740 (Mad.)(High Court)*

#### **S. 154 : Assessment – Rectification of mistake – Expenditure from incentive bonus – Debatable**

Claim of LIC Development Officer for deduction of expenditure from incentive bonus cannot be allowed by way of rectification.

*CIT v. G.D. Sharma (2003) 131 Taxman 292 / 180 CTR 169 (Raj.)(High Court) / CIT v. Mali Ram Verma (2003) 131 Taxman 518 / 185 CTR 539 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Incentive bonus – Debatable**

Rectification to allow deduction of expenses from incentive bonus received by LIC Development Officer from LIC was not justified.

*CIT v. Dinesh Lahoti (2003) 131 Taxman 500 / 186 CTR 554 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Incentive bonus – Debatable**

Rectification to disallow deduction claimed by LIC Development Officer to extent of 50 per cent of incentive bonus received by him was justified.

*CIT v. P.N. Tewari, LIC of India (2003) 131 Taxman 295 (Raj.)(High Court) / CIT v. Mali Ram Verma (2003) 131 Taxman 518 / 185 CTR 539 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Incentive bonus – Debatable**

Question as to whether assessee-LIC Development Officer was entitled to deduction of any expenditure out of incentive bonus is not a debatable issue in view of Rajasthan High Court's decision in Shiv Raj Bhatia's case, and, therefore, withdrawal of such deduction by way of rectification was justified.

*CIT v. Hukam Chand Jain (2003) 262 ITR 373 / 132 Taxman 79 / 185 CTR 537 (Raj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Allowance of depreciation – Generator**

Allowance of depreciation on generator at 15 per cent or 10 per cent is a debatable issue and rectification could not be made to reduce it to 10 per cent. (A.Ys. 1975-76, 1976-77)

*CIT v. Jayana Cold Storage & Ice Factory (2003) 128 Taxman 51 / 260 ITR 430 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Depreciation – Hirer**

Rectification to disallow depreciation on ground that petitioner being a hirer was not liable to claim depreciation, was not permissible when claim had been allowed earlier in assessment after due verification. (A.Y. 1994-95)

*D. S. Srinivas v. ITO (2003) 129 Taxman 657 / 262 ITR 209 / 183 CTR 269 (Karn.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Computation – Remuneration**

Scope of section 40A(5) and the extent to which amounts exempt under section 10(6)(viii) have to be considered for the purpose of computation under section 40A(5)

were indeed debatable till the decision in *CIT v. Lucas TVS Ltd (1997) 226 ITR 281 (Mad)*. (A.Ys. 1973-74, 1975-76)  
*CIT v. Madras Fertilisers Ltd. (2003) 261 ITR 673 / 184 CTR 93 (Mad.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Disallowance – Actual payment – Sales tax**

Where certain deposits accepted as such during assessment were subjected to disallowance under section 43B by way of rectification on ground that these deposits were collected towards sales tax, rectification was not justified. (A.Y. 1984-85)  
*CIT v. India Cements Ltd. (2003) 130 Taxman 190 / 186 CTR 571 / 265 ITR 479 (Mad.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Disallowance – Actual payment**

The question about claim of deduction under section 43B being a substantial question of law to be debated in appeal could not be considered a mistake apparent on the face of record. (A.Y. 1990-91)  
*CIT v. Udaipur Distillery Co. Ltd. (2003) 133 Taxman 383 / 182 CTR 284 / 267 ITR 358 (Raj.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Annexure in form no 10CCAC – Failure to file**

Not filing of return along with Annexure-A in Form No. 10CCAC in new format is merely a procedural mistake which can be rectified.  
*CIT v. Lakhi Gems (2003) 133 Taxman 69 (Raj.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Winning from lotteries, etc. – S. 115BB – Basic exemption**

Where question involved was as to whether in view of special provisions of section 115BB, basic exemption available under section 2 and First Schedule to relevant Finance Act was inapplicable. (A.Y. 1993-94)  
*CIT v. K.R. Syam Kumar (2003) 133 Taxman 568 / 184 CTR 504 / 133 Taxman 568 (Ker.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Intimation (S. 143 (1)(a) – Notice under section 143(2) issued – Time for**

Where return filed by an assessee is processed under section 143(1)(a) after issuance of notice under section 143(2), such order under section 143(1)(a) is invalid and cannot be rectified under section 154. (A.Y. 1992-93)  
*CIT v. A. V. Thomas & Co. (2003) 128 Taxman 735 / 182 CTR 116 (Ker.)*(High Court)

**S. 154 : Assessment – Rectification of mistake – Intimation – S. 143 (1)(a) – Assessment under section 143(3) completed**

Intimation issued under section 143(1)(a) cannot be rectified under section 154 after issue of notice section 143(2). (A.Ys. 1990-91 to 1994-95)

*C.E.S.C. Ltd. v. Dy. CIT (2003) 262 ITR 243 / 183 CTR 116 / 134 Taxman 647 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Income – Loss [S. 161(IA)]**

As to whether the term "income" in section 161(1A) should be read as including loss is clearly a debatable issue. (A.Ys. 1989-90, 1990-91)

*Ganga Medical Trust v. CIT (2003) 261 ITR 286/ 140 Taxman 40 (Mad.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Interest – Order of settlement commission [S. 234A, 234B, 234C]**

Where it was held that rectification of order of Settlement Commission allowing waiver of interest under sections 234A, 234B and 234C was not permissible under section 154.

*Netai Chandra Rarhi & Co. v. ITSC (2003) 263 ITR 186 / 186 CTR 706 / 133 Taxman 640 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Interest – Direction of tribunal [S. 244(IA)]**

No mistake could be there in ITOs order granting interest under section 244(1A) along with refund pursuant to order passed by the Tribunal even in absence of direction of Tribunal to grant such interest.

*CIT v. Bombay Conductors & Electrical (P.) Ltd. (2003) 131 Taxman 204 / 184 CTR 439 / 264 ITR 485 (Guj.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Period of Limitation – Second rectification**

Computation of limitation of four-years period for rectification will run from the date of 1st rectification and not from date of original assessment.

*CIT v. Shan Elahi (2003) 132 Taxman 89 (All.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Writ – Possibility**

Mere acceptance of notice under section 154 would not estop assessee from moving writ petition challenging the notice. (A.Y. 1991-92)

*Vijay Mallya v. ACIT (2003) 263 ITR 41 / 183 CTR 201 / 133 Taxman 552 (Cal.)(High Court)*

**S. 154 : Assessment – Rectification of mistake – Prima facie adjustment – Intimation [S. 143(1)(a)]**

Where the issue involved of debatable, an intimation under section 143(1)(a) disallowing claim based on such debatable issue on ground that it is prima facie in

admissible, cannot be sustained. When error is pointed out it is the duty of Assessing Officer to amend under section 154(1)(b).

*ACIT v. Haryana Telecom Ltd. (2011) 133 ITD 99 / 10 ITR 428 (Delhi)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Notice of demand – Limitation**

Order under section 154 purported to have been passed on 24th January 2000, and the consequential calculation of tax payable in Form No. ITNS -150 having been served on the assessee on 24th May 2005 and 6th June, 2005, respectively i.e. After expiry of limitation under section 154(7), it cannot be accepted that the order was in fact passed on 24th January 2000, especially when no notice of demand was issued and no recovery proceedings were initiated. (A. Y. 1995-96).

*V. B. Desai Financial Services Ltd. v. Dy. CIT (2011) 51 DTR 205 / 137 TTJ 338 / 132 ITD 302 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Order passed after limitation period**

Order passed beyond the period of six months mentioned in sub-section (8) of section 154 is not time barred and rectification is not deemed to have been automatically allowed. (A.Y. 1998-99)

*Desai Investment (P) Ltd v. ITO (2010) 45 DTR 75 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – After four years – Non-valid**

Rectification sought beyond four years from the date of original order on the issue or matter which was not part of or dealt with in any of the intervening rectification orders passed by Assessing Officer, is void ab initio and invalid. (A. Y. 1996-97)

*ACIT v. Precott Mills Ltd. (2009) 178 Taxman 15 (Mag.)(Chennai)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Mistake apparent from Record – Directions of CIT(A)**

Failure to carry out directions of CIT(A) is mistake apparent from record. (A.Y. 1989-90)

*Procter & Gamble India Ltd. v. Dy. CIT (2008) 113 TTJ 682 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Deduction – Basis of preceding year**

An order of rectification on the basis of rectification of earlier year seeking to disturb deduction under section 80I cannot be sustained under section 155(4). (A.Y. 1994-95)

*Indian Farmers Fertiliser Co-operative Ltd. v. Jt. CIT (2007) 107 TTJ 98 / 105 ITD 33 (Delhi)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – Refund**



Where more than one view is possible, orders under section 154 could not be passed by Assessing Officer for treating the returns as invalid and withdrawing the refund granted earlier. (A.Ys. 2000-01 and 2001-02)

*ACIT v. Hing Samchar Ltd. (2007) 106 TTJ 441 (Amritsar)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Authority under section 116 – ITAT's order**

Commissioner (Appeals) is an authority of Income Tax which is authorised to rectify its order as per provisions of sections 154 and 116.

Failure to apply a retrospective amendment amounts to a mistake apparent from record.

*Shokat Ali Contractor v. ITO (2007) 164 Taxman 99 (Mag.)(Jodh.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Subsequent decision – High Court**

Subsequent decision of jurisdictional High Court gives rise to a mistake apparent rectifiable under section 154. (A.Ys. 1991-92, 1993-94)

*Dy. CIT v. Vijay V. Meghani (2007) 109 TTJ 7 / 106 ITD 362 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Failure to claim – Assessing Officer to allow – Apparent from record**

Interest due to Financial Institution converted in to shares, on such conversion assessee failed to claim deduction in the relevant year despite of the fact that all requisite material was available with the Assessing Officer at the time of assessment, it was held that the Assessing Officer is duty bound to grant deduction to which he is clearly entitled under the law and held that such omission constituted bona fide mistake apparent from record and therefore, the same can be rectified under section 154.

*Luster Tiles Ltd. v. Addl. CIT (2007) 291 ITR 152 (AT)(Jp.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Allowance in assessment – Supreme Court decision**

Order allowing deduction of 1/10th of the total share issue expenses as claimed by the assessee-company as per s. 35D was not inconsistent with the Supreme Court decision in *Brooke Bond India Ltd. v. CIT (197) 140 CTR (SC) 598 : (1997) 225 ITR 798 (SC)* and the deduction could not be disallowed by resorting to rectification under section 154. (A.Y. 1996-97)

*Jt. CIT v. S. I. Property Development Ltd. (2006) 103 TTJ 478 / 101 ITD 179 (Chennai)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – Sale and lease back debatable**

Allowability of depreciation in case of sale and lease back transaction is a debatable issue and hence, same could not be disallowed by resorting to s. 154. (A.Ys. 1991-92 to 1995-96)

*Jt. CIT v. Investment Trust of India Ltd. (2006) 103 TTJ 653 / 102 ITD 135 (Chennai)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Debatable issue – MAT credit and Interest under section 234B & C.**

MAT credit is advance tax or not is a debatable issue and therefore, rectification under section 154 could not be made for re-computation of interest under sections 234B and 234C by allowing set off of MAT credit from the amount of assessed tax. (A.Ys. 1988-99 to 2001-02)

*Smruthi Organics Ltd. v. Dy. CIT (2006) 103 TTJ 546 / 101 ITD 205 (Pune)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Mistake apparent – CIT(A) [S. 251(1)(a)]**

Action of CIT(A) setting aside the assessment after the amendment in cl. (a) to s. 251(1) w.e.f. 1st June, 2001, also constituted mistake apparent from record. (A.Ys. 1989-90 to 1992-93)

*J & K Cigarettes (P) Ltd. v. Addl. CIT (2006) 102 TTJ 1028 (Amritsar)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Power of Tribunal [S. 254]**

An issue raised before Commissioner (Appeals), which has not been dealt by CIT(A) in his order, would be said to have arisen out of order of Commissioner (Appeals) and it would be within the powers of Tribunal to adjudicate such issue.

*Prakash M. Dugad v. Dy. CIT (2006) 154 Taxman 46 (Mag.)(Pune)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Block assessment – VDIS, 1997**

Issue whether deduction of income disclosed under VDIS, 1997 is to be allowed while determining the undisclosed income in the proceedings under section 158BD is a debatable issue and therefore, Assessing Officer had no jurisdiction to pass rectification order under section 154 to withdraw the deduction.

*Palitana Sugar Mills (P) Ltd. v. ACIT (2006) 101 TTJ 351 / 99 ITD 565 (Ahd.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Interest [S. 234B & C]**

Rectification under section 154 to charge interest under sections 234B and 234C was valid even though the rectification order was passed before the date of passing of the judgment by the High Court. (A.Y. 2001-02)

*ACIT v. Satia Paper Mills Ltd. (2006) 100 TTJ 526 (Amritsar)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Depreciation – Debatable**

Assessing Officer could not resort to the provisions of s. 154 for rectification of intimation under section 143(1) for allowing depreciation for the purpose of computing

relief under section 80-IB at a different figure than that claimed in the return. (A.Ys. 1999-2000 and 2000-01)

*Packers (India) v. ITO (2006) 101 TTJ 232 / 99 ITD 383 (Ahd.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Reasons – Speaking order**

Non-speaking order under section 154 passed by Assessing Officer without giving any reasons for disallowing car expenses and interest payments could not be sustained as only mistake apparent from record can be rectified. (A.Y. 1997-98)

*ACIT v. B. C. Parthasarathy (2006) 101 TTJ 448 (Bang.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Intimation [S. 143(1)]**

What cannot be done directly under section 143(1) cannot as well be done indirectly by taking resort to section 154(1)(b). (A.Ys. 1999-2000 and 2000-01)

*Packers India v. ITO (2006) 99 ITD 383 / 101 TTJ 232 (Ahd.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Order of commissioner – Review**

Once Commissioner had recorded his finding against the assessee, the Commissioner is not competent to review its own order on basis of same facts in garb of powers vested under section 154.

All issues which involve prolonged arguments and are debatable and where two views are possible fall outside the scope of powers under section 154.

*Pushpa Gujral Science City Society v. CIT (2000) 165 Taxman 67 (Mag.)(Amritsar)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Failure to apply statutory provision**

Omission to apply statutory provisions is surely a mistake apparent from record capable of being rectified under section 154 by Assessing Officer. (A.Y. 1993-94)

*GTC Industries Ltd. v. Dy. CIT 104 ITD 86 / 105 TTJ 1010 (TM)(Mum.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – MAT Credit – Interest [S. 244A & 115JAA]**

Tax credit under provisions of MAT under section 115JAA(2) is advance tax retained by department for being set off against future tax liability – MAT credit is to be adjusted first while calculating tax liability and then adjustment of pre-assessment taxes. Thereafter, if refund arises due to other prepaid taxes, assessee entitled to interest under section 244A. It is mistake apparent from record and could be rectified. (A.Y. 1998-99)

*ACIT v. Candy Industries P. Ltd., ITA No. 5006/Mum/2002, Bench "F", Order dated 30th September, 2005 (Mum.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Subsequent interpretation by supreme Court – Mistake apparent**

It is settled that mistake arising as a result of subsequent interpretation of law by Supreme Court would constitute 'a mistake apparent from record'. (A.Y. 1989-90)  
*Bajaj Hindusthan Ltd. v. Jt. CIT (2005) 92 ITD 411 / 92 TTJ 1064 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Intimation – Scope [S.143(1)(a)]**

Issue whether there is a mistake in intimation or deemed intimation is to be seen in light of powers conferred under section 143(1); if such powers do not exist under section 143(1), i.e., main section, such powers cannot be conferred under section 154(1)(b). (A.Ys. 1997-98 to 2000-01)

*Rachhpal Singh v. ITO (2005) 94 ITD 79 / 93 TTJ 283 / 94 ITD 79 (Amritsar)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Deductions – Right of assessee – Loss or nil income – Positive income**

Whenever loss or nil income returned by assessee is converted into positive income by way of rectification, assessee assumes right to make claims in course of rectification proceedings regarding deductions which could be available to it only against positive income. (A.Y. 1996-97)

*Associated Hotels Ltd. v. Jt. CIT (2005) 2 SOT 93 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Record – Revised return**

Where assessee-firm filed revised return within time specified in Act which as still available to assessee, though after issue of intimation under section 43(I)(a) and also filed supplementary partnership deed (providing for increased salaries to partners) along with revised return, supplementary partnership deed definitely constituted 'record' for Assessing Officer to make a rectification under section 154. (A.Y. 1995-96)

*Kings & Co. v. ITO (2005) 98 TTJ 26 (Agra)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Doctrine of Merger – Sale and lease back**

Where a sale-and-lease-back transaction entered into by assessee had been found to be bogus and depreciation disallowed on assets and that had been upheld up to High Court, issue of taxability of lease rental on such assets in assessee's hands, though not raised in appeal, should be taken to have been considered and decided by appellate authorities and for that reason and also for reason that such issue was debatable, rectification application by assessee for exclusion of lease rental from its income, was rightly rejected. (A.Ys. 1993-94 to 1996-97)

*Subuthi Finance Ltd. v. ACIT (2005) 96 TTJ 473 (Chennai)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Exemption-Recall of order [S. 10B]**

Where Commissioner (Appeals), after detailed discussion, had held that assessee was entitled to exemption under section 103 but later sought to recall his order under

section 154 on an application by revenue, though view taken by Commissioner (Appeals) might have been an error of judgment, but could not be qualified as 'mistake' within meaning of section 154 so as to entitle him to rectify/recall his order. (A.Y. 2001-02)

*Abbey Chemical (P.) Ltd. v. ITO (2005) 94 TTJ 275 (Ahd.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Accumulation – Specific purpose – Charitable trust [S. 11(2)]**

Where assessee-trust's claim was that resolution of managing council of assessee-trust was specific about purpose of accumulation of income, question whether resolution of managing council was specific or not was a highly debatable issue and, therefore, Assessing Officer was not justified in resorting to provisions of section 154 to deny claim for exemption of accumulated income under section 11(2) on ground that specific purpose of accumulation was not given. (A.Y. 1993-94)

*Murlidhar Sohanlal Foundation v. ACIT (2005) 92 TTJ 1054 (Luck.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Relief entitled by assessee – Depreciation**

If on basis of material on record assessee is entitled to a relief (depreciation) and it is neither claimed nor allowed, it would constitute mistake apparent from record, and, consequently, such relief cannot be denied merely because assessee has omitted to claim it by mistake. (A.Y. 1991-92)

*Container Corpn. of India Ltd. v. Dy. CIT (2005) 92 ITD 333 / 94 TTJ 502 (Delhi)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Interest – DTAA**

In view of article 11(2) of India - U.S. DTAA under which in case of U.S. company interest is to be taxed at rate of 15 per cent, levy of tax on interest income in hands of US company at a rate higher than 15 per cent is a 'mistake apparent from record' within meaning of that expression under section 154. (A.Y. 1995-96)

*Asia Pacific Fund Inc. v. Dy. CIT (2005) 96 TTJ 548 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Non-mentioning of interest under section 217 in original assessment**

If in original assessment order charge about levy of interest under section 217 has not been specifically stated, then subsequently in rectification order or in order giving appeal effect it may not be possible to do so. (A.Ys. 1978-79 to 1980-81)

*Addl. CIT v. Hindalco Industries Ltd. (2005) 4 SOT 757 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Book profit – MAT – Interest under section 234B [S. 115JA, 115JAA]**

Order of Assessing Officer charging interest under section 234B after allowing credit for tax paid under MAT under section 115JA/115JAA cannot be said to suffer from a

mistake apparent from record, as issue of chargeability of interest was a highly debatable issue. (A.Y. 1999-2000)

*Jindal Exports Ltd. v. ITO (2005) 2 SOT 7 (Delhi)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Interests under sections 234B and 234C.**

Question as to chargeability of interest under sections 234B and 234C in a case where income is computed under section 115JA is a debatable issue and hence outside scope of section 154. (A.Y. 1999-2000)

*Bullion Investments & Financial Services (P.) Ltd. v. Dy. CIT (2005) 4 SOT 622 (Bang.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Interests under sections 234A, 234B and 234C**

Where Assessing Officer has not charged interest under sections 234A, 234B and 234C or incorrectly charged or not correctly specified it in assessment order or demand notice, he is competent to rectify omission with an order under section 154 to charge interest; where Commissioner (Appeals) admits appeal on question of chargeability of interest under sections 234A, 234B and 234C, he too can correct error that has crept in order of Assessing Officer in respect of chargeability of interest.

*ITO v. Prabhu K. Chandani (2005) 4 SOT 190 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Unabsorbed depreciation [S.143(3)]**

Where Assessing Officer completed assessment under section 143(3) at nil income after allowing benefit of unabsorbed depreciation and brought forward business loss, he was not justified in subsequently rectifying assessment under section 154 holding that carried forward business loss could not be set off against income under head 'Capital gains'.

*Padra Taluka Co-op. Cotton Sales Ginning & Pressing Society Ltd. v. ACIT (2005) 142 Taxman 22 (Mag.)(Ahd.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – Interest under section 234A – Intimation [S. 143(1)(a)]**

Where while processing assessee's return under section 143(1)(a), Assessing Officer levied interest under section 234A though assessee had paid entire self-assessment tax before due date of filing return, it was a mistake apparent from record which could be rectified. (A.Y. 1994-95)

*Milan Enterprise v. ACIT (2005) 95 ITD 18 / 95 TTJ 635 (Mum.)(Trib.)*

**S. 154 : Assessment – Rectification of mistake – CIT(A)'s order – Appeal effect**



The Order of Commissioner (Appeals) should be rectified under section 154, if on order giving effect, the assessed Income goes below the returned Income, so as to restrict assessed income to extent of returned income.

*ACIT v. Subh Laxmi Construction Co. (2003) SOT 587 (Jp.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Donations [S. 32AB]**

Donations given and treated as expenditure, if not reduced from profit to be arrived at under section 32AB, would be a mistake apparent on record. (A.Y. 1989-90)

*Dy. CIT v. Jindal Aluminium Ltd. (2003) 87 ITD 598 (Bang.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Debatable issue – Unilateral [S. 41(1)]**

An issue which is debatable is beyond the scope of S. 154. In the instant case the issue was whether unilateral act in crediting suppliers' balances would be taxed under section 41(1).

*Concord Relays (P.) Ltd. v. ACIT (2003) SOT 15 (Delhi)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Adjustment under section 143(1) – Post 1-6-1999**

In case of Return of Income processed under section 143(1) after 1.6.99, Assessing Officer has no power to make any prima facie adjustment to returned income. Further action of Assessing Officer in invoking S. 154 is also not valid. (A.Y. 1999-2000)

*Arunkumar Champalal (HUF) v. ITO (2003) 86 ITD 709 / 84 TTJ 500 (Mum.)(Trib.)*

#### **S. 154 : Assessment – Rectification of mistake – Prima facie adjustment – Debatable – Intimation under section 143(1)(a) – Assessee's right**

Prima facie adjustment on a debatable issue is rectifiable under section 154.

Filing of Appeal against the Intimation under section 143(1)(a), will not preclude assessee from seeking rectification of an apparent error. (A.Y. 1998-99)

*Aquapharm Chemical Co. Ltd. v. Jt. CIT (2003) 85 ITD 188 / 80 TTJ 235 (Pune)(Trib.)*

#### **Section 155 : Other amendments**

#### **S. 155 : Assessment – Other amendments – Rectification – Partner's share – Revision [S. 147]**

Revision of partner's share infirm is permissible under section 155(l) and not under section 147.

*Shyama Charan Gupta v. ACIT (2003) 128 Taxman 669 (Mag.)(All.)(High Court)*

#### **S. 155 : Assessment – Other amendments – Settlement commission – Retrospective of fact**

No retrospective effect can be given to section 155(l)(c). (A.Ys. 1974-75, 1975-76)

*V. B. Desai v. Administrative Officer, Settlement Commission for IT and WT (No. 1) (2003) 260 ITR 273 / 132 Taxman 632 (Karn.)(High Court)*

**S. 155 : Assessment – Other amendments – Investment allowance – Utilisation of reserve – Opportunity**

Following withdrawal of investment allowance for non-utilisation of the reserve within statutory time-limit, giving assessee only one day's time to state its version could not be said to be justified.

*Bharat Wagon & Engg. Co. Ltd. v. UOI (2003) 126 Taxman 499 / 259 ITR 659 (Patna)(High Court)*

**S. 155 : Assessment – Other amendments – Assessee ceased to exist – Dissolution – Investment allowance**

Where the assessee had ceased to exist within the period of ten years because of its dissolution and amount of investment allowance reserve remained unutilized, withdrawal of investment allowance on its dissolution was justified. (A.Ys. 1978-79 to 1981-82)

*Wilson Industries v. CIT (2003) 259 ITR 318 / 179 CTR 186 (Mad.)(High Court)*

**Section 156 : Notice of demand**

**S. 156 : Assessment – Notice of demand – Less than 30 days – Reasons – Cost awarded**

Period for payment of taxes specified in demand notice under section 156 of the Act was reduced without assigning any reasons that the period of 30 days if allowed to the assessee would be detrimental to revenue. Cost of ` 10,000/- was awarded to the assessee even though the order was withdrawn / recalled by the Department.

*Denso India Ltd v. Addl. CIT (2006) 190 Taxation 91 (Delhi)(High Court)*

**CHAPTER XIV-A**

**SPECIAL PROVISION FOR AVOIDING REPETITIVE APPEALS**

**Section 158A : Procedure when assessee claims identical question of law is pending before High Court or Supreme Court**

**S. 158A : Assessment – Repetitive appeals – Question of law – Pending before High Court – Declaration – Application to stay – Proceedings**

The Tribunal dismissed the appeals of the assessee following its order for earlier years against which appeal was pending before the High Court. The appeals were dismissed by the Tribunal even though the assessee had made a declaration under section 158A of the Act for keeping the issue pending till it was decided by the High Court. On these facts the High Court set aside the order passed by the Tribunal with a direction to the Tribunal to admit the claim of the assessee as made in the declaration under section 158A and proceed further as per section 158A(5) of the Act after the appeal

of the assessee for earlier year is adjudicated by the High Court. (A.Ys. 1992-93 to 1997-98)

*Titanor Components Ltd. v. CIT (2009) 26 DTR 43 / 224 CTR 560 / (2009) 184 Taxman 10 / (2010) 323 ITR 266 (Bom.)(High Court)*

## **CHAPTER XIV-B**

### **SPECIAL PROCEDURE FOR ASSESSMENT OF SEARCH CASES**

#### **Section 158B : Definitions**

##### **S. 158B : Block assessment – Definitions – Computation of undisclosed income – Belated filing of return – Disclosure of income [S. 132(4)]**

If the search under section 132 takes place after the due date of filing of normal return and no return is filed by that time, and the assessee is not able to demonstrate that he had disclosed his income to the department before the date of search in the some manner or the other, filing of return thereafter under section 139(4) would be of no consequence for the applicability of Chapter XIV-B and the income of the assessee is to be treated as undisclosed. (A. Y. 1999-2000)

*CIT v. A. T. Invofin India (P) Ltd. (2011) 335 ITR 370 / 237 CTR 360 / 49 DTR 141 (Delhi)(High Court)*

##### **S. 158B : Block assessment – Definitions – Undisclosed income – No material found – Declaration**

Where the assessee had maintained regular books of account and the returns of income were filed regularly before the date of search and no incriminating documents were found during the course of search addition on account of peak credit of farmer's account was beyond the scope of block assessment and liable to be deleted. (A.Y. 1995-96)

*CIT v. Rajendrakumar (2009) 24 DTR 191 / (2009) 178 Taxman 208 (MP)(High Court)*

##### **S. 158B : Block assessment – Definitions – Undisclosed income – Gift – Accounted**

Where the gift which the assessing officer added as undisclosed income of the assessee for the block period were duly disclosed in the return filed by him, the same were held to be outside the scope of block assessment and no addition was called for with respect to the said gifts.

*CIT v. Ashok Dua (2008) 14 DTR 294 / 177 Taxman 494 (Delhi)(High Court)*

##### **S. 158B : Block assessment – Definitions – Undisclosed income – Gift from NRI**

Gift from NRI. Financial capacity and credit worthiness when doubted, it cannot be said that the gift received are genuine and therefore, the same were rightly treated as undisclosed income.

*Sandeep Kumar (HUF) v. CIT (2007) 213 CTR 151 / 293 ITR 294 / 162 Taxman 91 (Delhi)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Not a substitute for reassessment**

Assessment proceedings undertaken under Chapter XIVB are only in respect of undisclosed income, that is, income which has not been, or would not have been disclosed and which has been unearthed as a result of the search or requisition. The proceedings under Chapter XIV-B cannot be used as an opportunity to either reopen concluded assessments or to reassess the returned income by taking a fresh look at the disclosed facts and figures, unless, of course, they are found to be false as a result of the search or requisition. (A.Ys. 1993-94 to 1997-98)

*CIT v. Jupiter Builders (P.) Ltd. (2006) 156 Taxman 361 / 205 CTR 553 / 287 ITR 287 (Delhi)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income Advance tax [S. 158BA]**

The assessee had paid advance tax on her assessable income much before date of search. Assessing Officer had also accepted return filed by assessee declaring income from capital gains. The provisions of section 158B could not be attracted in respect of the income merely because return had been filed after date of search. (A.Y. 1995-96)

*CIT v. Kumkum Kohli (Mrs.) (2006) 150 Taxman 239 / (2005) 196 CTR 538 / 276 ITR 589 (Delhi)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Revised return [S. 139(1)]**

Amount not disclosed in Return filed under section 139(1) – Amount shown in books of account and included in revised return filed after search amounts to undisclosed income under section 158B. (A.Y. 1996-97)

*Brijesh Lahoti (Dr.) v. CIT (2006) 282 ITR 349 / 200 CTR 499 / 151 Taxman 216 (MP)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Below taxable limit**

**S. 158BA**

Undisclosed income of a particular block period, if not taxable, would not be treated as undisclosed income on non filing of return.

*CIT v. Lily Tobias (Smt.) (2004) 266 ITR 401 / (2005) 193 CTR 422 / 193 Taxman 29 (Patna)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Interest**

Interest admitted to have been received by assessee pertaining to amount financed by assessee was to be assessed in hands of assessee as undisclosed income. (A.Ys. 1990-91 to 1999-2000)

*Rishabchand Bhansali v. Dy. CIT (2004) 136 Taxman 579 / 267 ITR 577 / 188 CTR 185 (Karn.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Prior to expiry of due date for filing return [S. 158BA]**

Where search was conducted at assessee's premises prior to expiry of due date for filing return, Tribunal was right in holding that there was no undisclosed income for the block assessment period. (A.Y. 1986-87)

*CIT v. Nitin Munje (2003) 132 Taxman 452 / 185 CTR 255 / 264 ITR 628 (MP)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Expenditure**

There is no merit in the contention that if the assessee is found to have suppressed certain expenditure which is unearthed during the search proceedings, merely because the assessee is able to show that he has actually spent the amount, the whole expenditure has to be ignored.

*M. G. Pictures (Madras) Ltd. v. ACIT (2003) 263 ITR 83 / 132 Taxman 859 / 185 CTR 185 (Mad.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Income below taxable income [S. 158BA]**

Income for any year which was below taxable limit, should not have been included in undisclosed income of block period.

*CIT v. Chandra Balakrishnan (Smt.) (2003) 132 Taxman 235 / 184 CTR 353 (Ker.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Income below taxable limit**

Where issue that when the income was below taxable limit, that could not be treated as undisclosed income, was not raised before Tribunal, it could not be said to arise out of Tribunal's order. (A.Ys. 1989-90 to 1998-99)

*Umar Farooqui v. CIT (2003) 132 Taxman 103 / 183 CTR 526 / 265 ITR 98 (Raj.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – DVO's report**

Where during search in premises of assessee nothing was found with regard to investment in house, addition on account of investment in construction based on DVO's report obtained after search was not justified.

*CIT v. Khushlal Chand Nirmal Kumar (2003) 263 ITR 77 / 132 Taxman 274 / 183 CTR 503 (MP)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Income offered in name of sons**

Where the assessee and his two sons had offered income shown in the name of the firm as their income, if any books of account in the name of the firm were seized and some entries were found, that would not affect character of income which was assessable in the hands of assessee and his two sons. (A.Ys. 1987-88 to 1991-92)  
*Ramjas Nawal v. CIT (2003) 131 Taxman 525 / 183 CTR 144 (Raj.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Gift by father**

Amount claimed to be gift from father was rightly added to assessee's income where it was found that there was no occasion for father to gift such sum to assessee. (A.Ys. 1986-87 to 1996-97)

*Chain Sukh Rathi v. CIT (2003) 185 CTR 56 / 270 ITR 368 / 134 Taxman 56 (Raj.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Disclosure in the course of search**

Where assessee with full knowledge and full consciousness made admission of income and agreed to pay taxes thereon also, it could not be said that statement under oath was made under coercion or duress; in such a case retraction cannot be accepted. (A.Ys. 1987-88 to 1991-92)

*Ramjas Nawal v. CIT (2003) 131 Taxman 525 / 183 CTR 144 (Raj.)(High Court)*

**S. 158B : Block assessment – Definitions – Undisclosed income [S. 158BB]**

Search having not yielded any incriminating material in respect of accommodation entry business allegedly carried on by the assessee, no undisclosed income could be computed from this business merely on the basis of information received from the Sales Tax Department about turnover.

*Kulwant Singh v. Dy. CIT (2010) 134 TTJ 129 / 46 DTR 83 (UO)(Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Double taxation**

On basis of seized material additions were made in Block Assessment to the extent of properties related to the assessee. Additions were also made in another firm based on same seized material, which was deleted by the Tribunal in that firm's case. Held, issue being identical in nature and based on finding given by Tribunal, the addition is not justified even in assessee's case.

*Sahil Builders v. Dy. CIT (2008) 170 Taxman 165 (Mag.)(Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Unexplained income – Affidavit**

Jewellery received as gift which was supported by affidavits of parties, was treated as unexplained. Held, such additions made, without any examination and comments on Affidavits filed is erroneous, and additions be deleted.

*Asha Devi (Mrs.) v. ACIT (2008) 167 Taxman 84 (Mag.)(Delhi)(Trib.)*



**S. 158B : Block assessment – Definitions – Undisclosed income – Recording in a diary**

Receipt of loan found recorded in a diary cannot be considered as undisclosed income as defined in S. 158B(b).

*Sunil Rathi Alias Jitendra Rathi v. ACIT (2007) 112 TTJ 545 (Jodh.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Material found**

It was held that in order to charge on income at higher rate, as undisclosed income for the block period, condition to be first satisfied is that the income which has not been, or would not have been disclosed should have been determined on basis of evidence found as a result of search or other documents.

*ACIT v. Leena J. Sonawala (Mrs.) (2007) 162 Taxman 84 (Mag.)(Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Advance tax – Accounting entry [S. 158BA]**

- a) Income attributable to the extent of Advance Tax paid cannot be considered as undisclosed Income.
- b) Cash credits appearing in the regular books, and for which no material found suggesting the same as bogus or in genuine cannot be considered as undisclosed income.

*N. R. Sudhir v. Dy. CIT (2007) 159 Taxman 87 (Mag.)(Bang.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Belated return – Streedhana S. 139(4) [S. 158BB (1)(ca)]**

Entries regarding loans from various parties were passed in the books of account maintained by the assessee. Return of income was not filed when the search took place, but the same was filed later on under section 139(4). Held that same cannot be termed as undisclosed income. Gold jewellery found equal to 500 grams per married woman and 250 grams per unmarried woman treated as 'Streedhan' (As per Board instruction No. 288/63/93-IT(Inv) II, dt. 11-5-1994) not part of undisclosed income.

*Rajendra C. Shah v. Jt. CIT, Bench F, IT(SS)A 284/Mum/2002 Block Period 1/4/89 to 16-6-1998 dt. 26-4-2006 – BCAJ P. 539 Vol 39-B, Part 5 August 2006 (Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Cash credit – Accounting entry**

Cash credit duly disclosed in the trial balance filed along with the return before the date of search cannot constitute undisclosed income under section 158B(b).

*I. Appala Raju v. ACIT (2006) 100 TTJ 438 (Visakha.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Salary – Below taxable limit TDS [S. 158BA]**

Assessee in employment, not filed her return of income and tax was not deducted as salary was below taxable – Salary income could not be considered as undisclosed income. (A.Ys. 1990–91 to 2000-01)

*Sheila D'Souza v. Jt. CIT, Bench 'C', IT(SS)A No. 342/M/03, dated 10th July, 2006, BCAJ P. 154, Vol. 39-C, Part 2, November 2006 (Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Unaccounted sales – KVP – Disclosure**

Addition in respect of undisclosed sales is to be made only to the extent of profit on such transaction and not of the suppressed sales.

Assessing Officer having made additions on accounts of undisclosed opening capital and undisclosed profits, separate addition of impugned expenditure which is debited in such books, could not be made.

Existence of HUFs of the assessee having been accepted and the HUFs having disclosed investments in KVPs in their balance sheets filed along with the returns and explained the source thereof, addition in respect of undisclosed investments in KVPs and interest accrued thereon could not be sustained in the hands of individual assessees.

*Bimal Kumar Singnania v. Dy. CIT (2006) 100 TTJ 790 (Kol.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Drawings for house hold expenses – Material not found – Construction cost – Excess stock – Verification – Third party's statement – Dumb paper seized**

Drawings disclosed by the assessee from time to time not being adequate to reflect the acquisition of expensive brands of air-conditioners, colour TVs, refrigerators, etc. found at residential premises of the assessee during the course of search, addition made by the Assessing Officer by making a reasonable estimate of the total price of such appliances was upheld.

In the absence of seizure of any material during the search indicating any unexplained expenditure on construction of house by the assessee, addition could not be made by the Assessing Officer in block assessment by estimating the cost of construction.

Search party having adopted a simplified and slipshod procedure for physical stock taking of enormous quantity of stock held by the assessee and completed the entire exercise within a few hours, the finding that excess stock was found during the course of search cannot be sustained despite the fact that some staff members of the assessee have put their signatures on the inventories prepared by the search party and, therefore, additions on account of alleged excess stock cannot be upheld.

Statement of a third party recorded after the completion of search could not be considered to be part or result of the search and therefore, additions could not be made solely on the basis of said statement as no incriminating material was discovered during the search.

Unsigned and undated papers seized from assessee's car being dumb documents having no evidentiary value, no addition could be made simply on the basis of notings

on such loose papers in the absence of any circumstantial evidence in the form of recovery of any unaccounted cash, jewellery or investment outside books.

*Bansal Strips (P) Ltd. & Ors. v. ACIT (2006) 100 TTJ 665 / 99 ITD 177 (Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Depreciation**

Once it was clear that the assessee was engaged in a business, it could not be contended that there was no element of business income in the undisclosed income found as a result of search under section 132 and, that the assessee was not entitled to claim current depreciation in block assessment as he had not claim any depreciation in any of the assessment years prior to search.

*ITO v. N. R. Panduranga Setty (2006) 100 TTJ 424 (Bang.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Salary – Interest [S. 158BA]**

Income derived from partnership as share, salary and interest, and which is shown by the firm, and on which assessee has paid advance tax, cannot be treated as undisclosed income, while framing block assessment and computing income for block period.

*S. Badrinarayan Kala v. ACIT (2006) 153 Taxman 5 (Mag.)(Chennai)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Regular books of account [S. 158BA]**

Undisclosed income does not include and cannot include an income already disclosed in regular books of account or any income for a particular assessment year which is below taxable limit or that when there is no tax liability after allowing rebate under section 88. (A.Ys. 1988-89 to 1998-99)

*Dy. CIT v. M. L. Jain (2005) 96 TTJ 362 (Jodh.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Disclosure in Balance sheet**

Where an amount was duly disclosed by assessee in its balance sheet as loan and assessee had filed its regular return of income, Assessing Officer could not in block assessment proceeding, go into its genuineness and treat it as assessee's undisclosed income.

*Dang & Co. (P.) Ltd. v. Dy. CIT (2005) 94 ITD 29 / 93 TTJ 645 (TM)(Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Return not filed [S. 158BA]**

Where assessee had taxable income for assessment year in question and it did not file any return of income, above income was rightly considered as undisclosed income by Assessing Officer.

*Shan Trust v. ACIT (2005) 97 TTJ 678 (Ahd.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Disclosure during survey [S. 133A]**

Where prior to search, during course of survey under section 133A itself assessee had declared certain income as undisclosed income and already offered to pay tax thereon, income declared during survey operation under section 133A could not be considered as undisclosed income in search conducted subsequent to survey.

*Gauthamchand Bhandari v. Dy. CIT (2005) 95 TTJ 288 (Bang.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Evidence found**

Undisclosed income, which can be assessed under Chapter XIV-B, should be that amount which is computed on basis of evidence found as a result of search and such other material or information as are available to Assessing Officer and are relatable to such evidence; if there is no evidence or evidence has already come on record or has been disclosed by assessee in assessment proceedings, then that evidence cannot be said to have been found as a result of search and in that case, material or information available with Assessing Officer and relatable to such evidence cannot also help in computing undisclosed income

*Morarjee Goculdas Spg. & Wvg. Co. Ltd. v. Dy. CIT (2005) 95 ITD 1 / 98 TTJ 201 (TM)(Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Income below taxable – Advance tax**

Income which is covered by advance tax and the income which is below taxable limit, cannot be treated as undisclosed income.

*F. Ramesh v. ACIT (2005) 92 TTJ 760 (Chennai)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Position Prior to Amendment by Finance Act, 2002**

Where search was conducted on 7-12-1998, notice under section 158BC requiring assessee to file its block return was issued on 16-6-1999, block return was filed by assessee on 12-7-1999 and block assessment order was passed on 27-12-2000, as all above events occurred before amendment was brought in definition of 'undisclosed income', by Finance Act, 2002, in such circumstances, definition of 'undisclosed income' prior to amendment brought in by Finance Act, 2002, was correct law to be applied.

*Sun Pharma Exports v. Dy. CIT (2005) 96 TTJ 415 (Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Salary – Deduction of tax at source [S. 158BA]**

Salary income on which tax has been deducted at source cannot be treated as undisclosed income.

*Niranjan Thakur v. Jt. CIT (2005) 94 TTJ 253 (Mum.)(Trib.) / Surjit Tosaria (Dr Mrs) v. Jt. CIT (2005) 92 TTJ 338 / 146 Taxman 32 (Mag.)(Delhi)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – False Claims**

In order to bring deductions claimed by an assessee in its regular returns within scope of undisclosed income, assessing authority has to establish that claims made by assessee were false; degree of evidence necessary for establishing such falsehood is high; preponderance of probability alone is not sufficient.

*Sun Pharma Exports v. Dy. CIT (2005) 96 TTJ 415 (Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Cash and Jewellery**

Where cash and jewellery seized during search belonged to several persons, addition of same only in assessee's hands was not justified.

*Dinesh K. Shah v. Dy. CIT (2005) 92 TTJ 109 (Bang.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Stock**

Addition on account of excess stock in case of assessee in shipbreaking business was not justified on basis of his statement under section 132(4) which he had subsequently retracted, particularly when all purchases were accounted for and there was no evidence on record that assessee sold scrap out of books.

*Rajendra Shivchand Gupta v. Dy. CIT (2005) 93 TTJ 743 / 148 Taxman 46 (Mag.)(Ahd.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Income of Firm and Partner [S. 158BA]**

Income from firm, declared by firm, but not by assessee-partner on which assessee partner has paid advance tax, cannot be included as undisclosed income in block assessment of partner.

*S. Badrinarayan Kala v. ACIT (2005) 96 TTJ 642 (Chennai)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Income – Partner – Statement – Retraction**

Where assessee-firm's partner had retracted from disclosure made at time of search and huge discrepancies in stocks and sales were found from material seized at time of search, Assessing Officer should have arrived at undisclosed income independent of disclosure made by assessee.

*New Alfa v. Dy. CIT (2005) 1 SOT 302 (Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Foreign visit**

Where all expenses of foreign visit were duly disclosed by assessee in regular returns and there was no finding in course of search about any expenses incurred by assessee in excess of that as per any seized document, addition on account of expenses on foreign visit was not justified in block assessment.

*Vishnu Kumar Gupta v. Dy. CIT (2005) 94 TTJ 1082 (Mum.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Recorded in books**

Donations received by assessee-trust running a school for admission of students which were recorded in assessee's books of account, were out of purview of block assessment.

*Shan Trust v. ACIT (2005) 97 TTJ 678 (Ahd.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Repayment of loan**

Where assessee had not explained real source of repayment of certain loan and was hiding same, Assessing Officer was justified in making addition of said amount to income of assessee in block assessment.

*Nikky Enterprises (P.) Ltd. v. Dy. CIT (2005) 4 SOT 112 (Chennai)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed Income – Loose paper – Without signature**

Where during course of search at residence of assessee's husband, a piece of paper, without any date or signature, was found, no addition could be made to assessee's income on basis of such loose paper by treating some transactions noted on that paper as belonging to assessee.

*Bommana Swarna Rekha (Smt.) v. ACIT (2005) 94 TTJ 885 / 147 Taxman 59 (Mag.)(Visakha.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Loose paper – Affidavit**

Where though certain transactions were found noted on a piece of paper seized during search of assessee's premises but her husband by an affidavit admitted entries on said paper and same document had been considered by Settlement Commission in case of husband, addition to assessee's income based on said document was to be deleted.

*ACIT v. Parbhjot Kaur (2005) 97 TTJ 796 (Chd.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed Income – Reconciliation**

Where assessee filed reconciliation statement before Assessing Officer in respect of differences found in sales figures as shown in document seized during search operation and in books of account of assessee and stated that it was due to fact that sales figures as found in seized document were inclusive of sales tax, the difference added by Assessing Officer as undisclosed income was to be deleted.

*Jt. CIT v. Theme Apparels (P.) Ltd. (2005) 146 Taxman 17 (Mag.)(Delhi)(Trib.)*



### **S. 158B : Block assessment – Definitions – Undisclosed Income – Company – Director**

Where assessee-director of a company had shown nexus between amount declared by company in which he was director as undisclosed income and investments made by him in WP and KVPs, such investments could not be treated as undisclosed income in assessee's hands.

*Dy. CIT v. Sunil Umashankar Rungta (2005) 94 TTJ 329 (Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Evidence before police**

Where assessee was a transporter of Naphtha from a depot of BPCL/HPCL to a factory, and there was no material/evidence on record found as a result of search, to support involvement of assessee in adulteration of petrol by mixing up Naphtha, addition could not be made to assessee's income on account of profits from adulteration of petrol merely on basis of evidence of certain witnesses before police, particularly without confronting assessee with such evidence and without giving him an opportunity of hearing.

*Anil Nagpal v. ACIT (2005) 94 TTJ 745 (Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – No incriminating documents**

There is limited scope for estimated additions in a block assessment; in absence of any incriminating material to suggest that any transaction of purchase or sale was made by the assessee outside its books of account, found at the time of search, there was no justification to make any addition on that count.

*ACIT v. Santogen Textile Mills Ltd. (2005) 94 TTJ 637 / 147 Taxman 54 (Mag.)(Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Estimated sales**

Where on basis of search sales are estimated, sales are to be taken on basis of seized documents and sales are to be estimated only for year for which information or document has been found and seized; sales cannot be estimated for any other year.

*ACIT v. M. M. Sales Agencies (2005) 97 TTJ 575 (Jp.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Allegation**

Where on facts it was found that assessee was merely a conduit for alleged undisclosed cash receipt from main group companies in whose case main search was held and that the money was actually routed back to company, addition of such sum as assessee's undisclosed income was not justified.

*Niranjan Thakur v. Jt. CIT (2005) 94 TTJ 253 (Mum.)(Trib.)*

### **S. 158B : Block assessment – Definitions – Undisclosed income – Advance tax – Deduction of tax at source – Return not filed on due date [S. 158BA]**

Where though no undisclosed income was found during search, income of assessee for assessment year 1998-99 declared by him in block assessment return was treated as undisclosed income as return was not filed in due time, since assessee had been assessed to tax on income, had paid advance tax thereon and was subjected to tax deducted at source, Assessing Officer, without bringing out any search material, was not justified in assessing assessee's income as undisclosed income.

*Dy. CIT v. Damodardas Jerambhai Wadhwa (2005) 2 SOT 98 (Kol.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Reference to S. 271(1)(c) Expl.5 – Telescoping**

For determining the scope of undisclosed income recourse to the provisions of Expln 5 to S. 271(1)(c) can not be taken, and the definition as given in S. 158B(b) will have to be followed.

Addition sought to be made on basis of slips, can be setoff against against unexplained cash found, as both being in respect of undisclosed business of the assessee.

*Kay Cee Electricals v. Dy. CIT (2003) 128 Taxman 150 (Mag.) / 87 ITD 35 / 81 TTJ 734 (Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Unexplained cash**

Addition by the Assessing Officer in respect of Cash found, ignoring the explanation and reconciliation, and without any investigation and assigning any reason, was held to be unjustified

*Vishwanath Prasad v. ACIT (2003) 86 ITD 516 / (2004) 86 TTJ 642 (All.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Books of Account – Material not found**

No addition can be made in respect of credits appearing in books as non genuine, when no material was found in search in respect of such credits being non genuine.

*Sudhir Kumar Potdar v. Dy. CIT (2003) SOT 495 (Jab.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Job work – Ancestral – Unaccounted expenditure – Sales – Net profit**

Jewellery found in shop of assessee jeweller, which was stated to be for repairing, but not entered in repairing register, cannot be treated as undisclosed Income, by merely disbelieving the statement.

Addition on account of value of Jewellery, claimed to be an ancestral, made on ground that members of family were not wealth Tax assessee, was not justified.

Unexplained expenditure incurred for business purpose, and not recorded, can not be added deeming the same as Income.

Held, Addition made taking total sales value as an income would be unjustified, and only net profit rate should be applied on sales outside books of account.

*Madanlal Narendrakumar (HUF) v. ACIT (2003) 131 Taxman 41 (Mag.)(Indore)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Silverware**

Silverware found during search which might have been received on ceremonial occasions like marriage can not be added, considering the reasonableness in weight of silverware.

*Sulochana Devi Jaiswal (Smt.) v. Dy. CIT (2003) SOT 228 (Jab.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – DVO's export – Construction cost**

Addition on account of cost of construction, based on Report of valuation officer obtained after search was held to be not sustainable, as same can not be said to be an information or material discovered during course of search.

*Vignesh Flat Housing Promoters v. Dy. CIT (2002) 77 TTJ 873 (Chennai)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Net income**

Held, that against the additions made on estimate basis, estimated expenditure based on corroborative evidences be allowed as expenses.

*Satyabhushan v. Dy. CIT (2003) 132 Taxman 143 (Mag.)(Bang.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Interest on tax refund**

Interest on Income Tax Refund cannot be held to be undisclosed Income, assessable in the block period, as same was in the knowledge of the department.

*Jaswant Singh & Co v. ACIT (2003) SOT 545 (Amritsar)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Books of account – Disclosure**

Only undisclosed Income can be taxed under chapter XIV B found at time of search based on evidence, material or record. Income disclosed in books maintained in regular course cannot be brought to tax under chapter XIV B.

*Shanti Rani (Smt.) v. ACIT (2003) 126 Taxman 62 (Mag.)(Chd.)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Notings on loose papers**

Notings on slips of paper or loose sheets of paper cannot be considered relevant for purpose of considering nature and impact of transaction.

*Amarjit Singh Bakshi (HUF) v. ACIT (2003) 86 ITD 13 / 81 TTJ 169 (TM)(Delhi)(Trib.)*

**S. 158B : Block assessment – Definitions – Undisclosed income – Return not filed – Due date [S. 158BA]**

Income relating to previous year, before due date of filing the Return of Income, or before the end of previous year, would not be included in the block assessment.

*Hemalatha D. Shah (Smt) v. Dy. CIT (2003) 79 TTJ 188 / 132 Taxman 52 (Mag.)(Bang.)(Trib.)*

*Vishwanath Prasad v. ACIT (2003) 86 ITD 516 / (2004) 86 TTJ 642 (All.)(Trib.)*  
*Babros Machinery Mfrs. (P.) Ltd. v. Dy. CIT (2003) 84 ITD 91 / (2003) 78 TTJ 857 (TM)(Ahd.)(Trib.)*

### **Section 158BA : Assessment of undisclosed income as a result of search**

#### **S. 158BA : Block assessment – Undisclosed income – Direction to dispose the appeal**

On an SLP from the order of the Calcutta High Court in *Dy. CIT v. Shaw Wallace & Co. (2001) 248 ITR 81 (Cal.)*, all proceedings were stayed while allowing Assessing Officer to pass block assessment order but he was directed not to enforce it without obtaining order of Court. The CIT(A) was directed to pass the order considering the retrospective amendments made in the year 2002.

*Shaw Wallace & Co. Ltd. v. CIT (2003) 129 Taxman 543 / 180 CTR 105 (SC)*

#### **S. 158BA : Block assessment – Undisclosed income – Protective assessment – Regular assessment [S. 143(3)]**

Income which is assessed as undisclosed income for the block period cannot be assessed in regular assessment under section 143 of the Act for these years even on protective basis. (A.Ys. 1996-97, 1997-98)

*CIT v. Wipro Finance Ltd. (2008) 10 DTR 281 / (2010) 325 ITR 672 (Karn.)(High Court)*

#### **S. 158BA : Block assessment – Undisclosed income – Notice – Service of [S. 260A, 282]**

No substantial question of law arose from the finding of the Tribunal that the notice to the assessee was not served on him in his individual capacity, but was served to him as a partner of the firm, as such, the assessment was not valid.

*CIT v. Vijay Kumar Agrawal (2006) 192 Taxation 853 (MP)(High Court)*

#### **S. 158BA : Block assessment – Undisclosed income – Period – Entries in the books of account – Material found [S. 158B(b)]**

Undisclosed income is confined to the period for which tax liability is determined on the basis of entries in the accounts book or on the basis of material found in course of search and seizure. (A.Ys. 1986-87 to 1996-97)

*CIT v. Purshottamlal Tamrakar Uchehra (2003) 184 CTR 349 / 270 ITR 314 (MP)(High Court)*

#### **S. 158BA : Block assessment – Undisclosed income – Investment not disclosed in the books – Assessment [S. 158BA(b)]**

Investments detected during search and seizure which were found to be not covered by entries in books produced during regular assessment, are to be treated as undisclosed income.

*Dy. CIT v. H. V. Shantharam (2003) 128 Taxman 34 / 261 ITR 435 / 180 CTR 300 (Karn.)(High Court)*

**S. 158BA : Block assessment – Undisclosed income – Stock**

It was noticed on verification that there was no noting or computation to show that there was deficit of physical stock at time of search when compared to book stock. It was also noted that basic variables of computing stock position themselves were estimates assumed by the Assessing Officer. Also the partner who had initially deposed before the revenue authorities against the assessee firm, did not turn up for cross examination and thus the evidentiary value built on statement of the said person collapsed. In view of the above facts, the impugned addition made by the authorities were held not sustainable. (A. Y. 1989-90 to 1998-99)

*Sunrise Sales Corporation v. Dy. CIT (2011) 43 SOT 16 (URO)(Bang.)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Computation of undisclosed income – Share application money – Disclosure in return [S. 158B(b)]**

Amalgamation reserve and share application money, which were shown in the regular return of income could not be assessed as undisclosed income of the assessee.

*Dy. CIT v. M. L. Dalmiya & Co. Ltd. (2006) 100 TTJ 613 / (2006) 98 ITD 93 (Kol.)(Trib.)*

**S. 158BA : Block assessment – Computation of undisclosed income**

Investment in the house property belonging to assessee's wife cannot be considered as undisclosed income of the assessee as the investment in the house was already disclosed by her in the returns and she was assessed to tax.

*Chandravadan Jayantilal Chokshi v. ACIT (2006) 100 TTJ 879 (Ahd.)(Trib.)*

**S. 158BA : Block assessment – Computation of undisclosed income – Seized material**

While computing undisclosed income in block assessment, the net liability worked out as per the seized material could not be rejected on the presumption that there may be opening debit and credit entries in the accounts of the parties.

*Manoj Kumar Gupta v. Dy. CIT (2006) 100 TTJ 588 (Mum.)(Trib.)*

**S. 158BA : Block assessment – Surcharge – Amendment w.e.f 1-6-2002 [S. 113]**

Tax rate of tax applicable to undisclosed income is to be determined as per Sec 158BA r.w.s. 113 –Levy of surcharge in respect of the search initiated prior to 1-6-2002 was not valid in law

*Merit Enterprises v. Dy. CIT (2006) 102 TTJ 748 / 101 ITD 1 (SB)(Hyd.)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Retraction of statement – Justification [S. 158B(b)]**

Computation of undisclosed income solely on the basis of confessional statement of assessee was not justified.

*Rajesh Jain v. Dy. CIT (2006) 100 TTJ 929 (Delhi)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Sales of shares [S. 158B(b)]**

Sale of shares by assessee not being recorded in the books of account and other documents before the search, and details of receipt of full consideration was also not shown in the regular return. The conditions of s. 158BA(3) were not fulfilled by the assessee and, therefore, capital gains arising on sale of shares was rightly treated as undisclosed income of the assessee.

*Vijay Sehgal (HUF) v. ACIT (2006) 102 TTJ 904 / 100 ITD 560 (Amritsar)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Period – Date of commencement [S. 158B(b)]**

Assessment for block period under Chapter XIV-B can be made of undisclosed income only up to date of commencement of search or date of requisition, and not for period thereafter

*Morarjee Goculdas Spg. & Wvg. Co. Ltd. v. Dy. CIT (2005) 95 ITD 1 / 98 TTJ 201 (TM)(Mum.)(Trib.)*

**S. 158BA : Block assessment – Findings of Survey – Undisclosed Income [S. 133A)] – Scope**

No addition can be made on basis of deficit stock found in business premises during course of survey action taken under section 133A in block assessment as it is outside scope of Chapter XIVB which deals with assessment of undisclosed income as a result of search.

*Bommana Swarna Rekha(Smt) v. ACIT (2005) 94 TTJ 885 / 147 Taxman 59 (Mag.)(Visakha)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Undisclosed receipts – Profits [S. 158B(b)]**

Addition could be made only of profits earned on unaccounted receipts, and not of entire receipts.

*Narula Transport Co. v. ACIT (2003) 127 Taxman 163 (Mag.)(Amritsar)(Trib.)*

**S. 158BA : Block assessment – Undisclosed income – Cash credit – Applicability of S. 68**

Sec 68 can be invoked in block assessment.

*Cas Card Finance Ltd. v. ACIT (2003) 84 ITD 1 / 78 TTJ 55 (TM)(Ahd.)(Trib.)*

**Section 158BB : Computation of undisclosed income as a result of search**



**S. 158BB : Block assessment – Computation – Undisclosed income – Set off of brought forward losses**

In view of expl. (a) to section 158BB(4), it is mandatory that only brought forward losses of past year under chapter VI and unabsorbed depreciation under section 32(2) are to be excluded while aggregating total income or loss of each previous year in the block period and set off of inter se losses and losses accruing in any previous year in the block period against the income assessed in other previous year in the block period is not prohibited

*E. K. Lingamurthy v. Settlement Commission (2009) 222 CTR 1 / 19 DTR 99 / 178 Taxman 116 / 314 ITR 305 / 212 Taxation 142 (SC)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Belated return – Surrender of income – Gift from NRI**

Income declared in a belated return after search could not be treated as disclosed income. Assessee being unable to give any valid explanation for the alleged gift received from NRI, having surrendered the amount as unexplained income, Tribunal was not justified in treating the gifts as explained simply because the same were disclosed in the regular return.

*CIT v. Ashwani Trehan (2011) 239 CTR 10 / 47 DTR 329 (P&H)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income [S. 69, 132]**

Where no evidence has been produced by the assessee to rebut the statement made at the time of search that he had invested impugned sum in different names but the shares actually belonged to him, addition made by Assessing Officer was sustainable. (Block period 1987-88 to 1997-98).

*Dinesh B. Parikh v. CIT (2011) 63 DTR 25 / (2012) 246 CTR 51 (Cal.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Return not submitted [S. 158BC]**

Return not submitted in response to notice under section 158BC, the Court held best assessment valid.

*Alok Todi and Another v. CIT (2011) 339 ITR 102 / (2010) 06 DTR 501 / (2012) 247 CTR 345 (Cal.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Additions made not based on material discovered during search – Not valid [S. 132]**

*CIT v. Temleton Asset Management (India) P. Ltd. (2011) 337 ITR 541 (Bom.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Depreciation**

While computing income of the assessee even in block assessment, the Assessing Officer must allow the claim of the assessee for the depreciation which is legally permitted under the provisions of the Income-tax Act, 1961.

*CIT v. C. Sabira (Smt) (2010) 40 DTR 153 / 237 CTR 477 / 338 ITR 226 (Ker.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income [S. 41(1)]**

Addition in terms of section 41(1), cannot be made in block assessment where no material was found during search to show that the liability was either bogus or had ceased to exist.

*CIT v. Radhika Creation (2010) 47 DTR 60 (Delhi)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Unabsorbed depreciation – Loss**

Loss and unabsorbed depreciation are to be set off against the total income in computing the undisclosed income of the block period.

*H. E. Distilleries (P) Ltd. v. Dy. CIT (2010) 229 CTR 457 / 34 DTR 299 (Karn.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Third party statement – No material found [S. 158B(b)]**

Where no material was recovered in the course of search, addition cannot be made by the assessing officer while framing block assessment, merely on the statement of a third party independent of the search.

*CIT v. Concorde Capital Management Co. Ltd. (2009) 25 DTR 97 / 334 ITR 346 / 183 Taxman 172 (Delhi)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Discrepancy in stock – Material not found [S. 158B(b)]**

Where no incriminating documents found depicting sale or purchase outside the books and no defect found in the books of accounts maintained by the assessee in regular course of business, no addition to the income of the assessee as undisclosed income could be made merely on the basis of discrepancy worked out on estimation of stock.

*CIT v. Utkal Alloys Ltd. (2009) 26 DTR 259 / 226 CTR 676 / 319 ITR 339 (Orissa)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Due date of filing of return [S. 158BA]**

Mere fact that time for filing return has not expired is not enough to hold that income disclosed after search can not be treated as undisclosed.

*Rajesh Sayal v. CIT (2009) 185 Taxman 369 / 225 CTR 405 / 28 DTR 153 (P&H)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income [S. 158B(b)]**

No addition could be made in block assessment under Chapter XIV–B of the Act where no incriminating material was found by the revenue during the course of search having nexus with the undisclosed income.

*CIT v. M.S. Agrawal (HUF) (2008) 11 DTR 169 / 236 CTR 538 (MP)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Belated return [S. 158BA]**

Once the assessee has paid advance tax and declared the income in his belated return filed after the date of search such income cannot be held as undisclosed income of the assessee.

*CIT v. Shoba Ramalingam (Smt) (2008) 10 DTR 233 (Mad.)(High Court)*

*CIT v. A. M. Mohan Babu (2008) 10 DTR 235 (Mad.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Cash credit – Books of account [S. 158B(b)]**

Where the amount of alleged cash credit is shown in the regular return filed by the assessee much prior to the search and seizure action, the amount could not be added while making assessment under the provisions of Chapter XIV-B of the Income-tax Act, 1961.

*CIT v. Tirupati Enterprises (2008) 10 DTR 17 (Raj.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Chapter VIA – Advance Tax [S. 158BA]**

While computing the undisclosed income for the block period, deduction under Chapter VIA is allowable. Amount in respect of which advance tax has been paid must be excluded even if no return was filed.

*CIT v. V. Subramaniyan (Late) (2008) 305 ITR 289 (Mad.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Reopening – Regular assessment [S. 147]**

Matters disclosed by the assessee in his regular returns for relevant assessment year cannot be reopened while framing block assessment in absence of specific incriminating material.

*CIT v. C. L. Khatri (2006) 190 Taxation 540 (All.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Below taxable limit [S. 158BA]**

Where the income which is not otherwise taxable, being below the taxable limit, the same income cannot be taxed in the block assessment irrespective of the fact whether the same has been disclosed after or before the search operation.

*CIT v. Sangeeta Varma (Dr.) & Ors (2006) 195 Taxation 677 (MP)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Salary – Taxable limit [S. 158BA]**

Salary income for the period falling in the block period which is below the taxable limit or on which tax has been deducted at source cannot be included in undisclosed income of the assessee.

*Surendra Kumar Lahoti v. ACIT (2006) 195 Taxation 647 (MP)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income**

Where addition was made by the Assessing Officer solely on the basis of the valuation report found during the course of search, the Hon'ble High Court held that the same was not sufficient to make the addition as the said valuation report was neither an estimate of the investment by the assessee nor the fair market value of the property.

*CIT v. Sunilkumar Gupta (2006) 193 Taxation 47 (Delhi)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Income below taxable limit [S. 158BA]**

Where search was conducted on 3-11-1995, in view of retrospective amendment of section 158BB, income for those years in which income was found to be below taxable limit was to be excluded from block assessment. (A.Ys. 1986-87 to 1995-96)

*CIT v. Ashim Krishna Mondal (2004) 270 ITR 160 / 192 CTR 336 / 144 Taxman 365 (Cal.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Advance tax [S. 158BA]**

Income disclosed on account of payment of advance tax can not be held to be undisclosed income for purposes of block assessment.

*Alka Goswami (Dr Mrs) v. CIT (2004) 268 ITR 178 / 138 Taxman 212 / 190 CTR 214 (Gau.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Estimation – Appraisal**

The word 'computation' compared to the word 'assessment' bears a narrower meaning. It is the process of computation of the income. for the purposes of assessment. The word 'estimate' means the 'the action of valuing or appraising an approximate calculation based on probabilities'. The word 'appraisal' means 'the act of appraising; the setting a price' 'appraise' means, to fix a price, especially as an official valuer, to estimate the amount, or worth of where as 'appraisement' means the action of 'appraising by an official appraiser estimate value estimate of worth generally. Under the block assessment scheme the assessing officer compute the income he does not estimate or appraise the income from the business. Block assessment under search and seizure procedure can not proceed on conjecture and /or surmises and arrive an estimation instead of computation. (A.Ys. 1986-87 to 1995-96)

*CIT v. Ashim Krishna Mondal (2004) 270 ITR 160 / 192 CTR 336 / 144 Taxman 365 (Cal.)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Dead person – Bad in law [S. 158BC]**

Where despite knowledge that assessee was dead, proceedings were commenced against dead person and assessment order passed, such assessment order was liable to be quashed.

*R.C. Jain v. CIT (2004) 140 Taxman 379 / 190 CTR 34 / 273 ITR 384 (Delhi)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – No search warrant [S. 158BC]**

Where no search warrant is issued in name of the assessee, proceedings initiated under section 158BC are ab initio void and without jurisdiction.

*CIT v. M.S. Pushpa Rani (2004) 136 Taxman 627 / 193 CTR 256 / 289 ITR 328 (Delhi)(High Court)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Some evidence must be found in the course of search**

Block assessment can be made in respect of undisclosed income which is recovered as a result of evidence found during the course of search and not as a result of other documents or material which came to possession of Assessing Officer subsequent to conclusion of search operation unless and until such evidence recovered during course of search. It is apparent that some evidence is to be found as a result of operation and it is only thereafter that remaining part of provisions come in to play.

*Krishna Terine (P) Ltd. v. ACIT (2011) 130 ITD 411 / 139 TTJ 345 / 56 DTR 395 / 11 ITR 405 (Ahd.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Peak investment**

Seized documents showed that the assessee has earned undisclosed income on account of unrecorded turn over in the books of account which was declared in the return for the block period, further additions towards peak investment could not be made in the absence of any document or evidence.

*ACIT v. Saileshkumar Nathalal Patel (2011) 63 DTR 249 / 142 TTJ 521 / 132 ITD 526 (Ahd.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Bank accounts of third party – Gifts**

Computerised books of account not found at the time of search, but produced at the time of assessment cannot be ignored. Amount credited in the bank accounts of wife and son cannot be treated as undisclosed income of the assessee. Whisky bottles

received by the assessee in appreciation of good work as gifts cannot be assessed as income from undisclosed source.

*G. G. Dhir (Dr.) v. ACIT (2010) 35 DTR 81 / 125 ITD 35 / 129 TTJ 1 (TM)(Agra)(Trib.)*

#### **S. 158BB : Block assessment – Computation – Undisclosed income – Telescoping**

In the case of assessee's brother, the Tribunal having accepted the plea that unaccounted advances made out of undisclosed income are irrecoverable and allowed telescoping of the unrecovered amount against the undisclosed income assessed on the basis of unencashed cheques which were found in the course of search, similar addition of undisclosed income made in the case of assessee on identical facts cannot be sustained. (A.Y. 2003-04)

*ACIT v. M. N. Rajendrhian (2010) 37 DTR 263 / 127 ITD 244 (TM)(Chennai)(Trib.)*

#### **S. 158BB : Block assessment – Computation – Undisclosed income – Books of account – Evidence [S. 69]**

It is not sufficient that assessee had disclosed the asset, transaction or entry but it is essential that income attributable to transaction has also been disclosed to get the deduction under section 158BB(1).

The books of account maintained in regular course of business, found during course of search constitute "evidence" as contemplate under section 158BB.

In the case of share broker client ID mismatch found during the search would constitute "material" as contemplated under section 158BB(1).

Since all the provisions of section 142 are applicable to assessment under chapter X1V-B, it is always open to Assessing Officer to resort to provisions of section 142(2A), which deal with compulsory audit and findings of compulsory audit have to be taken in to consideration while determining undisclosed income.

Provision of section 69 would be applicable to extent of income not disclosed in transaction recorded in books of account. (A.Y. 2003-04)

*Triumph Securities Ltd. v. Dy. CIT (2010) 39 SOT 139 / 43 DTR 189 / 132 TTJ 257 / (2011) 10 ITR 1 (SB)(Mum.)(Trib.)*

#### **S. 158BB : Block assessment – Computation – Undisclosed income – Genuineness of gift – Inquiry by Assessing Officer**

Assessing Officer having not examined the alleged donor nor put specific question in respect of such credit to his father, addition could not be made by treating the gift as bogus.

*M. Balakrishna Hegde v. Dy. CIT (2010) 38 DTR 345 (Bang.)(Trib.)*

#### **S. 158BB : Block assessment – Computation – Undisclosed income – Firm – Partner**

In view of proviso to clause (b) of Explanation of section 158BB(1), if an income is earned by firm or on behalf of firm, whether disclosed or undisclosed, it has to be



assessed in hands of firm only and as such an assessment cannot be made merely because said income is not disclosed in account of firm or it is pocketed by partner.

*ACIT v. K. T. Joseph (2010) 125 ITD 235 / (2009) 126 TTJ 433 / 30 DTR 156 (TM)(Cochin)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Disclosure in balance sheet**

Loans which were shown by the assessee in the balance sheet filed with the return for an earlier year cannot be treated as bogus and addition cannot be made merely because interest has not been paid.

Estimation by Tehsildar cannot be basis to make addition as income from undisclosed source. (A.Ys. 1989-90 to 1998-99)

*ACIT v. Subhash Verma (2009) 125 TTJ 865 / 28 DTR 508 (SB)(Delhi)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Firm and Partners**

**[S. 10(2A)]**

In view of cl. (2A) of section 10 and proviso to cl. (b) of Explanation to sub-section 1 of section 158BB, both disclosed and undisclosed income of the firm to be taxed in the hands of firm, only and not in the hands of partners.

*ACIT v. K. T. Joseph (2009) 30 DTR 156 / 126 TTJ 433 / 125 ITD 235 (TM)(Cochin)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Dumb paper**

There being no supporting evidence addition in block assessment, merely on the basis of piece of paper not in the handwriting of the assessee nor containing name of the assessee, was not called for.

*Asha Devi (Mrs.) v. ACIT (2006) 101 TTJ 332 (Delhi)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Cash flow statement – Wife's assets**

Addition could not be made in respect of amount of investment shown in cash flow statement. (A.Ys. 1989-90 to 1990-2000)

Addition could not be made in respect of bank deposit said to have been made by assessee's wife out of her petty savings.

*Anand Prakash Soni v. Dy. CIT (2006) 101 TTJ 97 (Jodh.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Acceptance – Wealth tax assessment – FDR – Telescoping**

Assessing Officer having accepted the availability of adequate amount with the assessee in the wealth-tax assessment of the relevant assessment year, the source of FDR stands explained.

Purchase of FDRs can also be treated as explained on the basis of other additions on the principle of telescoping.

*Maj. Gen (Retd.) Kanwarjit Singh Gill L/H of Smt. Narinder Kaur Gill (Decd.) v. ACIT (2006) 101 TTJ 538 (Amritsar)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Death of assessee – All legal heirs**

Block assessment framed after the death of the assessee by bringing on record only the wife of the deceased without bringing on record other legal heirs was irregular assessment.

*A. P. Shanmugaraj v. Dy. CIT (2006) 100 TTJ 259 / 99 ITD 278 (Chennai)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Bank interest – Deduction [S. 80L]**

Deduction under section 80 'L' is permissible in block assessment. (A.Ys. 1975-76 and 1976-77)

*Gian Chand Vij v. Dy. CIT (2006) 153 Taxman 11 (Mag.)(Chd.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Estimate of unaccounted sales – No material found**

No sales can be estimated, where no information at all had been obtained during search, and when no information is available from seized records, that assessee had indulged in out of books transactions. (A.Ys. 1979-80 to 1983-84)

*ACIT v. M. M. Sales Agencies (2006) 153 Taxman 13 (Mag.)(Jp.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Set-off – Adjustment – Block period**

Set off of losses computed for later years, against the undisclosed income computed in respect of other previous year falling within the block period is allowable. (A.Y. 1977-78)

*ACIT v. Amritsar Processor (P) Ltd. (2006) 154 Taxman 33 (Mag.)(Amritsar)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Requisition – Evidence [S. 132A]**

Assets requisitioned under section 132A can reasonably be treated as evidence found as a result of search conducted under section 132(1) and can be the basis for computing undisclosed income for the block period as envisaged under section 158BB(1).

*Sukh Ram v. ACIT (2006) 99 ITD 417 / 99 ITD 417 (Delhi)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Salary and interest to partners – Deductable**

As per Explanation (b) salary and interest to working partners are to be allowed as deduction for purposes of determination of undisclosed income

*Hotel Kumar Palace v. Dy. CIT (2005) 93 TTJ 629 (Amritsar)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Sample transaction**

It is true that an estimate of the hawala transactions can be made by sample found during the course of search provided same is representative of same state of affairs throughout; two day's transactions noted on loose slips could not safely be taken as a sample for ascertaining profit for 18 months.

*Kantilal Prabhudas Patel v. Dy. CIT (2005) 93 ITD 117/ 94 TTJ 1002 (TM)(Indore)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Claims of loss – Fraud**

Loss suffered by assessee consequent to fraud played on assessee is outside ambit of Chapter XIV-B; as such claim of assessee for allowing deduction of loss suffered on account of fraud played is not allowable.

*K. Senthilnathan (Dr) v. ACIT (2005) 96 TTJ 637 (Chennai)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Estimation of expenses**

Where Assessing Officer had made additions in dispute based on estimation arrived at by taking figures that were disclosed in seized documents but he had not taken into consideration claim of assessee that for earning brokerage, he might have incurred certain expenses, such addition could not be sustained.

*Vijay Kumar Dhelia v. Dy. CIT (2005) 97 TTJ 808 (Ranchi)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Deduction-Bank interest [S. 80L]**

Deduction under section 80L is to be allowed while computing undisclosed income under Chapter XIVB.

*Prakash Chand Vij v. Dy. CIT (2005) 95 TTJ 409 (Chd.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Valuation report after search action**

Where block assessment was based on DVO's report regarding cost of construction which was obtained after search, such assessment was not sustainable.

*F. Ramesh v. ACIT (2005) 92 TTJ 760 (Chennai)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Income pertaining to financial year [S. 158BA]**

Where income pertained to financial year in progress at time of search and due date for filing return was yet to expire, that income could not have been included in block assessment, specially when assessee had filed return under section 139(1) declaring such income.

*Hotel Kumar Palace v. Dy. CIT (2005) 93 TTJ 629 / Taxman 32 (Mag.)(Amritsar)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income [S. 158B(b)]**

An income which cannot become undisclosed within the meaning of Sec 158B(b) can not be brought to tax by way of computation under section 158BB.

*Shanti Rani (Smt.) v. ACIT (2003) 126 Taxman 62 (Mag.)(Chd.)(Trib.)*

**S. 158BB : Block assessment – Computation – Undisclosed income – Unabsorbed depreciation not allowed**

In the case of Search and seizure-Block assessment, Computation of undisclosed income-Profits and losses determined in respect of each previous year falling within the block period subject to the condition that no set off in respect of unabsorbed depreciation under s. 32(2) should be allowed. Determination of negative income will automatically result in set off at the stage of aggregation of profits and losses in respect of the previous years falling within the block period-Thus, the contention of the assessee that the unabsorbed depreciation forms part of the current depreciation in the next year was rejected while computing the income of the next year because of the specific clause (a) of Explanation to s. 158BB. Therefore, no set off in respect of unabsorbed depreciation under s. 32(2) is to be allowed while determining profits and losses at the stage of aggregation of profits and losses in respect of the previous years falling within the block period in view of the said clause. (a) of Explanation to s. 158BB. (A.Ys. 1987-88 to 1997-98)

*G.C. Associates v. Dy. CIT (2003) 80 TTJ 539 (2004) 2 SOT 136 (Pune)(Trib.)*

**Section 158BC : Procedure for block assessment**

**S. 158BC : Block assessment – Procedure – Income disclosed in Regular Assessment – Material not found [S. 158B(b)]**

Any material or evidence unrelated to search could not form the basis of the computation of undisclosed income especially when the income had been disclosed by the assessee in regular assessment and had been assessed by Dept. (SLP of the Revenue dismissed.)

*CIT v. Krishna Kumar R. Parmar (2010) 322 ITR (St.) 2 (SC)*

**S. 158BC : Block assessment – Procedure – Commencement of search – Limitation – Last Panchnama [S. 158BE]**

Search conducted on 31-10-2000 and assessment completed on 27-12-2002, revocation of prohibitory passed on 23-12-2000. Revocation order does not amount to execution of a search, as no asset seized. Period of limitation starts from 31-10-2000 hence order passed beyond limitation period (*CIT v. Deepak Agrawal (2009) 308 ITR 116 (Delhi)*).

*CIT v. Deepak Agrawal (SLP No. 16360 of 2009 dt. 9-7-2009) rejected (2010) 321 ITR (St) 165. (SC)*

**S. 158BC : Block assessment – Procedure – Diary – Deemed Dividend [S. 2(22)(e)]**

Assessee share holder, partner and beneficial owner in companies and firms. Search resulting in diary being seized. From the diary and cash flow statement it was found that the assessee had advance by Company to the two firms in which the assessee had substantial interest. On these facts was held that said advances were rightly assessment is deemed dividend in block assessment.

*CIT v. Mukundray K. Shah (2007) 290 ITR 433 / 200 Taxation 272 / 209 CTR 97 / 160 Taxman 276 (SC) / 4 SCC 327*

**S. 158BC : Block assessment – Procedure – Protective assessment be framed [S. 158BD]**

The Assessing Officer in absence of any specific power under the Act, has power to make protective assessment in case of regular as well as block assessment under certain circumstances Lalji Haridas v. ITO 43 ITR 387 (SC) followed. (A.Y. 2000-01)

*CIT v. Mahindra Trading Pvt. Ltd. (2011) 58 DTR 36 / (2012) 343 ITR 464 (Delhi)(High Court)*

**S. 158BC : Block assessment – Procedure – Depreciation [S. 158BH]**

Section 158BH, makes all other provisions applicable to the assessment under. Chapter XIV-B, unless it is otherwise provided for, therefore even in block assessment, the Assessing Officer must allow the claim of the assessee for the depreciation which is legally permitted under the provisions of the Act. (A. Y. 1997-98 and 2003-04).

*CIT v. C. Sabira (Smt.) (2011) 237 CTR 477 / 338 ITR 226 / (2010) 40 DTR 153 (Ker.)(High Court)*

**S. 158BC : Block assessment – Procedure – Computation of undisclosed income – Set off of excess income**

Assessee is not entitled to set off of excess income disclosed in a particular year falling within the block period against the undisclosed income of subsequent year falling within the same block period.

*CIT v Kamala Devi Jain (2011) 51 DTR 70 / 238 CTR 328 / 330 ITR 153 (Guj.)(High Court)*

**S. 158BC : Block assessment – Procedure – Material not found**

Where no evidence/material was found in the course of search or any information relating to any undisclosed income earned by the assessee, block assessment framed by the Assessing Officer making addition of the undisclosed income merely on the basis of third party statement was held to be bad and set aside. (A. Ys. 1986-87 to 1996-97).

*CIT v. T. Sivaprabhaskar (2011) 50 DTR 329 / 238 CTR 457 (Mad.)(High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Remittances of foreign exchange and investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991 [S. 132]**

During the course of search it was found that the assessee has received India Development Bonds of US dollars 10,000 each by way of gift on November 14, 1994, and February 21, 1995. The amount of ₹ 5,69, 884, after maturity of India Development Bonds was credited in her savings bank account and out of this amount, fixed deposit receipts of ₹ 33, 75,000 were obtained. The Assessing Officer made the addition which was deleted by Tribunal. Hon'ble High Court held that a perusal of sections 6 and 7 of the Remittances of Foreign Exchange and Investment Bonds (Immunities and Exemptions) Act, 1991 makes it clear that no enquiry can be made from the bond holder regarding the source. The immunities are absolute. The Court held that no investigation could be allowed to be held pertaining to the India Development Bonds which were received from non-residents /overseas corporate bodies as gifts.

*CIT v. Usah Omer (Smt.) (2011) 338 ITR 448 / 64 DTR 405 / (2012) 246 CTR 523 (All.)(High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Deducted at source – Advance tax paid by recipient – Partner – Remuneration**

A search and seizure was conducted under section 132 in the premises of the assessee consequently notice under section 158BC was issued. On the date of search, due date of filing the assessment years 1999-2000 and 2000-01 stood expired. The assessee had not filed their returns. The assessee had the taxable income during relevant years. The source was remuneration from partnership firm. These firms have deducted the tax at source in respect of interest and have filed their returns before the date of search. The Income of partners cannot be held to be undisclosed in the hands of partners. (A. Ys. 1999-2000, 2000-01).

*CIT v. H. E. Mynuddin Pasha (2011) 338 ITR 533 (Karn.)(High Court)*

**S. 158BC : Block assessment – Procedure – Computation – Undisclosed income**

Search was conducted by the Central Excise department and unaccounted cash amounting to ₹ 10,25,000 was found and recovered. The Tribunal merely relying on the order of Assessing Officer reversed the finding of Commissioner (Appeals), without giving any reason, High Court set aside the order of Tribunal and directed the Tribunal to readjudication. Further, the plausibility of the explanation submitted by the assessee on the basis of sales bills produced by him also requires to be considered by the Tribunal.

*Brij Mohan Bhatia v. ITAT (2011) 64 DTR 212 / 335 ITR 580 / (2012) 246 CTR 529 (P&H)(High Court)*



**S. 158BC : Block assessment – Procedure – Power – Validity**

Block assessment made by Assessing Officer who was holding the power of ACIT by virtue of an order of the CIT is valid and proper.

*CIT v. Narendra Narayan Banik (2010) 39 DTR 232 / 232 CTR 356 / 320 ITR 436 (Gau.)(High Court)*

**S. 158BC : Block assessment – Procedure – Valuation report – Estimation [S. 158B(b)]**

Block assessment can only be made on the basis of evidence found during search. Where no evidence was found of unaccounted investment addition could not be made on the basis of valuation report of DVO.

*CIT v. Pramod Kumar Gupta (2010) 320 ITR 408 (Delhi)(High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Noting on Seized Paper [S. 158B(b)]**

Noting on the seized paper representing payment schedule of agreement yet to be executed. Assessee establishing that noting on the seized paper was from regular books of account. Deletion was justified.

*CIT v. Tips Industries P. Ltd. (2010) 321 ITR 154 / 35 DTR 10 / 190 Taxman 65 / 229 CTR 228 (Bom.)(High Court)*

**S. 158BC : Block assessment – Procedure – Natural justice – Right to cross examination**

Where oral evidence of any party is sought to be used against an assessee, it is necessary that information relating to such statement or the copy of deposition should be furnished to the assessee with opportunity to cross examination the deponent, if required by the assessee. If it is not done, it is violation of principle of natural justice. Hence, order will be bad in law.

*CIT v. Ashwani Gupta (2010) 322 ITR 396 / 191 Taxman 51 (Delhi)(High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed Income – Regular assessment [S. 69C 132]**

Sums found entered in regular books, enquiry in regular assessment permissible, however, in block assessment not permissible.

*Dy. CIT v. Radhe Developers India Ltd. and Another (2010) 329 ITR 1 (Guj.)(High Court)*

**S. 158BC : Block assessment – Procedure – Authorisation in joint name – AOP or BOP**

Where the search is carried out in pursuance to a warrant of authorisation issued jointly in names of assessee and her husband, then, the assessing officer cannot assess the assessee in her individual capacity by invoking the provisions of section 158BC of the Act on the basis of seized documents during the search. In such

circumstances, both the assesseees can be assessed jointly as an Association of Persons (AOP) or Body of Individuals (B.O.I.).

*CIT v. Vandana Verma (Smt) (2009) 31 DTR 214 / 227 CTR 388 / 330 ITR 533 / 186 Taxman 88 (All.)(High Court)*

#### **S. 158BC : Block assessment – Procedure – Issuance of notice [S. 143(2)]**

The Assessing Officer is not inclined to accept the return filed by the assessee, and an assessment under section 158BC is made without issuing notice under section 143 (2), then it would not be an irregularity but would be invalid.

*CIT v. Pawan Gupta (2009) 181 Taxman 299 / 223 CTR 487 / 318 ITR 322 / 22 DTR 291 (Delhi)(High Court)*

#### **S. 158BC : Block assessment – Procedure – Issue of notice**

Where the amount is received by the assessee on sale of plot of land through proper banking channel and the gain on such sale was depicted in her return prior to issue of notice under section 158BC of the Act the income could not be treated as unexplained deposit. (A.Y. 2002-03)

*CIT v. Shakuntala Devi (Smt.) (2009) 23 DTR 238 / 224 CTR 79 / 316 ITR 46 (Delhi)(High Court)*

#### **S. 158BC : Block assessment – Procedure – Material not found [S. 158B(b)]**

Where no material relating to understatement of cost of investment or improvement was found. High Court dismissing the revenue's appeal held that in such case no addition could be made under section 158BC as undisclosed income of the assessee.

*CIT v. Shri Prem Nath Nagpal (2007) 201 Taxation 252 (Delhi)(High Court)*

#### **S. 158BC : Block assessment – Procedure – Seizure from third party – Admission by assessee [S. 132]**

Block periods 1-4-1985 to 23-10-1995. Cash seized from third party admitted by assessee to be her undisclosed income - Block Assessment in the hands of the assessee – valid.

It was held by the High Court that the statement of the assessee was recorded under section 132 (4) of the I.T. Act, 1961 wherein it was admitted that the amount of ₹ 23,65,000 was recovered and seized belonged to him. Findings recorded by the Tribunal that the sequence of events from the stage of serving the warrant, recording the statement clearly established that the amount which was seized from the assessee could not be faulted and hence, the Block Assessment was valid in law.

*Ratpaulkar (Smt.) v. ACIT L/H. of I. Osan (2007) 294 ITR 273 / 231 CTR 288 (Bom.)(High Court)*

#### **S. 158BC : Block assessment – Procedure – Estimation – No evidence [S. 158B(b)]**

No evidence of concealment of income found in search proceedings. Addition based on estimate of value of property not valid.

*CIT v. Manoj Jain (2006) 287 ITR 285 / 200 CTR 327 / 163 Taxman 223 (Delhi) (High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Finding of false claim**

**[S. 40A]**

Unless the Revenue proves that the deduction claimed by Assessee is false, there is no scope to treat the disallowance under section 40A(2) as undisclosed income. Finding has to be given that the claim is false. (A.Ys. 1994-95, 1995-96)

*TCV Engineering Ltd. v. ACIT (2006) 205 CTR 161 / 284 ITR 470 (Mad.) (High Court)*

**S. 158BC : Block assessment – Procedure – Notice – Defect [S. 292B]**

The defects in notice, if any, are protected by section 292B, therefore, does not invalidate the block assessment. (A.Ys. 1989-90 to 1999-2000)

*Shirish Madukar Dalvi v. ACIT & Ors. 203 CTR 621 / 287 ITR 242 / 156 Taxman 79 (Bom.) (High Court)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Gift**

No incriminating material found against assessee in course of search on assessee's premises. Assessee has disclosed gifts in return of income. Not undisclosed income of the assessee.

*CIT v. Vishal Aggarwal (2006) 283 ITR 326 / 196 CTR 279 / 147 Taxman 597 (Delhi) (High Court)*

**S. 158BC : Block assessment – Procedure – Salary – TDS [S. 158BA]**

The salary of the assessee, which has been subjected to TDS and TDS returns were filed by the payer, the same cannot be treated as undisclosed income for the block period.

*CIT v. Vinod Prakash Saxena (2006) 152 Taxman 655 (MP) (High Court)*

**S. 158BC : Block assessment – Procedure – Invalid search**

If search and seizure fails due to test of law, then block assessment will have no legs to stand.

*Mahesh Kumar Agarwal v. Dy. DIT (2003) 260 ITR 67 / 180 CTR 517 / 133 Taxman 529 (Cal.) (High Court)*

**S. 158BC : Block assessment – Procedure – Income exempted**

In view of the provisions of section 158BB, income should be computed in accordance with the provisions of the Act and income exempted should not be taxed.

*Chain Sukh Rathie v. CIT (2003) 185 CTR 56 / 270 ITR 368 / 134 Taxman 56 (Raj.) (High Court)*

**S. 158BC : Block assessment – Procedure – Service of notice**

In the absence of any material or evidence to prima facie show that the alleged notice under section 158BC was actually sent to the assessee, it cannot be presumed, in the absence of acknowledgement of the said notice, that might have been served upon the assessee and therefore, the proceedings initiated by the Assessing Officer under section 158BC as well as block assessment are null and void initio. (A. Y. 1995 to 99 and 1989 to 2000).

*ACIT v. Lakshmi Industries (2011) 135 TTJ 112 / 7 ITR 495 / (2010) 48 DTR 54 (Chennai)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice under section 158BD – Statement of persons [S. 158BD]**

In the absence of any search warrant in the name of the assessee and search against him, the provisions of section 158BC in the hands of the assessee without issuing any notice under section 158BD, only on the basis of statements of three persons that the money recovered from them belonging to the assessee was held to be illegal.

*Anil Kumar Chadha (Guddu) v. Dy. CIT (2011) 138 TTJ 574 / 132 ITD 330 (All.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Warrant of authorization – Joint names – Assessment in the name of Individual is not invalid**

Warrant of authorization issued in the names of three companies including assessee, separated only by a comma without the word “and” between the names of the companies is a common warrant in the case of said three companies and not a warrant in the joint names of three companies and therefore, the block assessment order framed in the individual name of the assessee company is not in valid.

*Radan Multimedia Ltd. v. Dy. CIT (2011) 58 DTR 129 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Transactions which are subject matter of regular assessment – Cannot be treated as undisclosed income – Depreciation – Finance charges**

Assessee having disclosed all the transactions relating to its claim for depreciation on plant and machinery as well as payment of finance charges by filing all details in the return filed prior to the date of search which has been subject matter of enquiry in a regular assessment and all the machineries having been physically found at the time of survey as well as search at the business premises of the assessee, depreciation and finance charges could not be disallowed and treated as undisclosed income in the block assessment in the absence of detection of any material as a result of search.

*Radan Multimedia Ltd. v Dy. CIT (2011) 58 DTR 129 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Computation – Post search enquiry – Materials not relating to evidence found**

Additions which were made in the block assessment, on the basis of material and information available with the Assessing Officer pursuant to post search enquiry not being relatable to any alleged evidence found in the course of search are not sustainable. Additions were deleted.

*Shibu Soren v. ACIT (2011) 62 DTR 273 / 12 ITR 540 / 142 TTJ 714 / 47 SOT 331 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Anonymous donations [S. 11]**

Assessee society running a middle school received certain anonymous donations, The Tribunal held that such donations are liable to be taxed under section 158BC, where as in respected of other donations received receipts contains the details of name and addresses the said donations can not be assessed under section 158BC. (A. Y. 2007-08).

*Hans Raj Samarak Society v. ITO (2011) 133 ITD 530 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Limitation [S. 143(2), 282]**

Issuance of notice under section 143(2), is an essential requirement for making block assessment and such notice has necessarily to be issued within the time prescribed under proviso to section 143(2), since there is no conclusive evidence that alleged notice under section 143(2), on 16th May 2000, pursuant to the block return filed on 15th May 2000, as claimed by the revenue only notice was served on the assessee on 24th Dec., 2001 was served on the assessee on 24th Dec., 2001, which was time barred, the block assessment is quashed.

*Dy. CIT v. National Refinery (P) Ltd. (2010) 134 TTJ 109 / 38 SOT 36 / 45 DTR 325 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Survey – Search – Scope of assessment**

**[S. 132, 132(4), 133A]**

Where during continuation of survey proceedings under section 133A, search proceedings section 132 are initiated on basis of information obtained in survey, income to be assessed in block assessment proceedings only. Statement taken under section 133A, during survey cannot have same value as evidence recorded during search under section 132(4).

*ACIT v. Mangaram Chaudhary (HUF) (2010) 123 ITD 359 / 15 DTR 305 / 119 TTJ 671 (Hyd.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Investment recorded in books – Assessing Officer treated it as benami investment [S. 158B(f)]**

Search under section 132, covering the periods 1986-87 to 1996-97, was conducted on 22-1-1996 at registered office and the same was concluded on 22-4-1996. Before conclusion of the search some promoters filed affidavits admitting total undisclosed income of ` 40 lakhs Block Return was filed disclosing NIL income. The Assessing Officer completed the assessment at ` 38,64,000/- which was comprising certain amounts which were introduced in the names of some investors. The Assessing Officer treated value of such investment as benami investments in share capital and

the same was added as unexplained cash credit under section 68 disregarding the facts that the same was recorded in account books and had been part of record furnished to the Department. On these facts and circumstances it was held that impugned addition on account of such unexplained cash credit under section 68 was beyond jurisdiction of Chapter XIV-B. (A.Ys. 1986-87 to 1996-97)

*Value Securities (India) Ltd. v. ACIT (2007) 108 ITD 639 / 112 TTJ 804 / 15 SOT 495 (Hyd.) (Trib.)*

**S. 158BC : Block assessment – Procedure – Statement – Cross examination**

Statement recorded by the department cannot be used against any other person, unless opportunity of cross examination is given to such other person – Presumption under section 132(4A) can be raised on the basis of documents found only against the searched person and not against any another person.

*SMC Share Brokers Ltd. v. Dy. CIT, (2007) 109 TTJ 700 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Service by affixture**

Service of notice under section 158BC by affixture was not valid where the Inspector straightaway served the notice by affixture at the business premises in the absence of the assessee.

*Sanjay Kumar Mishra v. ACIT (2006) 100 TTJ 862 (Jab.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Non-existent company**

A search cannot be conducted on a non-existent company nor can a s. 158BC notice be issued to a non-existing company.

*Slocum Investment (P) Ltd. v. Dy. CIT (2006) 101 TTJ 558 / 106 ITD 1 / 7 SOT 761 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Interest under section 132B(4)(b) – Assessment within 6 months**

Since the Assessing Officer completed the block assessment before the expiry of six months period from the date of issue of notice under section 158BC, the assessee was not entitled to any interest under section 132B(4)(b).

*Dy. CIT v. M. Bansilal Jain (2006) 101 TTJ 440 / 99 ITD 8 (Chennai)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Third party – Satisfaction [S. 158BD]**

- (a) It is necessary to record satisfaction before making of assessment under section 158BD otherwise such assessment cannot be legally justified.
- (b) Service of a valid and legal notice requiring to furnish return after fifteen days is a necessary condition and mandatory requirement for assuming jurisdiction for assessment under section 158BD and if such condition is not satisfied, assumption of jurisdiction for making assessment under section 158BD cannot be legally justified.



*Navin Verma v. ACIT, (2006) 100 ITD 73 / 283 ITR 83 (AT) / 105 TTJ 952 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Third party statement – Bogus purchases – Material**

No incriminating material found during the search – No addition can be made on the basis of the statement by the alleged bogus suppliers of goods to the assessee before the FERA authorities.

*Dy. CIT v. Beautiful Diamonds Ltd., ITAT Mumbai Bench 'B', ITA No. 78/Mum/2000 dt.*

*8-12-2005 – BCAJ, May 2006 (39-B) P. 150 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Survey – Nature of Income declared**

Once the income is admitted as undisclosed income during survey, it does not retain the character of undisclosed income in the search under section 132. Undisclosed income under section 158BC can be computed on basis of material found during search, and not on basis of survey conducted under section 133A.

*Gauthanchand Bhandari v. Dy. CIT (2006) 152 Taxman 57 (Mag.)(Bang.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Sale of shares – Evidence**

Assessing Officer was not justified in assessing the profits as undisclosed income of the assessee-company when the sale of shares was duly reflected by the assessee in its returns and the documents filed therewith and the seized documents do not support the conclusions arrived at by the Assessing Officer.

*Slocum Investment (P) Ltd. v. Dy. CIT (2006) 101 TTJ 558 / 7 SOT 761 / 106 ITD 1 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – FDR – Period**

FDRs acquired by assessee prior to the commencement of the block period cannot be subject-matter of the block assessment.

*Maj. Gen (Retd.) Kanwarjit Singh Gill L/H of Smt. Narinder Kaur Gill (Decd.) v. ACIT (2006) 101 TTJ 538 (Amritsar)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Income of predecessor – Successor in business**

An assessment of undisclosed income for a block period under Chapter XIV-B in respect of a predecessor of a business cannot be made in the hands of the successor in such business.

*Slocum Investment (P) Ltd. v. Dy. CIT (2006) 101 TTJ 558 / (2006) 7 SOT 761 / 106 ITD 1 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Lease – Depreciation**

Ownership of assets and their leasing having been shown in the return and balance sheet depreciation thereon could not be disallowed in block assessment.

*Sigma Securities v. Jt. CIT (2006) 105 TTJ 428 / 102 ITD 342 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Statement during search – Method of accounting [S. 40A(3)]**

- (i) Computation of undisclosed is made de hors books of account and on the basis of the seized material and therefore, the provisions of section 40A(3) are not applicable.
- (ii) Valid statement, recorded under section 132(4), can be used as evidence in the block assessment proceedings even if that statement is retracted later on.
- (iii) Accounting of undisclosed profits as a consequence of search & seizure action under section 132 has to be made on the basis of method of accounting followed.

*Dhanvarsha Builders & Developers P. Ltd. 102 ITD 375 / 105 TTJ 376 (Pune)(Trib.)*

**S. 158BC : Block assessment – Procedure – Dividend – Chit funds – Principle of mutuality**

Assessee being one of the participants as well as a contributory to the chits conducted by him, dividend received by him is surplus arising by contributing to chits and hence it could not be taxed in view of principle of mutuality even though the assessee has admitted the same as taxable income

*Arun Kumar Bhansali v. Dy. CIT (2006) 99 TTJ 1308 (Bang.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Sources – Investment – Marriage gifts**

Assessee having explained the source of investments and a loan taken the additions were deleted. Assessee having filed the details of donors and the details of gifts received by her at the time of her marriage and the Department having not produced any evidence to show that the said gifts are not genuine, addition in respect of such gifts cannot be sustained.

*Madhavi Finvest (P) Ltd. & Ors. v. ACIT (2006) 99 TTJ 933 (Visakha)(Trib.)*

**S. 158BC : Block assessment – Procedure – Documentary evidence – Proof of refund**

Assessee having failed to prove by any documentary evidence that the amount received as advance against property was refunded, addition was justified.

*Narendra Kumar Nagpal v. Dy. CIT (2006) 99 TTJ 1278 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Unrecorded sales – Recorded stock**

Assessee having made unrecorded sales from the recorded stock and profit from such sales having been already taxed, no further addition for investment in working capital is justified.

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Seizure – By police – Employee**

Assessee company having explained that the cash seized by police from its employees belonged to the assessee which was being carried for depositing in the bank and produced its cash book to prove the availability of the cash no addition could be sustained irrespective of some discrepancies in the statements.

*Anand Autoride Ltd. v. Jt.CIT (2006) 99 TTJ 1250 / 99 ITD 227 (Ahd.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Unexplained money advance for purchases – Cash balance sheet**

Cash balance as per cash book which was found short together with the balance in the 'disawar' a/c in the regular books of account being adequate to explain the amount lying with employee as advance for purchase of material, same could not be treated as unexplained money.

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Explanation of assessee – Adjustment**

Having accepted the explanation of assessee regarding receipt of ₹ 1 lakh, Assessing Officer was not justified in rejecting the explanation regarding refund of ₹ 75,000 out of said amount and make addition of ₹ 1 lakh.

*Narendra Kumar Nagpal v. Dy. CIT (2006) 99 TTJ 1278 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Third party seizure & income – Assumption**

In the absence of any definite material, addition could not be made on the assumption that the profit arising from a transaction entered into by a third party was shared by the assessee and the said party simply because assessee had advanced ₹ 10 lakhs to that party. No presumption can be drawn against the assessee under section 132(4A) in respect of papers recovered from a third party and no addition can be made on the basis thereof in the absence of corroborative evidence.

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Return filed after search – Immunity**

Income returned by assessee though belated for assessment years in the block period, filed after search cannot be included in block assessment.

*Chandra Bhan v. ACIT (2006) 99 TTJ 906 / 98 ITD 6 (Agra)(Trib.)*

**S. 158BC : Block assessment – Procedure – Shortage of stock – Failure to take inventory**

Raiding party having not inventorised the stock said to have been stored in another shop even after it was apprised of said shop by the manager of assessee's factory,

addition on account of shortage of stock could not be made by assuming sales outside the books of account

*Dy. CIT v. Stylritc Optical Industries (2006) 99 TTJ 869 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – VDIS – Subsequent sale**

Various members of the assessee's family having disclosed diamonds under VDIS, 1997, which were later sold, and the Department having accepted the declaration of the assessee no addition could be made

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Investment / Expenditure – New income**

While computing the undisclosed income of the assessee set off of investment/expenditure should be allowed against the income only to the extent the same is after the earning of income

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Deceased Karta – HUF – Illegal and void ab initio**

Block assessment framed in the name of deceased karta through Authorised Representative' in the status of HUF was illegal and void ab initio as the notice was not validly served on Karta or adult member in terms of s. 282(2).

*Madhavi Finvest (P) Ltd. & Ors. v. ACIT (2006) 99 TTJ 933 (Visakha)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Premature – Requisition**

Notice issued before concluding the requisition of assets was premature and illegal as no block period was mentioned therein. Further assessment order for the block period which did not cover the period upto the date when the assets were really requisitioned by the Department and the documents were recovered by it was ab initio illegal, invalid and bad in law. (A.Ys. 1986-87 to 1996-97)

*R. P. Dwivedi v. ACIT (2006) 99 TTJ 794 (Agra)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – S. 143(2) – Curable defect [S. 292B]**

Omission by Assessing Officer to give notice under section 143(2) in block assessment is a curable defect under section 292B.

*Chandra Bhan v. ACIT (2006) 99 TTJ 906 / 98 ITD 6 (Agra)(Trib.)*

*Editorial : No more good law in view of Supreme Court's decision in the case of ACIT & Another v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*

**S. 158BC : Block assessment – Procedure – Search warrant – Husband's income – Valid**

Search warrant being in the name of husband of assessee, block assessment of assessee is void ab initio

*Dhiraj Suri v. Addl. CIT (2006) 99 TTJ 525 / 98 ITD 187 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Commencement of Search – Limitation**

There being only one authorization for search which was executed on 18th September, 1998, and no fresh authorization in favour of the officer who visited the assessee's premises on 13th November, 1998 and lifted the prohibitory order, the limitation for completion of block assessment ended on 30th September, 2000, and therefore, the assessment order passed on 28th November, 2000, was barred by limitation.

*Javed Mohd. Peshiman v. Dy. CIT (2006) 100 TTJ 434 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Failure in issuing notice – Irregularity – Curable defect [S. 292B]**

For the purpose of block assessment failure in issuing notice under section 143(2) is not a nullity but irregularity which is curable defect.

*A.P. Shanmugaraj v. Dy. CIT (2006) 99 ITD 278 / 100 TTJ 259 (Chennai)(Trib.)*

*Editorial : No more good law in view of Supreme Court's decision in the case of ACIT & Another v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*

**S. 158BC : Block assessment – Procedure – Recording of Satisfaction [S. 158BD]**

No block assessment under section 158BD rws 158BC can be undertaken without pre-recording any satisfaction that income belongs to "such other person" and in absence of such satisfaction being on record.

*Sakun International v. Jt. CIT (2006) 280 ITR (AT) 256 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice on legal heirs Set aside – Curable defect**

Block assessment framed after the death of the assessee by brining on record only the wife of the deceased without bringing on record other legal heirs was irregular assessment. Assessment is set aside and restored to the Assessing Officer to cure the irregularity and to bring on record all the legal heirs.

*A.P. Shanmugaraj v. Dy. CIT (2006) 100 TTJ 259 / 99 ITD 278 (Chennai)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Procedural [S. 292B]**

Provisions of section 158BC are not substantive but procedural and therefore, any error /defect in the notice under section 158BC would not render the block assessment proceedings to be null and void. Such mistake is easily taken care by section 292B.

*Mahesh Kumari Batra (Smt.) v. Jt. CIT (2006) 280 ITR (AT) 34 (SB)(Amritsar)(Trib.)*

**S. 158BC : Block assessment – Procedure – Limitation – Order of Tribunal [S. 150(1)]**

Order passed by the Tribunal against the order under section 158BC to the effect that the undisclosed income on account of undervaluation of properties could be assessed in the regular assessment under section 143(3) and not in block assessment amounted to a 'finding' or 'direction' and therefore, the provisions of s. 150(1) were attracted and no limitation of time was applicable for reopening of assessment. (A.Y. 1997-98)

*Hanemp Properties (P) Ltd. v. ACIT (2006) 102 TTJ 1083 (Delhi)(Trib.)*

**158BC : Block assessment – Procedure – Undisclosed income – Deposits and advance – Statement [S. 132(4)]**

- (a) Addition in respect of deposits in bank account not being based on any seized material could not be made in block assessment.
- (b) Addition on account of payment of on-money on purchase of flat could not be made on the basis of the statement of assessee's father recorded under section 132(4).
- (c) Amount of credit in the foreign bank account which was not disclosed in the regular returns and had escaped assessment is to be treated as undisclosed income.
- (d) Amount of prize money and remuneration received by the assessee was not charged to tax after due application of mind by the Assessing Officer cannot be included as undisclosed income in the block assessment.
- (e) Amount on account of creditors written back by the assessee could not be included in undisclosed income in the block assessment.
- (f) Assessee having declared the entire credits in a bank account as undisclosed income, payments said to have been made by her by utilizing a part of money withdrawn from the said account cannot be treated as undisclosed income.
- (g) Assessee having explained the cash found at the time of search on the basis of cash book the explanation cannot be rejected and the cash cannot be treated as undisclosed income.
- (h) In view of existence of relevant material to support the assessee's claim of depreciation cannot be treated as false and therefore, Assessing Officer could not treat the amount of depreciation as undisclosed income of the block period.
- (i) Once the acquisition of jewellery is duly reflected in the regular books of account, mere appreciation in its value due to passage of time cannot be subject- matter of addition.

*Aishwarya K. Rai (Ms.) v. Dy. CIT (2006) 105 TTJ 825 / 105 TTJ 825 (TM)(Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Service**

Service of a valid notice under section 158BC is a pre requisite for Assessing Officer to proceed to make an Assessment of Block period.

*Vinod Kumar v. ACIT 154 Taxman 146 (Mag.)(Agra)(Trib.)*



**S. 158BC : Block assessment – Procedure – Consultancy fees – Third party – Commission – Statement – Assumption**

The assessee-doctor has received commission from diagnostic centers for referring cases, additions on account of estimated commission could not be made simply by relying upon the statement of a partner of a diagnostic center recorded at the back of the assessee.

In the absence of any information or material with the Assessing Officer, no addition could be made on account of suppression of consultancy fees for the period during which assessee-doctor was not carrying on consultancy.

*P. R. Gupta (Dr.) v. Dy. CIT (2006) 102 TTJ 845 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Value of perquisites – Material not found**

Addition on account of value of perquisites, in the absence of any material found during the course of search, is part of regular assessment and is beyond the ken of block assessment.

*Dy. CIT v. Raj Kumar Agarwal (2006) 102 TTJ 991 (Jodh.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Gifts – Gold ornaments – Construction cost**

Gifts received disclosed in the books of account and shown in regular returns could not be subjected to addition in block assessment.

Gold ornaments disclosed in the books of account and shown in regular returns could not be subjected to addition in block assessment.

In the absence of any material found during search, no addition can be made in block assessment towards cost of construction on the basis of DVO's report.

*Dy. CIT v. Raj Kumar Agarwal (2006) 102 TTJ 991 (Jodh.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Search of third party – Natural justice – Telescoping**

No addition could be made on the basis of alleged material recovered from the search of a third party as the Assessing Officer has not established that such material was connected with the material recovered during the course of search against the assessee nor such material was confronted to the assessee.

No separate addition in respect of unrecorded repayment of loan is warranted as the amount already offered by the assessee as undisclosed income in the return for block period is available to the assessee to explain the said payments.

*Eagle Seeds & Biotech Ltd. v. ACIT (2006) 102 TTJ 1065 / 100 ITD 301 (Indore)(Trib.)*

**S. 158BC : Block assessment – Procedure – Seizure by police – Contraband Forest Produce – Addition's**

Contraband forest produce seized by police and the assessee having failed to account for the transportation of the goods / assets in the matter, same were rightly subjected to block assessment. (A.Ys. 1987-88 to 1996-97)

*Jageshwar Rosin & Turpentine Factory v. ACIT (2006) 102 TTJ 670 / 100 ITD 399 (Delhi)(Trib.)*

### **S. 158BC : Block assessment – Procedure – Notice under section [143(2)] – Irregularity – Curable**

Notice under section 158BC was issued and in response of which Return was filed. Assessing Officer issued detailed questionnaire calling for details and documents. Block assessment order was completed without serving notice under section 143(2). On assessee's contending that order is void ab initio, it was held, that non issuance of notice under section 143(2) is only an irregularity which is curable and not a nullity, and further as assessee was given a proper opportunity of being heard there could not be any grievance.

*Ruby Kashyap (Smt) v. Dy. CIT Central Circle 12 (1) (2006) 155 Taxman 81 (Mag.)(Delhi)(Trib.)*

*Editorial : No more good law in view of Supreme Court's decision in the case of ACIT & Another v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*

### **S. 158BC : Block assessment – Procedure – Surcharge – Amendment in S. 113 – Prospective**

Finance Acts did not provide for a separate and independent charge for levying surcharge on undisclosed income of a block period and, therefore, prior to insertion of proviso to s. 113 surcharge was not chargeable. Proviso to the section 113 which enables enhancement of tax determined under section 113, by the amount of surcharge is a substantive provision. It cannot be said to be a mere procedural one particularly in the absence of specific provision in the statute providing for retrospective operation and therefore, the same cannot have retrospective effect.

*Merit Enterprises v. Dy. CIT (2006) 102 TTJ 748 / 101 ITD 1 (Hyd.)(Trib.)*

### **S. 158BC : Block assessment – Procedure – Return – transaction record in the books of account**

No disallowance can be made in block assessment in respect of transactions as per regular books of account though returns were filed after date of search.

*Dy. CIT v. Raja Udayshankar (2006) 7 SOT 680 (Bang.)(Trib.)*

### **S. 158BC : Block assessment – Procedure – Jewellery – Disclosure by wife**

Ownership of the jewellery seized during search having been independently claimed by the wife of the assessee who was herself an income-tax assessee, addition in the hands of assessee in respect of such jewellery was invalid.

*Dy. CIT v. Vinod Kamra (2006) 102 TTJ 152 (Jodh.)(Trib.)*

### **S. 158BC : Block assessment – Procedure – Third party seizure – Evidence**

Addition on account of alleged unaccounted investment in land could not be sustained simply on the basis of certain papers seized from a third party.

*Jagmohan Singh Arora & Ors. v. Dy. CIT & Anr. (2006) 101 TTJ 682 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – Sale of plots – Validity – Minor mistake – Fresh assessment – Scope**

Profit earned by assessee on sale of plots which were purchased and sold at short intervals was assessable as business income and such profits are to be determined by deducting the actual purchase price and development expenditure as directed in each case from the sale consideration. (A.Ys. 1986-87 to 1996-97)

Minor mistake in not computing some of the undisclosed income year-wise is not fatal to the block assessment particularly when it is not the case of the assessee that some of the undisclosed income computed falls outside the block period.

If the entire assessment order is set aside to the file of the Assessing Officer for fresh consideration, the fresh assessment order would be perfectly valid even if it results in enhancement of the total income determined in the original assessment.

*Parshuram D. Patil v. ACIT (2006) 103 TTJ 765 / 102 ITD 241 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Dumb document – Addition**

No addition can be made on the basis of a dumb document which does not speak anything and no interpretation relating to undisclosed income emerges out from the same. (A.Ys. 1989-90 and 1990-91)

*ACIT v. Kalindee Rail Nirman Engg. Ltd. Bench "A", ITA Nos. 265 & 266/ JP/2003, dated 25th January, 2006 (Tax World – May 2006 – Vol XXXV – P. 135)(Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Estimate – Household expenditure**

Addition for household expenditure can be made on estimate basis in a case wherein assessee has voluntarily offered such an amount on estimate basis in the block return.

*ACIT v. Govind Ram Makhija Bench "A" (ITSSA No. 142/JP/2005) (C.O. No. 95/JP/2005) Block Period 1990–91 to 7-4-2000 dated 24th January, 2006 (Tax World – April 2006 – Vol XXXV – P 97)(Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Scope – Estimate of GP. [S. 144, 145]**

GP rate can be estimated even in block assessment after amendment under section 158BC(b) by which the provisions of section 144/145 are made applicable retrospectively. (A.Ys. 1986-87 to 1996-97)

*Subhash Chand Chopra v. ACIT (2005) 92 TTJ 1087 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Withdrawal – Exemption under section 10(22)**

If in regular assessment, exemption under section 10(22) is allowed, same cannot be withdrawn in block period unless claim of assessee is found to be false.

*Shan Trust v. ACIT (2005) 97 TTJ 678 (Ahd.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Estimate of income – Possible after amendment [S. 145]**

Amendment of section 158BC(b) with effect from 1-7-1995 shows intention of Legislature to apply provisions of section 145 to block assessment right from beginning and negates ratio of various decisions where it was held that income could not be estimated for block period; thus estimation of income for those assessment years for which seized documents were found during search was justified.

*ACIT v. Sharda Adhalkha (Dr Mrs.) (2005) 95 TTJ 643 (Amritsar)(Trib.)*

**S. 158BC : Block assessment – Procedure – Material found – Survey [S. 133A]**

If no material was found during search and seizure operation relating to a claim and certain material/information was found only during survey under section 133A, such material could not be used for computing undisclosed income under Chapter XIV-B.

*GMS Technologies Ltd. v. Dy. CIT (2005) 93 TTJ 218 (Delhi)(Trib.)*

**S. 158BC : Block assessment – Procedure – Search warrant – Person present**

All persons who are found at place of search are not automatically covered by action under section 132 and as such where search warrant was in name of assessee's husband, merely because she filed return in response to notice under section 158BC, Assessing Officer could not assume power to make any assessment of undisclosed income in her hands. (A.Ys. 1989-90 to 1999-2000)

*Jt. CIT v. Latika V. Waman (2005) 1 SOT 535 (Mum.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Partner – Firm**

Where there was search at partner's place and survey at firm's place and as a result of survey Assessing Officer impounded books of account of assessee- firm and made assessment under section 158BC, assessment made by Assessing Officer in case of assessee-firm was not sustainable.

*L. N. Exports v. ACIT (2005) 95 TTJ 186 / 149 Taxman 15 (Mag.)(Cuttack)(Trib.)*

**S. 158BC : Block assessment – Procedure – Service of notice – Advocate**

Where admittedly notice had not been served on assessee but it had been received by one advocate on behalf of assessee-company and department had not produced any documentary evidence to prove that said advocate was having any written authority from assessee-company to receive notice on behalf of assessee, notice was not valid; it is fundamental requirement to get notice served on assessee before proceeding to complete assessment and as it was lacking, this jurisdictional defect could not be cured by conduct of persons on behalf of assessee and thus assessment was liable to be quashed on that point

*Gorakhpur Petro Oils Ltd. v. Addl. CIT (2005) 3 SOT 661 / 95 TTJ 489 (TM)(All.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Mistake in return – Fact**

Assessee can not be taxed on incorrect income as per return filed under section 158BC, which is a result of mistake of fact or law on part of the assessee. (A.Ys. 1987-88 to 1996-97)

*Dy. CIT v. Sanmukhdas Wadhwani (2003) 85 ITD 734 / 80 TTJ 648 (Nagpur)(Trib.)*

**S. 158BC : Block assessment – Procedure – Material found in search**

Scope of computation under section 158BC is to be based on material found as a result of search.

*Satyabhushan v. Dy. CIT (2003) 132 Taxman 143 (Mag.)(Bang.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Search warrant – Family member – Scope**

Mere mention of 'family members' in search warrant issued on assessee's husband, would not justify block assessment against assessee, on the ground that search was conducted on the assessee.

*Daya Sharma (Dr.) (Mrs.) v. Dy. CIT (2003) SOT 53 (Jp.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Estimation – Applicable of S. 145**

Provisions of S. 145 cannot be applied while assessee in undisclosed Income under chapter XIVB.

*Babros Machinery Mfrs. (P.) Ltd. v. Dy. CIT (2003) 84 ITD 91 / 78 TTJ 857 (TM)(Ahd.)(Trib.)*

**S. 158BC : Block assessment – Procedure – TDS – Advance tax – Adjustment**

There is no provision to adjust Advance Tax or TDS against tax due under chapter XIVB. (A.Ys. 1987-88 to 1997-98)

*G. C. Associates v. Dy. CIT (2003) 80 TTJ 539 / 2 SOT 136 (Pune)(Trib.)*

**S. 158BC : Block assessment – Procedure – Time limit – Return**

Time-limit for filing Block Return. There is no outer time-limit given in s. 158BC(a)(i). In respect of searches carried out after the first day of January, 1997, the outer limit of 45 days is mentioned. Thus, there was no outer time-limit for filing the returns. Even in respect of cases covered after 1st Jan., 1997, returns filed beyond time are not regarded as non-est return but they are subjected to levy of interest and penalty wherever applicable. Therefore, if the law does not prescribe any outer limit for filing return and the return has in fact been filed before the assessment is completed and is admittedly available for taking cognizance by the Assessing Officer, such returns cannot be branded as invalid.

*G.C. Associates v. Dy. CIT (2003) 80 TTJ 539 / (2004) 2 SOT 136 (Pune)(Trib.)*

**S. 158BC : Block assessment – Procedure – Undisclosed income – below taxable limit**

**[S. 158B(b)]**

No addition can be made if the Computation of undisclosed income below taxable limit.

*Garima H. Jain (Miss) v. ACIT (2003) 87 ITD 242 / 80 TTJ 469 (TM)(Pune)(Trib.)*

**S. 158BC : Block assessment – Procedure – Validity – In absence of notice [S. 143(2)]**

Proviso to s. 143(2) is not applicable to block assessment proceedings. Assessment proceedings can be said to be validly initiated when notice under section 158BC is issued. However, non-issuance of notice under section 143(2) can not render the block assessment a nullity but it can only be a case of deviation from a rule of law resulting in irregularity which is curable. (A.Ys. 1988-89 to 1998-99)

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

*Editorial : No more good law in view of Supreme Court's decision in the case of ACIT & Another v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*

**S. 158BC : Block assessment – Procedure – Appealable – Validity of search**

(i) Order under section 158BC(c) based on valid action under section 132 is appealable before the Tribunal and not propriety of action taken in the course of valid search under section 132.

(ii) Tribunal's power is restricted to satisfy that action under section 132 was taken against such person and not beyond that; similarly, it may also examine whether there was any valid panchanama in respect of the search.

*C. Ramaiah Reddy v. ACIT (2003) 87 ITD 439 / 81 TTJ 1044 (SB)(Bang.)(Trib.)*

**S. 158BC : Block assessment – Procedure – Notice – Defect – Procedural**

Any defect in the notice under section 158BC(a) is curable as it is a procedural irregularity. In such case the block assessment does not become null and void.

*Krishna Verma (Smt.) v. ACIT 107 ITD 1 / 109 TTJ 173 / 13 SOT 96 (SB)(Delhi)(Trib.)*

**Section 158BD : Undisclosed income of any other person**

**S. 158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction**

Before the provisions of section 158BD are invoked against the person other than the person whose premises have been searched under section 132 or documents and other assets requisitioned under section 132A, the conditions precedent have to be fulfilled. In the present case as the Assessing Officer has not recorded his satisfaction, nor had he transferred the case to the jurisdictional assessing officer, the appeal of the assessee was allowed. (A.Ys. 1987-88 to 1995-96)



*Manish Maheshwari v. ACIT (2007) 208 CTR 97 / 159 Taxman 258 / (2008) 204 Taxation 205 (SC) / 3 SCC 794*  
*Indore Construction P. Ltd v. CIT (2007) 289 ITR 341 / 159 Taxman 258 / 208 CTR 97 / 199 Taxation 284 (SC)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Statement recorded**

Proceedings initiated against the assessee under section 158BD on the basis of statement recorded during search are not valid as statement is neither document nor asset; further, initiation of proceedings under section 158BD by the Assessing Officer against the assessee without recording the requisite satisfaction was illegal.

*CIT v. Late Raj Pal Bhatia (2011) 49 DTR 9 / 237 CTR 1 / 333 ITR 315 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction**

Assessing Officer of searched person, having nowhere recorded any satisfaction that the assessee's income of the relevant block period had escaped assessment nor forwarded the records of the case to the assessee's, Assessing Officer proceedings under section 158BD against the assessee were rightly set aside.

*CIT v. Sunil Bhala (2011) 238 CTR 18 / 50 DTR 238 / 336 ITR 550 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Notice – Jurisdiction**

Where the assessee had not raised the plea that the Assessing Officer had no jurisdiction over him within one month from the date on which he was served notice under section 158BD of the Act, the assessment proceedings cannot be held to be invalid for want of jurisdiction in view of section 124(3) of the Act. (A. Ys. 1997-98 to 2003-04).

*CIT v. Kapil Jain (2011) 50 DTR 342 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Order void if referring Assessing Officer's "satisfaction" not recorded**

Mere mention of the word 'satisfaction' in the order / note will not meet the requirement of the concept of satisfaction as used in section 158BD. The Assessing Officer must reach a clear conclusion that good ground exists for the Assessing Officer of the third person to initiate proceedings as material before him shows or would establish "undisclosed income" of third person. *Manish Maheshwari v. ACIT (2007) 289 ITR 341 / 208 CTR 971 / 159 Taxman 258 (SC)* followed.

*CIT v. Radhey Shyam Bansal (2011) 337 ITR 217 / 243 CTR 375 / 57 DTR 313 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction – Prior to handing over of documents**

As no satisfaction has been recorded by the Assessing Officer of the person with respect to whom the search was made, prior to handing over the documents to the Assessing Officer of petitioner, the impugned notice under section 158BD is liable to be quashed.

*Chandrakantbhai Amratlal Thakkar v. Dy. CIT (2011) 55 DTR 249 / 337 ITR 258 (Guj.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Office note – Presumption [S. 292C]**

If any material is found during search and seizure indicating undisclosed income of third person, further investigation is not necessary. Presumption under section 292C is applicable. Office note of Assessing Officer regarding undisclosed income of third person is valid for proceedings under section 158BD of the Income Tax Act.

*CIT v. Mukta Metal Works (2011) 336 ITR 555 / 244 CTR 544 / 62 DTR 167 (P&H)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Cash flow statement – Balance sheet and other documents from partner [S. 158BC]**

The Court held that the finding of the Tribunal that block assessment is solely on cash flow statement furnished by the assessee is factually incorrect, since the assessment is based on information collected in the form of balance sheet and other documents from partner of assessee, in the course of Search carried out in such person's premises, the block assessment order was held to be valid. Order of Tribunal was reversed.

*CIT v. K. V. Sudhakaran (2011) 63 DTR 232 / 245 CTR 596 (Ker.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Action under section 158BD must be taken before completion of search assessment of searched person [S. 158BC]**

Action under section 158BD must be taken before completion of assessment of searched person. Block assessment under section 158BC was completed on 30-3-2005. Satisfaction under section 158BD recorded on 15-7-2005. The Court held proceedings held to be not valid. (Block Period 1998 to 2003).

*CIT v. Mridula, Prop Dhruv Fabrics (2011) 335 ITR 266 (P&H)(High Court)*

*Editorial:- Refer Manoj Aggarwal v. Dy. CIT (2008) 113 ITD 377 / 117 TTJ 145 / 11 DTR 1 (SB)(Delhi)(Trib.)*

**S : 158BD : Block assessment – Undisclosed income of any other person – Time for recording of satisfaction**

The assessment of the person put to search was completed on 28-2-2005 and proceedings under section 158BD were initiated on 02-12-2006 by issue of notice. The satisfaction under section 158BD was recorded 31-03-2006. Since the satisfaction under section 158BD was recorded after the completion of proceedings under section 158BC, it was held that proceedings under section 158BD are time-barred.

*CIT v. Parveen Fabrics P. Ltd. (2011) 198 Taxman 463 (P&H)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Shares**

Addition made by Assessing Officer was in respect of valuation of the stock of shares. The valuation had been done on the basis of stock exchange rate and there was no material before the Assessing Officer to add up the said amount. Therefore, it was held that the Tribunal was justified in deleting the additions. (A.Ys. 1986-87 to 1996-97)

*CIT v. Digvijay Chemicals (2010) 322 ITR 95 (All.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

**[S. 158BC]**

Assessing Officer having jurisdiction over the person searched had not recorded any satisfaction, as required under section 158BD, and consequently, the proceedings initiated under section 158BD were bad in law.

*CIT v. Anupam Sweets (2010) 321 ITR 485 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Agent of Non-resident [S. 163]**

Assessment under section 158BD framed on non-resident assessee after issuing a notice on his power of attorney holder without passing an order under section 163 treating the latter as an agent of the assessee and granting him an opportunity of hearing is a nullity, more so the said power of attorney holder does not answer the description of agent as envisaged under section 163(1).

*CIT v. Mukesh B. Shah (2010) 40 DTR 297 / 195 Taxman 15 / 233 CTR 412 / (2011) 224 Taxation 203 (Guj.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Service of notice – Civil Procedure Code, Rule 17 Order V**

When there was no evidence of any local person having been associated with an identification of the place of business of the assessee and the report is not witnessed by any person at all, service of notice by affixture was not valid.

*CIT v. Naveen Chander (2010) 323 ITR 49 / 42 DTR 156 / 233 CTR 518 (P&H)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

Where the status of the assessee was incorrectly mentioned in the notice issued under section 158BD of the Act and also there was no subjective and independent satisfaction recorded by the Assessing Officer the notice issued under section 158BD of the Act cannot be sustained and is liable to be quashed.

*Subhas Chandra Bhaniramka v. ACIT (2009) 25 DTR 226 / 226 CTR 84 / 320 ITR 349 (Cal.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

For invoking section 158BD for the assessment of any person satisfaction must be recorded by the Assessing Officer and Books of accounts, documents or assets seized or requisitioned to be handed over to the assessing officer having jurisdiction over such person.

*CIT v. Dawn View Farms (P) Ltd. (2009) 212 Taxation 199 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Definition of the words ‘other person’**

Under section 153C of the Act, the Income Tax Dept. cannot demand unrestricted access to information on those persons who have no relation to the person who has been subjected to search u/s. 132. In this case, the Dept. seized the laptops of two employees of the petitioner (the petitioner is a renowned firm of auditors) and demanded password for getting access to files of all the clients of the petitioner- even of those persons who had no relation to the person (client of the petitioner) searched. The words ‘a person’ appearing in section 153C and ‘other person’ appearing in section 158BD, can only mean such person having dealings or transactions with the person searched.

*S. R. Batliboi & Co. v. Department of Income-Tax (2009) 181 Taxman 9 / 224 CTR 369 / 315 ITR 137 / 24 DTR 74 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Agent of non resident [S. 163]**

During the course of search and seizure action at the residential premises of the Assessee it was found that Assessee's non resident brother was maintaining some bank accounts. As the source of deposits in those banks was not explained assessment order under section 158BD was framed treating the Assessee as agent of his brother under section 163(1). Hon'ble Court held that neither assessee had any business connection with his non resident Indian brother, nor any income had come into existence as having been received by non-resident Indian so as to attract provisions of section 163(1)(c).

*CIT v. Rakeshchander Goel (2009) 177 Taxman 15 / 216 CTR 136 / 309 ITR 163 / 6 DTR 81 (P&H)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

Where no material showing that the undisclosed income of partner of a firm was found during the course of search, the High Court held that there could not be any basis for satisfaction for initiating proceedings under section 158BD of the Act against the partner which is mandatory requirement for initiating proceeding under section 158BD of the Act.

*Nivedita M. Makwana v. P.M. Shukla (2008) 11 DTR 225 (Guj.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

Assessing Officer must record his satisfaction about existence of undisclosed income before proceeding against a person other than one searched.

*New Delhi Auto Finance (P) Ltd. v. Jt. CIT (2008) 170 Taxman 276 / 217 CTR 628 / 300 ITR 83 / 4 DTR 318 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Permission to cross examine not allowed**

The assessee requested the Assessing Officer time and again to permit him to cross-examine Mr. A on the basis of whose statement, proceedings under section 158BD had been launched. However, the said request was not acceded to by the learned Assessing Officer and later on in appeal before ITAT it was found that it was in complete violation of the principles of natural justice. Since Assessing Officer was functioning as a quasi-judicial authority and was under an obligation to adhere to the principles of natural justice. The Hon'ble High Court upheld the view of the Tribunal.

*CIT v. SMC Share Brokers (2007) 288 ITR 345 / 210 CTR 353 / 159 Taxman 306 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Jurisdiction**

The assessee was other person as contemplated under section 158BD. She was a person other than the person in respect to whom search was carried out under section 132. Thus, as per section 158BD, the relevant material ought to have been handed over to the Assessing Officer having jurisdiction over such other person and the Assessing Officer should proceed against such other person as provided under section 158BD. Thus, the block assessment order passed in the assessee's case under section 158BD, by the Assessing Officer having jurisdiction over the assessee's covered in search is bad-in-law as the Assessing Officer does not have jurisdiction to do so.

*CIT v. Maya Chotrani (Smt.) (2006) 157 Taxman 107 / 210 CTR 413 / 288 ITR 175 (MP)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Communication of reasons recorded for issuing notice**

Where the assessee sought a copy of reasons recorded for issuing notice under section 158BD, the revenue authorities are bound to issue the recorded reasons before proceeding further in the matter of block assessment.

*Bishan Chand Mukesh Kumar v. UOI (2004) 135 Taxman 154 / 190 CTR 258 (Delhi)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – VDIS**

Once valid certificate is granted by Commissioner under section 68(2) of Voluntary Disclosure of Income scheme, proceedings under section 158BD will be illegal.

*Bhagwat Prasad Poddar v. CIT (2003) 263 ITR 119 / 183 CTR 626 / 130 Taxman 182 (All.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Bank guarantee – Release of seized amount**

Entire seized amount can be released on furnishing of bank guarantee and surety by solvent guarantors.

*Union of India v. Ashok Kumar Nahar (2003) 179 CTR 347 / 223 CTR 46 / 179 Taxman 347 (Raj.)(High Court)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Judicial satisfaction – Recorded in Block assessment of person searched [S. 158BC]**

Satisfaction recorded under section 158BD before initiation of block assessment proceedings of the person searched does not satisfy the requirement of law; further, so called satisfaction recorded by the Assessing Officer in the order sheet without even stating that undisclosed income pertaining to the assessee has been detected from the seized record of the persons searched was not in accordance with the provisions of section 158BD, therefore the block assessments of the assessee under section 158BD are not valid.

*ACIT v. Mukta Goenka (Smt.) (2011) 53 DTR 1 / 129 ITD 201 / 137 TTJ 249 (TM)(Jab.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction – Before completion of assessment of person searched [S. 158BC]**

Recording of satisfaction for taking action against any other person under section 158BD has to be between initiation proceedings under section 158BC and before completion of block assessment under section 158BC in case of person searched. Notice issued beyond period prescribed was bad in law.

*CIT v. Praveen Fabrics (P) Ltd. (2011) 198 Taxman 463 (P&H)(High Court)*



*Editorial:- View of Delhi Special Bench in Manoj Aggrawal v. Dy. CIT (2008) 113 ITD 377 (SB)(Delhi)(Trib.), affirmed.*

**S. 158BD : Block assessment – Undisclosed income of any other person – Computation – Post search enquiry – Materials not relating to evidence found – Protective assessment [S. 158BC]**

Income-tax department had the information regarding the existence of the bank accounts of all the individual assesses and money deposited in these bank accounts along with relevant dates of such deposits, no incriminating material can be said to have been found as a result of search carried out in respect of their bank accounts and the money lying in the said bank accounts cannot be subject matter of addition in block assessments. Once it is accepted that no incriminating documents were found in the case of four MPs in their premises, which justified any addition under section 158BC, in their hands, protective addition in their party JMM invoking section 158BD also cannot be sustained.

*Shibu Soren v. ACIT (2011) 62 DTR 273 / 12 ITR 540 / 142 TTJ 714 / 47 SOT 331 (Delhi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Statement of Third Party [S. 132(4)]**

Statements recorded of third parties which have been relied upon by the Assessing Officer for the purpose of assessment not having been provided to the assessee, order of Assessing Officer is bad in law to that extent. Impugned order is set aside and the Assessing Officer is directed to re do the assessment according to law by providing the said statement to the assessee as well as record satisfaction under section 158BD.

*Hamish Engineering Industries (P) Ltd. v. Dy. CIT (2010) 34 DTR 490 / (2009) 120 ITD 166 (Mum.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

Assessing Officer of searched person should record his satisfaction that undisclosed income found during search belonged to such person. If no satisfaction recorded block assessment was invalid.

*Dy. CIT v. Flair Builders P. Ltd. (2010) 3 ITR 158 (Delhi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction – Notice period [S. 158BC]**

- (i) For initiating action, first and foremost requirement as per the provisions of section 158BD, the Assessing Officer who has to make block assessment in case of person searched, has to be satisfied that undisclosed income detected belongs to some person other than person searched. However, in other words, the section itself contemplates satisfaction is mandatory and imperative on part of Assessing Officer

making assessment in case of person searched to record satisfaction before assumption of jurisdiction under section 158BD.

- (ii) Note of satisfaction must contain a positive finding by the Assessing Officer who is making assessment under section 158BC which indicate therein undisclosed income found as a result of his examination of seized material and person to whom such income belongs.
- (iii) As envisaged in section 158BC(a)(i) a clear time of fifteen days is required to be given in the notice for furnishing return in the prescribed form otherwise the notice will be rendered invalid and, hence, assumption of jurisdiction under section 158BD by issue of such notice and all further proceedings of block assessment pursuant to such notice will be invalid and void. The time-limit as set out in the section 158BE automatically applies for invoking provisions of section 158BD. For this reason the Parliament did not find it necessary to specify a separate time-limit for same as enactment itself shows that both sections 158BC and 158BD are inter-linked, interlaced and intertwined and both form part and parcel of the same Chapter.

*Manoj Aggarwal v. Dy. CIT (2010) 113 ITD 377 / 117 TTJ 145 / 11 DTR 1 (SB)(Delhi)(Trib.)*

#### **S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction in writing**

Statement recorded in search cannot form sole basis for initiation under section 158BD, addition made without recording the satisfaction is held to be bad in law.

*CIT v. Late Raj Pal Bhatia (2011) 333 ITR 315 / 237 CTR 1 / 49 DTR 9 (Delhi)(High Court)*

#### **S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

In view of the fact that there was a delay of more than 19 months in issuance of notice under section 158BD of the Act after the completion of the assessment order in the case of the person searched and also because the satisfaction required under section 158BD of the Act was not recorded by the Assessing Officer of the person searched, the proceedings are vitiated and need to be declared as null and void. (A.Ys. 1991-92 to 2001-02)

*Bharat Bhushan Jain v. ACIT, IT(SS)A No.13/Del/2007, Bench – A, Dt. 7-11-2008 - BCAJ P. 794, Vol. 40-B, Part 6, March 2009. (Delhi)(Trib.)*

#### **S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction**

Initiation of proceedings under section 158 BD without any positive material and without making necessary investigation in support of conclusion was held to be invalid. Further, held in the instant case that as material available with Assessing Officer upto the date of issuing of notice also does not justify an inference of

existence of undisclosed income, it can not be held that satisfaction was based on positive material, so as to show existence of impugned undisclosed income.

*Dy. CIT v. S. Hakam Singh (2008) 173 Taxman 23 (Mag.)(Chd.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Mandatory**

For assessing the undisclosed Income of any person other than the person who is searched under section 132(1), it is mandatory that the Assessing Officer should be satisfied, and such satisfaction is based upon material before him, and same should be clearly identified, as the same has to be handed over to Assessing Officer of person in whose case section 158BD is sought to be invoked.

*ACIT v. Hari Singh (2008) 169 Taxman 31 (Mag.)(Delhi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Notice under section 143(2)**

Block assessment order passed under section 158BD, pursuant to Notice under section 143(2), which was not served within prescribed period, held to be null and void.

*ACIT v. R. P. Singh (2007) 165 Taxman 147 (Mag.)(Delhi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Entries in the diary – Protective assessment**

Entries in the diary not clearly revealing that assessee has earned income and it being a dumb document, no addition could be made on the basis of nothings in the diary.

Documents having been received from the business premises of K and block assessment having been made in her hands substantively, protective assessment in the hands of assessee without recourse to section 158BD was invalid.

*ACIT v. Ashok Kumar Vig (2007) 106 TTJ 422 (Ranchi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person [S. 69]**

Incriminating documents found in the course of search of a company having revealed that the transaction in shares and the resultant capital gain disclosed by the assessee in her regular return was bogus and was only a cover up to explain the investment made by her in a house property which would have otherwise remained unexplained and attracted section 69, Assessing Officer was justified in taking action under section 158BD.

*ACIT v. Ranjit Kaur (Smt.) (2006) 99 TTJ 568 (Chd.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Third person – Protective Addition**

Proceedings under section 158BD – Assessment made under section 158BC in the case of Karta as individual having been struck down as time-barred, the substantive additions made therein do not exist at all and consequently protective additions could

not be made in the hands of HUF in assessment under section 158BD. (A.Ys. 1989-90 to 1999-2000)

*Ramesh Chand Prem Raj Soni (HUF) v. ACIT (2006) 105 TTJ 904 (Jodh.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Mandatory notice**

There being no search in the case of the assessee, and no notice under section 158BD, the assessment was illegal, and the same could not be validated by the subsequent letter of the Assessing Officer clarifying that the order passed in the case of the assessee be read as passed under section 158BD.

*Madhavi Finvest (P) Ltd. & Ors. v. ACIT (2006) 99 TTJ 933 (Visakha)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Proceedings**

Assessing Officer was justified in proceeding against the HUF (assessee) in accordance with section 158BD where the individual admitted in appeal before the Tribunal and also before the ACIT that the majority of shares which are subject matter of the agreement to sell found during the search were held by his HUF.

*Vijay Sehgal (HUF) v. ACIT (2006) 102 TTJ 904 / 100 ITD 560 (Amritsar)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Piecemeal declaration of income**

Assessee having not disclosed entire income in response to notice under section 158BD but disclosing the same in piecemeal subsequently by separate letters, penalty under section 158BFA(2) was rightly imposed.

*Dy. CIT v. Spark Electro Communication Systems (2006) 100 TTJ 847 / 98 ITD 237 (Mum.)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Material on record**

Under section 158BD, requirement of 'satisfaction' of Assessing Officer is a pre-requisite condition for initiating assessment proceedings against person other than searched person; further it should be based upon material before Assessing Officer and should be brought on record.

*Sakun International v. Jt. CIT (2005) 94 ITD 138/ 96 TTJ 496 (Delhi)(Trib.)*

**S. 158BD : Block assessment – Undisclosed income of any other person – Time limit – Person searched**

Though no time-limit has been prescribed under section 158BD, yet when proceedings are initiated after considerable delay, these could be said to be barred by limitation. (A.Ys. 1986-87 to 1997-98)

Where Assessing Officer had not initiated any assessment proceedings in case of persons who had been searched, to have enabled him to come to a conclusion that

undisclosed income belonging to some other person (assessee) was found, issue of notice under section 158BD to assessee was not justified.

*P. Mahender Reddy v. ACIT (2005) 2 SOT 696 (Hyd.)(Trib.)*

### **S. 158BD : Block assessment – Undisclosed income of any other person – Firm – Company**

Where material was seized from premises of a firm which was separate assessee from assessee-company and no material was seized from possession of assessee-company during search, no addition on the basis of material seized from premises of firm without following procedure prescribed under section 158BD was permissible.

*Gorakhpur Petro Oils Ltd. v. Addl. CIT (2005) 3 SOT 661 / 95 TTJ 489 (TM)(All)(Trib.)*

### **Section 158BE : Time limit for completion of block assessment**

### **S. 158BE : Block assessment – Time limit – Completion of search – Last Panchnama**

Limitation starts from date of Last Panchnama and not from date till prohibitory order is in operation.

*CIT v. Abolf Patric Pinto. SLP (C) No. 26625 of 2009, (2010) 322 ITR (St.) 3 (SC)*

*Editorial:– Tribunal order reported in 284 ITR (AT) 207 affirmed by Bombay H. C. Order ITA No. 856/2008 dated 5-9-2008*

*CIT v. Ranjana Katyal SLP (Civil) No. 683 of 2010, (2010) 322 ITR 4 (St.) (SC)*

*CIT v. White & White Minerals (P) Ltd. SLP (C) No. 4356/2010, (2010) 322 ITR 4 (St.)(SC) / CIT v. White & White Minerals (P) Ltd. (2011) 51 DTR 314 / 330 ITR 172 (Raj.)*

### **S. 158BE : Block assessment – Time limit – Panchnama – Completion of search**

Last valid panchnama has been drawn on August 7, 1996, the date on which seizure was made and therefore, the assessment proceedings ought to have been completed before August 30, 1997. The Tribunal held that the last Panchnama dt. 10th October, 1996, drawn after conclusion of search was not valid as no seizure was made on that date. [ITA No 904 of 2007 dt. 1-7-2008 (Kar.)]

*CIT v. Children's Education Society (2009) 319 ITR 2 (St)*

*Editorial:- See (a) S. K. Katyal (2008) 16 DTR 285 (Delhi) / (b) CIT v. Plastika Enterprises (2009) 23 DTR 333 (Bom.) / (c) Nandlal M. Gandhi v. ACIT (2008) 115 ITD 1 (TM)(Mum.)(Trib.)*

### **S. 158BE : Block assessment – Time limit – Last panchanama – Prohibitory Order [S. 132(3)]**

Panchanamas drawn on 27th and 28th March, 2003 in respect of residential and business premises of the petitioner being the last panchnams the date of the same is the date of conclusion of the search for reckoning the time limit of two years for completion of the search and not 17th and 14th June 2003, on which dates

prohibitory orders under section 132(3) were lifted though time period of 60 days already expired on 27th May, 2003 and therefore, the impugned assessment order passed on 30th June 2005, was barred by limitation. (A. Ys. 1997-98 to 2003-04)  
*Rakesh Sarin v. Dy. CIT (2011) 333 ITR 451 / 240 CTR 56 / 203 Taxman 58 (Mad.)(High Court)*

**S. 158BE : Block assessment – Time limit – Service of non-signed copy of assessment order [S. 292B]**

On the facts it was established that draft assessment was approved by the CIT under section 158BG on 23rd May, 1997 and that the assessment was finalized by the Assessing Officer on 27th May, 1997 i.e. before expiry of limitation on 31st May, 1997. The copy of the assessment order first sent to the assessee on 30th May, 1997 along with signed notice of demand did not contain the signature of the Assessing Officer did not invalidate the assessment which was validly completed within the period of limitation. (Block period April 1986 - May 1996)

*CIT v T. O. Abraham & Co. (2011) 333 ITR 182 / 54 DTR 105 / 241 CTR 561 (Ker.)(High Court)*

**S. 158BE : Block assessment – Time limit – Stay order in another assessee of family – Notice under section 142(2A) [S. 142(2A)]**

Another member MN of Assessee's family member has filed a writ petition challenging the order under section 142(2A) in his case, and stay was granted. The Court held that it cannot be accepted that the stay order passed by the court in writ petition filed by another family member in their assessment, amounted the staying the order under section 142(2A) passed against the assessee. On the facts of the assessee against the search and seizure action carried on 26th June, 1997 block assessment was passed on 28th July 2000. The order was time barred.

*CIT v. Sandeep C. Dugad (2011) 63 DTR 201 / 245 CTR 324 (Bom.)(High Court)*

**S. 158BE : Block assessment – Time limit – Last Panchnama – Completion of search**

Where the search was concluded on 29th / 30th Aug., 1996 by drawing a panchnama, the time limit of one year for framing the block assessment start, when revenue has not done anything tangible after passing the restraint order which was revoked on 18th Nov., 1996. Panchnama drawn at the time of vacating the order cannot extend the period of limitation and therefore assessment order passed on 28th Nov., 1997, was barred by limitation.

*CIT v. D. D. Axles (P) Ltd. (2010) 40 DTR 293 / 195 Taxman 277 / 323 ITR 558 (Delhi)(High Court)*

**S. 158BE : Block assessment – Time limit – Power of Tribunal**

The Appellate Tribunal has no power to extend the period of limitation by treating the assessment made beyond limitation.



*K. M. Tiwari and Sons (HUF) v. ACIT (2010) 325 ITR 389 / 236 CTR 306 / 46 DTR 334 (Chhatitsgarh)(High Court)*

**S. 158BE : Block assessment – Time limit – Last Panchnama – Completion of search**

In view of Expln. 2 to section 158BE, the period of limitation of two years is to be counted from the date when the last Panchnama was drawn in respect of any warrant of authorization, if there were more than one warrants of authorization. In view of deeming provision, even an authorization which may not be the last authorization would become last authorization if it is executed and if Panchnama in respect is drawn last.

*CIT v. Anil Minda & Ors. (2010) 328 ITR 320 / 45 DTR 121 / 235 CTR 1 (Delhi)(High Court)*

**S. 158BE : Block assessment – Time limit – Panchnama – Completion of search**

Search action in case of the assessee was concluded on 5-8-2000 and panchnama seizing stock was also prepared on the same day. Thereafter, on 20-9-2000 the authorities had only inspected the seals and again prepared a panchnama. The Hon'ble High Court on these set of facts held that the second panchnama was prepared by the revenue authority to just overcome the limitation period and the block assessment order passed by the assessing officer was barred by limitation.

*CIT v. Plastika Enterprises (2009) 23 DTR 333 / 180 Taxman 293 (Bom.)(High Court)*

**S. 158BE : Block assessment – Time limit – Panchnama – Completion of search**

Block Periods: 1-4-1990 to 17-11-2000

Panchnama on a later date i.e 3-1-2001, not showing that any search was conducted on that day but, only revoking the restrain order placed by the earlier Panchnama dated 17-11-2000. It was held by the High Court that only the panchnama dated 17-11-2000 which related to conclusion of search was relevant for computing the period of limitation under section 158BE of the Act. Accordingly the assessment order passed on 30-1-2003 was held to be beyond the period of limitation.

*CIT v. S.K. Katyal (2008) 16 DTR 285 / 221 CTR 310 / 308 ITR 168 (Delhi)(High Court)*

**S. 158BE : Block assessment – Time limit – Direction for special audit**

Direction of Assessing Officer for special Audit under section 142(2A) one day before the expiry of limitation for completing the Block Assessment given merely to get extension of time Assessing Officer's action apparently beyond the scope of 142(2A). Finding by Appellate Tribunal that the direction for special audit was illegal and consequently assessment was barred by time are findings of fact therefore, no substantial question of law arises.

*CIT v. Bajrang Textiles (2006) 205 CTR 287 / 294 ITR 561 (Raj.)(High Court)*

**S. 158BE : Block assessment – Time limit – Last authorization – Completion of search**

Period of limitation will be counted from the date of execution of last authorization of search and fact that such authorization was in respect of locker in name of family members of appellant assessee would not make any difference when authorization also contained name of appellant. (A.Ys. 1987-88 to 1997-98)

*Oswald Anthony (Dr) v. CIT (2004) 270 ITR 204 / 141 Taxman 520 (Patna)(High Court)*

**S. 158BE : Block assessment – Time limit – Panchnama – Completion of search**

Where search was conducted on 21-3-1996 the assessment order passed on 30-6-1997 was barred by limitation and alleged subsequent panchnama said to have been made on 27-2-1997, which was not part of record, could not be relied upon as the same was neither considered by the Assessing Officer nor by the Tribunal, the tribunal being final fact finding authority.

*CIT v. Kuwer Industries Ltd. (2004) 191 CTR 413 / 144 Taxman 487 (Delhi)(High Court)*

**S. 158BE : Block assessment – Time limit – Conclusion of search [S. 132]**

- (i) Commencement of limitation as prescribed in Explanation 2 to section 158BE shall be only on conclusion of search.
- (ii) By law the date on which search gets concluded is taken according to recording made in last panchnama.
- (iii) It could be said that passing of a prohibitory order under sub-section (3) of section 132 is in all cases only to extend period of limitation for making assessments, without any facts and circumstances or evidence justifying said conclusion and in a bona fide case, where there is no such attempt and prohibitory order is passed in normal course and for bona fide reasons, search cannot be deemed to have been concluded on day on which said order was passed.

*Krishna Verma (Smt.) v. ACIT (2011) 113 ITD 655 / 116 TTJ 565 / 8 DTR 446 (SB)(Delhi)(Trib.)*

**S. 158BE : Block assessment – Search and seizure – Time Limit – Special audit [S. 158BC, 142(2A)]**

Special Audit Report under section 142(2A) was directed to be obtained within 60 days because the financial statements were required to be prepared from two sets of accounts and other material involving huge unaccounted transactions. The Assessee despite of repeated requests of auditors neither produced books of account and vouchers nor afforded necessary facilities to get audit work completed within the extended stipulated time of 120 days. In the circumstances the Special Auditors

submitted their report on the basis of limited information primarily on the basis of seized material.

On the facts and circumstances the assessing officer completed the block assessment within the extended period in view of the Clause (ii) of Explanation 1 to section 158BE read with the proviso to the said Explanation 1.

On the facts & circumstances it was held that the order passed by the Assessing Officer was not barred by limitation under the provisions of section 158BE.

*Rajesh Kumar v. Dy. CIT (2010) 122 ITD 395 / 320 ITR 731 / (2009) 31 DTR 131 / 227 CTR 415 (Delhi)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Completion of search**

On the day of the search (i) panchnama prepared with the remark that 'search temporarily concluded for the day to be commenced subsequently'; and (ii) prohibitory order under section 132(3) issued. After a period, prohibitory order revoked and panchnama prepared with the remark 'search is finally concluded'. Held that the period of limitation is to be computed from the date search was originally initiated and not from later date of panchnama.

*Nandlal M. Gandhi v. ACIT, (2008) 118 TTJ 289 / 115 ITD 1 / 13 DTR 35 (TM)(Mum.)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Panchnama – Prohibition order**

Panchnama need not be prepared every time for purpose of lifting prohibition or making inventory of stocks. Panchnama has to be prepared independently on dates of search. Merely preparing and issuing a panchnama for purpose of lifting prohibitory order does not extend limitation available for completing stock assessment.

*Plastika Enterprises v. ACIT (2007) 161 Taxman 163 (Mag.)(Mum.)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Completion of block assessment**

The Explanation 2 of section 158BC was inserted by the Finance (No. 2) Act, 1998, with retrospective effect from 1-7-1995, which makes it clear that the authorization referred to in sub-section (1) of section 158BE shall be deemed to have been executed on the conclusion of search as recorded in the last panchnama drawn in relation to any person, in whose case the warrant of authorization has been issued. The said Explanation is with regard to authorization referred to in sub-section (1), which refers to last of the authorizations, which means that the last of the panchnama has to be taken into account in respect of last of the authorizations for search, as there could be more than one panchnamas in respect of same authorization. So the limitation will start from the end of the month in which last of the authorizations is executed.

*Shahrukh Khan v. ACIT (2007) 104 ITD 221 / 107 TTJ 252 (Mum.)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – For completion of assessment**

Assessing Officer is bound by time-limit prescribed under section 158BE. In the case before the Hon'ble Tribunal was – search under section 132, covering the periods

1986-87 to 1996-97, was conducted on 22-1-1996 at registered office and the same was concluded on 22-4-1996. On these facts Notice under section 158BC was served on 22-4-1996. On the facts & circumstances the Block Assessment order under section 158BC was due to be completed on or before 30-4-1997 but the order was passed on 30-5-1997. Therefore, the order passed on 20-5-1997 was held to be barred by limitation. (A.Ys. 1986-87 to 1996-97)

*Value Securities (India) Ltd. v. ACIT (2007) 108 ITD 639 / 112 TTJ 804 / 15 SOT 495 (Hyd.)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Valid panchnama**

Panchnama stated to have been drawn after an unexplained delay of nearly two years from the date of search when no valid prohibitory order was in existence was not a legal and valid Panchnama and the only valid Panchnama being the one that was drawn on the date of search itself, the assessment made for block period beyond one year from the end of the month in which the valid Panchnama was drawn, was clearly barred by limitation.

*Sarb consulate Marine Products (P) Ltd. v. ACIT (2006) 99 TTJ 732 / 97 ITD 333 / 5 SOT 447 (Delhi)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Search and seizure – Mandatory**

Block assessment completed was beyond the period of limitation and hence invalid notwithstanding the statement made by the assessee in its block return.

*ACIT v. Bhagwati Printers (P) Ltd. (2006) 102 TTJ 480 (Delhi)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Extraction**

Assessing Officer having completed the block assessment within the extended period as per cl. (ii) of Explan. 1 to s. 158E same was not time-barred.

*A.P. Shanmugaraj v. Dy. CIT (2006) 100 TTJ 259 / 99 ITD 278 (Chennai)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Notice – Sufficient time**

Order under section 158BC passed by the Assessing Officer was barred by limitation as the notice under section 158BC was issued just one day before the expiry of limitation.

*Sanjay Kumar v. ACIT (2006) 100 TTJ 862 (Jab.)(Trib.)*

#### **S. 158BE : Block assessment – Time limit – Prohibitory order – Conclusion of search**

There being only one authorization for search which was executed on 18th Sept., 1998, and no fresh authorization in favour of the officer who visited the assessee's premises on 13th Nov., 1998 and lifted the prohibitory order. The limitation for completion of block assessment ended on 30th Sept., 2000 and therefore the assessment order passed on 28th Nov., 2000, was barred by limitation.

*Javed Mohd. Peshimam v. Dy. CIT (2006) 100 TTJ 434 (Mum.)(Trib.)*

**S. 158BE : Block assessment – Time limit – Panchnama – Prohibitory order [S. 132]**

Panchnama executed to lift prohibitory order passed under section 132(3) cannot be equated with 'last panchnama executed' for purposes of computing period of limitation under section 158BE; where search took place on 15/21-10-1998 and panchnama was drawn on that date, assessment completed on 27-12-2000 was beyond period of limitation of two years prescribed in section 158BE and was therefore barred by limitation, even though a subsequent panchnama was executed on 8-12-1998 to lift prohibitory order under section 132(3).

*M. Sivaramakrishnaiah & Co. v. ACIT (2005) 93 TTJ 1035 (Visakha)(Trib.)*

**S. 158BE : Block assessment – Time limit – Panchnama – Prohibitory order [S. 132(3)]**

A prohibitory order under section 132(3) without there being a seizure could not be a valid panchnama so as to extend the time-limit available for the completion of assessment under section 158BC, read with section 158BE.

*Sarb Consulate Marine Products (P.) Ltd. v. ACIT (2005) 97 ITD 333 / 99 TTJ 732 (Delhi)(Trib.)*

**S. 158BE : Block assessment – Time limit – Fresh assessment**

Limitation specified in section 158BE is limitation for completing assessment to be made by Assessing Officer; and it is not a limitation for making a fresh assessment in pursuance of an order under section 250 or 254 or 263 or 264, setting aside or cancelling the assessment.

*W. C. Shaw (P.) Ltd. v. ACIT (2005) 93 ITD 535 / 94 TTJ 169 (Kol.)(Trib.)*

**S. 158BE : Block assessment – Time limit – Completion of Search**

Time-limit under section 158BE starts on conclusion of search as recorded in the last panchnama drawn irrespective of operation of prohibitory order under section 132(3). (A.Y. 1985-86 to 5-12-1995)

*C. Ramaiah Reddy v. ACIT (2003) 87 ITD 439 / 81 TTJ 1044 (SB)(Bang.)(Trib.)*

**Section 158BFA : Levy of interest and penalty in certain cases**

**S. 158BFA(1) : Block assessment – Interest – Penalty – Tax paid after due date of filing of return – Credit**

While calculating interest under section 158BFA(1), credit cannot be allowed for the tax paid by the assessee on various dates after the due date of filing of return.

*Kirti Foods Ltd. v. ACIT (2011) 60 DTR 96 (Pune)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Undisclosed income – Returned income**

Where the income finally assessed under section 158BC(c) is the only undisclosed income returned by the assessee and the assessee has complied with all the

conditions of clauses (i) to (iv) of the first proviso, no penalty under section 158BFA(2) could be levied. Penalty may be leviable in cases where undisclosed income finally assessed under clause (c) of section 158BC is in excess of the undisclosed income returned by the assessee in the return filed under section clause (a) of section 158BC. If additions made when compared with undisclosed returned income of assessee is very small penalty may not be justified.

*CIT v. Heera Construction Co. (P) Ltd. (2011) 63 DTR 99 / 337 ITR 359 / 245 CTR 208 (Ker.)(High Court)*

#### **S. 158BFA(2) : Block assessment – Interest – Penalty – Cash seized**

Assessee's contention that cash seized during the course of search lying with the department has to be adjusted towards tax payable and levy of interest would arise only after such assessment. Since fact was not considered the matter remanded back to the Assessing Officer for verification.

*CIT v. N. Leela Kumar (2010) 37 DTR 70 (Karn.)(High Court)*

#### **S. 158BFA(2) : Block assessment – Interest – Penalty – Delay in Filing return [S. 158BC]**

While computing period for which interest under section 158BFA(1) is chargeable, the total time taken by the assessee from the date of service of notice under section 158BC till date of filing of the return is to be taken into consideration and from this period, the time taken by the department in supplying the documents has to be excluded.

*CIT v. Mesco Airlines Ltd. (2010) 236 CTR 628 / 327 ITR 554 / 48 DTR 81 (Delhi)(High Court)*

#### **S. 158BFA(2) : Block assessment – Interest – Penalty – Clause (iv) – Quantum converted in appeal**

Assessee by filing an appeal against the order of block assessment disputing the rate of tax payable on long term capital gains fails to comply with cl. (iv) of the first proviso to section 158BFA(2), and hence is not entitled to the benefit of the proviso regarding non levy of penalty.

*CIT v. Anju R. Innani (Smt.) (2010) 38 DTR 75 / 231 CTR 417 / 191 Taxman 350 / 323 ITR 626 (Bom.)(High Court)*

#### **S. 158BFA(2) : Block assessment – Interest – Penalty**

Levy of penalty is discretionary and not mandatory. As the undisclosed income represents the estimation of opening capital prior to the block period and the said capital cannot be treated as undisclosed income for the first assessment year in the block period, the Tribunal is right in deleting the penalty. (A.Ys. 1996-97 to 2001-02)

*CIT v. Satyendra Kumar Doshi (2009) 222 CTR 258 / 315 ITR 172 / 18 DTR 236 (Raj.)(High Court)*

#### **S. 158BFA(2) : Block assessment – Interest – Penalty – Discretionary**



Penalty under section 158 BFA(2) of the Act is discretionary and not mandatory. Where the block assessment framed only on the basis of the income surrendered by the assessee during the course of search, without any evidence of undisclosed income detected during the search, under section 132 there is no question of imposition of penalty under section 158BFA(2).

*CIT v. Harkaran Das Ved Pal (2008) 16 DTR 348 / 222 CTR 438 / 336 ITR 8 / 177 Taxman 398 (Delhi)(High Court)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Undisclosed income – Addition on estimate basis – Gross profit – Appeal admitted by High Court**

The Tribunal confirmed the addition by the Assessing Officer on account of estimated gross profit merely on the basis that the entries found recorded in the ledger account found in the possession of a third party, and not on the basis of any material found in the possession of the assessee during the search, penalty under section 158BFA(2) is not leviable, more so when appeal against quantum has been admitted by the High Court.

*Sadhu Ram Goyal v Dy. CIT (2011) 63 DTR 296 / 128 ITD 436 (Jp.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Undisclosed income [S. 158BD]**

The assessee did not file the return of income in response to notice under section 158BD read with section 158BC for the block assessment. The addition on account of money paid in cash was based on the seized material found during the course of search. The Tribunal held that levy of penalty was justified.

*Madhuben R. Barot (Smt) v. ACIT (2011) 12 ITR 465 (Ahd.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Undisclosed income – Statement – Quantum confirmed by Tribunal**

In quantum appeal the Income tax Appellate Tribunal has not accepted the retraction made by the assessee, in the absence of any contrary, material placed on record by the Assessee, the assessee was liable to penalty under section 158BFA(2).

*Gunanath B. Thakoor v. ACIT (2011) 64 DTR 23 / 142 TTJ 770 / 132 ITD 319 (Mum.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Initiation – Issue of Notice**

When it is mentioned in the block assessment order that “penalty proceedings have already been initiated separately” there is a valid initiation of penalty proceedings under section 158BFA(2).

*Sunil Dua v. Dy. CIT (2010) 130 TTJ 313 / 38 DTR 493 (Delhi)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Withdrawal of Quantum appeal – Reason for Levy of penalty**

Merely because the assessee has withdrawn the appeal against addition in quantum, in the absence of any discussion whatsoever in the penalty order to suggest any independent appraisal of additions or documents has been done in the penalty proceedings levy of penalty is liable to be deleted. (A.Ys. 1989-90 to 1999-2000)  
*Nemchand Jain & Sons v. Dy. CIT (2010) 33 DTR 178 / 131 TTJ 478 (Kol.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Concealment – No positive concealment found on assessee's part – No penalty leviable on addition made on estimate basis**

In the present case, the assessee applied a different net profit rate and the Assessing Officer and the CIT (A) adopted different estimates and therefore, it could not be said that the assessee had concealed the particulars of his income so as to attract penalty under section 158 BFA(2).

*Bitoli Devi (Smt.) v. ACIT (2009) 31 SOT 30 (URD)(Luck.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Estimate basis – Validity**

Additions having been made on estimate basis, penalty cannot be levied.

*Dr. Hakeem S.A. Syed Sathar v. ACIT (2009) 123 TTJ 573 / 120 ITD 1 / 24 DTR 379 (Chennai)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Concealment – Payment of tax**

Amount of undisclosed income shown in the return of income in form NO 2B could not be taken into account for computation of penalty under section 158BFA(2). There is nothing in the language to incorporate the requirement of payment of tax on the "undisclosed income" as a condition for application of second proviso. (A.Y. 1992-93)  
*Dy. CIT v. Heera Constructions Co. (P.) Ltd. (2009) 29 DTR 398 / 121 ITD 407 / 125 TTJ 589 (TM)(Cochin)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Effective date**

On the facts & circumstances the authorization of search under section 132(1) was given on 30-12-1996 and the same was executed on 3-1-1997 whereas the penal provision of section 158BFA(2) came in to effect/operation from 1-1-1997 and therefore, it was held that the provision of section 158BFA(2) could not be applied to the facts of the case. In principle, therefore, the penal provision would apply provided that the same is operational at the relevant time of authorization of search by the authorities. (A.Ys. 1987-88 to 1997-98)

*Suraj Prakash Soni v. ACIT (2007) 106 ITD 321 / 105 TTJ 257 (Jodh.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Onus – Discretionary**

Penalty under section 158BFA(2) is optional and onus lies on the Department to prove concealment.

*Enfield Industries Ltd. v. Dy. CIT (2007) 106 TTJ 89 (Kol.)(Trib.)*

### **S. 158BFA(2) : Block assessment – Penalty – Discretionary**

Levy of penalty under section 158BFA(2) is at the discretion of the Assessing Officer.  
*Habibullah Kanyari v. Dy. CIT (2007) 108 ITD 321 / 109 TTJ 539 (Mum.)(Trib.)*

### **S. 158BFA(2) : Block assessment – Interest – Penalty – ‘May direct’ – ‘Small’**

Expression employed in section 158BFA(2); i.e., ‘may direct that a person shall pay’ indicates the discretionary nature of the penalty. The expression ‘shall’ coming in the second proviso is to restrict the applicability of the penalty only to the difference in the income and not to the entire income.

Assessing Officer having made the additions solely on the basis of assessee’s letter offering certain undisclosed income, no mala fide intention can be attributed to the assessee, and penalty under section 158BFA(2) was not leviable.

*Dy. CIT v. Koatex Infrastructures Ltd. (2006) 110 ITD 510 / 102 TTJ 737 (Mum.)(Trib.)*

### **S. 158BFA(2) : Block assessment – Interest – Penalty – Burden of proof**

Penalty proceedings under section 158BFA(2) are akin to s. 271(1)(c) proceedings and burden is on the Department to prove factum of concealment – Assessee having explained entries in the books and filed confirmation of creditors, burden on assessee stood discharged and penalty imposed under section 158BFA(2) could not be sustained.

*Gandhi Service Station v. ACIT (2006) 100 TTJ 1143 (Ahd.)(Trib.)*

### **S. 158BFA(2) : Block assessment – Interest – Penalty – Jurisdiction**

- (i) No penalty could be levied if the Block Assessment is found to be without jurisdiction.
- (ii) Penalty under section 158BFA(2) is discretionary as the words used in the section are ‘may direct’. In other words, the powers of the Assessing Officer or Commissioner (Appeals) may or may not impose penalty in a situation where the assessee has not complied with the conditions of the first proviso and even where the second proviso is attracted. (A.Y. 1993-94)

*Dhiraj Suri v. ACIT (2006) 98 ITD 187 / 99 TTJ 525 (Delhi)(Trib.)*

### **S. 158BFA(2) : Block assessment – Interest – Penalty – Application for grant of time**

Assessee’s application for extension of time for filing of return was not rejected. In such a case return filed by the extended period cannot be considered late. And hence no interest chargeable for delay in filing of return. (A.Ys. 1990-91 to 2000-01)

*Sheila D’Souza v. Jt. CIT, Bench ‘C’, IT(SS)A No. 342/M/03, dated 10th July, 2006, BCAJ P. 154, Vol. 39-C, Part 2, November 2006 (Mum.)(Trib.)*

### **S. 158BFA(2) : Block assessment – Interest – Penalty – Delay by income tax department**

Delay in filing the return of the block period having occurred on account of the failure of the Department and not on account of any element of lack of bona fides on the part of assessee, levy of interest under section 158BFA(1) was not justified.

*Bachubhai S. Antrolia v. ACIT (2006) 103 TTJ 73 / 103 ITD 66 (Rajkot)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Copy of seized material**

Interest under section 158BFA(1) cannot be charged for the period of delay in the supply of photocopy of the seized material

*Jai Kumar Jain v. ACIT (2006) 99 TTJ 744 (Jp.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Quantum accepted**

Assessee having admitted ownership of jewellery and disclosed value thereof in her return and also paid the difference of tax; i.e., additional tax payable at higher rate on income assessed in block assessment, without agitating the matter, levy of penalty was not justified. (A.Ys. 1987-88 to 1997-98)

*Dy. CIT v. Jayshree M. Pethani (Smt.) (2006) 99 TTJ 644 (Ahd.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Need for warrant – Compliance**

Block assessment in the present case being void ab initio since there was no warrant of authorisation under section 132 in the name of the assessee, the penalty levied cannot be sustained. (A.Y. 1993-94)

Penalty under section 158BFA(2) is not mandatory. Bona fides of the assessee and the co-operative attitude with which she conducted herself in the course of the block assessment proceedings and the absence of any defiance or contumacious conduct took the case out from the net of penalty under section 158BFA(2).

*Dhiraj Suri v. Addl. CIT (2006) 99 TTJ 525 / 98 ITD 187 (Delhi)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Cogent reasons for failure**

Penalty under section 158BFA(2) would be attracted in a case of failure to disclose or specify cogent reasons for his failure to include such income in block return. However, the assessee must be able to specify cogent reasons for his failure to include undisclosed income or to make true and full disclosure in block return.

*Dy. CIT v. Spark Electro Communication Systems (2006) 98 ITD 237 / 280 ITR (AT) 13 (Mum.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Not mandatory**

Penalty under section 158BFA(2) is discretionary and not mandatory.

*Dy. CIT v. Suresh Kumar (2005) 97 ITD 527 / 95 TTJ 926 (Kol.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Penalty – Scope of exceptions**

Proviso to section 158BFA(2) which deals with exceptions to imposition of penalty, cannot act as a proviso which enables Assessing Officer to impose penalty, and also exception clause cannot act as a main rule for imposition of penalty; where assessee filed return in response to notice under section 158BC with a delay of 15 days and filed no appeal against additions made, imposition of penalty under section 158BFA(2) by invoking proviso thereto was not justified. (A.Ys. 1988-89 to 1997-98)

*Nemichand v. ACIT (Investigation) (2005) 93 TTJ 564 (Bang.)(Trib.)*

**S. 158BFA(2) : Block assessment – Interest – Non supply of Photostat copy**

No interest should be charged under section 158BFA(1) up to date of supply of photostat copies of seized documents by revenue.

*ACIT v. M. M. Sales Agencies (2005) 97 TTJ 575 (Jp.)(Trib.)*

**S. 158BFA(2) : Block assessment – Levy of interest – Reasonable cause**

Interest cannot be levied for delay in filing block return not attributable to assessee.

*Jaswant Singh & Co. v. ACIT (2003) SOT 545 (Amritsar)(Trib.)*

*Narula Transport Co v. ACIT (2003) 127 Taxman 163 (Mag.)(Amritsar)(Trib.)*

**Section 158BG : Authority competent to make the block assessment**

**S. 158BG : Block assessment – Authority – Competent authority – Approval of Joint Commissioner – Hearing**

There is no need for Joint Commissioner to give a hearing to assessee before granting “previous approval” under section 158BG. (A.Ys. 1990-91 to 1999-2000)

*Rishabchand Bhansali v. Dy. CIT (2004) 136 Taxman 579 / 267 ITR 577 / 188 CTR 185 (Karn.)(High Court)*

**Section 158BH : Application of the provisions of this Act**

**S. 158BH : Block assessment – Disallowance – Rule 6DD [S. 40(A)(3)]**

While computing the income of the Appellant under chapter XIV-B of the Act if the assessee fails to bring his case within the ambit of exceptional circumstance as provided in Rule 6DD of the Income tax Rules, 1962 expenditure can be disallowed invoking provisions of section 40A(3) of the Act. (A.Y. 1990 to 2000)

*CIT v. Sai Metal Works (2011) 54 DTR 327 / 241 CTR 377 (P&H)(High Court)*

**CHAPTER XV  
LIABILITY IN SPECIAL CASES**

***A. Legal representatives***

**Section 159 : Legal representatives**

**S. 159 : Legal Representatives – Notice on legal heir – Assessment after death**

Assessment order passed by Assessing Officer after death of assessee without notice to any of the legal representatives is null and void. (A.Y. 1990-91)

*CIT v. Dalumal Shyamumal (2005) 276 ITR 62 / 144 Taxman 151 / 194 CTR 362 (MP)(High Court)*

**S. 159 : Legal representatives – Notice on dead person – Reassessment [S. 148 & S. 221]**

Where notice under section 148 in pursuance of which assessment was framed was issued in the name of deceased – assessee and no notice was served on his legal representative, notice of demand and notice of penalty under section 221 (1) in the name of legal heir was to be quashed.

*Braham Prakash v. ITO (2004) 192 CTR 190 / 275 ITR 242 (Delhi)(High Court)*

**S. 159 : Legal Representatives – Block Assessment – Search and seizure – Legal heirs**

Where premises of deceased B' were searched during his lifetime but proceedings had not been initiated by a notice while 'B' was alive, Department could have completed proceedings only after issuing notice to legal representatives of deceased.

*Sudha Prasad (Smt) v. CCIT (2003) 133 Taxman 864 / 186 CTR 475 / 275 ITR 135 (Jharkhand)(High Court)*

**S. 159 : Legal Representatives – Income prior to death – Status**

Income of deceased prior to his death is taxable in hands of legal heir of the deceased as legal representative and not in his in dividend capacity. (A.Y. 1967-68)

*CIT v. Maharaja Rana Inderjeet (2003) 185 CTR 65 / 134 Taxman 718 (Raj.)(High Court)*

**S. 159 : Legal representatives – Notice on dead person – Assessee – Reassessment [S. 2(7), 148]**

Assessing Officer issued the notice under section 148 in the name of assessee who already expired. The Tribunal held that notice was not valid hence proceedings initiated under section 147 was quashed. (A. Y. 1998-99).

*ITO v. Sikandar Lal Jain (2011) 45 SOT 113 (TM)(Agra)(Trib.)*

**S. 159 : Legal representatives – Assessment – Dead person – Search and seizure**

Assessment cannot be framed on a dead person, where the assessee had already died on 2nd Feb., 1990 and the search was conducted thereafter on 13th Sept., 1990, section 159(2) was not attracted and no assessment could be framed on a dead person. Therefore addition made under section 69B was liable to be deleted. (A. Ys. 1989-90 & 1990-91)



*Late Smt. Laxmibai Karanpuria Through L/H Rajendra Karanapuria v. ACIT (2011) 135 TTJ 123 / 49 DTR 59 / 130 ITD 40 (Indore)(Trib.)*

## ***B. Representative assesseees - General provisions***

### **Section 160 : Representative assessee**

#### **S. 160 : Representative assessee – Liability – Trust [S. 161]**

Assessee-trust was created in favour of two minor girls as beneficiaries, trust could not be said to be invalid merely because settlor had not taken care of eventuality of both beneficiaries dying before attaining majority. (A.Y. 1983-84)

*CIT v. Mehra Trust (2006) 284 ITR 149 / (2005) 147 Taxman 49 / 199 CTR 603 (All.)(High Court)*

#### **S. 160 : Representative assessee – Liability – Discretionary Trust – Shares specified by trustee [S. 164]**

Though initially assessee-trust was a discretionary trust, board of trustees of assessee-trust, in exercise of their powers, adopted a resolution and demarcated shares in favour of beneficiaries of trust in ratio of 50:50, it could be said that shares of beneficiaries were definite and ascertainable and as such it was not assessable as a discretionary trust. (A.Y. 1982-83)

*CIT v. Devshi Trust (2005) 279 ITR 519 / 148 Taxman 444 / 199 CTR 600 (Bom.)(High Court)*

#### **S. 160 : Representative assessee – Liability – Trust – AOP – Beneficiaries [S. 161]**

Trust income could be assessed only in hands of beneficiaries individually and not in the hands of trustees as an AOP. (A.Y. 1984-85)

*CIT v. T.S.K. Enterprises (2005) 274 ITR 41 / 156 Taxman 253 (Mad.)(High Court)*

#### **S. 160 : Representative assessee – Liability – Trust – Benefit of children**

Capital gain arising to assessee from sale of property, bequeathed to her by her father for benefit of her children (marriage and education), was assessable under section 160(1)(iv). (A.Y. 1983-84)

*CIT v. Marry Joseph (Mrs) (2004) 268 ITR 217 / 140 Taxman 398 (Mad.)(High Court)*

#### **S. 160 : Representative assessee – Liability – Agent [S. 161]**

There is no pre-condition for treating a person as representative assessee under section 160, read with section 163, and assessing him for principal in capacity of representative under section 161. Assessment made at the hands of the representative assessee is in the capacity of the representative of the principal; therefore, the mischief of double assessment has no manner of application. (A.Y. 1998-99)

*CESC Ltd. v. Dy. CIT (No. 2) (2003) 131 Taxman 751 / 263 ITR 402 / 183 CTR 124 (Cal.)(High Court)*

### **Section 161 : Liability of representative assessee**

#### **S. 161 : Liability of representative assessee – Gift of shares – Manufacture company – No liability for unconnected income [S. 163]**

The whole of the share capital of Genpact India, an Indian company, was held by a Mauritius company. The whole of the share capital of the Mauritius company was in turn held by General Electric Co, USA. The Mauritius company “gifted” the shares of Genpact India to another Mauritius company, whose shares were then ultimately sold to a Luxembourg company. The Assessing Officer claimed that the transaction of transfer of shares of Genpact India had resulted in capital gains to General Electric, USA, and so he issued a notice under section 163 proposing to treat Genpact India as an “agent” of General Electric and to assess it as a “representative assessee”. This was challenged by a Writ Petition. Upholding the challenge the court held that, the mere fact that a person is an agent or is to be treated as an agent under section 163 and is assessable as “representative assessee” does not automatically mean that he is liable to pay taxes on behalf of the non-resident. Under section 161, a representative assessee is liable only “as regards the income in respect of which he is a representative assessee”. This means that there must be some connection or concern between the representative assessee and the income. On facts, even assuming that Genpact India was the “agent” and so “representative assessee” of General Electric, there was no connection between Genpact India and the capital gains alleged to have arisen to General Electric (from the sale of shares of Genpact India). Consequently, the s. 163 proceedings seeking to assess Genpact India for the capital gains of General Electric were without jurisdiction.

*General Electric Co. v. Dy. DIT (2011) 243 CTR 417 / 60 DTR 297 / 201 Taxman 341 (Delhi)(High Court)*

#### **S. 161 : Liability of representative assessee – Trust – AOP – Allocation of income**

In view of the unreported decision of High Court in T.C. nos 210 and 211 of 1998 dated

29-10-2002, status of assessee trust could not be adopted as that of an AOP and income had to be allowed to beneficiaries only. (A.Y. 1984-85)

*CIT v. Seva Trust (2003) 130 Taxman 399 (Mad.)(High Court)*

#### **S. 161 : Liability of representative assessee – Trust – Beneficiary – Income deemed to have received in India [S. 4, 5]**

What can be taxed in the hands of a representative assessee is only the income which the beneficiary can be said to have received, or which can be deemed to have received in India. (A.Y. 1983-84)

*CIT v. Muthukrishnan (2003) 260 ITR 526 / 133 Taxman 470 / 181 CTR 129 (Mad.)(High Court)*

**S. 161 : Liability of representative assessee – Liability – Trust – Benefit of Ashram [S. 11]**

Where business was being carried on by assessee for benefit of an Ashram, assessee was assessable as representative assessee. (A.Ys. 1973-74, 1974-75)

*Honesty Engineers & Contractors Trust v. CIT (2003) 262 ITR 266 / 181 CTR 321 / 138 Taxman 136 (Mad.)(High Court)*

**S. 161 : Liability of representative assessee – Trust – Assessment year**

Sub-section (1A), introduced in section 161, with effect from 1-4-1985, was applicable during assessment year 1985-86.

*CIT v. Kumar Publications Trust (2003) 262 ITR 173 / 134 Taxman 661 (Mad.)(High Court)*

**S. 161 : Liability of representative assessee – Trust carrying on business – AOP**

There is no merit in the view that income of trust carrying on business should be assessed only in the hands of the beneficiaries and not in the status of an AOP as per the provisions of section 161(1A). The Assessing Officer has the discretion to assess the income of a trust in either hands and not in both the hands, however income where taxed in the hands of trustees, it should be taxed in the like manner and to the same extent as that of the beneficiaries. (A.Ys. 1985-86, 1986-87)

*CIT v. Manoranjitham Thanga Maligai Trust (2003) 260 ITR 143 / 183 CTR 673 / 134 Taxman 750 (Mad.)(High Court)*

**S. 161 : Liability of representative assessee – Trust – Overriding provision of section 26 [S. 22, to 26]**

Though sub-section (1A) overrides the provision of sub-section (1) of section 161, it does not have the effect of overriding the provisions of section 26, hence computation of the income from house property has to be made under sections 22 to 25. Even if trust is having income from business, income from house property received by trust has to be taxed in hands of trustee as representative assessee on behalf of beneficiary under section 161(1) and not at maximum marginal rate under section 161(1A). (A.Ys. 1988-89, 1989-90)

*CIT v. T.A.V. Trust (2003) 132 Taxman 835 / 264 ITR 52 / 185 CTR 466 (Ker.)(High Court)*

**S. 161 : Liability of representative assessee – Trust – Accepting deposits and advances**

Where assessee, owned by a trust, contended that its activity of accepting deposits and advances had attributes of business but there was no intention to make profits,

section 161(1A) was rightly invoked on ground that assessee earned income assessable as business income. (A.Ys. 1989-90 to 1991-92)  
*CIT v. J.K. Holdings (2003) 133 Taxman 443 / 182 CTR 243 / (2004) 270 ITR 594 (Bom.)(High Court)*

### ***C. Representative assesseees – Special cases***

#### **Section 163 : Who may be regarded as agent**

##### **S. 163 : Representative assessee – Agent – Power of Attorney Holder – Non-resident**

Power of attorney holder does not answer the description of agent in relation to a non resident, as envisaged under section 163(3)(1), hence, the assessment order framed in the case of Non-Resident in the name of power of attorney holder treating him as an agent is held to be illegal and void.

*CIT v. Mukesh B. Shah (2010) 40 DTR 297 / 233 CTR 412 / 195 Taxman 15 (Guj.)(High Court)*

##### **S. 163 : Representative assessee – Agent – Non-resident**

The foreign company was in receipt of some income from the assessee, on account of sale of shares. The Act uses the words "from or through", instead of the word 'through' in section 163(1)(c). Any person in India from or through whom the non-resident is in receipt of any income directly or indirectly can be treated as agent of the non-resident. (A.Y. 2003-04)

*Utkal Investments Ltd. v. ADIT (2009) 120 ITD 67 / 123 TTJ 286 / 28 DTR 287 / 5 ITR 481 (Mum.)(High Court)*

##### **S. 163 : Representative assessee – Agent of Non-resident – Principal assessee**

Section 163(l)(b) includes a person from whom non-resident receives any income, directly or indirectly. There cannot be any escapement of the assessment in the hands of the representative assessee when principal assessee is being assessed and is available before the Assessing Officer.

In connection with proceedings against non-resident, the Dy. Commissioner, Mumbai, had an authority to summon or ask for information from any person throughout India. (A.Y. 1998-99)

*CESC Ltd. v. Dy. CIT (No. 2) (2003) 131 Taxman 751 / 263 ITR 402 / 183 CTR 124 (Cal.)(High Court)*

##### **S. 163 : Representative assessee – Agent – Non-resident [S. 160, 195]**

When a non-resident does not remain in India, the proceedings under section 160 to 163 are taken to fasten on its agent of liability to tax in respect of income which non-resident is entitled to. The assessee carried on business of asset management. It had made payments to non-residents upon redemption of units of a debt scheme of Birla

Mutual fund without any deduction at source. Since payments were made through assessee to non-residents, in terms of section 163(1)(c), assessee was to be treated as agent of said non-residents so that assessment proceedings could be taken against assessee in regard to tax liability of non-resident investors. (A.Y. 2006-07)

*Birla Sunlife Asset Management Co. Ltd. v. ITO (2010) 38 SOT 523 (Mum.)(Trib.)*

**S. 163 : Representative assessee – Agent – Non-resident – Deduction at Source [S. 195]**

Single transaction of purchase of shares by assessee from non-resident. Consideration remitted by assessee after deduction of tax at source. Assessee can be treated as an agent of non-resident, that assessee has deducted tax at source will not preclude liability to be treated as agent. (A.Y. 2003-04)

*Utkal Investments Ltd. v. ADIT (2010) 5 ITR 481 / 123 TTJ 286 / 120 ITD 67 / 23 DTR 287 (Mum.)(Trib.)*

**S. 163 : Representative assessee – Agent – Non-resident – Notices – Opportunity of hearing**

Though provisions of section 163(1) do not make a formal notice mandatory, a reasonable opportunity of being heard must be afforded before any person is treated as an agent of a non-resident within meaning of section 163(1). (A.Ys. 1998-99 and 1999-2000)

*Kinetic Technology (India) Ltd. v. ITO (2005) 96 ITD 441 / 98 TTJ 90 (Delhi)(Trib.)*

**Section 164 : Charge of tax where share of beneficiaries unknown**

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – AOP – Liability of a Trust vis-a-vis its assessment**

Validity of a Deed of Trust executed with a prior date to the date mentioned on the Stamp Paper which was purchased in the name of a third party — Held, no valid trust had come into existence based on the alleged Deed and the income had to be assessed to tax at the rates applicable to AOP.

*Hemesh Family Trust v. CIT (2007) 207 CTR 99 / 295 ITR 514 / 165 Taxman 233 (Guj.)(High Court)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Discretionary Trust – Determinate shares**

Trustee is not to be assessed for all the income which trustee receives where beneficiaries are known and their shares are determinate. (A.Y. 1983-84)

*CIT v. Muthukrishnan (2003) 260 ITR 526 / 133 Taxman 470 / 181 CTR 129 (Mad.)(High Court)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Discretionary Trust – Applicability**

Where it was a case of trust and shares of beneficiaries were specified and known, income of assessee-trust should not be assessed in status of an AOP. (A.Ys. 1985-86 to 1989-90)

*CIT v. Viners Industries (2003) 130 Taxman 492 (Mad.)(High Court)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Beneficiary of trust – Sole beneficiary – Minor**

Where assessee-trust had a sole beneficiary who was a minor, since as per trust deed, in case of death of beneficiary before attaining majority, payment of income to any person was at discretion of trustee and, thus, interest of beneficiary was contingent upon her attaining majority, it could be said that income was not specifically receivable on behalf of or for benefit of any person and, therefore, income of assessee-trust was taxable as per provision of section 164(1); there was no merit in assessee-trust's plea that since trust was liable to be taxed under section 161 in like manner and to same extent as was leviable upon beneficiary and since as per trust deed beneficiary was not entitled to any income during her minority, assessee-trust would also not be liable to pay any tax on income accruing to it. (A.Ys. 1984-85 to 1986-87)

*ITO v. Sheetal Sunder Trust (2005) 96 ITD 128 / 97 TTJ 329 (TM)(Bang.)(Trib.)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Beneficiary of trust – Welfare of employees**

Where assessee-trusts had been created for welfare of employees of employer-companies which were within ambit of expression 'any other fund created bona fide by a person carrying on a business, exclusively for benefit of persons employed in such business', clause (iv) of the proviso to section 164(1) was clearly applicable and tax at normal rate was leviable on them and not at maximum rate. (A.Ys. 1996-97 to 1998-99)

*Rockman Cycle Employees Welfare Trust v. ACIT (2005) 92 TTJ 927 (Chd.)(Trib.)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Maximum marginal rate – Applicability**

Where beneficiaries are assessed individually, the maximum marginal rate cannot be applied. It is applicable only where assessment is made on trustee.

*R. Sreevidya (Smt.) v. ACIT (2003) 84 ITD 222 / 79 TTJ 303 (Cochin)(Trib.)*

**S. 164 : Representative assessee – Charge of tax – Beneficiaries or their shares unknown – Maximum marginal rate**

Held, on facts that Maximum marginal rate cannot be applied on assessee deity, assessed in the status of AOP. (A.Y. 1993-94)

*ITO v. Shri Hanuman Mandir Trust (2003) 84 ITD 83 / 78 TTJ 469 (Pune)(Trib.)*

***DD. Firms, association of persons and body of individuals***



## **Section 167A : Charge of tax in the case of a firm**

### **S. 167A : Firm – Charge of tax – Association of persons – Shares of members unknown – Trust – Position prior to 1-4-1993**

Clauses contained in the trust deed enabling the trustees to enrol more members would not convert the specific determinate shares of the existing members in to indeterminate shares. (A.Y. 1984-85)

*CIT v. Mani Enterprises (2004) 136 Taxman 507 / 267 ITR 157 / 187 CTR 215 (Guj.)(High Court)*

### **S. 167A : Firm – Charge of tax – Surcharge on Firm**

For Asst Year 1994-1995 surcharge was applicable to firm only if its total Income exceeded 1 lac.

*ACIT v. Niranjan Narottam (2003) 128 Taxman 25 (Mag.)(Ahd.)(Trib.)*

## **Section 167B : Charge of tax where shares of members in association of persons or body of individuals unknown, etc.**

### **S. 167B : Charge of tax – Shares of members unknown – No overriding effect [S. 112]**

Provision of sec 167B is not a non obstante clause, and it does not override provisions of Sec 112.

*ACIT v. Niranjan Narottam (2003) 128 Taxman 25 (Ahd.)(Mag.)(Trib.)*

## ***E. Executors***

## **Section 168 : Executors**

### **S. 168 : Executors – Income – Administrator [S. 4]**

Amount received by the administrator (Assessee) on distribution out of the accumulated funds of the estate of the deceased in his capacity as a transferee of the legatee's interest was not taxable in his hands, since the assessee had only acquired the rights to sale proceeds of the properties and the estate was continuing and was being administered by the assessee, he could not be treated as the residue legatee. (A. Y. 2004-05).

*Dy. CIT v. Nusli Neville Wadia (2011) 61 DTR 218 / 141 TTJ 521 (Mum.)(Trib.)*

## ***F. Succession to business or profession***

## **Section 170 : Succession to business otherwise than on death**

### **S. 170 : Succession to business otherwise than on death – Company – Change in shareholders**

The company is a juristic person having its distinct legal entity, separate from that of shareholders. The change in the shareholders of company does not change the legal identity of the company. Therefore, section 170 had no application to the facts of the case.

The term "succession" in section 170 has a somewhat artificial meaning. The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another;

Even if it is accepted that by a transfer of shares under section 2(47), there is a transfer in the right to use the capital assets of the company, still section 170 is not attracted because there is no "transfer of business". A company is a juristic person and owns the business. The share holders are not the owners of the company. By a transfer of the shares, there is no transfer so far as the company is concerned.

A limited liability company is thus different from a partnership firm because while a company is distinct from its shareholders and directors, a partnership firm is not different from its partners and it is not a distinct legal entity. Since the assessee is a limited liability company change in the ownership of its share will have no legal effect on the legal identity of the company. (A.Y. 1993-94)

*CIT v. Panchratan Hotels (P) Ltd. (2011) 220 Taxation 244 / (2010) 188 Taxman 299 / (2009) 29 DTR 73 / 226 CTR 586 (HP)(High Court)*

### ***G. Partition***

#### **Section 171 : Assessment after partition of a Hindu undivided family**

##### **S. 171 : Partition – Assessment – HUF – Notice – Members**

Order under section 171 passed by the Assessing Officer after issuing a call memo only to Karta of the HUF and not other members of the family did not comply with the mandatory requirement of section 171(2), and therefore, illegal and not valid. Matter remanded back to the Assessing Officer with the direction to pass an order under section 171 after notifying all the members of HUF and hearing them. (A.Y. 1987-88)

*P. G. Srinivasetty & Sons (HUF) v. ITO (2010) 41 DTR 283 / 233 CTR 437 (Karn.)(High Court)*

##### **S. 171 : Partition – Assessment – HUF – Status**

Provisions of section 171 of the Act, deal with assessment after the division of the Hindu Undivided Family (HUF). Thus, before provisions of section 171 of the Act can be invoked, to assess the property even after partition, an a HUF, it should have been assessed as HUF before such partition also. (A.Y. 1997-98)

*Tirlochan Singh v. CIT & Anr. (2009) 19 DTR 277 / 180 Taxman 640 / 228 CTR 390 / 316 ITR 39 (P&H)(High Court)*

##### **S. 171 : Partition – Assessment – HUF – Liability in special cases [S. 159]**

Where assessee-HUF's assessment for assessment years 1978-79 and 1979-80 was completed in October 1982, while its partial partition took place on 20-10-1979, it

was to be treated as hitherto assessed as HUF within meaning of section 171(9) and partial partition was to be ignored; Tribunal was not justified in holding that as no assessment was made in status of HUF, assessee was out of reach of section 171(9) and that word 'assessed' used in section 171(9) means passing of assessment order prior to date of partial partition. (A.Ys. 1981-82, 1982-83)

*CIT v. Gyan Chand & Sons (2008) 303 ITR 267 / (2005) 146 Taxman 429 / 202 CTR 605 (All.)(High Court)*

### **S. 171 : Partition – Assessment – HUF – Metes and bounds – Hindu Succession Act**

The assessee was a HUF consisting of the Karta, his wife and his minor son. On the death of the Karta, the wife claimed that on account of the death of her husband her right in the HUF property was defined and as per the provisions of section 6 read with Explanation 1 of the Hindu Succession Act, 1956 it was not for her to claim any partition in the property of the HUF.

The claim was not accepted by assessing authority but was accepted by the Tribunal. On a reference, the Hon'ble Court observed that there is no ipso facto partition of a joint Hind family immediately after the death of a male coparcener of Mitakshara School having coparcenary interest in the coparcenary property.

The Hon'ble Court did not agree with the order of the Tribunal that there is deemed partition and disruption of the HUF as per Explanation 1 to section 6 of the Hindu Succession Act. The Hon'ble Court also observed that this view also finds support from the judgment of Gujarat High Court in *CIT v. Balubhai Nanubhai (HUF) (1996) 220 ITR 334*. (A.Ys. 1982-83, 1983-84)

*CIT v. Meera Prem Sunder (Smt.) (HUF) (2006) 280 ITR 360 (All.)(High Court) / CIT v. Dharam Pal Singh (HUF) (2005) 146 Taxman 421 (All.)(High Court)*

### **S. 171 : Partition – Assessment – HUF – Partial [S. 159]**

Partial partition had, admittedly, been accepted by revenue, addition made by ITO holding that partition had not been accepted, was to be deleted

*CIT v. Kesho Ram (2005) 145 Taxman 473 (All.)(High Court)*

### **S. 171 : Partition – Assessment – HUF – Partial – Exemption**

There is no merit in the submission that when the partial partition has been declared null and void under section 171(9) it should be limited only for the purpose of assessment of the joint family and it would not extend to other purposes like claiming deduction or grant of exemption which is available under other provisions of the Act. (A.Ys. 1988-89, 1990-91)

*CIT v. B.S. Sundaravadivel Mudaliar & Sons (2003) 128 Taxman 74 / 260 ITR 662 / 181 CTR 544 (Mad.)(High Court).*

### **S. 171 : Partition – Assessment – HUF – Partial**

Interest income earned by assessee-smaller-HUF could not have been assessed in the hands of bigger HUF, where partition bringing into existence smaller-HUF had been recognized.

*CIT v. Nathulal Gangaram Soni (2003) 133 Taxman 480 / 185 CTR 362 / 262 ITR 189 (MP)(High Court)*

#### **S. 171 : Partition – Assessment – HUF – Partial – Validity – Share of minors**

In view of decision in *Approva Shatilal Shah v. CIT (1983) 141 ITR 558 (SC)*, partial partition of the assessee – HUF on 7-2-1976, was rightly recognized by the Tribunal under section 171 holding that the partial partition was genuine and it had the consent of all members and it was fair to minor and it was neither unequal nor against the interest of the minor. (A.Y. 1976-77)

*CIT v. Kr. Anand Singh (HUF) (2003) 130 Taxman 834 (All.)(High Court)*

#### **S. 171 : Partition – Assessment – HUF – Arbitration award**

For a partition of HUF to be valid/acceptable under section 171, it is not always essential that each of properties of HUF should be broken into pieces/ portions, nor that each property should be broken into as many shares as are shares or members of HUF, so as to fall within division by metes and bounds.

If under partition agreement/scheme, members mutually so agree that they allot a particular property to one member only and other members agree to take cash compensation only, if that property is given to one member, then that will also be a valid partition acceptable/recognizable under section 171.

Arbitration award can be looked into in income-tax proceedings, for knowing factum of partition having taken place. (A.Y. 1997-98)

*Mohanlal K. Shah, HUF v. ITO (2005) 96 ITD 9 / 92 TTJ 360 / 1 SOT 316 (Mum.)(Trib.)*

#### **S. 171 : Partition – Assessment – HUF – Total – Rejection**

Where assessee's claim for total partition of HUF while filing return, was rejected by Assessing Officer on finding that in none of documents like application for issue of certificate under section 230A for sale of HUF property, affidavit filed, agreement for sale and sale deed made or executed subsequent to alleged execution of memorandum of partition, there was any mention of having partitioned said property, rejection of claim of partition was justified. (A.Ys. 1985-86 to 1990-91)

*P. G. Srinivasasetty & Sons (HUF) v. ITO (2005) 2 SOT 1 (Bang.)(Trib.)*

#### **S. 171 : Partition – Assessment – HUF – Status – Not assessed in past**

Assessee having not been assessed as an HUF ever before the assessment year in question, provision of section 171 could not be invoked to make assessment in the status of HUF. (A.Y. 1997-98)

*Tirlochan Singh v. CIT & Anr. (2010) 228 CTR 390 / (2009) 316 ITR 39 / 180 Taxman 640 / 19 DTR 277 (P&H)(High Court)*

## ***H. Profits of non-residents from occasional shipping business***

### **Section 172 : Shipping business of non-residents**

#### **S. 172 : Non-residents – Shipping business – Scope – Extend of liability [S. 44B]**

There is an anomaly in terms of section 172 and section 44B, inasmuch as tax liability under section 172, which essentially is in nature of ad hoc liability in special cases, is lesser in scope vis-à-vis assessee's tax liability under section 44B. (A.Y. 1996-97)

*James Mackintosh & Co. (P.) Ltd. v. ACIT (2005) 93 ITD 466 / 92 TTJ 388 (Mum.)(Trib.)*

#### **S. 172 : Non-residents – Shipping business – Residents – India-Swiss DTAA [S. 90, Articles 7 & 22]**

Non-resident applicant enters into contract with an independent charterer in Dubai for carrying cargo from Indian ports; it contended that since it carries the business in India through independent agents, it has no permanent establishment in India and it stands excluded by Article 7 but should be brought within the purview of Article 22 which is in the nature of residuary article, 'other income' and as it does not have PE in India, only the state of residence can levy tax in terms of Article 22(1) - AAR observed that Residuary Article 22 concerning 'other income' was introduced in 2001; until then there is no dispute that profits derived from the operation of ship in International traffic are left as the subject matter of domestic tax law as Article 7 has specially excluded it; both Article 7 and Article 22 provides for the similar pattern of right of taxation in favor of State of Residence unless there is a PE in the State of Source - hence held carriage of goods from Indian ports by non-residents will be governed by domestic law enforced in India as it is specifically excluded by Article 7

*Gearbulk AG, (2009) 318 ITR 66 / 184 Taxman 383 / 226 CTR 209 / 29 DTR 98 (AAR)*

## ***L. Discontinuance of business, or dissolution***

### **Section 176 : Discontinued business**

#### **S. 176 : Discontinued business – Firm – Dissolution – Prior to 1-4-1976 – Amendment prospective**

The amendment in section 176 was with effect from 1-4-1976, and the provision being substantive in character, the question of its being given retrospective effect can not arise, hence prior to 1-4-1976 no assessment can be made in hands of a firm of income received after its dissolution.

*CIT v. Bhagat & Co (2004) 141 Taxman 298 / 192 CTR 617 (Delhi)(High Court)*

#### **S. 176 : Discontinued business – Business taken over by Company – Continuity**

Where business is continued even after same is taken over by assessee-company from erstwhile proprietor, provisions of section 176(3A) are not applicable.

*ACIT v. HYT Engg. Co. (P.) Ltd. (2005) 92 ITD 202/ 93 TTJ 16 (TM)(Pune)(Trib.)*

**S. 176(3A) : Discontinued business – Succession of Firm by Company [S. 189]**

Business of the erstwhile firm having been taken over and continued by a company there was no discontinuation of business and therefore, the amount of arbitration award pertaining to the claim made by the firm can not be taxed in the hands of partners by invoking the provisions of section 176(3A). Section 189 also would not be invoked, said award cannot be taxed also in the hands of alleged AOP. (A.Y. 1990-91) *ITO v. Jalamsingh B. Barad (2010) 130 TTJ 573 / 32 DTR 337 / 35 SOT 383 (Ahd.)(Trib.)*

**S. 176(3A) : Discontinued business – Business income-expenditure – Liability in special cases [S. 37(1)]**

Arbitration award received by assessee after discontinuation of business cannot be taxed on gross basis. (A.Y. 2001-02)

*Van Oord Dredging & Marine Contractors BV v. Dy. Director of IT (2007) 105 ITD 97 / 106 TTJ 889 (Mum.)(Trib.)*

***M. Private companies***

**Section 179 : Liability of directors of private company in liquidation**

**S. 179 : Private company – Liability of directors – Tax contemplated under section 179 does not include interest and penalty**

While deciding, if the nomenclature 'tax' would include other components such as penalty as well as interest, the High Court placed reliance on the judgement in the case of Soma Sundarams Ltd. v. CIT 116 ITR 620, which had held that the Court has decidedly stated that the component 'income tax' does not include payment of penalty as well as interest.

*H. Ebrahim and Others v. Dy. CIT (2011) 332 ITR 122 / 227 CTR 646 / 185 Taxman 11 / 32 DTR 249 (Karn.)(High Court)*

**S. 179 : Private company – Liability of directors – Penalty – Tax – Reasonable opportunity**

"Tax" for the purposes of section 179 does not include penalty, therefore, directors of the company cannot be called upon to pay penalty of the company under section 179. Order passed by the Assessing Officer under section 179 without examining the question as to whether the non recovery of tax from the assessee company was or not as a result of gross neglect, misfeasance or breach of duty on the part of the assessee in relation to affairs of the company, Assessing Officer was directed to pass fresh order after giving a reasonable opportunity to the assessee. (A.Y. 1990-91)



*Dinesh T. Tailor v. Tax Recovery Officer (2011) 238 CTR 165 / (2010) 326 ITR 85 / 41 DTR 6 / 192 Taxman 152 (Bom.)(High Court)*

**S. 179 : Private company – Liability of directors – Recovery from company**

For Recovery from directors of tax dues of assessee company under section 179. Revenue has to first of all show that the directors were responsible for the conduct of business during the concerned previous year. The Revenue has to establish that it has taken effective steps to recover the outstanding liabilities from the company. The words "cannot be recovered" requires the Revenue to establish that recovery could not be made from the company.

Order under section 179 against the director of the company for recovery of the tax dues of the company was quashed where the revenue failed to establish that the directors against whom the order was issued were responsible for the conduct of the company and further no steps were taken to effect recovery of outstanding tax dues from the company. (A.Y. 2001-02)

*Amit Suresh Bhatnagar (2009) 183 Taxman 287 / 221 CTR 70 / 15 DTR 29 (Guj.)(High Court)*

**S. 179 : Private company – Liability of directors – Liquidation**

Liability of directors for arrears of tax of company. First and foremost it is necessary for tax department to prove that recovery cannot be made from company. (A.Y. 1996-97)

*Indubhai T. Vasa (HUF) v. ITO. (2006) 282 ITR 120 / 196 CTR 15 / 146 Taxman 163 (Guj.)(High Court)*

**S. 179 : Private company – Liability of directors – Liquidation – Deemed public company [S. 159]**

Director is liable in respect of arrears of tax of company only for assessment year when he was functioning as director; further arrears of company for period prior to its becoming deemed public company could not be recovered from director.

*Arvind Kumar Gupta v. TRO (2005) 276 ITR 373 / 146 Taxman 579 / 199 CTR 36 (All.)(High Court)*

**S. 179 : Private company – Liability of directors – Liquidation – Proceeding against company – Directors [S. 159]**

Revenue has to establish that recovery of tax due cannot be made against company and then, and then alone would it be permissible for revenue to initiate action against director or directors responsible for conducting affairs of company during relevant accounting period. (A.Y. 1996-97)

*Indubhai T. Vasa v. ITO (2005) 146 Taxman 163 / 196 CTR 15 / 282 ITR 120 (Guj.)(High Court)*

**S. 179 : Private company – Liability of directors – Liquidation – Resignation [S. 159]**

On a writ, petitioner contended that he had not received notice from TRO for attachment of his assets for recovery of tax from defaulter-company of which he was former director and that he had resigned as director much earlier, petitioner was directed to make those submissions before TRO who should examine same

*Vakil Chand Jain v. TRO (2005) 145 Taxman 299 / 203 CTR 153 (Delhi)(High Court)*

### **S. 179 : Private company – Liability of directors – Recovery**

A proceedings can be initiated against directors of a company provided that there is a finding that tax for relevant period can not be recovered from the company.

*Dipak Dutta v. UOI (2004) 134 Taxman 533 / 268 ITR 302 / 187 CTR 14 (Cal.)(High Court)*

### **S. 179 : Private company – Liability of directors – Negligence – Proof**

If the director proves that non-recovery can not be attributed to gross negligence, misfeasance or breach of duty on his part in relation to affairs of the company, the question may be different, hence the case put up by director of a private limited company should be taken in to consideration by Assessing Officer before making an order adverse to such person.

*Jatinder Bhalla v. ITO (2004) 268 ITR 266 / 141 Taxman 553 / 187 CTR 478 (Delhi)(High Court)*

## **CHAPTER XVI**

### **SPECIAL PROVISIONS APPLICABLE TO FIRMS**

#### ***A. Assessment of firms***

### **Section 182 : Assessment of registered firm [Omitted by the Finance Act, 1992, w.e.f. 1-4-1993]**

#### **S. 182 : Firm – Recovery from firm – Position prior to 1-4-1993**

Procedure of assessment does not confer any substantive right. It merely provides the procedure and mechanism for the realization and recover of tax from the partners of a registered firm, who are non-residents. The tax is required to be paid by the registered firm. It is a mechanism provided to ensure speedier recovery of tax making the firm itself liable to pay the tax as provided in sub section (3), of section 182.

*CIT v. B. Narasimha Rao (2003) 263 ITR 62 / 132 Taxman 821 / 185 CTR 219 (AP)(High Court)*

### **Section 184 : Assessment as a firm**

#### **S. 184 : Firm – Assessment – Registration – Not specifying share of loss – (Position prior to 1-4-93)**

Section 184(2) of the Income tax Act 1961, is in pari material with section 27(2) of the Kerala Agricultural Income Tax 1950. Shares in loss not specified, cannot be a ground for rejection of registration. (A.Ys. 1969-70 to 1975-76)

*Commr. of Agrl. IT v. P. V. Balakrishnan Nair (2003) 264 ITR 563 / (2004) 186 CTR 101 / 134 Taxman 261 (SC)*

*Editorial:- Decision of Full Bench of the Kerala High Court in Kerala Publicity Bureau v. CIT (1993) 200 ITR 366 (FB)(Ker.) affirmed.*

### **S. 184 : Firm – Assessment – Certified copy to be filed every year – Mandatory**

Section 184 provides that the assessee firms should file copy of ruling partnership deed certified by all the partners along with return of income, the requirement is mandatory, otherwise the assessee can only be treated as AOP. The fact that assessee has been treated as firm in earlier years will not be sufficient. (A. Y. 1993-94 & 95).

*Bhaskar and Co. v. CIT (2011) 331 ITR 90 / 230 CTR 99 / 187 Taxman 163 / 33 DTR 150 (Ker.)(High Court)*

### **S. 184 : Firm – Assessment – Association of persons – Registration – Certified copy of partnership deed [S. 40(b), 185]**

Assessee filed the return of income for the Asst. year 1993-94 on 30th August, 1993 which was assessed under section 143(1). In the course of reassessment proceedings the Assessing Officer found that the assessee had not furnished certified copy of the partnership deed along with the return of income, however, during the course of assessment proceedings the assessee filed the a photo copy of a partnership deed. The Assessing Officer assessed the firm as an AOP and disallowed the salary and interest paid to the partners under section 40(b) of the income-tax Act. On appeal the CIT(A) and Tribunal held that as the assess had filed the deed of copy partnership which was signed by all the partners the assessee was liable to be assessed as partnership as the procedure requirement of the Act had been complied with. On appeal the High court held that the order of Tribunal being proper and the status of firm has been correctly assessed as partnership. (A. Y. 1993-94).

*CIT v. Nand Lal Labhu Ram (2011) 245 CTR 525 / 336 ITR 303 (P&H)(High Court)*

### **S. 184 : Firm – Assessment – AOP – Books of Account**

The Assessing Officer adopted the status of the assessee as that of an A.O.P. on the ground that the books of account have not been maintained by the assessee. On appeal, the High Court held that since the conditions laid down under section 184 of the Act were fulfilled by the assessee the firm is eligible to be assessed in the status of a firm.

*CIT v. Zhilmil Vaishno Dhaba (2007) 196 Taxation 127 (P&H)(High Court)*

### **S. 184 : Firm – Assessment – Contribution**

The assessee firm consisted of two partner being karta as representing their H.U.Fs. Subsequently, in the year 1978-79 son of one of the kartas was inducted as working partner without any capital contribution. Assessing officer rejected the registration of the new firm on the ground that there was diversion of income. The High Court setting aside the order of the assessing officer held that new partner of the firm contributed his skill and labour as a working partner and as such no separate capital contribution was required.

*Ishwar Bhuvan Hindu Hotel v. CIT (2006) 192 Taxation 529 / 281 ITR 139 / (2005) 199 CTR 722 / 148 Taxman 340 (Bom.)(High Court)*

#### **S. 184 : Firm – Assessment – Form No. 12 – Registration**

The Assessing Officer during the reassessment proceeding found that Form No. 12 was not available on record, as such, he did not allow continuation of registration to the firm. On appeal to the High Court the High Court observed that as the notice under section 139(9) was not issued by the Assessing Officer to the assessee regarding non-filing of Form No. 12 and continuation of registration was also allowed by the Assessing Officer while processing the return under section 143(1) (a), the Tribunal was not justified in upholding the order of the Assessing Officer.

*Suraj Oil Mills v. ITO (2006) 195 Taxation 400 (P&H)(High Court)*

#### **S. 184 : Firm – Assessment – Registration – Defects in the forms – Curable defects**

Where the declaration in form no 12 filed by the assessee did not contain the signature of the two partners and the assessee filed the fresh form on 3-10-1980 and explained the reasons. The form filed on 3-10-1980 has been treated fresh declaration and registration was granted.

*CIT v. Girish Chand Amar Nath (2005) 274 ITR 36 / (2004) 192 CTR 61 / 144 Taxman 378 (All.)(High Court)*

#### **S. 184 : Firm – Assessment – Partnership deed – Thumb impression**

Thumb impression is one of modes of signature and it is not necessary that partnership deed must bear signature in letters and words. (A.Ys. 1970-71 to 1973-74)

*CIT v. Kanhaiya Lal & Sons (2005) 273 ITR 425 (All.)(High Court)*

#### **S. 184 : Firm – Assessment – Ingredients of Partnership – Karta of HUF**

A partnership can be entered into by karta of HUF representing his HUF, with another coparcener in his individual capacity, and it is also not necessary that a person in order to become a partner should bring capital. (A.Y. 1977-78)

*CIT v. Th. Mahatam Rao Jagdish Narain (2005) 144 Taxman 905 (All.)(High Court)*

#### **S. 184 : Firm – Assessment – Partnership deed – Minor made liable to loss – Registration cannot be granted**

Partnership deed provided that minor shall also be liable to share loss to extent of his share according to section 30 of Indian Partnership Act, registration was rightly refused to assessee-firm. (A.Y. 1977-78)

*CIT v. Badri Nath Ganga Ram (2005) 273 ITR 485 / 194 CTR 347 (All.)(High Court)*

#### **S. 184 : Firm – Assessment – Validity – Banking business**

If a partnership with more than ten persons carrying a banking business is not registered under the Indian Partnership Act, such firm cannot be treated as a legally constituted firm.

*CIT v. Chakkiath Bankers (2003) 128 Taxman 617 / 261 ITR 292 / 182 CTR 424 (Ker.)(High Court)*

#### **S. 184 : Firm – Assessment – Registration – Carrying of business**

As per the ratio laid down by supreme court in R.C. Mitter & Sons (1959) 36 ITR 194 (SC), unless the partnership firm had carried on business in accordance with the terms of an instrument of partnership which was operative during the accounting year, it could not claim benefit of registration as it could not be registered in respect of the following assessment year. (A.Y. 1976-77)

*CIT v. J.P. Bhatia (2003) 133 Taxman 391 / 264 ITR 626 (All.)(High Court)*

#### **S. 184 : Firm – Assessment – Partner – Fees payable before formation of firm**

Fees payable to the assessee prior to the formation of the firm and received subsequently should be assessed as income belonging to the individual and not as income belonging to the firm. (A.Y. 1977-78)

*CIT v. M. Uttam Reddy (2003) 130 Taxman 398 (Mad.)(High Court)*

#### **S. 184 : Firm – Assessment – Partner – Dissolution – Capital gains**

Where after dissolution of firm its business was continued by an AOP comprising all erstwhile partners and assets of firm were ultimately sold under order of Court in winding-up proceedings, capital gains were to be assessed in hands of firm and not assessee-partners. (A.Y. 1995-96)

*B. Raghurama Prabhu Estate v. Jt. CIT (2003) 127 Taxman 605 / 264 ITR 124 / 180 CTR 87 (Karn.)(High Court)*

#### **S. 184 : Firm – Assessment – Registration – Position prior to 1-4-1993**

Return signed by power of attorney holder on behalf of one of the partner. Assessee firm was entitled for continuation of registration. (A.Y. 1990-91)

*Vivek Ispat Udyog v. ITO (2005) 2 SOT 65 (Delhi)(Trib.)*

#### **S. 184 : Firm – Assessment – Genuineness – Position after 1-4-1993**

After 1-4-1993, power to verify genuineness of firm is nowhere available to Assessing Officer. Though the fact that the assessee, who held license in his name, had not obtained approval for transfer of license for carrying on arrack business in the name of firm would amount to violation of the State Excise Act and rules framed there

under, but where provisions of section 184 were complied with, on applicability of section 184, firm was to be assessed as such. (A.Y. 1994-95)

*Dy. CIT v. H.E.D. Bros. Co. (2005) 1 SOT 881 (Bang.)(Trib.)*

#### **S. 184 : Firm – Assessment – Registration – AOP – Position prior after 1-4-1993**

Considering newly-inserted provisions of sections 184 and 185, and also CBDT Circular No. 636, dated 31-8-1992 explaining provisions of taxation of income of firm, there is very limited scope for Assessing Officer to make assessment of firm by treating same as an AOP; thus merely because license for sale and purchase of liquor was in name of partner of assessee-firm, Assessing Officer was not justified in assessing it as AOP instead of firm. (A.Ys. 1993-94 to 1996-97)

*Thodupuzha Wines v. Dy. CIT (2005) 97 ITD 253 / 99 TTJ 786 (Cochin)(Trib.)*

#### **S. 184 : Firm – Assessment – Ex-parte [S. 144]**

Provisions of sec 184(5) applies only when assessment is done under section 144.

*Y M Light House v. ITO (2003) 128 Taxman 22 (Mag.)(Cochin)(Trib.)*

#### **Section 185 : Assessment when section 184 not complied with**

#### **S. 185 : Firm – Deduction of interest – Salary – Registration – Genuineness of firm**

When the firm is held to be genuine, only because one of the partner failed to show the capital contribution, registration can not be refused. (A.Y. 1980-81)

*CIT v. Oriental Trading Corpn (2004) 270 ITR 564 / 142 Taxman 94 / 190 CTR 544 (MP)(High Court)*

#### **S. 185 : Firm – Deduction of interest – Salary – Registration – Firm carrying on business**

Expression “business” contemplates continuous activity from year to year, on the basis of evidence it was not possible to find whether the activity of construction of godowns and letting them out from year to year hence it was held that the firm was not entitled to continue the registration as per section 185(1)(a). (A.Ys. 1979-80 to 1981-82)

*CIT v. Y. Narayana Murthy (2004) 270 ITR 275 / 141 Taxman 404 (AP)(High Court)*

#### ***C. Changes in constitution, succession and dissolution***

#### **Section 187 : Change in constitution of a firm**

#### **S. 187 : Firm – Change in constitution – Death of partner – Dissolution – Succession**

Where the partnership deed provided that even if a partner died, at least till end of financial year, business would continue and thereafter heirs would step in shoes of



partners, partnership would not stand automatically dissolved on the death of partner and there would be single assessment and not two assessments. (A.Y. 1976-77)

*CIT v. Naveen Silk Stores (2004) 140 Taxman 85 (All.)(High Court)*

**S. 187 : Firm – Change in constitution – Succession of one firm by another [S. 188]**

As per section 187(2)(a), if even one of the partners continues to remain in the firm, then the firm will not be deemed to be dissolved. Hence, even if the partnership deed says that the firm will stand dissolved on the retirement of a partner, for the purposes of the Income tax Act, it will not be deemed to be dissolved in view of section 187(2)(a). (A.Y. 1979-80)

*CIT v. Ratan Lai Garib Das (2003) 261 ITR 200 / 131 Taxman 227 (All.)(High Court)*

**S. 187 : Firm – Change in constitution – Dissolution – Death of one partner – Two assessments**

As per the provisions of section 42 of the Partnership Act, and decision of *CIT v. Empire Estate (1996) 218 ITR 355 (SC)*, on the death of one of the partner's of the firm, there being nothing to show that there was any mention in the partnership deed that the firm would continue on the death of any partner, the assessee firm stood dissolved and hence, there should be two separate assessments for the period before the dissolution and after the dissolution.

*CIT v. K. Wadhwal & Sons (2003) 130 Taxman 611 (All.)(High Court)*

**S. 187 : Firm – Change in constitution – Dissolution – Death of one partner – Two assessments**

In view of the provision of section 42 of Indian Partnership Act, 1932, the assessee firm stood automatically dissolved on the death of one of its partners in absence of any provision to contrary in the instrument of partnership and, hence, two separate assessments had to be made in respect of income derived before dissolution and after dissolution. (A.Y. 1978-79)

*CIT v. Chandra Metal & Co (2003) 130 Taxman 604 (All.)(High Court)*

**S. 187 : Firm – Change in constitution – Dissolution – Death of partner – Discontinuation**

In view of section 42(c), of the Indian partnership Act, 1932, the assessee firm automatically stands dissolved on the death of one of partner in absence of any provision in partnership deed that firm would continue despite death of any partner and this would be a case of dissolution and not of reconstitution with in the meaning of section 187 (2).

*CIT v. Shyam Sunder & Sons (2003) 130 Taxman 596 (All.)(High Court)*

**S. 187 : Firm – Change in constitution – Dissolution – Death of partner – Two assessment**

In view of decision of the Supreme court in *CIT v Empire Estate (1996) 218 ITR 355 (SC)*, if there was no provision in partnership deed that even after death of any partner, partnership firm would continue, the assessee, firm would stand dissolved on the death of one of its partners justifying two assessments.

*CIT v. Dharm Kirti Satish Chandra (2003) 131 Taxman 248 (All)(High Court)* / *CIT v. Ram Babu Kapoor Chand (2003) 131 Taxman 250* / *CIT v. Amar Iron Stores (2003) 131 Taxman 249 (All) (High Court)* / *Shambu Nath Mangru Ram v. CIT (2003) 131 Taxman 251 (All)(High Court)* / *CIT v. Adarsh Industries (2003) 131 Taxman 255 (All)(High Court)* / *CIT v. Sardar Cloth House (2003) 131 Taxman 256 (All.)(High Court)*

#### **S. 187 : Firm – Change in constitution – Dissolution – Death of partner – Two assessment**

Where one of the partners dies and there is no clause in partnership deed that if any of partners dies the partnership shall stand dissolved, two separate assessment assessments are to be made.

*CIT v. K.M. Sinha & Bros (2003) 132 Taxman 90 (All.)(High Court)* / *CIT v. Jai Narain Binodi Lal (2003) 132 Taxman 91 (All.)(High Court)*

#### **S. 187 : Firm – Change in constitution – Dissolution – Death of partner – Two assessment**

Where one partner of assessee firm died and there was nothing in the partnership deed to effect that partnership would continue even after death of any partner ,the assessee firm would stand dissolved and as such two assessments for two periods on the basis of two returns filed by the assessee were valid in the eyes of law.

*CIT v. Mohan Lal Jagan Nath (2003) 130 Taxman 883 (All.)(High Court)*

#### **S. 187 : Firm – Change in constitution – Death of partner – Single assessment**

Where one partners of firm died during the year under consideration and as per provisions of partnership deed, the firm was not dissolved on the death of one partner, there was only reconstitution of firm and a single assessment had to be made and not two assessments. (A.Y. 1979-80)

*CIT v. Sri Sidh & Co. (2003) 131 Taxman 206 (All.)(High Court)*

#### **Section 188 : Succession of one firm by another firm**

#### **S. 188 : Firm – Succession of one firm by another form – Retirement – New partnership**

When two out of the three partners of the firm retire, there is an automatic cessation of the partnership business which tantamount to dissolution of the firm and subsequent constitution of a new partnership firm by the remaining partner by induction two or more partners would result in a new partnership coming in to existence and to such a case, the provisions of section 187 (2) have no application

and the assessment has to be completed under section 188 read with section 170. (A.Y. 1991-92)

*CIT v. Palakunnathu Traders (2004) 134 Taxman 600 / 269 ITR 322 / 186 CTR 343 (Ker.)(High Court)*

### **Section 189 : Firm dissolved or business discontinued**

#### **S. 189 : Firm – Dissolved – Discontinued – Tax liability of partner – Statutory override**

If there is a statutory liability on someone to pay certain dues he can not enter into contract with someone else transferring his liability to that person. Such contract will be ignored by the tax department. A statute overrides a contract. A partner of dissolved firm would be liable to pay income tax dues of dissolved firm at least he was partner in firm even if assets and liabilities of the partner had taken over by another party, and taking over of the assets and liabilities of the firm would not affect the statutory liability of the partner. (A.Ys. 1981-82, 1982-83)

*Dhanpat Rai Verma v. TRO (2004) 268 ITR 215 / 142 Taxman 58 (All.)(High Court)*

## **CHAPTER XVII COLLECTION AND RECOVERY OF TAX**

### ***B. Deduction at source***

### **Section 192 : Salary**

#### **S. 192 : Deduction at source – Salary – Assessee in default – Payment to non-residents vis-à-vis limitation [S. 201]**

At the relevant time, there was a debate on the question as to whether TDS was deductible on foreign salary payment as a component of the total salary paid to an expatriate working in India. Even assuming that the department is right on the issue of limitation still the question would arise whether on such debatable points, the assessee could be declared as assessee in default under section 192 r/w section 201. Further, the assessee has paid the differential tax and also the interest and they further undertake not to claim refund for the amounts paid. Question on limitation has become academic. *CIT v. Eli Lilly & Co (India) (P) Ltd. 312 ITR 225 (SC)* referred. *CIT v. British Airways (2010) 232 CTR 317 / 190 Taxman 304 / 41 DTR 121 (SC)*

#### **S. 192 : Deduction at source – Salary – Overriding charge – Citizen tax – Japanese Law [S. 4]**

The matter remitted to the Tribunal to decide whether the citizen tax as per Citizens Individual Inhabitant Tax Act in Japan was an overriding charge on the salary paid by the assessee to its employees. (A.Ys. 1988-89 to 1998-99)

*CIT v. NHK Japan Broadcasting Corporation (2009) 28 DTR 106 / 225 CTR 258 / (2010) 322 ITR 628 / 184 Taxman 39 (SC)*

### **S. 192 : Deduction at source – Salary – Leave travel concession [S. 10(5)]**

An employer is under no statutory obligation to collect evidence to show that its employee has actually utilized amount paid towards leave travel concession / conveyance allowance for purpose of TDS under section 192.

*CIT v. I.T.I. Ltd. (2009) 183 Taxman 219 / 18 DTR 162 / 221 CTR 619 (SC)*

### **S. 192 : Deduction at source – Salary – Leave travel concession – Evidence Employer [S. 10(5)]**

Employer is not under any statutory obligation to collect evidence to show that employees have actually utilised the amount paid towards leave concession or conveyance allowance under section 10(5).

There is no circular of the CBDT requiring the employer to collect and examine the evidence supporting the declaration of the employees for the purpose of deduction of tax under section 192.

*CIT v. Larsen and Toubro Ltd. & Anr. / CIT v. Asea Brown Boveri Ltd. (2009) 313 ITR 1 / 181 Taxman 71 / 18 DTR 163 / 221 CTR 620 / 213 Taxation 512 (SC)*

### **S. 192 : Deduction at source – Salary – Foreign Company [S. 9(ii)]**

The assessee was a joint venture between a foreign company and an Indian company. Four employees were deputed by the foreign company to work for the assessee. Salary was paid by the foreign company. Additional salary was also paid to the employees by the assessee, on which the assessee deducted tax at source under section 192(1).

The Supreme Court held that the provisions of section 192(1) would be applicable to the foreign salary received by the employees and that the assessee could be treated as an assessee in default for non deduction of tax at source on the foreign salary.

The deductions under provisions of chapter XVII are tentative deduction of income tax subject to regular assessments.

*CIT v. Eli Lilly & Co. (India) Pvt. Ltd. (2009) 312 ITR 225 / 223 CTR 20 / 178 Taxman 505 / 21 DTR 74 / 211 Taxation 172 (SC)*

### **S. 192 : Deduction at source – Salary – Assessee in default – Honest estimate – Perquisites – Free education facilities to wards of teachers – Staff members [S. 17(2), 201]**

While deducting TDS from employee's income employer is not expected to step into shoes of Assessing Officer and determine actual income. Where employer has deducted TDS on estimated income of employee and such estimate is found to be incorrect, this fact alone would not make employer an assessee in default under section 201(1), unless an inference can reasonably raised that employer has not acted honestly and fairly. Assessee school was providing free educational facilities to Wards of teachers / staff members and cost of education was less than ₹ 1000 per

month per child, assessee was entitled to benefit of proviso to rule (3)(5) and consequently, could not be treated as assessee in default.

*CIT v. Delhi Public School (2011) 203 Taxman 81 / 63 DTR 325 / (2012) 247 CTR 317 (Delhi)(High Court)*

### **S. 192 : Deduction at source – Salary – Unequal deduction of tax – Interest [S. 201]**

Sub section (3) of section 192 permits the person obliged to deduct tax to make adjustments in case of excess or deficiency and also authorizes adjustment even in case of total failure to deduct tax during the financial year and therefore, assessee is not liable to pay interest under section 201(IA) for not deducting tax at source from salary payments in several months, when it has deducted tax in the remaining months. (A.Y. 2000-01)

*CIT v. Enron Expat Services Inc (2010) 45 DTR 154 / 194 Taxman 70 / 235 CTR 198 / 327 ITR 626 (Uttarakhand)(High Court)*

### **S. 192 : Deduction at source – Salary – Foreign Company [S. 271C]**

Assessee is not required to deduct tax at source in regard to payments made by foreign company to its employees, as there was no record to show that amount paid by foreign company to its employees was made known to assessee or said amount was also disbursed to employees of foreign company through assessee. The assessee is not liable to pay penalty under section 271C, as there was no violation of section 192(1). (A.Ys. 1992-93 to 1998-99)

*CIT v. Indo Nissin Foods Ltd. (2010) 194 Taxman 144 / 325 ITR 451 / 231 CTR 440 (Karn.)(High Court)*

### **S. 192 : Deduction at source – Salary – Gratuity [S. 10(10)]**

Assessee liable to deduct tax at source (TDS) from salaries paid to its employees, was not liable to deduct tax on the amount of gratuity which is exempt under section 10(10) of the Act, even if gratuity is not paid under the provisions of the Payment of Gratuity Act, 1972 but under internal regulations.

*North West Karnataka Road Transport Corporation v. Dy. Labour Commissioner & Ors. (2009) 22 DTR 237 / 224 CTR 106 / 310 ITR 290 / 180 Taxman 489 (Karn.)(High Court)*

### **S. 192 : Deduction at source – Salary – Meal Coupon**

Non transferable meal coupon given by the assessee company to its employees which were usable only at specified eating joints are not taxable as perquisites in the hands of the employees and as such there was no default on the part of the assessee company for not deducting tax at source on the amount of such coupons.

Similarly, the High Court held that the expenditure incurred by the employer for the journey by the employee from residence to office and back is not to be regarded as perquisite in the hands of employees and as such there was no default on the part of the assessee company in not deducting tax at source on such amount.

*CIT v. Reliance Industries Ltd. (2008) 14 DTR 150 / 221 CTR 175 / 308 ITR 82 / 175 Taxman 367 (Guj.)(High Court)*

**S. 192 : Deduction at source – Salary – Accrual**

No deduction at source is contemplated under section 192 in cases where salary has accrued but is not paid. Accrual of salary and actual act of making payment must exist in order to deduct tax at source.

*CIT v. Tej Quebecor Printing Ltd. (2006) 151 Taxman 210 / 200 CTR 616 / 279 ITR 573 (Delhi)(High Court)*

**S. 192: Deduction at source – Salary – LIC – Conveyance allowance [S. 10(14)]**

Writ challenging order of TDS Officer asking Branch Managers of LIC to deduct tax at source from conveyance allowance and additional conveyance allowance paid to Development Officers could not be entertained and it would be a matter of establishing claim for exemption thereof under section 10(14) by individual assessee at time of completion of their assessments

*National Federation of Insurance Field Workers of India v. Union of India (2005) 276 ITR 127 / 145 Taxman 116 / 196 CTR 489 / 276 ITR 127 (Jharkhand)(High Court)*

**S. 192 : Deduction at source – Salary – Conveyance allowance – Development Officer – Circular issued by Executive Director (Marketing) LIC [S. 119]**

Circulars issued by Executive Director (Marketing) of LIC providing guidelines for deduction of income – tax at source on additional conveyance allowance paid to LIC Development Officers has no force and, therefore, is not binding on Income-tax department and LIC Development Officers.

*Franco Johan v. UOI (2004) 134 Taxman 435 / 269 ITR 441 / 186 CTR 760 (Ker.)(High Court)*

**S. 192 : Deduction at source – Salary – Foreign technicians – Fees for technical services [S. 195]**

Remittances made by assessee to American company in respect of reimbursement of salaries paid by American company to foreign technicians /expatriates deputed in India with assessee were rightly liable for deduction of tax at source as salary. Explanation to section 9(1)(vii) makes it clear that salaries would not fall within the expression "fees for technical services".

*DIT v. HCL Infosystems Ltd. (2004) 192 CTR 108 / 274 ITR 261 / 144 Taxman 492 (Delhi)(High Court)*

**S. 192 : Deduction at source – Salary – Assessee**



Even if a person responsible for paying any income chargeable under the head 'salaries' is not an assessee, he is also statutorily obliged to deduct income-tax at the time of payment of such salaries and to pay the same to the revenue.

*C.E.S.C. Ltd. v. ITO (TDS) 2003 Tax LR 401 (Cal.)(High Court)*

### **S. 192 : Deduction at source – Salary – Leave travel concession**

Leave travel concession/assistance can be treated as exempt under section 10(5) by employer and he can avoid his statutory obligation to deduct-tax at source there from only if he is satisfied as to three ingredients of said sub-section, and he also keeps and preserves evidence in support thereof.

*C.E.S.C. Ltd. v. ITO (TDS) (2003) Tax LR 401 (Cal.)(High Court)*

### **S. 192 : Deduction at source – Salary – Free boarding**

Since free boarding provided to employees of oil rigs on oil rig does not amount to perquisite, no obligation arises on part of employer to deduct tax from perquisite value of same.

(A.Y. 1994-95)

*CIT v. Hyundai Heavy Industries Co. Ltd. (2003) 264 ITR 328 / 189 CTR 91 / 137 Taxman 399 (Uttaranchal)(High Court)*

### **S. 192 : Deduction at source – Salary – Amounts not deductible – Income deemed to accrue or arise in India – Salary to staff at Netherland [S. 9, 40(a)(iii)]**

Where salaries had been paid to non-residents for services rendered abroad, provisions of Explanation to section 9(1)(ii) were not applicable to assessee. Since salary paid to non resident's for services rendered in Netherlands was not chargeable to tax in India, provisions of section 192 cannot be applied hence disallowance made by applying the provisions of section 40(a)(iii) were liable to be deleted. (A. Y. 2003-04).

*Dy. CIT v. Mother Dairy Fruits & Veg (P) Ltd. (2011) 45 SOT 186 / 141 TTJ 97 / 60 DTR 220 (Delhi)(Trib.)*

### **S. 192 : Deduction at source – Salary – Perquisite [Ss. 2(24), 17(1), 2, Expln. 201]**

Facility of composite free bus pick up and drop provided by employer to employees, is not taxable as perquisites. Facility enjoyed by all employees; as it is impossible of to compute the value, computation machinery fails hence, the employer cannot be treated as assessee in default for failure to deduct tax at source. (A.Y. 2005-06)

*Transwork Information Services Ltd. v. ITO (2010) 1 ITR 58 / (2009) 126 TTJ 900 / 29 SOT*

*543 / 32 DTR 367 (Mum.)(Trib.)*

*Editorial:– See WNS Global Services (P) Ltd. (2009) 33 SOT 445 (Mum.)*

### **S. 192 : Deduction at source – Salary – Tips**

Tips paid by customers to regular employees of restaurant, which were being collected along with the bills and were later on dispersed to concerned employees, would not constitute as profit in lieu of salary and would not be liable for TDS, as only the payments received by employees from employer are considered as profit in lieu of salary.

*Nehru Place Hotels Ltd. v. ITO (2008) 173 Taxman 88 (Mag.)(Delhi)(Trib.)*

*Editorial : Hon'ble Delhi High Court has is the case of CIT v. ITC Ltd. (2011) 243 CTR 114 (Delhi) / 199 Taxman 412 / 59 DTR 312 held that would constitute "profit in addition to salary and wages" and would be liable to tax deduction at source.*

### **S. 192 r.w. s. 201 : Deduction at source – Salary – Assessee in default**

Obligations cast under section 192 is being said to be duly discharged when the belief entertained by the company was bonafide and the estimate of salary made for purpose of deduction of tax at source was fair and honest estimate. The issue of short deduction raised by Assessing Officer on basis of his opinion that particular sum were liable to tax in India and forms part of salary cannot make an assessee, as an assessee in default.

*Dy. CIT v. Whirlpool India Holdings Ltd. 156 Taxman 233 (Mag.)(Delhi)(Trib.)*

### **S. 192 : Deduction at source – Salary – Reimbursement [S. 271C]**

A Sweden company failed to deduct tax under section 192 from children's education expenses reimbursed to expatriate employee in foreign currency. On realizing the mistake the taxes along with interest was paid. The default was on account of inadvertence and under a bonafide belief that said payments were not taxable. It was held that Commissioner (Appeals) is justified in cancelling the penalty, as the conduct had not been contumacious or defiance.

*Dy. CIT v. Ericsson Telephone Corporation India A. B. (2006) 155 Taxman 156 (Mag.)(Delhi)(Trib.)*

### **S. 192 : Deduction at source – Salary – Taxability of allowance in the hands of recipient**

Taxability of an allowance in hands of recipient cannot lead to conclusion that payer is also liable to deduct tax at source in respect thereof. (A.Ys. 1997-98, 1998-99, 1999-2000)

*Savani Financials Ltd. v. ITO (2005) 1 SOT 111 (Mum.)(Trib.)*

### **S. 192 : Deduction at source – Salary – Leave travel allowance – Assessee in default**

#### **[S. 201(1)]**

Where assessee-company, while deducting tax at source from salary paid to its employees did not include leave travel allowance paid during year under consideration, treating same as exempt under section 10(5) on basis of declaration filed by said employees confirming having actually spent said allowance on travel merely because actual proof /evidence of having spent leave travel allowance on

travel was not verified by it, assessee could not be treated as assessee in default under section 201(1). (A.Ys. 1989-90 to 1996-97)

*Dy. CIT v. HCL Infosystems Ltd. (2005) 4 SOT 428 / 95 TTJ 1093 (Delhi)(Trib.)*

### **S. 192 : Deduction at source – Salary – Unpaid**

Assessee is not required to deduct tax at source if salary is not actually paid to employee. (A.Ys. 1994-95 to 1998-99)

*Tej Quebecor printing Ltd. v. Jt. CIT (2003) 84 ITD 684 / 80 TTJ 783 (Delhi)(Trib.)*

### **S. 192 : Deduction at source – Salary – honorary – Part time teachers**

Where there is control of applicant over honorary part time teachers both in regard to work to be done and manner in which it should be done, it would establish employer – employee relation ship between applicant and honorary teachers so as to attract deduction of tax under section 192 from payments made to such teachers.

*Max Mueller Bhavan, In re (2004) 268 ITR 31 / 138 Taxman 113 / 189 CTR 450 (AAR)*

## **Section 194 : Dividends**

### **S. 194 : Deduction at source – Dividend – Proportionate credit**

1. The State Financial Corporation received dividend which was subject to TDS. The credit for the same was claimed by the assessee. The Assessing Officer was of the opinion that credit can be given in proportion to the dividend income assessable in the hands of the assessee as two-thirds of the dividend was assessable in the hands of the State Government. Rejecting the contention of the Assessing Officer it was held that the credit for the entire TDS should be given to the assessee – Financial Corporation.

*CIT v. Punjab Financial Corporation (2006) 152 Taxman 120 (P&H)*

2. The provisions of section 203 or section 206 are attracted only in a case where tax is deducted. Failure to deduct tax shall not attract these provisions. (A.Ys. 1994-95, 1995-96)

*CIT v. Sri Ram Memorial Education Promotion Society (2006) 152 Taxman 257 / 287 ITR 155 (All.)(High Court)*

### **S. 194 : Deduction at source – Dividend – Non-shareholder**

When payment is made to a non shareholder, section 194 does not apply. (A.Ys. 2003-04 to 2005-06)

*MTAR Technologies (P) Ltd. v. ACIT (2010) 39 SOT 465 (Hyd.)(Trib.)*

## **Section 194A : Interest other than “Interest on securities”**

### **S. 194A : Deduction at source – Interest – Loan in the name of company – Time of deduction**

When the loan is taken by the director in the name of the company and the interest is paid by the directors through the company, the Supreme Court held that the company is required to deduct tax at source.

The Supreme Court held that the material expression in section 194A "at the time of credit of such income to the account of the payee"; therefore whenever interest is credited to the account of the payee, the payer has to deduct tax at source.

Assessing Officer under section 201(1) of the Act declared the Assessee-Company as Assessee-in-default and imposed interest for not deducting TDS at source. Assessee contended that the loan and interest were not reflected in the books of the Assessee-Company therefore it was not liable to deduct TDS at source under section 194A. Held, there was no resolution of the Assessee-Company placed before the Assessing Officer whereby the company agreed to act as a medium for routing the borrowings and repayments. In the circumstances it could not be said that the Assessee-Company was in charge of disbursing repayments made by directors in their individual capacities. Consequently, Department was right in invoking the provisions of sections 201 and 201(1A) of the Act. Appeal allowed

*CIT v. Century Building Industries Pvt. Ltd. (2007) 293 ITR 194 / 163 Taxman 188 / 211 CTR 292 / 7 SCC 262 / (2008) 202 Taxation 190 (SC)*

#### **S. 194A : Deduction at source – Interest – Compensation – Limit to be worked separately**

Where the Motor Accident Claim Tribunal apportioned the compensation amount and interest payable to each claimants. The interest income of each of the claimant is to be taken into account separately for applying the limit prescribed under section 194A(3)(ix) for the purpose of deducting tax at source under section 194A of the Act.

*National Insurance Co. Ltd. v. Smt. Draupadibai & Ors. (2011) 50 DTR 282 / 238 CTR 201 (MP)(High Court)*

#### **S. 194A : Deduction at source – Interest – Compensation by Motor Accident Claims Tribunal**

If the amount of interest on compensation awarded by Motor Accident Claims Tribunal payable to the claimant in particular financial year does not exceed fifty thousand rupees then the person responsible for payment is not required to deduct tax at source under section 194A. Interest Awarded has to be spread over in number of years from the date of filing of claim petition till the due of payment.

*United India Insurance Co. Ltd. v Ramanlal & Ors. (2011) 56 DTR 407 (MP)(High Court)*

#### **S. 194A : Deduction at source – Interest – Reimbursement – Commission [S. 2(28A)]**

Assessee company utilized unspent credit limit of other company for importing goods for which bank charged interest, which was paid by said company on behalf of assessee. Assessee reimbursed such amount of interest to said company. It claimed that in reality it paid commission to that company for utilising its unspent credit limit

and therefore, provisions of section 194A were not applicable. The Court held that amount paid by the assessee would clearly come within the definition of 'interest' under section 2(28A) and assessee was liable to deduct TDS from the said amount in terms of section 194A. (A. Y. 2002-03)

*Bhura Exports Ltd. v. ITO (2011) 202 Taxman 88 / (2012) 66 DTR 87 / 246 CTR 482 (Cal.)(High Court)*

#### **S. 194A : Deduction at source – Interest – Decree**

Once decree is passed, it is a judgment debtor of the Court, which culminates in to final decree being passed which has to be discharged only on payment of amount due under said decree and therefore judgment debtor is not liable to deduct tax at source on interest component of decree.

*Madhusudan Shrikrishna v. Emkay Exports (2010) 188 Taxman 195 (Bom.)(High Court)*

#### **S. 194A : Deduction at source – Interest – Trust**

Assessee trust whose beneficiaries and trustees were ex-employees of the company, is not liable to deduct TDS under section 194A in respect of sums credited to members account as the status being Individual, provisions of section 194A are not applicable.

*NTPC Ltd. Employees Provident Fund Trust v. ITO (2010) 186 Taxman 13 (Delhi)(High Court)*

#### **S. 194A : Deduction at source – Interest – Agricultural land**

There is no obligation upon the person to deduct tax at source while paying compensation for agricultural land at any place including in an urban agglomeration as the section itself excludes agricultural land from its preview.

*Mysore Urban Development Authority & Ors. v. ITO & Anr. (2008) 11 DTR 331 / 218 CTR 678 / 175 Taxman 307 (Karn.)(High Court)*

#### **S. 194A : Deduction at source – Interest – Delayed compensation**

Insurance company rightly deducted tax at source in case of interest on delayed payment of compensation awarded by Motor Accident Claims Tribunal, Trial Court can not direct insurance company to make payment without deduction of tax at source.

*New India Assurance Co Ltd. v. Mani (2004) 270 ITR 394 (Mad.) / United India Insurance Co. Ltd. (2004) 136 Taxman 565 / 269 ITR 63 (Guj.)(High Court)*

#### **S. 194A : Deduction at source – Interest – Contempt of Court**

Respondent deducted the tax at source and paid the amount. Petitioner contended that the Court has not directed to deduct tax at source. Petitioner contended that respondents had by deducting tax at source, violated the Court order and were, thus guilty of contempt of Court. The court held that the Impossibility to act can not be equated with the non-compliance of the order and respondents were unknown to court, thus contempt application was dismissed.

*Kedarnath Jute Mfg. Co. Ltd. v. Prasad Ranjan Ray (2004) 137 Taxman 538 / 266 ITR 677 (Cal.)(High Court)*

**S. 194A : Deduction at source – Interest – AOP – Individual – Trust**

Where assessee-trust was assessed as AOP, its correct status was to be taken as individual and it was not liable to deduct tax at source under section 194A. (A.Y. 1984-85)

*CIT v. Sivasakthi Trust (2003) 128 Taxman 342 / 185 CTR 208 (Mad.)(High Court)*

**S. 194A : Deduction at source – Interest – Land acquisition – Enhanced Compensation**

Deduction of tax at source is permissible in respect of interest accrued or payable on compensation on compulsory acquisition of land and also on enhanced compensation under sections 18 and 30 of Land Acquisition Act but Court is not a person responsible for paying any income by way of interest to assessee and real person responsible for paying such income is LAO who has money in his possession.

*State of M.P. v. Parwatibai (2003) 128 Taxman 751 (MP)(High Court)*

**S. 194A : Deduction at source – Interest – Land acquisition – Compensation – Circular**

Circular issued by Dy. Commissioner to Land Acquisition Collector directing him to deduct tax at source at time of making payment of interest to petitioner on account of enhancement of compensation is valid.

*Raghubir v. UOI (2003) 179 CTR 603 (Delhi)(High Court) / Ved Prakash v. UOI (2003) 179 CTR 604 (Delhi)(High Court)*

**S. 194A : Deduction at source – Interest – Circular – Validity**

The petitioner co-operative Bank contended that the CBDT cannot issue a circular which is contrary to the provisions of section 194A (3). The court held that CBDT Circular No. 9 of 2002, dated 11-9-2002 is directly in conflict with provisions of section 194A(3)(v) and therefore is to be quashed.

*Jalgaon District Central Co-operative Bank Ltd. v. UOI (2003) 184 CTR 343 / 165 ITR 423 / 134 Taxman 01 (Bom.)(High Court)*

**S. 194A : Deduction at source – Interest – Co-operative Bank – Time deposit**

Where it was not revenue's case that assessee-co-operative society was not covered by exemption provisions of section 194A(3)(vii)(a), it was not liable to deduct income-tax out of interest paid by it on any kind of deposits, Whether time deposit or any other type of deposit, As such society was exempt under sub section (3) it fell out side of the purview of section 194A(1).

*ITO v. Thodupuzha Urban Co-operative Bank Ltd. (2003) 132 Taxman 284 / 264 ITR 36 / 185 CTR 272 (Ker.)(High Court)*



**S. 194A : Deduction at source – Interest – Dividend or Discount paid to subscribers of chit**

Transaction between the subscribers and the chit companies (foreman) under a chit scheme cannot be treated as a loan transaction and hence, dividend payments cannot be treated as interest payments made by foreman and they are not liable to deduct tax under section 194A on such payments. (A.Y. 2006-07)

*ITO v. Dasgupta Chits & Investments Ltd. & Ors. (2010) 41 DTR 141 / 131 TTJ 354 / 4 ITR 732 (Visakhapatnam)(Trib.)*

**S. 194A : Deduction at source – Interest – Business Expenditure – Disallowance – Application in Form No. 13., 15G [S. 40(a)(ia)]**

Disallowance under section 40(a)(ia) of interest payments on which no TDS was deducted was sustainable, as merely filing of Form No. 13 by payee to their respective Assessing Officers cannot be construed as an authorization to the assessee not to deduct tax for the interest due to them. No copies of Form No. 15G were forthcoming to justify the assessee's stand. (A.Y. 2006-07)

*Rajendra Kumar v. Dy. CIT (2010) 46 DTR 363 / 39 SOT 373 / 134 TTJ 244 (Bangalore)(Trib.)*

**S. 194A : Deduction at source – Interest – Notional Provision Cumulative deposit [S. 201]**

Bank making notional provision for half yearly interest on account of cumulative deposit shown in general ledger reversed on next working day. Interest credited to provision account for macro-monitoring. Interest not due and payable on that day. Deduction of tax not obligatory. (A.Y. 2002-03)

*Bank of Maharashtra v. ITO (2010) 6 ITR 824 / 38 SOT 406 (Ahmedabad)(Trib.)*

**S. 194A : Deduction at source – Interest – Department of State**

Assessee a department of State Government is liable to deduct TDS on interest paid, alongwith compensation to victims as per the order of courts / motor accident claims Tribunal. (A.Ys. 2000-01 to 2005-06)

*G. M. Punjab Roadways v. ITO (2009) 178 Taxman 112 (Magistrate)(Chandigarh)(Trib.)*

**S. 194A : Deduction at source – Interest – Discounting charges [S. 28A]**

Discounting charges paid to financiers in relation to moneys borrowed through bills was interest within the meaning of section 2(28A) hence liable to TDS under section 194A. (A.Ys. 2000-01 and 2001-02)

*ITO v. Kanha Vansapati Ltd. (2007) 108 TTJ 816 / 13 SOT 285 (Delhi)(Trib.)*

**S. 194A : Deduction at source – Interest – Compensation**

Assessee, an insurance company, was not liable to deduct tax at source and therefore it was not liable for payments under section 201(1) and 201(1A). (A.Y. 1999-2000)

*ITO v. Oriental Insurance Co. Ltd. (2006) 100 TTJ 1140 (Delhi)(Trib.)*

### **S. 194A : Deduction at source – Interest – Insurance company – Compensation**

Insurance company is not liable to deduct tax at source on amounts of interest on compensation paid by it to victims of accidents as result of award by Motor Accident Claims Tribunal. (A.Ys. 1999-2000 to 2001-02)

*Oriental Insurance Co. Ltd. v. ITO (2005) 143 Taxman 12 (Mag.) / 96 TTJ 589 (Delhi)(Trib.)*

### **S. 194A : Deduction at source – Interest – Special court – Loan against pledge**

Where assessee had made a provision for interest payable on loan raised by it against pledge of shares from a party, which was declared subsequently as notified person under Special Court's Act, and Special Court had by an order in case of such notified party had held that no bank, etc., could pay to income tax department, tax deducted at source from payments to such notified persons and directed assessee to deposit tax deducted in a separate account under intimation to custodian and income-tax department, till the date of passing of such order of Special Court, assessee had to be treated to be assessee-in-default for not deducting tax at source from such person and depositing same but after passing of that order assessee, though guilty of non-deduction, could not be held to be guilty for non-payment of tax as liability was only to deduct tax and payment could not be made to credit of Central Government as it was required to be deposited in a separate account in view of specific order of Special Court. (A.Ys. 1995-96 to 1999-2000)

*Rakshak Chemicals (P.) Ltd. v. ITO (2005) 97 ITD 135 / 98 TTJ 357 (Ahd.)(Trib.)*

### **S. 194A : Deduction at source – Interest – Cheque discounting charges**

Provisions of Sec 201(1A) are not attracted on cheque discounting charges, as same are different from interest payments. (A.Ys. 1985-86 to 1987-88)

*ITO v. Babu sah (2003) 86 ITD 283 / 89 TTJ 613 (Mad.)(Trib.)*

### **S. 194A : Deduction at source – Interest – Co-operative Bank**

For the purpose of Sec 194A(3)(v), the term Co-operative Society is to be interpreted as excluding Co-operative Bank. (A.Ys. 1997-98 and 1998-99)

*Bhagani Nivedita Sah. Bank Ltd. v. ACIT (2003) 87 ITD 569 / (2004) 89 TTJ 373 (Pune)(Trib.)*

## **Section 194B : Winnings from lottery or crosswords puzzle**

### **S. 194B : Deduction at source – Winning from lotteries or crossword Puzzle – Kuries**

Prize scheme introduced by person conducting kuries for limited purpose of ensuring due payment of kuri instalments, could not be treated as lottery so as to attract section 194B.

*Canaan Kuries & Loans (P.) Ltd. v. ITO (2005) 272 ITR 534 / 142 Taxman 249 / 193 CTR 413 (Ker.)(High Court)*

**S. 194B : Deduction at source – Winning from lottery – Essentials – Kuries**

The essential elements that go to constitute a lottery are : (a), a prize or some advantages in the nature of a prize, (b) distribution thereof by chance, and (c) consideration paid or promised for purchasing the chance. Thus unless all the three elements are satisfied, the prize scheme can not be considered as a lottery. The issue of conducting kuri installment has to be considered by applying the principles referred above.

*Sampanna Kuries (P) Ltd. v. ITO (2004) 141 Taxman 615 / 193 CTR 413 / 272 ITR 534 (Ker.)(High Court)*

**S. 194B : Deduction at source – Winning from lottery – Prize by draw of lots – Prospective amendment [S. 2(24)(ix)]**

Winning of prize by draw of lots or by chance was not included in ambit of word 'lottery' prior to amendment of section 2(24)(ix) brought with effect from 1-4-2002 and as such where assessee's case fell in period prior to amendment, assessee was not liable to deduct tax at source on distribution of prize under lucky-draw scheme. (A.Y. 1997-98)

*Jhaveri Industries v. ITO (2005) 3 SOT 93 (Ahd.)(Trib.)*

**S. 194B : Deduction at source – Winning from lottery – Knowledge and skill – World Cup Football Forecast – Lok sabha election forecast**

Where assessee-company conducted 'World Cup Football Forecast' 'Lok Sabha Election Forecast' contests and no price was to be paid by participants and only skill or knowledge was criterion and prize winners were selected by lot, said contests could not be said to be lottery and, therefore, assessee was not liable to deduct tax at source before distribution of prize money of said contests. (A.Y. 1998-99)

*ITO v. Malayala Manorama Co. Ltd. (2005) 94 ITD 195 / 95 TTJ 963 (Cochin)(Trib.)*

**Section 194C : Payments to contractors**

**S. 194C : Deduction at source – Contractors – Substantial question of Law – Freight paid by AOP – To member of AOP – Liability to TDS**

The question whether freight paid by the assessee (AOP) to truck owners who in turn are members of the said AOP is subject to TDS under section 194C(2) is a substantial question of law and the Supreme Court directed the High Court to decide the issue in accordance with law.

*CIT v. Sirmour Truck Operators Union (2009) 313 ITR 26 / 27 / 170 Taxman 242 / 215 CTR 299 / 4 DTR 170 / 213 Taxation 514 (SC)*

### **S. 194C : Deduction at source – Contractors – Sub-contractors – Substantial Question of Law**

The High Court dismissed appeals summarily rejecting the question as to whether the assessee was liable to deduct tax at source under section 194C where the assessee, a society of truck owners made payments without deduction of tax to its members. As the question under consideration was a substantial question of law, the Supreme Court held that the High Court ought to have decided said question.

*CIT v. Ambuja Darla Karsog Mangu Transport Co-operative Society Ltd. (2008) 168 Taxman 223 (SC)*

### **S. 194C : Deduction at source – Contractors – Amounts not deductible – Payments by firm to partners – Sub-Contract [S. 40(a)(ia)]**

Partners of the assessee firm having executed the transportation, contracts undertaken by the firm by using their own trucks and the assessee having acted as an agent in routing the payments to partners, it cannot be held that there was a separate contract between the firm and the partners and, therefore such payments could not be disallowed under section 40(a)(ia) on the ground that tax was not deducted at source under section 194C. (A. Y. 2006-07)

*CIT v. Grewal Brothers (2011) 54 DTR 99 / 240 CTR 325 (P&H)(High Court)*

### **S. 194C : Deduction at source – Contractors – Freight charges – Disallowance [40(a)(ia)]**

In the absence of any oral or written agreement for payment of any freight charges to truck owners, it does not become a case under section 40(a)(ia) r.w.s. 194C. Therefore, the disallowance made is not sustainable. (A. Y. 2006-07).

*CIT v. Bhagwati Steels (2011) 241 CTR 480 / 326 ITR 108 / 198 Taxman 275 / 47 DTR 75 (P&H)(High Court)*

*Editorial : SLP rejected : SLP (Civil) No 34791 of 2010 dated 3-12-2010 (2010) 204 Taxman 190 (Mag.)(SC)*

### **S. 194C : Deduction at source – Contractors – Transportation of building material – Hiring of dumpers – Rent [S. 194-I]**

Assessee engaged in transportation of building material, hiring Dumpers and making payments to contractor for hiring dumpers. The payment was not rent for machinery or equipment but the payment was for works contract of shifting of goods from one place to another, therefore section 194C and not section 194I. (A. Y. 2007-08)

*CIT (TDS) v. Shree Mahalaxmi Transport Co. (2011) 339 ITR 484 (Guj.)(High Court)*

### **S. 194C : Deduction at source – Contractors – Transportation – Rent [S. 194-I]**

Assessee entering in to works contracts for transport of goods belonging to assessee to clients through their vehicles. Payment was not rent for machinery or equipment but payment for works contract, tax deducted under section 194C and provision of section 194I cannot be applied. (A.Y. 2007-08).

*CIT (TDS) v. Swayam Shipping Services P. Ltd. (2011) 339 ITR 647 (Guj.)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Union of truck operators**

The assessee was a truck operators' union and procured contracts for its members. During the assessment of its income, the Assessing Officer made an addition after disallowance under section 40(a)(ia) of the income-tax Act, on the ground that it failed to deduct tax at source as required under section 194C(2) of the Act. The Court held that there being no sub contract the tax was not deductible at source under section 194C.

*CIT v. Truck Operators Union (2011) 339 ITR 532 (Mad.)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-Contractors – Society of truck owners – Members**

Assessee, a cooperative society was formed by the truck owners and it entered into contracts with companies for transportation. The company deducted TDS @ 2%. Thereafter the assessee-society paid the amount to the truck owners on the basis of work done after deducting a nominal amount for administrative expenses. The relationship between assessee and its members was NOT that of a contractor or a sub-contractor. The assessee was formed as a matter of convenience. The society was nothing more than a conglomeration of truck operators themselves. The truck owners were virtual owners of the society even though the society was a distinct legal entity. The society was formed only because the companies were not ready to deal with individual truck owners. The society did not even retain profits. There was no sub-contract hence, no liability to deduct tax at source.

*Ambuja Darla Kashlog Mangu Transport Co-op. Society v. CIT (2010) 188 Taxman 134 / (2009) 227 CTR 299 / 31 DTR 49 / 188 Taxman 134 (HP)(High Court)*

**S. 194C : Deduction at source – Contractors – Manufacturing – Amounting to sale**

Tests laid down to determine when contract manufacturing will amount to a contract of sale for section 194C (A.Y. 2006-07)

*CIT v. Glenmark Pharmaceuticals Ltd. (2010) 324 ITR 199 / 231 CTR 105 / 37 DTR 265 / 324 ITR 199 / 191 Taxman 455 (Bom.)(High Court)*

**S. 194C : Deduction at Source – Contractors – Written contract – Hiring of vehicles**

When the turnover of the assessee exceeded monetary limit specified under clause (a) or clause (b) of section 44AB, the assessee was liable to deduct tax at source from payments made to sub contractors from vehicles hired, if amount payable exceeded the ` 20,000/-, the contract may be in writing or oral, but liability to pay tax arises when recipient of said amount receives payment in excess of ` 20,000/-. (A.Y. 2005-06)

*J. Rama (Smt.) v. CIT (2010) 194 Taxman 37 / 46 DTR 248 / 236 CTR 105 (Karn.)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Freight charges [S. 40(a)(ia)]**

Where the Tribunal has recorded a categorical finding that there was no material on record to prove any written or oral agreement between the assessee and recipients of goods for transportation and that such payment of freight had not been shown to have been made in pursuance to a contract of transportation of goods for a specific period, quality or price and further, none of the individual payment exceeded ` 20,000, there was no liability to deduct tax under section 194 C and disallowance under section 40(a)(ia) was rightly deleted. (A.Y. 2006-07)

*CIT v. Bhagwati Steels (2010) 326 ITR 108 / 47 DTR 75 / 241 CTR 480 / 198 Taxman 275 (P&H)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Transporters society**

Assessee–society having been created by transporters with a view to enter into contracts with companies for transportation of goods and to ensure allocation of work among all members on an equitable basis, there was no sub-contract between the society and the members and therefore, section 194C(2) was not attracted and the assessee society was not liable to deduct tax at source from the payments made to the truck owners who were its members.

*CIT v. Sirmour Truck Operators Union (2010) 48 DTR 130 / 195 Taxman 62 / 236 CTR 550 (HP)(High Court)*

**S. 194C : Deduction at source – Contractors – Hotel Service – Meaning of work**

Service provided by a hotel to its customers does not amount to work within the meaning of 'work' for the purpose of section 194C. The word 'work' in section 194C can only mean such work which results into any product or results into some desired objective.

*East India Hotels v. CBDT (2009) 212 Taxation 311 / (2010) 320 ITR 526 / 223 CTR 133 / 179 Taxman 17 (Bom.)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Packing material**

Packing material carrying printed work, transaction essentially a sale. Purchaser not liable to deduct tax at source on price. (A.Y. 2006-07)

*CIT v. Dy. Chief Accounts Officer, Marketed Khanna (2008) 304 ITR 17 / 217 CTR 555 / 173 Taxman 149 (P&H)(High Court)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Freight – Agent**



Where the assessee who was in the business of freight forwarding had made payment to Indian agent of non-resident shipping companies covered under section 172 of the Act. These payments made to the agents was liable to T.D.S.

*CIT (T.D.S.) v. Continental Carriers P. Ltd. (2007) 197 Taxation 137 (Delhi)(High Court)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractors – Works Contract**

When the printing work was being carried out in the suppliers premises though as per the specifications of the assessee the supply was limited to the quantity specified in the purchase order. There was nothing on record to show that all other ancillary costs like the labels, ink papers, screen printing, screens, etc. were being supplied by assessee to the supplier.

The Hon'ble Court held that the supply of printed labels by supplier to the assessee was a "contract of sale" and it could not be termed a "works contract". Hence the provisions of section 194C were not applicable. (A.Y. 1996-97)

*BDA Ltd. v. ITO (TDS) (2006) 281 ITR 99 / 201 CTR 413 / 153 Taxman 386 (Bom.)(High Court)*

*Editorial : Refer BDA Ltd. v. ITO (2007) 84 ITD 442 (Pune)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractors – Printed boxes**

Supply of corrugated boxes to be made with labels printed on same, is a contract for sale of chattel and as such outside purview of section 194C

*CIT v. Dabur India Ltd. (2005) 198 CTR 375 / 283 ITR 197 (Delhi)(High Court)*

#### **S. 194C : Deduction at source – Contractor – Sub-Contractor – Octroi collection**

Municipal Committee awarded contracts for collection of octroi, tax was deductible from payments made to contractor and not on collections made by contractor on behalf of Municipal Committee.

*S.S. and Co. Octroi Contractors v. State of Punjab (2004) 268 ITR 398 / 191 CTR 109 (P&H)(High Court)*

#### **S. 194C : Deduction at source – Contractor – Sub-Contractor – Sister concern – Penalty**

##### **[S. 221]**

Where Tribunal has given finding that there was no sub-contract between assessee and the sister concerns, assessee cannot be held liable for tax deduction at source under section 194 (2). Levy of penalty under section 221 of the Income tax Act was not justified.

*CIT v. Ess Kay Construction Co (2004) 267 ITR 618 / 140 Taxman 442 (P&H)(High Court)*

### **S. 194C : Deduction at source – Contractors – Sub-contractor – Payments to professionals**

Word 'contractor' in section 194C does not include professionals like lawyers, chartered accountants, doctors, engineers, etc.

*Moradabad Chartered Accountants Association v. CBDT (2003) 264 ITR 374 / 186 CTR 671 / 137 Taxman 496 (All.)(High Court)*

### **S. 194C : Deduction at source – Contractors – Printing material – Payments to contractor**

Payment made for purchase of printed packing material to suppliers, no work involving skill or secrecy, it being sale, section 194C is not attracted. (A. Ys. 2004-05 and 2005-06).

*ITO v. Mother Dairy Food Processing Ltd. (2011) 7 ITR 16 / 40 SOT 9 (Delhi)(Trib.)*

### **S. 194C : Deduction at source – Contractors – Shipping agent – Carriage of Goods – Technical services – Payments to contractors [S. 194J]**

Payment made for carriage of goods from the customer's trailers to the vessel in the case of export and vice versa in the case of import of goods are covered by section 194C rather than section 194J which cannot be applied. (A. Y. 2004-05).

*ACIT v. Merchant Shipping Services (P) Ltd. (2011) 49 DTR 97 / 129 ITD 109 / 8 ITR 1 / 135 TTJ 589 (Mum.)(Trib.)*

### **S. 194C : Deduction at source – Contractors – Contractor and Sub-contractor [S. 40(a)(ia)]**

Where the transporters are hired by the vendors of the goods, who directly made supplies to the factory of the assessee and charged the amount of transportation separately in their bill to the assessee, provisions of section 194C are not applicable, hence, amount paid cannot be disallowed by applying the provisions of section 40(a)(ia).

*Chang Hing Tannery v. Dy. CIT (2011) 42-B-BCAJ March P. 32 (Kol.)(Trib.)*

### **S. 194C : Deduction at source – Contractors – Society – Charitable activities [S. 40(a)(ia), 194J]**

For non-deduction of tax at source from paying the payments made towards advertisement expenses, the Assessing Officer disallowed the sum of ₹ 5.10 lacs and taxed the same as business income. Before the Tribunal the assessee contended that since its income is not chargeable under section 26 to section 44AD under the head "Business income" the provisions of section 40(a)(ia) were not applicable. The Tribunal relying on the decision in the case of *ITO v. Sangat Bhai Pheru Sikh Education Society*. (ITA Nos. 201 to 203/ASR/2004 dt. 31-3-2006 and *CIT v. India Magnum Fund (2002) 74 TTJ 620 (Mum.)* accepted the contention and allowed the appeal of assessee. (A. Y. 2006-07).

*Baba Farid Vidyak Society v. ACIT, ITA No. 180/ASR/2010 dt. 31-1-2011 (2011) 43 A BCAJ April P. 34 (Amritsar)(Trib.)*

**S. 194C : Deduction at source – Contractors – Payment to truck operators – Second and third proviso – Not retrospective [S. 40(a)(ia)]**

Assessee operating trailer lorries disbursing freight charges amounting to ₹ 46,70,365 to 16 parties without deducting tax as specified in section 194C. Assessee was liable to deduct tax at source. Amendment to sub-section (3) of section 194C made through Finance Act 2005, where by second and third provisions were added to it w.e.f 1st June, 2005 has no retrospective effect. The Tribunal held that the Assessing Officer was justified in making disallowance under section 40(a)(ia). (A. Y. 2005-06).

*ITO v. M. Sankar (2011) 138 TTJ 690 / 127 ITD 316 / 55 DTR 289 (Chennai)(Trib.)*

**S. 194C : Deduction at source – Contractors – Franchisee – Sharing of profits [S. 40(a)(ia)]**

Franchisee agreement did not stipulate payment to be made to the licence for any work done on behalf of the assessee and it was merely a case of running a study centre and to apportion profits thereof between the assessee and the licence and therefore provisions of section 194C were not applicable and no disallowance under section 40(a)(ia) can be made. (A. Ys. 2005-06, 2006-07).

*Career Launcher (India) Ltd. v. ACIT (2011) 139 TTJ 48 / 56 DTR 10 / 131 ITD 414 (Delhi)(Trib.)*

**S. 194C : Deduction at source – Contractors – Transportation – Hire contract – Rent – Tests to distinguish “transportation contract” from “hire contract”. [S. 194I]**

The assessee entered into contracts with transporters for transporting petroleum products from the plant to various destinations. The assessee deducted tax under section 194C at 2% on the basis that the transportation contract was “work”. The Assessing Officer held that the contract was a “hiring” of vehicles on the basis that (i) the assessee had exclusive possession and usage, (ii) the use was for a fixed tenure, (iii) the tankers were customized to the assessee’s requirements and that TDS ought to have been under section 194-I at 10%. The assessee was held to be in default under section 201. On appeal, the CIT(A) reversed the Assessing Officer. On appeal by the department, HELD dismissing the appeal:

To decide whether a contract is one for “transportation” or for “hiring”, the crucial thing is to see who is doing the transportation work. If the assessee takes the trucks and does the work of transportation himself, it would amount to hiring. However, if the services of the carrier were used and the payment was for actual transportation work, the contract is for transportation of goods and not an arrangement for hiring of vehicles. On facts, the agreement was of the nature of transport agreement and not one for hiring of vehicles because the tank truck owners did not simply confine themselves to providing vehicles at the disposal of the assessee in lieu of rent but also engaged their drivers in driving such vehicles and thereby in transporting petroleum products from one place to the other. In effect, the truck remained in the possession of the staff of the carrier. Further, the assessee was required to pay for

the transportation work on the basis of distance and no idle charges were payable. There was no transfer of the right to use the vehicle involved in the agreement. The agreement was merely for carriage of petroleum products and so section 194-I was not applicable. (A.Ys 2008-09 to 2010-11)

*ITO v. Indian Oil Corporation (2012) 13 ITR 79 (Delhi)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Service of security personnel**

Service rendered by security personnel under a contract with agency would fall within the meaning of section 194C, because security guards are skilled persons carrying out work of guarding premises from any untoward incidence therefore assessee was justified the deduction of tax at source at 2.26%. (A.Ys. 2006-07 to 2008-09).

*Glaxo Smith Kline Pharmaceuticals Ltd. v. ITO (TDS) (2011) 48 SOT 643 (Pune)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Amounts not deductible – Lease rent for cranes – Works contract [S. 40(a)(ia)]**

Payment made by the assessee for hiring of cranes to crane owners was with reference to the period of lease and not at all related to the work / out derived from the cranes and therefore, such payment can not be said to be payment made for "works contract" covered by section 194C and therefore, was no requirement to deduct tax at source under section 194C and consequently the payments could not be disallowed under section 40(a)(ia). (A. Y. 2006-07).

*ACIT v. Sanjay Kumar (2011) 48 SOT 615 / (2012) 143 TTJ 415 (Delhi)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Labour Charges [S. 40(a)(ia)]**

Assessee paid labour charges to various labourers which included cash payments exceeding ` 50,000/- to some labourers throughout year. Assessing Officer disallowed such payments by invoking provisions of section 40(a)(ia) for non-deduction of tax at source under section 194C. According to assessee the number of persons from one family worked as casual labourers at site on daily wage basis and due to practical difficulties for preparing individual vouchers for each labour payment, only one voucher was prepared in name of head of family who received the money and if individual labourers were taken in to consideration, payment does not exceed ` 50,000/- in a year to each person. Assessee also filed the confirmation from persons who received the sums on behalf of a number of members and same had not been repudiated by revenue. Tribunal held that the disallowance was not justified. (A. Y. 2006-07)

*Nalawade C. Maruti v. Jt. CIT (2011) 48 SOT 566 (Pune)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Hiring of tractors and trolleys – Transport and octroi [S. 40(a)(ia)]**

Assessee hired Tractors and trolleys from nearby villages for purpose of business and payments were made on a day basis under the head "transportation and Octroi charges". Assessing Officer disallowed the same on ground that said payments were

transport charges and hence required deduction at source under section 194C. The Tribunal held that the nature of expenditure cannot be deduced merely on the basis treatment accorded in account books, but to be decided on basis of substantive character of transaction. As hiring of tractors /trolleys for purpose of using them in business could not be equated to a contract for transportation for carriage as contemplated under section 194C, therefore, disallowance of expenses by invoking provisions of section 40(a)(ia) was unjustified. Even if such an arrangement is considered to be falling within the purview of section 194I of the Act, however, for the period under consideration the requirement of deduction at source on machinery rentals are not applicable. (A. Y. 2006-07).

*Nalawade C. Maruti v. Jt. CIT (2011) 48 SOT 566 (Pune)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractors – Labour charges**

Assessee paid labour charges for loading, unloading, sorting, cleaning, transportation charges on daily basis to representative of labourers. Held, that as the individual payments did not exceed prescribed limit, assessee was not liable to deduct tax at source under section 194C. (A.Ys. 2005-06 to 2007-08)

*Dy. CIT v. Laxmi Protein (Products) Pvt. Ltd. (2010) 195 Taxman 32 (Mag.) / 3 ITR 768 (Ahd.)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractor – Hiring of Truck [S. 40(a)(ia)]**

Hiring of trucks belonging to truck owners without man power i.e. drivers and conductors, cannot be said to be carrying on any work as used in section 194C, and as such, no tax was deductible from payments made to truck owners. (A.Y. 2005-06)

*Dy. CIT v. Satish Aggarwal & Co. (2010) 122 ITD 35 / (2009) 124 TTJ 542 / 27 DTR 34 (Amritsar)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractors – Lorry Owners [S. 40(a)(ia)]**

The payment made to lorry owners at par with payments made towards salaries, rents etc, therefore, payment made to hired vehicles would not be considered as towards sub-contract with lorry owners. As section 194C is not applicable, payment made cannot be disallowed by applying the provision of section 40(a)(ia). (A.Y. 2005-06)

*Mythri Transport Corporation v. ACIT (2010) 124 ITD 40 / 1 ITR 290 / 124 TTJ 970 / 28 DTR 129 (Visakha)(Trib.)*

#### **S. 194C : Deduction at source – Contractors – Sub-contractors – Financing [S. 194J]**

Financing agreement between assessee and producer / director of films is not a contract within the meaning of section 194C; neither section 194C nor section 194J is

applicable for composite contracts for financing film project. (A.Ys. 2003-04 to 2006-07)

*Entertainment One India Ltd. v. ITO (2010) 39 DTR 26 / 126 ITD 491 (Mum.)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Labourers through representative – Mukadams [S. 40A (3), 201(1A)]**

When payment was made to labourer through their representative, single payment not exceeding ` 20000/-. Tax need not be deducted at source. (A.Ys. 2005-06 to 2007-08)

*Dy. CIT v. Laxmi Protein (Products) Pvt. Ltd. (2010) 195 Taxman 32 (Mag.) / 3 ITR 768 (Ahd.)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Transport Expenses – No obligation to get the accounts audited [S. 40(a)(ia), 44AB]**

Since the assessee, a transporter, was not liable to get his accounts audited under section 44AB in the immediately preceding assessment year, he was not required to deduct tax at source under section 194C; payments could not be disallowed under section 40(a)(ia) on account of non-deduction of TDS. (A.Y. 2005-06)

*ITO v. Dhirubhai Dajibhai Patel (2010) 133 TTJ 1 (UO)(Ahd.)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Event Management – Contractual service – Professional Service – Photography [S. 194J]**

Job awarded by the assessee to other parties in performance of duty as event manager has to be treated as a contract and not sub-contract and provisions of section 194(C)(1) is applicable. Art work and photography will also be covered under section 194C(1), same will not be treated as professional service. (A.Ys. 2000-01 to 2003-04)

*EMC v. ITO (2010) 45 DTR 275 / 134 TTJ 198 / 37 SOT 31 (Mum.)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Hiring of vehicles [S. 194I]**

The assessee entered into agreements with various transport service providers. Under the agreements entered into, the service provider was to provide transport service at particular locations for transportation of assessee's employees to different destinations and locations mentioned in the agreement. The transport service provider had to provide vehicles along with the requisite staff and relevant facilities, full maintenance and repairs of vehicles, etc. The assessee deducted the tax at source under section 194C, the Assessing Officer was of the view that the payments were covered under section 194I, The Tribunal held that the payment made by the assessee for hiring vehicles for transportation of its employees qualified for TDS under section 194C and not under section 194I.

*ACIT v. Accenture Services P. Ltd. (2010) TIOL 618 ITAT–Mum. 295 / (2010) 42-B BCAJ (December 2010 P. 23) / (2012) 13 ITR 48 (Mum.)(Trib.)*



### **S. 194C : Deduction at source – Contractors – Sub-contractors – Works Contract or mere sale of goods**

Agreements entered with third parties for manufacturing goods as per specifications of the manufacturers and all other relevant decisions being taken by the manufacturers, in such circumstances the said agreements were construed as contract for sale of goods and not as works contract. The provisions of Section 194C were thus not applicable. (A.Y. 2006-07)

*Glenmark Pharmaceuticals Ltd. v. ITO (2009) 30 SOT 19 (Mum.)(Trib.)*

*Editorial : Approved. CIT v. Glenmark Pharmaceuticals Ltd. (2010) 324 DTR 199 (Bom.)(High Court)*

### **S. 194C : Deduction at source – Contractors – Sub-contractors – Agreements – Works contract [S. 194C r.w.s. 201]**

In the present case, the DVDs etc. were manufactured by entrepreneurs in their own establishment, in accordance with specifications of assessee, (ii) the raw material cost and other ancillary costs were also incurred by them, (iii) excise duty was paid by them and it was only when goods were sold to assessee that property in goods passed over to it, such agreements of the assessee with entrepreneurs could not be termed as works contract within the scope of section 194C and hence no TDS was required. (A.Ys. 2003-04 to 2006-07)

*Shemaroo Video (P) Ltd. v. ITO (2009) 31 SOT 65 (Mum.)(Trib.)*

### **S. 194C : Deduction of sources – Contractors – Hire charges of trucks [Ss. 40(a)(ia)]**

In the instant case, assessee hired trucks for a fixed period on payment of hire charges which were utilized in its business of civil construction. There was no agreement for carrying out any work or to transport any goods or passengers from one place to another. Hiring of trucks for the purpose of using them in assessee's business did not amount to contract for carrying out any work as contemplated in section 194C, the provisions of section 194C were not attracted and no disallowance under section 40(a)(ia) can be made. (A.Y. 2005-06)

*Dy. CIT v. Satish Aggarwal & Co. (2009) 27 DTR 34 / 122 ITD 35 / 124 TTJ 542 (Amritsar)(Trib.)*

### **S. 194C : Deduction at source – Contractors – Composite Contracts – Allocation**

TDS on Composite contracts which was divisible consisting payments for supply of materials as well as payments for execution of civil work, erection, designing and commissioning, though having common purchase order, has to be deducted only in respect of consideration attributable to civil work, including erection and payment towards supply of material, spare parts, freight and insurance has to be excluded.

*Haryana Power Generation Corpn. Ltd. v. ITO (2007) 164 Taxman 64 (Mag.)(Delhi)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Ocean Freight and inland haulage charges**

Ocean freight and inland haulage charges paid by assessee acting as C&F agent cannot be subjected to TDS by virtue of s. 172 and CBDT Circular No.723. dt. 19th Sept., 1995. (A.Ys. 2000-01 to 2003-04)

*ITO v. Freight Systems (India) (P) Ltd. (2006) 103 TTJ 103 / 6 SOT 473 (Delhi)(Trib.)*

**S. 194C : Deduction at source – Contractors – Sub-contractors – Jobwork – Purchases**

Outsourcing of manufacture of goods by the assessee to the manufacturer was a transaction of purchase and sale of goods and not a works contract within the meaning of s. 194C.

(A.Y. 2003-04)

*Dy. CIT v. Reebok India Co. (2006) 100 TTJ 976 (Delhi)(Trib.)*

**S. 194C : Deduction at source – Contractors – Rent – Fees for technical services – Airport Authority – Airline [S. 194I, 194J]**

Legal position relating to applicability of sections 194C, 194-I and 194J explained.

Amount paid by a foreign airlines to Airport Authority of India for landing and parking facilities for its aircrafts, was not 'rent' subject to TDS under section 194-I but payment under contract from which tax was to be deducted at source under section 194C at 2 per cent. (A.Y. 1998-99)

*Dy. CIT v. Japan Airlines (2005) 93 ITD 163 / 92 TTJ 687 (Delhi)(Trib.)*

**S. 194C : Deduction at source – Contractors – Printing of packing material**

Where assessee had credited certain amount to various parties on account of printing of packing materials of company, which were got printed according to specification of assessee, it was a contract for sale and not works contract and as such assessee was not required to deduct tax at source from payment made for such work under section 194C. (A.Y. 2003-04)

*Balsara Home Products Ltd. v. ITO (2005) 94 TTJ 970 (Ahd.)(Trib.)*

**S. 194C(2) : Deduction at source – Sub-Contractors – Hiring of vehicles [S. 40(a)(ia)]**

Assessee taking vehicles on hire for purpose of executing contract, not a case of sub-contract, tax need not be deducted at source. (A.Y. 2005-06)

*Mythri Transport Corporation v. ACIT (2010) 124 ITD 40 / 1 ITR 290 / 124 TTJ 970 / 28 DTR 129 (Visakha)(Trib.)*

**Section 194D : Insurance commission**

**S. 194D : Deduction at source – Insurance Commission – Reinsurance – Sharing of profits**

Assessee, a general insurance company, entered in to an arrangement with one B for facultative reinsurance. As per said arrangement, assessee was liable to pay certain percentage of premium as reinsurance inward commission to B. Assessee was receiving only net premium on reinsurance from B. Profit commission, if any, was shared between assessee and B in certain percentage. Assessing Officer held that assessee was liable to deduct tax on reinsurance commission paid to B under section 194D. The Tribunal held that provisions of section 194D were not applicable to payment of reinsurance commission made by assessee to B. (A. Ys. 2005-06 and 2008-09).

*Tata AIG General Insurance Co. Ltd. v. ITO (2011) 43 SOT 215 / 55 DTR 254 / 140 TTJ 319 (Mum.)(Trib.)*

### **Section 194E : Payments to non-resident sportsmen or sports associations**

#### **S. 194E : Deduction at source – Non-resident – Sport person-Sports association [S. 115BBA]**

Once income accrues to a non resident sports man or sports association on fulfillment of the condition as mentioned in section 115BBA, then the statutory obligation of the payer under section 194E comes into play irrespective of taxability thereof, payments including guarantee money made by the assessee a committee formed by three host members of World Cup Cricket, 1996 for the purpose of conducting the tournament to ICC as well as to cricket control boards / associations of member countries of ICC in relation to matches played in India were liable to TDS under section 194E read with section 115BBA. (A. Y. 1995-96).

*PILCOM v. CIT (2011) 51 DTR 147 / 238 CTR 387 / 335 ITR 147 / 243 CTR 511 / 335 ITR*

*147 / 198 Taxman 555 (Cal.)(High Court)*

#### **S. 194E : Deduction at source – Non-resident – Sport person-Sports association – Umpires – Match referees [S. 115BBA]**

Amounts paid to foreign team for participation in match in India in any shape, either as prize money or as administrative expenses, is income deemed to have accrued in India and is taxable under section 115BBA and thus, section 194E is attracted. However, payments made to umpires or match referees do not come within purview of section 115BBA because umpires and match referee are neither sportsmen (including an athletic) nor are they non-resident sports association or institution so as to attract provisions contained in section 115BBA and therefore, liability to deduct tax at source under section 194E does not arise. (A. Y. 1996-97).

*Indcom v. CIT (2011) 200 Taxman 40 / 58 DTR 1 / 335 ITR 485 / 242 CTR 337 (Cal.)(High Court)*

### **Section 194H : Commission or brokerage**

#### **S. 194H : Deduction at source – Commission – Brokerage – Airline tickets**

Agents of Airline companies are permitted to sell tickets at any rate between fixed minimum commercial price and published price. Difference between commercial price and published price neither commission nor brokerage tax need not be deducted under section 194H.

*CIT v. Qatar Airways (2011) 332 ITR 253 (Bom.)(High Court)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Discount**

Where agreement between assessee and distributor was on principal to principal basis payments made by the assessee to the distributor were incentives and discounts and not commission, there was no need to deduct tax under section 194H on such payments. (A. Y. 2004-05).

*CIT v. Jai Drinks (P) Ltd. (2011) 57 DTR 261 / 242 CTR 505 / 336 ITR 383 / 198 Taxman 271 (Delhi)(High Court)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Discount – Franchisee**

Assessee company was engaged in business of providing cellular mobile telephone services under brand name 'Airtel', provided the services through its distributors/franchisees who kept sufficient stock of rechargeable coupons and starter packs with them. After selling the Sim cards and prepaid coupons to retailers, franchisees were to make payment of sale proceeds to assessee after deducting the discount. The Court held that receipt of discount by franchisee was in real sense, commission paid to franchisees and same would attract provisions of section 194H. (A. Y. 2003-04 & 2004-05)

*Bharati Cellular Ltd. v. ACIT (2011) 200 Taxman 254 / 244 CTR 185 / 61 DTR 225 (Cal.)(High Court)*

#### **S. 194H : Deduction at source – Commission – Brokerage – SIM Cards**

Discount offered by the assessee a cellular operator to the distributors on payments made by the distributors for the SIM cards / recharge coupons which are ultimately sold to the subscribers at list price is in the nature of commission and is subject to tax deduction at source under section 194H of the Act. (A.Ys. 2003-04, 2004-05)

*CIT v. Idea Cellular Ltd. (2010) 325 ITR 148 / 35 DTR 219 / 189 Taxman 118 / 230 CTR 43 (Delhi)(High Court)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Discount – SIM card**

"Discount" for supply of Sim Cards is "Commission" Not a sale of goods. Tax deductible at source under section 194H. (A.Ys. 2004-05 to 2007-08)

*Vodafone Essar Cellular Ltd. v. ACIT (2010) 45 DTR 217 / 194 Taxman 518 / 235 CTR 393 / (2011) 332 ITR 255 (Ker.)(High Court)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Air tickets**

Deductibility of TDS on tickets issued by assessee-airlines to agents – Issue of tickets at concessional rates does not amount to commission within the meaning to section 194H and hence there is no liability to deduct TDS.

*CIT v. Singapore Airlines Ltd. (2009) 213 Taxation 441 / 319 ITR 29 / 224 CTR 168 / 180 Taxman 128 / 22 DTR 129 (Delhi)(High Court)*

**S. 194H : Deduction at source – Commission – Brokerage – Air ticket**

Air tickets sold by assessee, an airline company to its travel agent at a concessional rates was held to be a sale transaction on principal to principal basis, did not amount to payment of commission to the agent as such the assessee was not liable to deduct tax at source under section 194H (A.Y. 2001-02)

*CIT v. Singapore Airlines Ltd. & Ors. (2009) 22 DTR 129 / 224 CTR 168 / 319 ITR 29 / 180 Taxman 128 (Delhi)(High Court)*

**S. 194H : Deduction at source – Commission – Brokerage – Stamp vendors – Discount**

Discount allowed by the treasury to stamp vendors on sale of stamp paper cannot be termed as 'commission' or 'brokerage' so as to attract TDS under section 194H.

*Kerla State Vendors Association & Ors. v. Office of the Accountant General & Ors (2006) 200 CTR 658 / 282 ITR 7 / 150 Taxman 30 (Ker.)(High Court)*

**S. 194H : Deduction at source – Commission or brokerage – “Principal-Agent” [S. 40(a)(i)]**

The assessee entered into agreements with hospitals etc (“collection centres”) in accordance with which the centres collected samples from patients seeking laboratory tests and forwarded it to the assessee. The centres raised a bill on the patient, retained their “discount” and paid the balance to the assessee. The assessee claimed that it had rendered “professional services” & that the centres had rightly deducted TDS under section 194J. The Assessing Officer held that in collecting the sample and forwarding it to the assessee, the centres acted as an “agent” of the assessee and that the “discount” retained by it was “commission” and that the assessee ought to have deducted TDS under section 194H. He consequently disallowed the “discount” under section 40(a)(i) in the hands of the assessee. This was upheld by the CIT(A). On appeal by the assessee, HELD reversing the Assessing Officer & CIT(A):

(i) To fall within section 194-H, the payment must be by a “person acting on behalf of another person”. The element of “agency” has necessarily to be there. If the dealings between the parties is not on a “principal to agent” basis, section 194-H does not get attracted;

(ii) On facts, the relationship between the assessee and the Centres was not on a “principal & agent” basis because (a) under the agreement, the Centres availed the professional services of the assessee to test the samples and were under no obligation to always forward these samples to the assessee; (b) The Centres issued its own bill to the patient, collected the fees and issued the receipt, (c) the assessee raised its invoice on the Centres after giving a “discount” over the standard price list;

(d) the rates charged by the Centres from its customers were not decided by the assessee, (e) there was no privity of contract between the assessee & the patient, (f) the amounts collected by the Centres was not on behalf of the assessee. Consequently, the relationship between the assessee and the Centres was on principal to principal basis and section 194H did not apply.

(iii) Further, the obligation of TDS under section 194 H arises only at the time of "payment" or "credit". As the assessee had not paid or credited any amount to the account of the Centres, section 194H had no application. The assessee had only credited the net amount received from the Centres as its income.

*SRL Ranbaxy Ltd. v. ACIT (2012) 65 DTR 185 / (2012) 143 TTJ 265 (Delhi)(Trib.)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Principal to principal**

Transaction between assessee and concessionaries, principal to principal. Payments to concessionaries for sale of milk products being not commission, tax not deductible. (A. Ys. 2004-05 and 2005-06).

*ITO v. Mother Dairy Food Processing Ltd. (2011) 7 ITR 16 / 40 SOT 9 (Delhi)(Trib.)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Booking of air tickets [S. 40(a)(ia)]**

The transaction in question were not transactions between principal and agent but those transactions were between principal and principal. In order to bring services or transactions within expression "Commission" and "Brokerage" under section 194H, element of agency must be present. When the discount allowed / given by the assessee to the intermediaries was also allowed to passenger directly who booked the tickets with the assessee and the assessee was recording the transaction in its books of account on net amount of the invoice, then it was not a case of commission or brokerage paid or payable by the assessee to the intermediaries, hence, the provisions of section 194H were not applicable therefore no disallowance can be made under section 40(a)(ia). (A. Y. 2006-07).

*ITL Tours and Travels (P) Ltd. v. ITO (2011) 44 SOT 277 (Mum.)(Trib.)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Discount**

The assessee mobile phone service provider to the distributors in the course of selling SIM cards and recharge coupons under prepaid scheme against advance payment received from the distributors. Section 194H is applicable. (A. Ys. 2007-08 & 2008-09).

*ITO v. Vodafone Essar Cellular Ltd. (2011) 59 DTR 75 / 141 TTJ 461 (Chennai)(Trib.)*

#### **S. 194H : Deduction at source – Commission – Brokerage – Business expenditure – Disallowance under section 40(a)(ia) – payment to consolidator of land**

Assessee having appointed a consolidator to acquire land who, as per the terms of MOU, agreed to assign its right to purchase the land in favour of the assessee, the



transaction between the assessee and the consolidator was on principal to principal basis and, therefore, provisions of section 194H were not applicable to the payments made by the assessee to the consolidator and consequently, same cannot be disallowed under section 40(a)(ia); provisions of section 40(a)(ia) are not applicable also for the reason that the assessee has reflected the impugned payments in purchases and closing stock and has not claimed any deduction for expenses on account of such payments. (A. Y. 2007-08)

*ITO v. Finian Estates Developers (P) Ltd. (2011) 63 DTR 314 (Delhi)(Trib.)*

**S. 194H : Deduction at source – Commission – Discount – SIM Card [S. 201(1), 201(IA)]**

Discount given by the assessee company on supply of prepaid SIM cards and recharge coupons, etc was in the nature of commission and therefore, the assessee service provider is liable to deduct tax at source under section 194H. (A.Ys. 2004-05 to 2007-08)

*Vodafone Essar Cellular Ltd. v. ACIT (2011) 32 SOT 280 / (2010) 129 TTJ 222 / 35 DTR 393 (Cochin)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage**

Expression "commission or brokerage" as contained in clause (i) of explanation to section 194H, is not so wide that it would include any payment receivable directly or indirectly for services in course of buying or selling of goods, hence, discount allowed on transactions relating to outright purchases cannot be treated as brokerage or commission. For application of provisions of section 194H there should be relationship of principal and agent in order to bring discount in ambit of commission or brokerage. (A.Y. 2003-04)

*ACIT v. Idea Cellular Ltd. (2010) 125 ITD 222 / (2009) 125 TTJ 663 / 29 DTR 237 (Hyd.)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage – Disallowance [S. 40(a)(ia)]**

The assessee sold the products billing them at gross amount and trade discount was given at the rate of 50% or 30% or 17.20% as the case may be. The net amount was shown as price payable and sales tax was collected on the said amount. Held that trade discount debited by the assessee in its accounts is not covered under section 194H. Since there was no liability to deduct tax, the disallowance under section 40(a)(ia) was deleted. (A. Y. 2005-06)

*S. D. Pharmacy Pvt. Ltd. v. Dy. CIT, ITA Nos. 948/Coch/2008, dt. 5-5-2009. BC&AJ P. 62, Vol. 41-A, Part 4, July 2009 (Cochin)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage – Principal agent**

If there is no principal-agent relationship between the parties then section 194H is not attracted. (A.Y. 2006-07)

*Ajmer Zila Dugdh Utpadak Sangh Ltd. v. ITO (2009) 126 TTJ 197 / 34 SOT 216 / 30 DTR 418 (Jp.)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage [S. 201]**

Assessee company was engaged in business of providing cellular mobile telephone services in a specific area through its distributors/franchisees by selling to them SIM and pre-paid cards at a fixed rate below market price for onward sale to its ultimate customers. Assessee claimed that discount allowed to franchisees was not 'commission' within the Explanation under section 194H and, therefore, not liable to TDS. As per the agreement between the parties commission agents were acting on margins and responsibilities as fixed by assessee from time to time. The distributors/franchisees were making payment for pre-paid cards supplied by assessee after deducting commission, at same time, all rights, title, ownership and property rights in such cards, at all time, would vest with assessee. However, on facts, it was held that price difference was nothing but a payment of commission by assessee to its franchisees and, therefore, assessee was liable for deduction of tax at source under section 194H on commission payment to its franchisees and the assessee on facts, was treated as a defaulter. (A.Ys. 2003-04 and 2004-05)

*ACIT v. Bharti Cellular Ltd. (2009) 105 ITD 129 / 108 TTJ 38 / TLR (Nov.) 435 (Kol.)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage – Incentives**

Distribution incentive, early payment discount and bond expenses do not constitute commission so as to attract TDS under section 194H. (A.Ys. 2002-03 to 2005-06)

*Foster's India (P) Ltd. v. ITO (2008) 117 TTJ 346 / 10 DTR 402 (Pune)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage – Distributors**

Where in order to boost its sales, assessee had offered huge commission to its distributors and dealers in form of incentives and discounts by using different names, viz. (a.) trade discount, (b) regional sales promotion, (c) key dealer incentive, (d) fast track bonus, (e) trade scheme, (f) sales promotion, (g) sale promotion (price buffer), (h) special discount (institutional sales), and (i) market alternations, those were nothing more than incentives to drive dealers to achieve certain targets and could not be treated as commission for purposes of section 194H so as to require tax deduction at source by assessee while making such payments.

*National Panasonic India (P.) Ltd. v. Dy. CIT (2005) 3 SOT 16 / 94 TTJ 899 (Delhi)(Trib.)*

**S. 194H : Deduction at source – Commission – Brokerage – Distributors**

Where assessee-company, engaged in manufacture and distribution of non-alcoholic beverages, through distributors sold its products by paying them commission and from various circumstances and documents on facts it emerged that relationship between assessee and its distributors was that of principal and agent, assessee was

liable to deduct tax at source on commission paid to distributors. (A.Ys. 2002-03 and 2003-04)

*Hindustan Coca-Cola Beverages (P.) Ltd. v. ITO (2005) 97 ITD 105 / 98 TTJ 1 (Jp.)(Trib.)*

## **Section 194-I : Rent**

### **S. 194-I : Deduction at source – Rent – Hire of machinery [S. 194C]**

Amendment of section 194I to include rent for hire of machinery w.e.f. 1-6-2007, assessee paying hire charges for Millers and Rollers for laying Roads, there is no liability to deduct tax at source in accounting year relevant to assessment year 2005-06. Operation of machinery by owner of Machinery not a case of composite contract for labour and hire of machinery. Section 194I of the Act came to provide for deduction of tax at source in respect of machinery /equipment with effect from June 1, 2007, and the relevant assessment year was 2005-06, there was no scope to disallow the expenditure applying the provisions of section 40(a)(ia). (A. Y. 2005-06).

*CIT v. D.Rathinam (2011) 335 ITR 101 / 55 DTR 382 / 197 Taxman 486 / 241 CTR 476 (Mad.)(High Court)*

### **S. 194-I : Deduction at source – Rent – Jurisdiction – Assessing Officer in place of payment has no jurisdiction if assessee assessed at a different place**

The assessee, based & assessed in Delhi, was allotted land by MMRDA at Bandra Kurla Complex, Mumbai, on lease for 80 years. The lease premium of ₹ 88.52 crores was paid without deduction of tax at source. The ITO (TDS) Mumbai passed an order under section 201 in which he held that the assessee had defaulted in not deducting TDS under section 194-I on the lease premium. The assessee filed a Writ Petition to challenge the jurisdiction of the ITO (TDS) Mumbai. HELD upholding the plea:

The assessee was assessed at New Delhi. Its PAN & TAN were allotted by the Assessing Officer at New Delhi. All returns including the TDS returns were filed at New Delhi. Accordingly, there was complete absence of jurisdiction on the part of the Assessing Officer at Mumbai to proceed against the assessee.

*India Newspaper Society v. ITO (TDS) (2011) 339 ITR 365 / (2012) 247 CTR 193 / 66 DTR 242 (Bom.)(High Court)*

### **S. 194-I : Deduction at source – Rent – Upfront fees – Time for liability to deduct tax**

A person who is responsible for paying to a resident any income by way of rent is required to deduct tax at source under section 194I at the time of credit of such income to the account of the payee even if it is not the income of the payee in the previous year in which it is paid; upfront fee paid by assessee to the lessor which is adjustable against 50% of the annual license fee payable to the lessor was rent and therefore, assessee was required to deduct tax at source under section 194I at the time of the credit of such amount. (A.Ys. 2002-03 to 2005-06)

*Tax Recovery Officer v. Bharat Hotels Ltd. (2009) 28 DTR 337 / 125 TTJ 679 (Bang.)(High Court)*

**S. 194-I : Deduction at source – Rent – Franchisee**

Payments made by the assessee to its franchisee would not bear the character of rent in the absence of any lessor-lessee relationship. (A.Ys. 1998-99 to 2001-02)

*CIT v. NIIT Ltd. (2009) 184 Taxman 472 / 30 DTR 49 / 318 ITR 289 (Delhi)(High Court)*

**S. 194-I : Deduction at Source – Rent – Co-owner – Interest Limits**

Interest on TDS / STDR paid to non-resident being exempt under section 10(15)(iv)(fa). tax is not required to be deducted tax at source under section 194A. Further, there is also no need for TDS under section 194I in a case where share of rental income from a co-owned property is chargeable in the hands of co-owners respectively and if the share of each co-owner is below ` 1,20,000/-

*CIT v. Manager SBI (2009) 226 CTR 310 / (2008) 13 DTR 294 / 323 ITR 93 (Raj.)(High Court)*

**S. 194-I : Deduction at source – Rent – Credit for tax deducted – Co-owners – Common tenancy – AOP [S. 201]**

Assessee company paying rents to individual co-owners separately and not as Association of Persons is covered under section 194-I(a), hence, deduction of tax @ 15% and not 20% was proper, recovery under section 201 for short deduction is also invalid. (A.Ys 1999-2000 to 2004-05).

*CIT v. Lally Motors Ltd. (2007) TLR 588 (2009) 311 ITR 29 / (2007) 164 Taxman 510 (P&H)(High Court)*

**S. 194-I : Deduction at source – Rent – Warehouse – Services**

Charges paid to warehouse, where agreement between parties was only for use of land and warehouse and no services of any type were provided by a warehouse-keeper. The Tribunal rightly held that tax is deductible as per section 194-I. (A.Ys. 1999-2000 to 2000-01)

*Hindustan Coca-Cola Bev (P) Ltd. v. CIT (2004) 141 Taxman 60 (Delhi)(High Court)*

**S. 194-I : Deduction at source – Rent – Let out jointly – Limits**

Tax is to be deducted at source where property is let out by undivided joint owners and rent is paid to them jointly. If upon such apportionment the petitioners were individually entitled to receive a sum not in excess of ` 1,20,000 per annum, the bank was not entitled to make any deduction of tax at source.

*Amalendu Sahoo v. ITO (2003) 264 ITR 16 / 185 CTR 326 / 135 Taxman 379 (Cal.)(High Court)*

**S. 194-I : Deduction at source – Rent – Fixed charges for hire of vehicles not "rent" S. 194C applicable**

Where cars were owned and maintained by the contractor and all expenditure was borne by contractor, the contract was for "carriage of passengers" for which a fixed amount was paid. Pursuant to definition of "work" as per section 194C, it was observed that, the payment of vehicle hire charges fell within the scope of section 194C and was not "rent" for section 194I. (A. Y. 2009-10)

*Ahmedabad Urban Development Authority v. ACIT (2012) 13 ITR 73 (Ahd.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Mobile service provider**

Payment by assessee to other mobile telephone service providers for national roaming facility is not for use of equipment. The assessee was mere a facilitator between its subscriber and other service provider, facilitating a roaming call to be made by the subscriber. The payment of roaming charges by the assessee to other service providers could not be considered as rent within the meaning of Explanation (i) below section 194-I, therefore there was no liability on the part of the assessee to deduct tax at source. (A. Ys. 2007-08, 2008-09, 2009-10)

*Vodafone Essar Ltd. v. Dy. CIT (2011) 9 ITR 182 / 135 TTJ 385 / 49 DTR 450 (Mum.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – License fee for enjoyment of entire property**

License fee paid towards utilization of production facilities including use of all facilities, utilities, machines, factory, office premises, tools, equipments and residential quarters with right to sub-let or under-let whole or part of the premises would fall within the definition of 'rent' as prescribed in Explanation (i) to section 194-I.

*J. C. Bansal, Chief Engineer, Kanoria Sugar & General Mfg. Co. Ltd. v. Tax Recovery Officer (2010) 123 ITD 245 / (2009) 23 DTR 34 / 122 TTJ 872 (Indore)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Upfront fees – Liability to deduct tax in year of credit**

A person who is responsible for paying to a resident any income by way of rent is required to deduct tax at source under section 194I at the time of credit of such income to the account of the payee even if it is not the income of the payee of the previous year in which it is paid; upfront fee paid by assessee to the lessor which is adjustable against 50% of the annual license fee payable to the lessor was rent and therefore, assessee was required to deduct tax at source under section 194I at the time of the credit of such amount. (A.Ys. 2002-03 to 2005-06)

*Tax Recovery Officer v. Bharat Hotels Ltd. (2009) 28 DTR 337 / 125 TTJ 679 (Bang.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Co-owners – Threshold**

Assessee was not liable to deduct tax under section 194-I from the rent paid by it for the building owned by two co-owners as the shares of the co-owners were

ascertainable and definite and the amount paid to each co-owner was less than ` 1.20 lakhs

No TDS on rent paid below 1.20 lakhs to each co-owners whose respective shares are definite and ascertainable. (A.Ys. 1996-97 to 2003-04)

*Oriental Bank of Commerce v. TDS/TRO Kaithal (2006) 150 Taxman 1 / 99 TTJ 1235 (Chd.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Premises with furniture**

Amount paid by assessee for use and occupation of premises with furniture, fixtures, etc., was 'rent' and, therefore, section 194-I was applicable. (A.Ys. 1997-98 to 2000-01)

*Wipro GE Medical Systems Ltd. v. ITO (2005) 3 SOT 627 (Bang.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Interest free security deposit**

Interest-free security deposit which is to be adjusted against rent only at end of lease, cannot be treated as 'rent' for purposes of section 194-I. (A.Y. 1995-96)

*P. S. Cars (P.) Ltd. v. ITO (2005) 4 SOT 143 / 92 TTJ 71 (Delhi)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Right of displaying advertisement**

Where assessee had taken and acquired only right of displaying advertisement at hoarding site belonging to others, payment made by assessee to hoarding site owners was for commercial exploitation of display rights and not for using hoarding sites under lease, sub-lease, tenancy, etc., and as such, assessee was not liable to deduct tax at source under section 194-I from such payments. (A.Ys. 1997-98 to 1999-2000)

*ITO v. Roshan Publicity (P.) Ltd. (2005) 4 SOT 105 (Mum.)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Clearing and forwarding agents**

Where assessee had appointed several clearing and forwarding agents and appointment was necessitated for a smooth and proper distribution of its goods over a particular area as said agents were a link between manufacturer and consumers, payments to them were covered by section 194C and not section 194-I; merely because they stored goods in intervening period, character of payment made by manufacturer to agent did not undergo any change so as to call it, rent, either under general law or for purposes of section 194-I. (A.Y. 2001-02)

*National Panasonic India (P.) Ltd. v. Dy. CIT (2005) 3 SOT 16 / 94 TTJ 899 (Delhi)(Trib.)*

#### **S. 194-I : Deduction at source – Rent – Cold storage**

Payment made for the use of cold storage is not subjected to deduction under section 194I. (A.Ys. 1998-99 and 1999-2000)

*Ganesh Alu Bhandar v. ITO (2003) 87 ITD 588 / 81 TTJ 756 (Rajkot)(Trib.)*

#### **Section 194J : Fees for professional or technical services**



**S. 194J : Deduction at source – Fees for technical services – Human intervention [S. 201(1), 201(1A), 271C]**

Department having not adduced any expert evidence to show that any human intervention is involved during the process when calls takes place so as to bring the payments of interconnect charges / access / port charges made by the assessee to BSNL / MTNL within the ambit of “fees for technical services” under section 194J, matter is remitted to Assessing Officer for examination by a technical expert and to decide a fresh. Department is not entitled to levy interest under section 201(1A), or impose penalty for non-deduction of TDS on the facts and circumstances of the case for the reasons that there is no loss of revenue as tax has been paid by the recipient and the moot question involved in the case is yet to be decided.

*CIT v. Bharati Cellular Ltd. (2011) 330 ITR 239 / 221 Taxation 18 / (2010) 44 DTR 190 / 193 Taxman 971 / 234 CTR 146 (SC)*

**S. 194J : Deduction at source – Fees for technical services – “Transaction charges” paid to BSE [S. 9(1)(vii), 40(a)(ia)]**

In the instant case, there is direct linkage between the managerial services rendered and the transaction charges levied by the stock exchange. The BOLT system provided by the BSE is a complete platform for trading in securities. A stock exchange manages the entire trading activity carried on by its members and accordingly renders “managerial services”. Consequently, the transaction charges constituted “fees for technical services” under section 194-J and the assessee ought to have deducted TDS. However, on facts, because from 1995 to 2005 no tax was deducted and no objection was raised by the Assessing Officer and because from A.Y. 2006-07 onwards the assessee had deducted TDS, there was a bonafide belief that no TDS had to be deducted, hence no disallowance under section 40(a)(i) can be made for A.Y. 2005-06.

*CIT v. Kotak Securities Limited (2011) 62 DTR 339 / 203 Taxman 86 / 245 CTR 3 / (2012) 340 ITR 333 (Bom.)(High Court)*

**S. 194J : Deduction at source – Fees for technical services – Medical profession – Incidental or ancillary services**

Payment made for rendering services in course of carrying on medical profession or other services as stipulated in section 194J, deduction of tax at source has to be made and it is immaterial, whether recipient is an individual, firm or artificial person. Incidental or ancillary services which are connected with carrying on medical profession are also included in term “Profession”. Payment made by TPA, on behalf of insurance company to hospital for settlement of professional fee under various claims including cash less claim, it would be liable to deduct tax under section 194J on all such payments. Circular No. 8 of 2009 of 2009, considered.

*Vipul Medcorp TPA (P) Ltd. v. CBDT (2011) 202 Taxman 463 / 63 DTR 65 / 245 CTR 125 (Delhi)(High Court)*

**S. 194J : Deduction at source – Fees for technical services – Human element – Cheque processing centre**

In the absence of anything on record to discern as to whether an intervention of human elements is involved in the services provided by the PNB MICR cheque processing centre to the assessee bank, orders of the authorities below were set aside and the matter is remitted to the Assessing Officer to examine afresh. (A. Y. 2004-05).

*CIT v. Chief Manager, State Bank of India (2011) 245 CTR 107 (P&H)(High Court)*

**S. 194J : Deduction at source – Fees for technical services – Professional fees – Hospital – Medical – TPA – Circular**

Though a hospital by itself, being an artificial entity, is not a “medical professional”, yet it provides medical services by engaging the services of doctors and qualified medical professionals. These are services rendered in the course of the carrying on of the medical profession. S. 194J applies to payments made to non-professionals by such hospitals. CBDT Circular on TPA liability is valid except for CBDT's view on penalty

*Dedicated Health Care Services (India) Pvt. Ltd TPA v. ACIT (2010) 324 ITR 345 / 39 DTR 25 / 191 Taxman 1 / 232 CTR 41 / (2011) 222 Taxation 174 (Bom.)(High Court)*

**S. 194J : Deduction at source – Fees for technical services – DD and Advertising Agency – Commission – Brokerage**

Transaction between DD (Doordarshan and Advertising Agents) where Ad agent collects amounts from customers for advertisement on DD and retains 15% commission while remitting the balance amount to DD is a transaction between Principal and Agent and amount of 15% retained by the Ad agent is commission to which section 194H is attracted. Decision in Ahmedabad Stamp Vendors' Association (2002) 257 ITR 202 (Guj.); *M.S. Hameed & Ors. v. Director of State Lotteries* 249 ITR 186 (Ker.) distinguished.

*CIT v. Prasar Bharati Doordarshan Kendra (2010) 189 Taxman 315 / 230 CTR 277 / 325 ITR 205 / 36 DTR 6 (Ker.)(High Court)*

**Editorial:** Affirmed in Director, Prasar Bharti v. CIT ( 2018) 164 DTR 177(SC) ,

**S. 194J : Deduction at source – Fees for technical services – Interconnection charges to MTNL**

The assessee paid interconnection and port charges to MTNL/BSNL for connecting the network of the assessee with that of the networks of other service providers, which was thru MTNL/BSNL. This was without deduction of tax. Held that the word 'technical' has to be read by applying the principle of 'noscitur a sociis', in company of the words 'managerial and 'consultancy'. Hence, technical services are covered under section 194J only if human element is involved. The principle of 'noscitur a sociis' means that if a word is used in company of other words having a specific meaning, then that word takes its colour from the other words in whose company the word is

used. To apply this principle to this case, since the word 'technical' has been used along with the words 'managerial and 'consultancy' and there cannot be any 'managerial and/or 'consultancy' unless they are rendered by a human being 'technical' service would also mean a service which is provided by a human being. Technical services without the human element are outside the scope of section 194J. *CIT v. Bharti Cellular Ltd. (2009) 210 Taxation 420 / (2008) 175 Taxman 573 / 220 CTR 258 / 319 ITR 139 / 15 DTR 73 (Delhi)(High Court)*

**S. 194J : Deduction at source – Fees for professional or technical services – Hospitals – TPA**

Third party Administrator (TPA), who is responsible for making payment to hospitals for rendering medical services to policy holders under various health insurance policies issued by several insurers, is obliged to deduct tax at source under section 194J from payments made to hospitals. (A.Ys. 2002-03 to 2008-09)

*Medi. Assist India TPA (P) Ltd. v. Dy. CIT (TDS) (2009) 184 Taxman 359 / 226 CTR 392 / 324 ITR 356 / 28 DTR 305 (Karn.)(High Court)*

**S. 194J : Deduction at source – Fees for technical services – Mobile service provider**

Considering the importance of issue whether payment made by mobile service provider for roaming facility is for technical service, the matter was remanded back to the assessing officer in the light of observation made by the Supreme Court in *CIT v. Bharti Cellular Ltd. (2011) 330 ITR 239 / 234 CTR 146 / 193 Taxman 97/ 44 DTR 190 (SC)*. (A.Ys. 2007-08, 2008-09, 2009-10).

*Vodafone Essar Ltd. v. Dy. CIT (2011) 9 ITR 182 / 135 TTJ 385 / 49 DTR 450 (Mum.)(Trib.)*

**S. 194J : Deduction at source – Fees for professional or technical services – Service of security personnel [S. 9(1)(vii), 194C]**

The Tribunal held that payment made for services of security guard provided by a contractor can not be kept in nature of managerial, technical or consultancy services to attract clause (vii) to section 9(1) reads with section 194J. For treating the payment for technical services to be covered under section 194J, should be a consideration for acquiring or using technical know how simplicitor provided or made available by human element and there should be direct and live link between payment and receipt / use of technical services information. The contention of assessee that payment is covered under section 194C is accepted. (A. Ys. 2006-07 to 2008-09)

*Glaxo Smith Kline Pharmaceuticals Ltd. v. ITO (TDS) (2011) 48 SOT 643 (Pune)(Trib.)*

**S. 194J : Deduction at source – Fees for professional or technical services – Hospital – Payment to Doctors [S. 192]**

Assessee hospital having engaged the services of doctors on the basis of agreements whereby the doctors are free to treat the patients at the hospital at their own

discretion and time, without any supervision and control of the assessee and they are not on the pay roll of PF payments, there is no element of employer and employee relationship and therefore, the doctors are to be treated as consultants and tax has to be deducted under section 194J from payments made to them and not under section 192. (A.Y. 2008-09)

*Dy. CIT v. Yashoda Super Speciality Hospital (2010) 133 TTJ 17 (UO)(Hyd.)(Trib.)*

**S. 194J : Deduction at source – Fees for professional or technical services – Hospital – Consulting Doctors [Ss. 192, 201]**

Where a hospital engaged consulting doctors and provided them with chambers with secretarial assistance and fee was collected from outpatients and paid to consultants each day after deducting certain amount towards rent and secretarial assistance, it was not a case of payment of professional fees and neither section 192 nor section 194J was attracted and the hospital cannot be treated as assessee in default for not deducting tax from such payments.

*ACIT v. Indraprastha Medical Corp. Ltd. (2010) 128 TTJ 500 / 35 DTR 535 / 33 SOT 261 (Delhi)(Trib.)*

**S. 194J : Deduction at source – Fees for technical services – Uplinking charges – Reimbursements [Ss. 9(1)(vii), 40(a)(1)(iii)]**

Payment of uplinking charges by assessee to parent company not in the nature of fees for technical services hence, not liable to deduction of tax at source.

Reimbursement of expenditure incurred in respect of Global accounts manager cannot be treated as payment of salary. Similarly reimbursement of common expenses incurred by parent company for benefit of group concerns not liable for deduction of tax at source. (A.Y. 2001-02)

*Expeditors International (India) P. Ltd (2010) 2 ITR 153 / (2008) 118 TTJ 652 / 2 DTR 435 (Delhi)(Trib.)*

**S. 194J : Deduction at source – Fees for technical services – VSAT**

Payment made to Stock exchange for providing infrastructure to their members is not in the nature of technical services to attract provisions of section 194J. (A.Y. 2005-06)

*Dy. CIT v. Angel Broking Ltd. (2010) 35 SOT 457 / 3 ITR 294 / 41 DTR 296 (Mum.)(Trib.)*

*Editorial:- Refer CIT v. Kotak Securities Ltd. (2011) 340 ITR 333 (Bom.)(High Court) for a contrary view in respect of payment for use of Trading System.*

**S. 194J : Deduction at source – Fees for technical services – Bandwidth**

Provision of bandwidth and network services cannot be said to be Technical services and payments liable to TDS under section 194J. (A.Y. 2003-04 to 2005-06)

*Pacific Internet (India) Pvt. Ltd. v. ITO(TDS), (2009) 125 TTJ 966 / 27 SOT 523 / 24 DTR 543 (Mum.)(Trib.)*

**S. 194J : Deduction at source – Fees for technical services – Royalty – Advisory**

Fees paid for obtaining advice and assistance on operational and financial aspects of business to Mauritius company, cannot be considered as Royalty as per section 9(i) (vi), and hence no requirement to deduct tax at source.

*Spice Telecom v. ITO (2008) 170 Taxman 82 (Mag.)(Bang.)(Trib.)*

**S. 194-J : Deduction at source – Fees for professional or technical services – Interconnection charges**

Interconnect charges paid by assessee, a telecommunication service provider, to BSNL in respect of calls which are routed through the latter's network cannot be treated as payment for technical services and, therefore, provisions of s. 194J are not applicable. (A.Ys. 2001-02 and 2002-03)

*HFCL Infotel Limited v. ITO (2006) 99 TTJ 440 (Chd.)(Trib.)*

**S. 194J : Deduction at source – Fees for professional or technical services – Reimbursement of salary**

Where assessee reimbursed salaries of employees of a group of hotels, who were deputed in assessee's hotel, and employees ranged from category of telephone operator to chief engineer, including account executive, housekeeper, chef, front office cashier, account assistant, etc., such services could not be treated as technical and professional services within meaning of section 194J for purposes of deduction of tax at source from such reimbursements. (A.Y. 1998-99)

*United Hotels Ltd. v. ITO (2005) 2 SOT 267 / 93 TTJ 822 (Delhi)(Trib.)*

**S. 194J : Deduction at source – Fees for professional or technical services – Sharing of office – Support services**

Where assessee was sharing office with W Ltd and utilizing services and facilities of W Ltd, payment made by the assessee to W Ltd for support services and shared services could not be treated as payment for 'professional and technical services' within meaning of section 194J. (A.Ys. 1997-98 to 2000-01)

*Wipro GE Medical Systems Ltd. v. ITO (2005) 3 SOT 627 (Bang.)(Trib.)*

**Section 194L : Payment of compensation on acquisition of capital asset**

**S. 194L : Deduction at source – Compensation for acquisition of capital asset – Competent authority – Decree of Court [S. 194LA]**

If there is a decree of a competent court to pay enhanced compensation on account of acquisition of any land, competent authority has an obligation to deduct tax at source from those amounts and no special or specific order of any court is necessary for that purpose

*State of Kerala v. Mariyamma (2005) 144 Taxman 744 / 193 CTR 393 (Ker.)(High Court)*

**S. 194L : Deduction at source – Compensation for acquisition of capital asset**  
– **Writ**

**[S. 194LA]**

Pursuant to an interim order, award amount deducting tax from said amount was paid to the assessee and assessee filed writ challenging said deduction, assessee was to be directed to file return and if any amount was due by way of refund, assessee would be entitled to get same

*Pareekutty v. UOI (2005) 144 Taxman 495 (Ker.)(High Court)*

**Section 194LA : Payment of compensation on acquisition of certain immovable property**

**S. 194LA : Deduction at source – Compensation on acquisition of certain immovable property – Time of applicability – Notification**

On mere issuance of notification under section 4 of the Land Acquisition Act, provision of section 194LA was not attracted.

*Infoparks Kerala v. ACIT (2010) 329 ITR 404 / 38 DTR 180 / 231 CTR 479 / 187 Taxman 1 (Ker.)(High Court)*

**S. 194LA : Deduction at source – Compensation for acquisition of certain immovable property – Interest on delayed payment – Liability**

Interest accrued on delayed payment of amount of enhanced compensation in respect of acquisition of agricultural land would not partake character of compensation for "agricultural land" which is excluded from operation of section 194LA.

*Karnail Singh v. State of Haryana (2009) 184 Taxmann 257 / 227 CTR 260 / 326 ITR 501 / 184 Taxman 257 / 31 DTR 192 (P&H)(High Court)*

**S. 194LA : Deduction at source – Compensation on acquisition of certain immovable property – Agricultural land [S. 2(14)]**

When land itself was agricultural land though it may not be used for agricultural purpose but unless and until same was used for non-agricultural purpose, it had to be treated as agricultural land for purpose of section 194LA, therefore Special Land Acquisition Officer was not required to deduct tax at source from amount of compensation paid for acquisition of land. Definition of "agricultural land" as given in section 2(14) cannot be imported for purpose of section 194LA. (A. Y. 2005-06).

*ITO v. Special Land Acquisition Officer (2011) 46 SOT 458 (Mum.)(Trib.)*

**S. 194LA : Deduction at source – Compensation on acquisition of certain immovable property – Capital Gains – Capital Asset – Agricultural Land [S. 2(14)]**

Definition of agricultural land contained in section 2(14)(iii)(a) & (b) cannot be borrowed to influence definition of agricultural land contained in Explanation to section 194LA. For the purpose of deducting tax at source under section 194LA, it is Land Acquisition Officer (LAO) who has to prima facie determine whether land acquired is



agricultural land or not. Land Acquisition Officer took prima facie view that land acquired by him was an agricultural land on the basis of entries in land revenue record, hence, he was justified in not deducting tax on compensation paid on acquisition of said land, trees, and houses standing thereon. (A.Y. 2008-09)

*Special Land Acquisition Officer v. ITO (2010) 42 SOT 9 (Ahd.) (Trib.)*

### **Section 195 : Other sums**

#### **S. 195 : Deduction at source – Non-resident – Other sums – Income – Accrual – Hire Charges [S. 5(2)]**

Non-resident company having received the charter fee of fishing vessels from the assessee in the shape of 85 percent of the fish catch in India as per the terms and conditions of the agreement between them, income earned by the non-resident company was chargeable to tax under section 5(2) and therefore, assessee was liable to deduct tax under section 195 on the payment made to that company. (A.Ys. 1991-92 to 1994-95)

*Kanchanaganga Sea Foods Ltd. v. CIT (2011) 220 Taxation 261 / (2010) 325 ITR 540 / 233 CTR 1 / 41 DTR 209 / 192 Taxman 187 (SC)*

*Editorial : The High Court decision in Kanchanaganga Sea Foods Ltd. v. CIT (2004) 136 Taxman 8 / 265 ITR 644 187 CTR 664 (AP) (High Court)*

#### **S. 195 : Deduction at source – Non-resident – Other sums – Ad-interim – Stay**

The Karnataka High Court in *CIT v. Samsung Electronics Co. Ltd.* (2009) 185 Taxman 313 (Kar.), held that liability cannot be avoided on ground of non taxability of recipient. In a SLP filed against the judgment, the Supreme Court, by an ad-interim order dated 18-12-2009 directed issue of notice to the Respondents and also directed "Stay of recovery till further orders".

*GE India Technology v. CIT (2010) 187 Taxman 110 (SC)*

#### **S. 195 : Deduction at source – Non-resident – Other sums – Chargeable – Mere remittance – Duty only on taxable income**

A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act. Section 195 contemplate not merely amounts, the whole of which are pure income payments; it also covers composite payments which have an element of income embedded or incorporated in them. The obligation to deduct tax at source is, however, limited to appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident.

As per the CBDT Circular No. 728 dated October 31, 1995, a tax deductor can take into consideration the effect of the DTAA in respect of payments of royalties and technical fees while deducting tax at source.

The expression "chargeable under the provisions of the Act" in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or a part of which is

liable to tax in India. If tax is not so assessable, there is no question of tax deduction at source.

*GE Technology Centre P. Ltd. v. CIT and Anr. (2010) 327 ITR 456 / 193 Taxman 234 / 234 CTR 153 / 44 DTR 201 / 10 SCC 29 / (2011) 221 Taxman 28 (SC)*

**S. 195 : Deduction at source – Non-resident – Other sums – Jurisdiction – Assessee in Default – Constitution of India [S. 2(47), 9(1)(1), 195, 201]**

The question of jurisdictional issue may be determined by the authorities concerned as a preliminary issue. The Supreme Court further held that the Petitioner would be entitled to question the decision of the authority on the preliminary issue before the High Court.

*Vodafone International Holdings B. V. v. UOI (2009) 221 CTR 617 / 179 Taxman 129 / 18 DTR 234 (SC)*

**S. 195 : Deduction at source – Non-resident – Other sums – Discounting charges – Export sales bill – Interest [S.2(28A), 40(a)(i)]**

Discounting charges paid by assessee to a foreign company for discounting export sale bills is not "interest" as defined in section 2(28A), since foreign company has no permanent establishment in India, it was not liable to tax in respect of discounting charges and therefore, assessee was under no obligation to deduct tax at source under section 195 and the discounting charges could not be disallowed under section 40(a)(i). (A. Ys. 2004-05 & 2005-06).

*CIT v. Cargill Global Trading (P) Ltd. (2011) 241 CTR 443 / 56 DTR 188 / 199 Taxman 320 / 335 ITR 94 (Delhi)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Sale of shares of Foreign Co. by Non-resident to Non-resident attracts Indian tax – AO to record finding and decide "preliminary issue"**

Where one non resident had sold shares of a foreign company to another and show cause notice was issued under section 195, in view of the judgement of the Supreme Court in Vodafone International v. UOI 221 CTR 617 it was held that the interest of the assessee is safeguarded by directing that the Assessing Officer shall record a finding on the preliminary issue relating to jurisdictional fact (as to whether the overseas transaction attracts Indian tax at all). If the assessee is aggrieved by the finding, it is entitled to challenge the same by a Writ Petition.

*Richter Holding Ltd. v. ADIT (IT) (2011) 339 ITR 199 / 200 Taxman 263 / 243 CTR 142 (Karn.)(High Court)*

*Editorial:- See also Vodafone International Holdings B.V. v. UOI 329 ITR 126 / 235 CTR 15 / 193 Taxman 100 / 44 DTR 97 (Bom.) on the same point.*

*This decision has since been reversed by Hon'ble Supreme Court in Vodafone International Holdings BV v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 (SC)*

**S. 195 : Deduction at source – Non-resident – Other sums – Income deemed to accrue or arise in India – Business information [S. 201]**

The assessee had imported business information reports from Dun and Brand street, USA and made remittances in respect thereof without deducting tax at source. The Assessing Officer held that the assessee was liable to deduct tax at source. Tribunal set aside the order of Assessing Officer. The Court held that the Authority for Advance Rulings had held that the sale of business information reports by the subsidiaries of Dun and Brand Street, USA in Spain, Europe and the U.K. to the assessee did not attract the provisions of section 195. Though the decision of the Authority was not binding in the present case, since the decision of Authority related to the same business information reports imported by the assessee and no fault in the decision of the Authority was pointed out, the decision of the Tribunal was affirmed.

*DIT v. Dun and Brand Street Information Services India P. Ltd. (2011) 338 ITR 95 (Bom.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Certificate not withdrawn, assessee not in Default [S. 201]**

The assessee made payment of "daily allowance" to a Japanese company on account of the stay of Japanese engineers without deduction of tax at source. The Assessing Officer held that the payment was assessable to tax as "fees for technical services" and that the assessee was liable under section 201 for failure to deduct tax at source. It was held that the Assessing Officer had issued a certificate under section 195(2) authorizing the remittance without deduction of tax at source. As this certificate was not cancelled under section 195(4), the assessee was not required to deduct tax at source and could not be treated as assessee in default. The issue whether the payments were taxable or not need not be gone into. (A. Y. 1987-88)

*CIT v. Swaraj Mazda Ltd. (2011) 62 DTR 205 / 198 Taxman 305 / 245 CTR 521 (P&H)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Lower rate**

Assessee cannot deduct tax at a lower rate without getting an authorization or certificate under section 195(2). (A. Y. 2002-03).

*CIT v. Chennai Metropolitan Water Supply & Sewerage Board (2011) 202 Taxman 454 / 64 DTR 395 / (2012) 246 CTR 402 (Mad.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Appeal [S. 195, 201, 246, 248]**

Where the appeal against order under section 195(1) and 201 was filed, Appellate authorities cannot decide whether payment was assessable or not. (A.Ys. 1999-2000 to 2001-02)

*CIT & Anr. v. Samsung Electronics Co. Ltd. (2010) 320 ITR 209 / (2009) 185 Taxman 313 / 31 DTR 257 (Karn.)(High Court)*

*Editorial: - SLP admitted by Supreme Court.*

**S. 195 : Deduction at source – Non-resident – Other sums – Reimbursement of Costs**

Obligation to deduct tax at source under section 195 is attracted only when the payment is chargeable to tax in India. When tax authority have accepted that the non-resident recipient is not liable to pay tax in India, the assessee payer not liable to deduct tax at source under section 195(1), in respect of mobilization and demobilization costs reimbursed by it the non-resident company. (A.Y. 2003-04)

*Van Oord Acz India (P) Ltd. v CIT (2010) 36 DTR 425 / 189 Taxman 232 / 323 ITR 130 / 230 CTR 365 (Delhi)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Denial of Certificate – Pendency before dispute resolution panel – DTAA – India-USA – Writ [Art. 27, Rule 29B]**

Certificate under section 195(3), could not be declined on the ground that when the matter is pending before the Dispute Resolution Panel, as no appeal is available against order under section 195(3). Writ is maintainable. (A.Y. 2011-12)

*Mckinsey & Company Inc v. UOI (2010) 38 DTR 34 / 323 ITR 544 / 231 CTR 430 / 192 Taxman 421 (Bom.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Purchase of software**

Remittances made by the assessee to the non-resident for purchase of software were in the nature of trading receipt and price of goods purchased by it bear the character of income receipt in the hands of non-resident and therefore, assessee is liable to deduct tax at source under section 195(1). (A.Ys. 2005-06 to 2007-08)

*CIT v. Sonata Information Technology Ltd. (2010) 38 DTR 350 / 192 Taxman 80 / 232 CTR 20 (Karn.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Purchase of software**

Resident paying to non-resident Company for purchase of software. There is an obligation to deduct tax while making payment to a non-resident if the impugned payment is in the character of income payment. (A.Ys. 1999-2000 to 2001-02)

*CIT v. Samsung Electronics Co. Ltd. (2009) 227 CTR 335 / 185 Taxman 313 / 31 DTR 257 (2010) 320 ITR 209 (Karn.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Purchase of plant [S. 9(1) (vi)]**

The assessee had purchased plant from a foreign country which were, technical documents viz, designs, drawings, sketches, etc. The title to these documents was transferred to the assessee by the foreign company (vendor). The payment made by the assessee to foreign vendor was held to be for the purchase of plant and not royalty under the provisions of section 9(1)(vi) of the Act. As such, the assessee was not liable to deduct tax at source from the payment made to foreign party.

*CIT v. Maggronic Devices (P) Ltd. (2009) 31 DTR 65 / 228 CTR 241 / 329 ITR 442 (HP)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Payment other than cash also covered**

Assessee company entered in to agreement chartering two fishing vessels, with a non resident company. As per the terms of agreement, the assessee had to pay 85% of fish catch towards, the hire charges to the said non-resident company. The court held that Payments contemplated under section 195 not only includes cash payments or payment by cheque or draft, but also payment even by any other mode.

*Kanchanganga Sea Foods Ltd. v. CIT (2004) 136 Taxman 8 / 265 ITR 644 (AP)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Pendency of regular assessment**

Pending regular assessment, Department should move Court for stay of order under section 195; when payment has already been made to foreign company, appeal regarding non-deduction of tax under section 195 would be infructuous.

*CIT v. Mahindra & Mahindra Ltd. (2003) 132 Taxman 30 / 263 ITR 481 (Bom.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Order under section 195 (2) – Regular assessment – Not binding**

Orders passed under section 195(2) are provisional and tentative and do not bind ITO in regular assessment proceedings. (A.Ys. 1977-78, 1978-79)

*Dodsai (P.) Ltd. v. CIT (2003) 131 Taxman 565 / 260 ITR 507 / 179 CTR 80 (Bom.)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Royalty or fee for technical services – Bandwidth charges paid for data communication [S. 9, 40(a)(i)]**

Assessing officer held that assessee was required to deduct tax at source in respect of payments made to AT&T and MCI Telecommunications were covered under section 195. Where payments are made to service providers such as AT&T or MCI Telecommunications for use of band width provided for down linking signals in United States and such payments are not in the nature of managerial, consultancy or technical services nor for use or right to use industrial, commercial or scientific, equipment. Then the said payment are not in the nature of royalty or fee for technical services assessee and thus not liable to deduct tax at source. (A. Y. 2004-05)

*Infosys Technologies Ltd. v. Dy. CIT (2011) 45 SOT 157 / 139 TTJ 18 (UO)(Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Commission paid outside India – Fees for technical services – DTAA – India-Russia [S. 9(1)(i), 40(a)(ia), Art. 7, 13]**

Commission was paid outside India for services rendered outside India, tax was not deductible at source. The definition of “fees for technical services” in article 13 of the Double taxation Avoidance Agreement does not include managerial service. Hence, the definition of the technical services as given in the Double Taxation Avoidance Agreement is to be applied and it was beneficial. Hence, the sales commission in respect of parties situated in the U.K. could not have been subjected to tax at source because it was business profits and not fees for technical services. Moreover the non-residents had not made available technical knowledge or experience. Hence clause 13 of the Double Taxation Avoidance Agreement between India and the U.K. was not applicable. (A. Ys. 2007-08 to 2010-11).

*ACIT v. Modern Insulator Ltd. (2011) 10 ITR 147 / 140 TTJ 715 / 56 DTR 362 (Jp.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Training its personnel – Fees for technical service [S. 9]**

Assessee company during relevant assessment year made payment to non-resident party for training its personnel or customers to explain proposed buyers salient features of products imported by assessee in India and to impart training to customers to use equipment. The payment made could not be said to be fees for technical services and not liable for deduction of tax at source. (A. Y. 2007-08).

*ACIT v. PCI Ltd. (2011) 46 SOT 183 (Delhi)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Remittances of sale proceeds of shares by bank – UAE resident – DTAA – India-UAE [S. 201, 201(1A), Article 13(3)]**

Abu Dahbi Commercial Bank, (ADCB) was engaged in the business of banking and operated through branch in India. ADCB made remittances to individuals being UAE residents, in respect of sale proceeds of shares which resulted in short term capital gain in India. Remittance was made without deducting tax at source. Assessing Officer treated the ADCB as an assessee in default, under section 201 and also levied interest under section 201(IA). On appeal CIT(A) held that though ADCB could be regarded as payer under section 204, there was no withholding tax obligation due to availability of treaty benefit. The Tribunal held that Liability to deduct tax on remittance, does not arise as bank is only acting as an authorized dealer in transferring the funds on behalf of the share broker in absence of liability to deduct tax, the bank could not be treated as an assessee in default.

*ITO v. Abu Dhabi Commercial Bank (2011) TII 103 ITAT–Mum–ITNL dt. 12-5-2011 (591 (2011) 43-A BCAJ–August P. 27) (Mum.)(Trib.)*



**S. 195 : Deduction at source – Non-resident – Other sums – Foreign agent – Commission – Business connection – Permanent establishment [S. 4(1), 40(a)(ia), 195]**

A foreign agent of an Indian exporter operates in his own country and his commission is directly remitted to him. Such commission is not received by him or in his behalf in India, and such agent is not liable to income tax in India on commission received by him. As there was no right to receive income earned in India nor there was any business connection between assessee and ETUK, therefore when income was not chargeable to tax in India under section 4(1), there was no question of invoking provisions of section 195 hence no disallowance can be made under section 40(a)(ia). (A. Y. 2007-08).

*Dy. CIT v. Eon Technology (P) Ltd. (2011) 46 SOT 323 (Delhi)(Trib.)*

*Editorial : Affirmed by CIT v. Eon Technology P. Ltd. (2012) 343 ITR 366 / (2011) 203 Taxman 266 / 64 DTR 257 (Delhi)(High Court)*

**S. 195 : Deduction at source – Non-resident – Other sums – Off the Shelf Software – Fee for user of software taxable as “Royalty” – DTAA – India-Switzerland [S. 9(1)(vi), 201]**

While the license to use the “shrink wrapped” or “off the shelf” software does not involve transfer of intellectual property, it constitutes “royalty” under section 9(1)(vi) and Article 12(3) of the DTAA because it is for “the use of and the right to use of intellectual property such as copyright of a literary, artistic or scientific work or any patent, trade mark, design or model, plan etc”. Thus, the consideration received by Oracle for use of its software constitutes “royalty” and the assessee ought to have deducted tax at source. (A. Y. 2008-09)

*ING Vysya Bank Ltd. v. Dy. CIT (2011) 61 DTR 401 / (2012) 143 TTJ 249 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Foreign Artists – Reimbursement of Expenses – Agents of Foreign Artistes – DTAA – India-UK**

As Colin Davie was not a performer, his income was not covered under Article 18 of the DTAA but was covered by Article 7 and as the services were rendered outside India and there was no PE, the same was not assessable to tax in India. Even under the Act, by virtue of Carborandum Co. v. CIT (1977) 108 ITR 335 (SC), Circular No. 17 of 1953 dated 17.7.1953 & Circular No.786 dated 7.2.2000, commission paid to agents for services rendered outside India is not chargeable to tax in India and there is no obligation to deduct tax under section 195;

As regards payment made towards reimbursement of expenses, the law is well settled by virtue of DIT v. Krupp UDHE GmbH (2010) 38 DTR 251 (Bom.) and CIT v. Siemens AG (2008) 220 CTR 425 (Bom.) that the same is not chargeable to tax and there was no obligation to deduct tax at source. (A.Y. 2002-03)

*ADIT v. Wizcraft International Entertainment (2011) 50 DTR 1 / 43 SOT 470 / 135 TTJ 647 / 8 ITR 334 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Royalty – DTAA – INDIA-USA-UK [S. 5(2), 9(1)(vi), 40(a)(i), 195, Articles 26(3), 26(4)]**

Payments to non-resident for hire of transponders being royalty, tax has to be deducted at source. (A.Ys. 2000-01 to 2006-07)

*Asianet Communications Ltd. v. Dy. CIT (2010) 1 ITR 683 / 38 SOT 158 (Chennai)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Reimbursement of Expenses – Permanent establishment – India-German – DTAA (Articles 5(2)(1), 12)**

Reimbursement of expenses incurred on travel not involving element of income not taxable. Various sites cannot be considered together when contracts are not interconnected. Period to be computed separately in respect of each activity. Activity once commenced continues till completion of contract. Intervening period cannot be excluded. Period of six months to be counted irrespective of years involved. (A.Ys. 1998-99 to 1999-2000)

*Jt. DIT v. Krupp Uhde GmbH (2010) 1 ITR 614 / 124 TTJ 219 / 28 SOT 254 / 26 DTR 289 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Reimbursement of expenses**

provisions of section 195 would be applicable to reimbursement of expenses related to fee for technical services, however, in view of fact that all services had been provided by "L", off shore, assessee would not incur any liability to deduct tax towards payment in respect of services. (A.Ys. 2003-04 to 2005-06)

*Bovis Lend Lease (India) (P) Ltd. v. ITO (2010) 36 SOT 166 / (2010) 127 TTJ 25 (UO)(Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Fees for included services**

**[S. 9(1)(vii), 90, 201(1)]**

Assessee company having entered into a contract with a US company ACSC only for procuring software personnel for the projects of another foreign company in USA, the primary services rendered by ACSC to the assessee under the contract is akin to recruitment and placement service rather than making available any technology, plan, design, etc. and, therefore, the payments made to ACSC cannot come within the purview of 'fee for included services' within the meaning of Article 12(4)(b) of Indo-US DTAA and the same are not chargeable to tax in India and no tax was deductible at source under section 195. (A.Ys. 2005-06, 2006-07)

*ACIT v. IIC Systems (P) Ltd. (2010) 33 DTR 422 / 127 TTJ 435 (Hyd.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Permanent establishment – India-Malaysia – DTAA [S. 40(a)(ia), S. 90]**

Personnel supplied by Malaysian company were supposed to function under direction, control and supervision of assessee, therefore it could be said that there was no PE of Malaysian company in terms of Article 5 of DTAA. Payment received by said company was not taxable in India, consequently provisions of section 195, and 40(a)(i) could not be invoked. (A.Y. 2000-01)

*Dy. CIT v. Stook Engineer & Contractors B. V. (2010) 122 ITD 49 / (2009) 121 TTJ 320 / 27 SOT 452 / 32 SOT 249 / 19 DTR 482 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Technical services – Activity of conducting impact tests by UTAC – India-France – DTAA [S. 9(1)(vii), 90, Art. 13(4)]**

Activity of conducting impact tests by UTAC a French company, on the cars manufactured by the assessee company in the presence of the assessee's representative and submission of test reports which were utilized for product development in India was in the nature of technical services and therefore, payment made to UTAC for such tests was for technical services within the meaning of Art. 13(4) of India-France DTAA, as well as section 9(1)(vii) and fees payable were chargeable to tax in India hence, the assessee is liable to deduct tax at source under section 195. (A.Y. 2005-06)

*Maruti Udyog Ltd. v. ADIT (2010) 37 DTR 85 / 130 TTJ 66 / 34 SOT 480 (Delhi)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Purchase of Air Craft – Fees for Technical Services [S. 90, 9, 201(1), 201(IA), DTAA, India and Russia – Art. 12]**

Payment made to foreign company for purchase of air craft engines, could not be regarded as "fees for technical services" hence, provisions of section 195 cannot be applied. (A.Ys. 2006-07, 2007-08)

*Hindustan Aeronautics Ltd. v. ITO (2010) 123 ITD 575 / (2009) 121 TTJ 242 / 19 DTR 164 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Agent**

Despite TDS under section 195, payer is liable as "agent" under section 163. However, if payee is assessed, payer cannot be assessed as "representative assessee". (A.Y. 2001-02)

*Hindalco Industries Ltd. v. Dy. CIT (2010) 40 DTR 372 / 132 TTJ 40 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Fees for technical services**

Logistic services rendered off-shore though utilized in India. Indian company not liable to deduct tax at source. (A.Ys. 2005-06, 2006-07)

*Sun Microsystems India Pvt. Ltd. v. ITO (2010) 3 ITR 808 / 130 TTJ 597 / 39 DTR 69 / 125 ITD 196 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Software – Royalty**

Fee for software is not royalty & TDS under section 195 not required.

*Kansai Nerolac Paints Ltd. v. Addl. Director of IT (2010) 134 TTJ 342 (URO) / 41 SOT 3 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Reimbursement of Expenses**

**[S. 40(a)(i)]**

As the reimbursement of expenses is not taxable in the hands of non-resident payee, assessee not liable to deduct tax at source and he cannot be held assessee in default, consequently no disallowance under section 40(a)(i) is called for. (A.Y. 2003-04)

*Nathapa Jhakri Joint Venture v. ACIT (2010) 41 DTR 233 / 37 SOT 160 / 131 TTJ 702 / 41 DTR 233 / 5 ITR 75 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Legal expenses – GDR issue**

Payment of legal charges to the firm of solicitors in connection with the assessee's GDR issue is covered within the ambit of "fees for technical services" as per provisions of section 9(1)(vi) and is liable to TDS under section 195. (A.Y. 1999-2000)

*Dy. DIT v. Tata Iron & Steel Co. Ltd. (2010) 42 DTR 204 / 132 TTJ 566 / 6 ITR 463 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Technical services – India-Austria – DTAA [S. 40(a)(i), Art. 7]**

Payment made by the assessee to an Austrian company by way of fees for technical services was not taxable in India as per Art. 7 of the old DTAA of 1065 as applicable to the relevant assessment year 2002-03, in view of the fact that no portion of the activities were performed by the Austrian enterprise in India, provisions of section 195 were not applicable to the payment made by the assessee to the said enterprise and as such fees for technical services is not hit by the provisions of section 40(a)(ia). (A.Y. 2001-02)

*VA Tech Wabag Ltd. v. ACIT (2010) 133 TTJ 121 / 44 DTR 1 / 234 CTR 139 / 327 ITR 305 / 194 Taxman 358 (Chennai)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Purchase of software DTAA – India-Singapore [Art. 12]**

A computer software when put in to a media and sold becomes goods and, therefore, amount paid by the assessee to a Singapore company towards purchase of software cannot be treated as royalty taxable in India under Art. 12 of DTAA between India and Singapore and assessee is not liable to deduct tax at source under section 195.

*Kansai Nerolac Paints Ltd. v. Addl. DIT (2010) 134 TTJ 342 / 43 DTR 385 (Mum.)(URO)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Not chargeable – Samsung (Kar) not followed**

Section 195(1) - TDS obligation does not arise if the payment is not chargeable to tax. Samsung Electronics Co. Ltd. (2010) 320 ITR 209 (Kar) not followed. (A.Y. 2002-03)

*ITO v Prasad Production Ltd. (2010) 3 ITR 58 / 125 ITD 263 / 129 TTJ 641 / 37 DTR 418 (SB)(Chennai)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Assessee in default – Limitation – Certificate [S. 201]**

An order under section 201, ought to be passed within four years, hence on the basis of showcause notice issued in October, 2002, assessee could not be treated in default for the period prior to 31st March, 1998.

Assessee on the basis of a no objection certificate under section 195(2) obtained in respect of a particular payment could not contend that it entertained a bonafide belief that it was not obliged to obtain such certificate under section 195(2) once again in respect of similar payment under another contract and hence could not be treated to be in default.

*Mangalore Refinery & Petro Chemicals Ltd. v. Dy. DIT (2008) 4 DTR 101 / 114 TTJ 632 / (2009) 113 ITD 85 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Fees for technical services**

Payment made by assessee to US company for technical services and start-up/turnkey responsibility service for setting up a power plant in India was fee for technical services and, therefore, the same was chargeable to tax in India, and the assessee was required to deduct tax as per the provisions of section 195. (A.Y. 1996-97 to 1998-99)

*Jindal Tractebel Power Co. Ltd. v. Dy. CIT (2007) 106 TTJ 1011 / 106 ITD 227 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Advance tax [S. 234B]**

Assessee company being a non-resident, all payment made to it were subject to TDS under section 195 and assessee was not liable for paying advance tax and, therefore, interest under section 234B was not chargeable. (A.Y. 2001-02)

*Van Oord Dredging & Marine Contractors BV v. Dy. DIT (2007) 106 TTJ 889 / 105 ITD 97 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Software – Royalty**

Payment for import of software does not amount to payment of royalty chargeable under section 9(1)(vi) and hence section 195 was not applicable to such payments. (A.Ys. 2000-01 to 2002-03)

*Sonata Software Ltd. v. ITO (2006) 6 SOT 700 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Royalty – Purchase of software [S. 40(a) (i)]**

Payment made for purchase of software amounts to 'royalty' within ambit of section 9(1)(vi) – Held, no – therefore, in such case assessee has no liability to deduct tax at source under section 195 and as such provisions of section 40(a)(i) cannot be applied – Held, yes. (A.Y. 2001-02)

Assessee company imported some software packages from various overseas vendors under separate agreements for the purpose of distributing those software to its customers. Therefore, what the assessee company acquired under the agreement was copy-righted article which partook the character of purchase and sale of goods and therefore, in terms of the CBDT Circular No. 23, dated 23-7-69, no tax was needed to be deducted under section 195.

*Sonata Information Technology Ltd. v. Addl. CIT (2006) 103 ITD 324 / (2007) 106 TTJ 797 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Annual surveillance fee**

Annual surveillance fee in respect of credit rating certificate falls within the category of ancillary services and accordingly, the assessee company was liable to deduct the tax under section 195. (A.Y. 1999-2000)

*Essar Oil Ltd. v. Jt. CIT (2006) 102 TTJ 270 / (2005) 4 SOT 161 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Credit rating fee – DTAA – India-Australia [Art. 12(2)]**

Credit rating fees paid to Australian company, who did not have permanent establishment in India, is not liable to be taxed as royalties under article 12(2)(b)(ii) of DTAA between India & Australia, and also since the payment of fees was not for any knowledge or information, but a payment for the professional services to decide credit rating of a company.

*Hindalco Ind. Ltd. v. ITO (2006) 152 Taxman 17 (Mag.)(Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Income chargeable to tax**

It cannot be said that assessee should first deduct tax at source without considering fact whether income in question is chargeable to tax in hands of recipient. (A.Ys. 1994-95 to 1997-98)

*NQA Quality Systems Registrar Ltd. v. Dy. CIT (2005) 2 SOT 249 / (2005) 92 TTJ 946 (Delhi)(Trib.)*



### **S. 195 : Deduction at source – Non-resident – Other sums – Reasoned order**

While acting under section 195(2), Assessing Officer is duty bound to make requisite enquiries, evaluate facts in context of provisions of law and then pass a reasoned order.

*Board of Control for Cricket in India v. DIT (Exemption) (2005) 96 ITD 263 / 97 TTJ 751 (Mum.)(Trib.)*

### **S. 195 : Deduction at source – Non-resident – Other sums – Interest services agreement**

Where assessee, engaged in the business of providing end-to-end communication facility to various companies, paid a sum to various foreign companies under an agreement called as 'interest services agreement' as per which such international service providers provided assessee with necessary bandwidth along with a package of services in return for a consideration, in view of order of Tribunal in case of *Wipro Ltd. v. ITO (2003) 133 Taxman 149 (Bang.) (Mag.)*, assessee was not required to deduct tax under section 195 in respect of payments made to various US-based companies. (A.Y. 1991-92)

*Software Technology Parks of India v. ITO (2005) 3 SOT 529 / 84 TTJ 31 (Bang.)(Trib.)*

### **S. 195 : Deduction at source – Non-resident – Other sums – Data base – Royalty**

Payment made by assessee-Indian company to U.S. company for providing access to information available in database maintained by it was not 'royalty' for purpose of deduction of tax at source under section 195. (A.Y. 2001-02 to 2003-04)

*Wipro Ltd. v. ITO (2005) 94 ITD 9 / 92 TTJ 716 / 1 SOT 663 (Bang.)(Trib.)*

### **S. 195 : Deduction at source – Non-resident – Other sums – Lead managers – Technical service – GDR issue [S. 9 (1) (vii)]**

Services rendered by lead managers in connection with GDR issue fell within definition of 'technical services' under section 9(1)(vii), read with Explanation 2 and, therefore, management commission and selling commission were income of Lead Managers deemed to accrue or arise in India and as such, assessee was liable to deduct tax under section 195(1); however underwriting commission would not fall under section 9(1)(vii) and, therefore, no tax was deductible therefrom under section 195. (A.Y. 1999-2000)

*Gujarat Ambuja Cements Ltd. v. Dy. CIT (2005) 2 SOT 784 (Mum.)(Trib.)*

### **S. 195 : Deduction at source – Non-resident – Other sums – Membership fee**

Where assessee was engaged in business of publishing newspapers, periodicals, etc., and was a member of International Press Institute (IPI) situated in Austria, section 195 was not applicable to remittance by assessee of foreign currency as its membership fees, donation and advertisement charges to IPI as those payments could not be regarded as income chargeable to tax under the Act. (A.Y. 1999-2000)

*ACIT v. Malayala Manorama Co. Ltd. (2005) 94 ITD 121/ 96 TTJ 442 / 1 SOT 739 (Cochin)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Technical information**

Where assessee deducted tax from fee paid to foreign companies for supply by these of technical information and also for sending technical skilled personnel to put into commercial use, information supplied, but did not deduct tax on expenses incurred by it on airfare, hotel expenses and local travelling for foreign technicians visiting India on ground that as none of them had permanent establishment in India, income was not taxable in India, and, therefore, section 195 was not applicable, expenses in question could not be separated from fees because same were incurred during earning of that fees only and, therefore, assessee's contention that section 195 was not applicable to these expenses had no merit. (A.Y. 1999-2000)

*Mahindra & Mahindra Ltd. v. Dy. CIT (2005) 1 SOT 896 (Mum.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Technical designs – DTAA – India-USA**

Where assessee-company entered into an agreement with a US company for development of water features at premises owned by it and under the agreement US company was not only to provide schematic ideas but also to provide technical designs, drawings and information, on basis of which assessee was to execute and install water features, since US company was required to deliver technical designs or plan for sole use by assessee-company in India, payments effected under agreement squarely fell within definition of 'fees for technical services' mentioned in article 12(4)(b) of DTAA, and consequently, assessee was liable to deduct tax under section 195.

*Gentex Merchants (P.) Ltd. v. Dy. DIT (International Taxation) (2005) 94 ITD 211 / 95 TTJ 956 (Kol.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Fees paid non-resident under the agreement for services rendered abroad [S. 9 (1)(vi)(vii)]**

Payment by assessee-company to non-resident telecom companies for down linking and transmitting of data to the assessee's customers who were located outside India cannot be considered as fees for technical services under section 9(1)(vii). Similarly, services offered by VSNL is not regarded as technical services. Hence, there is no question of applicability of s. 9(1)(vi). So long as the amount paid is not taxable under the Act, the clause in the DTAA cannot bring the charge. Hence, there was no liability to deduct tax under section 195. (A.Y. 1999-2000 to 2001-02).

*WIPRO LTD. v. ITO (2003) 80 TTJ 191 / (2004) 1 SOT 758 (Bang.)(Trib.)*

**S. 195 : Deduction at source – Non-resident – Other sums – Insurance premium to COFACE for guaranteeing the credit facility-exemption under Article 12.3 of India-France DTAA read with MFN clause in Protocol – DTAA with Hungary, Canada, Ireland [Article 12(3)(b)]**

The applicant, Indian Company entered into an agreement for purchase of aircraft from Dassault Aviation SA, French company. On 17.3.2009, COFACE agreed to partially guarantee the credit facility to be extended by the seller. The credit facility which was to be repaid in six-monthly installments, was paid by way of promissory notes. All the promissory notes were irrevocably and unconditionally assigned by Dassault to BNP Paribas, France. The questions before the authority are as under

- a) Whether the payment of interest to Dassault and/or to BNP is taxable in view of provision of Article 12(3)(b) of the India-France DTAA?
- b) In light of the facts and declaration by Dassault that it does not have PE in India, whether the applicant would require to deduct tax at source under section 195(2) of the Act on the payment of interest to Dassault, if yes at what rate?
- c) Based on the facts and also that the interest payment by applicant is not in connection with debt that is effectively connected to a PE of BNP in India, whether the applicant would be required to deduct tax at source under section 195(2) of the Act on the payment of interest to BNP, if yes at what rate?

Article 12.3(b) of India-France DTAA covers loan or credit extended or endorsed. COFACE has neither extended the loan or credit nor guaranteed the repayment of the loan by the applicant. It has only engaged itself to pay an agreed sum to Dassault in the event Dassault incurring a loss on not being able to recover the loan or credit.

A protocol was signed by India and France on 29.9.1992 by which the benefit of the Most Favoured Nation clause has been extended to this Convention and based on it, exemption is extended to insurance of the credit, in view of such exemption being granted by India in treaties with Hungary, Canada and Ireland. Thus the interest payable to Dassault is not taxable in India under Article 12.3(b) of India-France DTAA.

There is nothing in contrary to state that interest payable to BNP PARIBAS, France is not beneficially owned by it. Thus India-France treaty would continue to be applicable and interest payable to BNP PARIBAS would not be taxable in India in view of Article 12.3(b). Accordingly there is no obligation on the applicant to withhold tax on the interest paid to Dassault or to BNP PARIBAS on the transaction.

*Poonawalla Aviation (P) Ltd., In Re (2011) 64 DTR 385 / (2012) 246 CTR 22 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Data processing services**

Services involving routine data entry, application sorting, document handling and data capturing service not involving use of sophisticated technology. Services rendered non-managerial, technical or consultancy service. Fees based on invoice from non-resident. Not Fees for technical services. Not taxable in India.

*R. R. Donnelley India Outsource P. Ltd. (2011) 335 ITR 122 / 241 CTR 305 / 199 Taxman 255 / 56 DTR 1 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Capital gains – Transfer of shares – Wholly owned subsidiary – Without consideration [S. 45, 48, 92, 92C, 195]**

Transfer of shares to subsidiary company without consideration would not attract liability to tax under section 45 read with section 48. As the consideration is inapplicable on the date of transfer, as no income is chargeable to tax, provisions of section 195 or provisions of sections 92 to 92F would not apply.

*Good Year Tire & Rubber Co., In Re. (2011) 240 CTR 209 / 54 DTR 281 / 334 ITR 69 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Basic design service – DTAA – India-USA [Art. 12]**

Basic design services provided by US entity which includes preparation of plan, concept design, design development and other related consultancy services during construction phase are part of architectural services provided by the US entity. Payment received for such services are fees for included services as it involved development and transfer of technical plan and design. The agreement needs to be read having regard to the predominant features of the contract and by taking into account crux and substance of the contract.

Remittance made to the US entity for making payment to consultants directly to the taxpayer represents reimbursement of actual expenses and does not represent income chargeable to tax.

*HMS Real Estate (2010) 325 ITR 71 / 230 CTR 340 / 36 DTR 281 / 190 Taxman 22 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Withholding Tax – Business connection – Permanent Establishment – DTAA – India-USA [S. 9, Art 7]**

Consideration paid by Indian company to American company under assignment agreement was not capital gains but business profits; since American company did not have PE in India, consideration not chargeable to tax in India; payer not required to withhold tax.

*Laired Technologies India Pvt. Ltd. (2010) 323 ITR 598 / 188 Taxman 304 / 229 CTR 322 / 35 DTR 110 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Withholding tax – Reimbursement of costs – Royalties – Fees for technical services – DTAA – India-Swiss [S. 9, Art. 5 & 7]**

Payments made towards the share of the cost incurred in respect of research and development activities pursuant to cost contribution arrangement is payment towards fees for technical services or royalty. Such contribution is not liable to tax in the hands of the co-coordinating agencies.

*ABB Limited (2010) 322 ITR 564 / 230 CTR 327 / 189 Taxman 422 / 36 DTR 262 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Referral fee – Permanent establishment – Technical services – DTAA – India-UK [Art. 5, 7, 13]**

Referral fee received by the applicant, a UK company from India-based recruitment agency for referring potential Indian clients and candidates to the latter even if it is in the nature of consultancy services, cannot be considered to be ancillary and subsidiary to the enjoyment / application of the right or information referred in para.3(a) of Article 13 of the Indo-UK DTAA, nor would the activity of providing information would fall within the ambit of making available technical knowledge and experience of the service provider, in the absence of PE, the receipts in the nature of referral fee are not taxable even as business profits - Held referral fee not taxable in India.

*Real Resourcing Ltd. (2010) 322 ITR 558 / 230 CTR 120 / 36 DTR 132 / 190 Taxman 151 / (2010) 36 DTR 132 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Commission – Agent**

No tax is required to be deducted from commission paid to agent outside India if no services performed in India or no fixed place of business in India

*Spahi Projects Pvt. Ltd., (2009) 225 CTR 133 / 315 ITR 374 / 183 Taxman 92 / 26 DTR 303 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Revenue receipts are “any other sum” chargeable under the Act – Packed business software solutions**

Applicant is purchaser of packaged business software solutions from non-resident for supply to domestic clients - issue is whether there is obligation on applicant to withhold tax when making payment for software purchased from non-resident - AAR observed that determination of royalty or PE in India of non-resident is beyond scope of consideration; only issue is with regard to “liability to withhold taxes” - Held that revenue receipts of non-resident are “any other sum chargeable under the provisions of this Act” and hence there exists a legal obligation on the part of applicant to withhold taxes.

*Headstart Business Solutions Pvt. Ltd. (2006) 204 CTR 519 / 285 ITR 530 / 155 Taxman 639 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Indian subsidiary**

Amount paid by Indian subsidiary of US company to latter for services rendered in US to Indian subsidiary under an agreement, though not including any profit element as per agreement, will be subject to withholding tax under section 195.

*Timken India Ltd., In re (2005) 273 ITR 67 / 143 Taxman 257 / 193 CTR 610 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Liability of foreign Lender – DTAA – India-Singapore [Art. 11]**

Assessee has undertaken to pay tax liability of foreign lender to whom it is liable to pay interest and who has no permanent establishment in India, interest payable to such non-resident would constitute its income as per article 11 of DTAA with Singapore and assessee would be liable to deduct tax at source under section 195 from such interest.

*Jay Shree Tea & Industries Ltd., In re (2005) 274 ITR 97 / 145 Taxman 516 / 194 CTR 401 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Reimbursement of cost incurred by payee [S. 2(24)]**

To apply section 195, amount in question should be income of payee and not mere reimbursement of cost incurred by payee.

*Danfoss Industries (P) Ltd In re. (2004) 138 Taxman 280 / 268 ITR 1 / (2004) 189 CTR 489 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Fees for technical services – DTAA – India-Sweden [Art. 12]**

Section 195 (1) comes into play at the stage where a payer who is required to deduct the tax, either credits such income to the amount of the payee or makes payment thereof whether in cash or by way of cheque or draft or any other mode. The taxability of such amounts in the hands of the payee or occasioning of the taxable events, is alien for the purpose of section 195 (1). The deduction of tax need not necessarily be at the time of making actual remittance of the said sums but it has to be at the time of making mere provision thereof in the books of account of the applicant, since the requirement of actual payment of "royalties" is not a pre-requisite or pre condition for triggering the incidence of income tax, under the Indo – Sweden Tax treaty.

*Flakt (India) Ltd., In re (2004) 139 Taxman 238 / 267 ITR 727 / 189 CTR 359 (AAR)*

**S. 195 : Deduction at source – Non-resident – Other sums – Commission – Retainer fee**

For Commission/retainer fee payable to non-resident having no office or business operation in India, no tax is required to be deducted at source.

*Ind Telesoft P. Ltd., In re (2004) 267 ITR 725 / 140 Taxman 463 / 189 CTR 287 (AAR)*

**Section 195A : Income payable "net of tax"**

**S. 195A : Deduction at source – Income payable "Net of tax" – Foreign companies – Royalty – Fees for technical services – Grossing up – Agreement approved by Government [S. 10(6A)]**



Where technical collaboration agreement between assessee and foreign company was approved by Government of India under section 10(6A), tax paid by assessee on remittance to foreign collaborator was exempt from further tax and grossing up under section 195A to cover tax component of remittance does not arise. Section 195A, authorizes assessment of gross income only when collaboration agreement is not approved by Government of India under section 10(6A).

*CIT v. Tata Ceramics Ltd. (2011) 203 Taxman 43 (Ker.)(High Court)*

**S. 195A : Deduction at source – Net of tax – Grossing-up – Tax borne by employee**

Grossing up was done by Assessing Officer presumably on the basis that advance tax was paid by employer, where as it was paid by assessee himself and therefore, grossing up of tax liability was not valid.

*CIT v. Tadashi Murakami (2010) 40 DTR 191 (2009) 319 ITR 347 / (2010) 187 Taxman 158 (Delhi)(High Court)*

**S. 195A : Deduction at source – Income payable ‘Net of Tax’ – Grossing up**

Provisions of section 195A are applicable to all cases where person has undertaken to bear tax payable on income of another person under an agreement; section 195A provides for grossing up of income wholly if it forms part of total income.

*B. J. Services Co. Middle East Ltd. v. ACIT (OSD) (2005) 4 SOT 633 (Delhi)(Trib.)*

**S. 195A : Deduction at source – Net of tax – Agreement – Onus on department**

In order to invoke Sec 195A, onus is on the department to prove that there was an agreement or arrangement between the employer and employee that employee agreed to bear the tax payable by its employee. (A.Ys. 1988-89 to 1997-98)

*Mitsubishi Corpn. v. Dy. CIT (2003) 85 ITD 414 / (2004) 86 TTJ 139 (Delhi)(Trib.)*

**S. 195A : Deduction at source – Net of tax – Rate of tax – Grossing up**

Rate of tax for grossing up under section 195A will be the rate in force for financial year in which Income is payable. There is no provision for grossing up at the maximum marginal rate.

*Mitsubishi Corpn v. Dy. CIT (2003) 85 ITD 414 (Delhi)(Trib.)*

**Section 197 : Certificate for deduction at lower rate**

**S. 197 : Deduction at source – Certificate for lower rate – Writ – Alternative remedy [S. 264]**

Assessee made application under section 197 for lower deduction of tax at 0.27%. The Assessing Officer refused to grant the certificate. The Assessee has filed writ petition against the said order. The Court held that Revision under section 264 is efficacious statutory remedy against such order and Writ is not maintainable.

*Sime Darby Engineering SDN BHD Malaysia v. UOI (2011) TAX. L. R. 784 (Uttarakhand)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – AO's power**

If conditions for grant of certificate under section 197 are duly fulfilled, it would be impermissible for Assessing Officer to reject application merely on a whim and caprice.

*Larsen & Toubro Ltd. v. ACIT (2010) 190 Taxman 373 / 38 DTR 361 / 235 CTR 108 / 326 ITR 514 (Bom.)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – Revision by Commissioner [S. 264]**

Assessee applying for nil tax withholding certificate in respect of payments received for by firm services rendered to Indian branches. Orders passed under section 264 by Commissioner and Assessing Officer under section 197, specifying the rate of tax for other years. Assessing Officer without any valid reasons deviating from position adopted by Commissioner for earlier years. Court directed the assessing officer to issue the certificate. (A.Y. 2010-11)

*Mckinsey and Company Inc. v. UOI (2010) 324 ITR 367 / 45 DTR 81 / 193 Taxman 47 (Bom.)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – Cogent reasons**

Rejection of application under section 197 without assigning cogent reasons was not justified, especially when it had been accepted for earlier year. (A.Y. 2009-10)

*Infrastructure Development Authority v. CIT (2010) 321 ITR 278 / 40 DTR 94 / 232 CTR 353 (Patna)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – Remand**

As the question as to whether assessee-company was carrying on its business in India through a permanent establishment and whether any income was attributable to any such permanent establishment, had not been determined, matter was to be remitted back to Assessing Officer to pass a fresh order under section 197 on application filed by petitioner, depending on determination of aforesaid question. (A.Y. 2004-05)

*Schindler Aufzuge Und Fahrtrep v. DIT (2005) 149 Taxman 562 / (2006) 200 CTR 262 (Delhi)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – Financial year**

Where certificate issued to assessee was cancelled, since liability of assessee was not being finally determined at the time of withdrawal of certificate, assessee's challenge to withdrawal of certificate must fail. If ultimately it was found that the petitioner was liable to pay tax at a rate lower than the deduction to be made, the amount paid was to be refunded. Petition was dismissed. (A.Y. 2003-04)

*Ansaldo Engergia S.P.A. v. ITO (2003) 261 ITR 476 / 184 CTR 88 / 133 Taxman 795 (Mad.)(High Court)*

**S. 197 : Deduction at source – Certificate for lower rate – DTAA – India-Singapore**

**[S. 9(1)(vii), 195, 197, 201(1), 201 (1A), Art. 12]**

Assessing Officer having issued certificate under section 197 for no deduction of tax at source, Assessing Officer could not subsequently treat the assessee as an assessee in default under section 201.

*Bovis Lend Lease (India) (P) Ltd. v. ITO (2010) 127 TTJ 25 (UO) / 36 SOT 166 / (2009) 32 DTR 145 (Bang.)(Trib.)*

**S. 197 : Deduction at source – Certificate for lower rate – Period of validity**

Certificate for non-deduction or deduction of tax at lower rate would hold good and remain in force till close of financial year in which it is issued; there is no need to apply for a fresh certificate during currency of period up to close of financial year which is stipulated in certificate; amount specified in certificate in column 'sums expected to be credited paid in pursuance of contract...' is only a tentative figure and actual amount may be more or less than that. (A.Y. 1997-98)

*ITO (TDS) v. Dy. General Manager (Finance), Aditya Cement (2005) 96 ITD 398 / 98 TTJ 632 (Jodh.)(Trib.)*

**Section 199 : Credit for tax deducted**

**S. 199 : Deduction at source – Credit for tax deducted – Dividend – Partner**

Dividend income was taxed in the hands of partner, once dividend income is assessed in the hands of assessee partner, proviso to section 199 has no application and credit for TDS cannot be denied to the assessee partner. (A.Ys. 1972-73, 1976-77)

*Yezdi Hirji Malegam & Ors. v. CIT (2007) 213 CTR 161 / (2008) 299 ITR 329 (Bom.)(High Court)*

**S. 199 : Deduction at source – Credit for tax deducted – Dividend**

Where assessee-corporation had to divest part of dividend received by it on shares to State Government, which was not assessable, credit for TDS in respect of entire dividend was to be given to assessee, and not proportionately. (A.Y. 1978-79)

*CIT v. Punjab Financial Corpn. (2005) 277 ITR 469 / 198 CTR 691 / (2006) 152 Taxman 120 (P&H)(High Court)*

**S. 199 : Deduction at source – Credit for tax deducted – Refund [S. 203]**

Assessee, from whose payments taxes have been deducted at source and who is also in receipt of the appropriate certificates in accordance with the scheme of the Act, must get credit admissible under section 199 uninfluenced by any refund of TDS subsequently granted to the tax deductor. (A. Y. 2002-03).

*Lucent Technologies GRL LLC v. Dy. DIT (2011) 136 TTJ 291 / 45 SOT 311 / 51 DTR 8 (Mum.)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – Year of assessment**

Credit for TDS, under section 199 is to be allowed in year in which corresponding income is assessable to tax. (A. Y. 2006-07).

*ITO v. Shri Anupallavi Finance & Investments (2011) 131 ITD 205 / 138 TTJ 200 / 54 DTR 198 (Chennai)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – Certificate**

When a particular income is received by assessee after deduction of tax at source and TDS has been duly deposited with Government and assessee received requisite certificate to this effect, on production of certificate assessee becomes entitled to credit of TDS, even if assessee has not directly offered said income for tax as assessee considers that same is not liable to tax. (A.Y. 2003-04)

*Supreme Renewable Energy Ltd. v. ITO (2010) 124 ITD 394 / 128 TTJ 352 / 3 ITR 339 / (2009) 32 DTR 140 (Chennai)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – Income not assessable in relevant assessment year**

Credit for tax deducted at source, if income is not assessable in relevant assessment year, shall be allowed on pro-rata basis; i.e., in proportion in which such income is offered for taxation in different assessment years.

*Pradeep Kumar Dhir v. ACIT (2008) 303 ITR 45 (AT)(TM)(Mag.)(Chd.)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – No TDS certificate is furnished by employer [S. 205]**

When no TDS certificate is furnished by employer, tax could not be recovered from assessee in view of section 205 of the Income-tax Act.

*Capt. J. G. Joseph v. Jt. CIT (2008) 303 ITR 395 (AT) / (2005) 92 ITD 358 / 92 TTJ 1067 (Mum.)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – Project completion method**

Credit of TDS has to be given in the relevant previous year even though assessee follows project completion method of accounting. (A.Y. 1999-2000)

*Toyo Engg. India Ltd. v. Jt. CIT (2006) 100 TTJ 373 (2006) 5 SOT 616 (Mum.)(Trib.)*

**S. 199 : Deduction at source – Credit for tax deducted – Shares registered – Original owner**

Assessee having taken no steps for getting shares registered in its name, credit for TDS in the name of original owner cannot be allowed to assessee. (A.Y. 1997-98)

*Kameshwari Finance & Leasing (P) Ltd. v Dy. CIT (2006) 102 TTJ 461 / (2007) 109 ITD 173 (Delhi)(Trib.)*

### **S. 199 : Deduction at source – Credit for tax deducted – Offering of income**

Only when an assessee offers his income for assessment, he will be entitled to claim tax credit for tax deducted at source. (A.Y. 1997-98)

*Tej Ram v. ITO (2005) 93 ITD 1 / 92 TTJ 1185 (Chd.)(Trib.)*

### **S. 199 : Deduction at Source – Credit for tax deducted – Respective assessment year**

Tax deducted at source in a particular assessment year should be given respective assessment year itself, as there is no provision in Act to divide TDS into different proportionate pieces and to give credit on basis whether entire income has been offered for assessment or not; tax deducted at source must be attributed to concerned assessment year and not to particular item or source of income. (A.Ys. 1997-98 to 1999-2000)

*Pushpa Vijoy (Smt) v. ACIT (2005) 4 SOT 589 (Cochin)(Trib.)*

### **Section 201 : Consequences of failure to deducted at source**

#### **S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Fees for technical services – Matter Set-aside [S. 194J, 201(1A), 271C]**

As the matter is remitted to Assessing Officer for examination by a technical expert and to decide a fresh. Department is not entitled to levy interest under section 201(1A), or impose penalty for non-deduction of TDS on the facts and circumstances of the case for the reasons that there is no loss of revenue as tax has been paid by the recipient and the moot question involved in the case is yet to be decided.

*CIT v. Bharati Cellular Ltd. (2011) 330 ITR 239 / (2010) 44 DTR 190 / 193 Taxman 971 / 234 CTR 146 (SC)*

#### **S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Survey – Reasonable Cause**

Though tax was deducted at source, assessee deposited it only after a survey took place. It was to be considered whether assessee was entitled to plead reasonable cause for not depositing tax. The matter was remitted back to High Court to consider whether there was a reasonable cause.

*CIT v. Air Liquide India Golding (P) Ltd. (2008) 167 Taxman 221 (SC)*

#### **S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Limitation**

When there was no period of limitation fixed for exercising power under section 201 at relevant point of time, there is no question of invoking a reasonable period of limitation for applying the provision of section 201. (A. Y. 2002-03).

*Bhura Exports Ltd. v. ITO (2011) 202 Taxman 88 / (2012) 66 DTR 87 / 246 CTR 482 (Cal.)(High Court)*

### **S. 201 : Deduction at source – Failure to deduct or pay – Limitation**

No limitation period can be read into the scheme of section 201, prior to April 2010 i.e. prior to insertion of sub-section (3) to section 201. (A. Y. 2002-03)

*Bhura Exports v. ITO (2011) 202 Taxman 88 / (2012) 66 DTR 87 / 246 CTR 482 (Cal.)(High Court)*

*Editorial: This view is contrary to the Special Bench decision in Mahindra & Mahindra Ltd. v. Dy. CIT (2009) 122 TTJ 577 / 30 SOT 374 / 22 DTR 361 (SB)(Mum.)(Trib.) where the Tribunal applied the time-limit under section 147 to take action under section 201.*

### **S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Interest – Salary – Unequal Deduction of tax [S. 192(1)]**

Sub section (3) of section 192 permits the person obliged to deduct tax to make adjustments in case of excess or deficiency and also authorizes adjustment even in case of total failure to deduct tax during the financial year and therefore, assessee is not liable to pay interest under section 201(IA) for not deducting tax at source from salary payments in several months, when it has deducted tax in the remaining months. (A.Y. 2000-01)

*CIT v. Enron Expat Services Inc (2010) 45 DTR 154 / 194 Taxman 70 / 235 CTR 198 / 327 ITR 626 (Uttarakhand)(High Court)*

### **S. 201 : Deducting at source – Failure to deduct or pay – Assessee in default – Tax paid by deductee**

A person liable to deduct tax at source (Deductor) cannot be asked to pay tax where the deductee has already paid tax on the income received by him. Further, interest under section 201 (1A) of the Act could be charged to the deductor only upto the date on which the return of income declaring such income is filed by the deductee.

*CIT v. Trans Bharat Aviation (P) Ltd. (2009) 27 DTR 151 / 225 CTR 415 / 184 Taxman 118 / (2010) 320 ITR 671 / (Delhi)(High Court)*

### **S. 201 : Deducting at source – Failure to deduct or pay – Assessee in default – Short deduction of tax**

Short-deduction of tax from salary income, assessee company having received intimation from the expatriate employees as regards the payments received by them from the other employer only in the month of March, 2000, assessee company was not an assessee in default on account of short-deduction of TDS for the financial year 1998-99. Further, performance incentive being dependent on the performance of the employer company in a given financial year and the payment of such incentive being uncertain, assessee company is not an assessee in default on account of short-deduction of tax relatable to the payment of performance incentive and thus, interest under section 201(1A) is not chargeable. (A.Ys. 1999-2000 and 2001-02)

*CIT v. Marubeni India (P) Ltd. (2007) 212 CTR 415 / 294 ITR 157 / 165 Taxman 467 (Delhi)(High Court)*



**S. 201 : Deducting at source – Failure to deduct or pay – Assessee in default – Interest**

Period for which interest can be charged under section 201(1A) is 'from date on which such tax was deductible to the date on which such tax is actually paid' and, consequently, no interest beyond date of actual payment of tax can be charged. Section 201 does not state that tax should have been paid by assessee (deductor) alone, and tax may actually be paid by assessee or deductee. (A.Ys. 2000-01, 2001-02)

*CIT v. Adidas India Marketing P. Ltd. (2006) 157 Taxman 519 / 206 CTR 499 / 288 ITR 379 (Delhi)(High Court)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default**

Where petitioner-company, having regional office at Kolkata had at its Kolkata office deducted tax at source from salary paid to employees at Balasore where also it had undertaken projects and also tax at source from payments made to sub-contractors at Balasore and deposited same with Department at Kolkata, no action could be taken by officer at Balasore under section 201 for non-deduction of tax at source.

*Larsen & Toubro Ltd. v. ITO-cum-TRO (TDS) (2005) 278 ITR 369 / 149 Taxman 485 / 199 CTR 680 (Orissa)(High Court)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Interest – Mandatory**

In sub section (1A) of section 201 it is provided that an 'assessee in default'. if he fails to pay after deduction, is liable to pay simple interest at 15% per annum on the amount of tax deductible from the date on which it was deductible till the date it is actually paid. Sub section (1A) is without prejudice to the provisions of sub-section (1). Therefore in order to interpret sub-section (1A), aid of section 221 is not material. The use of the expression 'shall' in sub-section (1A) makes liability to pay interest in circumstances mentioned therein mandatory.

*Kanoi Industries (P.) Ltd. v. ACIT (2003) 261 ITR 488 / 182 CTR 427 (Cal.)(High Court)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Non resident assessee**

Where assessee-bank had claimed that interest income had been taxed in hands of assessee non-residents and for over 20 years, Department had made no effort to verify assessee's claim, Department could not treat assessee as assessee-in-default. (A.Ys. 1975-76, 1976-77)

*CitiBank, N.A. v. CIT (2003) 132 Taxman 902 / 259 ITR 377 / 179 CTR 121 (Bom.)(High Court)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Non-resident [S. 163, 195(2), 201(IA)]**

The Assessing Officer asked the assessee to deduct the tax and remit the amount. The assessee approached the Court of Appeal in London for permission to deduct the tax at source from the award amount. Pending the stay the Court directed the assessee to remit the amount to escrow account maintained in names of both the parties. The entire amount was remitted as by court order. Indian tax authorities sought to proceed holding assessee in default under section 201(1)(IA). The Tribunal held that assessee could not be held to be assessee in default in terms of section 201(1) and 201(IA), as it was a case of impossibility of performance, and hence assessee would be released from obligation to deduct tax at source. (A. Y. 2001-02) *National Aviation Co. of India v. Dy. CIT* (2011) 43 SOT 362 / 137 TTJ 662 / 53 DTR 379 (Mum.)(Trib.)

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Limitation – Tax duly paid by payee**

Maximum time limit for initiating and completing the proceedings under section 201(1) has to be at par with the time limit available for initiating and completing the assessment / reassessment of the payee; impugned order under section 201(1) passed by the Assessing Officer within the period of six years from the end of the relevant assessment year is not time barred.

Person responsible for deduction tax cannot be treated as an assessee in default in respect of tax under section 201(1) if the payee has paid the tax directly. (A. Y. 2004-05)

*ACIT v. Merchant Shipping Services (P) Ltd.* (2011) 49 DTR 97 / 135 TTJ 589 / 129 ITD 109 / 8 ITR 1 (Mum.)(Trib.)

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Burden of proof [S. 194I]**

When assessee provided permanent account numbers of payees and confirmation from some of them. It is the duty of the assessing officer to verify payment of tax by payees. Treating the assessee as in default placing burden of proof wholly on it was not reasonable. (A. Ys. 2007-08, 2008-09, 2009-10).

*Vodafone Essar Ltd. v. Dy. CIT* (2011) 9 ITR 182 / 135 TTJ 385 / 49 DTR 450 (Mum.)(Trib.)

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Limitation – Four years from the end of financial year – Interest**

The period of limitation for initiating proceedings is four years from the end of financial year in which notice issued. (A.Ys. 1998-99 to 2004-05)

*Block Development Officer v. ITO (TDS)* (2010) 5 ITR 426 (Delhi)(Trib.)

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Limitation – Time limit – Four years or six years from the relevant assessment years**

Maximum time limit for passing the order under section 201(1) or (1A), is the same as prescribed under section 149 i.e. Four years or six years from the end of the relevant assessment year, as the case may be, depending upon the amount of income in respect of which the person responsible is sought to be treated as assessee in default. (A.Y. 1999-2000)

*Dy. DIT v. Tata Iron & Steel Co. Ltd. (2010) 42 DTR 204 / 132 TTJ 566 / 6 ITR 463 / 42 DTR 204 (Mum.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Tax paid by payee on income – Interest leviable**

Payer not an assessee in default under section 201 if payee has paid tax on income but payer liable to interest under section 201(1A). (A.Y. 2004-05)

*ITO v. Intel Tech India Pvt. Ltd., ITA No. 71/Bang/2009, dt. 9-4-2009 BCAJ P. 48, Vol. 41A, Part 6, September 2009 (Bang.)(Trib.)*

**S 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Time limit for passing order**

- (i) Where no time limit is prescribed then in that case order must be passed within a reasonable time.
- (ii) Sub-section (1) of sec. 201(1) or (1A) do not prescribe any time limit for initiation of proceedings or passing of order under section 201(1) or (1A). Under the statute time limit is provided for issuing notice for completion of assessment under section 143(2) and similarly time for issuing notice of reassessment has been set in section 149. As such, time limit for completion of assessment and reassessment has been provided under section 153 and similarly time limit has been provided for rectification order and for revision order under section 154 and under section 263 respectively.

But, it was held that order passed under section 195 r.w.s. 201(1) or 201(A) of the Act cannot be held as barred by limitation "in law", if it not passed within four years from end of the relevant financial year.

- (iii) Adverting to the facts of the assessee, that –
  - (a) no assessment had been made in the hands of payee in respect of the sum received from the assessee in respect of the Euro issues,
  - (b) similarly, no proceedings had been taken against it till date for assessing such income, and
  - (c) finding that time limit for issuing notice under section 148 had come to an end for the A.Y. 1998-99

held that no lawful order can be passed against the assessee either under section 201(1) or 201(1A) of the Act. Hence, it was held that that the order passed in the case of the assessee was invalid.

*Mahindra and Mahindra Ltd. v. Dy. CIT (2009) 313 ITR (AT) 263 (Mum.)(Trib.)*

**S. 201 : Deducting tax at source – Failure to deduct or pay – Assessee in default – Interest – Waiver**

Interest under section 201(1A) not being penal in nature, the question of waiver of Interest on grounds such as reasonable cause, bonafide belief, unintentional, are irrelevant. (A. Y. 2000-01 to 2005-06)

*G. M. Punjab Roadways v. ITO (2009) 178 Taxman 112 (Mag.)(Chd.)(Trib.)*

**S. 201 : Deducting tax at source – Failure to deduct or pay – Assessee in default – Interest – Short payment**

Interest can be charged only up to the date of payment of tax by the payee. (A.Y. 2002-03)

*Meena S. Patil (Mrs) v. ACIT (2008) 113 TTJ 863 (Bang.)(Trib.)*

**S. 201 : Deducting tax at source – Failure to deduct or pay – Assessee in default – Interest**

Tax having been paid by payee, CIT (A) was justified in directing charging of interest from the date of deductibility of tax till payment by the payee. (A.Y. 2000-01, 2001-02)

*ITO v. Kanha Vanaspati Ltd. (2007) 108 TTJ 816 / 13 SOT 286 (Delhi)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Contractor – Certificate for Lower rate of tax [S. 194C, 197(1)]**

Assessee having not deducted tax under section 194C from the payments made to a company which related to the period before the certificate under section 197(1) issued to that company came into effect, Assessing Officer rightly treated the assessee as assessee-in-default under section 201(1) and charged interest under section 201(1A). (A.Y. 2001-02)

*Sri Santhalakshmi Mills (P) Ltd. v. ITO (2006) 99 TTJ 1134 (Chennai)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Limitation – Beyond four years**

Orders under sections 201(1) and 201(1A) passed beyond four years are held invalid on the ground of limitation. (A.Ys. 1988-89 to 1998-99)

*NHK – Japan Broadcasting Corporation v. Dy. CIT (2006) 101 TTJ 292 (Delhi)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Contractor [S. 194C]**

Assessee having deducted tax in accordance with the provisions of s. 194C, it could not be treated to be an assessee-in-default. (A.Y. 2001-02)

*Eli Lilly & Co., (India) (P) Ltd. v. Dy. CIT (2006) 99 TTJ 461 (Delhi')(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Consequence – Time limit**

The statute does not prescribe any time for passing any order under section 201. (A.Y. 1999-2000)

*Gujarat Ambuja Cements Ltd. v. Dy. CIT (2005) 2 SOT 784 (Mum.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Time limit – Four years from the end of financial year**

There is no infallible time-limit of four years from end of financial year in question in respect of every order under section 201(1) and 201(1A) made or to be made by Assessing Officer; no time-limit has been laid down for passing orders under section 201(1)/(1A). (A.Ys. 1986-87 to 1993-94)

*Thai Airways International Public Co. Ltd. v. ACIT (2005) 2 SOT 389 (Delhi)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Speaking order**

Assessing Officer is required to pass a speaking order for charging interest under section 201(1A). (A.Y. 1995-96)

*Mittal Bhai Investment (P.) Ltd. v. ITO (2005) 92 TTJ 286 (Jp.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Tax paid by recipient**

If tax has already been paid by recipient of income, Revenue would not be justified in again demanding tax from person who was responsible to deduct tax at source but failed to do so. (A.Ys. 1985-86 to 1998-99)

*Secretary, Municipal Committee, Sirsa v. ITO (2005) 97 TTJ 959 (Chd.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Before close of financial year Interest – Salary [S. 192]**

Where deficiency in deduction of tax at source under section 192 had been made good before close of financial year by person responsible for deducting tax at source, no interest was leviable for short deduction of tax at source. (A.Ys. 1998-99, 1999-2000)

*Secretary, Board of Secondary Education, Rajasthan v. ITO (2005) 93 TTJ 256 (Jp.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – No loss to exchequer – Penal interest**

Merely because in preceding month, tax was deducted on higher side as increments were given to employees and there was no uniformity for deducting tax in each month, penal interest could not be levied when there was no loss to exchequer. (A.Y. 1997-98)

*Grasim Industries Ltd. v. ITO (2005) 92 TTJ 944 / (2006) 153 Taxman 32 (Mag.)(Jodh.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – ESOP [S. 192]**

Assessee can be said to have acted bonafide in not deducting TDS on benefit in the form of shares issued under ESOP as none of the CBDT circular prior to the insertion

of clause (iiia) to sub-section (2) of section 17 had cast any liability to deduct tax on perquisite of such nature. (A.Y. 1997-98 to 1999-2000).

*Wipro Ltd. v. Dy. CIT (2003) 80 TTJ 106 (2004) 2 SOT 611 / 80 TTJ 106 (Bang.)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Non filing of form 15H – Penalty**

ITO has no authority and jurisdiction to pass order under section 201(1) & (1A) levying penalty for failure to file declaration of payees in Form 15H.

*ITO v. Sri Krishna Trading Co. (2003) SOT 436 (Cuttack)(Trib.)*

**S. 201 : Deduction at source – Failure to deduct or pay – Assessee in default – Non-resident – Recovery of TDS without service of notice of demand [S. 195]**

Recovery of tax deductible under section 195(1) can be made even without the service of a notice of demand. An order under section 201(1) is for the purpose of declaring an assessee as an “assessee in default”. Legally, in the case of sec. 201 read with section 195, it is the failure to deduct the tax which invites an assessee with the liability of an “assessee in default”. The liability under section 195 or under section 201 is at no time ambulatory, but is attracted immediately upon the happening of an event, viz., the failure to deduct tax. There is no further requirement of computation or assessment. Once the liability is incurred, no further demand is necessary to recover the tax. Under the circumstances, the tax can be recovered from the assessee. (A.Y. 1998-99).

*Raymond Ltd v. Dy. CIT (2003) 86 ITD 791 / 80 TTJ 120 (Mum.)(Trib.)*

**S. 201(1) : Deduction at source – Failure to deduct or pay – Assessee in default – Payee showing the sale consideration [S. 195, 201-IA]**

Once the payee acknowledges the receipt of the sale consideration, filed the return assessing the said amounts in his hands and paid tax, which is accepted by the department, the payer ceases to be assessee in default. (A. Y. 2004-05).

*CIT v. Intel Tech India (P) Ltd. (2011) 55 DTR 173 (Karn.)(High Court)*

**S. 201(1) : Deduction at source – Failure to deduct or pay – Assessee in default – Demand notice [S. 156, 195, 200, 201(IA)]**

Where section 201(1) is attracted there is no need of giving any demand notice under section 156, and if any such notice is given the same should be held to be redundant. Provisions of section 195, 200 and 201, when conjointly read, deal with a liability which at no point of time, depends on passing any order under the Act but is attracted immediately upon the happening of the default mentioned therein, i.e., failure to deduct tax or failure to credit the sum as required by section 200. As soon as such failure occurs liability arises automatically and there is no further requirement of computation or reassessment or service of notice of demand under section 156. (A. Y. 1995-96).



*Pilcom v. CIT (2011) 55 DTR 209 / 243 CTR 511 (Cal.)(High Court)*

**S. 201(1) : Deduction at source – Failure to deduct or pay – Consequences – Assessee in default – Time limit**

Time limit for treating deductor as in default, is maximum time limit available for initiating and completing reassessment. On the facts as the order passed by the Assessing Officer was within six years from the end of the relevant assessment year, the order passed by the Assessing Officer was not time barred. (A. Y. 2004-05).

*ACIT v. Merchant Shipping Services (2011) 8 ITR 1 / 135 TTJ 589 / 129 ITD 109 / 49 DTR 97 (Mum.)(Trib.)*

**S. 201(1A) : Deduction at source – Failure to deduct or pay – Interest – Assessee in default – Profits in lieu of salary – Tips collected and paid to employees [S. 2(24), 15, 17(1)(iv), 17(3), 192, 201, 273B]**

Payment of banquet and restaurant tips to the employees of assessee in its capacity as employer constitutes salary within the meaning of section 15 read with section 17(3). Assessee is considered as assessee in default for non-deduction of tax at source on account of banquet and restaurant tips collected by its employees and was liable to interest under section 201(1A). In the given circumstances no under section 201 could be charged, however levy of interest under section 201(1A), is neither treated as penalty nor has the said provision been included in section 273B to make reasonableness of the cause for the failure to deduct a relevant consideration, hence, there is no question of waiver of such interest on the basis that default was not intentional or any other basis. (A. Ys. 1999-2000 to 2005-06).

*CIT v. ITC Ltd. (2011) 59 DTR 312 / 243 CTR 114 / 199 Taxman 412 (Delhi)(High Court)*

**S. 201(1A) : Deduction at source – Failure to deduct or pay – Interest – Assessee in default**

Interest under section 201(1A), is leviable where recipient is a loss making company. In such case interest under section 201(1A) has to be calculated from date on which tax should have been deducted to date on which payee should have filed its return under provisions of Act. Circular No. 275/201/95-IT(B) dated 29-1-1997. (A. Y. 2002-03).

*CIT v. Chennai Metropolitan Water Supply & Sewerage Board (2011) 202 Taxman 454 / 64 DTR 395 / (2012) 246 CTR 402 (Mad.)(High Court)*

**S. 201(1A) : Deduction at source – Failure to deduct or pay – Assessee in default – Interest – Retrospective amendment [S. 194A]**

In view of the retrospective amendment of section 201 w.e.f. 1st June, 2002, by Finance Act, 2008, all persons who were liable to deduct tax at source under section 194A are liable to pay interest under section 201(1A) if they have not deducted the amount; assessee's liability ceases from the day the creditor pays the tax. (A. Ys. 2004-05 to 2006-07).

*Solar Automobiles India (P) Ltd. v. Dy. CIT (2011) 64 DTR 34 / (2012) 204 Taxman 667 (Karn.)(High Court)*

**S. 201(1A) : Deduction at source – Failure to deduct or pay – Assessee in default – Interest payment by cheque – Delay by collecting bank**

Assessee having deposited the TDS for June 2008, vide pay order dated 4th July 2008, in the authorized bank and the latter having collected the same on 7th July, 2008, which was the due date for payment of said TDS, it cannot be said that there was a default on the part of the assessee simply because the amount was credited to the Central Government by the bank on 8th July 2008, and therefore, interest under section 201(1A) was not chargeable. (A. Y. 2009-10).

*ICIC I Bank Ltd. v. Dy. CIT (2011) 58 DTR 284 / 141 TTJ 380 (Luck.)(Trib.)*

**S. 201(1A) : Deduction at source – Failure to deduct or pay – Assessee in default – Unequal deduction – Salary [S. 192]**

If there were bonafide reasons in deducting a lesser tax during the earlier months of financial year and is made good immediately after noticing such short fall, then section 192(3), would save the employer from liability of making payment of interest under section 201(1A); however, if the Assessing Officer finds that employer has taken the deduction casually during the earlier months of the financial year, by not deducting the tax at the end of the financial year, then interest can be charged. (A. Y. 2004-05).

*Madhya Gujarat Vij Co. Ltd. v. ITO (2011) 64 DTR 127 / 133 ITD 89 (Ahd.)(Trib.)*

**S. 201(1A) : Deducting tax at source – Failure to deduct or pay – Assessee in default – Interest**

Interest under section 201(1A) is chargeable from the date of deduction of tax at source to the date of completion of assessment of the payees or upto the actual date of payment of TDS, whichever is earlier, and where no assessment has been made, upto the date of processing of return under section 143(1)(a). (A.Ys. 1997-98 to 1999-2000)

*ITO v. Labh Construction & Industries Ltd. (2006) 103 TTJ 269 / 8 SOT 475 (Ahd.)(Trib.)*

**Section 205 : Bar against direct demand on assessee**

**S. 205 : Deduction at source – Bar against direct demand – Rent – Tenant [S. 194-I]**

Tenant has deducted tax from rent payable as per section 194-I, but has not paid it to Government, revenue is to be definitely restrained in terms of section 205 from enforcing any demand on landlord insofar as demand with reference to amount of tax which has been deducted by tenant to assessee is concerned; only course open to revenue is to recover amount from very person (tenant) who has deducted and not from landlord

*Anusuya Alva (Smt) v. Dy. CIT (2005) 278 ITR 206 / 147 Taxman 152 / 197 CTR 37 (Karn.)(High Court)*

**S. 205 : Deduction at source – Bar against direct demand – Rent – Certificate without date [S. 194-I]**

Credit for tax deducted at source must be given to the assessee, though the certificate furnished by the deductor has not shown the date of payment to Central Government.

(A.Y. 2004-05)

*Ahlwallia and Associates v. ITO (2010) 2 ITR 582 / (2009) 123 TTJ 972 / 26 DTR 109 (Ahd.)(Trib.)*

**S. 205 : Deduction at source – Bar against direct demand – Non issue of TDS certificate**

Tax at source had been deducted from assessee's salary but no TDS certificate was issued to assessee by employer despite repeated requests by assessee. In view of section 205, income-tax authorities, under no circumstances, could make assessee liable to make payment of any tax to extent to which such tax had been deducted at source by person paying salary to assessee.

*Capt. J.G. Joseph v. Jt. CIT (2005) 92 ITD 358 / 92 TTJ 1067 / (2008) 303 ITR 395 (AT)(Mum.)(Trib.)*

***BB. Collection at source***

**Section 206C : Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.**

**S. 206C : Collection at source – Trading – Alcoholic liquor – Forest produce – Scrap – Tax paid by buyer – Remand**

If in a given case assessee had not collected tax under section 206C from buyer, before proceeding against assessee, it is necessary to find out whether buyer has paid tax in accordance provisions of Act and only in event buyer has not paid tax then the authorities can proceed against assessee, who was under obligation to collect tax and remit to Government. Matter remanded. (A. Ys. 2004-05 and 2005-06).

*Sree Manjunatha Wines v. CIT (2011) 202 Taxman 620 (Karn.)(High Court)*

**S. 206C : Collection at source – Trading – Alcoholic liquor – Wholesaler – Subsequence – Sale**

The assessee a wholesaler in liquor purchased liquor from the distilleries and sold the liquor. The assessee being first buyer, on subsequent sale was not liable to collect tax at source under section 206C(6) of the Act.

*CIT v. Vira Singh & Co. (2007) 199 Taxation 112 (P&H)(High Court)*

**S. 206C : Collection at source – Trading – Forest produce – Meaning of**

In order to attract provisions of section 206C, one has to examine whether items sold are forest produce or not. (A.Ys. 1988-89 to 1993-94)

*A.P. Forest Dev. Corpn. Ltd. v. ACIT (2005) 272 ITR 245 / 144 Taxman 51 / 195 CTR 81 (AP)(High Court)*

**S. 206C : Collection at source – Trading – Alcoholic liquor – Excise duty**

Since purchase price of liquor is inclusive of excise duty, tax will be recoverable under section 206C on actual price paid by buyer inclusive of tax and excise duty.

*Vinod Rathore v. Union of India (2005) 278 ITR 122 / 146 Taxman 32 / 195 CTR 210 (MP)(High Court)*

**S. 206C : Collection at source – Trading – Forest produce – Timber – Teak poles, teak billets – Jungle wood**

Teak poles, teak billets, jungle wood etc., in question were timber, and respondent deducted the tax at 5 %.

*P.S. Sajan v. Range Officer (2004) 135 Taxman 452 / 186 CTR 309 (Ker.)(High Court)*

**S. 206C : Collection at source – Trading – Alcoholic liquor – Excise duty – Sale price**

For purpose of section 206C, sale price of liquor excludes excise duty.

*Harvansh & Sons v. UOI (2003) Tax LR 716 (MP)(High Court)*

**S. 206C : Collection at source – Trading – Alcoholic liquor – Retailer – Distilleries – Country liquor**

Where distilleries supplied country liquor to retailers holding a valid licence at a price fixed by State, and retailer had to sell at a price fixed by the Government, section 206C had no application.

*Sir Shadi Lai Enterprises Ltd. v. Union of India (2003) 262 ITR 166 / 130 Taxman 563 / 185 CTR 626 (All.)(High Court)*

**S. 206C : Collection at source – Trading – Forest produce – Tax paid by purchaser**

As per the provision of section 206C(6), the liability in respect of Tax collection at source is fastened upon the person engaged in collection of forest produce and selling them whether or not he collects the Tax collection at source as per provision of section 206C(1) and therefore, the contention that the assessee should not be made liable to pay the Tax collection at source on the impugned sales, since the purchasers have already paid the tax thereon was not sustainable. Accordingly the assessee was made liable to pay the demand. (A. Y. 2005-06).

*Girijan Co-op. Corporation Ltd. v. ACIT (2011) 64 DTR 433 / 47 SOT 323 / (2012) 143 TTJ 256 (Visakha)(Trib.)*

**C. Advance payment of tax**

## **Section 209 : Computation of Advance tax**

### **S. 209 : Advance tax – Computation – Deduction at source – Interest Salary [S. 234B]**

Once the entire income received was by way of salary and same being liable to TDS, assessee is not required to pay Advance Tax as per provisions of section 209 (1) (d), and therefore levy of Interest under section 234B is not justified on account of shortfall or due to non-deduction.

*Dy. CIT v. Western Geco International Ltd. (2008) 172 Taxman 41 (Mag.)(Delhi)(Trib.)*

## **Section 210 : Payment of advance tax by the assessee of his own accord or in pursuance of order of Assessing officer**

### **S. 210 : Advance tax – Payment order of Assessing Officer – Interest – Estimate – Form No. 28A**

The assessee was liable to pay advance tax only on the basis of the income estimated by it in Form No. 28A filed under sub section (5) of section 210. (A.Y. 2004-05)

*Punjab Tractors Ltd. v. ACIT (2004) 137 Taxman 211 / 267 ITR 229 / 188 CTR 275 (P&H)(High Court)*

## **Section 214 : Interest payable by Government (upto Assessment year 1988-89)**

### **S. 214 : Advance tax – Interest payable by Government – Refund – Wrongly withheld by the Government**

The Supreme Court recognized the principle that a person should be taxed in accordance with law. Any amount wrongly withheld by the Government is required to be compensated. The assessee was granted interest on refund after substantial lapse of time; the Supreme Court held that the assessee is entitled to claim interest on such delayed payment of interest. (A.Ys. 1977-78 to 1982-83)

*Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 / 150 Taxman 591 / 200 CTR 505 / 193 Taxation 163 (SC) / 2 SCC 508*

### **S. 214 : Advance tax – Interest payable by Government – Actual date on which refund of advance tax was ordered**

The High Court following the decision of Apex Court in the case of *Modi Industries Ltd. v. CIT [(1995) 216 ITR 759 (SC)]* held that assessee was entitled to interest under section 214 of the Act from the prescribed date to the actual date on which refund of advance tax was ordered. (A.Y. 1977-78)

*CIT v. P. K. Industries (2008) 6 DTR 37 / 316 ITR 155 / 172 Taxman 79 (P&H)(High Court)*

**S. 214 : Advance tax – Interest payable by Government – Refund – Order u/s. 250**

The assessee was entitled to receive interest under section 214 of the Income-tax Act, 1961 on the amount of refund due as per order under section 250 of the Act also.

*Ultramarine and Pigments Ltd. v. O.P. Srivastava, CIT (2006) 192 Taxation 719 (Bom.)(High Court)*

**S. 214 : Advance tax – Interest payable by Government – Refund – Regular assessment**

**[S. 244(1A)]**

Under section 214 the assessee would be entitled to interest on advance tax from 1st April of the relevant assessment year to the date of regular assessment under section 143 or 144 and not on the revised assessment order pursuant to appellate order. If any further amount was found refundable as a result of any appellate or other order, then interest under section 244(1A) is payable on amount of refund. But interest is not payable under both the sections 214 and 244(1A) simultaneously. (A.Ys. 1972-73 to 1976-77)

*CIT v. Udhoji Shri Krishandas (2004) 136 Taxman 465 / 268 ITR 244 / 189 CTR 26 (FB)(MP)(High Court)*

**S. 214 : Advance tax – Interest payable by Government – Refund – Regular assessment**

**[S. 243]**

Where no refund was made out after first regular assessment framed under section 143/144 and it was only in consequences of the decisions of the AAC and subsequent order giving effect assessment order that refund became due and the same was paid in very next month after the month in which final assessment order was made, no interest on refund was payable. (A.Y. 1973-74)

*Punjab State Warehousing Corporation v. CIT (2003) 264 ITR 597 / (2004) 138 Taxman 48 / 186 CTR 247 (P&H)(High Court)*

**S. 214 : Advance tax – Interest payable by Government – Refund – Deduction at source**

Interest under section 214 is not payable to assessee on the amount of excess "tax deducted at source" by the assessee and paid to the Department.

*CIT v. Aravali Construction Co. (P.) Ltd. (2003) 133 Taxman 53 / 185 CTR 464 (Raj.)(High Court)*

**S. 214 : Advance tax – Interest payable by Government – Refund [S. 143(3), 251]**

Assessee entitled to receive interest under section 214(1A), on difference between advance tax and assessed income under section 251 from the first day of assessment



year till date of passing regular assessment under section 143(3). (A.Ys. 1986-87 to 1988-89)

*Dy. CIT v. Simbholi Sugar Mills Ltd. (2010) 6 ITR 247 (Delhi)(Trib.)*

### **Section 215 : Interest payable by assessee (upto Assessment year 1988-89)**

#### **S. 215 : Advance tax – Interest payable by assessee – Rule 40 – Waiver of interest**

The mere fact that the delay in completion of the assessment was occasioned because of Search conducted by the Revenue at the premises of the assessee would not per se show that the assessee was responsible for delaying the proceedings which must be indicated in the order refusing to reduce or waive the interest charged. (A.Y. 1972-73)

*Brig. Anant Singh v. CIT (2003) 261 ITR 335 / 182 CTR 377 / 133 Taxman 799 (Delhi)(High Court)*

#### **S. 215 : Advance tax – Interest payable by assessee – Regular assessment**

Interest under section 215 can be levied on finally determined reassessed Income, but only up to the date of regular assessment. (A.Ys. 1987-88 to 1988-89)

*ACIT v. Jayendra Kr. Doshi (2003) 79 TTJ 482 / 132 Taxman 222 (Mag.)(Ahd.)(Trib.)*

#### **S. 215 : Advance tax – Interest payable by assessee – Reassessment**

No Interest under section 215/217 can be levied in re-assessment, when in original assessment under section 143(1) no Interest was charged.

*ITO v. Mukesh Kumar (2003) SOT 499 (Amritsar)(Trib.)*

### **Section 216 : Interest payable by assessee in case of under-estimate, etc. (upto Assessment year 1988-89)**

#### **S. 216 : Advance tax – Interest payable by assessee in case of under estimate – Not deliberate**

Since there was no finding given by the Assessing Officer that the assessee deliberately under estimated its income as also the advance tax payable thereon in the first two instalments, no finding about any default committed by the assessee in this regard had been given by Assessing Officer and hence, no interest under section 216 was leviable. (A.Y. 1977-78)

*CIT v. Mahindra & Mahindra Ltd. (2006) 284 ITR 679 / 200 CTR 28 / 150 Taxman 451 (Bom.) (High Court)*

#### **S. 216 : Advance tax – Interest payable by assessee in case of under estimate – Explanation**

Since the assessee had underestimated advance tax payable by it and had not given any satisfactory explanation for the same, the Tribunal was right in holding that interest under section 216 was rightly charged. (A.Y. 1982-83)

*Baroda Electric Meters Ltd. v. CIT (2003) 128 Taxman 72 / 184 CTR 134 (Guj.)(High Court)*

**Section 217 : Interest payable by assessee when no estimate made (upto Assessment year 1988-89)**

**S. 217 : Advance tax – Interest payable by assessee when no estimate made – Failure to file**

The requirement of submitting a statement under the provisions of section 209 of the Act is for the purpose of paying advance tax and furnishing the basis to the assessing authority on which the advance tax is paid. Thus where there is a failure on the part of assessee to file estimate of advance tax, the assessee was liable to pay interest under section 217 of the Act.

*CIT v. Aesthetic Builders (2006) Tax L. R. 50 / 283 ITR 283 / 203 CTR 434 (Bom.)(High Court)*

**S. 217 : Advance tax – Interest payable by assessee when no estimate made – Original assessment**

Interest under section 216 and 217 has to be charged only up to the date of original assessment and not up to the date of reassessment since regular assessment is the first order of assessment passed under section 143 or 144. (A.Ys. 1986-87 & 87-88)

*Jaipur Bottling Co. v. ACIT, I.T.A. Nos. 473 & 472/JP/2000, dated 25th January, 2006 - (Tax World – June 2006 – Vol XXXV – P. 157) (Jp.)(Trib.)*

***D. Collection and recovery***

**Section 220 : When tax payable and when assessee deemed in default**

**S. 220 : Collection and recovery – Assessee deemed in default – Waiver Interest – Genuine hardship**

The provision for levy of interest for non-payment of tax within time has to be interpreted by the principle of purposive construction and the same principle has to be applied for the purpose of determining whether any hardship has been caused or not. The ingredients of genuine hardship must be determined by the dictionary meaning thereof and the legal conspectus attending thereto. The Supreme Court then send the matter back to the Commissioner for fresh consideration in view of the findings of the Supreme Court.

As the department had failed to consider genuine hardship and the circumstances which were beyond the control of the Assessee which CIT having failed the consider, the matter was remitted to CIT to reconsider relating wavier of interest as per provision of section 220(2A) afresh. (A.Ys. 1990-91 to 1995-96)

*B. M. Malani v. CIT (2008) 306 ITR 196 / 219 CTR 313 / 174 Taxman 363 / 13 DTR 186 (SC)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Recovery of tax – Settlement Commission [S. 245D]**

Recovery of tax is not automatically barred by law on filing an application for settlement of a case. Recovery proceedings will continue until Commission allows application for settlement.

*CIT v. Damani Brothers (2003) 259 ITR 475 / 173 Taxation 40 / 179 CTR 362 (SC)*

### **S. 220 : Collection and recovery – Assessee deemed in default – When tax payable – Interest**

For the assessment year 1994-95, the assessment was completed under section 143(3) on 28-2-1997. The original assessment order was set aside by Tribunal and fresh assessment order was passed on 24-12-2006. Assessing Officer held that the Interest under section 220(2) to commence after thirty days from the date of service of the original demand notice dated 28-2-1997. Tribunal held that interest would be applicable on the demand notice pursuant to fresh assessment order i.e. 24-12-2006 and question of demanding interest for the period prior to 24-2-2006 does not arise. Order of Tribunal was confirmed by High Court.

*CIT v. Chika Oversea Pvt. Ltd. (2012) 247 CTR 134 / 66 DTR 398 (Bom.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Interest – Notice of demand – If original demand not fully paid, interest payable even for period when demand was not in existence [S. 156]**

The Assessing Officer passed an assessment order and raised a demand of ` 21.24 lakhs of which ` 10.50 lakhs was paid by the assessee and the balance of ` 10.94 was stayed. On 20.5.1998, the CIT(A) allowed the appeal of the assessee and no demand remained payable by the assessee. The Assessing Officer refunded the taxes paid by the assessee. Subsequently, the Tribunal reversed the order of the CIT(A). The Assessing Officer gave effect to the Tribunal's order on 30.7.2004 and charged interest under section 220(2) for the entire period. The assessee filed a Writ Petition claiming that it was not liable to pay interest for the period from 20.5.1998 to 30.7.2004 (6y 3M) when the CIT(A)'s order was operative and no sum was due from it. HELD by the High Court:

Section 220(2) provides for levy of interest if the demand is not paid within 30 days of the service of notice under section 156. A distinction has to be drawn between a case where the assessee pays up the entire demand raised pursuant to the assessment order within the period specified in section 156, wins in appeal and the amount is refunded and subsequently loses in further appeal and has to repay the taxes. In such a case, as the assessee is not in default in the first instance, no interest under section 220(2) is payable for the period when the favourable verdict of the appellate authority was operative. However, if the assessee has not paid up the entire tax within the specified period, it is liable to pay interest under section 220(2) from that date on the unpaid amount and any variation in the amount of the demand favourable to the assessee which was directed by any of the appellate authorities in the interregnum has no effect on the liability of the assessee to pay the interest. On facts, as the assessee had paid only a part of the demand at the first stage, it was

held liable to pay interest for the entire period including the period when the favourable CIT(A)'s order was operative though no interest was payable on the section 244A interest. (A.Y. 1995-96)

*Girnar Investment Ltd. v. CIT (2012) 340 ITR 529 / 204 Taxman 569 / 67 DTR 329 / 247 CTR 509 (Delhi)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – When tax payable – Waiver of interest**

Petition for waiver of interest under section 220(2) can be filed even after interest has been paid by the assessee. (A.Y. 1993-94).

*Jewellers Om prakash v. CCIT (2011) 202 Taxman 71 (Delhi)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – When tax payable – Stay – Appeal pending before Commissioner (Appeals) – Writ [Art. 226, 227, Constitution of India]**

Writ petition filed by the assessee seeking stay of recovery of demand during the pendency of appeal before the Commissioner (Appeal) is not maintainable, however, Commissioner (Appeal) is directed to decide the appeal expeditiously, preferably within a period of three months. (A. Y. 2007-08).

*Countrywide Buildrstate (P) Ltd. v. UOI (2011) 63 DTR 343 / (2012) 247 CTR 623 (Raj.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – When tax payable – Stay – Money stashed abroad – Russia-England – Certificate recovery officer [S. 222]**

Assessee declared money received from a Russian company, kept abroad in a bank account in London in a clandestine manner, only in the revised returns and not in their original returns and there being no bar or restriction on transfer of that money or remittance thereof from Russia to India, assessee is not entitled to protection or benefit of section 220(7) and stay of recovery. (A. Ys. 2004-05, 2005-06 and 2006-07).

*Ravina & Associates (P) Ltd. & Anr. v. CIT (2011) 245 CTR 45 (Delhi)(High Court)*

*Ravina Khurana v. CIT (2011) 245 CTR 45 (Delhi)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Demand notice**

For invoking the provisions section 220 of the Act and recovering tax from the assessee the assessing officer is required to serve upon the assessee the demand notice under section 156 of the Act, specifying the amount of tax to be recovered, as well as mentioning the place and name of the person from whom the tax is to be recovered. In absence of service of demand notice on the assessee the very foundation of the recovery proceedings is vitiated and recovery proceedings initiated against the assessee were quashed.

*Saraswati Moulding Works v. CIT & Ors. (2010) 46 DTR 25 / 236 CTR 121 (Guj.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest – Set aside**

Where the assessment order is set aside in appeal and the same is subsequently affirmed in appeal, interest under section 220(2) of the Act cannot be levied till the demand is raised afresh.

*CIT v. Samurai Software (P) Ltd. (2010) 48 DTR 167 (Raj.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Stay – Garnishee Notices**

Garnishee notice even after stay of demand by CIT was not valid, further CIT was not justified in rejecting stay for one year without giving proper reasons and ignoring the principle laid by the Court. (A.Ys. 2008-09 to 2010-11)

*Paramount Heath Services (TPA) (P) Ltd. v. ACIT (2010) 37 DTR 377 / 237 CTR 153 / 202 CTR 288 (Bom.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed to be in default – Stay**

Where the Assessing Officer passed the assessment order completely ignoring the registration garneted by the DIT (E) under section 12 AA of the Income-tax Act, 1961, granted the order so passed by the Assessing Officer was held to be without jurisdiction and the High Court also directed the Assessing Officer to stay recovery proceedings in pursuance of the said assessment order till the disposal of the appeal by the appellate authority before whom the assessee's appeal was pending. (A.Y. 2007-08)

*Ahmedabad Urban Development Authority v. Dy. DIT (E) (2010) 40 DTR 76 / 233 CTR 407 / 335 ITR 575 (Guj.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Penal Interest – Waiver**

Discretion to waive interest should be exercised judicially. The order should give reasons and rejection of application for waiver, without giving reasons, is held to be not valid.

*Mani v. CIT (2010) 320 ITR 472 / 231 CTR 453 / 190 Taxman 417 / 38 DTR 233 (Mad.)(High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest – Waiver**

Where the CIT has not addressed to the conditions contemplated in section 220(2A) of the Act, while refusing the assessee's request for waiver of interest under section 220 of the Act, matter was remanded back to the CIT for considering the request of the assessee afresh.

*Polyfex (India) P. Ltd. v. DGIT (Inv.) & Anr. (2009) 30 DTR 54 (Karn.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Attachment by TRO**

The powers of Tax Recovery Officer under rule 11 of Second Schedule relate only to properties ostensibly and apparently owned by assessee. If the property is ostensibly and apparently in name of third party, then if income tax authorities claim that said property is actually possessed or owned by assessee in default, they shall have to establish their claim in civil court.

*Darshana Aggarwal (Smt) v. TRO (2008) 173 Taxman 90 / 215 CTR 419 / 302 ITR 82 / 1 DTR 454 (HP)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Stay**

The stay application filed under section 220(6) should be disposed of by passing a speaking order giving consideration to relevant factors, as required by law and as mentioned in Instruction No. 1914 issued by CBDT. (A.Y. 2005-06)

*Subhash Chander Sehgal v. Dy. CIT (2008) 173 Taxman 412 (Delhi)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Stay – Attachment of bank account**

Where assessee files an application for stay when the appeal is pending before the CIT(A), unless the Assessing Officer rejects the application, he cannot direct for attaching the assessee's bank account. (A.Y. 2004-05)

*Dr. T. K. Shanmugasundaram v. CIT and others (2008) 303 ITR 387 (Mad.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Interest**

Where fresh assessment order is passed in pursuance of the order of the Tribunal, interest under section 220(2) of the Act should be charged / computed only from the due date of demand notice issued for the fresh assessment order and not from the original assessment order.

*CIT v. Rajesh Kumar Dinesh Kumar (2008) 15 DTR 182 / 221 CTR 78 / 325 ITR 346 (Raj.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Waiver of interest**

For the purpose of granting waiver of interest chargeable under section 220 of the Act, all the three conditions prescribed in clauses (i), (ii) and (iii) of section 220(2A) may not be cumulatively satisfied by the assessee. (A.Ys. 1992-1993 to 1995-96)

*M.V. Amar Shetty v. CCIT (2008) 12 DTR 98 / 219 CTR 141 / 309 ITR 93 / 177 Taxman 186 (Karn.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Waiver – Interest**



Continued losses with genuine hardship and unavoidable circumstances and the assessee burdened with PF, ESI liabilities leading to default. CIT misdirected to a wrong conclusion. Matter set aside.

*Common Wealth Trust (India) Ltd. v. Dy. CIT & Ors (2006) 200 CTR 45 / 280 ITR 70 / 149 Taxman 648 (Ker.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Waiver – Penalty**

Waiver or reduction of interest and/or Penalty – When assurance is given by the Department to consider waiver of interest and penalty to the assessee, the order denying the said relief is bad-in-fact which deserve to be set aside for reconsideration. (A.Y. 1996-97)

*Sangram Singh Mehta & Ors. v. ITO & Ors. (2006) 200 CTR 93 / 196 ITR 483 / 150 Taxman 641 (Raj.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Stay – Prima facie**

Stay – Non consideration of prima facie case of the Appellant resulted in passing the order without application of mind and must be set aside. Interim stay granted against recovery of penalty till the disposal of appeal pending before the Tribunal. (A.Y. 2003-04)

*Fountainhead Communications Ltd. v. Addl. CIT (2006) 205 CTR 415 / 285 CTR 36 / 164 Taxman 426 (Mad.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Transfer of property – Schedule II, Rule 11**

Dispute as to whether the defaulter had transferred the property prior to issuance of notice under rule 2 of Second Schedule of the Act or thereafter can be conveniently adjudicated in a suit under rule 11(6) of the Second Schedule. Such disputed facts cannot be decided in a writ proceeding under Article 226 of the Constitution.

*Siby Jose v. T.R.O., J.C. Augustine & Ors. (2006) 195 Taxation 46 (Ker.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Notice of demand**

For reducing period of 30 days for payment of demand specified in notice of demand, as per proviso to section 220(1), grounds as to previous history of petitioner in disputing its liability and delay in payment of tax and assessee's financial position are wholly irrelevant. Where from facts, action of Assessing Officer in reducing period of 30 days to one day for payment of amount specified in notice of demand appeared to have been taken in haste and most arbitrary manner just to pre-empt and foreclose option available to petitioner to approach higher authority for grant of interim relief, such action was unsustainable. (A.Y. 2002-03)

*Farrukhabad Gramin Bank v. Addl. CIT (2005) 277 ITR 320 / 197 CTR 366 / 148 Taxman 38 (All.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Notice of demand**

Where reasons which persuaded Assessing Officer to reduce period of 30 days to 7 days for payment of demand under section 156 as per proviso to section 220(1), were that it had been gathered that petitioner-company was winding up its manufacturing activity in country and, secondly, that it had not paid any advance tax on due dates, and it was clear that those reasons were factually incorrect, in facts and circumstances of case, reasons to believe that grant of full period of 30 days for payment of tax to assessee would be detrimental to revenue, were mere assumptions rather than a reality as reflected from records produced before Court and thus, order-cum-direction issued by Assessing Officer reducing period for payment of tax demand raised upon assessee under section 156, was to be quashed. (A.Y. 2002-03)

*Sony India Ltd. v. CIT (2005) 276 ITR 278 / 146 Taxman 98 / 196 CTR 81 (Delhi)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Waiver of Interest**

Under section 220(2A), discretion conferred upon Commissioner to waive or reduce interest is circumscribed by three conditions and where material on record showed that assessee had not fulfilled two of those conditions, rejection of prayer for waiver of interest payable was justified. (A.Y. 1985-86)

*Raasi Cement Ltd. v. CIT (No. 3) (2005) 275 ITR 585 / 156 Taxman 74 (AP)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Waiver of Interest – Speaking order**

Whenever an application is filed under section 220(2A) seeking waiver of interest, same should be decided by authority by speaking order. (A.Y. 1980-81)

*Auro Food Ltd. v. CIT (2005) 276 ITR 658 / 198 CTR 585 / 153 Taxman 216 (Mad.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Stay of Recovery – Appeal pending**

Stay of recovery of proceedings where assessee's application for interim relief under section 220(6) was pending before Assessing Officer and appellate authority, was to be granted. (A.Y. 2000-01)

*Satish Chand Jain v. ITO (2005) 142 Taxman 500 (All.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Certificate proceedings – Official liquidator [S. 222]**

Where funds lying with Official Liquidator were meant for purpose of repayment to innocent depositors, same could not be made available to Income-tax Authorities

towards any liability of appellants in question by exercising powers conferred under section 530 of Companies Act.

*S. Rajalakshmi v. Official Liquidator (2005) 272 ITR 257 / 145 Taxman 89 (Mad.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Certificate proceedings**

#### **[S. 222]**

It is not obligatory to apply Second and Third Schedules of the Income-tax Act and the Rules while investigating a claim or objection to attachment and sale during course of execution of recovery certificate under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

*Keshrimal Jivji Shah v. Bank of Maharashtra (2005) 273 ITR 451 / 193 CTR 229 (Bom.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – SICA [S. 226]**

Where assessee has been declared a sick company and an appeal under SICA is pending before appellate authority, it is obligatory for Assistant Commissioner to apply for necessary consent from appellate authority before taking any execution proceedings against sick company for realizing amount due to department

*Punalur Paper Mills Ltd. v. ACIT (2005) 274 ITR 475 / 145 Taxman 35 / 194 CTR 204 (Ker.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Appellate order**

When a fresh demand notice is issued in pursuance of a fresh assessment order as a result of the appellate order, interest is payable only when amount is not paid as per the fresh demand in view of the clear language used in section 220(2). (A.Y. 1984-85)

*B. Indra Rani (Smt) v. CIT (2004) 134 Taxman 428 / 271 ITR 570 / 186 CTR 220 (Karn.)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Interest waiver**

#### **Co-operation in proceedings**

If the assessee co-operates, shows the genuine hardship, circumstances beyond control then only the petition for waiver of interest will be satisfied and entertained. (A.Y. 1985-86)

*New United Construction Co v. CIT (2004) 140 Taxman 478 / 270 ITR 224 / 189 CTR 411 (Jharkhand)(High Court)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Interest – Company Court – Overriding effect**

Power of the Company Court under section 446(2)(h) of Companies Act, 1956 overrides any other law, more particularly section 220(2). (A.Ys. 1972-73 to 1997-98)

*Catholic Centre v. Pilot Pen Co. (India) (P.) Ltd. (2003) 259 ITR 252 / 131 Taxman 437 / 186 CTR 562 (Mad.) (High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest – Order giving effect**

Where as a result of consequential order giving effect to appellate order, amount of tax payable became nil and thus notice of demand issued earlier became a dead letter, no interest under section 220(2) was leviable. (A.Y. 1976-77)

*Seshasayee Paper & Boards Ltd. v. CIT (2003) 128 Taxman 539 / 260 ITR 419 / 181 CTR 457 (Mad.) (High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Stay of Recovery – Discretion**

Discretion under section 220(6) has to be exercised judicially.

*Shivangi Steels (P.) Ltd. v. ACIT (2003) 133 Taxman 403 / 192 CTR 573 / 266 ITR 62 / 192 CTR 573 (All.) (High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – Stay of Recovery – Appeal**

Mere filing of appeal does not constitute stay of demand.

*Gulam Momen v. ACIT (2003) 263 ITR 69 / 132 Taxman 826 / 185 CTR 78 (Cal.) (High Court)*

**S. 220 : Collection and recovery – Assessee deemed in default – When tax payable – Stay – Appellate Tribunal [S. 254(1)]**

Assessing Officer and CIT(A) has disallowed the expenses under section 40(a)(ia), mainly relying on the decision of Karnataka High Court which now stands overruled by the Supreme Court and liquidity being not favourable, the entire demand is stayed till the disposal of assessee's appeal by the Tribunal or for a period of six months which ever is earlier.

(A. Y. 2007-08).

*Softcell Technologies Ltd. v. Addl. CIT (2011) 49 DTR 129 / 135 TTJ 249 (Mum.) (Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Pendency of Appeal before Tribunal – Stay [S. 222]**

Quantum appeal was pending before the Tribunal. Dy. CIT refused stay further without giving any reason. Department was directed to refrain from coercive proceedings for recovery till the disposal of the application made before Additional CIT. (A.Y. 2004-05)

*ONGC Videsh Ltd. v. Dy. CIT (2010) 37 DTR 158 / 123 ITD 179 / 12 DTR 187 (Delhi)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest – Intervening Period**

The Assessing Officer is not justified in charging interest for the intervening period when the CIT(A) allowed the appeal in favour of the assessee till the Tribunal allowed the appeal in favour of the revenue. (A. Y. 1995-96 & 1996-97)

*ACIT v. The Southern Paradise and Stud Developers Pvt. Ltd., ITA Nos. 2135 & 2136/Mum/2008, dt. 27-5-2009. BCAJ P. 30, Vol. 41-A, Part 5, August 2009. (Mum.)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest – Undisclosed income [158BC, 158BD, 140A(3)]**

Assessment having been made of the first time under section 143(3) r/w s. 158BC/158BD, even though the assessee did not pay tax on returned undisclosed income under section 140A(3), there being no notice of demand issued under section 156, no interest could be charged under section 220(2).

*Pedda Sankara Rao & Ors. v. Dy. CIT (2006) 99 TTJ 424 (Visakha)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest**

For charging interest under section 220(2), notice under section 156 is pre-condition and second condition is that there must be default of this notice.

*ACIT v. Mohan Lal Swarnkar (Dr) (2005) 95 TTJ 969 (Jp.)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest**

For charging interest under section 220(2), assessee must be found to be in default; further, an assessee will not be an assessee-in-default if assessment has been set aside by the appellate authority for being made *de novo*; hence, no interest under section 220(2) can be charged till the period when fresh assessment is made, fresh demand notice is issued, and statutory time-period for making the payment has expired. (A.Ys. 1978-79 to 1980-81)

*Addl. CIT v. Hindalco Industries Ltd. (2005) 4 SOT 757 (Mum.)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Interest**

Where assessee has not paid interest under sections 217 and 234B which is included in demand notice issued under section 156, assessee is liable to pay interest under section 220(2) even on interest levied under sections 217 and 234B.

*Shriram Chits & Investments (P.) Ltd. v. ACIT (2005) 2 SOT 838 (Chennai)(Trib.)*

**S. 220 : Collection and recovery – Assessee deemed in default – Stay**

Where assessee sought stay of demand alleging that it had been created by department to take revenge, keeping in view overall situation an early hearing was to be granted in appeals in relation to which those stay applications had been filed and

till such time, it was ordered that department shall not take any coercive steps for recovery in question. (A.Ys. 1994-95 to 1999-2000)

*S. R. Giri (Dr) v. ITO (2005) 94 TTJ 764 / 149 Taxman 33 (Mag.)(Jodh.)(Trib.)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Interest**

Where order of Commissioner (Appeals) in favour of assessee is reversed by Tribunal, in terms of Circular No. 334, dated 3-4-1982, interest payable under section 220(2) would be computed only with reference to due date reckoned from original demand notice as well as with reference to tax finally determined in view of order of Tribunal; and intervening period when order of Commissioner (Appeals) in favour of assessee creating no demand against assessee was under operation, was not liable to be excluded. (A.Y. 1990-91 to 1993-94)

*Agya Ram v. ITO (2005) 4 SOT 398 (Delhi)(Trib.)*

### **S. 220 : Collection and recovery – Assessee deemed in default – Recording of reasons – Reduce the period of 30 days**

To avail benefit of proviso to sec 220(1), to reduce the full period of 30 days to pay the taxes, Assessing Officer has to record the reason, and in absence of any finding benefit of proviso is not available.

*Western Agencies (Madras Ltd.) v. Jt. CIT (2003) 86 ITD 462 / 81 TTJ 284 (Mad.)(Trib.)*

## **Section 221 : Penalty payable when tax in default**

### **S. 221 : Collection and recovery – Penalty – Tax in default – Assessee in default**

No penalty can be imposed before disposing of stay applications of assessee in default.

*CIT v. DLF Universal Ltd. (2008) 297 ITR 342 / 199 CTR 432 / 148 Taxman 617 (Delhi)(High Court)*

### **S. 221 : Collection and recovery – Penalty – Tax in default – Assessee in default**

Non-payment of tax in time. Time for payment extended in assessment year 1996-97. No sufficient cause for non-payment in A. Y. 1997-98. Penalty could be levied for 1997-98 but not for 1996-97.

*CIT v. Hydro Flex Equipment Ltd. and Anr. (2006) 282 ITR 418 / 200 CTR 551 / 150 Taxman 264 (Bom.)(High Court)*

### **S. 221 : Collection and recovery – Penalty – Tax in default – Appeal pending before Tribunal – Assessee deemed to be in default [S. 156]**

Assessing Officer levied the penalty after considering the explanation of assessee. The CIT(A) held that the no proper opportunity was given before levying the penalty. In cross objection assessee contended that the Assessing Officer should have waited to



levy the penalty till the order of Tribunal. The tribunal rejected the contention holding that there was no provision in the Act that penalty under section 221(1) can be imposed only after order is passed by the Tribunal. (A. Ys. 2008-09 & 2009-10)

*ACIT v. Catmoss Retail Ltd. (2011) 63 DTR 1 / 133 ITD 397 / 142 TTJ 273 (Delhi)(Trib.)*

#### **S. 221 : Collection and recovery – Penalty – Tax in default – Assessee in default**

Held, that penalty under section 221 is not attracted in respect of delay in payment of Interest, when assessee had made payment of entire taxes raised as per demand created under section 143 (1).

*ACIT v. Avdesh Kumar Parvinder S. Kochar (2008) 173 Taxman 91 (Mag.)(Delhi)(Trib.)*

#### **S. 221 : Collection and recovery – Penalty – Tax in default – Assessee in default**

As there was no authority of law as on 13-11-1996 to compel assessee to pay self-assessment tax under section 140A(1) before filing of return under section 158BC, no penalty could be imposed on assessee for failure to pay self-assessment tax where return was filed on 13-11-1996. (A.Ys. 1986-87 to 1996-97)

*ACIT v. S. Dharamchand Jain (2005) 96 ITD 47 / 96 TTJ 1033 (Chennai)(Trib.)*

#### **S. 221 : Collection and recovery – Penalty – Tax in default – Payment of tax and interest**

Assessee cannot be treated as assessee-in-default, when assessee has already paid much more than the finally assessed tax plus interest. Also there is no justification to levy penalty under section 221(1). (A.Y. 1992-93)

*Barmer Travels v. ITO (2003) 79 TTJ 989 / 132 Taxman 176 (Mag.)(Jodh.)(Trib.)*

#### **S. 221 : Collection and recovery – Penalty – Tax in default – Non-payment of Interest**

Penalty under section 221(1) can be imposed only for failure to pay tax and not for failure to pay interest under sections 234B & 234C. (A.Y. 2004-05)

*Great Value Foods v. ACIT (2009) 122 TTJ 682 / 178 Taxman 114 / 16 DTR 88 (Amritsar)(Trib.)*

#### **Section 222 : Collection and recovery - Assessee in default - Certificate to tax Recovery Officer**

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Writ – Sale of immoveable property – Beneficiaries of Trust – Rule 11, Schedule II [Art. 226]**

Petition filed by two beneficiaries of a trust challenging the attachment and proclamation of sale of properties belonging to the trust for recovery of tax dues of their deceased father without arraying the third beneficiary either as petitioner or as a party respondent cannot be entertained since the impugned order has become final and conclusive as regards 1/3rd undivided interest of the third beneficiary and no inconsistent order can be passed by the Court in the same lis. Petitioners have an alternative remedy of appeal against the impugned order passed by the respondent authorities rejecting their objections under Rule 11 of Schedule II and therefore, petition filed by two petitioners (beneficiaries of a trust) challenging the attachment and proclamation of sale of properties belonging to the trust for recovery of tax due is dismissed in limine. (A. Y. 1992-93).

*Sagar Sharma & Anr. v. Addl. CIT (2011) 336 ITR 611 / 52 DTR 89 / 239 CTR 169 / 198 Taxman 209 (Bom.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – TRO did not mention that unearned increase, the said amount should be paid by the revenue- Rule 11 – Recovery**

Where the sale effected by TRO did not mention that unearned increase on the property was to be paid by the buyer of the property, then such unearned increase should be paid by the Department and not by the buyer of the property.

*CIT v. Monoflex India Pvt. Ltd. (2011) 202 Taxman 163 / 244 CTR 251 / 61 DTR 377 (Delhi)(High Court)*

**Editorial:** SLP of revenue is dismissed ; CIT v Monoflex India (P.) Ltd. (2017) 245 Taxman 339 (SC)

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Civil Court Jurisdiction – Certificate**

The property of the assessee in default was attached by the revenue authorities for recovery of its tax dues. During the pendency of attachment, a civil suit was instituted by a third party in a Civil Court claiming the ownership of the attached property. In these facts, the Court held that the attachment of the assessee's property for recovery of tax dues was valid and should be continued so that the interest of the revenue is protected. However, the court directed the revenue authorities not to take further steps to sell / dispose of the property until the rights of the assessee and third party with respect to the ownership of the property is decided by the Civil Court.

*Maxworth Home Ltd. v. U. Yamunakumari & Anr. (2010) 36 DTR 72 / 234 CTR 233 (Mad.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Attachment – Sch. 11 Rule 53**

Assessee purchasing land in the name of his minor son in the year 1974 and the land and house thereon standing in the name of assessee's son at least from Asst. Year 1979-80, such land and house could not be attached and sold for recovery of tax arrears of assessee for block periods 1986-87 to 1995-96 by recourse to explanation to section 222(1).

*Samson Johan v. Tax Recovery Officer & Ors (2008) 3 DTR 124 / 215 CTR 131 / 300 ITR 188 / 169 Taxman 227 (Bom.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Certificate proceedings – Sale of attached property – Power of CBDT [S. 119]**

There is no power under section 119 to issue notification no 9995 dated 1-3-1996 by which the period of three years mentioned in rule 69B of Schedule 11 has been extended to four years. The rule 6B Schedule 11 lays down the period of three years alone for sale of attached immoveable property.

*S.V. Gopla Rao v. CIT (2004) 270 ITR 433 / 192 CTR 530 / 144 Taxman 395 (MP)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Time limit for sale of attached property – Rule 68B of Second Schedule – Prospective**

Rule 68B which has been added with effect from 1-6-1992 is prospective. It can not apply to those cases where the order under section 245-1 or Chapter XX became conclusive before 1-6-1992 which is the date on which rule 6B came into effect. Rule 68B applies only in cases where a conclusive order was passed under section 245-1 or Chapter XX after 1-6-1992.

(A.Y. 1942-43 to 1977-78)

*Sanjay Khetan v. CIT (2004) 139 Taxman 190 / 266 ITR 453 / 188 CTR 361 (All.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Protective attachment**

When certain property belonging jointly to the assessee and his sister, was protectively attached for recovery of tax arrears of assessee. The Court held that the protective attachment of property cannot be questioned. However, the rent can not be recovered unless the source of investment is established.

*R. Rajbabu v. TRO (2004) 141 Taxman 252 / 270 ITR 256 / 188 CTR 182 (Mad.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Second Schedule – Garnishee [S. 226(3)]**

TRO can not attach the debt due to the garnishee from its debtor without following the provisions contemplated in section 222 read with Second Schedule.

*Shaw Wallace and Co. Ltd. v. UOI (2004) 267 ITR 248 / 189 CTR 1 (Cal.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Insolvent – Official assignee – Recovery of penalty**

Where defaulters were adjudicated as insolvents prior to date of imposition of penalty, claim for recovery of penalty was rightly rejected by official assignees.

*UOI v. Shantilal Jewellers (2004) 136 Taxman 147 / 271 ITR 140 / 192 CTR 655 (Bom.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Notice of attachment – Second schedule-rule 48 – Writ Jurisdiction**

Points regarding the issue of notice under Rule 48 of Second Schedule must be raised before concerned authority by filing appropriate representation and not in writ petition.

*M.M.N.D. Kanakasabai v. TRO (2004) 136 Taxman 157 / 186 CTR 627 (Ker.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Occupation after attachment**

Defaulter's property was attached on 3-2-1995, and it was occupied by the petitioner society on 25-3-1999, that is after the date of attachment, hence the petitioner can not challenge the attachment and sale of shop. Under Rule 11(6) to the Second Schedule, the remedy is by way of a suit.

*Dadar Manish Market Co-operative Society Ltd. v. UOI (2004) 265 ITR 97 / 136 Taxman 332 (Bom.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Recovery of tax – Certificate Proceedings**

Tax Recovery Officer is entitled to go into the questions of title as a part of enquiry but is not entitled to decide questions of law as to the title to the property, which is sought to be attached by him.

*Videocon International Ltd. v. Indus Ind. Bank Ltd. (2003) 131 Taxman 460 / 185 CTR 575 (Bom.)(High Court)*

**S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Assessee in default – Recovery of tax – Certificate Proceedings – Liability of purchaser**

Where auction purchaser is not put on notice by Department in respect of any obligation/liability in respect of property purchased, purchaser cannot be asked to pay such liability.

*Monoflex India (P.) Ltd. v. CIT (2003) 133 Taxman 1 / 185 CTR 513 / 264 ITR 731 (Delhi)(High Court)*

**Section 226 : Other modes of recovery**

**S. 226 : Collection and recovery – Modes of recovery – Sale by auction of property of defaulter – Protection for bona fide purchaser [Sch. II, Rule 60, 61]**

The land belongs to partners was sold in the auction towards recovery of tax, interest and penalty. The firm and partners challenged the auction on hyper technical grounds. The writ petition was dismissed by the High Court. On appeal to the Supreme Court, the Court held that a bona fide purchaser of the property of the appellants in the valid auction could not be disturbed as according to an established principle of law, a third party auction purchaser continues to be protected, notwithstanding that the underlying decree might be set aside. The appellants ought to have availed the statutory remedy for ventilating their grievances under Rules 60 and 61 of Schedule II. (A.Y. 1985-86)

*Janatha Textiles & Others v. TRO (2008) 301 ITR 337 / 206 Taxation 150 / 216 CTR 371 / 170 Taxman 221 / 7 DTR 133 (SC)*

**S. 226 : Collection and recovery – Modes of recovery – Provisions of Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 shall prevail over Income Tax Act**

The language of section 13 of the Special Courts Act is similar to section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985. The Apex Court, following the ratio laid down in *Solidaire India Ltd. v. Fair Growth Financial Services Ltd.* (2001) 3 SCC 71 held that the provisions of the Special Court Act, wherever they are applicable, shall prevail over the provisions of the Income-tax Act, 1961.

*Tax Recovery Officer (TRO) v. Custodian Appointed under Special Court Act, 1992 (2007) 163 Taxman 441 / 293 ITR 369 / 211 CTR 369 (SC)*

**S. 226 : Collection and recovery – Modes of recovery – Garnishee proceedings – From third person whom amount is due to Assessee – Scope of Provisions**

Sub section 226(3) of the Income Tax Act, 1961 is applicable only when money is due to the assessee-in-default from any person. Clause (vi) of sub-section (3) of section 226 in categorical terms creates a legal fiction to the effect that when an amount is not payable, such person is not required to pay any such amount or part thereof. When assessee is in default, the units held by the defaulter assessee, UTI cannot sell units at redemption value without consent of assessee. If UTI sells, it is also liable to assessee for dividend.

*Administrator Unit Trust of India v. B. M. Malani & Ors. (2007) 212 CTR 425 / 164 Taxman*

*463 / (2008) 296 ITR 31 / 202 Taxation 160 (SC)*

**S. 226 : Collection and recovery – Modes of recovery – Attachment of property – HUF – Liability of sons tax arrears of father**

Father having joined as a partner of a firm in his individual capacity and not representing the joint family, only his 1/5th share in the joint family property alone was liable to be proceeded against for realization of tax arrears and not the four-fifth share of the sons, members undivided family, for recovery of the income tax arrears of father. (A. Ys. 1971-72 & 1972-73).

*ITO v. Tippala China Appa Rao & Ors. (2011) 331 ITR 248 / 240 CTR 298 / 54 DTR 260 (AP)(High Court)*

**S. 226 : Collection and recovery – Mode of recovery – Attachment – Garnishee Proceedings – Fixed Deposits – Fixed deposit is not the property of the assessee [S. 222, 281B]**

Order of attachment of the fixed deposits of the petitioners passed under section 281B and encashment of the fixed deposits after the expiry of the period of bank guarantee, was illegal and unjustified.

*Gopal Das Khandelwal & Ors. v. Union of India & Ors. (2010) 45 DTR 47 / 235 CTR 253 / 192 Taxman 54 / (2011) 222 Taxation 139 (All.)(High Court)*

**S. 226 : Collection and recovery – Mode of recovery – Notice of Demand [S. 156, 220, 222]**

Before invoking the provisions of section 220 a demand notice under section 156 is required to be served upon the assessee specifying the amount as well as the place and the person to whom such amount is to be paid and therefore, in the absence of service of a demand notice under section 156 on the assessee, the very foundation of the recovery proceedings stands vitiated and the same cannot be sustained. Impugned notice under section 226(3) served upon the assessee's bankers and recovery proceedings initiated against the assessee are quashed and set aside. (A.Y. 1985-86)

*Saraswati Moulding Works v. CIT & Ors. (2010) 46 DTR 25 / 236 CTR 121 (Guj.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – High pitched assessment – Seventy four times**

The income of the assessee assessed at seventy four times the income returned by the assessee was held to be unreasonably high pitched. Accordingly, the garnishee proceedings initiated by the revenue authorities for recovery of taxes on the basis of the said assessment order was liable to be stayed.

*Soul v. CIT (2008) 14 DTR 267 / 220 CTR 211 / 323 ITR 305 / 173 Taxman 468 (Delhi)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Stay in earlier years – ITAT and High Court**

Demand was raised on account of certain disallowances. The same was disputed before the Appellate Authority. Similar issues for the earlier years were pending before the Appellate Tribunal. The Appellate Tribunal granted stay for the earlier



years. However, for the impugned year the CIT rejected the stay application. The assessee filed writ petition and Hon'ble Court held that looking to stay orders passed in earlier years and in view of facts that appeals of earlier years were fixed for hearing before Tribunal, till disposal of appeal pending with the Commissioner (Appeals), demand of tax and interest should be stayed. (A.Y. 2002-03)

*Coca Cola India Pvt. Ltd. v. Addl. CIT (2006) 150 Taxman 359 / 199 CTR 138 / 285 CTR 419 (Bom.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Garnishee proceedings – UTI monthly income plan**

Attachment of units held by assessee in a UTI Monthly Income Plan could not be said to be justified. (A.Ys. 1988-89 to 1990-91 to 1995-96)

*B.M. Malani v. Income Tax Department (2005) 270 ITR 515 / 142 Taxman 330 (AP)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Objection – TRO**

Once objection under clause (vi) of section 226(3) is raised, TRO is not supposed to recover tax until the claim is found to be false.

*Shaw Wallace & Co. Ltd. v. Union of India (2003) 262 ITR 528 / 181 CTR 290 / 129 Taxman 639 (Cal.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Garnishee order – Denial by Debater**

When the garnishee does not admit or denies that he owes debt to assessee, TRO cannot sit in judgment over denial and come to his own conclusion.

*Shaw Wallace & Co. Ltd. v. Union of India (2003) 262 ITR 528 / 181 CTR 290 / 129 Taxman 639 (Cal.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Employees of defaulting company – Garnishee proceedings**

Employees of defaulter-company cannot challenge garnishee proceedings for recovery of amount due to company, unless they establish their claim for priority over income-tax dues.

*Shibu S. Nair v. CIT (2003) 260 ITR 586 / 182 CTR 120 / 134 Taxman 547 (Ker.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Statement on oath – Garnishee**

Person objecting to garnishee notice under section 226(3) must furnish statement on oath under section 226(3)(vi) and in absence of such statement, garnishee order would continue to operate.

*Relay Shipping Agency Ltd. v. TRO (2003) 260 ITR 631 / 189 CTR 128 / 135 Taxman 389 (Bom.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Hearing is not mandatory**

It is not mandatory to issue notice upon the assessee and hear him before passing an order under section 226(3).

*Golam Momen v. ACIT (2003) 263 ITR 69 / 132 Taxman 826 / 185 CTR 78 (Cal.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Nomination rights of defaulter of stock exchange – Deposits**

Sale proceeds of the nomination rights of defaulter-member of Stock Exchange cannot be attached but TRO is entitled to attach balance surplus amount lying with BSE out of sale proceeds of nomination rights of the defaulter-member; further deposits made by the defaulting member under various heads such as security deposit, margin money, securities deposited by members and others are attachable.

*Stock Exchange, Mumbai v. V.S. Kandalgaonkar (2003) 261 ITR 577 / 129 Taxman 237 / 181 CTR 30 (Bom.)(High Court)*

**S. 226 : Collection and recovery – Modes of recovery – Sick company – BIFR**

Where assessee-sick-company had given an undertaking which adequately protected interest of revenue, revenues grievance that BIFR had held demand created by Department as contingent liability without affording an opportunity of being heard, was merely academic.

*DGIT v. A.A.I.F.R. (2003) 130 Taxman 251 / 185 CTR 663 (Delhi)(High Court)*

**S. 226 : Collection and recovery – Mode of Recovery – No-coercive recovery pending appeal ready**

The assessee filed appeals before the Commissioner of Income-tax (Appeals) against the assessment orders for Asst. Years 2004-05 to 2008-09. Though the appeals were ripe for hearing and the appellate authority had already posted for hearing on different dates, the Assessing Officer without considering the pendency of the appeals issued demand notice and took steps for attachment of the assessee's bank account. The assessee filed a Writ petition to challenge the recovery action which was opposed by the department on the ground that the assessee had repeatedly sought adjournment of the hearing of appeals, the Court allowed the petition and directed to dispose the appeals at the earliest possible after affording an opportunity of hearing to the assessee, at any date within a period of one month from the date of receipt of a copy of the Court's judgment and till such time orders are passed by the appellate authority, recovery steps shall be kept in abeyance. If there is no co-operation by assessee the appellate authority is at liberty to finalise the appeals without according any further opportunity of hearing.

*Hotel Leela Venture v. Ag. ITO WPNo. 32732 of 2010 dated 1-11-2010 (Ker.)(High Court)*

Source : [www.itatonline.org](http://www.itatonline.org).

**S. 226 : Collection and recovery – Mode of Recovery – Ability is no bar for grant of stay**

The assessee filed a stay application before the Tribunal. The department opposed the stay by relying on the Supreme Court in *ACCE v. Dunlop India (1985) 154 ITR 172 (SC)*, and contended that as paucity of funds had not been sufficiently demonstrated, for this reason alone stay should not be granted. The Tribunal rejected the contention of Departmental representative following *B. N. Co. v. Jt. CIT (2001) 71 TTJ 153 (Kol.)* and further held that Supreme Court's observation in *Dunlop* cannot be interpreted to mean that the Tribunal is denuded of the powers to grant stay until case for financial stringency is successfully made out by the applicant. Accordingly stay was granted till the disposal of appeal.

*KEC International Ltd. v. Addl. CIT (2010) 41 SOT 43 (Mum.)(Trib.)*

**S. 226 : Collection and recovery – Mode of recovery – Stay application**

Once application for stay of demand was made and listed for hearing, Assessing Officer was not justified in recovering amount under section 226(3).

*KLM Royal Dutch Airlines v. Dy. CIT (2005) 1 SOT 659 (Delhi)(Trib.)*

**S. 226(3) : Collection and recovery – Modes of recovery – Stay – Garnishee proceedings – Application pending – Reasoned order**

Though application has been filed by petitioner under section 220(6), no order was passed and therefore notice under section 226(3) can not be acted upon. Revenue was directed to decide the application under section 220(6) without taking any steps under section 226(3). As the Commissioner has not passed a reasoned order the order passed by the Commissioner was set aside and Court directed to pass a speaking order. (A. Y. 2004-05).

*Dagny De souza (Smt) v. ITO (2011) 56 DTR 263 / 198 Taxman 205 / 242 CTR 176 (Bom.)(High Court)*

**S. 226(3) : Collection and recovery – Modes of recovery – Assessing Officer is directed to pay costs for "recovery harassment"**

The Assessing Officer's order of attaching the bank account of the assessee even before the service of the CIT(A)'s order was wrong in view of: -

- (a) the CBDT's letter dated 25.3.2004 advising that penalties under section 271D & 271E for violation of section 269SS & 269T should not be indiscriminately imposed without considering section 273B,
- (b) the CCIT's direction that demand arising out of penalties imposed under section 271D & 271E should be stayed in cases of co-operative credit societies,
- (c) *UOI v. Raja Mohammed Amir Mohammed AIR 2005 SC 4383* where concern was expressed over dangerous attitude developing amongst Executive resulting in institutional damage &
- (d) *KEC International Ltd. 251 ITR 158 / 170 CTR 415 / 119 Taxman 974 (Bom.)* where it was held that generally coercive measures may not be adopted during the period provided by the Statute to go in appeal.

Accordingly, the assessee was unnecessarily subjected to harassment by the actions of the lower authorities. It is thus a fit case for imposing costs under section 254(2B) on the Revenue to compensate the harassment caused by the officers of the Revenue at fault. (A. Y. 2006-07)

*Shramjivi Nagari Sahakari Pat Sanstha v. ACIT ITA No. 477/PN/2010 dated 8-6-2011 (Pune)(Trib.) Source : www.itatonline.org*

### **Section 231 : Period for commencing recover proceedings [Omitted by The Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1-4-1989]**

#### **S. 231 : Recovery – Limitation – Period for commencing proceedings – Prior to 1-4-1989**

Assessee during the previous year, relevant to assessment years, 1986-87 to 1988-89, did not deduct tax due from employees in respect of payment of bonus. The Assessing Officer passed an order under 201 declaring the assessee in default. On appeal, the first Appellate Authority and Tribunal held that the order of recovery of tax and interest was barred by limitation. The court held that for assessment year 1986-87, since the period of limitation expired as per section 231, nothing could be recovered from the assessee for the assessment year. However, in view of the 1987 Amendment, which resulted in the omission of section 231 with effect from 1-4-1989, there was no period of Limitation for the assessment years 1987-88 and 1988-89, and hence the assessee was liable to pay interest on defaulted tax amount under sections 201 and 201(IA) in respect of the said assessment years. (A.Ys. 1986-87 to 1988-89)

*CIT v. Trichur Co-op. Bank Ltd. (2003) 132 Taxman 249 / 184 CTR 400 / 266 ITR 574 (Ker.)(High Court)*

#### ***F. Interest chargeable in certain cases***

### **Section 234A : Interest for defaults in furnishing return of income**

#### **S. 234A : Interest – Return of income – Settlement Commission [S. 234A, 234B, 234C, 245C, 245D(1)]**

Interest under section 234B, can be levied only up to the date of order under section 245D(1) and not up to date of order of settlement under section 245D(4).

*Brij Lal and Others v. CIT (2010) 46 DTR 153 / 328 ITR 477 / (2011) 1 SCC 1 / 235 CTR 417 (SC)*

#### **S. 234A : Interest – Return of income – Return late – Tax paid before due date of filing of return**

The Supreme Court held even though the return of income is filed late, if the assessee has paid the taxes before the due date of the filing of the return, which is not less than the tax payable on the returned income which has been accepted, no interest can be levied under section 234A. (A.Y. 1995-96)

*CIT v. Pranoy Roy & Anr. / CIT v. India Meters Ltd. (2009) 309 ITR 231 / 222 CTR 6 / 179 Taxman 53 / 19 DTR 102 / 211 Taxation 155 (SC)*

**S. 234A : Interest – Return of income – Settlement Commission – Power of Rectification**

The petitioner submitted that in the case of *CIT v. Anjuman M. H. Ghaswala* (2001) 252 ITR 1 (SC), the question whether sections 234A, 234B and 234C, are at all applicable to proceedings of the settlement commission under Chapter XIX-A did not arise for consideration and the judgment of the constitution Bench proceeded sub silentio on the point by assuming that these sections are so applicable. The Apex court held that the above plea was one which should be considered by the Constitution Bench.

*Brij Lal v. CIT (2005) 279 ITR 432 / 199 CTR 716 / (2006) 192 Taxation 213 / 150 Taxman 106 (SC)*

**S. 234A : Interest – Return of income – Power of Settlement Commission – Waiver [S. 234B, 234C, 245D]**

Interest charged under section 234A, 234B, and 234C becomes payable on the income already disclosed and the income disclosed before the Settlement Commission and such interest is chargeable till the Commission acts in terms of section 245D. After the Commission allows the application for settlement to be proceeded with there will be no further charge in terms of sections 234A, 234B, and 234C. Interest charged in terms of section 245D is a separate levy and not in terms of interest chargeable under sections 234A, 234B and 234C. There is no scope for charging interest on interest.

*CIT v. Damani Brothers (2003) 259 ITR 475 / 173 Taxation 40 / 179 CTR 362 (SC)*

**S. 234A : Interest – Return of income – Waiver – Power of Settlement Commission [S. 234B, 234C, 245D(4)]**

Settlement Commission has no power to waive mandatory interest as contemplated under sections 234A, 234B and 234C. (A.Y. 1993-94)

*CIT v. Sant Ram Mangat Ram Jewellers (2003) 264 ITR 564 / (2004) 186 CTR 115 / 134 Taxman 262 / 181 Taxation 1 (SC) / 9 SCC 285*

*Editorial:- CIT v. Anjum M. H. Ghaswala (2001) 252 ITR 1 / 171 CTR 1 / 119 Taxman 352 (SC), followed.*

**S. 234A : Interest – Return of income – Advance tax – Retrospective amendment**

No interest can be charged for default on advance tax where there is amendment with retrospective effect. (A. Ys. 2001-02 & 2002-03)

*CIT v. Jupiter Bio-Science Ltd. (2011) 202 Taxman 80 / 67 DTR 91 (Karn.)(High Court)*

**S. 234A : Interest – Return of income – Assessee in default – Failure to deduct or pay – Advance tax – Interest [S. 201, 234B, 234C]**

Where the deductor had already discharged tax liability payable under section 201(1A) of the act no further interest could be claimed by the revenue from the deductee-employee either under section 234A or section 234B or section 234C.

*CIT v. Emilio Ruiz Berdejo (2010) 320 ITR 190 / 228 CTR 145 / 186 Taxman 390 / (2009) 32 DTR 27 (Bom.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Notification – CBDT [S. 234B, 234C]**

Where the assessee filed his return voluntarily and paid the taxes due thereon, the Court held that as the assessee who was a singer by profession, working for sixteen hours a day the overbusy schedule of the assessee during the relevant assessment years constituted 'unavoidable circumstances' within the meaning of clause 2 (e) of the notification issued by the C.B.D.T. with respect to waiver of interest under sections 234A, 234B and 234C of the Act. (A.Y. 1993-94 to 1996-97)

*S. Nagoor Babu Mano v. CCIT & Anr. (2009) 24 DTR 193 / 227 CTR 287 / 320 ITR 500 / 181 Taxman 33 (Mad.)(High Court)*

**S. 234A : Interest – Return of income – Advance Tax – Waiver – Instruction – CBDT [S. 234B, 234C]**

On the Chief Commissioner of Income Tax rejecting the application for waiver of interest, the assessee challenged the said order before the High Court by way of a writ and High Court held that if the assessee has complied with the conditions laid down in Cl. 2(e) of section 273A, then the authority shall decide tax quantum while considering the question of waiver.

The High Court further held that the prayer for waiver has to be decided by a competent authority/officer other than the Chief Commissioner of Income Tax.

High Court allowed the writ petition of the assessee with costs. (A.Ys. 1990-91 to 1992-93)

*Om Prakash Trivedi v. Union of India (2006) 287 ITR 11 / 153 Taxman 554 (All.)(High Court)*

**S. 234A : Interest – Return of income – Company – Book profit [S. 115J]**

Interest under section 234A, 234B and 234C is chargeable even when the assessment was made under section 115J. (A.Y. 1989-90)

*CIT v. Geetha Ramakrishna Mills (P) Ltd. (2006) 205 CTR 365 / 288 CTR 489 (Mad.)(High Court)*

**S. 234A : Interest – Return of income – Compensatory [S. 234B, 234C]**

Assessee could not challenge levy of interest under section 234A/234B/234C as these provisions are compensatory in character

*K. Venugopalan Nambiar v. Union of India (2005) 148 Taxman 616 / 199 CTR 387 (Ker.)(High Court)*



**S. 234A : Interest – Return of income – Bona fide dispute – Levy non-justified**

Where a bona fide dispute is there as to taxability of a sum, imposition of interest would not be justified.

*CIT v. Reading & Bates Exploration Co. (2005) 278 ITR 47 / 148 Taxman 457 / 198 CTR 670 (Uttaranchal)(High Court)*

**S. 234A : Interest – Return of income – Bona fide disputes – Opportunity of hearing**

Where a bona fide dispute was pending regarding the taxability of certain amount received by assessee, imposition of interest under section 234B was not justified without hearing and without reasons

*CIT v. Reading & Bates Exploration Co. (2005) 278 ITR 47 / 148 Taxman 457 / 198 CTR 670 (Uttaranchal)(High Court)*

**S. 234A : Interest – Return of income – No direction in order – Mandatory**

Where there was no direction in assessment order for charging of interest under sections 234A and 234B, interest charged under sections 234A and 234B was to be deleted

*CIT v. Gold Tex Furnishing Industries (2005) 276 ITR 164 / 158 Taxman 53 (Delhi)(High Court)*

**S. 234A : Interest – Return of income – Cash seized – Search – Firm and Partners [S. 234B, 234C]**

Where cash was seized from premises of firm and partners requested, before advance tax liability of firm became due, for adjustment of cash against advance tax, such cash was to be adjusted against advance tax liability of firm and, hence, no interest could be levied under sections 234B and 234C. (A.Y. 1994-95)

*CIT v. K.K. Marketing (2005) 278 ITR 596 / 196 CTR 611 (Delhi)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Conditions [S. 234B, 234C]**

Chief Commissioner while considering question of waiver of interest under section 234A/234B/234C has to confine himself within four corners of conditions specified in CBDT Notification No. F. No. 400/234/95-IT and cannot travel beyond it; question of financial hardship and difficulty in paying amount of interest under sections 234A, 234B and 234C is misconceived as it does not find mention in CBDT's notification empowering Chief Commissioner to exercise such a power. (A.Ys. 1995-96 to 2001-02)

*Ashwani Dhingra v. Chief CIT (2005) 275 ITR 72 / 142 Taxman 241 / 194 CTR 233 (All.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Claim based on High Court decision**

Where assessee had been granted deductions under sections 80HHA and 80-I on basis of a High Court decision and assessee had not paid advance tax in respect of sums claimed as deductions but High Court decision was subsequently reversed by Supreme Court, and thereupon notice under section 148 was issued to assessee which filed return and deposited tax payable, entire interest levied on assessee under section 234B was to be waived as there is no provision in Act requiring the assessee to file a revised return of income in regard to relevant assessment years after Supreme Court reverses the judgment of High Court. (A.Ys. 1993-94 to 1997-98)

*Balakrishna Breeding Farms (P.) Ltd. v. CCIT (2005) 276 ITR 20 / 147 Taxman 148 (Karn.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Powers of board [S. 119(2), 234B, 234C]**

In an extreme hardship, Board has the power to waive or reduce the interests levied under sections 234A, 234B and 234C of the income tax Act. (A.Y. 1997-98 to 1999-2000)

*CIT v. Upper India Steel Mfg & Engg Co Ltd. (2005) 279 ITR 123 / (2004) 141 Taxman 692 / 192 CTR 385 (P&H)(High Court)*

**S. 234A : Interest – Return of income – Compensatory – Non penal [234B, 234C]**

The provisions of sections 234A, 234B, and 234C are not penal provisions but are compensatory in nature for breach of civil obligation.

*CIT v. Upper India Steel Mfg & Engg Co Ltd. (2005) 279 ITR 123 / (2004) 141 Taxman 692 (P&H)(High Court)*

**S. 234A : Interest – Return of income – Constitutional validity [Article 14]**

Provisions of sections 234A, 234B and 234C, cannot be said to be violative of article 14 of the Constitution of India. Hardship cannot be the ground to hold unconstitutional. (A.Ys. 1993-94 to 1996-97)

*Umesh S. Bhargava v. UOI (2004) 137 Taxman 231 / 268 ITR 405 / 189 CTR 319 (Bom.)(High Court)*

*Prabha Lal v. CIT (2004) 137 Taxman 277 / 269 ITR 212 / 190 CTR 99 (Patna)(High Court)*

**S. 234A : Interest – Return of income – Cash seized – Search [S. 132(5), 234B, 234C]**

Surplus cash is left after passing of an order under section 132 (5), has to be adjusted towards advance tax liability of assessee as on date of order under section 132(5) and interest liability to be reworked accordingly. (A.Y. 1990-91)

*CIT v. Pandurang Dayaram Talmale (2004) 135 Taxman 193 / 187 CTR 625 (Bom.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Seizure of books after last date of filing of return [S. 234B, 234C]**

Assessee can not be denied the benefit of reduction / waiver of interest under instruction no 400/234/95 – IT(B) dated 23-5-1996, only because books of account had been seized after last date for filing the returns. (A.Y. 1991-92)

*Paras Bansilal Patel v. B.M. Jindal, CCIT (2004) 135 Taxman 125 / 267 ITR 108 / 187 CTR 613 (Guj.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Circular dt. 23-5-1996 [S. 234B, 234C]**

Clause (e) of para 2 of Circular no 400/234/95–IT(B) dated 23-5-1996, which confers power of Commissioner to waive or reduce the interest is also applicable for waiver of interests under section 234B, and 234C of the Income tax Act. (A.Ys. 1992-93 to 1994-95)

*Bhanuben Panchal and Chandrikaben Panchal v. CCIT (2004) 136 Taxman 237 / 269 ITR 27 (Guj.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – CBDT – Commissioner [S. 119 (2) (a), 234B, 234C]**

Application for waiver of interest under section 234A, 234B and 234C, cannot be rejected in laconic and mechanical manner.

*Tushaar Mehta v. CCIT (2004) 189 CTR 550 / 143 Taxman 38 (Mad.)(High Court)*

**S. 234A : Interest – Return of income – Chargeable – Anjum Ghaswala's decision [S. 234B, 234C]**

All aspects relating to charging of interest have not been finally decided by Supreme Court in CIT v. Anjum H. Ghaswala and Others (2001) 252 ITR1 / 170 CTR 311 / 118 Taxman 558. (A.Y. 1983-84)

*ITSC v. Netai Chandra Rarhi & Co. (2004) 271 ITR 514 / 193 CTR 430 / 142 Taxman 446 (Cal.)(High Court)*

**S. 234A : Interest – Return of income – Company – Book Profit [S. 115J]**

Interest under section 234A is levied for delayed or non filing of return and the invocation of section 115J at the time of regular assessment has no relevancy in considering the question of such failure. (A.Y. 1989-90)

*CIT v. Holiday Travels (P.) Ltd. (2003) 127 Taxman 250 / 263 ITR 307 / 181 CTR 442 (Mad.)(High Court)*

**S. 234A : Interest – Return of income – Capital gains – Accrual**

Since advance tax in respect of capital gains becomes payable only after of advance tax on capital gains accrues, liability to pay interest on delayed payment of advance tax on capital gains which arise after 15 th March, can arise only with effect from date on which advance tax in respect of such capital gains becomes payable and not earlier there to. (A.Y. 2000-01)

*CIT v. Premalata Jalani (Smt) (2003) 185 CTR 601 / 264 ITR 744 (Raj.)(High Court)*

**S. 234A : Interest – Return of income – Waiver – Voluntary filing of return**

Waiver of interest can be considered only if return of income is filed voluntarily without detection by the Assessing Officer. (A.Y. 1997-98)

*K.C. Prasad v. CCIT (2003) 185 CTR 588 / 265 ITR 415 / 134 Taxman 51 (Karn.)(High Court)*

**S. 234A : Interest – Return of income – Assessable as PE – TDS [S. 195 & 234B]**

Income of the assessee who are non residents being assessable in the hands of PEs the same cannot be held liable to TDS under section 195 and therefore, assesseees are liable to pay interest under section 234A and 234B. (A.Ys. 2000-01 to 2005-06)

*eFunds Corporation v. ADIT (2010) 45 DTR 345 / 42 SOT 165 / 134 TTJ 1 (Delhi)(Trib.)*

**S. 234A : Interest – Return of income – Mandatory – No power to waive [S. 234B, 234C]**

Interest under sections 234A, 234B and 234C is mandatory in nature and Assessing Officer has no power to waive or reduce it by implication or otherwise.

*ITO v. Prabhu K. Chandnani (2005) 4 SOT 190 (Mum.)(Trib.)*

**S. 234A : Interest – Return of income – Assessment – No levy**

If there is no assessment or no assessed income, interest cannot be levied.

*Anand Kumar Agarwal (HUF) v. ACIT (2005) 92 TTJ 81 (Agra)(Trib.)*

**S. 234A : Interest – Return of income – Assessment – Company – Book profit [S. 115JA, 143(1)]**

While processing return under section 143(1), Assessing Officer can charge interest under sections 234B and 234C on account of assessee's failure to pay advance tax in respect of income determined under section 115J A on basis of book profit. (A.Y. 1999-2000)

*Lumax Industries Ltd. v. Dy. CIT (2005) 97 ITD 217 / 99 TTJ 1125 (Delhi)(Trib.)*

**S. 234A : Interest – Return of income – Delay in filing return – Tax paid in advance**

It is not open to Assessing Officer to charge interest under section 234A in a situation where assessee has paid due taxes and merely filing of income-tax return is delayed. (A.Y. 1994-95)

*Milan Enterprise v. ACIT (2005) 95 ITD 18 / 95 TTJ 635 (Mum.)(Trib.)*

**S. 234A : Interest – Return of income – Chapter XII-B – NRI**

Interest is chargeable when income is computed under Chapter XII-B. (A.Y. 2001-02)

*Chetak Enterprises (P.) Ltd. v. ACIT (2005) 95 ITD 1 / 92 TTJ 611 (Jodh.)(Trib.)*

**S. 234A : Interest – Return of income – No specific direction – Invalid [S. 234B, 234C]**

Levy of interest under sections 234A to 234C cannot be held to be invalid merely on account of there being no specific direction in assessment order or on ground that section under which interest is levied is not specified in body of assessment order, provided that assessment form in ITNS 150 contains a specific reference to section under which interest is charged, calculations are shown under relevant columns and said form is signed or initialled by same Assessing Officer who signed assessment order and is also dated. (A.Y. 1997-98)

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

**S. 234A : Interest – Return of income – No direction to charge interest – Levy in ITNS-150 – Invalid**

If in assessment order, there is no direction to charge interest but in ITNS-150 and in demand notice, amount of interest to be charged is mentioned, that will not amount to direction to charge interest and levy of interest in such cases will be invalid. (A.Ys. 1996-97 to 1997-98)

*Shadi Ram & Sons v. Dy. CIT (2005) 92 ITD 22 / 92 TTJ 534 (Luck.)(Trib.)*

**S. 234A : Interest – Return of income – Computation sheet – Valid**

Where in computation sheet forming part of assessment order, section under which interest was charged was mentioned and interest was computed and quantified, it could not be said that there was no order charging interest. (A.Y. 1999-2000)

*Jindal Exports Ltd. v. ITO (2005) 2 SOT 7 (Delhi)(Trib.)*

**S. 234A : Interest – Return of income – Regular assessment**

Interest under section 234A shall be computed on basis of tax determined on regular assessment and not on basis of tax payable on basis of return.

*Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 / 96 TTJ 01 (SB)(Delhi)(Trib.)*

**S. 234A : Interest – Return of income – Specific order**

Where in assessment order, only words mentioned were 'charge interest', it could not be taken as specific order for charging interest.

*Shikha Gupta (Smt) v. ITO (2005) 148 Taxman 31 (Mag.)(Delhi)(Trib.)*

**S. 234A : Interest – Return of income – Regular assessment**

In Section 234A the words 'regular assessment' are used in the context of computation.

*Priti Pithawala (Ms) v. ITO (2003) 129 Taxman 79 (Mag.)(Mum.)(Trib.)*

**S. 234A : Interest – Return of income – Chargeability – No specific direction [S. 234B, 234C]**

Levy of interest under section 234A and 234B not permissible when there is nothing mentioned in the assessment order for charging the interest and no indication in the notice of demand about the figure of interest. (A.Y. 1990-91)

*V.V. Industries v. ACIT (2003) 78 TTJ 758 (2004) 1 SOT 227 (Delhi)*

*Credit Rating Information Services Of India Ltd. v. Dy. CIT (2003) 84 ITD 247 / 79 TTJ 219 (Mum.)(Trib.)*

**S. 234A : Interest – Return of income – Cash with department – Adjustment [S. 234B, 234C]**

Interest under section 234A/B/C cannot be charged if the cash available with the department is sufficient to meet such liability, and same has not been adjusted even on specific request.

*ACIT v. Bharatbhai Chuni Shah (2003) SOT 382 (Ahd.)(Trib.)*

**Section 234B : Interest for defaults in payments of advance tax**

**S. 234B : Interest – Advance tax – Company – MAT [S. 115JA, 115JB, 234C]**

In view of specific provisions in section 115JA and 115JB, to the effect that all other provisions of the Act, shall apply to the MAT company, interest under sections 234A, 234B is payable on failure to pay advance tax in respect of tax payable under sections 115JA, 115JB.

*Jt. CIT v. Rolta India Ltd. (2011) 237 CTR 329 / 49 DTR 346 / 330 ITR 470 / 196 Taxman 594 / 2 SCC 408 (SC)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115J, 115JA]**

The assessee was bound to pay advance tax under the scheme of the Act. Section 234B is clear that it applies to all companies. There is no exclusion of section 115J/115JA in the levy of interest under section 234B (Kwality Biscuits Ltd v. CIT 243 ITR 519 (Kar.) (SLP dismissed in 284 ITR 434) considered).

*Jt. CIT v. Rolta India Ltd. (2011) 237 CTR 329 / 330 ITR 470 / 49 DTR 346 / 196 Taxman 594 (SC)*

**S. 234B : Interest – Advance tax – Rectification of mistake**

The Supreme Court, while dismissing the petition of the assessee held that error in calculation of interest, if any, can be set right by moving application under section 154 of the Income-tax Act, 1961.

*Arvind Sud v. UOI & Others (2006) 192 Taxation 1 (SC)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115J, 234C]**

The Supreme Court dismissed the appeal of the revenue against the order of the Karnataka High Court (2000) 243 ITR 519, which held that interest under sections 234B and 234C is not leviable in the case of assessment under section 115J, since the



entire exercise of computing income under section 115J can only be done after the end of the financial year. (A.Y. 1989-90)

*CIT v. Kwaliti Biscuits Ltd. (2006) 284 ITR 434 / 155 Taxman 658 / 205 CTR 122 / 195 Taxation 229 (SC)*

### **S. 234B : Interest – Advance tax – Specific section**

Supreme Court in *CIT v. Ranchi Club (2001) 247 ITR 209* did affirm requirement to charge interest under a specific section. Question as to whether law laid down in *CIT v. Ranchi Club (2001) 274 ITR 209 (SC)* has been changed by virtue of decision of Constitution Bench in *CIT v. Anjum M. H. Ghaswala (2001) 252 ITR 1*, is question of law. (A.Y. 1991-92)

*CIT v. Insilco Ltd. (2005) 278 ITR 1 / 149 Taxman 112 / 198 CTR 114 (SC)*

### **S. 234B : Interest – Advance tax – Order of Settlement Commission – Assessment – Reassessment – Amount disclosed [S. 234A, 234C, 245D]**

For the purpose of charge of interest under section 234B in a case where settlement commission passes order under section 245D (4), the end point of the terminus has to be the date on which the commission passes an order under section 245D (4) and not of regular assessment or reassessment. Interest charged in terms of sections 234A, 234B, and 234C becomes payable on the income already disclosed in the returns filed together with the income disclosed before the commission, the concerned interest as aforesaid, shall be on the consolidated amount of income i.e., both disclosed and undisclosed.

*CIT v. Hindustan Bulk Carrier (2003) 259 ITR 449 / 126 Taxman 321 / 179 CTR 362 / 173 Taxation 16 (SC)*

### **S. 234B : Interest – Advance tax – Deduction at source – Salary [S. 191, 192, 195]**

Advance tax is not payable on the salary of an employee in as much as the obligation to deduct tax at source is upon the employer under section 192, upon failure on the part of the employer to deduct at source, the assessee (employee) only becomes liable to pay the tax directly under section 191 and does not become liable to pay interest under section 234B.

*DIT v. Maersk Co. Ltd., as Agent of Henning Skov (2011) 334 ITR 79 / 54 DTR 41 / 198 Taxman 518 / 240 CTR 218 (FB)(Uttarakhand)(High Court)*

### **S. 234B : Interest – Advance tax – Difficulty in computing interest – Enhanced compensation**

The difficulties faced by the assessee while computing advance tax cannot defeat the liability to pay advance tax. As compensation was liable to be taxed as business income, the assessee is liable to pay interest. (A. Ys. 2000-01 to 2002-03).

*Dy. CIT v. Gopal Ramnarayan Kasat (2011) 240 CTR 266 / 54 DTR 228 / 328 ITR 566 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Capital gains [S. 47(v), 139(9), 292B]**

Assessee claiming exemption in respect of capital gains on sale of shares to holding company. Return found defective and assessee filed corrected return. By that time holding company was no longer holding company. The Court held that no default at time of payment of advance tax. Interest for default not chargeable. (A. Y. 1991-92). *Prime Securities Ltd. v. ACIT (2011) 333 ITR 464 / 59 DTR 251 / 243 CTR 229 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Minimum alternative tax – Set off [S. 115JAA, 234C]**

Minimum alternative credit in terms of section 115JAA has to be set off against tax payable before calculating interest under section 234B, 234C. *CIT v. Deccan Creations (P) Ltd. (2011) 55 DTR 206 (Karn.)(High Court)*

**S. 234B : Interest – Advance tax – Search and seizure – Retention of seized asserts [S. 234C]**

Assets seized were released on deposit of money. Assessing Officer failing to accede to request of assessee and adjust advance tax against deposits. Interest under section 234B and 234C for default in payment of advance tax cannot be levied. (A. Y. 1995-96).

*Vishwanath Khanna v. UOI (2011) 335 ITR 548 / 244 CTR 208 / 61 DTR 318 (Delhi)(High Court)*

**S. 234B : Interest – Advance tax – Waiver or reduction – CBDT circulars [S. 80HHC]**

There being no decision of jurisdictional High Court favouring interpretation of section 80HHC, assessee was not entitled to waiver or reduction interest. On the facts the assessee was not entitled to reduction or waiver of interest under section 234B under any of the CBDT circulars dt. 23rd May 1996, 30th Jan., 1997 or 2 of 2006 dt. 17th January, 2006. (A. Y. 2002-03).

*Raju Bhojwani v. CCIT (2011) 63 DTR 236 / 202 Taxman 226 (Delhi)(High Court)*

**S. 234B : Interest – Advance tax – Book profit – Company – Retrospective amendment of law – Impossible of performance [S. 115JB, 234C]**

Provisions relating to payment of advance tax are applicable in a case where book profit is deemed to be total income under section 115JB. On the facts of assessee, there was no liability to make payment of the advance tax on the last day of the financial year i.e. 31st March 2001 when its book profit was nil according to section 115JB. Provision of section 115JB having been amended by the Finance Act, 2002, with retrospective effect from 1st April 2001, the assessee cannot be held defaulter of payment of advance tax, where on the last date of the financial year preceding the relevant assessment year, the assessee had no liability to pay advance tax, he cannot be asked to pay interest under section 234B and 234C for no default in making

payment of tax in advance which was physically impossible therefore interests under sections 234B and 234C cannot be charged. (A. Y. 2001-02).

*Emami Ltd. v. CIT (2011) 63 DTR 301 / 337 ITR 410 / 245 CTR 651 / 200 Taxman 326 (Cal.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit – MAT Credit [S. 115JAA]**

MAT credit available under section 115JAA, represents tax paid by the assessee before determination of total income under section 143(1) or completion of regular assessment within the meaning of sub section (2) of section 234B and therefore credit for MAT under the provisions of section 115JAA has to be reckoned in computing interest payable under section 234B. Amendment made by Finance Act, 2006, by substituting Explan. 1 to section 234B was clarificatory or curative in nature and consequently, even prior to the amendment, the credit under section 115JAA could not be ignored in determining the liability to pay interest under section 234B. (A.Y. 2000-01)

*CIT v. Apar Industries Ltd. (2011) 220 Taxation 72 / (2010) 38 DTR 128 / 323 ITR 411 / 231 CTR 313 / 190 Taxman 353 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Cash seized – Search and seizure [S. 132B(1)(i), 234C]**

Cash was seized in the course of search and seizure action on 12th January, 2007. Prior to the last date for payment of installment of advance tax assessee filed a letter dated 14-3-2007 requesting to adjust the cash seized, towards the existing advance tax liability. The Tribunal directed to adjust the cash seized towards advance tax liability. High Court confirmed the view of Tribunal. (A. Y. 2007-08).

*CIT v. Jyotindra B. Mody ITA No. 3741 of 2010 dt. 21-9-2011 181 (2011) 43B-BCAJ 53 (November-52) (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Bona fide mistake**

Levy of interest under section 234B is compensatory and interest is chargeable notwithstanding the fact that default is bona fide. (A.Y. 1991-92)

*CIT v. Insilco Ltd. (2010) 321 ITR 105 / 190 Taxman 306 / 231 CTR 247 / 37 DTR 342 (Delhi)(High Court)*

**S. 234B : Interest – Advance tax – Deduction at source**

Interest under section 234B is not chargeable where the income of the assessee is subject to Tax deduction at source. (A.Y. 1998-99)

*DIT v. Krupp Udge GmbH (2010) 38 DTR 251 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Settlement Commission – Liability to Pay Interest**

Even if no interest under section 234B was levied on the assessee in the original order of assessment, the assessee is liable to interest for that portion of the income

forming part of the total income as determined by the Settlement Commission. Words, "the interest shall be increased", would contemplate both a situation where interest had been levied on the assessee in the first instance and a situation where no interest has been levied on the assessee in the original order of assessment. (A.Ys. 2002-03 to 2006-07)

*Akbar Travels of India (P) Ltd. v. Income Tax Settlement Commission & Ors. (2010) 43 DTR 49 / 192 Taxman 457 / 236 CTR 37 / 332 ITR 572 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Deduction at source – Non-resident [S. 194, 234D, 209(1)(d)]**

Non-resident recipient is not liable to pay advance tax, as under section 195 entire taxes have to be deducted at source by payee. Non-residents are not liable to pay interest under section 234B. (A.Ys. 2001-02 to 2003-04)

*DIT v. Jacobs Civil Incorporated (2010) 45 DTR 163 / 235 CTR 123 / 235 CTR 123 / 194 Taxman 494 (Delhi)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit – MAT Credit [S. 115JAA, 234C]**

Credit for MAT brought forward credit under section 115JAA should be given effect before charging interest under sections 234B, 234C. (A.Y. 2004-05)

*CIT v. Roots Muliclean Limited (2010) 327 ITR 65 / 182 Taxman 13 (Mad.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit – MAT [S. 115JB, 234C]**

Interest cannot be levied under sections 234B and 234C, while computing the book profit under section 115JB.

*CIT v. Natural Gems Ltd. (2010) 327 ITR 269 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115J, 234C]**

Assessment of company under section 115JA, interest under section 234B and 234C is not leviable. (A.Y. 1997-98)

*CIT v. Cortalim Shipyard & Engineers (P) Ltd. (2010) 46 DTR 263 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 234C]**

In view of the specific provision of sub section (5) of section 115JB, which makes all other provisions of the Act, applicable to companies mentioned in the said section, and the clarification issued by the CBDT vide Circular No. 14 of 2001 dt. 22-Nov 2001, companies covered by the provisions of section 115JB are liable to pay advance tax and consequently, interest under section 234B and 234C is chargeable. (A.Y. 2001-02)

*CIT v. Sankala Polymers (P) Ltd. (2010) 46 DTR 385 / 338 ITR 617 (Karn.)(High Court)*

### **S. 234B : Interest – Advance tax – Additional income disclosed**

Where the assessee had offered a certain amount as its additional income only to buy peace of mind and the same was accepted by the assessing officer without any further inquiry the assessee cannot be said to have defaulted in payment of instalments of advance tax on the additional income declared by the assessee so as to make him liable to pay interest under section 234B of the Act. (A.Y. 1998-99)

*T. P. Indrakumar v. ITO (2009) 29 DTR 311 / 238 CTR 213 / 322 ITR 454 (Karn.)(High Court)*

### **S. 234B : Interest – Advance tax – Deduction at source – Salary – Employers [S. 192, 234C]**

Where the employer company had discharged the tax liability along with the interest under section 201(1A) of the Act due to default in deduction of tax at source under section 192 of the Act, no interest under section 234B and 234C of the Act could be charged from the employees. (A.Y. 2001-02)

*CIT v. Emilio Ruiz Berdejo & Ors. (2009) 32 DTR 27 / 228 CTR 145 / 320 ITR 190 / 186 Taxman 390 (Bom.)(High Court)*

### **S. 234B : Interest – Advance tax – Waiver or reduction [S. 234B, 234C]**

Assessee filing returns voluntarily and paying taxes, due to his over busy schedule during the relevant assessment years constituted as 'unavoidable circumstances' within the meaning of clause 2(e) of CBDT Notification No.400/234/1995-IT(B) and entitle him for waiver of interest under section 234A, 234B, 234C levied upon by him for failure to file returns within the time allowed under section 139(1)/(4). (A.Ys. 1993-94 to 1996-97)

*S. Nagoor Babu @ Mano v. CCIT & Anr. (2009) 227 CTR 287 / 320 ITR 500 / 181 Taxman 33 / 24 DTR 193 (Mad.)(High Court)*

### **S. 234B : Interest – Advance tax – Waiver [S. 234C]**

Assessee having paid tax voluntarily and having pleaded a good and reasonable reason for not filing the return on time and therefore, interest under sections 234B and 234C was liable to be waived.

*V. Akilandeswari v. CCIT (2009) 227 CTR 582 / 318 ITR 1 / 184 Taxman 22 / 30 DTR 213 (Mad.)(High Court)*

### **S. 234B : Interest – Advance tax – Deduction at source**

Where the payer fails to deduct tax at source on the payments made by him to the payee, no interest under section 234 B of the Act can be imposed on the payee.

*DIT (International Taxation) v. NCG Network Asia LLC (2009) 18 DTR 203 / 222 CTR 86 / 313 ITR 187 (Bom.)(High Court)*

### **S. 234B : Interest – Waiver – Amendment retrospectively**

Export cash assistance was made taxable with retrospective effect by Finance Act 1990. The assessee for A.Y. 1989-90 was under a bonafide belief that it was not liable

to pay advance tax. The Court held that waiver of only part of the interest levied under section 234B without assigning any reasons was not proper in facts of the present case. (A.Y. 1989-90)

*Devarsons Pvt. Ltd. v. U. P. Singh (2006) Tax L. R. 40 / 284 ITR 36 / 203 CTR 48 (Guj.)(High Court)*

### **S. 234B : Interest – Advance tax – Company – Book profits – Hearing [S. 115JA]**

Provisions of section 234B and 234C would be attracted even in case where a company is assessed on income computed under section 115JA. Levy of interest being mandatory, no opportunity of hearing is required to be given to the assessee. (A.Ys. 1997-98 to 1999-2000)

*CIT v. Upper India Steel Mfg & Engg Co. Ltd. (2005) 279 ITR 123 / (2004) 141 Taxman 692 (P&H)(High Court)*

### **S. 234B : Interest – Advance tax – Waiver – Retrospective amendment**

Tax liability on assessee after filing of return and after expiry of assessment year, on account of retrospective amendment of law, consequential levy of interest under section 234B was to be dealt with as a fit case for reduction or waiver of interest. (A.Y. 1989-90)

*Deversons (P) Ltd. v. Chairman, CBDT (2005) 273 ITR 414 / (2004) 140 Taxman 628 / 192 CTR 400 (Guj.)(High Court)*

*Editorial : Waiver of interest Circular no 783 dt 18-11-1999 (2000) 240 ITR 183 (ST).*

### **S. 234B : Interest – Advance tax – Compensatory [S. 234C]**

Since interest under sections 234B and 234C is compensatory, questions of equity, rules of natural justice and justification for not making payment do not arise for determination.

(A.Y. 1989-90)

*CIT v. Kotak Mahindra Finance Ltd. (2003) 130 Taxman 730 / 183 CTR 491 / 265 ITR 119 (Bom.)(High Court)*

### **S. 234B : Interest – Advance tax – Automatic**

Levy of interest under section 234B is automatic. (A.Y. 1991-92)

*Kuttukaran Machine Tools v. CIT (2003) 131 Taxman 690 / 264 ITR 305 / 185 CTR 104 (Ker.)(High Court)*

### **S. 234B : Interest – Advance tax – Bonafide dispute**

In case of bona fide dispute as to taxability of a sum, interest for short payment of tax could not be levied under section 234B. (A.Y. 1992-93)

*CIT v. Sedco Forex International Drilling Co. Ltd. (2003) 264 ITR 320 / 186 CTR 144 / 134 Taxman 109 (Uttaranchal)(High Court)*

### **S. 234B : Interest – Advance tax – Company – Book profit [S. 115J]**



Levy of interest under section 234B on basis of income computed under section 115J is not illegal but it is automatic. (A.Y. 1990-91)

*Karimtharth Tea Estates Ltd. v. CIT (2003) 131 Taxman 149 / 182 CTR 307 (Ker.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115J]**

Interest under sections 234B and 234C is chargeable even in a case where tax liability arises only by applicability of section 115J. (A.Y. 1989-90)

*CIT v. Kotak Mahindra Finance Ltd. (2003) 130 Taxman 730 / 183 CTR 491 / 265 ITR 119 (Bom.)(High Court)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115J]**

An assessee-company is liable to pay interest under section 234B even when its income is determined by invoking provisions of section 115J. (A.Y. 1989-90)

*CIT v. Holiday Travels (P.) Ltd. (2003) 127 Taxman 250 / 263 ITR 307/ 181 CTR 442 (Mad.)(High Court)*

**S. 234B : Interest – Advance tax – Waiver – Incorrect particulars form No 15H [S. 234A, 234C]**

Filing of incorrect particulars in Form No. 15H cannot lead to an inference that assessee had deliberately tried to mislead the authorities so as to justify rejection of prayer of assessee for waiver of interest. (A.Ys. 1990-91 to 1997-98)

*Baso Devi (Smt) v. CCIT (2003) 133 Taxman 36 / 184 CTR 356 / 266 ITR 404 (P&H)(High Court)*

**S. 234B : Interest – Advance tax – Book profit – Company [S. 234C]**

Interest is chargeable under sections 234B, 234C on failure to pay advance tax in respect of tax payable under sections 115JA/115JB. (A. Ys. 1997-98 & 2000-01 to 2004-05).

*Singareni Collieries Company Ltd. v. ACIT (2011) 141 TTJ 593 / 133 ITD 213 / 57 DTR 28 (Hyd.)(Trib.)*

**S. 234B : Interest – Advance tax – Deduction at source – Non-resident [S. 234C, 209]**

There cannot be any interest liability under section 234B or 234C, for non-resident assessee where all payments received from Indian sources are subject to TDS. (A.Y. 2003-04)

*Cable News Network LP LLLP v. ADIT (International Taxation) (2010) 129 TTJ 177 / 36 DTR 233 (Delhi)(Trib.)*

**S. 234B : Interest – Advance tax – Deduction at source [S. 195]**

Income subject to tax deduction at source, interest cannot be charged under section 234B. (A.Ys. 1998-99, 1999-2000)

*Jt. DIT v. Krupp Uhde GmbH (2010) 1 ITR 614 / 124 TTJ 219 / 28 SOT 254 / 26 DTR 289 (Mum.)(Trib.)*

**S. 234B : Interest – Advance tax – Deduction at source – Non-resident**

In case of a non resident assessee when all payments received in terms of an agreement with Indian company for rendering of services were subjected to TDS, interest under section 234B cannot levied for non-payment of advance tax. (A.Y. 1998-99)

*Dy. DIT v. Scientific Atlanta Inc. (2010) 37 DTR 98 / 4 ITR 422 / 130 TTJ 142/ (2009) 33 SOT 220 (Mum.)(Trib.)*

**S. 234B : Interest – Advance tax – Retrospective Amendment**

Assessee is not liable to pay interest under section 234B when by retrospective amendment made later, the amount becomes taxable. Administrative relief can be obtained by the assessee cannot erode the powers of the Tribunal while dealing with the valid appeal laid before it.

*Sun Petrochemicals Pvt. Ltd. v. ITO, 'D' Bench, ITA No. 1010/Ahd./2009, dated 5-6-2009 (BCAJ 42-A, May 2010 P. 168)(Ahd.)(Trib.)*

**S. 234B : Interest – Advance tax – Constructive payment of Advance Tax – Attachment of bank account.**

Once assessee's bank account was put under attachment, the amount therein is to be considered to be lying with the Department which would indicate constructive payment of advance tax and, therefore, interest under section 234B is not chargeable.

*S. M. Wahi v. ADIT (Int. Taxation) (2010) 47 DTR 241 / 134 TTJ 457 (Delhi)(Trib.)*

**S. 234B : Interest – Advance tax – Appeal**

When the chargeability of interest under section 234B itself is challenged the same is appealable. (A.Y. 1995-96)

*ICICI Ltd. v. Jt. CIT (2008) 119 TTJ 848 / 115 ITD 25 / 9 DTR 183 (Mum.)(Trib.)*

**S. 234B : Interest – Advance tax – Self assessment tax [S. 140A]**

The controversy before the Tribunal was when the tax payable by the assessee was enhanced in the reassessment proceedings, then whether the self-assessment tax paid by the assessee under section 140A was to be ignored for the purpose of computing the interest payable by the assessee under section 234B(3) of Act. According to the Tribunal, the reference to section 234B(1) in section 234B(3) was to be read with reference to section 234B(2) of the Act, and applying the rule of harmonious construction on the facts of the present case, interest was to be charged up to the date on which the assessee had paid the tax under section 140A. In the present case, the income of the assessee was enhanced and due to the enhanced income, additional tax liability was also determined, but at the same time, it was seen that the assessee has paid the self-assessment tax under section 140A, which was

more than even whatever tax was determined after reassessment. Hence self-assessment tax paid under section 140A cannot be ignored. (A.Y. 1996-97)

*The Fertilizers and Chemicals Travancore Ltd. v. ACIT, ITA No. 1213/Coch./2004, dt. 24-4-2007, BCAJ P. 30, Vol. 39-E, Part 1, October, 2007. (Cochin)(Trib.)*

### **S. 234B : Interest – Advance tax – Excess of specified limit**

Assessee's tax liability more than ` 1,500/ ` 5,000. Assessee was liable to pay advance tax and assessee having failed to do so, interest under section 234B was chargeable. (A.Y. 1997-98)

*R. M. Chinniah v. ITO (2007) 106 TTJ 1001 / 107 ITD 479 (Chennai)(Trib.)*

### **S. 234B : Interest – Advance tax – Book profit [S. 115JA]**

Interest under ss. 234B and 234C can be charged where assessment is made under section 115JA. (A.Y. 2000-01)

*Jindal Steel & Power Ltd. v. ACIT (2007) 106 TTJ 943 / 10 SOT 106 (Delhi)(Trib.)*

### **S. 234B : Interest – Advance tax – Deduction at source**

Where income of assessee is subject to TDS, interest under section 234B cannot be charged even though no tax is deducted. (A.Ys. 1995-96 to 2000-01)

*Sheraton International Inc. v. Dy. DIT (2007) 106 TTJ 620 / 107 ITD 120 / 10 SOT 542 (Delhi)(Trib.)*

### **S. 234B : Interest – Advance tax – Mistake apparent on record**

There being nothing on assessment record of AO to entertain the plea of assessee that he was not liable to pay advance tax and hence interest under section 234B and the matter also being debatable, AO was justified in rejecting assessee's application under section 154. (A.Y. 1997-98)

*R. M. Chinniah v. ITO (2007) 106 TTJ 1001 / 107 ITD 479 (Chennai)(Trib.)*

### **S. 234B : Interest – Advance tax – Cryptic mention – Assessment order – Validity [S. 234C]**

Mention of charging Interest as per rules, in the Assessment Order is sufficient, and it is not necessary to mention section & quantum of Interest in ITNS 150 or demand notice under section 156. (A.Y. 1989-90)

*Rambilas Mathoura Lab & Co v. ITO (2003) SOT 61 (Jodh.)(Trib.)*

*Lathia Rubber Mfg Co (P) Ltd v. ACIT (2003) 81 TTJ 779 / (2004) 3 SOT 714 (Mum.)(Trib.)*

### **S. 234B : Interest – Advance tax – Assessment order – Direction**

Interest cannot be charged, in absence of any direction under relevant section in the Asst Order. (A.Ys. 1991-92 to 1994-95)

*Centex Publication (P) Ltd v. Dy. CIT (2003) 79 TTJ 265 / 133 Taxman 42 (Mag.)(Delhi)(Trib.)*

*H G Malik v. ACIT (2003) 85 ITD 79 / 79 TTJ 844 (Delhi)(Trib)*

*Sarin Chemical Laboratory v. ACIT (2003) SOT 382 (Ahd.)(Trib.)*

**S. 234B : Interest – Advance tax – Assessment order [S. 234C]**

If Interest is calculated in the body of the order itself, then direction to charge Interest is immaterial. (A.Y. 1990-91)

*Charbhai Biri Works v. ACIT (2003) 87 ITD 189 / 80 TTJ 483 (TM)(Pune)(Trib.)*

**S. 234B : Interest – Advance tax – Mandatory**

Once the Assessee was liable to pay Advance Tax from initial stage, the charging of interest under section 234B on basis of assessed tax is also mandatory. (A.Y. 2004-05)

*Flexfit Industries v. ACIT (2009) 176 Taxman 59 (Mag.)(Chd.)(Trib.)*

**S. 234B : Interest – Advance tax – Computation – Self assessment tax [S. 140A]**

Adjustment towards interest payable under section 234B is to be considered only at the time of filing return of income, i.e., when payment of self assessment under section 140A is required to be made, before that interest under section 234B is independently required to be calculated only in accordance with the provisions provided in s. 234B(1). (A.Ys. 1992-93, 1993-94)

*Patson Transformers Ltd. v. Dy. CIT (2006) 103 TTJ 735 / 6 SOT 673 (Ahd.)(Trib.)*

**S. 234B : Interest – Advance tax – Excess payment**

Assessed tax being less than advance tax paid by assessee and advance tax paid by assessee not being less than 90 per cent of assessed tax, assessee was not liable to any interest under section 234B(3).

*Baby Marine Exports v. ACIT (2006) 103 TTJ 696 (Cochin)(Trib.)*

**S. 234B : Interest – Advance tax – Mandatory – Speaking order [S. 234A, 234C]**

In view of the judgments of the Supreme Court in *CIT v. Ranchi Club Ltd. [2001] 164 CTR*

*200 / 247 ITR 209 /114 Taxman 414* and *CIT v. Anjum M.H. Ghaswala (2001) 252 ITR 1 / 171 CTR 1 / 119 Taxman 352*, in a case where interest under sections 234A, 234B and 234C is chargeable but not charged, that would be a mistake apparent from record which can be rectified by the Assessing Officer under the provisions of section 154. These two judgments have laid down the following propositions: –

- (i) Interest under sections 234A, 234B and 234C should be charged only when there is a speaking order in the body of assessment order;
- (ii) Interest under sections 234A, 234B and 234C must be charged in all cases where the levy is attracted.

In view of the above proposition and with reference to the judgment of Hon'ble Supreme Court in the case of *CIT v. Jai Prakash Singh (1996) 219 ITR 737 / 132 CTR*

262 / 85 Taxman 407 the matter was restored to the file of the Assessing Officer for taking a decision afresh after passing a speaking order. (A.Ys. 1995-96 to 1996-97)  
*Dy. CIT v. Royal Jordanian Airlines (2006) 98 ITD 1 / (2005) 97 TTJ 434 (SB)(Delhi)(Trib.)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115JA, 234C]**

Interest under section 234B and 234C is leviable while computing deemed income under the provisions of s. 115JA. (A.Y. 1990-2000)

*ACIT v. SMR Cotton Mills (P) Ltd. (2006) 100 TTJ 594 (Chennai)(Trib.)*

**S 234B : Interest – Advance tax – Deduction at source – Bonafide belief [S. 234A, 234B]**

Plea of the assessee that it committed defaults under a bona fide belief that deduction under section 80-O was allowable in respect of gross income and not net income being not sustainable in view of jurisdictional High Court decision and charge of interest being mandatory. Assessing Officer was justified in charging interest under section 234A, 234B & 234C. (A.Ys. 1994-95 to 1996-97 to 2001-02)

*Cascade Enterprises v. ACIT (2006) 101 TTJ 277 (Delhi)(Trib.)*

**S. 234B : Interest – Advance tax – Waiver – Rectification [S. 154, 234C]**

Interest under section 234B and 234C being mandatory in nature, Assessing Officer has no power to waive interest overtly or by implication and therefore he can charge interest by invoking provisions of s. 154 if not charged originally in the assessment order. (A.Y. 1996-97)

*Dy. CIT v. Oscar Investments Ltd. (2006) 99 TTJ 1202 / 98 ITD 339 / 7 SOT 330 (Mum.)(Trib.)*

**S. 234B : Interest – Advance tax – Mandatory [S. 234C]**

Levy of interest under sections 234B and 234C is mandatory. (A.Ys. 1997-98, 1998-99)

*Pathi Designs v. Dy. CIT (2005) 2 SOT 408 (Bang.)(Trib.)*

**S. 234B : Interest – Advance tax – Mandatory**

No discretion can be exercised in matter of levy of interest under section 234B, i.e., merit of reasons resulting into shortfall leading to levy of interest under section 234B cannot be taken into consideration; where assessee calculated its advance tax liability after availing exemption under section 47(v) and subsequently, by virtue of section 47A, exemption was withdrawn and resultantly tax liability was increased, Assessing Officer was justified in levying interest under section 234B. (A.Y. 1991-92)

*ACIT (Inv.) v. Prime Securities Ltd. (2005) 95 ITD 249 / 96 TTJ 553 (Mum.)(Trib.)*

**S. 234B : Interest – Advance tax – Reasonable cause**

Consideration as to whether there was reasonable cause for non-payment of advance is not relevant for purposes of section 234B. (A.Ys. 1995-96 to 1996-97)

*Dy. CIT v. Haryana Warehousing Corpn. (2005) 1 SOT 257 (Chd.)(Trib.)*

**S. 234B : Interest – Advance tax – Company – Book profit [S. 115JA, 234C]**

Interest under sections 234B and 234C can be charged in case income is computed under section 115JA. (A.Y. 1999-2000)

*Bullion Investments & Financial Services (P.) Ltd. v. Dy. CIT (2005) 4 SOT 622 (Bang.)(Trib.)*

**S. 234B : Interest – Advance tax – Non-mentioning the specific section**

Where the Assessing Officer had specifically mentioned in the assessment order for charging of interest under section 234B, there was no merit in the assessee's submission that the interest under section 234B was not at all chargeable for non-mentioning of the specific section in demand notice. (A.Y. 1998-99)

*Hindustan Sanitary Engineers v. ITO (2005) 95 ITD 226 / 96 TTJ 460 (Amritsar)(Trib.)*

**S. 234B : Interest – Advance tax – Direction to charge interest**

Having regard to fact that necessary computation of interest was contained in ITNS 150 which had been sent to assessee, it could not be said that there was no direction to charge interest; as such rule laid down in CIT v. Ranchi Club Ltd. (2001) 247 ITR 209 (SC) had not been violated. (A.Y. 1998-99)

*Annamaria Travels & Tours (P.) Ltd. v. Dy. CIT (2005) 95 TTJ 71 (Delhi)(Trib.)*

**S. 234B : Interest – Advance tax – Regular assessment [S. 143(1)]**

Interest under section 234B is to be charged on income determined on regular assessment under section 143(3) and not on income determined under section 143(1). (A.Y. 1998-99)

*Hindustan Sanitary Engineers v. ITO (2005) 95 ITD 226 / 96 TTJ 460 (Amritsar)(Trib.)*

**S. 234B : Interest – Advance tax – Regular assessment**

As per section 234B, as amended with retrospective effect from 1-4-1989, where a regular assessment is made interest is leviable up to that date, but interest is to be calculated on assessed income and not on returned income. (A.Ys. 1996-97, 1997-98)

*Shadi Ram & Sons v. Dy. CIT (2005) 92 ITD 22 (Luck.)(Trib.)*

**S. 234B : Interest – Advance tax – Regular assessment [S. 143(1)(a)]**

Interest is chargeable up to date of regular assessment and not merely up to date of processing of return under section 143(1)(a). (A.Y. 1991-92)

*ACIT v. N. Sasikala (Smt) (2005) 92 TTJ 1196 (Mad.)(Trib.)*

**S. 234B : Interest – Advance tax – Computation – Retrospective amendment – Assessed income**



In view of the retrospective amendment brought about by the Finance Act, 2001, with retrospective effect from 1-4-1989, interest under section 234B is to be levied on assessed income and not on returned income.

*Addl. CIT v. Hilton Roulunds Ltd. (2005) 97 TTJ 490 (Delhi)(Trib.)*

#### **S. 234B : Interest – Advance tax – Set off-MAT – Credit [S. 234C]**

Set-off of MAT credit is to be given in working out tax payable by assessee for purpose of determination of payment of advance tax, and, consequently for purpose of levy of interest under sections 234B and 234C. (A.Y. 2002-03)

*Phillips India Ltd. v. ACIT (2005) 92 ITD 441 / 93 TTJ 767 (Chd.)(Trib.)*

#### **S. 234B : Interest – Advance tax – Deduction at source – Income subjected to TDS**

Where all income received by assessee was such from which tax was deductible at source, assessee could not be held to be liable to pay interest under section 234B.

*Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 / 96 TTJ 0001 (SB)(Delhi)(Trib.)*

#### **S. 234B : Interest – Advance tax – Disallowance [S. 40A(3)]**

Where assessee as per its returned income, was not under obligation to pay advance tax as required under section 208, interest under section 234B was not chargeable on account of disallowance under section 40A(3). (A.Y. 1998-99)

*Sri Renukeswara Rice Mills v. ITO (2005) 93 ITD 263 / 93 TTJ 912 (Bang.)(Trib.)*

#### **S. 234B : Interest – Advance tax – Adjustment of cash seized – Search and seizure [S. 132B]**

No question of adjusting cash seized towards advance tax liability where seizure carried out much after the date of payment of advance tax for the relevant assessment year. Seized amount can not be appropriated towards advance tax or any other liability until an order under section 132(5) is passed and it is determined that some amount has been still left out of adjustment. On the facts and circumstances interest under section 234B and 234C is chargeable for the default of payment of advance tax. (A.Ys. 1989-90 & 1990-91)

*ACIT v. Rajesh Cotton Co. (2003) 79 TTJ 202 (Mum.)(Trib.)*

#### **S. 234B : Interest – Advance tax – Direction [S. 234C]**

Once the Assessing Officer calculated the interest chargeable under section 234B and 234C in the assessment order there was no need to give direction to charge the interest and therefore, the levy of interest under section 234B and 234C was valid. (A.Y. 1990-91).

*Charbhai Bidi Works v. ACIT (2003) 87 ITD 189 / 80 TTJ 483 (TM)(Pune)(Trib.)*

#### **Section 234C : Interest for deferment of advance tax**

**S. 234C : Interest – Deferment of advance tax – Capital gain – Intimation [S. 143(1)(a)]**

Even though the assessee had not paid advance tax on the capital gain on sale of property on 19-6-1995 by 15-9-1995 in accordance with the proviso to section 234C (1)(b)(ii) of the Act, levy of interest under section 234C of the Act in the intimation under section 143(1)(a) of the Act was not permissible. (A.Y. 1996-97)

*CIT v. Hindustan Hotels Ltd. & Anr. (2009) 27 DTR 127 / 226 CTR 454 (Bom.)(High Court)*

**S. 234C : Interest – Deferment of advance tax – Capital gains – Accrual – Amendment – Proviso**

Amendment of proviso to section 234C by the Finance (No. 2) Act, 1996 w.e.f. 1st April 1997, is clarificatory in nature and the same is to be applied retrospectively. Where the assessee has paid taxes arising out of income from long term capital gain as part of installments due after the date of sale of capital asset, he could not be in default as stipulated under section 234C and therefore, levy of interest was not valid. (A.Y. 1996-97)

*Torrential Investments (P) Ltd. v. ITO (2010) 133 TTJ 787 / 46 DTR 172 / 127 ITD 257 (Mum.)(Trib.)*

**S. 234C : Interest – Deferment of advance tax – Business commencement**

Assessee company incorporated on 4-12-2002 and commenced business in January. Held that assessee company was not liable to pay advance tax in December. (A. Y. 2003-04)

*BVQI (India) Pvt. Ltd. v. ACIT, ITA No. 1309/Mum/2005, Bench — K, dt. 7-11-2006 – BCAJ P. 401, Vol. 39-C, Part 4, January 2007. (Mum.)(Trib.)*

**S. 234C : Interest – Deferment of advance tax – Maximum period of 3 months**

Interest under section 234C is chargeable for the period of default, subject to a maximum period of 3 months, and not compulsorily for a period of 3 months. Interest should not be charged if assessee has paid the money after the due date prescribed for payment of advance tax. Further a citizen who paid advance tax belatedly cannot be worse of than the person who has not paid at all.

*Panther Investrade Ltd. v. Dy. CIT (2007) 160 Taxman 203 (Mag.)(Mum.)(Trib.)*

**S. 234C : Interest – Deferment of advance tax – Appeal – Maintainability**

Appeal lies against the order charging interest under S.234C where the assessee limits itself to the ground that it is not liable to pay interest at all. (A.Y. 1999-2000)

*Express Newspapers Ltd. v. Jt. CIT (2006) 103 TTJ 122 (Chennai)(Trib.)*

**S. 234C : Interest – Deferment of advance tax – Computation – Date of presentation of cheque**

Where the taxes are paid by cheque and the same is honoured, it is the date of presentation of cheque which is date of payment of tax for purposes of interest under section 234C. (A.Ys. 1995-96, 1996-97)

*P. L. Haulwel Trailers Ltd. v. Dy. CIT (2006) 103 TTJ 249 / 100 ITD 485 (Chennai)(Trib.)*

### **S. 234C : Interest – Deferment of advance tax – Intimation**

Assessee having received intimation regarding the adjustment of income-tax refund only after the last instalment of advance tax was paid which it could not anticipate, interest under section 234C was not chargeable for the shortfall in payment of advance tax.

*Express Newspapers Ltd. v. Jt. CIT (2006) 103 TTJ 122 (Chennai)(Trib.)*

### **S. 234C : Interest – Deferment of advance tax – Computation**

Tax paid after the due date, but before the due date for the next instalment, such payment of tax is to be adjusted from the amount computed as shortfall and interest to be computed on the net amount. (A.Y. 2000-01)

*Panther Investrade Ltd. v. Dy. CIT, Bench J, ITA 1361/Mum/2003 dated 28-2-2006 - BCAJ P. 411 Vol 39-B, Part 4 July 2006 (Mum.)(Trib.)*

### **S. 234C : Interest – Deferment of advance tax – Non-payment of advance tax**

Assessee earned income from speculation business in October – Advance tax instalment due in September not paid the Tribunal held that the assessee is not liable to pay interest.

(A.Y. 2001-02)

*Mahendra U. Shah (Dr.) v. ACIT, Bench H, ITA 3048/Mum/2003 dated 8-3-2006 – BCAJ P. 658 Vol 39-B, Part 6 September 2006 (Mum.)(Trib.)*

### **S. 234C : Interest – Deferment of advance tax – Returned income – TDS**

Interest under section 234C is leviable on shortfall of advance tax as compared to tax due on returned income and therefore, where tax on returned income of assessee was less as against TDS credit of assessee, no interest under section 234C would be leviable on assessee. (A.Ys. 1989-90, 1991-92 to 1993-94 and 1997-98 to 1999-2000)

*Sterlite Industries (India) Ltd. v. Addl. CIT (2006) 6 SOT 497 / 102 TTJ 53 (Mum.)(Trib.)*

### **S. 234C : Interest – Deferment of advance tax – Company – Book profit [S. 115JA]**

Section 234C is applicable even where income has been computed under section 115JA; however, since provisions of section 115JA were brought on statute by Finance (No. 2) Act, 1996 on 1-4-1997 and came into operation with effect from 28-9-1996, assessee was not liable to pay advance tax installments due before 28-9-1996, i.e., on or before 15-6-1996 and

15-9-1996 and interest under section 234C was chargeable only for non-payment of advance tax installments due on 15-12-1996 and 15-3-1997. (A. Y. 1997-98)  
*Jt. CIT v. Arihant Industries Ltd. (2005) 96 ITD 464 / 98 TTJ 52 (Chd.)(Trib.)*

### **Section 234D : Interest on excess refund**

#### **S. 234D : Interest on excess refund – Chargeability – 1-6-2003**

Section 234D is applicable only from 1st June, 2003 and therefore, no interest under that section could be levied from earlier date. (A. Y. 1999-2000).

*CIT v. Faunc India Ltd. (2011) 57 DTR 340 / 244 CTR 529 (Karn.)(High Court)*

#### **S. 234D : Interest on excess refund – Appeal effect Order – Regular assessment [S. 143(1)]**

Section 234D is attracted only when the refund is granted to the assessee under section 143(1) becomes refundable to the revenue on regular assessment and cannot be charged when the refund was granted to the assessee not in the assessment under section 143(1) but pursuant to order of CIT(A) on appeal. (A.Ys. 1992-93 to 1998-99).

*DIT (International) v. Delta Air Lines Inc. (2011) 63 DTR 1 / 245 CTR 16 (Bom.)(High Court)*

#### **S. 234D : Interest on excess refund – Date w.e.f. 1-6-2003**

Interest under section 234D is payable from the date it was introduced i.e. 01.06.2003. (A.Y. 1995-96)

*CIT v. South Indian Bank Ltd. (2010) 47 DTR 135 / 194 Taxman 73 (Ker.)(High Court)*

#### **S. 234D : Interest on excess refund – Period before 1-6-2003 – Not retrospective**

As section 234D was inserted w.e.f. 1.6.2003, it is not retrospective.

*CIT v. Bajaj Hindustan ITA No. 198 of 2009 dated 15-4-2009 (Bom.)(High Court)*

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#### **S. 234D : Interest on excess refund – A. Y. 2004-05 – Not retrospective**

Section 234D applies from A. Y. 2004-05 and is not retrospective.

*DIT v. Jacobs Civil incorporated (2010) 235 CTR 123 / 330 ITR 578 / 194 Taxman 995 / 45 DTR 163 (Delhi)(High Court)*

#### **S. 234D : Interest on excess refund – Effective date – Levy only from A.Y. 2004-05**

Section 234D was brought under statute book from the assessment year 2004-05 the Assessing Officer was not to levy the interest under section 234D. (A. Y. 2002-03 and 2003-04).

*C.A. Computer Associates P. Ltd. v. Dy. CIT (2011) 8 ITR 142 (Mum.)(Trib.)*

**S. 234D : Interest on excess refund – Date – Levy from A.Y. 2004-05**

Levy of interest under section 234D on excess refund was not justified for the Asst. Year 2003-04 as the provision was applicable only from Asst. Year 2004-05. (A.Y. 2003-04)

*Komaf Financial Services Ltd. v. ITO (2010) 132 TTJ 359 / 42 DTR 402 (Mum.)(Trib.)*

**S. 234D : Interest on excess refund – Levy – Period after 1-6-2003**

Interest under section 234D cannot be charged for the period prior to 1st June, 2003 but chargeable w.e.f. 1st June, 2003. (A.Y. 2000-01)

*Jindal Steel & Power Ltd. v. ACIT (2007) 106 TTJ 943 / (2006) 10 SOT 106 (Delhi)(Trib.)*

**S. 234D : Interest on excess refund – Order passed prior to 1-6-2003**

Interest under section 234D is not chargeable where the order granting refund was passed prior to insertion of section 234D. (A.Y. 2001-02)

*Van Oord Dredging & Marine Contractors BV v. Dy. DIT (2007) 106 TTJ 889 / 105 ITD 97 (Mum.)(Trib.)*

**S. 234D : Interest on excess refund – Substantive law – Not retrospective**

Provisions of section 234D, i.e. brought on statute from 1-6-2003, are substantive and they cannot be applied retrospectively and therefore, it can not be applied to the earlier years even though the regular assessments for those years were framed after 1-6-2003 or refund was granted for those years after said date. (A.Ys. 1998-99, 1999-2000, 2000-01)

*ITO v. Ekta Promoters (P.) Ltd. (2008) 113 ITD 719 / 117 TTJ 289 / 10 DTR 563 (SB)(Delhi)(Trib.)*

**S. 234D : Interest on excess refund – Substantive law – Not procedural**

Law dealing with imposition of interest is substantive and not procedural law, and, therefore, interest under section 234D cannot be charged in respect of assessment years prior to coming into force of the provision.

*Glaxo Smithkline Asia (P.) Ltd. v. ACIT (2005) 97 TTJ 108 (Delhi)(Trib.)*

## **CHAPTER XIX**

### **REFUNDS**

#### **Section 237 : Refunds**

**S. 237 : Refunds – Appeal – Proviso clarificatory [S. 240]**

Failure or inability of the revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment had been made. If assessment nullified, the tax deposited by

assessee by way of advance tax, or self assessment tax or tax deducted at source is liable to be refunded to the assessee, since its retention may offend article 265 of the Constitution. Proviso (b) to section 240 is declaratory and it must be held retrospective. (A.Y. 1976-77)

*CIT v. Shelly Products & Anr. (2003) 261 ITR 367 / 129 Taxman 271 / 181 CTR 564 / 175 Taxation 434 (SC)*

### **S. 237 : Refunds – Deduction at source – Amount recovered from employer [S. 240]**

Where assessability of the perquisite value of stock option was held as not justified and not in accordance with the law by apex court, TDS recovered from assessee by employer company was refundable to the assessee.

*Ramaa Sivaram (Smt) v. CCIT (2010) 42 DTR 215 / 322 ITR 586 / 235 CTR 411 (Mad.)(High Court)*

### **S. 237 : Refunds – Returns filed with in period of limitation – Deduction at source**

When assessee files the return with in limitation period, assessing officer was duty bound to take action. If the refund is due, the Assessing Officer is bound to issue the refund. (A.Y. 1989-90)

*CIT v. Daljit Singh Pyare Lal & Co (2004) 269 ITR 19 / 141 Taxman 538 / 191 CTR 394 (P&H)(High Court)*

### **S. 237 : Refunds – Advance tax – Assessment time barred**

The assessee is not entitled to refund of advance tax paid by him for an assessment year for which no regular assessment was made and it was allowed to become time barred by the ITO. (A.Y. 1981-82)

*Kamal Kishore Gupta v. ITO (2006) 280 ITR 588 / (2004) 141 Taxman 170 / 191 CTR 165 (P&H)(High Court)*

## **Section 239 : Form of claim for refund and limitation**

### **S. 239 : Refunds – Non filing of form no 30 – Limitation**

The assessee's claim for refund can not be rejected merely on the ground that the assessee had not filed Form NO 30. (A.Y. 1989-90)

*CIT v. Daljit Singh Pyare Lal & Co (2004) 269 ITR 19 / 141 Taxman 538 / 191 CTR 394 (P&H)(High Court)*

### **S. 239 : Refunds – Form – Claims beyond limitation period – Board's authority**

Claim for refund can not be entertained unless it is made with in the period specified. It is not possible to accept that the statutory provision incorporated under section 239 as amenable to relaxation at the hands of the Board through instructions under section 119.



*Niranjan Dass v. CBDT (2004) 135 Taxman 422 / 266 ITR 489 / 186 CTR 152 (P&H)(High Court)*

**S. 239 : Refunds – Form – Limitation – Order passed – Reassessment [S. 240]**

For the years under appeal the assessee had not filed return of income under section 139(1) or under section 139(4). Return was filed in response to notice under section 148. While the Assessing Officer allowed the credit for prepaid taxes as per the law, he refused the refund of excess taxes paid, holding that same was not allowable under section 239. The CIT(A) upheld the order. The Tribunal referring to the provisions of section 240, held that a refund becomes due to an assessee as a result of any order passed in appeal or other proceedings under the Act. The phrase "other proceedings" used in section 240 was of wide amplitude to cover any order passed in proceedings other than appeals under the Act. Hence assessee was entitled to refund of excess taxes paid. (A. Ys. 1999-2000 to 2001-02)

*Claridge Hotels Pvt. Ltd. v. ACIT, ITA Nos. 4250 to 4252/Del/2004, Bench - E, dt. 13-10-2006 - BCAJ P. 421, Vol. 39-D, Part 4, July 2007 (Delhi)(Trib.)*

**Section 240 : Refund on appeal, etc.**

**S. 240 : Refund – Appeal – Interest – Advance tax [S. 214, 237, 243, 244]**

The assessee paid advance tax in excess of tax as assessed as pursuant of decision of appellate authorities. There was delay in refunding of amount. The court held that interest is payable to assessee such interest by way of compensation. The court held that the amount wrongfully detained by tax department. The assessee is entitled for interest.

*Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 / 200 CTR 505 / 55 Taxman 591 (SC)*

**S. 240 : Refund – Appeal – Interest – Interest on interest [S. 214, 237, 243, 244(1)]**

Considering the context in which the word 'refund' or the expression 'any amount' has been used in section 240, it would not include an amount of interest payable by the department to the assessee. Section 244(1) can not be read independently of section 240, but at same time it could not be accepted that section 240 can not be read independently of section 244 (1). Assessee can not get interest on interest. Obligation to pay interest in terms of section 244(1) or 244 (1A) is not applicable to cases relating to assessments for assessment year commencing from 1-4-1989 onwards. (A.Ys. 1977-78 to 1981-82)

*Sandvik Asia Ltd. v. CIT (2004) 137 Taxman 167 / 267 ITR 78 / 189 CTR 226 (Bom.)(High Court)*

*Editorial : Refer Supreme Court in Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 (SC)*

**S. 240 : Refund – Appeal – Assessment time barred**

Where an order of assessment is set aside and matter restored to ITO for passing a fresh order of assessment, who passes no order and assessments get time barred, assessee is entitled to get refund of amount deposited by him in pursuance of assessment order. (A.Y. 1984-85)

*Harihar Nath Agarwal (P.) Family Trust v. ACIT (2003) 184 CTR 589 / 184 CTR 589 / 264 ITR 612 / 137 Taxman 394 (All.)(High Court)*

### **Section 243 : Interest on delayed refunds**

#### **S. 243 : Refunds – Interest on delayed refunds – Period u/s. 214 and S. 243 [S. 214, 237]**

Excess realization of advance tax, upon assessment and adjustment, becomes refundable under section 237 and no further interest is payable on it under section 214; Interest if any, on delayed refund is payable under section 243. (A.Ys. 1972-73 to 1976-77)

*CIT v. Udhoji Shri Krishandas (2004) 136 Taxman 465 / 268 ITR 244 (FB)(MP)(High Court)*

### **Section 244 : Interest on refund where no claim is needed**

#### **S. 244 : Interest on refund – No claim is needed [S. 244A]**

Where it was held that computation of interest under section 244 and 244A, by revenue authorities was not in compliance of the order of the High Court passed in assessee's case. The decision of the High Court was clearly to grant the appellant the due amount hence, the interest was required to be granted as per order of the High Court.

*Vijay Kumar Bhati v. CIT (2003) 264 ITR 657 / 128 Taxman 54 / 179 CTR 397 (SC)*

#### **S. 244 : Interest on refund – Accrual of income – No claim needed**

Interest on refund accrues only when the refund is granted. (A.Y. 1994-95)

*K. Devayani Amma (Smt.) v. Dy. CIT (2010) 328 ITR 10 (Ker.)(High Court)*

#### **S. 244 : Interest on refund – No claim is needed [S. 214]**

If the amount on which the interest is payable is varied subject to the first assessment, then the quantum of interest has also to be increased or decreased accordingly. But the period for which the interest has to be paid is not altered by the newly substituted sub section (1A) of section 214. Assessee can not get interest under section 214 and section 244(1A), simultaneously though the rate of interest is same under both the sections. (A.Ys. 1972-73 to 1976-77)

*CIT v. Udhoji Shri Krishnadas (2004) 136 Taxman 465 / 268 ITR 244 (FB)(MP)(High Court)*

#### **S. 244 : Interest on refund – Interest paid u/s. 220(2) – Delay – AO personally responsible**

The Court held that assessee deserves to be compensated for delay in issuing refunds. The Assessing Officer personally held liable to pay compensation to assessee.

*Balwant Singh Bhangal v. ITO (2004) 137 Taxman 200 / 188 CTR 157 (P&H)(High Court)*

**S. 244 : Interest on refund – Appeal – Assessment – Non est – No claim needed**

If on appeal, assessment is held to be as nonest, assessee would not be entitled to interest under section 244(1A) on amount deposited by it pursuant to such order of assessment. (A.Y. 1973-74)

*Punjab State Warehousing Corp v. CIT (2004) 138 Taxman 48 / 186 CTR 247 / 264 ITR 597 (P&H)(High Court)*

**S. 244 : Interest on refund – No claim needed – Interest [S. 220(2)]**

The assessee is entitled to interest under section 244(1A) in respect of the interest payments under section 220(2).

*Modipon Ltd. v. CIT (2004) 270 ITR 257 / 142 Taxman 92 / 192 CTR 110 (Delhi)(High Court)*

**S. 244 : Interest on refund – No claim needed – Date of order – Actual refund**

Assessee is entitled to interest under section 244 from the date of order of Dy. CIT(A) till the date of actual refund.

*Lalchand Bhangdia v. ITO (2006) 99 TTJ 1314 / (2005) 97 ITD 509 (Hyd.)(Trib.)*

**S. 244 : Interest on refund – No claim needed – Waiver of interest [S. 234A, 234B, 234C]**

Assessee is entitled to interest under section 244A on refund arising on waiver of interest under section 234A, 234B and 234C.

*ITO v. A. J. Dhanapal (HUF) (2006) 99 TTJ 1009 / 97 ITD 317 (Chennai)(Trib.)*

**S. 244 : Interest on refund – No claim needed – Interest on interest**

Assessee is entitled to simple interest on interest which is admittedly due to it under sections 214 and 244(1) from the date when the interest became due till date when such interest is granted at the rate specified in the Act. (A.Y. 1988-89)

*Mohan Meakins Ltd. v. ACIT (2006) 101 TTJ 359 (Delhi)(Trib.)*

**S. 244 : Interest on refund – No claim needed – Withdrawal of interest [S. 243]**

Prior to the insertion of S. 244A w.e.f. 1st April, 1989, interest under section 243 and 244(1A) once granted to assessee, could not be withdrawn. (A.Y. 1980-81)

*Jt. CIT v. Leader Valves (P) Ltd. (2006) 100 TTJ 913 (Amritsar)(Trib.)*

**S. 244 : Interest on refund – No claim is needed – Appeal order [S. 214]**

Where order in appeal was passed on 17-10-1995 and three months from end of month in which such order was passed expired by 31-1-1996, whereas refund as a consequence of order in appeal was granted by Assessing Officer on 24-5-2002, assessee was entitled to interest under section 244 even on amount of interest calculated under section 214.

*Lalchand Bhangdia v. ITO (2005) 97 ITD 509 / 99 TTJ 1314 (Hyd.)(Trib.)*

### **Section 244A : Interest on refunds**

#### **S. 244A : Interest on refunds – Deduction at source – Delayed Refund**

Interest, which accrued to the assessee for non-refund of TDS, partook the character of the "amount due" under section 244A and became an integral part of the principal amount which was not refunded after it became due and payable and therefore assessee was entitled to interest on delayed refund of TDS. (A.Y. 1993-94)

*CIT v. H.E.G. Ltd. (2010) 324 ITR 331 / 33 DTR 304 / 228 CTR 495 / 189 Taxman 335 (SC)*

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Interest, which accrued to the assessee for non-refund of TDS, partook the character of the "amount due" under section 244A and became an integral part of the principal amount which was not refunded after it became due and payable and therefore assessee was entitled to interest on delayed refund of TDS.

The amount on which the interest for the period during which tax was not refunded will include the amount of tax deducted at source.

*CIT v. H.E.G. Ltd. (2010) 33 DTR 304 / 228 CTR 495 / 189 Taxman 335 / 324 ITR 331 / 216 Taxation 39 (SC)*

#### **S. 244A : Interest on refunds – Refund of tax adjusted out of seized amount – Payable**

In respect of refund of tax recovered by the authorities by way of adjustment out of the amount seized from the assessee-trust, sub-cl. (b) of section 244A is attracted and accordingly, interest under section 244A is payable to the assessee on such refund. (A. Y. 2004-05).

*CIT v. Islamic Academy Education (2011) 52 DTR 69 / 239 CTR 209 / 202 Taxman 276 (Karn.)(High Court)*

#### **S. 244A : Interest on refunds – MAT Credit – First adjustment**

From the tax payable by assessee under section 115JA, MAT credits is to be adjusted first, then what becomes refundable after adjustment of MAT credit is excess advance tax, paid by assessee and on such refundable advance tax interest under section 244A has to be calculated and paid. (A. Y. 1988-99).

*CIT v. Bharat Aluminium Co Ltd. (2011) 200 Taxman 57 / 58 DTR 113 / 242 CTR 366 / (2011) Tax L.R. 931 (Delhi)(High Court)*

**S. 244A : Interest on refunds – Adjustment of amount seized – Non payment of S.A tax**

After a search conducted at assessee's premises, it filed its return of income. However, it failed to pay self-assessment tax due as per return and requested authorities to adjust amount of tax due out of amount seized from its office and its chairman. Subsequently, assessment order came to be passed making assessment at a lesser amount and, consequently, assessee became entitled to refund. Held that, clause (b) of section 244A was attracted and assessee was entitled to refund with interest. (A. Y. 2004-05)

*CIT v. Islamic Academy Education (2011) 202 Taxman 276 / 239 CTR 209 / 52 DTR 69 (Karn.)(High Court)*

**S. 244A : Interest on refunds – Self assessment tax – Regular assessment – Notice of demand [S. 156]**

Where the assessee is entitled to refund of self assessment tax, interest under section 244A, is to be calculated from the date of payment of tax till the date of refund and not from the 1st April of the assessment year or from the regular assessment. (A. Y. 2002-03).

*CIT v. Vijaya Bank (2011) 64 DTR 411 / 332 ITR 235 / (2012) 246 CTR 548 (Karn.)(High Court)*

**S. 244A : Interest on refunds – Minimum Alternative Tax – MAT [S. 115JAA]**

Interest under section 244A is allowable on the refundable taxes arrived after giving credit of brought forward MAT under section 115JAA. (A.Y. 2000-01)

*CIT v. Apar Industries Ltd. (2011) 220 Taxation 72 / (2010) 38 DTR 128 / 323 ITR 411 / 231 CTR 313 / 190 Taxman 353 (Bom.)(High Court)*

**S. 244A : Interest on refunds – Self Assessment Tax [S. 140A]**

Assessee is entitled to interest under section 244A, on the refund of self assessment tax paid under section 140A. (A.Y. 1998-99)

*CIT v. Sutej Industries Ltd. (2010) 37 DTR 25 / 325 ITR 331 / 231 CTR 80 / 190 Taxman 136 (Delhi)(High Court)*

**S. 244A : Interest on refunds – Wrong deduction of source – Refunded – Not eligible**

Assessee company erroneously deducted tax out of interest payment made to IDBI under section 194A(3)(iii)(b), though no tax was required to be deducted from such payments. On assessee's request department granted refund of amount so deducted. Assessee claimed interest on refund. The Court held that as the assessee has paid the tax on its own on an erroneous impression, it did not become deemed assessee and therefore section 244A did not get attracted.

*Universal Cables Ltd. v. CIT (2010) 191 Taxman 370 (MP)(High Court)*

**S. 244A : Interest on refunds – Belated Claim – Stock Option – Deduction at source**

Tax deducted at source from the salary treating the stock option held to be not taxable as perquisites and refundable to the assessee, the department is directed to consider the claim for interest under section 244A on such refund. (A.Ys. 1998-99 and 1999-2000)

*Malliga D. v. ACIT (2010) 45 DTR 146 (Karn.)(High Court)*

**S. 244A : Interest on refunds – TDS Certificates filed in Assessment Proceedings – Eligible**

TDS certificates were filed in the course of assessment proceedings. As the tax was deducted at source at the right time, interest under section 244A could not be denied. Provisions of section 244A(2) are not attracted.

*Larsen & Toubro Ltd. v. ACIT (2010) 190 Taxman 373 / 38 DTR 361 / 235 CTR 108 / 326 ITR 514 (Bom.)(High Court)*

**S. 244A : Interest on refunds – Interest on Interest – Eligible**

When excess amount of tax is refunded but interest is not refunded therewith, interest on interest would also become payable. (A.Y. 1994-95)

*Motor & General Finance Ltd. v. CIT (2009) 185 Taxman 167 / 31 DTR 170 / (2010) 228 CTR 109 / 320 ITR 88 (Delhi)(High Court)*

**S. 244A : Interest on refunds – Interest on interest – Entitlement**

Assessee is entitled to interest on the amount of interest allowable under section 244A of the Act.

*CIT v. H.E.G. Ltd. (2009) 19 DTR 316 (MP)(High Court)*

**S. 244A : Interest on refunds – Deduction at source – Wrongly deducted – Not entitled to interest**

Where the assessee had wrongly deducted tax at source without any statutory liability to make such deduction, subsequently when such amount is refunded to it, the assessee is not entitled to interest under section 244A of the Act on such refund.

*Universal Cables Ltd. v. CIT (2009) 26 DTR 98 / (2011) 237 CTR 157 (MP)(High Court)*

**S. 244A : Interest on refunds – Excess amount seized – Compensation – Damages**

Where there is refund of excess amounts seized as a result of appellate order, interest is payable from date of original assessment order. Assessee also entitled to compensation / damages in addition to interest.

*Ajay Gupta v. CIT (2008) 297 ITR 125 / (2007) 210 CTR 116 / 162 Taxman 296 (Delhi)(High Court)*



**S. 244A : Interest on refunds – Order under section 201 for refund of TDS [S. 201]**

Interest under section 244A(1)(b) is allowable and should be granted on refund of tax paid in pursuance of an order under section 201 of the Act. (A. Y. 2006-07)

*Reliance Infrastructure Ltd. v. Addl. CIT (2011) 9 ITR 84 / 60 DTR 419 (Mum.)(Trib.)*

**S. 244A : Interest on refunds – Self assessment tax – Date of payment to refund**

An assessee is entitled to interest on excess payment of self assessment tax in terms of section 244A(1)(b), from date of payment of such amount up to date on which refund is actually granted. (A. Y. 2007-08).

*ADIT v. Royal Bank of Scotland N.V. (2011) 130 ITD 305 / 138 TTJ 698 / 55 DTR 307 (Kol.)(Trib.)*

**S. 244A : Refunds – Interest – Interest on refunds – Interest on interest – Self assessment tax**

Held, that assessee is entitled to Interest on Interest under section 244(1A) on refund of tax paid by way of S.A. Tax.

*MMTC Ltd. v. Dy. CIT (2009) 185 Taxman 104 (Mag.)(Delhi)(Trib.)*

**S. 244A : Interest on refunds – Interest – Non-resident – Deduction at source – In any other case [S. 195]**

The assessee paying tax in consequence of an order passed under section 195. On appeal, CIT(A) held that tax not payable and ordered refund thereof. The assessee claimed that it was also entitled to interest as provided under section 244A. However, Assessing Officer and CIT(A) refused the interest on refund. The Tribunal allowed the appeal and granted interest on refund. Clause (b) of section 244A(1) very categorically provided that interest shall be paid on any refund, arising because of payment of tax 'in any other case'. (A.Ys. 1997-98,)

*Tata Chemical Ltd. v. Dy. CIT, (2007 16 SOT 481 (Mum.)(Trib.)*

**S. 244A : Interest on refunds – Excess self assessment tax – Mandatory**

Assessee is entitled to the interest under section 244A on the excess self-assessment tax paid under section 140A. (A.Y. 1998-99)

*ACIT v. Grindwell Norton Ltd. (2006) 102 TTJ 265 / 100 ITD 245 / 6 SOT 601 (Mum.)(Trib.)*

**S. 244A : Interest on refunds – Last day of accounting year – Date of issue and date of receipt**

Interest on refund allowed on last day of accounting year cannot be added as income of the relevant year as there is always time gap between date of issue and date of receipt of refund order. (A. Y. 1998-99)

*Om Prakash Nargotia v. ITO (2006) 100 TTJ 657 (Amritsar)(Trib.)*

**S. 244A : Interest – Interest on refunds – Appealable order**

An order under section 244A granting Refund of Interest at a lesser figure is an appealable order, as assessee is aggrieved by such order, order rejecting the claim of assessee on ground that no appeal lay against such order, was set aside.

*Aich Aar Chemicals (P) Ltd. v. Dy. CIT (2006) 154 Taxman 85 (Mag.)(Indore)(Trib.)*

**S. 244A : Interest on refunds – Borrowed money – Source of advance tax**

For entitlement to interest under section 244A, it is immaterial as to from which source advance tax is paid or whether assessee is paying interest on funds received by it or whether it has returned funds received by it out of which advance tax is paid; grant of interest is mandatory as there is a use of word 'shall' while directing Assessing Officer to grant interest. (A.Y. 1994-95)

*Executor of Estate of Late Dinshah J. Gazdar v. Jt. CIT (2005) 4 SOT 604 (Mum.)(Trib.)*

**S. 244A : Interest on refunds – Delayed payment – Entitled**

Where payment of interest to assessee under section 244A was delayed by revenue, assessee was entitled to interest on interest.

*MMTC Ltd. v. Dy. CIT (2005) 149 Taxman 7 (Mag.)(Delhi)(Trib.)*

**S. 244A : Interest on refunds – Late filing of TDS certificate – Eligible period**

In terms of section 244A(2), while determining eligible period for calculation of interest, delay caused because of late filing of TDS certificates by assessee needs to be excluded and reasons which caused delay in filing TDS certificates should not come in way of determining issue. (A.Y. 1992-93)

*Kotak Mahindra Finance Ltd. v. Dy. CIT (2005) 93 ITD 7 / 93 TTJ 500 (Mum.)(Trib.)*

**S. 244A : Interest on refunds – Cash seized – Search and seizure – Block assessment**

Where out of cash seized from assessee, certain amount was adjusted against demand created as a result of block assessment, on refund of balance amount, interest was to be paid up to date of refund and further interest on interest on aforesaid amount was also to be paid.

*ACIT v. Ramesh C. Sugandh (2005) 1 SOT 217 / 89 TTJ 807 (Nagpur)(Trib.)*

**S. 244A : Interest on refunds – Element of interest – Eligible**

Interest is to be granted also on the Interest element comprised in the Refund amount.

*Uni-sankyo Ltd. v. Dy. CIT (2003) SOT 410 (Hyd.)(Trib.)*

*Nuchem Ltd. v. ACIT (2003) 128 Taxman 64 (Mag.)(Delhi)(Trib.)*

**S. 244A : Interest on refunds – Self assessment tax – Date of order to payment**

Interest on Refund of S.A tax would be calculated from date of assessment order and not from the date of payment of S.A Tax. (A.Ys. 1994-95, 1995-96)

*Sutlej Industries Ltd. v. ACIT (2003) 86 ITD 335 / (2004) 84 TTJ 80 (Delhi)(Trib.)*

### **Section 245 : Set off of refunds against tax remaining payable**

#### **S. 245 : Refunds – Set off against tax remaining payable – Collection and recovery – Assessee deemed in default – Waiver of Interest – Powers of Settlement Commission [S. 220]**

Power to waive or reduce interest subject to restriction in respective provisions. Commission has to examine whether assessee has made out a case.

*CIT v. Damani Brothers (2003) 259 ITR 475 / 173 Taxation 40 / 179 CTR 362 (SC)*

#### **S. 245 : Refunds – Set off against tax remaining payable – Refund arising in earlier year on issue cannot be adjusted against demand on same issue in subsequent year**

Against an order passed under section 144C / 143(3), the assessee filed a stay application before the Assessing Officer under section 220(6) and also filed a stay application before the Tribunal. The Tribunal passed an interim order directing "status quo". Despite the interim order, the Assessing Officer passed an order under section 245 (without giving prior notice) and adjusted refunds against the demand. Before the Tribunal, the department accepted that the 245 refund adjustment was not proper and said a proper order would be passed. The Assessing Officer then passed an order under section 220(6) in which he held that the adjustment of refunds was in order on the ground that (i) an adjustment of refunds was not a "recovery" and (ii) though some issues were covered in favour of the assessee, the decision had not become final as the department was in appeal. The Tribunal then passed a stay order in which it accepted the Assessing Officer's stand that an adjustment of refund was not a "recovery". It was also held that action under section 245 was not "mala fide". The assessee filed a writ petition to challenge the adjustment of refunds. HELD allowing the Petition:

- (i) Section 220(6) has no application to a case where an appeal is filed before the Tribunal though the Tribunal has inherent power to grant stay. The order passed under section 220(6) is null and void. The Tribunal should have decided the stay application instead of calling upon the Assessing Officer to dispose of the application under section 220(6);
- (ii) It is wrong to say that an adjustment of refund under section 245 is not a "recovery" only on the ground that section 245 is placed in the Chapter of "Refunds". The term "recovery" is comprehensive and includes adjustment thereby reducing the demand. In Circular No. 1914 dated 2.12.1993, even the CBDT did not regard 'recovery' as excluding 'adjustment' under section 245. However, different parameters may apply in considering a request for stay against coercive measures to recover the demand and a stay against refund adjustment. It is permissible for the authority to direct stay of recovery by coercive methods

but not grant stay of adjustment of refund. However, when a simple & absolute order of stay of recovery is passed, it bars recover of the demand by way of adjustment of demand. The revenue must be obedient and respect the stay order and not over-reach or circumvent the stay order. No deviancy or breach should be made;

- (iii) It will be specious & illogical for the Revenue to contend that if an issue is decided in favour of the assessee giving rise to a refund in an earlier year, that refund can be adjusted under section 245, on account of the demand on the same issue in a subsequent year. While the Assessing Officer can made an addition on the ground that the appellate order for an earlier year has not been accepted, he cannot make an adjustment towards a demand on an issue decided in favour of the assessee.
- (iv) The argument that as the assessment order has been passed under section 144C after reference to the DRP, the orders passed by the CIT(A) and Tribunal in favour of the assessee have lost significance and do not justify stay of demand in covered matters is not acceptable. The decisions of the CIT(A) & Tribunal in favour of the assessee should not be ignored and have not become inconsequential. This is not a valid ground to ignore the decisions of the appellate authorities and is also not a good ground to not to stay demand or to allow adjustment under section 245;
- (v) The respondents are officers of the State and the Law requires that they perform their duties with utmost objectivity and fairness, while keeping in mind the sanctity of the role and function assigned to them which at times requires tough steps. On facts, the conduct and action of the Revenue in recovering the disputed tax in respect of additions on issues which are already covered against them by the earlier orders of the ITAT or CIT(A) is unjustified and contrary to law. Directions issued to refund the tax. ( A.Ys 2003-04, 2005-06 & 2006-07)

*Maruti Suzuki India Limited v. Dy. CIT (2012) 204 Taxman 48 / 65 DTR 110 / 246 CTR 176 (Delhi)(High Court)*

### **S. 245 : Refunds – Set off against tax payable – Set off – Intimation – KVSS**

Assessee having a valid certificate under the KVSS showing full and final settlement of tax payable for asst. yr. 1992-93, there was no occasion for the AO to adjust any tax arrears of that year against refund for asst. yr. 1997-98 that too without any intimation to assessee. (A.Y. 1997-98)

*Radhe Investments (P) Ltd. v. ITO (2006) 99 TTJ 777 (Ahd.)(Trib.)*

## **CHAPTER XIX-A SETTLEMENT OF CASES**

### **Section 245A : Definitions**

### **S. 245A : Settlement Commission – Definitions – Application for settlement [S. 245BC]**

Where on application by assessee under section 245C, revenue had taken an objection to maintainability of application contending that applicant had not fulfilled qualifying criteria as contemplated under section 245C and had sought to agitate matter as a preliminary issue before Commission, but Commission rejected such preliminary objection, writ petition filed by revenue against rejection of their preliminary objection was to be dismissed as at stage of disposal of application; revenue could agitate or apprise Commission on all aspects of matter. (A.Ys. 1994-95 to 1997-98)

*CIT v. Vysya Bank Ltd. (2006) 282 ITR 185 / (2005) 198 CTR 450 / 152 Taxman 297 (Karn.)(High Court)*

#### **S. 245A : Settlement Commission – Definitions – Bench less than three members [S. 245BA]**

Only in exceptional circumstances under sub-section (5) of section 245BA, a Bench of less than three members can be constituted; taking advantage of sub-section (5) Settlement Commission cannot constitute Bench of less than three members initially; formation of Bench consisting of two members to entertain application for rectification and to pass rectification order rectifying order of a three-member Bench is de hors provision of sub-section (2) of section 245BA. (A.Ys. 1989-90 to 1994-95)

*Smriti Properties (P.) Ltd. v. Settlement Commission (IT & WT) (2005) 278 ITR 274 / 149 Taxman 386 / 199 CTR 261 (Cal.)(High Court)*

#### **S. 245A : Settlement Commission – Definitions – Order conclusive – Order under section 245D(4) [S. 245-I]**

Conclusiveness given by section 245-I is only as regards liability under Income-tax Act; section 245D does not clothe an order of Settlement Commission under section 245D(4) with such conclusiveness as to exclude any proceedings under Kerala General Sales Tax Act, 1963 (KGST Act) on basis of undisclosed business income found by Settlement Commission in its order. (A.Y. 1991-92)

*P.T. Antony & Sons v. Union of India (2005) 279 ITR 363 / 148 Taxman 165 (Ker.)(High Court)*

#### **S. 245A : Settlement Commission – Definitions – Power to reopen – Assessee's instance**

Settlement Commission has no power to reopen the completed proceedings at the instance of the assessee. (A.Ys. 1972-73 to 1979-80)

*IDCO Dyes & Chemicals (P.) Ltd. v. Settlement Commission (2003) 259 ITR 600 / 128 Taxman 687 / 180 CTR 212 (Delhi)(High Court)*

#### **Section 245C : Application for settlement of cases**

#### **S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Revision – Undisclosed income – Full and true disclosure – Right to revise application [S. 245D(4)]**

A "Full and True" disclosure of income which had not been previously disclosed by the assessee, being a pre condition for a valid application under section 245C(1), the scheme of Chapter XIX does not contemplate revision of the income as disclosed in the application against item no 11 of Form No 34B. More over, if an assessee is permitted to revise his disclosure, in essence he would be making a fresh application in relation to the same case by withdrawing the earlier application. The assessee can not revise the application. In the Scheme of Chapter XIX-A, there is no stipulation, for revision of an application filed under section 245C(1) and the determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under that section. Revision of the annexure to the application is tantamount to revision of application, not contemplated in the scheme. Revision of undisclosed income in Settlement Application is not permissible.

*Ajmera Housing Corporation v. CIT (2010) 326 ITR 642 / 193 Taxman 193 / 234 CTR 118 / 43 DTR 276 (SC) / 8 SCC 739 / (2011) 221 Taxation 1 (SC)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – True and complete disclosure [S. 132(5), 132(12)]**

The Supreme Court set aside the order of High Court and remanded the matter back to the High Court to decide a fresh leaving the parties to raise the points, including the points (i) of the assessee, that the High Court ought not to have entertained the petitions in exercise of writ jurisdiction; (ii) of the Department, that the application filed by the assessee before the Settlement Commission could not be entertained because the assessee had not made a true and complete disclosure of its undisclosed income. (A.Ys. 1989-90 to 1993-94)

*Chhota Lal S. Ajmera (HUF) Karta & Anr. v. CIT (2007) 289 ITR 1 / 199 Taxation 168 / 208 CTR 435 / 160 Taxman 142 (SC)*

*Editorial:- Decision of Bombay High Court in CIT v. Income tax Settlement Commission (2000) 246 ITR 63 / 163 CTR 440 / 112 Taxman 523 (Bom.), set aside and matter remanded.*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Income already disclosed – Interest – Order – Power [S. 234A, 234B, 234C, 245D, 245F]**

An assessee cannot approach the commission for settlement of his case in respect of an income which has already been disclosed before the Assessing Officer. Mere filing of an application by assessee for settlement would have no adverse effect on proceedings of assessment or initiation against assessee. Commission is not bound to proceed with any application filed under section 245C as is clear from section 245D.

Section 245D refers to "order" not an assessment and "order" is not described as original assessment order or regular assessment.

Interest charged under section 245D (2C) and 245D (6), for different types of defaults and not really relatable to sections 234A, 234B, and 234C, therefore, the apprehension that there is scope for charging of interest on interest is without any basis.



Settlement Commission has no power to reduce / or waive the tax or interest because as laid down in sub section (4) of section 245D, it has to pass orders in the matter of determining quantum of income and tax in accordance with other relevant provisions of the Act, applicable to the relevant assessment years.

*CIT v. Hindustan Bulk Carrier (2003) 259 ITR 475 / 126 Taxman 321 / 179 CTR 362 / 173 Taxation 16 (SC)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Stage of application – Power to grant immunity from penalty and prosecution [S. 245D]**

Assessee can go before the Settlement Commission at any stage, even after investigation / detection of concealed income by the assessing authority. The matter remanded back to the settlement commission to consider the immunity from penalty and prosecution. (A.Y. 1997-98)

*CIT v. The Vyaya Bank Ltd. (2010) 42 DTR 97 / 240 CTR 68 / 194 Taxman 533 (Karn.)(High Court)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Full and true disclosure – Writ-High Court [Art 226. Constitution of India]**

Once the income disclosed by the assessee under section 245C of the Act is not accepted as a full and true disclosure, the application under section 245C of the Act filed by the assessee is not maintainable at all and, therefore, Settlement Commission has no jurisdiction to enhance the income of the assessee. (A.Ys. 1991-92 to 1993-94)

The Settlement Commission Order was challenged before High Court by way of a Writ Petition. It was contended that the income shown was a full and true disclosure, then there was no occasion to fix some higher income.

Alternatively, it was contended that if the settlement commission did not want to accept the income disclosed by the assessee under section 245C of the I. T. Act, then in that case, the Petition under section 245C was not maintainable and, therefore, the Settlement Commission was not bound to pass any Orders thereon.

The Hon'ble High Court set aside the Order passed by the Settlement Commission.

*Canara Jewellers & Ors. v. Settlement Commission & Anr. (2009) 28 DTR 270 / 226 CTR 79 / 315 ITR 328 / 184 Taxman 491 (Mad.)(High Court)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – No power of court – Expediting proceeding**

Court cannot interfere to direct Settlement Commission to proceed expeditiously with application.

*Ashish Kumar Ahuja v. UOI (2004) 141 Taxman 349 / 278 ITR 394 (Delhi)(High Court)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Power – Income tax authorities – Rectification [S. 154, 245D, 245F, 245-1]**

After the order is made under sub-section (4) of section 245D, the Commission will not have jurisdiction to exercise the power and perform the function of an Income Tax Authority.

The order made by the Settlement Commission is final and conclusive and can not be reopened under any provisions of the Act, or under any other law, save as otherwise provided in Chapter XIX–A, the same is not subject to section 154. An order made by Settlement Commission under section 245D is conclusive and it can not be reopened in any proceedings under the Act, or any other law for time being in force, even if in a different case, subsequently a view is taken indicating that views expressed in such order by Settlement Commission were wrong.

*Capital Cables (India) Pvt Ltd. v. Income tax Settlement Commission (2004) 267 ITR 528 / 138 Taxman 332 / 189 CTR 103 (Delhi)(High Court)*

**S. 245C : Settlement Commission – Application for settlement of cases – Conditions – Deduction at source**

Failure on the part of the petitioner to deduct tax at source does not come within purview of section 245C(1).

*Shaw Wallace & Co. Ltd. v. Settlement Commission (2003) 263 ITR 285 / 184 CTR 532 / 139 Taxman 59 (Cal.)(High Court)*

**S. 245C : Settlement commission – Application for settlement of cases – Court's review**

If Court concludes that Settlement Commission did not satisfy itself about the necessary ingredients which were to be established before penalty was imposed, Court could judicially review such order of commission. (A.Ys. 1972-73 to 1979-80)

*INDCO Dyes & Chemicals (P.) Ltd. v. Settlement Commission (2003) 259 ITR 600 / 128 Taxman 687 / 180 CTR 212 (Delhi)(High Court)*

**Section 245D : Procedure on receipt of an application under section 245C**

**S. 245D : Settlement Commission – Procedure – Application – Interest – Period upto date of admission [S. 234B, 154, 245J]**

Interest under sections 234B can be directed to be charged by the Settlement Commission only up to the order of admission of settlement application under section 245D(1) and not up to the final order of Settlement Commission under section 245D(4). The Commission cannot reopen the concluded proceedings by invoking the proceedings under section 154 of the Act, to levy interest under section 234B that is not charged earlier in the order of settlement particularly in view of section 245I.

*Brij Lal and Others v. CIT (2010) 328 ITR 477 / 235 CTR 417 / 46 DTR 153 (SC) / (2011) 1 SCC 1. (SC)*

*Editorial: In the light of the divergent judgements of the Supreme Court in CIT v. Anjum Ghaswala (2001) 252 ITR 1 / 171 CTR 1 / 119 Taxman 352, CIT v. Hindustan Bulk Carrier (2003) 259 ITR 449 and CIT v. Damani Brothers (2003) 259 ITR 475, a reference was made to the Full Bench of the Supreme Court.*

**S. 245D : Settlement Commission – Procedure – Application – Fraud or misrepresentation – Revenue’s right [S. 245C, 245I]**

Merely because section 245I provides that order of settlement is conclusive, it does not take away power of Commission to decide whether settlement order has been obtained by fraud or misrepresentation of facts, but it is not a requirement that Commission must *suo-moto* initiate action; if revenue has material to show that order was obtained by fraud or misrepresentation of facts, it certainly can move Commission for decision on that issue.

*CIT v. Om Prakash Mittal (2005) 273 ITR 326 / 143 Taxman 373 / 194 CTR 97 / 186 Taxation 177 (SC) / 2 SCC 751*

**S. 245D : Settlement Commission – Procedure – Application – Power – Interest – Separate levy – Waiver [S. 234A, 234B, 234C, 234D, 245D]**

Interest charged under section 234A, 234B, and 234C becomes payable on the income already disclosed and the income disclosed before the Settlement Commission and such interest is chargeable till the Commission acts in terms of section 245D. After the Commission allows the application for settlement to be proceeded with, there will be no further charge in terms of sections 234A, 234B, and 234C. Interest charged in terms of section 234D is a separate levy and not in terms of interest chargeable under sections 234A, 234B and 234C. There is no scope for charging interest on interest.

*CIT v. Damani Brothers (2003) 259 ITR 449 / 173 Taxation 40 / 179 CTR 362 (SC)*

**S. 245D : Settlement commission – Procedure – Finality of order – Power – Jurisdiction – Assessing Officer [S. 245C, 245F, 245-I]**

Settlement Commission passed an order under section 245D(4) with observation that Commissioner of Income Tax / Assessing Officer may take such action as appropriate in respect of the matter not placed before the Commission by the applicant as per provision of section 245F(4). Assessing Officer issued notice thereafter and made additions over and above that sustained by Settlement Commission. The matter was taken up before the Tribunal, the Tribunal deleted the additions made by the Assessing Officer. In an Appeals filed by the revenue the Court held that, after passing the order by the Settlement Commission, no power vests in the Assessing Officer or any authority to issue the notice in respect of the period and income covered by the order of the Settlement Commission, except in the case of fraud or misrepresentation of facts. Assessing Officer therefore had no power to issue notice in respect of the period and income covered by the order of Settlement Commission. (A. Ys. 2001 to 2006-07).

*CIT v. Diksha Singh (Smt.) (2011) 64 DTR 268 / (2012) 247 CTR 215 (All.)(High Court)*

*CIT v. Late Paramjeet Singh (2011) 64 DTR 268 / (2012) 247 CTR 215 (All.)(High Court)*

### **S. 245D : Settlement Commission – Procedure – Application – Judicial review – Power of court**

The Court's power of judicial review on the decision of the Settlement Commission is very restricted. The Court can only consider whether the order of the Settlement Commission is contrary to the provisions of the Income Tax Act.

*Mahavir Rolling Mills Pvt. Ltd. v. Income Tax Settlement Commission & Anr. (2010) 40 TLR 18 (Guj.)(High Court)*

### **S. 245D : Settlement Commission – Procedure – Application**

If Settlement Commission, while passing order, leaves calculation of tax and interest to Assessing Officer, period of thirty-five days for purpose of interest under section 245D(6A) has to be counted from date of actual calculation and service of demand notices on assessee and not from date of order of Settlement Commission. (A.Ys. 1991-92 to 1994-95)

*Ranjan Kumar Akhauri (Dr) v. CCIT (2003) 128 Taxman 671 / 261 ITR 385 / 182 CTR 281 (Patna)(High Court)*

### **Section 245F : Powers and procedure of Settlement Commission**

### **S. 245F : Settlement Commission – Powers – Procedure – Rectification of mistakes – Charge interest**

Settlement Commission committed an error apparent by not following the decision of the Special Bench of Settlement Commission which was confirmed by the Gujarat High Court and therefore Settlement Commission was justified in exercising the power under section 154 and in allowing the miscellaneous application of the department for charging interest under section 234B. (A.Ys. 2002-03 to 2006-07)

*Akbar Travels of India (P) Ltd. v. Income Tax Settlement Commission & Ors. (2010) 43*

*DTR*

*49 / 192 Taxman 457 / 236 CTR 37 / 332 ITR 572 (Bom.)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Rectification of mistakes – Decision of constitutional bench**

Merely because a division bench of the Apex Court had expressed doubt on the decision rendered by the Constitutional Bench of the Apex Court, the issue cannot be said to be debatable and therefore was outside the scope of rectification. (A.Ys. 1991-92 to 1995-96)

*CIT v. Settlement Commission & Anr. (2008) 14 DTR 237 / 176 Taxman 421 (Ker.)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Rectification of mistakes – Supreme court judgment [S. 154]**

Scope and ambit of section 245F is wide enough to enable Commission to rectify order. Settlement Commission is an income tax authority to give effect to judgment of Supreme Court within four years from date of original order passed under section 245D, same will be in accordance with provisions contained in section 154. Settlement Commission had passed an order under section 245D(4) waiving and/reducing interest levied on the assessee under sections 234A, 234B, AND 234C, in accordance with the law prevalent at that time. The Settlement Commission within four years following the ratio of judgment in case of *CIT v. Anjum M.H. Ghaswala (2001) 252 ITR 1(SC)* rectified the order after giving a reasonable opportunity to the assessee.

*AOP of Sanjabhai R. Patel v. Assessing Officer / ACIT (2004) 135 Taxman 210 / 267 ITR 129 / 187 CTR 583 (Guj.)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Rectification of mistakes [S. 154]**

Settlement Commission has power to rectify a mistake under section 154 in order passed by it. (A.Ys. 1985-86 to 1994-95)

*Andrew Nettikkadan v. ACIT (2004) 135 Taxman 132 / 266 ITR 708 / 187 CTR 602 (Ker.) / Queens Saree Collection v. Addl Bench Income Tax – Settlement Commission. (2004) 140 Taxman 235 / 270 ITR 401 / 190 CTR 193 (Karn.)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Rectification of mistakes – No interest power [S. 154, 245I]**

Settlement Commission has no inherent power to exercise jurisdiction under section 154 after a final order is passed and becomes conclusive by reason of section 245-1, unless it is necessary in extreme cases

*ITSC v. Netai Chandra Rarhi & Co. (2004) 271 ITR 514 / 193 CTR 430 / 142 Taxman 446 (Cal.)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Return of jewellery seized**

When Settlement Commission was seized of the matter, it has the power to decide the application of the petitioner for return of jewellery seized. The Court directed the Settlement commission to decide the matter within three weeks.

*AMS Jewellers v. CIT (2004) 139 Taxman 34 / 187 CTR 557 (Delhi)(High Court)*

### **S. 245F : Settlement Commission – Powers – Procedure – Reassessment – Income tax authority**

During pendency of proceedings before the Settlement Commission, lower authorities cannot invoke provisions of section 147/148, as Settlement Commission has exclusive jurisdiction to exercise powers and perform functions of Income Tax Authority.

*Vivek Nagpal v. Dy. CIT (2007) 165 Taxman 71 (Mag.)(Delhi)(Trib.)*

## **Section 245H : Power of Settlement Commission to grant immunity from prosecution and penalty**

### **S. 245H : Settlement Commission – Power – Grant immunity from prosecution and penalty**

If application for settlement of income tax cases is filed before Settlement Commission prior to prosecution launched under Income Tax Act or under Indian Penal Code, 1860 and Settlement Commission grants immunity, prosecution proceedings are to be quashed. (A.Y. 1988-89)

*Ashirvad Enterprises & Ors. v. State of Bihar & Anr. (2004) 137 Taxman 455 / 266 ITR 578 / 187 CTR 609 / 180 Taxation 319 (SC)*

## **Section 245HA : Abatement of proceeding before Settlement Commission**

### **S. 245HA : Settlement Commission – Abatement of proceedings – Constitutional Validity**

High Court passing an interim order that proceedings will not abate, held Court's interim order is valid & it would decide the constitutional validity of section 245HA. Supreme Court upheld the interim order.

*UOI v. Rajendra Construction Co. (2010) 217 Taxation 273 / 187 Taxman 135 / 31 DTR 186 / 227 CTR 241 (SC)*

## **Section 245-I : Order of settlement to be conclusive**

### **S. 245-I : Settlement Commission – Order – Conclusive – Prosecution – Immunity [S. 245D(4)]**

Settlement Commission granting immunity from prosecution in respect of matters arising out of settlement and not confined to only to specific assessment year. It is not open to Criminal Court to go behind order passed by Settlement Commission. In view of the order passed by the Settlement Commission, the prosecution which was pending against the appellants would not survive. (A.Y. 1985-86)

*Nirmal & Navin (P) Ltd. v. D. Ravindran (2002) 255 ITR 514 / 123 Taxman 540 / (2003) 172 Taxation 473 / 175 CTR 407 (SC)*

## **CHAPTER XIX-B ADVANCE RULINGS**

## **Section 245N : Definitions**

### **S. 245N : Advance rulings – Definitions – Application – Maintainability – Amalgamation**



Advance Ruling sought by the applicant regarding the tax implications of its proposed amalgamation with another company cannot be declined on the ground of pendency of proceedings under the Companies Act.

*Star Television Entertainment Ltd. & Others (2010) 229 CTR 7 / 321 ITR 1 / 188 Taxman 206 / 34 DTR 98 (AAR)*

**S. 245N : Advance rulings – Definitions – Application – Maintainability – Capital gains**

Non-resident buys entire share capital of Indian company which was earlier partnership firm within period of 5 years of conversion on basis of revalued assets; continuation of 50% of voting power thus violated - Non-resident applicant seeks advance ruling on taxability of Indian company for which a doubt was raised on admissibility of the application - AAR observed that there is no specific requirement in sub-clause (i) of S. 245N(a) that determination should relate to the tax liability of the non-resident; further, it is clear that the capital gain tax issue arising in the case of the acquired Indian company has a direct and substantial impact on the applicant's business in view of the stipulations in share purchase agreement - Hence held that application for advance ruling is maintainable

*Umicore Finance (2009) 184 Taxman 99 / 318 ITR 78 / 225 CTR 353 / 28 DTR 177 (AAR)*

**S. 245N : Advance rulings – Definitions – Application – Maintainability**

Proposed withdrawal from I.R.A. by Indian non-resident after returning to India whether exempt from tax - AAR observed that present case does not fall under any of the provisions of said Section. By withdrawing his own money from the IRA, the applicant is neither earning any income nor undertaking any transaction with any other person in India. The applicant does not either belong to a class of persons notified in the Official Gazette by the Central Government - Hence held that the questions raised by the applicant are beyond the scope of advance ruling

*Shirishkumar Kulkarni (2007) 207 CTR 258 / 288 ITR 530 / 158 Taxman 255 (AAR)*

**S. 245N : Advance rulings – Definitions – Application – Maintainability – Deduction available if process results in a new product – Partnership with Husband – Himachal Pradesh [S. 81C]**

Benefit available only if nature of business involves manufacturing or production as required under the provisions of said section - If the formulation/processing does not result in a new product and presents only a part of manufacturing process, it shall not be entitled to deduction in respect of direct business procured by the applicant - Held proposed partnership firm would be resident as day-to-day business of the firm would be under control of the resident partner in terms of the partnership deed. Since, in the instant case de facto control and management of affairs of firm would be with applicant's husband in India, firm can not be said to be non resident entity and in such circumstances, application would not be maintainable.

**S. 245N : Advance rulings – Definitions – Tax liability – Resident – Non-resident – Amendment w.e.f. 1-6-2000.**

Earlier an advance ruling could have been sought in relation to the tax liability of a resident as well as non-resident. But after 1-6-2000, that position no longer obtains. After the amendment, a resident can seek advance ruling in relation to the tax liability of only a non-resident. Advance ruling on tax liability of a resident can not be given.

*Hindustan Powerplus Ltd., In re (2004) 139 Taxman 64 / 267 ITR 685 / 189 CTR 390 (AAR)*

**S: 245N : Advance Rulings – Definitions – Non-resident – Indian subsidiary**

Application by a non-resident company seeking an advance ruling on tax liability of its Indian subsidiary, is not maintainable.

*Connecteurs Cinch S.A. In re (2004) 138 Taxman 120 / 268 ITR 29 / 189 CTR 497 (AAR)*

**Section 245-O : Authority for Advance Rulings**

**S. 245-O : Authority for Advance Rulings – Questions not answered – Non availability of facts – Intellectual property – DTAA – India-USA**

SREHT, a deemed university & hospital entered into an agreement with Harvard Medical International USA for transfer of knowledge and experience in the field of medical sciences. Both, the applicant and HMI are exempt from tax in their respective countries - AAR observed that if fee paid includes consideration for use of intellectual property, it will be taxable, but as applicant makes lump sum payment for all the services, it is not possible to say what amount is relatable to teaching in or by educational institution - hence on the basis of facts available, this question cannot be answered

*Sri Ramachandra Educational and Health Trust (SREHT) (2009) 224 CTR 225 / 181 Taxman 74 / 24 DTR 1 (AAR)*

**S. 245-O : Authority for Advance Rulings – Lack of clear information – Dismissal of application – Business connection – DTAA – India-Singapore**

Applicant is a sub-contractor of a contractor who gets major contract for modernization of Delhi Airport – contract involves supplies of goods fabricated abroad and payment for the same is made outside India and design & erection of structural steel work in India – Assessee seeks ruling whether its income is deemed to arise in India – AAR observed that the operations that took place in India have not been specified and from the main agreement it is not clear as to who is the exporter and what is the role played, point of time of transfer of ownership,

payment, etc. and thus the authority dismissed the application for lack of information

*Yongnam Engineering & Construction (Pte.) (2009) 224 CTR 356 / 181 Taxman 218 / 25 DTR 1 (AAR)*

### **Section 245Q : Application for Advance Rulings**

#### **S. 245Q : Advance rulings – Application – Public sector undertaking – Permission from COD**

Authority for advance ruling cannot pronounce a ruling in respect of public sector undertaking without permission from COD. (A.Y. 1986-87)

*Mahanagar Telephone Nigam Ltd. In re (2005) 142 Taxman 53 / 191 CTR 518 / 269 ITR 552 (AAR)*

#### **S. 245Q : Advance Rulings – Application – Academic interest – Need for an order**

The Authority will not pronounce a ruling on a question which is of academic interest.

*Acer Computer International Ltd., In re (2004) 138 Taxman 272 (AAR)*

#### **S. 245Q : Advance Rulings – Application – Assessee can confine to few Questions raised in the application**

After stating questions for seeking an advance ruling, if applicant confines a question to only some of items/ aspects mentioned therein and/or give up some parts of question, there can be no valid objection to such a course. The authority held that the scheme and the provisions of the Act, dealing with advance ruling are intended to provide facility to all those who fall within the sweep of the term "applicant" and by narrow interpretation, the object and the purpose of the Act cannot be thwarted.

*Fidelity Advisor Services V111, In Re (2004) 271 ITR 1 / 142 Taxman 111 / 192 CTR 201 (AAR)*

#### **S. 245Q : Advance Rulings – Application – Government of India Undertaking – Permission from COD**

Application by Government of India Undertaking without clearance from Cabinet Secretariat, permission should be granted to withdraw the application with liberty to approach Authority only after getting permission from COD.

*Uranium Corporation of India Ltd., In Re (2004) 138 Taxman 274 / 189 CTR 500 (AAR)*

### **Section 245R : Procedure on receipt of application**

#### **S. 245R : Advance rulings – Procedure – Application – Jurisdiction**

Section 245R is an integrated section not only dealing with admission of an application but also its final disposal. AAR can independently consider nature of transaction put forward in context of proviso (iii) to section 245R(2) because said

proviso gives jurisdiction to Authority to test transaction projected before it in order to find out whether it is designed prima facie for avoidance of Income-tax.

*ABC International Inc. (2011) 199 Taxman 211 / 241 CTR 289 / 55 DTR 393 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Capital gains – Colourable device – Pendency of proceedings [S. 45, 195, 201]**

Applicant MA, a French company, pursuant to an understanding with the other applicant GIMD, also a French company having floated a 100 percent subsidiary and acquired majority shares of an Indian Company in the name of said subsidiary and later both the applicants having sold their shares in the subsidiary to another French company, it was a preordained scheme to deal with the assets and control of the Indian Company without actually dealing with its shares thereby avoiding payment of tax on the capital gains in India and therefore, in view of clause (iii) of the proviso to section 245R(2) Ruling on the question relating to the taxability of the capital gains arising from the sale of said shares by the applicant was declined. The Authority also held that nature of proceedings under section 201 on the basis of section 195 are only preliminary and not conclusive and therefore, pendency of proceedings or order passed under section 201 against the purchaser of shares cannot in the way of the Authority in giving an Advance Ruling under section 245R(4).

*Groupe Industrial Marcel Dassault, In. Re. (2011) 64 DTR 1 / (2012) 340 ITR 272 / 245 CTR 353 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Pendency of proceedings – Notice under sections [S. 143(2), 147]**

Notices under section 143(2) and 147 having been issued to the applicant by the time it filed the application under section 245Q seeking ruling on the question as to whether the amounts received by the applicant are liable to tax in India under the provisions of the Income Tax Act, the question raised is the very question pending adjudication before the Assessing Officer so far as that particular income is concerned and therefore, application is liable to be rejected under proviso to section 245R(2).

*Sepco III Electric Power Construction Corporation (2011) 243 CTR 529 / 61 DTR 49 / 202 Taxman 149 / (2012) 340 ITR 225 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Objection by department when posted for hearing – Maintainability**

After hearing counsel for both the sides on the point of admissibility of an application, the authority posted for hearing, allowing the application under section 245R(2) for hearing on merits. The authority held that the department can not take objection as to maintainability of application when matter posted for hearing on merits. (refer (2009) 318 ITR 78).

*Umicore Finance (2010) 323 ITR 25 / 230 CTR 218 / 189 Taxman 250 / 36 DTR 249 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Issue pending before Tribunal – Deduction at source – Payment to Non-Resident – Royalty income – DTAA – India & USA [S. 195]**

Application seeking advance ruling, rejected on ground that similar issue is pending with Tribunal and any ruling at this stage may create anomalous situation for applicant to comply with; further, it would have been a different matter if the applicant had approached AAR at the earlier point of time in initial stages.

*Microsoft Operations Pte. Ltd. (2009) 222 CTR 313 / 310 ITR 408 / 178 Taxman 328 / 20 DTR 1 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Application maintainability – Order of Tribunal favourable to assessee**

Non-resident applicant sold shares in an Indian listed company which resulted in long-term capital gains and applied to the Authority for advance ruling on whether the applicable tax rate would be 10% as per the proviso to S.112.(1) of the IT Act; prior to this application, it had moved the assessing authority under section 197 for certificate for deduction at lower rate but that had been rejected and certificate was issued for deduction @ 20% with validity up to 31-3-2008. Within 3 days of expiry of validity, applicant moved the AAR which has been opposed by Department - AAR ruled that the applicant is eligible to apply for ruling as none of the embargos laid down in sub-section (2) of section 245R are attracted. The question raised in the application was not presently pending before any income-tax authority or Tribunal or Court - hence, ruled application cannot be rejected on the grounds that applicant has already moved the assessing authority under section 197 of the IT Act for deduction of tax at lower rate, that had been rejected by the assessing authority.

*Burmah Castrol Plc. (2008) 174 Taxman 95 / 305 ITR 375 / 219 CTR 112 / 13 DTR 17 (AAR)*

**S. 245R : Advance rulings – Procedure – Application – Early ruling – Deduction of tax at source – Non resident-Soft ware maintenance [S. 195, Art. 7]**

Applicant had obtained advance ruling about taxability of payments in respect of contract entered in 2003 where AAR had ruled that the transaction is not liable to tax in India in the hands of recipient but the Assessing Officer decided the income tax liability in India of Raytheon, under section 147 r.w. sec 143(3) discarding the ruling, appeal against which is now pending - Applicant has now renewed the contract on substantially similar terms and conditions and seeks advance ruling - AAR ruled that current application is not hit by the embargo laid down in the first part of clause (i) to the 2nd proviso to section 245R(2) as an eligible applicant should not be denied the remedy to have an early ruling in the matter on which it had earlier got a ruling

*Airports Authority of India (2008) 299ITR 102 / 215 CTR 212 / 168 Taxman 158 / 4 DTR 107 (AAR)*

**Section 245S : Applicability of Advance Rulings**

### **S. 245S : Advance rulings – Binding – Precedent**

Ruling of Authority for Advance Rulings is binding on the assessee and the assessee cannot agitate on those aspects. (A.Y. 2004-05)

*Mustaq Ahmed v. ADIT (2010) 124 ITD 312 / 2 ITR 315 / 29 DTR 410 / 126 TTJ 523 (Chennai)(Trib.)*

### **S. 245S : Advance rulings – Binding – Precedent – Income tax Appellate Tribunal [S. 255]**

Ruling given by the Advance Ruling Authority is not binding precedent on the Tribunal but, it was held that, it does not mean that the Tribunal cannot concur with the reasoning given by the said Authority.

*Dy. CIT v. Pipeline Engineering GmbH (Mumbai) (2009) 318 ITR (AT) 210 (Mum.)(Trib.)*

### **S. 245S : Advance rulings – Binding – Precedent – Income Tax Appellate Tribunal [S. 255]**

Howsoever strong be persuasive value of ruling given by Authority, these rulings are certainly not binding precedents on Tribunal. (A.Y. 1997-98)

*Dy. CIT v. Boston Consulting Group Pte. Ltd. (2005) 94 ITD 31 / 93 TTJ 293 (Mum.)(Trib.)*

### **S. 245S : Advance rulings – Binding – Precedent**

An advance ruling under the Act is confined to the facts and law projected in the application leading to the ruling and is binding only on the party and the revenue.

*Cairn U.K. Holdings Ltd. In Re (2011) 59 DTR 121 / 242 CTR 449 / 337 ITR 131 / 201 Taxman 111 (AAR)*

## **CHAPTER XX APPEALS AND REVISION**

### ***A. Appeals to the Deputy Commissioner (Appeals) and Commissioner (Appeals)***

#### **Section 246 : Appealable orders**

### **S. 246 : Commissioner (Appeals) – Appealable orders – Intimation [143(1)(a)]**

It was held that the appeal against intimation under section 143(1)(a) relating to the assessment for the A.Y. 1996-97 is maintainable. (A.Y. 1996-97)

*Balmukund Acharya v. Dy. CIT (2009) 310 ITR 310 / 221 CTR 440 / 176 Taxman 316 / 17 DTR 34 (Bom.)(High Court)*



**S. 246 : Commissioner (Appeals) – Appealable orders – Order giving effect to appellate order**

Appeal can be entertained which is filed against an order giving effect to appellate order which holds the same characteristic as the original order against which appeal was filed. (A.Y. 1983-94)

*CIT v. Industrial Machinery Mfg. P. Ltd. (2006) 282 ITR 595 / 202 CTR 83 (Guj.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Assessment – Registration – Single appeal**

A single appeal is maintainable against order of assessment and refusal to grant registration. (A.Y. 1976-77)

*CIT v. Brahm Swarup Tandon & Co. (2006) 283 ITR 320 / (2005) 142 Taxman 569 (All.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Order giving effect to**

Appeal is not maintainable against order of Assessing Officer giving effect to order of commissioner. (A.Y. 1982-83)

*Tsai Tea Enterprises P. Ltd. v. CIT (2005) 273 ITR 119 / 196 CTR 148 / 151 Taxman 225 (Cal.) (High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – AAC – Interest [S. 139, 217]**

AAC is competent to entertain appeal of assessee filed against chargeability of interest under section 139/217. (A.Ys. 1974-75 to 1977-78)

*CIT v. Aziz Ahmad (2005) 145 Taxman 542 (All.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Reassessment**

Assessee is entitled to contest validity of reopening of assessment in appeals filed before Commissioner (Appeals) against reassessment. (A.Ys. 1996-97 to 2001-02)

*Toja Tyres & Treads (P.) Ltd. v. Dy. CIT (2005) 272 ITR 522 / 194 CTR 208 (Ker.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Assessment order – Refusal registration – Single appeal**

A single appeal is maintainable against order of assessment and refusal to grant registration. (A.Y. 1977-78)

*CIT v. Electrical Enterprises (2004) 141 Taxman 388 / 192 CTR 596 (All.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Failure to grant interest**

Appeal against failure to grant interest while giving effect to order passed by Commissioner (Appeals) would be maintainable. (A.Y. 1985-86)

*British Bank of India of the Middle East v. CIT (2003) 131 Taxman 106 / 266 ITR 269 (Bom.)(High Court)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Interest [S. 234B]**

Where pursuant to direction in the assessment order for charging interest under section 234B and interest having been omitted to be charged in demand notice, Assessing Officer invoked provisions of section 154 and levied interest under section 234B, since assessee was challenging levy of interest in total and Assessing Officer's order had effect of reducing refund, appeal was maintainable; there was no merit in contention that appeal being only against charging of interest under section 234B was not maintainable. (A.Y. 1998-99)

*Hindustan Sanitary Engineers v. ITO (2005) 95 ITD 226 / 96 TTJ 460 (SMC)(Amritsar)(Trib.)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Interest – Maintainable**

Where assessee disputes liability of interest as a whole, then he can file appeal before Commissioner (Appeals); but assessee cannot file appeal against liability of interest merely for quantification thereof. (A.Ys. 1978-79 to 1980-81)

*Addl. CIT v. Hindalco Industries Ltd. (2005) 4 SOT 757 (Mum.)(Trib.)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Refund [S. 244A]**

Grant of refund and interest under section 244A is a part and parcel of assessment and any grievance arising there from can be agitated by assessee by way of appeal, which is his statutory right.

*MMTC Ltd. v. Dy. CIT (2005) 149 Taxman 7 (Mag.)(Delhi)(Trib.)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Direction of Commissioner [S. 263]**

Where Assessing Officer frames assessment under section 143(3) pursuant to order passed by Commissioner under section 263 and assessee is aggrieved by any portion of such fresh assessment order, same is appealable before Commissioner (Appeals). (A.Y. 1998-99)

*ITO v. Uma Kant Newatia (2005) 97 ITD 414 / 99 TTJ 376 (Kol.)(Trib.)*

**S. 246 : Commissioner (Appeals) – Appealable orders – Tax deduction at source**

Where State Government had paid TDS on prize won by assessee under its lucky coupon scheme, since no tax had been demanded from assessee, assessee was not aggrieved and appeal by him claiming refund of such tax was unnecessary and devoid of any merit.

*Gopal Dass v. ITO (2005) 1 SOT 197 (Chd.)(Trib.)*

**Section 246A : Appealable orders before Commissioner (Appeals)**

**S. 246A : Commissioner (Appeals) – Appealable orders – TRO's order for – Sale – Limitation from the date of knowledge of order**

Tax recovery officer confirming sale in recovery proceedings Schedule II, RR, 63, 65, 86 is not conclusive, appeal maintainable. For computing limitation the date of order to be construed to mean date of knowledge of order.

*Vijay Kumar Ruia v. CIT (2011) 334 ITR 38 / 57 DTR 300 / 242 CTR 292 / Tax L.R. 553 / 203 Taxman 462 (All.)(High Court)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Maintainability – Order giving effect to order u/s. 263 – Revision**

Appeal lies before the Commissioner of Income-tax (Appeals) under section 246A of the Act, against the order passed by the assessing officer in pursuant to the order passed/direction given by the Commissioner of Income-tax under section 263 of the Act. (A.Y. 2004-05)

*Azhimala Beach Resorts (P) Ltd. v. CIT (2010) 35 DTR 238 / 325 ITR 419 / 195 Taxman 259 (Ker.)(High Court)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Order giving effect to ITAT's order**

Appeal against the order of the assessing officer simply giving effect to the order of the Tribunal would only lie before the Tribunal and not before the CIT (A) under section 246A(1) of the Act.

However, the High Court held that though the Tribunal was right in holding that the appeal was not maintainable before the CIT (A), it ought to have decided the assessee's case on merits and not simply dismiss the appeal.

*Paras Rice Mills v. CIT & Anr. (2009) 18 DTR 149 (P&H)(High Court)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Person aggrieved – Creditor**

Creditor of assessee-debtor whose bank accounts are seized following search by the revenue and following assessment whose assets are attached is not a 'person aggrieved', with in the meaning of section 246A so as to maintain writ against assessee-debtor's assessment.

*Gem Granites v. CIT (2004) 267 ITR 640 / 140 Taxman 362 / 192 CTR 26 (P&H)(High Court)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Power – Interim relief**

Appellate authority has implied and incidental power to grant relief even if statute does not provide it.

*Bulk India Transport Co v. CIT (2004) 266 ITR 144 / 141 Taxman 262 / 191 CTR 161 (All.)(High Court)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Shipping – Non-resident [S. 172(4)]**

Order determining amount of tax under section 172(4) is appellable.

*ITO v. MSC Agency (India) P. Ltd. (2011) 9 ITR 425 (Chennai)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Withholding tax – Relief u/s. 90 & 91**

Question of not allowing relief in respect of withholding tax under section 90 / 91 has direct effect of reducing refund or enhancing amount of tax payable, such an issue is squarely covered within the ambit of section 246A(1)(a). 'Amount of tax determined' as per section 246A(1)(a) encompasses not only determination of amount of tax on total income but also any other thing which has an effect of reducing or enhancing total amount of tax payable by assessee. Section 246A(1)(a) covers issue of not allowing relief in respect of withholding tax under section 90 or section 91. (A. Y. 2006-07).

*Capgemini Business Services (India) Ltd. v. Dy. CIT (2011) 131 ITD 396 / 9 ITR 391 / 139 TTJ 202 / 56 DTR 353 (Mum.)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Revision [S. 264]**

Appeal against assessment made consequent to order passed under section 264 is maintainable under section 246A, but only to the extent of issues which have not attained finality in order passed under section 264. (A.Ys. 1996-97 to 2003-04)

*A. Naresh Babu (Dr.) v. ITO (2010) 124 ITD 28 / 5 ITR 485 / (2009) 24 DTR 41 / 123 TTJ 833 (Hyd.)(Trib.)*

**S. 246A : Commissioner (Appeal) – Revision under section 264 – Fresh Amendment [S. 264]**

Appeal against fresh assessment order passed in pursuance of an order under section 264 is maintainable under section 246A(1A). (A.Y. 2002-03)

*ACIT v. Kalyan Mitra Trust (2007) 116 TTJ 362 (Delhi)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Revision – Direction [S. 264]**

Assessment order framed afresh by Assessing Officer, as per direction under section 264 is an appealable order under section 246A(1)(a).

*Teja Singh v. ITO (2007) 158 Taxman 108 (Mag.)(Jodh.)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Interest on Refund of interest – Waiver by CCIT [S. 234A, 234B, 234C]**

No appeal lies against the order of the Assessing Officer refusing to grant interest on refund in the consequential order passed on the order of Chief CIT waiving interest under sections 234A, 234B and 234C. (A.Y. 1993-94)

*ITO v. A. J. Dhanapal (HUF) (2006) 99 TTJ 1009 / 99 ITD 317 (Chennai)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Withdrawal of appeal**

CIT (A) having permitted the assessee to withdraw the appeal in the absence of objection by the Revenue, no cause of action arises to the assessee. (A.Ys. 1992-93 and 1996-97)

*M. Loganathan v. ITO (2006) 99 TTJ 1224 / 99 ITD 246 (Chennai)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Rectification – Interest [S. 154, 244A]**

Order under section 154 reducing Interest under section 244A is an appealable order. (A.Y. 1995-96)

*Progressive Construction Seenayah & Co v. Dy. CIT (2003) 85 ITD 277 / 80 TTJ 1030 (Hyd.)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Failure to deduct tax [S. 201(1)]**

Order under section 201(1) is an appealable order.

*Infosys Technologies Ltd v. Dy. CIT (2003) 86 ITD 342 / 130 Taxman 129 (Mag.)(Bang.)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Rectification application**

Appeal against non disposal of Rectification Application is an appealable order.

*ACIT v. Prakash Agricultural Industries (2003) 127 Taxman 51 (Mag.)(Agra)(Trib.)*

**S. 246A : Commissioner (Appeals) – Appealable orders – Non-resident – No order passed – Deduction at source [S. 195]**

Appeal is maintainable where no order is passed under section 195, but an order under section 201 is passed. (A.Y. 1998-99)

*Raymond Ltd. v. Dy. CIT (2003) 86 ITD 791 / 80 TTJ 120 (Mum.)(Trib.)*

**Section 248 : Appeal by denying liability to deduct tax in certain cases**

**S. 248 : Appeal – Denying liability to deduct tax – Non-resident**

Dispute relating to the chargeability of income of the non-resident recipient can alone be the subject matter of an appeal under section 248 and not the possibility of assessing of the income of the non resident in the hands of the resident payer as no procedure of assessment of the income of the non-resident in the hands of the resident payer is contemplated in sub section 1 of section 195. (A.Ys. 2005-06 to 2007-08)

*CIT v. Sonata Information Technology Ltd. (2010) 38 DTR 350 / 192 Taxman 80 / 232 CTR 20 (Karn.)(High Court)*

**S. 248 : Appeal – Denying liability to deduct tax – Non-resident [S. 195]**

A person who denies liability to deduct tax under section 195 on amount payable to a non-resident is entitled to appeal under section 248.

*Reliance Industries Ltd. v. Dy. DIT (International Taxation) (2005) 3 SOT 501 / 98 TTJ 856 (Mum.)(Trib.)*

### **Section 249 : Form of appeal and limitation**

#### **S. 249 : Appeal – Form of appeal and limitation – Admitted tax – Recovery from Hundi seized**

Assessing Officer recovered amount out of Hundies Seized from the assessee in excess of the admitted tax, the defect in the appeal before CIT(A) due to non payment of admitted tax as required under section 249(4) can be treated to have been removed, the matter was remitted to CIT(A) to decide on merit. (Block period 1st April 1966 to 26th June 2002).

*Mansukhlal v. CIT (2011) 62 DTR 356 / 245 CTR 111 (MP)(High Court)*

#### **S. 249 : Appeal – Form of appeal and limitation – Admitted tax – Block assessment**

The CIT(A) did not admit the said appeals since taxes were not paid as per Block Returns. Income-tax Tribunal upheld the same view.

On appeal to High Court, it was held that looking into the facts and circumstances of the case if both the assessee made payments within four weeks of the order, then CIT(A) would look into the merits of the case and pass appropriate orders in accordance with law.

*D. Komalakshi, D. Rajkumar v. Dy. CIT (2007) 292 ITR 99 / 209 CTR 70 / 162 Taxman 16 (Karn.)(High Court)*

#### **S. 249 : Commissioner (Appeals) – Forms of Appeal and limitation – Signature by managing partner – Signed by authorized representative [S. 249]**

Memorandum of appeal is to be signed by managing partner/partner, if memorandum of appeal is signed by authorized representative it would not be an illegality but an irregularity which is curable and capable of being rectified. (A.Y. 1978-79)

*Remfry & Sons v. CIT (2005) 276 ITR 1 / 145 Taxman 22 / 195 CTR 66 (Delhi)(High Court)*

#### **S. 249 : Appeal – Form of appeal and limitation – Admitted tax – Limitation – Refund of earlier years**

Commissioner (Appeals), dismissed the appeal on the ground that the assessee has not paid the admitted tax. The assessee contended that in the earlier years the assessee had made excess payments of tax and it was entitled to refunds, and further the bank account was also attached. The assessee made payments afterwards. The Tribunal set aside the order of Commissioner of (Appeals) and directed him to decide on merit. (A. Y. 2007-08).



*Endeavour Industries Ltd. v. Dy. CIT (2011) 43 SOT 322 / 55 DTR 128 / 138 TTJ 461 (Hyd.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Admitted tax – Paid subsequently**

If the appeal is filed without the payment of tax on returned income but subsequently the required amount of tax is paid, the appeal shall be admitted on payment of tax and appeal has to be decided on merit. (A. Y. 2007-08).

*Bhumiraj Constructions v. Addl. CIT (2011) 49 DTR 195 / 135 TTJ 357 / 131 ITD 406 (Mum.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Condonation of delay – Payment of taxes**

In the absence of supporting evidence it could not be accepted that the assessee was unable to make payment of tax due to tight financial condition and thus the same also did not constitute a valid explanation for the delay in filing the appeals. (A.Ys. 1989-90 to 1991-92)

*Jagdish Raj Chauhan, Sohagwanti & Gurbachan Singh (AOP) v. ITO (2006) 99 TTJ 45 / 6 SOT 629 / 100 ITD 525 (Amritsar)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Condonation of delay**

Assessee-company having initially taken a conscious decision not to file appeals against the assessment orders acting on the advice of its senior manager, CIT (A) was justified in refusing to condone the inordinate delay of more than four years in filing the appeals. (A.Ys. 1995-96, 1996-97)

*Sri Venkatesa Paper & Boards Ltd. v. Dy. CIT (2006) 99 TTJ 450 / 98 ITD 200 (Chennai)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Condonation of delay**

Assessee having made bona fide attempt to file the appeal before the Tribunal on the last day of the prescribed period failed to do so as it was a holiday (Saturday) filed on the next working day, there was a reasonable cause for the delay and, therefore, the delay is condoned. (A.Y. 1999-2000)

*Star Electroplaters v. ITO (2006) 99 TTJ 640 (Ahd.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Condonation of delay**

Assessee's advocate having not filed any appeal against the penalty order and assessee being under bona fide impression that the appeal has been filed the delay in filing the appeal is condoned. (A.Y. 1986-87)

*Ram Lal & Sons v. ITO (2006) 99 TTJ 63 (Amritsar)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – AOP – Payment of taxes**

Income of the AOP had been already taxed in the hands of its members and the Assessing Officer adjusted the tax due by the AOP against the tax paid by one

member thus reducing the demand for two assessment years to nil, and the assessee having paid the demand for the other assessment year before the appeals were filed, the requirement of section 249(4)(a) stood complied with. (A.Ys. 1989-90 to 1991-92)

*Jagdish Raj Chauhan, Sohagwanti & Gurbachan Singh (AOP) v. ITO (2006) 99 TTJ 45 / 6 SOT 624 / 100 ITD 525 (Amritsar)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Payment of admitted taxes – Penalty**

**[S. 221]**

Provisions of section 249(4) do not apply to an appeal directed against an order imposing penalty under section 221. (A.Y. 1996-97)

*Satyam Enterprises v. Jt. CIT (2005) 93 ITD 606 / 93 TTJ 489 / (2005) 1 SOT 675 (Mum.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Payment of admitted taxes – Attachment by department**

Dismissal of appeal under section 249(4)(a) for non-payment of taxes was not justified where all properties of assessee had been attached by Department and assessee neither had other sources of income nor was holding any liquid assets and all admitted tax and interest had been paid by assessee by selling properties as soon as attachment was lifted.

*Shamraj Moorjani v. Dy. CIT (2005) 2 SOT 321 / 93 TTJ 927 (Hyd.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Limitation – Condonation – Decision of Supreme Court**

Where assessee filed belated appeal before Commissioner (Appeals) against order of Assessing Officer along with a condonation petition on ground that appeal was filed in light of decision of Supreme Court in case of CIT v. Shaan Finance (P.) Ltd./1998) 97 Taxman 435 and as said decision was not available at time of due date for filing appeal, delay was due to reasonable cause, Commissioner (Appeals) was not justified in refusing to condone delay holding that if delay was condoned, it would lead to proliferation of endless litigation. (A.Y. 1989-90)

*Bajaj Hindustan Ltd. v. Jt. CIT (2005) 92 ITD 411 / 92 TTJ 1064 (Mum.)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Condonation of delay – Negligence of consultant**

Held, on facts and circumstances that delay attributable to negligence on part of consultant should be condoned.

*Shakti Clearing Agency (P) Ltd v. ITO (2003) 127 Taxman 49 (Mag.)(Rajkot)(Trib.)*

**S. 249 : Appeal – Form of appeal and limitation – Payment of admitted tax – Date of intimation of assessment**

For the purpose of application of proviso to section 249(4), the relevant date is the date of intimation of assessment proceedings, and not the date of filing appeal. (A.Y. 1987-88)

*C. Subramanian v. Dy. CIT (2003) 84 ITD 23 / 79 TTJ 377 (Chennai)(Trib.)*

### **S. 249 : Appeal – Form of appeal and limitation – Prepayment of tax – Block assessment**

Condition of prepayment of tax apply to appeal filed before CIT(A) and it does not apply to appeals filed before Tribunal. In support, it was clarified from the fact that in Form No. 35, being the proforma of appeal before CIT(A), there is a column for furnishing date and amount of payment of admitted tax, while in Form 36, being proforma of appeal before Tribunal, there is no such column.

*Pawan Kumar Ladha v. ACIT (2003) 84 ITD 178 / 78 TTJ 983 (Indore)(Trib.)*

*Editorial : Affirmed by Supreme Court (2010) 324 ITR 324 (SC) / Anil Sanghi v. ACIT (2003) 85 ITD 73 / 79 TTJ 517 (Delhi)(SB)*

### **S. 249 : Appeal – Form of appeal and limitation – Admitted Tax – Interest payable [S. 140A, 234A, 234B, 234C]**

The expression “tax due on the income returned” in s. 249(4)(a) does not include interest payable under section 234A, 234B and 234C. Sec. 140A read with the Explanation and Sec. 249(4) deal with different situations. The provisions sec. 140A cannot be imputed in the provisions of the Sec. 249(4). Therefore, the Assessing Officer has to first adjust the amount of tax paid on the returned income towards interest payable under the Act. As a result of such adjustment there may be a shortfall in the amount to be given credit under section 140A but if the tax due on the returned income is paid then there is sufficient compliance of s. 249(4). (A.Y. 1992-93).

*Subbiah Nadar & Sons v. ACIT (2003) 84 ITD 55 / 78 TTJ 549 (Chennai)(Trib.)*

### **Section 250 : Procedure in appeal**

#### **S. 250 : Appeal – Procedure – Additional evidence [Rule 46A]**

Admission of additional evidence is with in the discretion of the Commissioner(Appeals), on the facts the said discretion has not been exercised improperly or against the provisions of law. CIT(A) was justified in admitting the additional evidence. (A. Y. 2001-02).

*CIT v. Better ways Fianance & Leasing (P) Ltd. (2011) 62 DTR 282 (Delhi)(High Court)*

#### **S. 250 : Appeal – Procedure – Validity of warrant – Second round**

Assessee having not chosen to challenge the validity of assessments on the allegation of defect or irregularity in the warrant issued either before the Assessing Officer or in the first round of appeals and raised the contention after remand before the CIT(A) for the first time, is not permissible.

*Jose Cyriac v. CIT (2011) 238 CTR 207 / 50 DTR 292 / 336 ITR 241 (Ker.) (High Court)*

**S. 250 : Appeal – Procedure – Additional evidence [Rule 46A]**

The Assessing Officer asked the assessee to furnish confirmation letters from customers who had paid advances by cash (& not cheque) which the assessee complied with. In the assessment order, the Assessing Officer treated the advances received by cheque as “unexplained cash credits” under section 68. Before the CIT(A), the assessee produced confirmation letters from customers who paid by cheque. The CIT(A) admitted the additional evidence under Rule 46A & without giving the Assessing Officer an opportunity, deleted the addition. In appeal by the department, the Tribunal upheld the CIT(A)’s action on the ground that as the Assessing Officer had not called for the confirmations before making the addition, the CIT(A) was justified in admitting the additional evidence and there was no reason to set-aside the matter to the Assessing Officer for a second innings. On further appeal to the High Court, HELD allowing the appeal:

Under section 250(4), the CIT(A) has the power to direct enquiry and call for evidence from the assessee. Under Rule 46A, the assessee has the right to ask for the admission of additional evidence. If the CIT(A) exercises his powers under section 250(4) to call for additional evidence, the Assessing Officer need not be given an opportunity to show-cause. However, if the CIT(A) acts on an application under Rule 46A, then the requirement of giving the Assessing Officer an opportunity as per Rule 46A(3) is mandatory. The argument that in all cases where additional evidence is admitted, the CIT(A) should be considered to have exercised his powers under section 250(4) is not acceptable as it will render Rule 46A redundant. On facts, as the assessee had produced the evidence, the CIT(A) ought to have followed Rule 46A(3) and remanded the evidence to the Assessing Officer for comments and verification (matter remanded to the CIT(A)). (A. Y. 2005-06).

*CIT v. Manish Build Well Pvt. Ltd. (2011) 63 DTR 369 / 245 CTR 397 / (2012) 204 Taxman 106 (Delhi) (High Court)*

*Editorial: Dy. CIT v. Manish Build Well (P) Ltd. (2011) 142 TTJ 749 / 63 DTR 448 (Delhi)*

**S. 250 : Appeal – Procedure – Additional evidence [Rule 46A]**

Assessing Officer should be given opportunity to examine documents produced by assessee. Rule embodies provision of natural justice and it is mandatory, when assessee produced additional evidence first time before the CIT(A). (A.Y. 1996-97)

*CIT v. Shree Kangra Steel Pvt. Ltd. (2010) 320 ITR 691 / 188 Taxman 392 / 38 DTR 170 / 231 CTR 413 (HP) (High Court)*

**S. 250 : Appeal – Procedure – Additional ground**

Additional Ground challenging the assessment on the ground of limitation can be raised first time before the CIT (A) in appeal against the fresh assessment order

passed on remand, even though it was not raised either before the assessing authority or the CIT (A) in the first round of proceedings. (A.Y. 1987-88)

*CIT v. Madhu Patani (Smt.) (2009) 18 DTR 110 (Ker.)(High Court)*

#### **S. 250 : Appeal – Procedure – Additional ground**

Where the assessee's claim for genuine expenditure in a subsequent year was rejected as the same pertained to an earlier year, additional ground with respect to the claim of the expenditure can be raised in the appeal for the earlier year, if the appeal for that year is pending for adjudication before the CIT(A). (A.Y. 1985-86)

*CIT v. Vadilal Industries Ltd. (2008) 6 DTR 98 / 217 CTR 318 (Guj.)(High Court)*

#### **S. 250 : Appeal – Procedure – Additional grounds**

By virtue of section 250(5), the CIT(A) is empowered to entertain any new ground raised before him which is not specified in the memorandum of appeal. (A.Y. 1990-91)

*Himachal Gramin Bank v. Dy. CIT (2008) 9 DTR 141 / 219 CTR 670 / 305 ITR 163 / 176 Taxman 433 (HP)(High Court)*

#### **S. 250 : Appeal – Procedure – Additional evidence – Opportunity – AO [Rule 46A]**

Opportunity of being heard. The Assessing Officer who was present at the time of hearing before CIT(A) having raised no objection, the opportunity as envisaged u/r. 46A is said to have been satisfied. (A.Y. 1973-74)

*CIT v. Kuldip Industrial Corporation (2007) 209 CTR 400 / 164 Taxman 285 (P&H)(High Court)*

#### **S. 250 : Appeal – Procedure – Additional evidence [Rule 46A]**

Assessing Officer never directed the assessee company to produce any evidence to prove the genuineness of share holdings by the subscribing companies nor expressed any doubts regarding the genuineness of share holdings of these companies prior to treating the assessee's capital as unexplained CIT(A) correctly admitted the additional evidence produced before him and there is no question of giving an opportunity to the Assessing Officer to examine the additional evidence. (A. Y. 2005-06).

*Dy. CIT v. Dolphine Marbles (P) ITD (2011) 57 DTR 58 / 139 TTJ 129 / 129 ITD 163 (TM)(Jab.)(Trib.)*

#### **S. 250 : Appeal – Procedure – Reasoned order – Point for determination**

An order passed by CIT(A) without mentioning point of determination as also without giving any reason for decision while dismissing the appeal is violative of section 250(6) of the Act and cannot be sustained.

*Rang Rasayan Agencies v. ITO, ITA No. 917/Ahd./2009, dt. 18-01-2011, 'C' Bench, BCAJ P. 25, Vol. 42-B, Part 5, February 2011 (Ahd.)(Trib.)*

#### **S. 250 : Appeal – Procedure – Different provisions of law [S. 68 & S. 69]**

CIT(A) is duty bound to consider the matter placed before him in its all respects and he could consider the addition under section 68 even though the Assessing Officer had only invoked section 69. (A.Y. 2001-02)

*Ishrawati Devi (Smt.) v. ITO (2008) 114 TTJ 541 (All.)(Trib.)*

### **S. 250 : Appeal – Procedure – Additional ground**

Claim whether counter sales to foreign tourists against foreign exchange can be treated as export turnover for purposes of section 80 HHC being based on a pure question of law, it can be raised and entertained at any stage of appeal. (A.Y. 1997-98)

*Dy. CIT v. Suprint Textiles (2006) 100 TTJ 352 (Jp.)(Trib.)*

### **S. 250 : Appeal – Procedure – Undisputed items – Revision – Fresh assessment**

Disallowance on account of unverifiable expenses made in the original assessment being neither disputed by the assessee in appeal or revision nor was subject-matter of revision under section 263, same had attained finality, and CIT (A) erred in allowing relief to the assessee in the appeal against the fresh assessment pursuant to revision under section 263. (A.Y. 1998-99)

*ITO v. Uma Kant Newatia (2006) 99 TTJ 376 / 97 ITD 414 (Kol.)(Trib.)*

### **S. 250 : Appeal – Procedure – Only what AO can do**

Powers of Commissioner (Appeals) in course of his appellate jurisdiction are co-terminus with powers of Assessing Officer, and Commissioner (Appeals) can do what Assessing Officer could do but has not done; this applies in a reverse way as well and as such Commissioner (Appeals) cannot do what Assessing Officer could not have done. (A.Y. 1993-94)

*Ellel Hotels & Investments Ltd. v. Jt. CIT (2005) 2 SOT 659 (Mum.)(Trib.)*

### **S. 250 : Appeal – Procedure – Jurisdiction – Assessment year**

Jurisdiction of Commissioner (Appeals) is confined only to assessment year which is subject-matter of appeal. (A.Y. 1993-94)

*Abdul Wahid Gehlot v. ITO (2005) 93 TTJ 232 (Jodh.)(Trib.)*

### **S. 250 : Appeal – Procedure – Further enquiry**

Expression 'may' appearing in section 250(4) is required to be interpreted as 'shall'; powers conferred upon Commissioner (Appeals) under section 250(4) are not merely decorative or cosmetic; they cast upon Commissioner (Appeals) an obligation and duty to carry out such further inquiry as is necessary to arrive at a decision on merits on facts of case; while deciding a ground of appeal taken by an assessee, it is incumbent upon Commissioner (Appeals) to give a positive finding of fact, he cannot rely upon a mistake committed by Assessing Officer. (A.Y. 1995-96)

*Jt. CIT v. Swarup Vegetable Products Industries Ltd. (2005) 96 ITD 468 / 98 TTJ 283 (Delhi)(Trib.)*



### **S. 250 : Appeal – Procedure – Additional evidence**

Where assessee's claim for exemption under section 10(4) of interest on FDRs in NRE account was rejected on ground that status shown by him in return was 'resident', and assessee produced additional evidence in the form of certificate which indicated that money kept in NRE account was as per guidelines of RBI, Commissioner (Appeals) was not justified in declining to admit fresh evidence in form of certificate. (A.Ys. 1997-98 to 2000-01)

*Rachhpal Singh v. ITO (2005) 94 ITD 79 / 93 TTJ 283 (Amritsar)(Trib.)*

### **S. 250 : Appeal – Procedure – Additional evidence**

Where assessee raised additional grounds relating to claim for depreciation and exemption under section 10(19) but those were not admitted by Commissioner (Appeals) on ground that all facts required to decide said issues were not available on record even though assessee claimed that such facts were on record, action of Commissioner (Appeals) in refusing to admit additional grounds for that reason was not justified as Commissioner (Appeals) could have obtained any further information/clarification from books of account and other record maintained by assessee. (A.Y. 1993-94)

*International Airports Authority of India Ltd. v. Dy. CIT (2005) 95 ITD 101 / 95 TTJ 1075 (Delhi)(Trib.)*

### **S. 250 : Appeal – Procedure – Additional claim**

Where revenue itself had allowed depreciation at 25 per cent on value of additions to various assets it could not be said that details were not available on record and therefore in such a case Commissioner (Appeals) was not justified in rejecting to entertain assessee's additional claim of depreciation at rate of 100 per cent on various additions in depreciable assets. (A.Ys. 2001-02, 2002-03)

*Smartchem Technologies Ltd. v. ITO (2005) 97 TTJ 818 (Ahd.)(Trib.)*

## **Section 251 : Powers of the Commissioner (Appeals)**

### **S. 251 : Commissioner (Appeals) – Powers – Condonation of Delay – Avoid technicalities**

Unless *mala fides* are writ large, delay should be condoned. Matters should be disposed of on merits and not technicalities.

*Improvement Trust v. Ujagar Singh Civil Appeal No. 2395 of 2008 dated 9-6-2010 (SC) [www.itatonline.org](http://www.itatonline.org)*

### **S. 251 : Commissioner (Appeals) – Powers – Direction**

Proceedings for assessment of an assessee cannot be based on directions issued by another co-ordinate Tribunal or even a higher forum, if that was not the subject matter before it. That would be an exercise without jurisdiction. Power of

Commissioner (Appeals), directing to tax certain amounts in hands of a third party, held to be not valid. (A. Y. 2006-07).

*CIT v. Krishi Utpadan Mandi Samiti (2011) 336 ITR 77 / 200 Taxman 362 / 64 DTR 147 (All.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence [Rule 46A]**

When the assessee files additional evidence before the CIT(A) it is not necessary that the CIT(A) must remand the matter to the Assessing Officer, it depends on the nature of the evidence. The CIT(A) in appropriate case without prejudice to either parties can look into the evidence itself. (A. Y. 2001-02).

*CIT v. Jind Co-operative Sugar Mills Ltd. (2011) 51 DTR 121 / 335 ITR 43 (P&H)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Omission to claim in the return**

Mere omission of the assessee to claim exemption under section 10(35) in the return of income could not debar the assessee from making the claim before the first Appellate Authority during the appellate proceedings. (A. Y. 2004-05).

*CIT v. Metalman Auto P. Ltd. (2011) 52 DTR 385 / 336 ITR 434 (P&H)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – No Jurisdiction over third party**

Powers of appellate authority is normally co-extensive with that of original authority. It would not be open to appellate authority to exercise a jurisdiction which Assessing Officer did not have. Assessee claimed to be charitable institution, in its assessment. Assessing Officer held that amount transferred by assessee to Mandi Parishad as development cess and administrative expenditure were for non charitable purpose and therefore, were added in assessee's income.

On appeal Commissioner (Appeals) held that both amounts could not be assessed in hands of assessee, but in hands of Parishad. He observed that amount transferred to Mandi Parishad was not credited to "Cess Fund". (Central Mandi Fund). Accordingly he directed Assessing Officer to make a reference to Assessing Officer of Mandi Parishad to make remedial measures, if necessary, in relevant assessment years to tax relevant receipts in hands of Mandi Parishad. The Court held that it is not open to another quasi judicial authority to give direction to determine tax liability of third party. Accordingly observations made by Commissioner(Appeals) were without jurisdiction.

*CIT v. Krishi Utpadan Mandi Samiti (2011) 336 ITR 77 / 200 Taxman 362 (All.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Recovery – Stay [S. 220]**

CIT(A) has not passed any order whatsoever on the stay application filed along with the appeal even after lapse of two and half months. Inaction on the part of CIT(A), is deprecated. CIT(A), is directed to hear the stay application and dispose of the same within period of 15 days and meanwhile no coercive action is to be taken against the

assessee. CBDT is directed to issue a circular if necessary for disposal of stay application.

*Smita Agrawal (HUF) v. CIT (2010) 321 ITR 491 / 230 CTR 173 / 215 Taxation 657 / 26 DTR 333 (All.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Grounds not raised [S. 23 Wealth Tax Act]**

Commissioner (Appeals) in appeal can consider grounds not raised before Assessing Officer. (A.Ys. 1993-94 to 2001-02)

*Binny Ltd. v. ACWT (2010) 324 ITR 34 / 45 DTR 239 / 235 CTR 185 (Mad.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – On remand**

Where the Tribunal had remanded the matter back to the Appellate Commissioner with a specific direction to consider a particular plea of the assessee. Then before the Commissioner in the second round a new plea cannot be raised. (A.Ys. 1990-91 to 1995-96-97)

*Ritz Theatre v. ITO (2010) 47 DTR 234 / 194 Taxman 544 / 236 CTR 246 (Delhi)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Jurisdiction – Order after transfer – Set aside**

The appeal had been decided by J who had been transferred. J sought to discharge his duties as Commissioner (Appeals) and decided the appeal on October 3, 2006, though on the said date, A in fact, was holding the office of the Commissioner (Appeals), Allahabad. On October 3, 2006, when J passed the order in the appeal of the assessee, admittedly, he was already transferred by the order dated May 31, 2006, passed by the competent authority. On October 3, 2006, J had no jurisdiction to function as Commissioner (Appeals), Allahabad. It was held that the Tribunal was right in setting aside the order passed by him.

*Vinod Kumar Rai (Dr) v. Income-tax Appellate Tribunal and Others (2008) 302 ITR 148 / 217 CTR 607 / 173 Taxman 289 / 4 DTR 309 (All.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Direction to reopen another year**

CIT (A) has no power to give direction to Assessing Officer to reopen the assessment of another year. (A.Y. 1998-99)

*CIT v. T. A. Krishnaswamy (2008) 2 DTR 143 (Mad.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Enhancement – Opportunity**

While completing the assessment for the A.Y 1997-98, the Assessing Officer allowed the claim of the assessee with respect to ` 1,26,06,781/- being the interest on debenture and inter-corporate dividends. The Learned CIT(A) without giving any

opportunity to the assessee enhanced the assessment. On appeal to the ITAT, the ITAT set aside the order of the CIT(A).

On appeal to the High Court, the High Court held that the CIT(A) committed an error in passing the order without giving opportunity to be heard. The Hon'ble High Court further held that it is a settled law in the case of *India Cements Ltd., v. CIT* reported in 60 ITR at page 52 (SC), that the loan obtained was not an asset or an advantage for the enduring benefit of the business of the assessee. Applying the same principle, the interest on debentures and corporate borrowings also cannot be treated as an asset or an advantage for the enduring benefit of the business of the assessee and accordingly confirmed the ITAT's Order. (A.Y. 1997-98)

*CIT v. Lotte India Corporation Ltd. (2007) 290 ITR 248 / 212 CTR 543 (Mad.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence [Rule 46A(4)]**

Rule 46A(4) provides that notwithstanding rule 46A(1), the appellate authority can permit production of documents which enables him to dispose of the appeal. In this case before CIT(A), the assessee produced confirmation letters from various creditors which request was turned down on the ground that under rule 46A(1) of the Income-tax Rules, 1962, no fresh evidence could be permitted for the first time in appeal. Later the Tribunal reversed the decision and the High Court upheld the same. (A.Y. 1997-98)

*CIT v. Suretech Hospital and Research Centre Ltd. (2007) 164 Taxman 168 / 211 CTR 360 / 293 ITR 53 (Bom.)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Enhancement – Information from AO**

The High Court held that the Assessing Officer had right to alert CIT (A) who has power to enhance the income not only suo moto but also on the basis of information received from the Assessing Officer.

*Goel Die Cost Ltd. v. CIT (Appeals) (2007) 201 Taxation 330 (P&H)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence [Rule 46A]**

CIT(A) is justified in allowing the application under section 46A where the Assessing Officer has not responded to the repeated reminders by the CIT(A) to submit his report. (A.Y. 1998-99)

*CIT v. Imperial Cables (P.) Ltd. (2007) 159 Taxman 328 (Delhi)(High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence [Rule 46A]**

The assessee did not tender relevant and documentary evidence before Assessing Officer and tendered the same for the first time before CIT(A). He did not give any explanation for not filing the same before Assessing Officer. However, the learned CIT(A) admitted the said document/evidence without calling upon the revenue to rebut it. The Hon'ble ITAT upheld the action of the CIT(A). On appeal to High Court, it

was held that since no opportunity of hearing was given to the revenue, ITAT was not justified in upholding the CIT(A)'s order. High Court remanded the matter to CIT(A). (A.Y. 1998-99)

*CIT v. Ranjit Kumar Chaudhary (2007) 288 ITR 179 / 209 CTR 21 / 162 Taxman 257 (Gau.) (High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Natural justice [S. 251]**

Commissioner (Appeals) has powers to go into question of violation of principles of natural justice complained of by assessee while prosecuting appeal before him

*K. Nedunchezian (Dr) v. Dy. CIT (2005) 274 ITR 37 / 199 CTR 301 (Mad.) (High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence – Oral – Documentary [S. 251]**

An appellant is not entitled to produce fresh oral or documentary evidence, as a matter of right in appeal; duty is cast on authority concerned to record reasons in writing for admission of additional evidence; mere presence of assessing authority during course of hearing of appeal would not lead to presumption that he assented for taking additional evidence on record. (A.Y. 1974-75)

*Haji Lal Mohd. Biri Works v. CIT (2005) 275 ITR 496 / 145 Taxman 578 / 199 CTR 170 (All.) (High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Condonation of delay**

Impugned assessment order was based on a High Court's decision which had been reversed by Division Bench, condonation of delay in filing appeal against assessment order could be considered.

*United India Insurance Co v. UOI (2004) 139 Taxman 325 / 187 CTR 400 / 274 ITR 255 (Raj.) (High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Direction**

Commissioner (Appeals) remanded case to Assessing Officer and directed him to consider question of addition on account of expenses that remained unexplained, Tribunal was not justified in modifying directions of Commissioner (Appeals) and directing Assessing Officer to restrict additions to that originally made.

*CIT v. M.C. Garg (Dr), Prop, Garg Eye and Maternity Hospital (2004) 271 ITR 264 / 193*

*CTR*

*275 / 193 Taxman 338 (P&H) (High Court)*

### **S. 251 : Commissioner (Appeals) – Powers – Additional evidence**

In view of rule 46A(4) Commissioner cannot straightaway refuse to entertain confirmation letters from creditors produced before him by way of additional evidence; he should direct Assessing Officer to consider them.

*CIT v. K. Ravindranathan Nair (2003) 131 Taxman 743 / 184 CTR 461 / 265 ITR 217 (Ker.)(High Court)*

**S. 251 : Commissioner (Appeals) – Powers – Annulment of assessment**

Where assessment is set aside without any direction for fresh assessment, it would amount to annulment of assessment in toto and reopening of assessment on basis of such appellate order was not justified.

*FU Sheen Tannery v. ITO (2003) 262 ITR 456 / 185 CTR 70 / 134 Taxman 25 (Cal.)(High Court)*

**S. 251 : Commissioner (Appeals) – Powers – New claim – Non filing of revised return**

When the assessee, during the course of assessment claimed the cost of acquisition of the capital asset as per the valuation report stating the fair market value as on 1st April 1981, the Assessing Officer should have entertained the said claim and CIT(A) also erred in not considering the claim, which is a legally permissible claim. (A. Y. 2005-06)

*Gopi S. Shivnani (Mrs) v. ITO (2011) 57 DTR 18 / 139 TTJ 308 / 133 ITD 172 (Mum.)(Trib.)*

**S. 251 : Commissioner (Appeals) – Powers – Finding – Direction**

An appellate authority cannot give direction or finding in respect of other years, direction or finding can be given only in respect of year or period which is before the authority.

*Sun Metal Factory (I) (P) Ltd. v. ACIT (2010) 124 ITD 14 / (2008) 15 DTR 274 (Chennai)(Trib.)*

**S. 251 : Commissioner (Appeals) – Powers – Set aside**

After 1st June, 2001, CIT(A) has no power to set aside the issue to the file of the Assessing Officer for reconsideration. (A.Y. 2005-06)

*Suri Sons v. Addl. CIT (2009) 124 TTJ 800 / 27 DTR 306 (Amritsar)(Trib.)*

**S. 251 : Commissioner (Appeals) – Powers – Additional evidence**

There is no requirement for confronting Assessing Officer in a situation where the Additional evidences were filed before the Commissioner (Appeals) under his direction. (A.Y. 2001-02)

*Dy. CIT v. Thoresen Chartering Singapore (Pte) Ltd. (2009) 118 ITD 416 / 199 TTJ 621 / 24 SOT 433 / 15 DTR 395 (Mum.)(Trib.)*

**S 251 : Commissioner (Appeals) – Powers – Before settlement commission – Settlement commission**

(i) Assessee appealed before the Appellate Tribunal against dismissal of appeal by the CIT(A) on the ground that the appeal had become infructuous and non est before him as the issues were placed before the Settlement Commission. In other



words, the CIT(A) loses his jurisdiction to decide the appeals in such situation. So, order passed by the CIT(A), dismissing the appeal, is only a technical order for statistical purposes and such order is not appealable order before the Appellate Tribunal.

(ii) Where the matter is abated before the Settlement Commission then the erstwhile jurisdiction of the CIT (Appeals) gets revived.

*J. C. Augustine v. ACIT (2009) 312 ITR (AT) 60 (Cochin)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Powers – Enhancement – Opportunity of hearing – Notice**

Section 251(2) only requires to offer a reasonable opportunity to call for an explanation from an assessee for proposed action of enhancement and it has not prescribed any statutory notice under the Act for issuing a show-cause notice for enhancement of income. (A.Y. 2001-02 & 2002-03)

*Honda Siel Cars India Ltd. v. ACIT (2007) 109 ITD 1 / 111 TTJ 630 (Delhi)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Power – Condonation of delay – Illness of director**

Illness of the director of the assessee company constituted sufficient cause for the delay and, therefore, the delay in filing the appeal is condoned. (A.Y. 2001-02)

*Orbitel Communication (P) Ltd. v. ITO (2007) 107 TTJ 112 (Delhi)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Powers – Mistake of counsel**

Counsel of the assessee having admitted his fault and shown reasonable cause for non-appearance, impugned order dismissing the appeal is set aside and the matter is restored to the first appellate authority for a fresh decision as per law. (A.Y. 2001-02)

*Suprabhat Road Carrier (P) Ltd. v. ITO (2006) 103 TTJ 720 (Jodh.)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Powers – Enhancement – Remand on specific issue**

CIT(A) had no power of enhancement when the matter was remanded to him on a specific issue of addition. (A.Y. 1993-94)

*Delhi Building Material Corpn. v. ACIT (2006) 103 TTJ 830 (Amritsar)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Powers – Allowability of expenditure**

Order of CIT(A) directing the Assessing Officer to examine the allowability of expenditure after verification of details amounted to setting aside the assessments. (A.Ys. 1989-90 to 1992-93)

*J & K Cigarettes (P) Ltd. v. Addl. CIT (2006) 102 TTJ 1028 (Amritsar)(Trib.)*

#### **S. 251 : Commissioner (Appeals) – Powers – Brought forward loss [S. 72(1)]**

It was held that, even though no appeal was preferred against Assessing Officer's declining the carry forward of loss in the assessment year in which the loss was incurred, the assessee is not denuded of his right to claim the set off of such loss in

the year in which he has an income. The CIT(A) has jurisdiction to adjudicate such a claim on merits and it cannot be simply brushed aside on the ground that the assessee did not raise any grievance in the assessment year to which the loss pertains. Therefore, on the facts of the case, the Revenue's plea that CIT(A) was denuded of the powers while dealing with an appeal for the A.Y. in which the assessee sought such set-off of carried forward loss to adjudicate was rejected. (A.Y. 1990-91).

*ACIT v. M.K. Chatterjee (2003) 86 ITD 90 / (2004) 86 TTJ 591 / 86 ITD 91 (Cal.)(Trib.)*

### **S. 251 : Commissioner (Appeals) – Powers – Assessment**

Commissioner (Appeals) has no power to decide the issue on merits by pre-empting the judgement of assessing officer that can be made under section 143(3). (A.Y. 1998-99)

*Aquapharm Chemical Co Ltd v. Jt. CIT (2003) 85 ITD 188 / 80 TTJ 235 (Pune)(Trib.)*

### **S. 251 : Commissioner (Appeals) – Powers – Direction for other year**

Commissioner (Appeals) can only give finding that the particular income does not belong to the year under appeal, and he has no power to give direction to assess the said income in any other year.

*ACIT v. Munnalal Sons & Co. (2003) SOT 533 (Agra)(Trib.)*

### **S. 251 : Commissioner (Appeals) – Powers – Not deciding the issue on merits – Set aside**

Assessee cannot object the Commissioner (Appeals) action, of not deciding the issue on merits, and setting aside the order with the direction to pass fresh order giving proper opportunity.

*Manish enterprises v. ACIT (2003) SOT 530 (Jab.)(Trib.)*

## ***B. Appeals to the Appellate Tribunal***

### **Section 252 : Appellate Tribunal**

### **S. 252 : Appellate Tribunal – Court – Ministry of law and justice – Judicial autonomy**

The Tribunal exercises judicial functions and has trappings of Court. The Tribunal functions under the Ministry of Law and Justice and the Law secretary is the member of the selection Board. The Ministry of law and Justice exercises a disciplinary power over the members of the Tribunal. The functions of the Tribunal being judicious in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. The Tribunal, as far as possible, should have judicial autonomy.

*Ajay Gandhi & Anr. v. B. Singh & Ors. (2004) 265 ITR 451 / 134 Taxman 537 / 186 CTR 506 / 179 Taxation 433 (SC)*

**S. 252 : Appellate Tribunal – Appointment of Vice President of the ITAT is by Merit-based selection and not seniority – No reservation for OBC**

Appointment to post of Vice-President has to be made on basis of merit from amongst members by method of selection and not on basis of seniority. No reservation to be applied in case of appointment not by way of direct recruitment.

*Sunil Kumar Yadav v. UOI & B. R. Mittal v. UOI O.A. No. 2839/2009 dated 28-10-2010 (CAT). Source : [www.itatonline.org](http://www.itatonline.org)*

**Section 253 : Appeals to the Appellate Tribunal**

**S. 253 : Appeals – Appellate Tribunal – Public Sector Undertakings – COD Approval**

Supreme Court doubts law requiring PSUs to obtain COD approval and refers the matter to a larger bench for reconsideration.

*CCE v. Bharat Petroleum Corporation Civil Appeal No. 1903 of 2008 dated 6-4-2010 (SC)*

*Source : [www.itatonline.org](http://www.itatonline.org)*

**S. 253 : Appeals – Appellate Tribunal – Change of address – Amendment in Form No. 36 [S. 282]**

In case of change of address of assessee, Tribunal to make it mandatory to amend their appeal memo or cross objections and form no 36 to facilitate proper service of notice and avoid passing of ex-parte order. (A.Y. 1993-94)

*Jagjivandas Nandlal & Co. v. ITAT (2011) 333 ITR 274 / (2010) 195 Taxman 157 / 47 DTR*

*145 / 236 CTR 274 (Bom.)(High Court)*

*Editorial : Refer Income-tax Appellate Tribunal Rules, 1963 (R. 9A) Revised Form No. 36 (2012) 343 ITR 34 (St.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Reasonable Cause – Pendency of rectification application [S. 154]**

Where the delay in filing the appeal before the Tribunal was caused due to the pendency of the application under section 154 before the CIT(A) and the assessee has shown just and sufficient cause for the delay in filling the appeal, Tribunal was not justified in refusing to condone the delay. (A.Y. 2001-02)

*Subhash Malik v. CIT (2010) 325 ITR 243 / 39 DTR 245 / 187 Taxman 88 / 236 CTR 407 (All.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Passing of order – Time limit [S. 254(1)]**

Appellate Tribunal passing order and making pronouncement of judgment – Tribunal passing the Order after more than four months from the date of hearing, therefore,

the impugned order was set aside and Tribunal directed to decide the same afresh. (A.Y. 2001-02)

*Shivsagar Veg Restaurant v. ACIT & Another (2009) 317 ITR 433 / 176 Taxman 260 / (2008) 220 CTR 563 / 16 DTR 30 (Bom.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Maintainability – Order of CST – Refusing to grant the approval [S. 80G]**

Appeal against the order of the Commissioner of Income tax refusing to grant the approval to the assessee trust under section 80G of the Act was not maintainable before the Tribunal. (A.Y. 2003-04)

*CIT v. Shri Digamber Jain Mindir Chaksu (2009) 29 DTR 65 / (2010) 189 Taxman 106 (Raj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Right to Appeal – Board's instructions**

Filing of an appeal is statutory right, but it can certainly be regulated by Board by issuance of order, instructions or circulars, this would not amount to taking away right of filing of appeal. When Supreme Court or territorial High Court has declared law on a question, it is not open to Tribunal to direct that circular issued by Board prescribing monetary limit for filing appeal should be given effect to such decision of Supreme Court or territorial High Court must be brought to Tribunal's notice by department and an objection to that effect must be raised by the department. (A.Ys. 1995-96, 1996-97)

*CIT v. Concord Pharmaceuticals (2009) 317 ITR 395 / (2008) 220 CTR 117 / 14 DTR 186 / 174 Taxman 529 (Guj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Appeal – Fees – Income assessed is a loss**

Where the income assessed by the Assessing Officer is a loss, Tribunal appeal fees payable would be ` 500 as per clause (d) of sub section (6) of section 253 of the Act. (A.Y. 2003-04)

*Gilbs Computer Ltd. v. CIT (2009) 27 DTR 163 / 226 CTR 19 / 317 ITR 159 / 184 Taxman 342 (Bom.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Fees – Rejection of appeal by Commissioner (Appeals) – Limitation – ` 500**

The assessee has preferred an appeal against the CIT(A)'s Order rejecting the appeal on the ground of limitation has to pay the appeal fees at ` 500/- as per the provisions of section 253(6)(d) of the Act.

*Rajkamal Polymer (P.) Ltd. v. CIT (2007) 158 Taxman 120 / 207 CTR 160 / 291 ITR 314 (Karn.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Non representation – No power to hold appeal as not maintainable – Ex parte – Merits – Rules 19, 20, 24 – Income-tax (Appellate Tribunal) Rules, 1963**

Non representation of assessee on the date of hearing, Tribunal did not hear on merits, the court held that Tribunal holding appeal not maintainable was not proper. Held that the ITAT misread and misapplied Rules 19 and 20 of 1963 Rules in holding that the assessee's appeal was not maintainable. On the contrary, ITAT could have proceeded with the hearing of the appeal ex parte as per Rule 24 of ITAT Rules. The appeal was not heard on merits and erroneously held that appeal was not maintainable.

*Tribhuvankumar & Others v. CIT (2007) 294 ITR 401 / 213 CTR 198 (Raj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Cross objection – Not fatal [Rule 27]**

Order of CIT(A) beneficial to assessee, failure of assessee to file cross objection cannot be held against him. (A.Y. 1984-85)

*Dahod Sahakari Kharid Veehan Sangh Ltd. v. CIT (2006) 282 ITR 321 / 200 CTR 265 / 149 Taxman 456 (Guj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Affidavit by counsel – Ethics of advocacy – Tantamount to committing contempt**

The assessee, before the Hon'ble High Court on the basis of an affidavit of its Counsel, contended that the additions confirmed were not justified. The Hon'ble Court observed that it is not the job of a Counsel to file affidavit. The submission of the assessee in placing reliance on affidavit of the Counsel and pressing such submission, deserved to be deprecated and rejected at the outset. Indeed, it is highly objectionable and against the ethics of advocacy and judicial norms. It may tantamount to committing contempt entitling the court to initiate proceedings against the concerned lawyer who filed such an affidavit. (A.Y. 1991-92)

*Keshav Pulses v. CIT (2006) 156 Taxman 234 / 204 CTR 482 (MP)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Approval of COD – State Governments and PSUs**

State Governments and PSUs do not need COD approval for filing an appeals in the Income tax matters.

*Shivshahi Punarvasan Prkalp v. UOI W.P. No. 2270 of 2009 dated 5-1-2010 (Bom.)(High Court) Source: [www.itatonline.org](http://www.itatonline.org)*

**S. 253 : Appeals – Appellate Tribunal – Additional grounds – Any stage of proceedings – Rule 11 of ITAT Rules, 1963**

Additional ground could be raised at any stage of the proceeding in order to decide the appeal which has a bearing on the correct determination of tax liability and the same can not be rejected on the ground of limitation. (A.Ys. 1993-94 to 1995-96)

*Zakir Hussain v. CIT (2006) 202 CTR 40 (Raj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Illness of male partner**

Illness of only male partner constituted reasonable cause where other partner was aged about 68 years old. Delay was condoned. (A.Y. 1992-93)

*Auto Centre v. St. of UP Ors. (2006) 204 CTR 142 / (2005) 278 ITR 291 / 148 Taxman 573 (All.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Advice of counsel – Affidavit of director**

Assessee not preferring the appeal before the Tribunal within the specified time on the advice of its counsel and the Director of the Assessee Company filing affidavit to explain the reasons for the delay – Delay is due to reasonable cause and Tribunal must give a finding that there was no sufficient cause for the delay. (A.Y. 1997-98)

*Areva T & D India Ltd. v. Jt. CIT (2006) 203 CTR 325 / 287 ITR 555 (Mad.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Period of limitation – Amendment of memo**

In section 253(3) limitation is provided only for purpose of filing appeal and not for amendment of memo. (A.Y. 1997-98)

*Shilpa Associates v. ITO (2003) 263 ITR 317 / 181 CTR 92 / 135 Taxman 277 (Raj.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – ITAT – Tax effect less than ` 30000, or less**

Circular issued by the CBDT regarding not pursuing matter where tax involved is less than

` 30,000 is not an unqualified embargo on the revenue proceeding with the matter where the amount of tax in issue is ` 30,000 or less. (A.Y. 1986-87)

*CIT v. P.S.T.S. Thiruvirathnam & Sons (2003) 261 ITR 406 / 186 CTR 400 / 140 Taxman 48 (Mad.)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Stay Application in Tribunal maintainable despite non-filing of stay petition before lower authorities – Dispute Resolution Tribunal**

There is no merit in the argument of the department that the stay application should be rejected outright since the assessee has not moved any petition before the Revenue Authorities seeking stay of the demand. Seeking stay before the lower authorities is directory and not mandatory.

*DHL Express (India) P. Ltd. v. ACIT (2011) 140 TTJ 38 / 49 DTR 432 (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Fees – “pauper provisions” under 33 of CPC**

Benefit of “pauper provisions” under section 33 of CPC is confined to the underprivileged class of public which does not have means to pay the costs of litigation. Assessee a lawyer, who is practicing before High Court, Debt recovery



Tribunal and lower Courts and does not fit in the criterion of an indigent person in Expl. 1 to Rule 1 of order 33 and therefore, she is not entitled to protection of order 33. Appeals are dismissed for want of payment of appeal fees. (A.Ys. 1999-2000 to 2004-05)

*Yashshree Yogesh Naik v. Dy. CIT (2011) 44 SOT 1 / (2010) 45 DTR 249 / 133 TTJ 534 (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Power – Penalty [S. 246A(1)(q), 271FA]**

Income tax Appellate Tribunal has no power to entertain the appeal against the order passed under section 271FA i.e. delay in filing information. An appeal against the order passed under section 271FA can be preferred before the CIT(A). (A. Ys. 2005-06 to 2008-09).

*Sub-Registrar, Nakoar v. DIT (2011) 57 DTR 497 / 139 TTJ 734 (Amritsar)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Fees – Income determined – Order under section 154**

Order passed under section 143(1), assessed income is ` 13,06,780/-. Appeal filed against order under section 154. Total income determined at more than ` 2 lakhs fee payable shall be one percent of assessed income subject to a maximum of ` 10,000/-. The Tribunal held that fee rate dependent on total income determined. (A. Y. 2002-03).

*M. M. Bagwan and Brothers v. ACIT (2011) 7 ITR 298 (Bang.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Special bench – Judicial discipline – Member who has decided the issue – Depreciation on Goodwill**

If a member has already taken a view, it would be in the interest of judicial discipline to recuse him self from hearing of instant appeal. Issue of allowability of depreciation on good will is kept pending till the decision of High Court.

*CLC & Sons (P) Ltd. v. ACIT (2010) 38 SOT 439 (SB)(Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Jurisdiction – Reassessment – Second round [S. 147]**

Challenged the validity of reassessment proceedings in the second round before the Tribunal. The Tribunal held that, it is now well established that the issue of jurisdiction of the authorities is a fundamental and the root of the proceedings or matter. Any finality and the dispute or defect as regards the jurisdiction got inbuilt into the order and should, therefore, always subject matter for legal scrutiny, when questioned as long as such issue has not reached finality. After all the jurisdiction to authorities cannot be conferred by acceptance or negligence of the parties to the dispute. It can always be agitated or questioned when the assessee gets some opportunity over the issue. (A.Y. 2001-02)

*Hemal Knitting Industries v. ACIT (2010) 127 ITD 160 / 48 DTR 393 / 135 TTJ 143 (TM) (Chennai)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Special audit – Fees to Auditor – Not maintainable [S. 142(2A)]**

In the absence of any specific provision empowering the Tribunal to hear appeal against fixation of audit fees payable to special auditors appointed under section 142(2A), appeal filed by the assessee against the order under section 142(2D), is not maintainable. (A.Y. 2005-06)

*Sony Mony Electronics Ltd. v. Dy. CIT (2010) 121 TTJ 660 / 45 DTR 431 (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Cross objection – Assessee's appeal**

Cross objection at assessee's instance in its own appeal is not maintainable.

*Vidya Institute v. CIT (2010) 3 ITR 491 (Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Appeal – Fees – Non-maintainability by CIT(A) – ` 500**

As the Commissioner (Appeals), dismissed the appeal on ground of non-maintainability only sum of ` 500/- payable as fee. (A.Ys. 1996-97 to 2003-04)

*A. Naresh Babu (Dr.) v. ITO (2010) 124 ITD 28 / 5 ITR 485 / (2009) 24 DTR 41 / 123 TTJ 836 (Hyd.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Appeal – Fees – Penalty – ` 500**

An appeal against levy of penalty under section 271 is covered by cl. (d) of section 253(6), and the fee payable is ` 500 only. (A.Y. 2000-01)

*Dabwali Transport Company v. ACIT (2010) 38 DTR 434 / 3 ITR 785 / 137 TTJ 49 (Chd.)(Trib.)*

*Editorial:- Refer Ajit Kumar Pandey (Dr.) (2009) 310 ITR 195 / 223 CTR 96 / 21 DTR 103 (Patna)(High Court)*

**S. 253 : Appeals – Appellate Tribunal – Appeal fee – Revision Order [S. 263]**

In an appeal against order under section 263 filing fee will be governed by cl. (d) of 253(6). Finding given in order under section 263 is not based on the computation of total income by the Assessing Officer. Hence, cls. (a) (b) and (c) of section 253(6) are not attracted. Only

` 500 is payable as filing fee. (A.Y. 2003-04)

*Jet Electronics v. ACIT (2008) 2 DTR 337 / 116 TTJ 225 (Ahd.)(Trib.)*

*Editorial Note: Order of Special Bench of Tribunal at Kolkata in Bidyut Kumar Sett v. ITO (2004) 85 TTJ 896 / 92 ITD 148 (SB)(Kol.) distinguished.*

**S. 253 : Appeals – Appellate Tribunal – Delay in Filing – Mistake of counsel – Wrong opinion**

Delay in filing of appeal caused due to mistake on part of counsel in giving wrong opinion, constituted a reasonable cause for delay.

**S. 253 : Appeals – Appellate Tribunal – Cross objection – Raising new ground – No estoppel**

There is no estoppel in raising a claim just because the same was not originally raised either before the Assessing Officer or before the CIT (A). (A.Ys. 1995-96, 1996-97)

*Jt. CIT v. Steri Sheets Ltd. (2007) 106 TTJ 460 (Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Charitable Trust [S. 12A]**

Applicant society working under Government supervision having applied for registration under section 12A as a result of amendment of law, there was reasonable cause for the delay in filing the application for registration under section 12A and, therefore, the delay is to be condoned.

*Krishi Upaj Mandi Samiti, Hindaun City v. CIT (2007) 107 TTJ 381 (Jp.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Charitable Trust [S. 11, 12A]**

Applicant having filed belated application for registration under section 12A as it came to know only at a later stage from a decision of the Tribunal that it can claim exemption under section 11, there was reasonable cause for the delay in filing the application.

*Rajasthan State Agricultural Marketing Board v. CIT (2007) 106 TTJ 1109 (Jp.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Power – Right to contest – Tribunal Rules, 1963 R. 27)**

Where the CIT(A) decided the ground of reopening against the assessee but decided the ground of merits in favour of the assessee, the assessee is entitled, in an appeal by the Revenue before the Tribunal, to urge, under Rule 27 of the Income Tax Rules, that the CIT(A) was wrong in deciding the ground of reopening against the assessee. (A.Y. 1995-96)

*ACIT v. Triace, ITA No. 2827/Mum/04, Bench-H, dated 26-11-2007 Source: www.itatonline.org (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Appeal fee – Excess fee to be refunded [S. 263]**

Filing fee required to be paid in respect of appeal against order under section 263 being

₹ 500 under section 253(6)(b) and assessee having paid ₹ 5021, excess directed to be refunded.

*Kiranjit Singh v. ACIT (2006) 101 TTJ 424 (Amritsar)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – “Sufficient cause”**

Words “sufficient cause” appearing in section 253(5) should receive a liberal construction so as to advance substantial justice – Length of delay is immaterial and acceptability of explanation is only criteria for condoning delay. (A.Ys. 1989-90 to 1999-2000)

*Sterlite Industries (India) Ltd. v. Addl. CIT (2006) 6 SOT 497 / 102 TTJ 53 (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Reference to third member – Additional evidence**

Additional evidence cannot be admitted by the Third Member and the matter has to be decided by him on the basis of record available before the original Bench.

*Aishwarya K. Rai (Ms.) v. Dy. CIT (2006) 105 TTJ 825 / (2007) 104 ITD 166 (Mum.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Delay of 310 days – Negligence**

Reasonable cause – Delay of 310 days in filing appeal before the Tribunal occurring solely due to misplacement of CIT(A)’s order is attributable to negligence and inaction and the same did not constitute sufficient and good reason for condonation of delay. (A.Y. 1996-97)

*Jt. CIT v. Tractors & Farm Equipments Ltd. (2006) 105 TTJ 705 / 104 ITD 149 (TM)(Chennai)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Condonation of delay – Gross negligence**

Department having sent the appeal to the Tribunal through a Chowkidar which was not in fact delivered and even after knowing that fact filed a fresh appeal after further delay of more than three months, the delay in filing the appeal was caused by gross negligence and not due to any sufficient cause and, therefore, delay cannot be condoned. (A.Y. 1991-92)

*ITO v. Nauhria Rice Mills (2006) 103 TTJ 245 / 101 ITD 191 (Amritsar)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Tax effect is nil – CBDT’s Instruction**

If tax effect in an appeal filed by the revenue before it is nil then in that case the said appeal is not maintainable in view of the CBDT Instruction No. 1979, dated – 27-3-2000 even if it involves a question of law. (A.Y. 1996-97)

*Jt. CIT v. Peerless Developers Ltd., (2006) 103 ITD 349 / 104 TTJ 741 (SB)(Kol.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Appealable Orders – Block assessment – Rectification of mistake [S. 154, 158BC]**

In absence of any provision under section 253(1), no appeal lies directly to Tribunal against order of Assessing Officer under section 154 rectifying original order under section 158BC.

*Pradeep Singh v. Dy. CIT (2005) 93 ITD 514 / 93 TTJ 1055 (Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Appealable Orders – Dismissal by CIT(A) for non payment of admitted tax**

An appeal lies against order of Commissioner (Appeals) whereby appeal was dismissed for non-payment of admitted tax on returned income.

*Shamraj Moorjani v. Dy. CIT (2005) 2 SOT 321 / 93 TTJ 927 (Hyd.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Tax effect – Appealable orders**

Where tax effect in case of an assessee does not exceed minimum limit stipulated, revenue will be prohibited from filing appeal before Tribunal in view of CBDT Instruction No. 1979, dated 27-3-2000. (A.Y. 2001-02)

*ITO v. Chandra Kant S. Dharma (2005) 94 ITD 152 / 95 TTJ 151 (Indore)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Tax effect – Appealable orders**

Appeal filed by revenue where tax effect involved is less than monetary limit prescribed by CBDT, is not maintainable. (A.Y. 1998-99)

*Jt. CIT v. Dev Raj Agarwal (2005) 92 ITD 249 / 92 TTJ 889 (Luck.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Tax effect – Appealable orders**

CBDT Instruction No. 1979, dated 27-3-2000, specifying monetary limits for departmental appeals does not apply in case of penalty. (A.Ys. 1996-97, 1997-98)

*Dy. CIT v. Mangal Dayak Chit Fund (P.) Ltd. (2005) 92 ITD 258 / 97 TTJ 130 (Hyd.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Validity of assessment – Penalty appeal**

It is open to assessee to set up/raise question of validity of assessment in appeal against levy of penalty. (A.Ys. 1996-97, 1997-98)

*Tidewater Marine International Inc. v. Dy. CIT (2005) 96 ITD 406 / 97 TTJ 130 (Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Fees – As per AO's order – Income assessed – Relief granted by Commissioner (Appeals) cannot be considered**

For filing an appeal before Tribunal, assessee is required to pay fee on the basis of income as computed by Assessing Officer under section 143(3) without taking into account relief granted by Commissioner (Appeals). (A.Y. 1998-99)

*Kothari Departmental Stores (P.) Ltd. v. Assessing Officer (2005) 96 ITD 142 / 97 TTJ 278 / 97 TTJ 278 (TM)(Jodh.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Validity of appeal – Appeal by Assessing Officer without direction of CIT – Non est**

Petition or appeal, etc., filed by Assessing Officer or by an Officer other than Assessing Officer without directions of Commissioner to do so, is non est and cannot be considered by Tribunal. (A.Y. 1988-89)

*Rajeev Kumar Doneria v. ACIT (2005) 94 ITD 345 / 95 TTJ 732 (Agra)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Priority hearing – Stay granted matters**

With the insertion of two provisions in sub section 254(2A) by the Finance Act, 2001, with effect from 1-6-2001, while fixing the time limit for disposal within the said time, it has become imperative for the Tribunal to fix the appeal of the assessee for hearing out of turn hearing when ever stay is granted. (A.Y. 2000-01)

*Bechtel India (P.) Ltd. v. ACIT (2005) 92 ITD 205 / 93 TTJ 794 (Delhi)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – ITAT Rules, 1963 – Rule 35 – Separate stay petition for each assessment year**

Separate stay petition should be filed seeking stay of recovery of demand for different assessment years even though pertaining to same enactment. (A.Ys. 1999-2000 to 2001-02).

*Wipro Ltd. v. ITO (2003) 86 ITD 407 (2004) 84 TTJ 685 (Bang.)(Trib.)*

**S. 253 : Appeals – Appellate Tribunal – Fees – Penalty order u/s. 271(1)(c) – ` 500. [S. 271(1)(c)]**

Penalty under section 271(1)(c) is not based on total income assessed but it is on tax sought to be evaded. Therefore, appeal filing fee against the penalty order is governed by section 253(6)(d). Accordingly, filing fee of ` 500 for each assessment year deposited was proper. (A.Y. 1993-94 to 1996-97)

*Amruta Enterprises v. Dy. CIT (2003) 84 ITD 172 / 79 TTJ 214 (Mum.)(Trib.)*

**S. 253(1)(b) : Appeals – Appellate Tribunal – Maintainability – Non-payment of Admitted tax [S. 249(4)(a)]**

Each heading of Chapter XX being a stand-alone item, the provision of section 249(4)(a) cannot be read into section 253(1)(b) and, in the absence of dis-enabling provision in section 253(1)(b), assessee's appeal under section 253(1)(b) was maintainable despite non-payment of full amount of admitted tax.

*CIT v. Pawan Kumar Laddha (2010) 324 ITR 324 / 38 DTR 3 / 190 Taxman 169 / 231 CTR 219 (SC) affirming (2003) Pawan Kumar Ladha v. ACIT 84 ITD 178 (Indore)(Trib.)*

**S. 253(5) : Appeals – Appellate Tribunal – Appeal – Condonation of delay – Reasonable cause – Prosecution notice**



Prosecution notice alone was the provocation for filing the appeal after a long delay of 13 years which did not constitute a reasonable cause, therefore, the delay could not be condoned. (A.Y. 1986-87)

*Jetha Drums & Containers (P) Ltd. v. ACIT (2007) 106 TTJ 1047 (Mum.)(Trib.)*

**S. 253(6) : Appeals – Appellate Tribunal – Appeal Fee ` 500 – Interest [S. 220(2)]**

In appeal challenging interest under section 220(2), appeal fee payable is ` 500 under cl. (d) of section 253(6).

*Pedda Sankara Rao & Ors. v. Dy. CIT (2006) 99 TTJ 424 (Visakha)(Trib.)*

**Section 254 : Orders of Appellate Tribunal**

**S. 254(1) : Appellate Tribunal – Order – Power – Enhancement**

Under section 254(1), the Tribunal has no power to take back the benefit conferred by assessing officer or enhance the assessment. In the present case since the assessing officer has granted depreciation the benefit could not be withdrawn by the Tribunal. (A.Y. 1991-92)

*MCorp Global Pvt. Ltd. v. CIT (2009) 309 ITR 434 / 178 Taxman 347 / 19 DTR 153 / 222 CTR 110 / 211 Taxation 197 (SC) / 3 SCC 420*

**S. 254(1) : Appellate Tribunal – Order – Cross objection – Non adjudication by ITAT**

Revenue filing appeal and the assessee filing cross objection before the Tribunal. Tribunal dismissed the revenue's appeal and not adjudicated the assessee's cross objection. The Court held that the cross objection to be decided.

*Ram Ji Dass & Co. v. CIT (2011) 220 Taxation 90 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Reasoned order**

A judicial order must be supported by sufficient reasons for coming to the conclusion. Failure to record reason would violate the principles of natural justice and is against the basic concept of fairness and transparency, therefore, orders passed by the CIT(A) and the Tribunal suffer from violation of principles of natural justice can not be sustained. (A. Y. 2001-02).

*Iskraremeco Regent Ltd. v. CIT (2011) 237 CTR 239 / 49 DTR 185 / 331 ITR 317 / 196 Taxman 103 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional grounds – Factual Plea – ITAT Rule 11**

Where the Revenue had not contested / urged before the lower appellate authority or as an additional ground before the Tribunal nor the Assessing Officer had taken such stand in his assessment order. The Tribunal was held to have committed an error in allowing the Revenue to raise such new factual plea for the first time before it at the stage of argument and adjudicating upon such plea. (A. Ys. 1966-67 to 1981-82)

*Meghji Girdhar (HUF) v. CIT (2011) 52 DTR 397 / 239 CTR 411 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Issue of notice**

Assessee cannot be allowed to raise the plea as to whether the notice under section 143(2) was validly served on it for the first time before the Tribunal. (A. Y. 1997-98).  
*Aravali Engineers P. Ltd. v. CIT & Anr. (2011) 49 DTR 68 / 237 CTR 312 / 335 ITR 508 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Natural justice – Administrative law – Opportunity for filing paper book**

The Tribunal had decided the Departmental appeal against the assessee without waiting for the paper book containing the relevant documents promised to be filed by the Department. The Department appeal was allowed. The High court remitted the matter back to the Tribunal to decide the matter a fresh.

*Krishan Kumar Sethi v. CIT (2011) 333 ITR 16 / 203 Taxman 216 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Jurisdiction – Reopening of assessment [S. 147]**

The assessee had raised a specific ground challenging the jurisdiction of the assessing officer on framing the assessment order beyond limitation before the CIT(A) and succeeded before him in appeal. The Tribunal was held not justified in deciding the issue on merits and reversing the order of the CIT(A) without deciding the issue on jurisdiction under section 147 of the Act. (A. Y. 1990-91)

*Kumudam Printers (P) Ltd. v. CIT (2011) 56 DTR 61 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order giving effect to order of Tribunal – Scope – Binding nature of order of Tribunal – Assessment [S. 143(3), 237]**

While giving the effect to the appellate order Assessing Officer cannot travel beyond the order of Tribunal and assessee the prize money as income from other sources. Assessing Officer being a quasi judicial authority and subordinate to the Tribunal is bound by the decision of the Tribunal. The assessee is entitled to refund of advance tax collected with interest as per law. (A. Y. 2001-02).

*Lopamudra Misra (Miss) v. ACIT (2011) 59 DTR 257 / 243 CTR 66 / 337 ITR 92 / 202 Taxman 437 (Orissa)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Additional evidence – Forensic – Report**

The revenue has filed the report of the Forensic Science Laboratory was a relevant material and so was affidavit of the searched person. The additional evidence was necessary for just decision of the matter. The Tribunal was not justified in declining to consider the additional evidence comprising the opinion of the laboratory of the Government examiner and also the affidavit of the author of the diary, as the documents had a direct bearing on the issue.

*CIT v. Mukta Metal Works (2011) 336 ITR 555 / 244 CTR 544 / 62 DTR 167 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Binding – Decision of jurisdictional High Court**

It is the duty of the Tribunal to follow decision of jurisdictional High Court. Tribunal cannot hold High Court decision erroneous because it did not consider relevant provision. (A. Y. 1989-90)

*National Textile Corporation Ltd. (M.P.) v. CIT (2011) 338 ITR 371 / (2008) 216 CTR 153 / 171 Taxman 339 / 5 DTR 159 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Power of enhancement**

The arrears of rent & damages received by the assessee were claimed as 'not taxable' by the assessee, being capital receipts whereas the Department contended that the same were taxable, being on revenue account. The Tribunal remanded the matter back to consider whether the same could amount to 'Capital Gains', being received for surrender of tenancy. It was not even the case of the Department that these were 'capital gains'. It was held that the Tribunal cannot enhance the scope of the appeal by adjudicating on grounds not raised by the Appellant.

*Jasmine Commercials Ltd. v. CIT (2011) 200 Taxman 338 / 56 DTR 159 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Additional ground – Remand of the matter**

When the material called upon by Tribunal was produced and available on record, remand of the matter to the CIT(A) was not valid, once the materials are available on record, the Appellate Court should have disposed of the case on merit taking those materials into consideration and there is no need to remand the matter. (A. Ys. 2000-01 to 2006-07).

*Siksha "O" Anusandhan v. CIT (2011) 244 CTR 515 / 62 DTR 191 / 336 ITR 112 (Orissa)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Search and seizure – Validity**

A search took place in case of assessee and two sons. Assessee filed the return declaring 1/3 share of rent as his share. Assessing Officer completed the assessment treating the said property as HUF. Assessee challenged the validity of search. Tribunal declined to go into validity of search. On merits the Tribunal remitted the matter back to the assessing Officer. The Court held that refusal on part of Tribunal to go into validity of search which is sine qua non for initiating block assessment is illegal. The Court also held that it was not proper for the Tribunal to remand matter without attempting to settle at its stage. The order passed by the Tribunal was set aside and the matter was remanded to it for fresh consideration. (A. Ys. 2000-01, 2004-05 and 2005-06).

*CIT v. Subbalakshmi (Smt.) (2011) 202 Taxman 448 (Karn.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Search – Validity – Authorisation [S. 132(1)]**

Validity of search and seizure operation could not be gone in to by the Tribunal in appeal proceedings.

*Brij Mohan Bhatia v. ITAT (2011) 64 DTR 212 / 335 ITR 580 / (2012) 246 CTR 529 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Powers – Second remand**

Where the CIT(A) failed to pass order in terms of remand made by the Tribunal, the Tribunal had power to make a second remand to the CIT(A). (A. Y. 2001-02)

*Vipin Khanna v. CIT (2011) 202 Taxman 250 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Need not follow blindly earlier decision**

The appellate Tribunal need not blindly follow earlier decision if it did not reflect the correct position of law.

*CIT v. HI Tech Arai Ltd. (2010) 321 ITR 477 / 236 CTR 321 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Precedent – Binding nature of order of another Bench – Judicial Discipline – The Constitution of India [Article 226]**

One bench cannot differ from the view of another co-ordinate Bench. Judicial discipline requires reference to larger bench in case of difference in views between benches on identical facts.

*Mercedes Benz India Pvt. Ltd. v. UOI (2010) 252 E.L.T. 168 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power**

The Tribunal has no power to put restriction on Assessing Officer to determine income, either at figure higher than that determined by Assessing Officer under section 144 or at figure lower than that declared by assessee in original return. (A.Ys. 1993-94, 1994-95)

*CIT v. H. P. State Forest Corporation Ltd. (2010) 320 ITR 54 / 230 CTR 284 / 230 CTR 284 (HP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty**

Order passed by the Tribunal by merely relying upon the decision without recording the finding and also the reasons as to how the decision was applicable to the facts of the assessee's case was liable to be set aside as the order of the Tribunal was passed without application of judicial mind.

*DIT (E) v. Shia Dawoodi Bohra Jamat (2010) 40 DTR 31 (Guj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Consider facts**

Tribunal mechanically following decision of High Court which was not applicable to the facts, the court held that the order of Tribunal not valid and matter remanded to the Tribunal. (A.Y. 1993-94)

*CIT v. Damodar Mangalji Mining Co. (2010) 326 ITR 437 / (2009) 26 DTR 211 / 228 CTR 160 / 185 Taxman 39 (Bom.)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Duty – Reasoned order**

It is obligatory on the part of Tribunal to pass reasoned order and adjudicate the list on merits, by ascribing cogent and germane reasons after dealing with the factual issue in detail. (A.Y. 1998-99)

*Rajesh Maheshwari v. ACIT (2010) 36 DTR 43 / 320 ITR 58 / 230 CTR 412 (MP)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Jurisdiction – Finding in respect of other year**

Tribunal cannot give a finding in respect of assessment of an year which is not subject matter appeal. (A.Y. 1997-98, 1998-99)

*Marubeni India P. Ltd. v. CIT (2010) 328 ITR 306 / 195 Taxman 76 / 47 DTR 181 / 236 CTR 234 / (2011) Tax. L.R. 417 (Delhi)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Ex-parte Order – ITAT Rules 1963, Rule 24**

Where the Tribunal rejected the application of the petitioner under Rule 24 for recalling ex-parte order on irrelevant grounds and the petitioner had explained reason for non appearance on the date of hearing of appeal, the order passed by Tribunal rejecting the petitioner's application under Rule 24 was liable to be set aside. (A.Ys. 2000-01 to 2003-04-05-06)

*Devendra G. Pasale v. ACIT (2010) 47 DTR 297 / 236 CTR 227 / 333 ITR 263 (Guj.)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Powers – Deduction under an alternative section**

##### **[S. 36(1), 37]**

Assessee having claimed deduction under section 36(1)(vii), Tribunal was empowered to deal with the issue of allowability of the impugned amount as an expenditure under section 37(1). (A.Y. 1990-91)

*CIT v. Khaitan Chemicals & Fertilizers Ltd. (2010) 38 DTR 86 / 326 ITR 114 (Delhi)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Duty – Reasoned order**

While deciding the appeal, Tribunal should deal with issues both on facts and law with reference to submissions urged and then return its own reasoning, quoting the finding of CIT(A) and simply upholding the same without its own reasoning is not proper.

*K. D. Wires Pvt. Ltd. v. CIT (2010) 319 ITR 359 / 187 Taxman 257 / 38 DTR 210 (MP)(High Court)*

*Editorial:- Refer Jt. CIT v. Saheli leasing & Industries (2010) 324 ITR 170 (SC)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Reasoned Order**

Tribunal was not justified in dismissing the revenue's appeal mechanically, merely to maintain consistency, disregarding several issues decided by the Assessing Officer, more so when the tax effect was substantial. It should have dealt with the issues adjudicated by the Assessing Officer by passing reasoned order instead of relying upon the outcome of the earlier assessment year. (A.Y. 1996-97)

*CIT v. Swapna Roy (Smt.) (2010) 40 DTR 193 / 192 Taxman 105 / 233 CTR 10 / 331 ITR 367 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Powers – Partial relief by Commissioner (Appeals) – Non filing of cross objection**

Where the revenue authorities had challenged the action of the CIT (A) granting a partial relief to the assessee before the Tribunal and there was no appeal or cross objection filed by the assessee in absence of such appeal or cross objection, Tribunal could not grant 100 per cent relief to the assessee in appeal filed by the revenue. (A.Y. 1994-95)

*CIT v. Sisodia Marble & Granite (P) Ltd. (2009) 18 DTR 147 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Adjournment – Absence of counsel**

Where both the parties request for adjournment in the absence of their respective counsels, the Tribunal can consider their request or proceed to decide the case on the merits instead of dismissing the case. The technicalities should take a back seat as far as determination of rights of the parties are concerned. The parties should be afforded opportunity to address arguments on the merits instead of dismissing the case for default. (A.Y. 1999-2000)

*CIT v. Avon Cycles Ltd. (2009) 309 ITR 247 / 177 Taxman 33 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Speaking order**

Merely confirming CIT(A)'s Order without recording reasons, ITAT's Order to be set aside and has to be remanded back.

The Order of the Tribunal does not satisfy even the bare necessities of an Order of a quasi-judicial body, and hence, to be set aside. (A.Ys. 1999-2000)

*CIT v. India Carbon Limited (2009) 315 ITR 315 / 30 DTR 99 (Gau.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Exempt income [S. 14A]**

Where neither during the assessment proceedings, nor during the appellate proceedings before the CIT(A), the revenue had invoked the provisions of section 14A of the Act with respect to expenditure incurred for earning exempt dividend income and further, there was no material before the Tribunal, which would have permitted it to take up the additional ground pertaining to section 14A, the Hon'ble High Court on these facts held that the Tribunal was justified in rejecting the plea of the revenue to



raise additional ground pertaining to section 14A of the Act for disallowing expenditure incurred for earning exempt dividend income. (A.Y. 2001-02)

*CIT v. Hindustan Tin Works Ltd. (2009) 24 DTR 88 / 226 CTR 42 / 330 ITR 350 / 187 Taxman 298 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Precedent – Decision of High Court of different jurisdiction – Not binding**

Decision of High Court of different jurisdiction is not binding on Tribunal. (A.Y. 2004-05)

*Visvas Promoters (P.) Ltd. v. ITO (2009) 30 DTR 65 / 226 CTR 638 / 185 Taxman 145 / 232 ITR 114 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional evidence – Hypertechnical – Rule 46A**

Tribunal confirming the order of CIT(A) without considering the additional evidence which was crucial. The High Court held that the additional evidence goes very root of the matter and a reasonable approach is needed and not the hyper technical approach adopted by the Tribunal, hence, the matter remanded to the Tribunal. (A.Y. 1971-72)

*Daljeet Kaur v. ITO (2009) 212 Taxation 46 (MP)(High Court)*

*Editorial Note:- See Prabhavati Shah (Smt.) v. CIT (1998) 231 ITR 1 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Additional ground – Interest – First time before Tribunal  
[S. 234B]**

Plea against charging of interest under section 234B, could be allowed to be raised by the assessee in appeal before the Tribunal notwithstanding the fact that it was not raised by it before lower authorities. (A.Y. 1992-93)

*S. Kumars Tyre Manufacturing Company Ltd v. CIT (2009) 227 CTR 181 / 30 DTR 233 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Block assessment – Validity of search**

While hearing an appeal against the block assessment order the Tribunal cannot go into the question of validity of the administrative decision for conducting search and seizure operation. (A.Ys. 1986-87, 1996-97)

*CIT v. Paras Rice Mills (2008) 15 DTR 262 / 220 CTR 619 / 313 ITR 182 / 176 Taxman 181 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Remand – Fresh evidence**

Where the High Court had directed the Tribunal to adjudicate the matter afresh on the basis of the material on record, in such a case it was not open for the Tribunal to

take fresh evidence while readjudicating the matter afresh in pursuance of the direction of the High Court. (A.Y. 2000-01)

*Harsingar Gutkha Pvt. Ltd. v. Income Tax Appellate Tribunal & Ors. (2008) 13 DTR 9 / (2009) 176 Taxman 137 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – New source of income**

Where the revenue sought to introduce a new source of income by raising an additional ground before the Tribunal, the High Court concurring with the view taken by the Tribunal, held that if the request of revenue is acceded to, it would amount to setting the process of assessment in action by the authorities below for the first time, as the issue sought to be raised in form of additional ground was not part of subject matter of the assessment order or the order of the first appellate authority. (A.Y. 1978-79)

*CIT v. Dalmia Dairy Industries Ltd. (2008) 12 DTR 25 / 176 Taxman 169 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Speaking order – Relying upon order passed by subordinate authority without independent application of mind**

The Tribunal is expected to apply its mind to facts of each case and thereafter arrive at a conclusion since it is final fact-finding authority and facts determined by it would be conclusive unless they are perverse. Therefore, while disposing of an appeal, Tribunal cannot entirely rely upon order passed by subordinate authority without independent application of mind.

*CIT v. Jadeja Consultants (P) Ltd. (2008) 173 Taxman 286 / 10 DTR 205 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Third member – Power – No right to enlarge, restrict, modify and/or formulate any question of law on his own**

Third Member must confine himself to order of reference, he has no right to go beyond scope of reference in a matter of difference of opinion between Member of Bench and has no right to enlarge, restrict, modify and/or formulate any question of law on his own on difference of opinion referred to by Members of Tribunal. (A.Y. 1990-91)

*Dynavision Ltd v. ITAT (2008) 171 Taxman 486 / 217 CTR 153 / 304 ITR 350 / 7 DTR 123 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Reasoned order**

Tribunal is under a legal obligation to formulate in short the question involved and then quote its reasoning already arrived at in its main leading order in case the Tribunal does not wish to add any more reasoning to its earlier order. (A.Y. 1995-96)

*CIT v. Madhya Pradesh Tyres Co. (2008) 171 Taxman 296 / (2009) 316 ITR 202 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Adjournment – Rejection not valid**

Tribunal was not justified in refusing prayer of assessee's counsel for 10-12 days adjournment on the ground that he being busy before the High Court, without giving any valid reason and in proceeding ex parte and deciding the appeal. (A.Y. 1999-2000)

*Babulal Jain v. ITO (2008) 3 DTR 232 / 215 CTR 340 / 298 ITR 369 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – New claim – Not made in the original return**

The Hon'ble High Court after considering the decision of Apex Court in the case of *Goetze (India) Ltd. vs. CIT (2006) 284 ITR 323 (SC)* held that Tribunal had power to allow deduction of expenditure to the assessee to which it was otherwise entitled even though no claim was made by the assessee in its return of income. (A.Y. 1990-91)

*CIT v. Jai Parabolic Springs Ltd. (2008) 6 DTR 233 / 306 ITR 42 / 172 Taxman 258 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Search and seizure – Validity of search**

Tribunal had jurisdiction to go into the question as to whether the search was conducted consequent upon valid authorisation.

*CIT v. Chandra Devi Soni (2008) 1 DTR 98 / 214 CTR 118 / 313 ITR 174 / 170 Taxman 164 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground**

Issuance of notice under section 143(2) is mandatory and its non-issuance would make Assessment Order illegal, and, thus, ground raised and sought to be added was a legal ground which goes to the root of matter. Therefore, Tribunal should permit assessee to add additional grounds and adjudicate the same.

*Mohan Davey v. UOI (2007) 163 Taxman 274 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Judicial discipline – Order of Special Bench**

The Department had filed an appeal to High Court against special Bench decision which was pending for final disposal. In spite the special Bench order in favour of assessee, the Assessing Officer has raised the demand.

Aggrieved by the said order of Assessing Officer assessee preferred an appeal to CIT(A). The High Court directed CIT(A) to hear the appeal in keeping with the high standard of judicial discipline for which the sub-ordinate authority such as the CIT(A) should not feel hesitant to follow the order of the Special Bench which was not suspended by a competent court. (A.Y. 2003-04)

*Nokia Corporation v. D.I. (International Taxation) & Others (2007) 292 ITR 22 / 211 CTR 48 / 162 Taxman 369 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Record reasons**

It is well settled law that while disposing of an appeal, the appellate authority must record reasons for its decision. The appellate authority has examined the record of the case and has taken a view without giving any reason. This does not serve the cause of justice. The High Court remanded the matter to the Tribunal for a fresh consideration in accordance with law. The Tribunal should give its reasons for whatever conclusion it arrives at on the merits of the case. (A.Y. 1995-96)

*D. I. (E) v. Uma Maheshwar Parmurth Trust (2007) 292 ITR 352 / 165 Taxman 81 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional evidence**

Assessee for the first time filed affidavit in 1993, seeking to produce Trust Deed dt. 4-4-1977. The Assessing Officer had given ample opportunity to the assessee to file or produce relevant documents like trust deed which was not produced before him. It was not produced before CIT(A) also and hence Tribunal refused to admit the same.

On reference, High Court upheld the decision of ITAT. (A.Ys. 1978-79 to 1982-83)

*N. B. Surti Family Trust v. CIT (2007) 288 ITR 523 / 200 CTR 145 / 153 Taxman 31 (Guj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Restoration of appeal – ITAT Rules 1963 [Rule 24]**

On the day of hearing, assessee sought adjournment of hearing. ITAT without considering assessee's application for adjournment passed exparte order on merits and dismissed assessee's appeal. Thereafter assessee filed Miscellaneous application to ITAT by praying to set aside the exparte order passed by it and to restore the appeal for disposal afresh on merits, but the ITAT dismissed the same.

On Writ Petition filed before the Madras High Court, the Court held that sufficient cause had been shown by the assessee for non-appearance before ITAT on day of hearing, the order of the ITAT was liable to be set aside and appeal restored for the disposal afresh.

*Ravi Prakash Khemka v. ITAT (2007) 288 ITR 362 / 209 CTR 342 / 164 Taxman 431 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Competency of appeal – Monetary limit**

It was held by the Hon'ble High Court that CBDT's instructions came w.e.f. 1-4-2001. The assessment year involved in this appeal was earlier to the date from which notification was given effect. Hence, the application of notification for dismissing the appeal was not legally permitted. Over and above, Clause (ii) of Para 3 of the Instruction No. 1979 provided that where the Board's Order, Notification, Instructions or Circular is the subject matter of an adverse order irrespective of the monetary limit, the appeal has to be decided on merits.

The High Court held that the questions raised by the Revenue in its appeal are questions of law and are answered in favour of the Revenue. (A.Y. 1992-93)

*CIT v. V. Sivakumar & Others (2007) 294 ITR 371 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Question of law**

An additional ground can always be raised under section 254 before Tribunal if it involves a question of law, which emerges from facts on record in assessment proceedings, although same might not have been raised before Commissioner (Appeals).

*Avery Cycle Industries Ltd. v. CIT (2007) 164 Taxman 429 / 292 ITR 493 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Remand – Partial disallowance of expenses by CIT(A) – No contest by revenue – Order of remand to reconsider entire claim – Not valid**

The assessee filed second appeal to ITAT. The ITAT without considering the specific grounds raised in appeal relating to disallowance of service charges and marketing expenses confirmed by the CIT(A), restored the matter to the Assessing Officer for de novo consideration.

The court held that the order passed by the ITAT without considering the issues raised in the appeal and in remanding the case to the file of the Assessing Officer for reconsidering the entire claim could not be sustained and hence the said order is liable to be quashed. The matter was remitted to the ITAT for disposal of the appeal in accordance with law.

(A.Y. 1997-98)

*Coca Cola India P. Ltd. v. ITAT (2007) 290 ITR 464 / 208 CTR 269 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Search – Validity of Authorization [S. 132, 158BC]**

A search was conducted at the residential premises of the assessee under the provisions of the Prevention of Corruption Act, 1988. Later on, the books of account, documents and assets found and seized by the Lokayukt authorities were requisitioned by the Commissioner as per Section 132A of the I.T. Act, 1961. Subsequently, notice under section 158BC was issued to the assessee. Return for Block Period was filed. The assessment was completed. Before the ITAT, it was contended by the assessee that the authorization issued by the Commissioner under section 132A was invalid which vitiated the entire assessment under section 158BC making it void ab initio.

However, the ITAT held that the notice issued under section 158BC was valid though status of the assessee was not mentioned in the said notice and Tribunal had no jurisdiction to look into the legality and validity of the authorization issued under section 132A of the Act. H.C. dismissed the appeal.

*Gaya Prasad Pathak v. ACIT (2007) 290 ITR 128 / 209 CTR 74 / 162 Taxman 307 (MP)(High Court)*

**S 254(1) : Appellate Tribunal – Dismissal for default – ITAT Rules 1963 [Rules 19, 20, 24]**

Non-representation of appellant. Appeal filed by the assessee before the Tribunal could not be dismissed as non-maintainable simply for the reason that the assessee or his representative was not present on the date when the appeal came up for consideration before the Tribunal. Tribunal could have proceeded for hearing of the appeal ex-parte as provided in Rule 24 of ITAT Rules.

*Tribhuwan Kumar & Ors. v. CIT & Anr. (2007) 213 CTR 198 / 294 ITR 401 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Condonation of delay – Appeal fees**

The Tribunal's order denying to condone the delay of twelve (12) days in filing appeal before it was set aside as being perverse, where the appellant in its application for condonation of delay before the Tribunal, had stated that on account of strike of the bank the appeal fees could not be paid and this resulted in belated filing of appeal before the Tribunal.

*Babu Lal Jain v. ITO (2007) 200 Taxation 183 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Reasoned order**

Quasi-judicial authorities like Commissioner (Appeals) and Tribunal must pass reasoned order which should reflect application of mind. (A.Y. 1990-91)

*CIT v. Palwal Co-operative Sugar Mills Ltd. (2006) 284 ITR 153 / (2005) 147 Taxman 636 / 197 CTR 320 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Powers – Rule 25 – ITAT Rules, 1963**

Rule 25 of ITAT Rules, 1963, empowers the Tribunal to dispose of an appeal on the merits after hearing the appellant. If on the day of hearing on which the matter is fixed the respondent does not remain present personally or through an authorized representative, then the proviso to the said Rule, however, makes it very clear that any such order of disposal of an appeal can be set aside upon an application made by the respondent on sufficient reasons shown for non-appearance.

In the aforesaid case, the respondent proved that it was not served with the notice of hearing on the day it was fixed. Tribunal was justified in recalling its exparte order. It has to freshly reconsider the merits of the case. (A.Y. 1994-95)

*CIT v. Focus Estating P. Ltd. (2006) 286 ITR 410 / 203 CTR 152 / 152 Taxman 471 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duty of Tribunal – Spacing order**

Since, there was no appropriate discussion, appeal of the assessee was allowed and matter was sent back. (A.Y. 1998-99)

*Novartis A. G. Basle v. ACIT (2006) 287 ITR 409 / 209 CTR 113 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Notice – Proper opportunity of being heard**



Where the notice sent by the Tribunal was not received by the appellant as the office of the appellant was closed and the Tribunal did not send notice to the second address which was on record of the Tribunal, the Hon'ble High Court restored the matter back to the file of the Tribunal to meet the ends of justice, as the order of the Tribunal was passed without affording the assessee a proper opportunity of being heard.

*Jasoka India Ltd. v. CIT (2006) 194 Taxation 155 (Delhi)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Additional grounds – Question of law**

The Appellate Tribunal has power to entertain any question of law as additional grounds of Appeal though the same may not have been raised before any of the authorities below.

*Dy. CIT v. Torquoise Investment & Finance Ltd. (2006) 154 Taxman 80 / 202 CTR 395 / (2008) 299 ITR 143 (MP)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Power to stay**

Once the appeal is pending before an Appellate Court, the Court has power to pass an order of stay to do justice otherwise there will be miscarriage of justice.

*The Agricultural Produce Market Committee v. CIT (2006) 190 Taxation 168 (Patna)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Ex parte – ITAT Rules, 1963 – Rule 25**

If no notice of hearing is served on the assessee, the same constitutes a 'sufficient cause' for the purpose of proviso to Rule 25. Hence, the ex parte order can be set aside. (A.Y. 1994-95)

*CIT v. Focus Estates (P.) Ltd. (2006) 152 Taxman 471 / 203 CTR 152 / 286 ITR 410 (Delhi)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Duties – Reasoned order**

Appellate Tribunal is not justified in passing the Order relying only on the written submissions filed by the Department without assigning any dependent reasons. The Order of the Appellate Tribunal should reflect not only its conclusion, but the decision-making process also. (A.Y. 1993-94)

*S. J. & S. P. Family Trust v. Dy. CIT (2006) 152 Taxman 234 / 198 CTR 255 / 277 ITR 557 (Guj.)(High Court)*

#### **S. 254(1) : Appellate Tribunal – Order – Duty – Examine evidence – Record facts – Assign reasons**

The Tribunal must examine the evidence on record while rendering a decision on any issue raised by the assessee. The Tribunal being the final fact finding authority, a higher responsibility is cast by the legislature on it to decide the case by recording complete facts and assigning cogent reasons. It is the duty of the Tribunal to decide the case on the basis of the law laid down by the Supreme Court/High Court. Every

effort must be made by the Tribunal to decide the issue by taking help from the decisions of the Supreme Court and if there is no direct decision of the Supreme Court on the point then of the jurisdictional High Court and lastly of any other High Court. Not taking note of the facts of the case, nor the legal position and not even referring to the facts of the case involved in those decisions on which reliance is placed for deciding the appeal amounts to non-exercise of the appellate powers by the Tribunal. (A.Y. 1993-94)

*CIT v. Abhishek Industries Ltd. (2006) 286 ITR 1 / 205 CTR 304 / 156 Taxman 257 (P&H)(High Court)*

### **S. 254(1) : Appellate Tribunal – Power – Judicial propriety – Not to comment on decision of High Court**

Assessee filed Reference Application under section 256(2) of the Income-tax Act, 1961 for the Hon'ble High Court's opinion by raising three questions.

In a given case, Tribunal declined to follow the law laid down by the Madhya Pradesh High Court essentially on the ground that it does not lay down the correct principles of law because it has not taken into consideration certain amendments brought on the statute book which had a bearing on the controversies involved therein. It was the Department's appeal. Tribunal declined to refer a question of law on a Reference Application filed under section 256(1) of the Income-tax Act by the assessee.

Held, that the manner in which the Tribunal dealt with the issue so far as precedents of judicial propriety in following High Court decisions was concerned, should have been referred to the Court for examination. It was an issue which the High Court alone had to decide and it was not for the Tribunal to decide. Tribunal cannot comment on the decision of the High Court. Tribunal cannot ignore such decision and take its own view.

High Court allowed the Reference Application filed by the assessee under section 256(2) and directed to draw statement of facts for High Court.

*National Textile Corpn. Ltd. v. CIT (2006) 286 ITR 496 / 203 CTR 374 / 150 Taxman 39 (MP)(High Court)*

### **S. 254(1) : Appellate Tribunal – Order – Pronouncement of Judgment – Pass an order [Rule 35]**

There is no distinction between meaning of expression 'pass' or 'pronounce' and consequences thereof; Tribunal should pronounce its judgment and orders in open hearing and upon enlisting them for a given date; 'pronouncement of a judgment' is a concept which covers dating, signing and declaration of a judgment and order by Court; there is no merit in contention that section 254(1) requires Tribunal to pass an 'order' and communicate same to party as contemplated under section 254(3) read with rule 35 of the Rules and as such Tribunal is under no obligation to openly pronounce its orders in presence of parties or otherwise

*CIT v. Sudhir Choudhrie (2005) 278 ITR 490 / 147 Taxman 306 / 196 CTR 538 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Appeal – Maintenance – Small tax effect**

Where amount involved was a petty amount of ₹ 16,300/40,532, revenue should not have preferred appeal before Appellate Tribunal since it was a case covered by Instruction of Central Board of Direct Taxes.

*CIT v. Ashim Kumar Agarwal (2005) 275 ITR 48 / 196 CTR 23 / 153 Taxman 226 (Jharkhand)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Validity of search – Block assessment [S. 132, 158BC]**

Appeal before Tribunal against block assessment made under section 158BC does not take within its fold questions touching validity of search conducted under section 132.

*M.B. Lal v. CIT (2005) 279 ITR 298 / 149 Taxman 490 / 199 CTR 571 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Condonation of delay**

In matters of condonation of delay, a pragmatic view should be taken and there should be a liberal approach; law of limitation is enshrined in maxim interest reipublica ut sit finis litium (it is for the general welfare that a period be put to litigation); a pedantic approach should not be made. (A.Y. 1992-93)

*Auto Centre v. State of Uttar Pradesh (2005) 278 ITR 291 / 148 Taxman 573 / 204 CTR 142 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Restoration of appeal [Rule 24, Appellate Tribunal rules]**

Whether assessee had obtained adjournment earlier or Tribunal had shown latitude in granting successive adjournments would be immaterial for purpose of considering an application made under proviso to rule 24 of ITAT Rules for purpose of restoring an appeal

*Sourav Jhunjhunwalla v. CIT (2005) 273 ITR 225 / 145 Taxman 243 / 196 CTR 145 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Restoration of appeal – Affidavit of assessee**

Where miscellaneous application praying for restoration of appeal decided ex parte against assessee for non-appearance on date of hearing, was rejected by Tribunal without considering affidavit of assessee's counsel enclosed with application for restoration explaining cause for non-appearance on date of hearing, matter was to be restored to Tribunal for consideration afresh in accordance with law. (A.Ys. 1985-86, 1986-87)

*Khaitan Paper & Industries Ltd. v. CIT (2005) 273 ITR 234 / 148 Taxman 326 / 195 CTR 447 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Revival of appeal [S. 254(2)]**

Where assessee did not press appeal against Tribunal's order and had withdrawn it to pursue its application under section 254(2) and no liberty was sought nor granted to assessee to file a fresh appeal against same order, on rejection of its application under section 254(2) assessee could not be allowed to revive appeal earlier withdrawn by it.

*Paras Cold Storage & Ice Factory v. CIT (2005) 272 ITR 301 / 145 Taxman 46 / 194 CTR 520 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Memorandum of appeal – Technical mistakes**

Though Tribunal has discretion to reject memorandum of appeal if it is defective, where rejection of memorandum of appeal because of a technical mistake on part of revenue had resulted in manifest injustice to revenue, Tribunal's order of rejection of memorandum of appeal was to be set aside. (A.Y. 1992-93)

*CIT v. Protectron Electronics (P.) Ltd. (2005) 274 ITR 420 / 146 Taxman 90 / 193 CTR 672 (Karn.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Paper book – Signature – Certificate**

If in paper book, signature does not appear or a certificate in paper book is not incorporated to the effect that papers included in paper book were correct copies of papers of record, in that event, same may be an irregularity but not an illegality which is not capable of being corrected and dismissal of appeal on that ground would not be justified

*Exoimp Resources (India) Ltd. v. CIT (2005) 276 ITR 87 / 144 Taxman 795 / 195 CTR 226 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Adjournment application – Dismissal of appeal – Different signature**

Where file of Commissioner (Appeals) was not before Tribunal, it was not justified in rejecting assessee's adjournment application on ground that appeal was filed by different person and signature was forged on memo of appeal

*Ram Vilas Mani v. CIT (2005) 142 Taxman 204 / (2006) 280 ITR 494 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Adjournment application**

Where assessee did not appear before Tribunal when appeal was taken up for hearing and Tribunal suo motu posted appeals for hearing and disposal on next date, and on said date assessee filed an application for adjournment which was declined and appeals were disposed of by Tribunal, no error was committed by Tribunal in disposing of appeals. (A.Y. 1994-95)

*Green Valley Builders v. CIT (2005) 149 Taxman 671 / (2008) 296 ITR 225 (Ker.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional grounds – Question of law**

A question of law arising out of facts found by authorities and which goes to root of jurisdiction, can be raised for first time before Tribunal. (A.Ys. 1983-84 to 1987-88)  
*West Bengal State Electricity Board v. Dy. CIT* (2005) 278 ITR 218 / 147 Taxman 234 / 198 CTR 122 (Cal.)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Additional grounds – Service of notice**

Tribunal should not allow assessee to raise plea of service of notice for first time in second appeal as one of the additional grounds for challenging order of assessment; it is much more so when there is no factual material available for recording a finding on merits. (A.Y. 1996-97)

*CIT v. Premium Capital Market & Investment Ltd.* (2005) 275 ITR 260 / 198 CTR 680 / 151 Taxman 194 (MP)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Additional grounds – New ground**

During pendency of appeal before Tribunal, assessment proceeding is pending and as such Tribunal can adjudicate a new ground by which assessee claims benefit under section 11(2). (A.Y. 1980-81)

*CIT v. Mayur Foundation* (2005) 274 ITR 562 / 194 CTR 197 (Guj.)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Additional grounds**

Appellate Authority has power to permit party to raise additional ground which had not been raised in memorandum of appeal and further in penalty proceedings fresh material can be considered which was not available at time of the assessment or while passing the penalty order. (A.Y. 1981-82)

*Bharat Rice Mill v. CIT* (2005) 278 ITR 599 / 148 Taxman 145 / 200 CTR 481 (All.)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Second stay application**

Where assessee filed a second stay application on expiry of interim relief granted earlier, Tribunal was directed to dispose of application expeditiously and no recovery was to be effected till then

*Satish Chandra Jain v. ITAT* (2005) 142 Taxman 499 (All.)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Power to stay**

Appellate authority, even in absence of a specific provision, has power vested in it by virtue of being an authority, to grant stay in appropriate cases

*Agricultural Produce Market Committee v. CIT* (2005) 279 ITR 371 / (2006) 156 Taxman 423 (Patna)(High Court)

**S. 254(1) : Appellate Tribunal – Order – Duties – Recording reasons**

Every judicial and quasi-judicial authority/body must record reasons in support of its conclusion indicating application of mind by presiding officer to points raised by aggrieved party. (A.Y. 1992-93)

*Ambica Oil & General Mills v. ITO (2005) 274 ITR 231 / (2007) 158 Taxman 167 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Recording reasons**

Every quasi-judicial authority/Tribunal must not only record reasons in support of order they make, but such reasons should also be communicated to affected party; thus Tribunal is duty-bound to record tangible and cogent reasons for upsetting well-reasoned orders passed by Assessing Officer and Commissioner (Appeals) (A.Y. 1991-92)

*CIT v. Sunil Kumar Goel (2005) 274 ITR 53 / 144 Taxman 697 / 194 CTR 145 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Decision making process**

Tribunal's order must reflect not only its conclusion but decision-making process also; where Tribunal while deciding appeal simply stated in its order that it agreed with submission of departmental representative, such order was not sustainable as Tribunal could not have passed impugned order on basis of written submissions filed by the departmental representative without assigning independent reasons so as to reflect application of mind by Tribunal. (A.Y. 1993-94)

*S.J. & S.P. Family Trust v. Dy. CIT (2005) 277 ITR 557 / 198 CTR 255 / (2006) 152 Taxman 234 (Guj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Non speaking order – Rules of natural justice**

Where Tribunal had neither considered points raised by appellant nor assigned any reason for approving order passed by Commissioner (Appeals), order of Tribunal was a non-speaking order and was, thus, vitiated due to violation of rules of natural justice. (A.Y. 1988-89)

*CIT v. Vikas Chemi Gum India (2005) 276 ITR 32 / 146 Taxman 256 / 196 CTR 123 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Scope – Restricted to order of CIT(A) – Preliminary point – Not on merits**

Where Commissioner (Appeals) did not deal with grounds of appeal on merits but allowed assessee's appeal on a preliminary point that assessment order had not been signed by Assessing Officer, Tribunal was not justified in deciding appeal on merits while overruling Commissioner (Appeals) on preliminary ground; while reversing order of Commissioner (Appeals) on preliminary point it was incumbent upon Tribunal to restore matter to file of Commissioner (Appeals). (A.Y. 1994-95)

*Sheth Construction Co. v. ITO (2005) 274 ITR 304 / 148 Taxman 271 / 195 CTR 398 (Guj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Binding precedent – Own case in earlier year**



Where Tribunal had taken a particular view in assessee's own case in an earlier year and subsequently a contrary view in another case, in assessee's case for assessment year in question, it was not justified in following its contrary view taken in another case, as there should be consistency in orders of Courts. (A.Y. 1992-93)

*Arihant Builders, Developers & Investors (P.) Ltd. v. ITAT (2005) 277 ITR 239 / 144 Taxman*

*121 / 197 CTR 471 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Right to appeal – Small tax effect**

In light of instructions which came into effect from 1/4/2000, appeal having small tax effect are also maintainable

*CIT v. Kodananad Tea Estates Co. (2005) 275 ITR 244 / (2004) 192 CTR 159 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Duties – Speaking order**

Where Tribunal simply recorded ground of attack and recorded concession of departmental representative for dismissing appeal, manner of disposal of appeal by Tribunal was not proper. (A.Y. 1995-96)

*CIT v. Sanghi Finance & Investment Ltd. (2005) 273 ITR 268 / (2004) 141 Taxman 466 / (2004) 191 CTR 150 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Mistake apparent [S. 254(2)]**

If order of Tribunal contains a factual inaccuracy, Tribunal can recall its order. (A.Y. 1993-94)

*CIT v. Mool Chand Shyam Lal (2005) 273 ITR 160 / (2004) 141 Taxman 322 / (2004) 190 CTR 332 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Mistake apparent from record [S. 254(2)]**

Where appellant satisfies Tribunal that there was sufficient cause for assessee's non-appearance when appeal was called for hearing, Tribunal has power to recall its ex parte order. (A.Y. 1993-94)

*CIT v. Ansal Housing & Construction Ltd. (2005) 274 ITR 131 / (2004) 140 Taxman 297 / 190 CTR 172 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Mistake apparent [S. 254(2)]**

Section 254(2) does not extend to permit re-arguments on issues already decided. (A.Ys. 1993-94 to 1996-97)

*State Bank of Bikaner & Jaipur v. CIT (2005) 273 ITR 98 / (2004) 191 CTR 344 / 142 Taxman 382 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Mistake apparent [S. 254(2)]**

Rectification done by Tribunal to direct authorities to follow law laid down by Apex court does not give rise to a substantial question of law. (A.Ys. 1992-93-94)

*CIT v. Madhya Pradesh Financial Corporation (2005) 272 ITR 33 / (2004) 140 Taxman 614 / 190 CTR 212 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Memoranda of Appeal – Failure to mention grounds – Form no 36 – Rule 12 – Income tax (Appellate Tribunal) Rules 1963**

The Tribunal is not justified in dismissing in limine, appeal filed by Revenue only because the grounds are not mentioned in the memorandum of appeal in form no 36. In a matter like this the Tribunal, instead of dismissing the appeals, in limine ought to reject the appeal under Rule 12 of the Income tax (Appellate Tribunal) Rules 1963 or ought to return the same for being annexed with in such time as it may be allowed. Accordingly the High Court (1) returned the appeals before the Appellate Tribunal to be disposed of on merits and (II)), directed the Commissioner to file the grounds of appeal with in period of four weeks.

*CIT v. British Airways (2005) 274 ITR 418 / 274 ITR 418 / (2004) 141 Taxman 613 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Subject matter of appeal**

While restoring additions in respect of various parties to the file of Assessing Officer, Tribunal was not justified in restoring addition in respect of a party which was not even subject matter of appeal.

*Manchanda International v. CIT (2005) 272 ITR 577 / (2004) 141 Taxman 2 / 190 CTR 567 (Delhi)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Additional grounds**

Tribunal can consider an additional issue which is a question of law.

*CIT v. A.M. Moosa (2005) 272 ITR 29 / (2004) 141 Taxman 49 / 191 CTR 441 (Ker.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Right to file appeal – Executive instructions**

Right to file an appeal is a statutory right and cannot be taken away or prohibited by executive instructions. (A.Ys. 1996-97 to 1998-99)

*Jugal Kishore Arora v. Dy. CIT (2004) 269 ITR 133 / 141 Taxman 187 / 192 CTR 174 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Appealable orders – Clarifying an earlier order**

No appeal lies from the Tribunal's order clarifying an earlier order. (A.Y. 1993-94)

*CIT v. Shreenbai (Smt) (2004) 271 ITR 400 / 134 Taxman 681 / 187 CTR 31 (MP)(High Court)*

**S. 25(1) : Appellate Tribunal – Duties – Facts – Not taking note of legal position**

Not taking note of facts of case or legal position and not even referring to facts of case involved in those decisions on which reliance is placed for deciding appeal, amounts to non-exercise of appellate powers by Tribunal. (A.Y. 1988-89)

*CIT v. G.M. Mittal Stainless Steel Ltd. (2004) 271 ITR 219 / 142 Taxman 349 / 192 CTR 18 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Duties – Mere reference of citation is not enough**

It must appear from order passed by Tribunal that sincere efforts were made to decide issue that fell for examination, keeping in view law laid down by apex court in its right earnest; mere reference of a citation in orders for recording a finding is not enough. (A.Y. 1994-95)

*Shreejee Chitra Mandir v. CIT (2004) 269 ITR 55 / 140 Taxman 249 / 190 CTR 139 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Duties – Respondent**

Tribunal may pass such order or decree as case may require and this would include passing orders in favour of any of respondents although such a respondent may not have filed appeal. (A.Ys. 1979-80 to 1983-84)

*CIT v. P.B. Corporation (2004) 266 ITR 548 / 138 Taxman 167 / 187 CTR 212 (Guj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Principle of law – Duty to apply to facts of case**

When Tribunal follows certain principles, it cannot shirk its responsibility after laying down principle of law without applying same to facts and circumstances of case at hand, even though this might go in favour of assessee who had not preferred appeal. (A.Y. 1990-91)

*C.C.A.P. Ltd. v. CIT (2004) 270 ITR 248 / 141 Taxman 471 / 193 CTR 74 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Adjournment – Technical approach**

Where Tribunal decided appeal on merits despite counsel seeking an adjournment on ground of no notice of hearing of appeal, Tribunal's technical approach could not be countenanced. (A.Ys. 1999-2000 to 2004-05)

*Vikaschand Mansingka v. CIT (2004) 142 Taxman 564 / 191 CTR 259 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Binding precedent – Lower authorities**

Lower taxing authorities are bound to carry out Tribunal's orders and have no jurisdiction to again pass any order contrary to the order passed by Tribunal. (A.Ys. 1973-74 to 1976-77)

*State Bank of Indore v. CIT (2004) 269 ITR 459 / 190 CTR 149 (MP)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Additional ground**

Whether or not to allow additional grounds to be raised is a matter of sound discretion of Tribunal. (A.Y. 1972-73)

*CIT v. Southern Roadways Ltd. (2004) 266 ITR 135 / 136 Taxman 550 / 188 CTR 53 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Appeal – Maintainability – Tax effect**

The Board's Circular no. F. 279/126 /98 –TTJ dated 27-3-2000, is only an instruction issued to the Income Tax Authorities not to file appeals where the tax effect is less than 1,00,000. The Tribunal is not bound by any such instruction and once the Department files an appeal, the Tribunal is bound to decide the same on merits. (A.Ys. 1993-94 to 95-96)

*Rani Paliwal v. CIT (2003) 185 CTR 333 / 268 ITR 220 / 136 Taxman 135 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Duty – Reasons**

Tribunal cannot merely say that it agrees with findings of Commissioner (Appeals). A total non consideration by the Appellate court would entail a substantial question of law. The matter was sent back for fresh decision of the concerned issue.

*South India Surgical Co. (P.) Ltd. v. ACIT (2003) 263 ITR 5 / 186 CTR 685 / 138 Taxman 230 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Matter before Commissioner (Appeals) – Opportunity of hearing**

Tribunal cannot ignore matter placed before Commissioner (Appeals) without giving an opportunity of hearing to the assessee.

*Rishabh Textiles v. CIT (2003) 260 ITR 424 / 131 Taxman 213 / 186 CTR 758 / 266 ITR 424 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Unaware of date of hearing – Sufficient cause**

If a party is unaware of date of hearing and unawareness is not due to any fault of its own, then unawareness would be sufficient cause for non-appearance.

*Rainbow Agri Industries Ltd. v. ITAT (2003) 132 Taxman 752 / 185 CTR 482 / 266 ITR 38 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Additional grounds**

It is open to appellant forum to consider fresh ground if sought to be raised by the parties, if no new facts are required to be ascertained. (A.Ys. 1978-79 to 1981-82)

*Wilson Industries v. CIT (2003) 259 ITR 318 / 179 CTR 186 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Additional grounds – Relates back to date of filing of the appeal**

Permission to add and urge additional grounds necessarily relates back to date of filing of the appeal.

*K. B. Jewellers & Co. v. ACIT (2003) 130 Taxman 605 / 184 CTR 44 (All.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Additional grounds – Limitation**

Additional ground can be raised in memo of appeal after expiry of the period of limitation. (A.Y. 1997-98)

*Shilpa Associates v. ITO (2003) 263 ITR 317 / 181 CTR 92 / 135 Taxman 277 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Additional grounds**

Prayer to raise additional ground cannot be rejected on the ground that such additional ground was raised after expiry of prescribed limit for filing appeal before Tribunal. (A.Y. 1994-95)

*Madad Lal Ansari v. Dy. CIT (2003) 184 CTR 76 / 272 ITR 560 / 139 Taxman 346 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Grounds vaguely taken – Additional grounds**

When an issue is vaguely taken in grounds of appeal, but argued specifically at time of final hearing of appeal, Tribunal cannot refuse to adjudicate upon that issue on merits on ground that no such ground had been taken specifically in the grounds of appeal.

*Baby Samuel v. ACIT (2003) 262 ITR 385 / 184 CTR 140 / 138 Taxman 192 (Bom.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Remand – Limitation**

Once Tribunal has refused to condone delay and dismissed appeal as barred by limitation, it has no jurisdiction or authority to go into the merits of the case and pass an order of remand.

*Williamson Financial Services Ltd. v. CIT (2003) 262 ITR 595 / 140 Taxman 246 (Gau.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Remand – Confirming the finding**

Once Tribunal remits matter back to Assessing Officer to decide issue afresh, there is no justification for confirming finding of Assessing Officer in respect of same issue.

*Kundan Associate (P.) Ltd. v. ACIT (2003) 130 Taxman 838 / 183 CTR 353 (Raj.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Remand – Merits of matter**

While remitting matter for reconsideration Tribunal should not enter into merits of matter. (A.Y. 1984-85)

*CIT v. Coromandal Indag Products (P.) Ltd. (2003) 260 ITR 289 / 129 Taxman 820 / 184 CTR 276 (Mad.)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Approval of Commissioner – Grounds of appeal – Memo – Accompanying document**

Approval of Commissioner of the grounds of appeal to be filed before the Tribunal is not required. Tribunal has discretion to accept memorandum of appeal even though it may not be accompanied by any of documents referred to in sub-rule (1) of rule 9 of the ITAT Rules. (A.Y. 1990-91)

*CIT v. V.K. Sood Engineers & Contractors (P.) Ltd. (2003) 264 ITR 313 / 186 CTR 162 / 135 Taxman 175 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Order – Power – Support of order**

Order or judgment, if open to appeal, can be supported or objected to by either of parties in appeal. (A.Y. 1986-87)

*CIT v. General Industrial Society Ltd. (2003) 129 Taxman 628 / 262 ITR 1 / 183 CTR 67 (Cal.)(High Court)*

**S. 254(1) : Appellate Tribunal – Binding precedent of Orders – Decision of Tribunal rendered in earlier case**

Decision of the Tribunal rendered in earlier case may be wrong, nonetheless a Bench of co-ordinate jurisdiction has to ordinarily follow it unless it doubts correctness of said decision and refers matter to the President of the Tribunal. (A.Ys. 1991-92 to 1995-96)

*CIT v. Travancore Titanium Products Ltd. (2003) 131 Taxman 705 / 183 CTR 473 / (2004) 265 ITR 526 (Ker.)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Applicability of provision of section 14A for the first time before Tribunal [S. 14A]**

Issue of disallowance under section 14A, cannot be raised for the first time before the Tribunal where the provision of section 14A, was not invoked against the assessee by the Assessing Officer while making disallowance of interest expenditure under section 36(1)(iii) and CIT(A) also at no stage considered the application of section 14A.

*ACIT v. Delite Enterprises (P) Ltd. (2011) 135 TTJ 663 / 50 DTR 193 / 128 ITD 146 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Recovery – Stay [S. 220]**

Besides considerations like existence of strong prima facie case, financial constraints of the applicant are important, even if not sole or qualifying consideration in entertaining a stay application, and therefore stay granted to the assessee subject to certain conditions. (A. Y. 2006-07).

*KEC International Ltd. v. Addl. CIT (2011) 136 TTJ 60 / 49 DTR 428 (Mum.)(Trib.)*



**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Decision of co-ordinate bench**

When the issue is already covered by an earlier order of Tribunal, that too in assessee's own case, a co-ordinate bench of Tribunal should not differ the earlier decision of the bench simply for the reason that a contrary view is possible. (A. Ys. 2001-02 to 2004-2005)

*Patspin India Ltd. v. Dy. CIT (2011) 51 DTR 57 / 129 ITD 35 / 136 TTJ 377 (TM)(Cochin)(Trib.)*

**S. 254(1) : Appellate Tribunal – Appeal – Tax effect – Pending appeals**

As per Instruction No. 3 of 2011 dated 09.02.2011(( 2011) 322 ITR 1(st)) appeal before Tribunal can be filed where the tax effect exceeds the monetary limit of ` 3 lakhs. However, considering the similar situation where tax limits were modified by the CBDT Instruction No. 5 of 2008 the jurisdictional High Court in Madhukar K. Inamdar (HUF) 318 ITR 149 held that the circular will be applicable to the cases pending before the court either for admission or for final disposal. In view of the order of the jurisdictional High Court we hold that Instruction No. 3 dated 09.02.2011 is applicable for the appeal preferred by the Revenue.

*ITO v. Laxmi Jewel Pvt. (2011) BCAJ July – P. 33 – Vol. 43A Part 4 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Stay – Direct stay application to Tribunal maintainable – Not necessary that lower authorities must be approached first [S. 220]**

It is settled law that a Direct Stay Application filed before the Tribunal is maintainable and it is not the requirement of the law that assessee should necessarily approach the CIT before approaching the Tribunal for grant of stay. In deciding a stay application, the following aspects have to be considered: (i) liquidity of the funds of the assessee to clear the tax arrears out of own funds at the relevant point of time based on the assessee's financial status at the time of the stay petition hearing; (ii) creditworthiness of the assessee to outsource the funds to clear the departmental dues; (iii) prima facie views on the likely decision of the Tribunal on the issues raised in the appeal; (iv) departmental urgencies in matters of collection and recovery; (v) guarantees provided by the assessee to safe guard the interest of the revenue etc. (A. Y. 2006-07).

*Honeywell Automation India Ltd. v. Dy. CIT (2011) 54 DTR 265 / 138 TTJ 373 / (2012) 49 SOT 333 (Pune)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Stay – Despite third proviso to S. 254(2A) – Power to extend stay beyond 365 days if delay not attributable to assessee [S. 220, 245]**

The Third Proviso to section 254(2A), as amended w.e.f. 1.10.2008, provides that if the appeal filed by the assessee is not disposed off within the period of stay granted by the Tribunal (which cannot exceed 365 days), the order of stay shall stand vacated even if the delay in disposing of the appeal is not attributable to the assessee. The assessee filed a stay application requesting stay of demand for penalty of ` 369

crores. On the expiry of 365 days of stay, the assessee asked for extension of stay relying on the Tribunal's order in Ronak Industries where, stay had been granted beyond 365 days relying on the judgement of the Bombay High Court in Narang Overseas ( ) 295 ITR 22 (Bom.). As it was felt by the Tribunal that the reliance in Ronak Industries and Narang Overseas was misplaced in view of the amendment to the Third proviso to section 254(2A) w.e.f. 1.10.2008, the question whether the Tribunal had jurisdiction to extend stay beyond 365 days referred to the Special Bench. Held by the Special Bench:

- (i) In Ronak Industries, the Tribunal held, relying on Narang Industries, that the Tribunal has the power to extend stay beyond 365 days. This decision of the Tribunal was challenged by the department in the Bombay High Court by specifically raising a question as to the applicability of the Third Proviso to section 254(2A) as amended w.e.f 1.10.2008. The High Court, vide order dated 22.10.2010, dismissed the department's appeal. As such, the Tribunal's order holding that there was power to extend stay even after 365 days stood affirmed;
- (ii) The department's argument that the High Court's order in Ronak Industries should be treated as per incuriam on the ground that the amendment made by the FA 2008 was not considered by it is not acceptable because (a) In Narang Overseas (rendered prior to the amendment) a wider view was taken as regards the power to grant stay, (b) In the appeal filed by the department in Ronak Industries a specific question with regard to the effect of the Third Proviso was raised and so it cannot be said that the High Court had not taken cognizance of the amendment, (c) the Tribunal cannot ignore a High Court's decision on the ground that a provision of law was not considered by the High Court and (d) the fact that there is no discussion in the High Court's order in Ronak Industries does not mean that does not lay down any ratio decidendi;
- (iii) However, the recovery of the arrears by the Assessing Officer on the expiry of 365 days of stay cannot be ordered to be refunded because on the date of recovery the stay had expired and the application for extension was pending before the Special Bench. The Assessing Officer's act was bona fide and as the recovery was by adjustment of refunds, it was not a "coercive measure" (RPG Enterprises( ) 251 ITR (AT) 20 (Mum) & other cases holding that the Assessing Officer must refund taxes collected during the pendency of a stay application distinguished).(A. Y. 2000 to 2002-03)

*Tata Communications Ltd. v. ACIT (2011) 130 ITD 19 / 54 DTR 274 / 138 TTJ 257 / 9 ITR 1 (SB) (Mum.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Issues “sub-judice” before High Court – Power to hear**

The objection to the Special Bench hearing the issue only on the ground that the High Court has admitted the appeal is not acceptable for two reasons. Firstly, the mere fact that a superior authority is seized of an issue identical to the one before the lower authority does not create any impediment on the powers of the lower authority in disposing off the matters involving such issue as per prevailing law. If the suggestion

is accepted, there would be chaos and the entire working of the Tribunal will come to standstill. Secondly, the Special Bench was constituted at the assessee's request because it then wanted an "escape route" from a potential adverse view. The assessee cannot now argue that the Special Bench be deconstituted. Such "vacillating stand" cannot be approved. (A. Y. 2006-07)

*Dy. CIT v. Summit Securities Limited (2011) 59 DTR 313 / 11 ITR 88 / 132 ITD 1 / 140 TTJ 393 (SB)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional evidence – Data of comparables – Annual reports**

In view of the fact that annual reports / data base extracts of three companies which were selected as comparable cases were not available earlier in the public domain and having regard to the fact that these documents are essential for determining ALP, these additional evidences are admitted for consideration. (A. Y. 2005-06).

*ACIT v. NIT Ltd. (2011) 57 DTR 334 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Assessment – New claim – Without revised return**

Assessee has raised new claim before the Assessing Officer with regard to doctrine of mutuality without filing revised return under section 139. Assessing officer has not entertained the claim following the judgment of Apex Court in Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC), which was confirmed by CIT(A). On further appeal, the Tribunal held that as the issue required proper verification of facts and relevant facts are not available on record nor in the assessment proceedings it could not be admitted. If this ground was admitted, it had to go back to the Assessing Officer to verify the facts and adjudicate the claim of assessee would be against the spirit of the Supreme Court Judgment. Therefore, the claim of assessee with regard to doctrine of mutuality could not be entertained at this stage. (A. Y. 2004-05).

*Jay Bharat Co-operative Society Ltd. v. ITO (2011) 10 ITR 717 / 125 TTJ 552 / 125 ITD 90 / 29 DTR 278 (Mum.)(Trib.)*

*Editorial:- Refer CIT v. Jai Parabolic Springs Ltd. (2008) 306 ITR 42 / 6 DTR 233 / 172 Taxman 258 (Delhi)(High Court) & CIT v. Ramco International (2009) 221 CTR 491 / 332 ITR 306 / 180 Taxman 584 / 17 DTR 214 (P&H)(High Court)*

**S. 254(1) : Appellate Tribunal – Power – Contempt – Commissioner – DR's "false & frivolous" submissions constitute "criminal contempt" & justify recovery of costs from salary**

In the department's appeal, the assessee raised a preliminary objection that the notice under section 143(2) was not issued within the prescribed period of 12 months. The Assessing Officer accepted that the section 143(2) notice had not been issued in time. Accordingly, the Tribunal, relying on Hotel Blue Moon 321 ITR 362 (SC), dismissed the department's appeal without going into the merits of the appeal. Thereafter, the CIT-DR addressed two letters to the Hon'ble Members in which it made certain allegation against the bench . It was also alleged that the letter was

sent by post as the Bench clerk had refused to accept the letter. The letters were treated as a MA by the Tribunal and heard. Thereafter, the CIT-DR filed a letter of apology clarifying that it was not his intention to "hurt the sentiments" of the Members though he did not appear personally before the Bench. The Tribunal dealing meticulously with each assertion made by the CIT-DR and terming them as "frivolous and untrue" and held that :

"We are of the view that the conduct of the learned CIT(A) in addressing correspondence to the Hon'ble Members in respect of an appeal which has been heard and under consideration for passing orders is improper. It is an attempt to interfere with the due course of any judicial proceeding and tends to interfere with or obstructs or tends to obstruct the administration of justice and as such would be "Criminal contempt" within the meaning of the Contempt of Courts Act, 1971. The allegations made in the letters dated 23.3.2010 and 24.3.2010 are serious enough to warrant an action seeking protection of the Hon'ble High Court in exercise of its powers to punish for contempt of the sub-ordinate Courts and Tribunals. In our opinion, there cannot be a fitter case for imposition of exemplary costs on the learned Departmental Representative, who in our view, is responsible for such a M.A. and for wasting the time of the Tribunal by raising frivolous arguments and making blatantly false submissions. The cost should have to be recovered from the salary of the delinquent employee, who is responsible for such actions and entry made in his service record on the adverse comments made against the D.R. by the Tribunal. We however refrain from doing so in the hope that such indiscretion would not be repeated in future and also in view of the letter of apology filed by the D.R."

*CIT (DR) v. Simoni Gems MA No. 240/Mum/2010 dated 26-8-2011 (Mum.)(Trib.)*  
*www.itatonline.org*

#### **S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Decision of co-ordinate bench**

A co-ordinate Bench decision, which is admittedly contrary to earlier precedents on the issue from other Co-ordinate Benches, does not bind the subsequent co-ordinate Benches. (A. Y. 2006-07).

*Addl. DIT (International Taxation) v. TII Team Telecom International (P) Ltd. (2011)*  
60 DTR  
177 / 140 TTJ 649 / 12 ITR 688 (Mum.)(Trib.)

#### **S. 254(1) : Appellate Tribunal – Power – Stay – *Prima facie* case – Rejection**

Assessee moved the stay application before the Tribunal to stay the demand of tax and interest. Demand has arisen mainly because of disallowance of interest commission etc due to failure to deduct tax at source. The Tribunal held that the assessee has failed to prove a *prima facie* case in his favour, hence the stay application was rejected. (A.Y. 2007-08).

*Maharashtra State Electricity Distribution Co. Ltd. v. ACIT (2011) 133 ITD 519 (SB)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional ground – Appeal against penalty**

Tribunal can admit the additional ground while deciding the penalty appeal a pure question of law not involving investigation into the facts. (A. Y. 2005-06)

*Dy. CIT v. B.J.D. Paper Products (2011) 141 TTJ 108 / 60 DTR 81 (Luck.) (Trib.)*

**S. 254(1) : Appellate Tribunal – Additional ground – Facts on record – Question of law**

If relevant facts are available on record Tribunal can admit a question of law as additional ground. (A. Ys. 2000-01 to 2004-05)

*ACIT v. Wolkman India Ltd. (2011) 142 TTJ 888 (Jodh.) (Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Subject matter of appeal – ITAT Rules 1963 (Rule 11)**

Tribunal can examine on its own any aspect of the subject matter of appeal, whether the same has been examined by the authorities below or not. In the appeal, it is open to the Tribunal to consider the issue of admissibility of benefits of Indo-UK treaty to the assessee though not raised earlier. (A.Y. 1995-96)

*Linklaters LLP v. ITO (2010) 132 TTJ 20 / 42 DTR 233 / 40 SOT 51 (Mum.) (Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Communication to assessee**

Members of the Tribunal do not become functus officio till the order is communicated to the parties, and before that they can change it as many times as they want. (A.Y. 2004-05)

*Star Drugs & Research Labs Ltd. v. ACIT (2010) 42 DTR 343 / 132 TTJ 305 / 127 ITD 85 (TM) (Chennai) (Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Additional plea**

In the appeal filed by the department against deletion of disallowance of unaccounted expenditure under proviso to section 69C, it is entitled to raise a fresh plea before the Tribunal to consider the allowability or otherwise of the expenditure under section 37(1) as the subject matter of the appeal remains the same. (A.Ys. 2002-03 to 2004-05)

*ACIT v. Amarnath Reddy (2010) 42 DTR 449 / 132 TTJ 377 / 126 ITD 113 (TM) (Chennai) (Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Additional claim – Letter [Rule 29]**

Additional claim for deduction of Bad Debt made by the Assessee at time of Assessment proceedings on ground of arithmetical error while filing the Return, was rejected, by observing that Assessee has to file a separate Revised Return of Income to make such a claim, relying on Supreme Court's decision in case of Goetze India Ltd. The Tribunal can consider the claim and grant relief.

The decision in case of Goetze (India) Ltd. did not in any way affect the powers of Tribunal to admit additional claim / ground. (A.Y. 2004-05)

*Franco Indian Pharmaceuticals (P) Ltd. v. ITO (2010) 195 Taxman 30 (Mag.) / 3 ITR 754 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Search and Seizure – Validity [S. 132(1)]**

Tribunal has no power to examine validity of search in an appeal against block assessment i.e. validity of search warrant. (A.Ys. 1989-90 to 2004-05)

*CIT v. Chika Vyankatesh Sidram (2010) 1 ITR 369 / 122 ITD 293 / 124 TTJ 41 (Pune)(Trib.)*

**S. 254(1) : Appellate Tribunal – Right of respondent – Any ground – No cross objection**

**[S. 253(4)][Rule 27 of ITAT, Rule 1963]**

Respondent can support the order of CIT(A) by taking any ground, though no cross objection had been filed. (A.Y. 2003-04)

*Cable News Network LP LLLP v. Asst Director (2010) 36 DTR 233 / 129 TTJ 177 (Delhi)(Trib.)*

*Editorial:– See ACIT v. Traice ITA No. 2827/M/2004 dated 26-11-2011 (Mum.)(Trib.)*

*Source: www.itatonline.org*

**S. 254(1) : Appellate Tribunal – Additional grounds – Hypertechnical – ITAT Rules 1963 [Rule 11]**

Assessee's prayer for admission, of additional ground cannot be rejected on the hypertechnical ground that the specific space provided to mention the actual additional ground on page 2 of the petition was left blank by oversight. (A.Y. 1999-2000)

*Everwin Export Corporation v. ITO (2010) 124 ITD 181 / 128 TTJ 19 / 34 DTR 256 / 6 ITR 287 (TM)(Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Powers – Direction to give Credit of Tax Paid in Subsequent Year – Such direction is necessary for disposal of the appeal**

Capital Gains being assessable in Asst. Year 2002-03 direction is given to the Assessing Officer to give credit for the tax already paid by the assessee on this very income in the later years as such direction is necessary for disposal of the appeal. (A.Y. 2002-03)

*Dy. CIT v. Standard Fire Works (P) Ltd. (2010) 34 DTR 270 / 128 TTJ 1 / 4 ITR 379 (TM) (Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Binding – Precedent – Principle of Consistency**

Principle of consistency qua judicial forums is not unexceptionable, if the subsequent Bench finds it difficult to follow the earlier view due to any convincing reasons, the earlier view cannot be thrust upon it, when a matter is referred to larger Bench, the



appeal needs to be decided on merits rather than following the earlier view taken by the Tribunal in assessee's own case. (A.Y. 2002-03)

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

#### **S. 254(1) : Appellate Tribunal – Additional ground – Material on record**

Any party can raise an additional ground before the Tribunal for the first time, provided the necessary material for the adjudication of the additional ground is available on record.

(A.Y. 1998-99)

*Dy. DIT v. Scientific Atlanta Inc. (2010) 37 DTR 98 / 4 ITR 422 / 130 TTJ 142 / (2009) 33 SOT 220 (Mum.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Orders – Resjudicata – Not applicable – If facts are different**

Non applicability of rule of res judicata is to be followed on factual matters repeated from assessment year to assessment year. Chord of consistency can be cut off only if facts are substantially different from earlier asst. years, capable of leading to a different finding. The Tribunal can take different view. (A.Y. 2001-02)

*Arvind Fashions Ltd v. ACIT (2010) 37 SOT 369 / 45 DTR 299 (Ahd.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Binding – Precedent – Order of co-ordinate bench**

It is the duty of co-ordinate bench to examine earlier decision of the Tribunal and if a view has been expressed after taking in to consideration all facts and circumstances of case, to follow same unless its correctness is doubtful in the opinion of the subsequent Bench of Tribunal. (A.Ys. 2000-01 to 2003-04)

*ITO v. Baker Technical Services (P) Ltd. (2010) 125 ITD 1 / 126 TTJ 455 / 31 DTR 1 (TM)(Mum.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – New Plea**

Grounds of appeal raised by the revenue before the Tribunal challenging the order of the CIT(A), holding that there was no PE of the assessee, a UK company, in India is wide enough to admit the plea that the assessee has PE in India under any clauses of Art. 5 of the Indo-UK DTAA and therefore, the plea of the Revenue regarding existence of PE within the meaning of Art. 5(2)(k), though not raised earlier, is well within the parameters of the grounds of appeal. (A.Y. 1997-98)

*Jt. CIT v. Reuters Ltd. (2010) 133 TTJ 22 / 33 SOT 301 / 41 DTR 250 / 7 ITR 422 (Mum.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – Departmental appeal – Contrary to finding of Assessing Officer – Income-tax (Appellate Tribunal) Rules 1963 (Rule 11).**

Department is not entitled to raise additional grounds contrary to finding of Assessing Officer. The duty of the learned Departmental representative is always confined to support the assessment order, he has widest power to argue on the matter involved in the appeal, but with the limitation that he cannot set up a new case contrary to the finding of the Assessing Officer. If such course is allowed, then it will amount to the learned departmental representative revising the assessment order under the garb of his arguments by usurping the power under section 263, which incidentally lies only in the domain of the commissioner, hence, additional oral ground was refused. (A.Ys. 2001-02, 2005-06)

*ITO v. M. M. Textiles (2010) 122 ITD 435 / 125 TTJ 14 / 31 SOT 207 / 28 DTR 321 / 5 ITR 547 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional evidence – No need to make a formal application under Income-Tax (Appellate Tribunal) Rules 1963 [Rule 29]**

There is no need to make a formal application under rule 29 of the ITAT Rules for admission of the additional evidence. There is no error in the order of Accountant member admitting the additional evidence and sending it to the CIT for examination and decision. (A.Y. 2002-03)

*Mascon Global Ltd. v. ACIT (2010) 45 DTR 20 / 133 TTJ 257 / 37 SOT 202 (TM)(Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional ground – Alternative ground**

Alternative contentions raised by the assessee in the additional grounds of appeal before the Tribunal claiming deduction of the impugned payment of non-compete fee as a deferred revenue expenditure over the period of agreement or depreciation thereon in case the said fee is to be considered as giving rise to acquisition of an intangible asset are pure questions of law not requiring investigation of fresh facts and therefore, the additional grounds are admitted for adjudication. (A.Y. 2003-04)

*Orchid Chemicals & Pharmaceuticals Ltd. v. ACIT (2010) 48 DTR 441 / 137 TTJ 373 / 7 ITR 601 / 131 ITD 385 (Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Stay – Vacated by High Court – Highly improper for the Tribunal to grant stay of recovery of demand and start parallel proceedings**

Assessee challenged the order passed by CIT rejecting the application under section 273A by way of writ petition before the High Court and also sought stay of recovery of penalty imposed on him. Court granted stay of recovery of demand on certain conditions but the same was subsequently vacated on default of the assessee. Assessee was seeking stay of recovery of penalty and interest in the appeal filed before the Tribunal against levy of said penalty. It was held that though the jurisdiction of the High Court in the writ petition and that of the Tribunal in the appeal before it might be different, the question whether the recovery of demand should be

stayed was identical and in the light of the said direction of the High Court, it would be highly improper for the Tribunal to grant stay of recovery of demand and start parallel proceedings. (A.Y. 1985-86).

*G. Venkateshwaran v. Dy. CIT (2009) 23 DTR 290 / 123 TTJ 1 / 119 ITD 1 / (2011) 10 ITR 770 (Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional ground – Jurisdiction – Block assessment**

Ground challenging the jurisdiction to make block assessment can be urged before any authority for the first time. Bar of estoppel or res judicata does not apply when the validity of assessment is questioned for want of jurisdiction. (A.Ys. 1992-93 to 2001-02)

*ACIT v. Bijay Shankar Gupta (2009) 21 DTR 254 / 122 TTJ 430 (Jodh.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Additional ground – Question of law**

Additional ground raised by the appellant can be admitted if it raises a question of law which arises from the undisputed facts as found by the Income Tax Authorities. (A.Y. 2001-02)

*DCW v. Dy. CIT (2009) 126 TTJ 416 / 31 DTR 82 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Binding – Precedent – Jurisdictional High Court – Per incuriam or sub silentio**

Tribunal has no power to hold decision of jurisdictional High Court as per incuriam or sub silentio.

*ACIT v. Sreeja Hosieries (2009) 33 SOT 29 (URO)(Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – No power to take away the benefit given by AO**

It is not open for the tribunal to take away the benefit given by the Assessing Officer.

*ITO v. Anant Y. Chavan (2009) 32 DTR 377 / 126 TTJ 984 (Pune)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Decision of non jurisdictional High Court – Special Bench decision**

Decision of non-jurisdictional High Court prevails over an order of Jurisdictional Special Bench of the Tribunal. (A.Y. 1998-99)

*Kanel Oil & Export Ind. Ltd. v. Jt. CIT (2009) 126 TTJ 158 / 121 ITD 596 / 30 DTR 130 (TM) (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Judgment of co-ordinate Bench – Identical facts**

Judicial propriety demand that a Bench of the Tribunal must follow the judgement of a co-ordinate Bench, Judicial Member was not justified in taking a different view than one taken in an earlier case by a Co-ordinate Bench on identical facts. (A.Y. 2003-04)

**S. 254(1) : Appellate Tribunal – Oral pronouncement is not an order – Order must be in writing – Signed and dated – Income-tax (Appellate Tribunal) Rules 1963 [Rule 34]**

According to the Rule 34 of the IT (Appellate Tribunal) Rules, 1963 an order of the Tribunal can only be in writing as duly signed and dated by the members constituted it. Hence, oral pronouncement during the course of hearing is not an order at all. It is only an intimation of likely result or prima-facie conclusion expressed on the basis of contentions made by the parties. It was held to be a procedural aspect and it does not create any statutory embargo or limitation. Even entry in the order sheet to that effect signed by the members of the bench would not constitute an order because an order is a mandate precept or command but reasoning is its soul. Hence without any reasoning or conclusion based upon considered or authoritative opinion on a matter or context, oral pronouncement cannot be an order in the strict sense. (A.Y. 1996-97) *Mafatlal Securities Ltd. v. Jt. CIT (2009) 119 ITD 444 / 199 TTJ 501 / 21 SOT 245 / 15 DTR 187 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Solitary judgment of any High Court – Where different views by different benches – High Court order be followed**

After considering the judgment of the Apex Court in case of CIT v. Vegetable Products Ltd. [88 ITR 192], where it was held that if two views are taken by different High Courts, view favourable to the assessee should be adopted, the Hon'ble Bench of the Tribunal held that a solitary judgment of any High Court, in the country on a particular point or issue, should be followed in its letter and spirit by all Benches of the Tribunal notwithstanding contrary views expressed by some Benches of the Tribunal, unless there are strong reasons to deviate from the view expressed by the High Court. Otherwise, the hierarchical judicial system would collapse. (A.Y. 2000-01) *ITO v. Ranisati Fabric Mills (P.) Ltd. (2009) 118 ITD 293 / 116 TTJ 177 / 6 DTR 481 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Duties – Judgment of High Court must be followed if there is no contrary decision of High Court**

Tribunal is duty bound to follow the decision of a High Court, if there is no contrary decision available from any other High Court. (A.Y. 2000-01) *Maharashtra State Warehousing Corp. Ltd. v. Dy. CIT (2009) 122 TTJ 865 / 22 DTR 531 (Pune)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Raising a contention for the first time before it**

Tribunal can set aside a matter or remand it to file of Assessing Officer for further enquiry to make proper assessment by allowing parties including revenue authorities to raise a contention for first time before it. (A.Y. 1998-99)

*ACIT v. Amar Mining Co. (2009) 121 ITD 273 / 123 TTJ 473 / 24 DTR 139 (TM)(Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Right of respondent – On the point rejected by the Commissioner (Appeals) [Rule 27]**

The respondent can support his argument against the appeal filed by the Appellant on the points which has been rejected by the CIT (A). (A.Y. 2003-04)

*Dy. CIT v. Hind Industries Ltd. (2009) 120 TTJ 505 / 120 ITD 89 / 26 SOT 196 / 14 DTR 561 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Non taxability of particular income**

Tribunal can entertain the claim for exemption or non-taxability of particular income. (A.Y. 2003-04)

*Kisan Discretionary Family Trust v. ACIT (2008) 113 TTJ 918 / 2 DTR 363 (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding precedent – Binding on lower authorities**

Orders of the Tribunal are binding on the lower authorities.

*Finance Officer, MDV v. ITO (2008) 113 TTJ 914 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Right of respondent – New issue does not involve investigation of facts**

Where the issue has been considered by CIT(A), the assessee can raise the issue before the Tribunal for the first time as respondent as the issue does not involve investigation into facts. (A.Y. 1992-93)

*ACIT v. M. P. Exports Comp. Ltd. (2008) 117 TTJ 417 / 120 ITD 460 / 7 DTR 346 (Indore)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Validity of appointment of special auditor**

**[S. 142(2A)]**

Tribunal has no jurisdiction to examine validity of the order for appointment of special auditor under section 142(2A) in the course of appeal before it.

*ACIT v. Badri Ram Choudhary (2008) 118 TTJ 492 / 13 DTR 177 (Jodh.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Question of law**

When all the relevant facts are on record and the issue being sought to be raised is a pure question of law on the basis of admitted facts of the case, the same can be admitted for decision. (A.Y. 1997-98)

*Jehtalal K. Morbia v. ACIT (2007) 109 TTJ 1 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Time barred – Legal issue**

Assessee can raise objection that the assessment framed by the Assessing Officer was time-barred for the first time before the Tribunal as it is purely a legal issue going to the very root of the assessment. (A.Y. 1991-92)

*ACIT v. Chowdhary Motor Agency (2007) 108 TTJ 998 (Amritsar)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Additional ground – Special bench – Entire appeal**

Special Bench of Tribunal is seized of entire appeal, has power to admit additional ground. (A.Ys. 1991-92 to 1993-94)

*ACIT v. DHL Operations BV (2007) 108 TTJ 152 / 13 SOT 581 (SB)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Duty – Reassessment**

Tribunal has powers and, indeed, duty, to examine the nature of order passed by the Assessing Officer as 'reassessment order' and whether this order can be termed as a reassessment order at all. (A.Y. 1997-98)

*R. K. Steel Syndicate v. ITO (2007) 108 TTJ 353 / 14 SOT 158 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Condonation of delay – Reasonable cause**

There cannot be a sufficient cause for condonation of delay in filing appeals before Tribunal on the basis of a subsequent decision on appeal by CIT (A). (A.Y. 1989-90)

*ITO v. Hemraj Onkarji Mali & Ors. (2007) 108 TTJ 100 / 106 ITD 513 (Indore)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional evidence – Rule 29 – ITAT Rules, 1963**

In an appeal filed by assessee, additional evidence can be admitted at the instance of revenue on application under Rule 29 of ITAT Rules.

*UOPLLC v. Addl. Dir. of IT. (2007) 110 TTJ 619 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional ground – Reassessment [S. 147]**

It was held that though the ground challenging the Issue of Notice under section 148 was not challenged before Assessing Officer nor Commissioner (Appeals), the same can be raised before the Tribunal as it being purely a legal ground.

*Otis Elevator Co. (India) Ltd. v. Dy. CIT (2007) 159 Taxman 128 (Mag.)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Legal issue**

Admissibility – Additional grounds on legal issues going to the root of the matter and requiring no further factual investigation are admissible in appeal before Tribunal. (A.Ys. 1993-94 to 1995-96)

*Kanoi Industries (P) Ltd. v. Dy. CIT (2006) 102 TTJ 285 / 100 ITD 462 (Kol.)(Trib.)*



**S. 254(1) : Appellate Tribunal – Order – Binding precedent – Third Member decision – Equal to Special Bench decision – Only in territorial jurisdiction**

Third Member decision of Tribunal is as good as a Special Bench decision within its territorial jurisdiction. (A.Y. 1994-95)

*Dy. CIT v. Oman International Bank SAOG (2006) 102 TTJ 207 / 100 ITD 285 (SB)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Question of law**

Question whether the assessee is entitled to relief under section 80-I in respect of cash subsidy on exports being a pure question of law not requiring investigation of facts same is admitted by way of additional ground of appeal before the Tribunal. (A.Y. 1991-92)

*Dy. CIT v. Maruti Udyog Ltd. (2006) 101 TTJ 760 / 99 ITD 666 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional Ground – New plea**

New plea raised by the Revenue that the assessee is engaged in the business of holding investments cannot be admitted in the appeal as complete evidentiary facts are not available on record to adjudicate the said plea and in the past income from investment had been assessed as capital gains. (A.Y. 2001-02)

*Escorts Ltd. v. ACIT (2006) 102 TTJ 522 / 104 ITD 427 / 8 SOT 167 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Maintainability – State Government undertaking COD**

Appeals can be heard by the Tribunal without any clearance from the said Committee where litigation is between a State Government undertaking and the IT Department.

*Dy. CIT v. Maharashtra State Road Transport Corporation (2006) 102 TTJ 22 / 100 ITD 187 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – No power of enhancement**

Power of enhancement has not been conferred by legislature on the Tribunal under the IT Act and the order of the Tribunal cannot enhance the income originally assessed by the Assessing Officer.

*Dy. CIT v. Maruti Udyog Ltd. (2006) 101 TTJ 760 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding Precedent – Latest provision of law**

If a party is able to apprise the Tribunal of latest provisions of law or binding decision which was not brought to the notice of the Tribunal at the earlier occasion, and if it comes to the conclusion that there is necessity for deviating from the earlier findings, it must deviate and decide the issue judiciously. (A.Y. 1998-99)

*ACIT v. New Nandi Seeds Corporation (2006) 101 TTJ 725 / 99 ITD 702 (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order giving effect – Direction to Commissioner to take necessary administrative action**

The Assessing Officer did not give effect to the order of the CIT(A) which was confirmed by the ITAT for 10 years – Further he started recovery proceedings – The Tribunal held that it was not an executing authority and was not a correct forum and hence assessee's application was not maintainable. But while doing so the Tribunal made certain observations. One amongst them is "Necessary action may be taken by the CCIT on the administrative side." (A.Y. 1983-84)

*Noormohmad Umar Bapda v. ITO, M.A. No. 20(Rjt)/2002, ITA 1724/Ahd/1993 dated 29-11-2002 – BCAJ P. 410 Vol 39-B, Part 4 July 2006 (Rajkot)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Appeal – Maintainability – Tax effect**

CBDT circular dt. 24th Oct., 2005, is binding on the Revenue even in cases of appeals filed before 31st Oct., 2005, and the Department would not be justified in proceedings with appeals in which the tax effect is less than the monetary limit prescribed in the circular. (A.Y. 2001-02)

*ACIT v. Rajoo Engineers Ltd. (2006) 102 TTJ 733 / 100 ITD 555 (Rajkot)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Appeal – Commissioner – Revisional Jurisdiction**

It is not open to the Revenue to challenge the order of the appellate authority on an issue on which relief has been given by CIT himself by exercising revisional jurisdiction in other cases. (A.Y. 1997-98)

*ACIT v. Capt. K. P. Singh (2006) 103 TTJ 962 / 107 ITD 82 / 9 SOT 642 (Mum.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Additional ground – Legal ground**

Additional grounds taken being legal grounds and relevant facts being already on record, are admissible. (A.Y. 2002-03)

*Buxa Dooars Tea Co. (I) Ltd. v. ACIT (2006) 99 TTJ 898 (Kol.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Additional ground – Reassessment [S. 147]**

An additional ground regarding validity of assessment which involves a pure legal question not involving any investigation into facts can be admitted for decision in appeal against penalty. (A.Y. 1993-94)

*Dhiraj Suri v. Addl. CIT (2006) 99 TTJ 525 / 98 ITD 187 (Delhi)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Additional ground – Not raised in original and appellate proceedings – Justified in not admitting the ground**

Assessee having refrained from raising certain grounds at the time of completion of set aside assessment and also at the time of appellate proceedings and not given any reasons, as to why these grounds were not raised in the regular course of appeal before the Tribunal, such grounds cannot be admitted in appeal.

*A. P. Shanmugaraj v. Dy. CIT (2006) 100 TTJ 259 / 99 ITD 278 (Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Jurisdiction – Enhancement – Retrospective amendments**

Enhancement of income/tax vis-à-vis retrospective amendments of law. Tribunal is not always prevented from passing orders which may result in enhancement of the assessee's tax liability beyond the tax liability determined by the Assessing Officer. (A.Y. 1992-93)

*Jt. CIT v. Sakura Bank Ltd. (2006) 99 TTJ 689 / 100 ITD 215 / 6 SOT 684 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Binding – Precedent – A subsequent Bench can draw different conclusion if there is adequate justification to depart from the earlier**

Decision of a Bench of the Tribunal, even in the case of the same assessee in a particular assessment year does not constitute a binding precedent on subsequent co-ordinate Bench of the Tribunal in relation to another assessee or another assessment year of the same assessee. A subsequent Bench can draw different conclusion if there is adequate justification to depart from the earlier view, e.g. where subsequently new or more facts or material come to light.

*Npar Drugs (P) Ltd. v. Dy. CIT (2006) 100 TTJ 38 / 98 ITD 285 (TM)(Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Binding – Precedent – Lower authorities**

All the authorities below the Tribunal are bound to follow the decision of the Tribunal. Further, where there are conflicting decisions of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decision. (A.Ys. 1998-99 to 2002-03)

*Mahanagar Telephone Nigam Ltd. v. Addl. CIT (2006) 100 TTJ 1 / 8 SOT 376 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Respondent – Support order of Commissioner (Appeals)**

A respondent can support order appealed against on a ground which was decided, expressly or impliedly, against him; where though assessee had not paid tax before filing appeal as required by section 249(4), Commissioner (Appeals) entertained appeal and dismissed it on merit, in appeal by assessee before Tribunal, department could support Commissioner (Appeals) order of dismissal of appeal on grounds of non-compliance with section 249(4). (A.Y. 1998-99)

*Durgeshwari Investments (P.) Ltd. v. ITO (2005) 93 TTJ 432 / 146 Taxman 56 (Mag.)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Orders – Cross objections – Any part of order**

A cross objection can be filed against any part of the order of the Commissioner (Appeals). (A.Ys. 1990-91 to 1996-97 to 1998-99)

*ACIT v. Baldev Plaza (2005) 93 ITD 579 / 94 TTJ 135 (All.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Co-ordinate bench**

It is not open to a Bench of Tribunal to differ from view taken by a co-ordinate Bench of equal strength. (A.Y. 1998-99)

*Mehratex India Ltd. v. Dy. CIT (2005) 3 SOT 539 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Co-ordinate bench**

It is not open to another co-ordinate Bench of Tribunal to differ from view taken by a co-ordinate Bench of equal strength; in case one doubts correctness of such a decision, one has to refer matter for constitution of a larger Bench. (A.Y. 1997-98)

*J. K. T. Fabrics (P.) Ltd. v. Dy. CIT (2005) 4 SOT 84 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Co ordinate bench**

Co-ordinate Bench should not reach a conclusion directly opposite to conclusion reached by another Bench of Tribunal on earlier occasion and if Division Bench differs from views of other Division Bench, matter should be posted before larger Bench for considering question; however a decision reached on particular facts and on consideration of law prevailing at that time can be deviated from if some new facts are brought on record or some more cases of higher Courts on subject have come to its notice. (A.Ys. 1990-91 to 1992-93)

*V. G. Gajjar v. Dy. CWT (2005) 93 ITD 624 / 93 TTJ 70 / 1 SOT 702 (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Co-ordinate bench**

A decision of a co-ordinate Bench of same strength is required to be accepted by Bench of same strength. (A.Y. 1993-94)

*Dy. CIT v. Mangalam Cement Ltd. (2005) 92 ITD 44 / 92 TTJ 01 (TM)(Jp.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Later decision**

It is only later decision which has a precedence over earlier decision even in a case where earlier decision was neither cited nor discussed in later decision. (A.Y. 1999-2000)

*N. Sandeep Reddy v. ACIT (2005) 95 ITD 33 / 96 TTJ 315 (Hyd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Per incuriam**

A decision which is per incuriam is not a binding judicial precedent; a decision ignoring rule of precedence cannot but be viewed as per incuriam. (A.Y. 1997-98)

*J. K. T. Fabrics (P.) Ltd. v. Dy. CIT (2005) 4 SOT 84 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Other than jurisdictional High Court – Favourable to assessee and not latter decision**

Where there are conflicting decisions of different High Courts, none of which is of jurisdictional High Court, decision, which is favourable to assessee, should be followed and not later decision, which is against assessee. (A.Ys. 1993-94 to 1995-96)  
*ACIT v. Hindustan Steel Industries (India) (2005) 94 TTJ 1094 (Agra)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding – Precedent – Higher authority**

Once an authority higher than Tribunal has laid down a proposition of law, all that is normally open to Tribunal is to respectfully follow same. (A.Y. 1994-95)  
*Milan Enterprise v. ACIT (2005) 95 ITD 18 / 95 TTJ 635 (Mum.)(Trib.)*

**S. 254 : Appellate Tribunal – Order – Binding – Precedent – Per incuriam**

It is not open to other Bench of Tribunal to express a contrary view unless earlier view of Bench is per incuriam. (A.Y. 1998-99)  
*Kothari Departmental Stores (P.) Ltd. v. Assessing Officer (2005) 96 ITD 142 / 97 TTJ 278 (TM) (Jodh.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Powers – Duties – The Constitution of India – Article 142**

Tribunal does not enjoy same powers as Supreme Court under article 142 of Constitution of India to pass such orders as deemed fit for doing complete justice in matter before it. (A.Ys. 1986-87 to 1993-94)  
*Thai Airways International Public Co. Ltd. v. ACIT (2005) 2 SOT 389 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Interpretation – Doctrine of reading down**

Once because of letter of notification provisions of statute have been negated or diminished by an executive order, Tribunal does have power to deal with validity of such rules or notifications and by applying doctrine of 'reading down' can strike down such rules if held to be in contradiction with provisions of statute itself.  
*Reliance Industries Ltd. v. Dy. DIT (International Taxation) (2005) 3 SOT 501 / 98 TTJ 856 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Additional grounds**

Merely because proceedings before Tribunal are appellate proceedings, it cannot be said that it puts any restriction on Tribunal in giving direction for production of documents and for calling information from parties; Tribunal can, if required, direct any party to produce any document or any witness to be examined or to file affidavit, even if same as in the nature of additional evidence, for deciding appeal. (A.Y. 2000-01)  
*Chandrasekhar Balagopal v. ACIT (2005) 4 SOT 313 (Cochin)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional grounds**

Additional grounds can be admitted where facts giving rise to them have been discussed by lower authorities in their order and such facts are already on record.

*Sun Pharma Exports v. Dy. CIT (2005) 96 TTJ 415 (Mum.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Order – Additional grounds**

Where a claim was not made before authorities below and relevant material necessary for allowing such claim was not on record, such ground could not be entertained by Tribunal. (A.Y. 1995-96)

*Budhewal Co-operative Sugar Mills Ltd. v. Dy. CIT (2005) 94 TTJ 307 (Chd.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – Jurisdiction – Reassessment**

Issuance of notice under section 148 goes to root of jurisdiction and such matter can be raised even for first time before Tribunal. (A.Ys. 1995-96 to 1997-98)

*Barmatics v. Dy. CIT (2005) 2 SOT 845 (Bang.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – Special Bench**

Where based on a decision of Special Bench of Tribunal, assessee sought to raise an additional ground, to treat sales tax incentive received from Government for setting-up industry in notified areas as a capital receipt not includible in total income, since basic facts with regard to setting-up of industry in notified area and receipt of incentive, if any, by assessee, were not available on record and said issue was not raised before lower authorities, additional ground raised by assessee could not be admitted. (A.Y. 2000-01)

*Garden Silk Mills Ltd. v. ACIT (2005) 2 SOT 856 (Ahd.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – Legal – Jurisdiction**

Additional ground raised by assessee that assessment order in question had been framed under section 143(3), without assuming jurisdiction to frame such assessment inasmuch as notice under section 143(2) was not issued and served within statutorily allowable period of 12 months from end of month in which return under section 148 was filed, being a legal ground and being capable of being adjudicated on material on record, was to be allowed. (A.Ys. 1999-2000, 2000-01)

*Sat Narain v. ITO (2005) 94 TTJ 499 (Delhi)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional grounds – Reassessment**

Additional ground raised before Tribunal that assessment made under section 143(3), read with section 147, was bad in law and in violation of provisions of section 143 being a purely legal issue which goes to root of matter was liable to be admitted. (A.Y. 1993-94)

*S. Kumar Enterprises (Synfabs) Ltd. v. Jt. CIT (2005) 4 SOT 412 (Mum.)(Trib.)*

#### **S. 254(1) : Appellate Tribunal – Additional Grounds – Income-tax (Appellate Tribunal) Rules 1963 [Rule 27]**



Where assessee did not prefer appeal against order of Commissioner (Appeals) in respect of ground decided against it because on substantial ground, that it was not liable to pay additional tax, it had succeeded, on revenue's appeal against order of Commissioner (Appeals) assessee could under rule 27 of ITAT Rules support order of Commissioner (Appeals) by raising ground decided against it. (A.Ys. 1989-90, 1990-91)

*Dy. CIT v. Bifora Watch Co. Ltd. (2005) 94 ITD 203 / 96 TTJ 393 (TM)(Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional grounds – Issue not subject of assessment [S.69]**

Where at the time of completing assessment, Assessing Officer had not made addition by invoking provisions of section 69, additional ground of appeal raised by department pleading taxability of accrued interest on IVPs under section 69 could not be admitted by Tribunal.

*Dy. CIT v. Roshan Singh (2005) 95 TTJ 485 (Amritsar)(Trib.)*

**S. 254(1) : Appellate Tribunal – Additional grounds – Block assessment**

Where appeal was against block assessment and was thus first appeal and documentary evidence was produced before Tribunal for first time, an opportunity should be given to Assessing Officer to examine documentary evidence and thereafter to reconsider issue; further additional grounds raised before Tribunal were also required to be reconsidered in light of material that might be produced before Assessing Officer by assessee.

*V. Kumar v. ACIT (2005) 96 TTJ 483 (Chennai)(Trib.)*

**S. 254(1) : Appellate Tribunal – Stay – Direction under section 263**

Tribunal has no inherent power to grant stay against demand raised by virtue of assessment order passed independently and after making due enquiries in pursuance of directions of Commissioner under section 263.

*Technib Italy Spa v. ACIT (2005) 147 Taxman 114 (Mag.)(Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Stay – Clearance from committee**

Tribunal has no power or authority to admit appeals filed by public sector undertakings/corporations seeking stay of demand arising from impugned assessment order, in absence of necessary clearance from Committee on Disputes. (A.Y. 1998-99)

*Transmission Corpn. of AP Ltd. v. ACIT (2005) 97 ITD 171 / 98 TTJ 161 (Hyd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Stay – Recovered without allowing time to file appeal**

Where pursuant to order of Commissioner (Appeals), revenue recovered assessed amount from assessee through attachment of bank accounts, without allowing time to file appeal and/or stay application before Tribunal, amount so recovered had to be

refunded to assessee and also a stay on recovery of demand was to be granted for specified period.

*Glaxo Smith Kline Asia (P.) Ltd. v. Addl. CIT (2005) 2 SOT 457 (Delhi)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Stay – Rental income [S. 80P(2)(e)]**

Where assessee, a Government organization, had an arguable case that its claim for exemption of rental income under section 80P(2)(e) was justified, stay of demand was to be granted till disposal of appeal by Tribunal. (A.Ys. 1992-93 to 1999-2000)

*Haryana State Co-op. Supply & Marketing Federation Ltd. v. ACIT (2005) 92 TTJ 1269 (Chd.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Stay – Enhancement by Commissioner (A)**

Where the additions made by the Assessing Officer and further enhancement of assessed income by the Commissioner (Appeals) had resulted in high-pitched assessment of assessee's income as against that returned by assessee giving rise to a demand of more than ` 11.50 crores and as demonstrated by the assessee, there was a good prima facie arguable case for it to succeed on merits, its request for stay of demand was to be granted. (A.Y. 2000-01)

*Bechtel India (P.) Ltd. v. ACIT (2005) 92 ITD 205 / 93 TTJ 794 (Delhi)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Power – Condonation of delay**

In every case of delay (in filing appeal) there can be some lapse of litigant concerned; that alone is not enough to turn down plea of condonation of delay and to shut doors against him. (A.Y. 2001-02)

*Earthmetal Electricals (P.) Ltd. v. ITO (2005) 4 SOT 484 (Mum.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Power – Grant Relief on Equitable Consideration**

Tribunal has no power to grant relief on equitable jurisdiction as High Court and Supreme Court have been vested with such powers under writ jurisdiction. (A.Y. 1973-74)

*Dy. CIT v. Maharaja Shree Umaid Mills Ltd. (2005) 94 ITD 291 / 95 TTJ 395 (Jp.)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Power – Validity of search [S. 132]**

Tribunal has no powers to adjudicate upon the issue relating to the validity of the search conducted under section 132 while disposing the appeal against block assessment.

*Promain Ltd. v. Dy. CIT (2005) 95 ITD 489/ 95 TTJ 825 (SB)(Delhi)(Trib.)*

### **S. 254(1) : Appellate Tribunal – Duty – Dissenting order**

Duty cast on Member who writes a dissenting order is much heavier as he has not only to meet each & every point of his colleague, but also give a detailed reasoning for coming to a different conclusion.

**S. 254(1) : Appellate Tribunal – opportunity of being heard – Notice of hearing**

Absence of service of notice of hearing on respondent assessee. Particularly, when service of notice of hearing issued by Tribunal could not be effected by post at the address given in the memorandum of appeal, it was obligatory on the part of IT authority to effect service of notice. As per the established practice and accepted procedure that, in case notices of hearing cannot be served on the respondent- assessee in Revenue's appeals, such notices are got served through IT authorities. This practice and procedure has been long established and is fully in conformity with the judicial powers and jurisdiction of the Tribunal. On the facts and circumstances the Revenue showed scant regard for serving the notices and challenged the power of the Tribunal to direct the Revenue for service, the appeal of the Revenue was dismissed. (A.Y. 1989-90).

*ITO v. Marco Roadways (2003) 81 TTJ 275 / (2004) 2 SOT 969 (Chd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Direction or finding for another assessment year**

**[S. 153(3)]**

The Tribunal by virtue of the powers vested under the provisions of Section 254(1) for disposal of an appeal may pass such orders thereon as it thinks fit. The Tribunal would obviously pass the orders which have a bearing on the subject-matter of appeal and cannot possibly record finding or direction on incidental issues which are not connected with the subject-matter of appeal. The various provisions enacted by the legislature in Chapter XIV of the IT Act, 1961, viz., Sections 153(2A) and 153(3) and the two Explanations appended below sub-sections (3) of Section 153, which lift the bar of time limitation for giving effect to the finding or direction given by the Tribunal, amply bring out the legislative intention for enlarged ambit of appellate jurisdiction of the Tribunal conferred under section 254(1). If Section 254(1) is to be construed as prohibiting the Tribunal from giving any direction or finding in relation to any assessment year other than the assessment year under appeal, there was obviously no occasion for the legislature to include various sections in Chapter XIV for lifting the bar of time limitation to initiate proceedings for assessment in consequence of such directions or findings. The only limitation on the powers of the Tribunal to give directions or finding in relation to another assessment year would be that these are necessary for the disposal of appeal and are not merely incidental. (A.Y. 1992-93)

*Perfect Equipments v. Dy. CIT. (2003) 85 ITD 50 / (2004) 86 TTJ 361 (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Power – Grant stay of recovery beyond six months**

On the facts and circumstances the Tribunal has power to grant a further stay on expiry of six months of earlier stay. Object behind insertion of sub-section (2A) of

section 254 is only to curtail the delays and to ensure the disposal of pending appeals within a reasonable time-frame. There is no bar imposed on the powers of the Tribunal to reconsider the grant of stay beyond 180 days if the appeal is not disposed of within that period. (A.Y. 1997-98)

*Centre For Women's Development Studies v. Dy. DIT (Exemption) (2003) 78 TTJ 740 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Interpretation – Binding – Precedent – Order of Tribunal**

The Tribunal cannot make a departure from the view taken in its earlier decision. It is permissible only if the facts are different or if there is a change in the law. (A.Y. 1992-93)

*Venkateshwara Farms (P) LTD. v. Dy. CIT (2003) 84 ITD 212 / 79 TTJ 74 (Pune)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Maintainability – Tax effect – Board Circular**

Any Appeal by revenue where tax effect involved was less than monetary limit prescribed in board's circular is not maintainable.

*ITO v. Mohd. Hanif & Sons (2003) SOT 609 (Jab.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Maintainability – Tax effect – Interest**

For working out the monetary limit for filing of Appeals by revenue, only tax effect has to be considered and not the Interest. (A.Y. 1993-94)

*ITO v. Roopchand Jain (2003) 79 TTJ 406 / 130 Taxman 223 (Mag.)(Nagpur)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Maintainability – Consent – Void appeal**

Once the assessee gives his consent in respect of particular assessment, the right to appeal is lost, and appeals filed are not competent and void ab initio.

*Malwa Texturising Pvt Ltd v. ACIT (2002) 77 TTJ 995 (Indore)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Res judicata – Different view**

Tribunal can take different view in a later year for same assessee, based on decision of superior authority in subsequent proceedings. (A.Y. 1990-91)

*Humphreys & Glasgow Consultants (P) Ltd v. Dy. CIT (2003) 87 ITD 344 / (2004) 86 TTJ 189 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Res judicata – Examine afresh**

Merely because the matter has been decided against the assessee in preceding years, the Tribunal is not denuded of its power to examine the matter afresh and take an independent view of the matter.

*Orissa State Civil supplies Corporation Ltd v. Dy. CIT (2003) 130 Taxman 218 (Cuttack)(Mag.) (Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional evidence – Power – Opportunity**

Admission of additional evidence without giving opportunity to assessing officer to verify the same is not permissible. (A.Y. 1992-93)

*Veena Kanoria v. Dy. ITO (2003) 85 ITD 95 / 79 TTJ 746 (TM)(Kol.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional evidence – Power**

Prayer for admission of additional evidence be allowed when assessee had not changed his stand, nor new ground has been taken, nor a new explanation different from one which was taken before the Assessing Officer & CIT(A) is being put up, and by admitting the same it proves assessee's case. (A.Ys. 1997-98, 1998-99)

*Sikander Publishing (P) Ltd v. Dy. CIT (2003) 81 TTJ 249 / 133 Taxman 156 (Mag.) / (2004) 2 SOT 294 (Delhi)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Additional ground – Power – Legal issue – Interest [S. 139(8), 215]**

Additional ground which is purely a legal issue, being charging of Interest under section 139(8)/215 has to be admitted. (A.Y. 1988-89)

*Shankarlal Nebhumal (HUF) v. Dy. CIT (2003) 80 TTJ 69 / 2 SOT 671 (Ahd.)(Trib.)*

*Lathia Rubber Mfg. Co (P) Ltd. v. ACIT (2003) 81 TTJ 779 / 3 SOT 714 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Civil court – Stay – Order Refund**

Tribunal can exercise powers of civil court and pass order in nature of mandatory direction to department to refund the amounts recovered forcibly during pendency of stay petitions and income tax appeals.

*Western Agencies (Madras Ltd) v. Jt. CIT (2003) 86 ITD 462 / 81 TTJ 284 (Mad.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Stay – Separate petition for each year**

Separate stay petition is necessary for each year, even pertaining to same enactment.

*Wipro (Ltd) v. ITO (2003) 87 ITD 407 / 81 TTJ 362 (Bang.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Stay – Security – Satisfaction of AO**

Assessing officer can not insist on any particular form of security, in connection with grant of stay granted by Tribunal, on condition of furnishing security to satisfaction of assessing officer.

*Dhruv N Shah v. Dy. CIT (2003) SOT 528 (Mum.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Direction – Assessment year not before it**

Tribunal can give direction in relation to any assessment year which is not before it but which is necessary for disposal of appeal. (A.Y. 1992-93)

*Perfect Equipment v. Dy. CIT (2003) 85 ITD 50 / 86 TTJ 361 (Ahd.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Power – Relief on different ground**

Tribunal has powers to grant relief on ground other than given by Commissioner (Appeals), and also it is their duty to grant relief if contentions raised by the assessee are justified. (A.Y. 1992-93)

*ITO v. Pradip Kumar Rathi (2003) 85 ITD 309 / 81 TTJ 152 (Gau.)(Trib.)*

**S. 254(1) : Appellate Tribunal – Order – Binding precedent – Does not extend to whole country – Cotermious with that of the jurisdictional High Court**

Impact of Tribunal's order does not extend to the whole country but to the area which is cotermious with that of the jurisdictional High Court. On other benches of the Tribunal it has only persuasive value. (A.Y. 1985-86)

*Saipem S.P.A v. Dy. CIT (2003) SOT 661 / 86 ITD 572 / 87 TTJ 794 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Business loss [S. 28]**

Loss was allowed for earlier and subsequent year. Appellate Tribunal refused to rectify the order. The Apex Court remanded the matter to Tribunal for consideration afresh in light of CIT v. Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC). (A. Y. 1998-99).

*Perfetti Van Melle India (P) Ltd. v. CIT (2011) 334 ITR 259 / 63 DTR 189 / 245 CTR 235 (SC)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merger – Order of High Court**

The order of the Appellate Tribunal was dismissed in appeal by the High Court. Subsequently a Miscellaneous Application was filed as the Tribunal had not adjudicated the alternate ground of the assessee. The Tribunal recalled the matter for the limited purpose of disposal of the alternate ground. When the relief was granted by the Tribunal, the department went up in appeal. The High Court held that the Tribunal order has merged with the order of the High Court and had attained finality once it was dismissed by the High Court and therefore, the Tribunal could not have recalled the order. The Supreme Court reversed the order of the High Court and held that as the recall was not challenged by the department, it has become final and it could not have been interfered by the High Court.

*Hindustan Coca Cola Beverage Pvt. Ltd. v. CIT (2008) 202 Taxation 210 / (2007) 293 ITR 226 / 163 Taxman 355 / 211 CTR 545 (SC) / 8 SCC 463 / AIR 2007 SC 930*



**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Jurisdictional High Court – Supreme Court**

Non consideration of decision of Jurisdictional High court or Supreme Court is a mistake apparent from record rectifiable under section 254(2). (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 / 12 DTR 346 / 173 Taxman 322 / (2009) 208 Taxation 90 (SC) / 14 SCC 171*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Limitation – Application within four years**

If the application for rectification is made within 4 years, then the rectification order can be passed by the Tribunal after the expiry of 4 years. (A.Y. 1989-90)

*Sree Ayyanar Spinning & Weaving Mills Ltd. v. CIT (2008) 301 ITR 434 / 171 Taxman 498 / 216 CTR 351 / 7 DTR 57 (SC)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Not considering the decision of a co-ordinate bench of the Tribunal**

The Tribunal was right in rectifying the mistake on record as not considering the decision of a co-ordinate bench of the Tribunal cited before them would constitute a mistake rectifiable under section 254(2). The rule of precedent was an important aspect of certainty in the rule of law, and prejudice has resulted to the assessee since the precedent has not been considered by the Tribunal. (A.Y. 1991-92)

*Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466 / 165 Taxman 307 / 213 CTR 425 (SC)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Application under Rule 29 of the ITAT Rules, 1963, pending before Tribunal**

Where application under Rule 29 of the ITAT Rules is pending, the Tribunal should first dispose of such application on merits and thereafter proceed to dispose of appeal on merits.

*Jyotsna Suri v. ITAT (2003) 128 Taxman 33 / 179 CTR 265 (SC) / 9 SCC 211*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Power to Recall**

It is fundamental principle that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and no prejudice should be caused to either of the parties before the Tribunal which is attributable to the Tribunal's mistake, omission or commission. Thus, Tribunal entitled to recall order in entirety to rectify apparent mistake. Followed Supreme Court Judgement Honda Siel Power Products 295 ITR 466 and Saurashtra Kutch Stock Exchange 262 ITR 146. (A.Ys. 2000-01 to 2005-06)

*Lachman Dass Bhatia Hingwala v. ACIT (2011) 330 ITR 243 / 49 DTR 98 / 237 CTR 117 / 196 Taxman 563 (FB)(Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Review**

While exercising the power of rectification under section 254(2), Tribunal can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review. (A. Ys. 2000-2001 to 2005-06).

*Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) 237 CTR 117 / 330 ITR 243 / 196 Taxman 563 / 49 DTR 98 / (2011) Tax L. R. 101 (FB)(Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Orders – Rectification of mistake – Power to review – Additional evidence**

Once the Tribunal has disposed the appeal on merits, it cannot review its order and therefore, miscellaneous application filed by the assessee seeking modification of the order of Tribunal so as to admit more additional evidence than that permitted by the order was rightly rejected by the Tribunal. (A. Y. 1998-99)

*Indrakumar Patodia v. ITO (2011) 51 DTR 183 / 238 CTR 437 (Bom.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Orders not cited – Tribunal entitled to do “own research” and rely on non-cited cases**

Reliance and reference to reasons stated in another decision cannot be regarded as a mistake apparent from the record. It is not unusual or abnormal for Judges or adjudicators to refer and rely upon judgements / decisions after making their own research.

*Geofin Investment (P) Ltd. v. CIT W.P. No. 3744/2011 dated 27-5-2011 (Delhi)(High Court)* Source : [www.itatonline.org](http://www.itatonline.org)

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Admission by counsel**

Tribunal recording admission by counsel for assessee, assessee filing application denying admission, application should be considered on merits. (A. Y. 1997-98).

*Bagoria Udyog v. CIT (2011) 334 ITR 380 / 60 DTR 386 / 244 CTR 339 (Cal.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Reappreciating the correctness of the same decisions once again**

Where the Tribunal after specifically dealing with the decisions cited by the assessee and distinguished the same dismissed the assessee appeal. Thereafter, the Tribunal while dealing with the rectification application was held to be not justified in reappreciating the correctness of the same decisions once again and allowing the assessee appeal. The High Court observed that section 254(2) is not a carte blanche for the Tribunal to change its own view by substituting a view which has been taken by it earlier.

*CIT v. Earnest Exports Ltd. (2010) 36 DTR 274 / 323 ITR 577 / 230 CTR 527 (Bom.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Second application for rectification is not maintainable**

Second application for rectification is not maintainable.

*S. Panneerselvam (Dr.) v. ACIT (2010) 217 Taxation 260 / Tax. L.R. 326 (Vol. 40 May 2010)(Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Variation in Order Pronounced in Open Court and Final Order**

In view of alleged variation between the order pronounced by the Tribunal in the open Court on the conclusion of hearing on the stay application and the final order passed subsequently as regards the amount of deposit directed by the Tribunal. The Court directed the Tribunal to take up the hearing of the miscellaneous application filed by the assessee expeditiously to obviate any further complications. (A.Ys. 1999-2000 to 2005-06)

*Asia Satellite Telecommunications Co. Ltd. v. ADIT (2010) 39 DTR 241 / 232 CTR 177 / 191 Taxman 177 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Order relied without giving an opportunity**

Tribunal passing order relying on its own decision in another case. Assessee filing application contending that no opportunity given to deal with decision which had not been cited by either side when arguments were heard. The Tribunal dismissed the application. The Court held that assessee to be given an opportunity to deal with distinguishable features of case relied on. Matter remanded to decide on merit. (A.Y. 1997-98)

*Inventure Growth and Securities Ltd. v. ITAT (2010) 324 ITR 319 / 41 DTR 117 / 195 Taxman 195 / 233 CTR 172 (Bom.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merger – Second application**

Once, rectification filed by one of the parties is considered and decided by Tribunal, rightly or wrongly, another rectification application on same issue is not maintainable against order passed by Tribunal under section 254(1).

*CIT v. Aiswarya Trading Co. (2010) 192 Taxman 385 / 46 DTR 126 / 134 TTJ 33 (Ker.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Second Rectification Petition**

Once the power for rectification of the earlier order is invoked / exercised and an order is passed, such order merges with the earlier order of the Tribunal and another application for rectification under section 254 (2) can not be entertained.

*CIT v. Panchu Arunachalam (2010) 323 ITR 31 / 235 CTR 308 / 45 DTR 368 (Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merger – Second application**

Order under section 254(2) merges with original order. Second application for rectification not maintainable. (A.Ys. 1984-85 and 1987-88)

*S. Panneerselvam (Dr) v. ACIT (2009) 319 ITR 135 / 228 CTR 423 / 32 DTR 357 (Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Tribunal relying on decision not cited**

Where the Tribunal rejected the Appeal and also the rectification application relying upon the decisions which were neither cited by the departmental representative nor the assessee who had any notice of the same and also without taking into consideration the vital statements, the High Court on writ filed by the assessee remanded the matter to the Tribunal to decide it afresh after hearing both the parties in accordance with law. (A.Y. 1995-96)

*Naresh K. Pahuja v. I.T.A.T. & Ors. (2009) 19 DTR 273 / 224 CTR 284 (Bom.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Long drawn reasoning**

Power conferred upon the Tribunal under section 254(2) of the Act is limited to correct the mistake apparent on the face of record and the power cannot be exercised to rectify an error by long drawn process of reasoning. (A.Y. 1966-67)

*CIT v. Pearl Woollen Mills (2009) 31 DTR 349 / 227 CTR 614 / 330 ITR 164 / 191 Taxman 286 (P&H)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Limitation**

Time limit of four years to make rectification under section 254(2) applies to both suo motu action of Tribunal as well as action taken on request of parties. Section 254(2) does not provide for any condonation of delay and moreover, provisions of section 5 of Limitation Act, 1963 are not applicable. (A.Y. 1988-89)

*Rahul Jee & Co (P.) Ltd. v. ACIT (2009) 120 ITD 481 / 123 TTJ 217 / 22 DTR 329 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Non-consideration of a Apex Court decision**

Non – consideration of a Apex Court decision by the Tribunal, which was relevant for deciding the issue before it would amount to a mistake apparent from the record and can be rectified under the provisions of section 254(2) of the Act. (A.Ys. 1995-96 to 1997-98)

*CIT v. V.L.S. Finance Ltd. (2008) 15 DTR 180 / 310 ITR 224 / 178 Taxman 433 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Binding precedent –Jurisdictional High Court**

Tribunal has to follow the decision of the jurisdictional High Court without making any comment upon the judgment that it did not take into consideration a particular provision of law. (A.Y. 1989-90)

*National Textile Corporation Ltd. (MP) v. CIT (2008) 5 DTR 117 / 226 CTR 153 / 171 Taxman 339 (MP)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – No power to rehear the matter touching the merit**

While exercising the power under section. 254(2) of the Act, the Tribunal can rectify any mistake apparent from the record and amend any order passed by it, if a mistake is brought to the Tribunal's notice by the Assessing Officer or by the assessee. However, the Tribunal has no power to rehear the matter touching the merit, which was finally decided, and as such the Tribunal should not make any observation relating to merits of the case while passing the order under section 254(2) of the Act.

*Bharat Drug Stores v. CIT (2007) 197 Taxation 263 / 295 ITR 120 (Gau.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Cannot be allowed to reopen and reargue the whole matter**

Assessee cannot be allowed to reopen and reargue the whole matter in the garb of rectification under section 254(2). (A.Y. 1998-99)

*Perfetti Van Melle India v. CIT (2007) 212 CTR 173 / 296 CTR 595 / 164 Taxman 493 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Failure to consider one of ground – Block assessment – Search and seizure**

On appeal to High Court, it was held that the ITAT at the stage of deciding the Misc. Application itself could not be regarded as a correct approach. The assessee should have been given an opportunity to present her case further in respect of the third issue which had been left out for consideration in the original order passed by the ITAT by giving due opportunity. Therefore, the order was not valid and matter was remanded back. (A.Ys. 1986-87 to 1996-97)

*T. Jayabharathy v. ACIT (2007) 294 ITR 128 / 213 CTR 223 (Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Review**

The Tribunal cannot overturn a well-reasoned order given by a regularly constituted bench by taking recourse to the provisions of section 254(2) like an appellate court. The Tribunal while hearing an application under section 254(2) cannot act as an appellate court. The Tribunal must keep in mind the subtle distinction between the appellate power and rectification powers while deciding the rectification application.

*CIT v. Chhabra Ginning Udyog (2006) 195 Taxation 671 (MP)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Opportunity of hearing**

Assessee filed Miscellaneous Application, opportunity to hear must be given. Rejection of application without giving opportunity held to be not valid. (A.Y. 1999-2000)  
*Jain Trading Co. v. UOI (2006) 282 ITR 640 / 195 CTR 324 (Bom.) (High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merely, because a judgment given on the subject either by the Tribunal or any other court was not noticed**

Merely, because a judgment given on the subject either by the Tribunal or any other court was not noticed while taking a particular view on the merits of the case decided by it, it may constitute an error, which could be corrected in appeal but, would fall short of constituting a mistake apparent from record within the meaning of section 254(2) of the Act.

*CIT v. ITAT (2006) 195 Taxation 288 (Delhi) (High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Cannot recall entire order**

Tribunal cannot recall entire order on an application under section 254(2). (A.Y. 1992-93)

*CIT v. Mayur Recreational & Development Ltd. (2005) 196 CTR 97 (Delhi) (High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Failure to consider a ground raised in memorandum of appeal**

Failure by Tribunal to consider a ground raised in memorandum of appeal is a mistake apparent from record in Tribunal's order. (A.Y. 1973-74)

*CIT v. K.M. Sugar Mills (P.) Ltd. (2005) 275 ITR 247 / 198 CTR 72 (All.) (High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Assessee was not served with memo of appeal before it was heard**

Tribunal was justified in recalling its order where it was found that assessee was not served with memo of appeal before it was heard finally. (A.Ys. 1991-92 to 1993-94)

*CIT v. Alankar Tiles (2005) 272 ITR 447 / 196 CTR 647 (MP) (High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Contentions raised before Bench not taken note of it**

If assessee thought that contentions raised by it before Bench had not been taken note of, it was incumbent upon it to file rectification application to bring it to attention of those very Members who had heard appeal, immediately on receipt of order when matter was still fresh in their minds; rectification application filed by assessee almost two years later when constitution of Bench had undergone change and when there was no material on record to see whether such contentions were raised, could not be allowed.



*Paras Cold Storage & Ice Factory v. CIT (2005) 272 ITR 301 / 145 Taxman 46 / 194 CTR 520 (P&H)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Decision one or other**

Where Tribunal disallowed assessee's claim for deduction of interest paid on borrowed capital, after dealing with matter one way or the other, it could not be said that Tribunal's order suffered from a mistake apparent from record. (A.Y. 1977-78)

*Biswanath Prasad & Sons v. CIT (2005) 277 ITR 265 / 150 Taxman 49 (All.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Recalling of order was not justified**

Where in its original order a specific finding had been given by Tribunal regarding addition representing value of jewellery source of which remained unexplained, Tribunal was not justified, on application by assessee under section 254(2), in recalling that order. (A.Y. 1976-77)

*CIT v. Shashi Modi (Smt) (2005) 277 ITR 355 / 155 Taxman 144 (All.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Block assessment – Peak working**

Where as per Tribunal's order, during block assessment addition made was on account of capital employed in liquor business and no separate addition had been made on account of peak credit in various bank accounts, there was no merit in assessee's application under section 254(2) for rectification of Tribunal's order on ground that while working out peak amount in bank accounts, amount on account of bank interest had also been taken into account and that constituted a mistake apparent from record in Tribunal's order. (A.Ys. 1987-88 to 1997-98)

*Naresh Kohli v. CIT (2005) 277 ITR 496 / 150 Taxman 363 (P&H)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Time limit – Four years from date of order**

Tribunal has no jurisdiction to amend any order passed by it under sub- section (1), after expiry of four years from date of order, whether it is on its own volition or on an application being made by assessee or Assessing Officer; there is no merit in contention that this time-limit is applicable to suo motu order of Tribunal and not in a case where mistake is brought to its notice by assessee or revenue. (A.Ys. 1972-73 to 1984-85)

*Raja Malwinder Singh v. Union of India (2005) 278 ITR 568 / 199 CTR 418 / 152 Taxman 377 (P&H)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Recalling the entire order**

The power to rectify mistake under section 254(2) cannot be used for recalling the entire order

*DIT v. Dumez Sogea Borie SAE (2005) 142 Taxman 309 / 192 CTR 543 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Omission of Tribunal**

Omission on part of Tribunal to note fact of finality of order of Commissioner (Appeals) against which no appeal had been preferred and assumption of jurisdiction by Tribunal to interfere with merits of such final order, would be a mistake apparent on face of record in Tribunal's order.

*Kesoram Industries Ltd. v. CIT (2004) 270 ITR 501 (Cal.)(High Court)*

**S. 254(2) : Appellate Tribunal – Power – Mistake apparent from the record**

There is no merit in the contention that power of Tribunal under section 254(2) is restricted to correction of errors apparent on record; it can decide matter over again on merit.

*CIT v. Gangaprasad Bachulal (2004) 188 CTR 581 (MP)(High Court)*

**S. 254(2) : Appellate Tribunal – Power – Mistake apparent from the record**

Power to rectify a mistake under section 254(2) cannot be used for recalling entire order.

*CIT v. Vichitra Construction (P) Ltd. (2004) 269 ITR 371 / 191 CTR 423 / 144 Taxman 456 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Power – Mistake apparent from the record**

Where Tribunal in its appellate order had observed that commissioner had not correctly appreciated evidence while deleting additions, on miscellaneous application it could not held that its earlier observation was a mistake apparent from record. (A.Ys. 1985-86, 1986-87)

*CIT v Roop Narain Sardar Mal (2004) 267 ITR 601 / 134 Taxman 350 / 186 CTR 713 (Raj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Jurisdiction – Mistake apparent from the record**

Where the miscellaneous application which was filed before the Rajkot Bench stood transferred to the Ahmedabad Bench under an administrative order taking into consideration the fact that Rajkot Bench was not available, unless a fresh order retransferring the matter from the Ahmedabad Bench to Rajkot Bench was made, Ahmedabad Bench would be seized of the jurisdiction to hear and determine the miscellaneous application. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Finality of Order**

An appeal attains finality unless and until disturbed or modified as provided by statute. However, an order on appeal would take with in its sweep an order made under sub section (1) as well as order made under sub section (1) as rectified under sub section (2) of section 254. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Ex-parte order**

Where the Tribunal decided the case against the assessee ex-parte, setting aside such an ex parte order on the ground that the assessee for valid reasons could not attend the hearing of the case would not amount to review. (A.Y. 1984-85)

*CIT v. Gheru Lai Bal Chand (2003) 185 CTR 97 / 269 ITR 386 / 135 Taxman 525 (P&H)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Finality**

Power of rectification is to be exercised to remove an error or correct a mistake and not for disturbing finality. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – No power to deal with entire appeal afresh**

Power to rectify can be exercised even if a mistake has occurred at instance of party to appeal. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Debatable issue**

Tribunal can only make changes in original order consequent on rectification and it cannot go further and deal with entire appeal afresh. (A.Y. 1985-86)

*Prajantra Prachar Samity v. CIT (2003) 264 ITR 160 / 186 CTR 96 (Orissa)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Debatable issue**

A debatable issue does not come within scope of section 254(2). (A.Ys. 1987-88 to 1988-89)

*CIT v. Bhagwati Developers (P.) Ltd. (2003) 261 ITR 658 / 182 CTR 619 (Cal.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Amendment in law – Subsequent to Order of Tribunal**

Where amending law received assent of President subsequent to date of Tribunal's order, on basis of such retrospective amendment, Tribunal's order cannot be said to suffer from mistake apparent from record.

*CIT v. Sudhir S. Mehta (2003) 183 CTR 592 / 183 CTR 592 / 265 ITR 548 / 139 Taxman 54 (Bom.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Jurisdictional High Court – Rendered subsequently**

A decision of the jurisdictional High Court, even if rendered subsequently, would constitute a mistake apparent from the record investing an authority with jurisdiction to rectify the mistake. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Ignorance of decision of Supreme Court**

Order passed by Tribunal in total ignorance of decision of Supreme Court between same parties would be fit for rectification. (A.Y. 1991-92)

*CIT v. Daluram Mangilal (2003) 132 Taxman 791 / 185 CTR 254 / 265 ITR 278 (MP)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Reliance on a wrong provision of law**

Reliance on a wrong provision of law tantamounts to mistake apparent from the record.

*Seth Madan Lai Modi v. CIT (2003) 126 Taxman 129 / 261 ITR 49 / 179 CTR 67 (Delhi)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Mathematical error**

Tribunal is right in invoking jurisdiction under section 254(2) to rectify mathematical error in its order. (A.Y. 1989-90)

*CIT v. Devilal Soni (2003) 185 CTR 180 / 271 ITR 566 / 134 Taxman 08 (Raj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Point of contention**

In case a party before Tribunal invites attention of the Tribunal that a point or contention which is material for determining amount of tax payable has not been considered by the Tribunal, it would certainly constitute a mistake apparent from record within the meaning of section 254(2). (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2003) 130 Taxman 316 / 262 ITR 146 / 183 CTR 364 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Two views**

Petition under section 254(2) on an issue, on which two views were possible, to remand the matter back to assessing authority for giving assessee an opportunity to show cause against the assessment of amount as assessee's undisclosed income was not maintainable. (A.Y. 1985-86)

*Visalakshi Gandhi v. CIT (2003) 127 Taxman 625 / 260 ITR 323 / 181 CTR 523 (Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Failure to record a finding in relation to a second proposition**

Failure of Tribunal to record a finding in relation to second proposition in Sunil Siddharthbhai's case while applying first proposition, would constitute a mistake apparent from record. (A.Y. 1982-83)

*CIT v. Subodhchandra S. Patel (2003) 184 CTR 393 / 265 ITR 445 / 138 Taxman 185 (Guj.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Findings**

Tribunal's order of remand in respect of expenditure which was sought to be added under section 69C to find out its reasonableness could not be treated as a mistake apparent from record. (A.Ys. 1987-88, 1988-89)

*CIT v. Bhagwati Developers (P.) Ltd. (2003) 261 ITR 658 / 182 CTR 619 (Cal.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Two views**

On the question whether for assessment year 1989-90, assessee was entitled to benefit of section 80HH even though place where assessee's industry was located had ceased to be a notified backward area in year 1986, more than one view was possible and Tribunal's order allowing deduction could not be said to suffer from mistake apparent from record. (A.Y. 1989-90)

*CIT v. Electro Alloy Special Steel Castings (P.) Ltd. (2003) 128 Taxman 666 / 264 ITR 97 / 181 CTR 521 (Mad.)(High Court)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merger**

On the facts of the case, the High Court had reversed the order passed by the Tribunal holding that since the assessee had paid arm's length remuneration for services of its Indian agent, no further profits could be attributed to foreign enterprises in India under Article 7(1) of DTAA.

In such cases the application filed by the revenue under section 254 read with section 9 & 90 of the Income-tax Act, 1961 Article 7 of DTAA between India and Singapore was rendered infructuous as the impugned order of Tribunal had already merged with

the order passed by High Court & Tribunal had no jurisdiction to modify its earlier order. The revenue's application was therefore dismissed. (A. Y. 1999-2000).

*Dy. DIT v. SET Satellite (Singapore) Pte. Ltd. (2011) 43 SOT 1 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Mistake in order passed u/s. 254(2), cannot be rectified**

The miscellaneous application filed by the assessee against earlier order passed under section 254(2) is not maintainable only course open to the assessee is to file an appeal against the said order. (A. Y. 1995-96).

*Shri Padma Prakash (HUF) v. ITO (2011) 131 ITD 121 / 136 TTJ 257 / 51 DTR 2 / 87 ITR*

*135 / 8 ITR 135 (SB)(Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake apparent from the record – Powers – Stay**

Power of Tribunal to pass an order of stay is not confined to a case where an appeal is pending before Tribunal, but also extends to any proceedings relating to an appeal pending before it.

Application under section 254(2) is maintainable against order passed by Tribunal granting stay. (A. Y. 2007-08 and 2009-2010).

*ITO v. Vodafone Essar Ltd. (2011) 44 SOT 304 / 54 DTR 253 / 138 TTJ 284 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Income-tax (Appellate Tribunal) Rules 1963 Rule 34 – Rectifiable Order – Pronouncement**

Order pronounced at the conclusion of hearing, though not passed in writing, constitute an order of the Tribunal and the same could be rectified under section 254(2). (A. Y. 1999-2000 to 2004-05).

*ITO v. Meenakshi (Smt.) (2011) 128 ITD 1 / (2010) 128 TTJ 619 / 36 DTR 42 (TM)(Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Powers – Jurisdiction –Additional ground on recall – Not maintainable**

The Tribunal omitted to consider an issue. A Miscellaneous application was moved seeking to recall the order. The tribunal recalled the order and registry was directed to fix the appeal as far as ground regarding rent receipt was concerned. Assessee moved instant application seeking admission of additional ground that reopening was bad in law. Held that the statute permits bench, which originally heard the matter, to recall its order in its entirety or to recall in a limited way or to pass a corrigendum or correct certain mistakes apparent from record and bench has no jurisdiction to go into other issues other than one which was recalled. Hence, Assessee was not entitled to raise any additional ground. (A.Y. 1999-2000).



*Tokhem Enterprises v. ITO (2011) 132 ITD 375 / 144 TTJ 265 / 66 DTR 407 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Review or Recall**

Tribunal cannot recall its previous order unless there are manifest errors which are obvious, clear and self-evident. (A. Y. 2007-08)

*Sudhakar M. Shetty v. ACIT (2011) 139 TTJ 663 / 58 DTR 289 / 130 ITD 197 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Reference in log book**

In the log book of the author of the order of the Tribunal there is reference to CIT(A)'s order which contains the relevant findings on the issue of agency PE, there is also a reference to Departmental Representative's submission contesting the finding of the CIT(A) on this issue, therefore, assessee's plea that the question of agency PE was never raised before the Bench at the time of hearing of the appeal cannot be accepted. Tribunal having given its finding on the issue of agency PE which was actually raised before the Bench at the time of hearing of the appeal and arrived at its conclusions based on relevant reasoning, miscellaneous application filed by the assessee questioning the correctness of the view of the Tribunal without indicating any apparent error in the order of the Tribunal not maintainable. (A. Y. 1997-98).

*Reuters Limited v. Jt. CIT (2011) 62 DTR 322 / 48 SOT 246 (Mum.)(Trib.)*

*Editorial: Refer Jt. CIT v. Reuters Limited (2009) 33 SOT 301 / (2010) 133 TTJ 22 / (2011) 7 ITR 422 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Order pronounced**

Order pronounced by the Tribunal at the conclusion of hearing though not passed in writing, constituted an order of the Tribunal which could be rectified, however, order is not be recalled for the reasons that the judicial member has kept the matter pending with him after the order was pronounced and expressed his opinion to reopen the case after three months. (A.Ys. 1999-2000, 2004-05)

*ITO v. V. Meenakshi (Smt.) (2010) 36 DTR 42 / 128 TTJ 619 / 128 ITD 1 (TM)(Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Second Application**

Tribunal having taken a conscious decision in the order passed on the first Miscellaneous Application that its conclusion in the original order was not based on erroneous facts /and or misappreciation of facts on record that no legal contention going to the root of the matter remained to be considered, second Miscellaneous Application is not maintainable on the same set of facts.

*Kailashnath Malhotra v. Jt. CIT (2010) 36 DTR 1 / 129 TTJ 393 / (2011) 8 ITR 457 (TM)(Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Second Application**

When first Miscellaneous Application is rejected, second Miscellaneous Application is not maintainable. (A.Y. 1999-2000)

*Hexa Securities & Finance Co. Ltd. v. ITO (2010) 127 TTJ 510 / 33 DTR 557 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Specific and alternative ground**

A request made at the time of hearing, which has not been dealt with in the order of the Tribunal, constitutes an error in the order. The action of the Tribunal in setting aside the order of CIT(A) and upholding the action of the Assessing Officer in a case where the CIT(A) has not adjudicated on the specific grounds raised by the assessee and also on the alternate grounds raised, constitutes a mistake apparent on record.

*Puja Agencies Pvt. Ltd. v ACIT, BC&AJ P. 17, Vol.41-B, Part 6, March 2010.(Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Book Profit – Retrospective Amendment [S. 115JB]**

Retrospective amendment after passing order does not lead to "apparent mistake".

*ACIT v. GTL Ltd., (2010) Tax World–July P. 46. Vol xiv Part 1 V / BC&AJ P. 27, Vol. 42-B, Part 2, November 2010 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Subsequent decision of Jurisdictional High Court or Supreme Court**

Decision of the Supreme Court or the Jurisdictional High Court is binding on the Tribunal, and therefore, constitute an apparent error in the order, which is contrary to the principle laid down in the subsequent decision. Accordingly, the subsequent law laid down by the Supreme Court or the jurisdictional High Court has to be considered for rectifying the mistake under section 254(2) of the Income Tax Act 1961. (A.Y. 2004-05)

*V. R. Chittanandam v. ACIT (2010) 5 ITR 258 (Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Direction is expunged – Cost of Trademark**

Direction given to the Assessing Officer to assess the Capital Gain on transfer of trademark in question as short term capital gain if the same was registered within six months being an unworkable direction in as much as the cost thereof has nowhere been determined nor it is determinable, an error has crept in the order of the Tribunal and consequently the said direction is expunged. (A.Y. 1999-2000)

*Trent Brands v. ITO (2010) 133 TTJ 70 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Question pending before the High Court**

When the question was pending before the High Court, it was not right for the assessee to agitate it before the Tribunal. It is for the bench to decide whether there should be joint consideration by members before draft order finalised. Merely because there was no specific mention of each argument, the order could not be said to be vitiated by mistake apparent from the record. (A.Y. 2002-03)

*Tata Communications Ltd. v. Jt. CIT (2009) 317 ITR 1 (AT) / 124 TTJ 721 / 225 CTR 248 / 183 Taxman 444 / 28 DTR 1 (SB)(Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Judgement of Supreme Court – Jurisdictional High Court**

If an order passed by Tribunal is not in conformity with judgement of Supreme court or that of Jurisdictional High court rendered prior to or subsequent to impugned order, same constitute a mistake apparent from record.

*Kailasnath Malhotra v. Jt. CIT (2009) 34 SOT 541 (TM)(Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Non-Consideration of argument**

Non consideration of any argument advanced by either party for arriving at a conclusion is not an error apparent on record, although it may be an error of judgement and same can not be rectified under section 254(2). (A.Y. 1989-99)

*Essel Propack Ltd. v. ACIT (2009) 34 SOT 359 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – No power to Condone delay – Application filed after four years**

There is no provision to entertain the condonation of rectification application under section 254(2) of the Income-tax Act, therefore the Rectification Application filed after expiry of four years cannot be allowed.

*Rahul Jee & Co. v. ACIT (P) Ltd. (2009) 123 TTJ 217 / 120 ITD 481 / 22 DTR 329 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Omission to consider order of co-ordinate bench which was cited**

Omission to consider order of co-ordinate bench which was cited by the assessee, is mistake apparent rectifiable under section 2454(2).

*Paliwal Overseas Ltd. v. Dy. CIT (2008) 117 TTJ 427 / 8 DTR 638 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Pendency of departmental appeal**

When the fact of pendency of Departmental appeal was not pointed out at the time of hearing of the appeal of the assessee, it cannot be said that the Tribunal has committed an error while hearing only the assessee's appeal. (A.Y. 2003-04)

*ACIT v. Changepond Technologies Pvt. Ltd., M.P. No. 137/Mds/08, dt. 14-8-2008 – BCAJ P. 394, Vol. 40-B, Part 3, December 2008.(Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Subsequent decision of Jurisdictional High Court and Supreme court overruling the decision**

- (i) Where an order passed by Tribunal is based upon an interpretation or application of law which ultimately found to be wrong in light of subsequent judicial pronouncement which is rendered by jurisdictional High Court or Supreme Court would be always regarded as mistake apparent from record.
- (ii) Where an order passed by Tribunal is based upon a particular decision of High Court and if the same is reversed in further proceedings would justify a rectification within the provision of section 254(2).
- (iii) Where an order passed by Tribunal is based upon a particular decision of High Court which is overruled by a subsequent decision of Supreme Court then in that case the order of the Tribunal which was based on overruled decision could not be allowed to stand and therefore, the Tribunal is duty bound to pass an order in conformity with the law laid down by the Supreme Court. (A.Y. 1991-92)

*Jt. CIT v. Milton's Ltd. (2007) 106 ITD 478 / 112 TTJ 167 / 11 SOT 557 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Additional ground**

There being nothing on record to show that additional ground taken by the Revenue was ever sought to be argued for admission by the Departmental Representative, Tribunal committed no mistake rectifiable under S. 254 (2) in not considering the same in its appellate order.

*ACIT v. J & K Bank Ltd. (2007) 107 TTJ 135 / 104 ITD 316 (Amritsar)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Failure by Tribunal due to oversight or inadvertence to consider a ground raised in the memo of appeal**

Failure by Tribunal due to oversight or inadvertence to consider a ground raised in the memo of appeal is a mistake apparent rectifiable under section 254(2).

*NEPC India Ltd. v. Dy. CIT (2006) 103 TTJ 486 / 100 ITD 65 (Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Recall of ex parte order – Notice of hearing not received**

Absence of service of notice of hearing. Assessee having not received any notice of hearing of appeal and there being nothing on record to show that the notices allegedly sent by registered / ordinary post were received by the assessee or delivered to him, ex parte order passed by the CIT(A) is set aside with the direction to give an opportunity of hearing to the assessee and pass a fresh order after considering assessee's submission.

*Sanjeev Vats v. ACIT (2006) 103 TTJ 724 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Decision merged – Dismissal of appeal by High Court**

Appeal against the order of the Tribunal having been dismissed by the High Court, the decision of the Tribunal merged with the decision of the High Court and therefore, only the High Court has the power to consider and rectify the mistake, if any, in the order of the Tribunal and not the Tribunal. (A.Y. 1995-96)

*Bhawan Va Path Nirman (Bohra) & Co. v. ACIT (2006) 101 TTJ 169 / 101 ITD 101 (Jodh.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Delay in pronouncing the order**

Delay in pronouncing the order is no ground for rectification. (A.Ys. 1996-97 to 1998-99)

*British Airways Plc. v. Dy. CIT (2006) 101 TTJ 886 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Wrongly recorded the date of notice under section 142(1)**

Tribunal having wrongly recorded the date of notice under section 142(1) as 24th Aug., 1997, whereas the admitted correct date was 24th Aug., 1998, the mistake warranted rectification under section 254(2) as qua the correct date, the very issue of validity and jurisdiction of making assessment assumed importance. (A.Y. 1997-98)

*Shaw Wallace & Co. Ltd. v. Dy. CIT (2006) 101 TTJ 258 (Kol.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Order passed by Special Bench**

Order passed by Special Bench is one under section 254 and if it contains mistake apparent from the record, it is rectifiable under section 254(2). (A.Y. 1993-94)

*ACIT v. Apollo Tyres Ltd. (2006) 102 TTJ 15 / 6 SOT 478 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Miscellaneous petition filed by Representative of the Department – Not maintainable – Only by AO**

Miscellaneous petition of the Revenue is to be signed by the Assessing Officer and none else. Miscellaneous petition filed by the senior Authorised Representative of the Department is not maintainable. (A.Y. 1994-95)

*Dy. CIT v. Hydraulics Ltd. (2006) 100 TTJ 857 / 99 ITD 310 (Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Misappreciation of facts [S. 44BB]**

Tribunal having drawn presumption under section 44BB on misappreciation of facts that salary paid to expatriates had been deducted while computing profits of PE in India, order recalled under section 254(2) for decision afresh. (A.Y. 1988-89)

*Pride Foramer S. A. v. ACIT (2006) 100 TTJ 936 / 98 ITD 249 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Submissions raised by the assessee have been duly recorded and considered – Interest [S. 234B]**

If the submissions raised by the assessee have been duly recorded and considered by the Bench and a conscious decision has been taken it cannot be said that any mistake has been committed by the Tribunal. Tribunal having noted that the assessee had received payment and consciously held that the assessee committed default and is liable for interest under section 234B, it cannot be said that the Tribunal failed to consider the contention of the assessee and therefore, no rectification under section 254(2) was called for.

*Novartis AG Basle v. ACIT (2006) 101 TTJ 673 / 100 ITD 42 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Mere inordinate delay in pronouncing the order**

Mere inordinate delay in pronouncing the order by the Tribunal cannot be a ground for recalling the order by invoking section 254(2) as the validity of the order of the Tribunal cannot be the subject matter of proceeding under section 254(2)

*Novartis AG Basle v. ACIT (2006) 101 TTJ 673 / 100 ITD 42 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Exceeded its jurisdiction**

Whether the tribunal exceeded its jurisdiction in confirming disallowance on a ground other than the one taken by CIT(A) is not a matter which can be gone into in proceedings under section 254(2).

*Budhewal Co-operative Sugar Mills Ltd. v. Dy. CIT (2006) 102 TTJ 336 / 6 SOT 805 (Chd.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Stay of recovery – Vacated by operation of law**

Tribunal having earlier held that the stay granted stood vacated by operation of law, matter cannot be reconsidered and therefore, assessee is not entitled to any further relief of stay of recovery of demand. (A.Ys. 1990-91 to 1993-94)

*Anuradha Timber Estates v. Dy. CIT (2006) 101 TTJ 316 / 99 ITD 53 (Hyd.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Order recalled**

Assessee having been assessed under the jurisdiction of Hyderabad Benches of the Tribunal, and not Visakhapatnam Bench and therefore, order of the Visakhapatnam Bench passed in appeal is recalled and the registry is directed to transfer the appeal to Hyderabad Benches for adjudication. (A.Y. 2001-02)

*ACIT v. Chandrasekhar Transport (2006) 101 TTJ 840 (Visakha)(Trib.)*



**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Not restoring the matter to the file of CIT (A)**

Where particular issue has been omitted to be considered or has not been adjudicated properly or where perverse findings have been recorded in total disregard of material on record by lower authority, Tribunal is under legal obligation to issue directions to Commissioner (Appeals) for deciding such issues although no specific ground is taken for that purpose by concerned party; mistake on part of Tribunal in not restoring matter to Commissioner (Appeals) can be rectified by amending its earlier order. (A.Ys. 1992-93 and 1993-94)

*Shahid Atiq v. ITO (2005) 97 ITD 22 / 98 TTJ 971 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Jurisdictional High Court – Rendered prior or subsequent**

Non-consideration of a judgment of jurisdictional High Court constitutes a mistake apparent from record regardless of judgment being rendered prior to or subsequent to order proposed to be rectified. (A.Ys. 1995-96 and 1996-97)

*Datamatics Financial Services Ltd. v. Jt. CIT (2005) 95 ITD 23 / 95 TTJ 944 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Not incorporating arguments – Submissions etc.**

By not incorporating arguments, submissions, reference to paper books, etc., it could not be said that there was any mistake apparent from record in Tribunal's order.

*Naveen Grah Nirman Sahakari Samiti v. Competent Authority (2005) 92 TTJ 151 (Jp.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Applicability of article – Double taxation avoidance agreement**

Where assessee filed a miscellaneous application before Tribunal pointing out that impugned order of Tribunal was vitiated by a mistake apparent from record inasmuch as it was held by Tribunal that provisions of article 7 of India-Mauritius DTAA were not applicable to instant case, whereas authorities below had held that article 7 would apply, since Assessing Officer as well as Commissioner (Appeals) had held that provisions of article 7 were applicable to instant case, Tribunal did commit an error by going behind an uncontested finding of authorities below and disturbing that finding without invitation of either of parties to do so. *Integrated Feeder Container Services v. Jt. DIT (IT) (2005) 4 SOT 357 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Wrong conclusion**

Merely because Tribunal considered and did not allow a claim, even if conclusion is wrong, that will be no ground for moving an application under section 254(2), unless it can be said that there is a mistake apparent from record. (A.Y. 1997-98)

*Corrossion Roadlines v. Dy. CIT (2005) 92 ITD 181 / 92 TTJ 631 (TM)(Pune)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Jurisdictional High Court**

If view taken by Tribunal is found to be contrary to jurisdictional High Court's decision given subsequently, Tribunal's order is liable to be rectified. (A.Ys. 1990-91 and 1991-92)

*ACIT v. Hughes Services (FE) Pte. Ltd. (2005) 93 ITD 77 / 94 TTJ 815 (TM)(Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Non disposal of additional ground**

Non-disposal of additional ground by the Tribunal is an error on face of record. (A.Y. 1990-91)

*Alstom Ltd. v. Dy. CIT (2005) 95 TTJ 139 (Chennai)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Wrong Conclusion**

Merely because Tribunal has considered and has not allowed a claim, even if conclusion is wrong, that will be no ground for moving an application under section 254(2), unless it can be said that there is a mistake apparent from face of record. (A.Ys. 1990-91, 1991-92)

*Tivoli Investment & Trading Co. (P.) Ltd. v. ACIT (2005) 1 SOT 150 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Merger – Dismissal of appeal by High Court**

Doctrine of merger will not apply to cases where High Court dismisses appeal against order of Tribunal on ground that no substantial question of law is involved therein and in such a case, Tribunal may rectify a mistake in its order which is apparent from record. (A.Ys. 1991-92 and 1992-93)

*Electropack v. Dy. CIT (2005) 94 ITD 227 / 95 TTJ 275 (TM)(Ahd.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Tax effect**

Where Tribunal, following CBDT Instruction No. 1979, dated 27-3-2000 providing that Department should not file appeal where tax effect is below prescribed amount, dismissed appeal, it could not be said that Tribunal committed a mistake apparent from record which could be rectified under section 254(2). (A.Y. 1983-84 to 1985-86)

*ITO v. Bir Engg. Works (2005) 94 ITD 164 / 93 TTJ 257 (SB)(Amritsar)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Book profit – Amendment – Consequential order**

Where Tribunal while holding that the amendment to section 115 A by Finance Act, 1994 was clarificatory in nature, had not passed any consequential order or given any direction regarding the rate of charging of tax, Tribunal's order was required to be

rectified to apply rate prescribed in amended provision to earlier assessment years. (A.Ys. 19987-88 and 1989-90 to 1991-92)

*Sikkim Janseva Pratisthan (P.) Ltd. v. Dy. CIT (2005) 1 SOT 650 (Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake apparent from the record – Power of review**

Tribunal has no power to review its own order, and re-look into the matter and readjudicate even if vital points have not been properly appreciated. (A.Y. 1991-92)

*Auto Piston Mfg. Co. (P) Ltd. v. Dy. CIT (2003) 78 TTJ 815 / 130 Taxman 84 (Mag.)(Amritsar)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Failure to consider the arguments advanced by parties**

Failure of Tribunal to consider the arguments advanced by either parties is not mistake apparent on record.

*Paras Cold Storage & Ice Factory v. ACIT (2003) 84 ITD 108 / 79 TTJ 584 (Chd.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Certain decision not being considered by Tribunal**

Question of applicability of certain decision not being considered by Tribunal will justify rectification and not review. (A.Y. 1997-98)

*Finquick finance (P) Ltd v. Dy. CIT (2003) 87 ITD 323 / 81 TTJ 319 (TM)(Delhi)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Subsequent decision of the Jurisdictional High court**

Later decision of the jurisdictional High Court would not give rise to a mistake apparent on record for the purposes of rectification under section 254(2). (A.Y. 1991-92).

*Trilok Ship Breakers (P) LTD. v. ACIT (2003) 84 ITD 48 / 78 TTJ 766 (Mum.)(Trib.)*

**S. 254(2) : Appellate Tribunal – Order – Rectification of mistake – Inordinate delay in passing order**

Order passed by the Tribunal though after a delay of about one year after the arguments was not violative of any express provisions of IT Act. There was no mistake apparent from the order of the Tribunal and therefore, the same cannot be recalled on ground of inordinate delay. (A.Y. 1986-87 to 1996-97).

*Paras Cold Storage & Ice Factory v. ACIT (2003) 84 ITD 108 / 79 TTJ 584 (Chd.)(Trib.)*

**S. 254(2A) : Appellate Tribunal – Power – Stay – Extension of Period**

The Tribunal has power to extend period of stay beyond three hundred and sixty five days under the provisions of section 254(2A) of the Income-tax Act, 1961. (A. Y. 2003-04).

*CIT v. Ronuk Industries Ltd. (2011) 333 ITR 99 / 240 CTR 265 / 54 DTR 291 / 203 Taxman 90 (Mag.)(Bom.)(High Court)*

**S. 254(2A) : Appellate Tribunal – Power – Stay – Should dispose off stay granted appeals within time limit i.e. not beyond 365 days**

Income Tax Appellate Tribunal should dispose off stay granted appeals within time limit prescribed under section 254(2A) i.e., not beyond 365 days from the stay order. *Jethmal Faujimal Soni v. ITAT (2010) 38 DTR 174 / 231 CTR 332 / (2011) 333 ITR 96 (Bom.)(High Court)*

**S. 254(2A) : Appellate Tribunal – Stay – Power to grant Extension – Interim stay**

The power to grant stay or interim relief being inherent or incidental is not defeated by the provisos introduced under section 254(2A) by the Finance Act, 2007. The third proviso has to be read as a limitation on the power of the Tribunal to continue interim relief in case where the hearing of the appeal has been delayed for acts attributable to the assessee. The power of the Tribunal to continue interim relief is not overridden by the language of the third proviso to section 254(2A). There would be power in the Tribunal to extend the period of stay on good cause being shown and on the Tribunal being satisfied that matter could not be heard and disposed of for reasons not attributable to the assessee.

*Narang Overseas (P) Ltd. v. ITAT (2007) 165 Taxman 557 / 211 CTR 524 / 295 ITR 22 (Bom.)(High Court)*

**S. 254(2A) : Appellate Tribunal – Power – Stay – Proceedings Before Assessing Officer**

Tribunal can stay the proceedings before the Assessing Officer in exercise of its inherent powers as well as in view of the proviso to section 254(2A). The Tribunal disposed the stay application by directing the Assessing Officer to pass the assessment order by 31-12-2009 in accordance with the law but not to serve on the assessee, and thus not to give effect to the same for a period of a six months from the date of passing of its order or till date of passing of the appellate order, whichever is earlier.

*Pancard Clubs Ltd. v. Dy. CIT Stay No. 235/2009 dt. 18-12-2009 Bench C, BCAJ March, 2010 14. 642 (2010) 41-BCAJ (Mum.)(Trib.)*

**S. 254(2B) : Appellate Tribunal – Awarding cost – Failure to follow directions – Round of litigation**

Assessment made without following the directions of the CIT(A) and without giving adequate opportunity to the assessee. The Tribunal imposed cost of ` 5,000/- upon the appellant for the casual and irresponsible approach of the Assessing Officer, which led the assessee into two rounds of litigation. (A.Y. 1997-98)

*Dy. CIT v. Dalal Street Press Ltd., ITAT Bench 'B', - ITA No. 3756/Mum/2003, dated 20-6-2006 - BCAJ P. 403, Vol. 39-C, Part 4, January 2007 (Mum.)(Trib.)*

**S. 254(2B) : Appellate Tribunal – Binding – Precedent – Cost of appeal – Co-owner**

Assessing Officer having not followed the order of the CIT(A) and the CIT(A) also having not followed the order of the Tribunal dealing with an identical issue, the Assessing Officer as well as the CIT(A) acted against the law and their action amounts to judicial indiscretion and impropriety. Assessee is entitled to costs of appeal.

*Maj. Gen (Retd.) Kanwarjit Singh Gill L/H of Smt. Narinder Kaur Gill (Decd.) v. ACIT (2006) 101 TTJ 538 (Amritsar)(Trib.)*

**Section 255 : Procedure of Appellate Tribunal**

**S. 255 : Appellate Tribunal – Procedure – Functions – Constitution of Tribunal – Transfer and Posting of Members**

Central Government cannot confer upon itself statutory power of transfer and posting of members of Income Tax Appellate Tribunal. Long standing practice should be allowed to prevail over the stand of the respondents. The Court prescribed the guidelines regarding posting of members of the Tribunal.

*Ajay Gandhi & Anr. v. B. Singh & Ors. (2004) 265 ITR 451 / 134 Taxman 537 / 186 CTR 506 / 179 Taxation 433 (SC)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Jurisdiction – Single Member**

Single member of the Tribunal has jurisdiction to decide an appeal in case where income assessed by the Assessing Officer is below Rs. 5 lakhs even though the income is enhanced in appeal by CIT(A). (A.Y. 1996-97)

*CIT v. Mahakuteshwar Oil Industries (2008) 3 DTR 131 / 215 CTR 262 / 298 ITR 390 / 169 Taxman 277 (Karn.)(High Court)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Additional evidence – Income-tax (Appellate Tribunal) Rules 1963 [Rule 29]**

For the admission of the additional evidence, the assessee has to make an application to show cause why it should be admitted. The accounts of the assessee were rejected by Assessing Officer on the ground of non-production of stock register. The stock register constitutes additional evidence in that regard and hence stock register cannot be produced for the first time before ITAT without proper application. (A.Y. 1982-83)

*Bimal Kumar Anant Kumar v. CIT (2007) 288 ITR 278 / 210 CTR 171 / 159 Taxman 402 (All.)(High Court)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Difference of opinion – Matter sent back**

The Accountant Member by his order dismissed the appeals preferred by the revenue. After going through the order of the Accountant Member, the Judicial Member passed an order to the extent of allowing the appeals of the revenue partly for statistical purposes, thereby amounting to a disagreement between the two members. Instead of placing the matter before the President, as required under section 255(4), the Accountant Member subsequently changed his views and agreed with ultimate findings of the Judicial Member. The Hon'ble Court held there being an unresolved difference of opinion, the matter was sent back to the Tribunal, to pass an appropriate order in terms of section 255(4), for a resolution of the difference in the manner prescribed.

*Delhi Press Samachar Patra (P) Ltd. (2006) 155 Taxman 236 (Delhi)(High Court)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Abatement – Legal heirs on record – Income-tax Rules, 1963 – Rule 26 ITAT – CPC 1908, Order 22 [R. 4]**

Though Rule 26 of the ITAT Rules 1963, provides for bringing legal heirs of deceased on record, no time limit has been prescribed under that rule, and provisions of order 22 rule 4 of the CPC, 1908 have to be applied. Revenue having failed to bring the legal heirs of deceased assessee on record, in spite of giving reasonable opportunity the appeal of revenue was dismissed. (A. Ys. 1999-2000 to 2002-03).

*ITO v. Myeni Raghava Rao (2011) 139 TTJ 740 / 131 ITD 321 / 58 DTR 357 (Visakha)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Power – Vice President**

Vice President of the Tribunal has powers to prepone cases in order to streamline their disposal. (A.Ys. 1990-91 to 1994-95)

*K Raheja (P) Ltd. v. ACIT (2009) 124 TTJ 933 / 26 SOT 39 / 28 DTR 201 (Mum.)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Action by members**

A Bench of the Tribunal comprises of a Judicial Member and an Accountant Member. The powers and functions of the Tribunal are to be exercised by the Bench and not by the Members individually. It is imperative that two Members should act in unison and in harmony and the decision should be taken and arrived at after deliberations and discussions by the Bench. The litigant should have the feeling that the Bench is one and not two Members moving in opposite directions. For smooth functioning of the Benches and of the Institution as a whole individualistic approach and ego has to be suppressed by adopting fair, reasonable and objective approach aimed at advancing cause of justice. (A.Ys. 1995-96, 1996-97)

*Navin Kumar v. Jt. CIT (2006) 98 ITD 242 / 99 TTJ 267 (TM)(Amritsar)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Power – Third member – Jurisdiction**



Third member is competent to decide only the point or points on which the Members of the Bench originally hearing the case differed. New point raised by a party at the time of hearing cannot be considered. (A.Y. 1996-97)

*Dy. CIT v. Shripet Cybertech Systems Ltd. (2006) 103 TTJ 149 / 101 ITD 201 (Chennai)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Binding – Precedent – Third member – Special Bench**

Decision of the Special Bench even of three Members is entitled to all the weight and must have precedence over the decision of a Third Member. Regular Benches are required to follow and act upon the decision of Special Bench and in case its views are contradictory to the views of the Third Member, preference is required to be given to Special Bench

*Dy. CIT v. Padam Prakash (HUF) (2006) 104 ITD 1 / 288 ITR 1 (AT) / (2006) 104 TTJ 989 / 10 SOT 1 (SB)(Delhi)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Power – Additional evidence – Third Member**

Third Member has the power to take into consideration the additional evidence, if it is very essential to dispose of the question referred to the Third Member on merit, provided the additional evidence was at least tendered before the original Bench. (A.Ys. 1991-92, 1992-93)

*Ichalkaranji Co-operative Spinning Mills Ltd. v. Dy. CIT (2006) 103 TTJ 593 / 102 ITD 177 (Pune)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Reference to third member – Additional ground**

While acting under section 255(4), Tribunal does not have power to entertain an additional ground which was not subject-matter of point of difference between Members who originally heard appeal and was not even raised during course of original hearing before Division Bench.

*Rameshwar Soni v. ACIT (2005) 97 ITD 127 / 98 TTJ 1039 (Jodh.)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Opinion of third member – Formulation of new question**

The Third Member is competent to decide only the point on which the Members of the Bench originally hearing the case differed. He cannot himself formulate a new point on which he could base his decision. (A.Y. 1991-92)

*Jain Irrigation Systems Ltd. v. Dy. CIT (2003) 86 ITD 243 / 79 TTJ 347 / (2004) 1 SOT 664 (TM)(Pune)(Trib.)*

**S. 255 : Appellate Tribunal – Procedure – Functions – Power – Exercise powers of Civil Court [S. 131, 254]**

As per the Sec. 254, 255 and 131 the Tribunal can exercise powers of civil Court and could pass order in the nature of mandatory directions to the Department to refund/return the amounts recovered forcible during the pendency of the stay petitions and the income-tax appeals. Sec. 254 is very clear and gives wide power to this Tribunal to pass "such orders thereon as it thinks fit" according to facts and circumstances of each case and only requisite condition is that to give both the parties an opportunity of being heard. Therefore, the Tribunal has power to pass such appropriate orders in the facts and circumstances of each case to maintain judicial balance between the parties and therefore the powers under s. 254 would include power to grant stay which is incidental and ancillary to the appellate jurisdiction. While exercising the powers to grant stay, the Tribunal would be having all powers to grant stay in the nature of prohibitory, mandatory, or directory to order for return the amount already recovered by the Revenue in appropriate cases and to do justice between the parties. (A.Y. 1997-98).

*Western Agencies (Madras) Ltd. v. Jt. CIT (2003) 86 ITD 462 / 81 TTJ 284 (Mad.) (Trib.)*

#### **S. 255(4) : Appellate Tribunal – Procedure – Functions – Third member – Jurisdiction – Scope**

Jurisdiction of the third member is limited to the issue in the question referred to him and he is not supposed to investigate new facts beyond the scope of the question referred to him. (A. Y. 2004-05).

*Dy. CIT v. Akay Flavours & Aromatics (P) Ltd. (2011) 55 DTR 1 / 130 ITD 41 / 138 TTJ 513 (TM) (Cochin) (Trib.)*

#### ***C. [Reference to High Court]***

#### **Section 256 : Reference to High Court [Omitted by the National Tax Tribunal Act, 2005, with effect from a date yet to be notified]**

#### **S. 256 : High Court – Reference – Jurisdiction**

The Tribunal is a final fact finding authority. In a reference to the High Court, fact can only be gone into only where a finding of fact recorded by the Tribunal has been challenged on the grounds of perversity. (A.Ys. 1984-85 to 1987-88)

*Sudarshan Silks & Sarees v. CIT (2008) 216 CTR 12 / 300 ITR 205 / 169 Taxman 321 / 5 DTR 261 / 206 Taxation 195 (SC)*

#### **S. 256 : High Court – Reference – Question of Law – Agricultural Income Tax**

Even after the reference is made by the Tribunal directly or on the basis of the direction of the High Court, it is open to the High Court not to answer reference if no question of law is involved. (A.Ys. 1982-83, 1983-84)

*Comm. of Agricultural IT v. M. N. Moni (2007) 291 ITR 387 / 161 Taxman 207 / 210 CTR 82 (SC)*

### **S. 256 : High Court – Reference – Question of Law**

While dealing with question as to whether a question of law arises within meaning of section 256(2), instead of deciding to answer question, High Court should direct the Tribunal to refer question of law.

*CIT v. Nabhinandan Digamber Jain & Anr. (2003) 263 ITR 516 / 185 CTR 197 / 133 Taxman 663 / (2004) 178 Taxation 393 (SC)*

### **S 256 : High Court – Reference – Statement of case to the High Court**

Profits from sale of agricultural land ,whether exempt is finding by Tribunal that land was agricultural land not assessable as Capital Gains is a question of Fact. (A.Y. 1996-97)

*CIT v. Minguel Chandra Pais (2006) 282 ITR 618 / 200 CTR 152 / 149 Taxman 131 (Bom.)(High Court)*

### **S. 256 : High Court – Reference – Statement of case to the High Court – Power**

The issue before the Hon'ble High Court was whether it has the powers to recall an order passed ex parte in the absence of any such provision under the Act. The Hon'ble Court observed that in terms of section 256 a reference is made to the High Court. The High Court, therefore, is not a persona designate. While exercising its power, the High Court still acts as a constitutional authority and thus, can exercise its jurisdiction in a manner as it may think fit and proper. The High Court is not a creature of statute. It is now a well settled principle of law that a power of substantive review is required to be confirmed by statute. No such power is required to be expressly conferred upon a court in relation to exercise of its power of procedural review. Such a power inheres in every court, more so in the High Court.

*International Airports Authority of India v. CIT (2006) 154 Taxman 1 / 287 ITR 8 (Delhi)(High Court)*

### **S. 256 : High Court – Reference – Statement of case – Questions not referred**

It is out of several questions assessee seeks reference of question which is held to be question of fact, assessee cannot be permitted at time of hearing to address arguments on another question not referred. (A.Y. 1987-88)

*P.O. Basheer v. CIT (2005) 142 Taxman 48 / 192 CTR 188 (Ker.)(High Court)*

### **S. 256 : High Court – Reference – Scope – Power**

If it appears that based on established facts inference drawn is contrary to settled principles of law, in such cases High Court can interfere with conclusion arrived at by Tribunal on established facts

*Jayshree Tea & Industries Ltd. v. CIT (2005) 272 ITR 193 / 143 Taxman 143 / 194 CTR 244 (Cal.)(High Court)*

### **S. 256 : High Court – Reference – Scope – Power**

High Court cannot reappreciate evidence while dealing with petition under section 256(2). (A.Y. 1987-88)

*CIT v. Oberoi Textile (P.) Ltd. (2005) 276 ITR 634 / 144 Taxman 648 / 195 CTR 431 (P&H)(High Court)*

### **S. 256 : High Court – Reference – Scope – Power**

High Court, in exercise of jurisdiction conferred under section 256(2), cannot probe questions of fact, nor can it examine correctness of explanation offered by assessee. (A.Ys. 1988-89, 1989-90)

*Premier Proteins Ltd. v. CIT (2005) 142 Taxman 441 / 193 CTR 37 (MP)(High Court)*

### **S. 256 : High Court – Reference – Scope – Power**

When Tribunal decides any question by placing reliance on its earlier decision, then either Tribunal in its order refers in detail to view taken in that case and/or sends a copy of order as a part of statement of case to High Court, and only then High Court in its advisory jurisdiction can examine in its right perspective whether Tribunal was right in deciding question; parties cannot be allowed to file any documents in reference proceedings for first time

*CIT v. Abhishek Cineco (P.) Ltd. (2005) 275 ITR 280 / 144 Taxman 358 (MP)(High Court)*

### **S. 256 : High Court – Reference – Question arising out of order of Tribunal**

For a question to arise out of Tribunal's order, it must first be decided on its merit by Tribunal. (A.Ys. 1978-79 to 1981-82)

*CIT v. Thakur Das Aidasani (2005) 274 ITR 605 / 145 Taxman 96 / 193 CTR 315 (MP)(High Court)*

### **S. 256 : High Court – Reference – Question arising out of order of Tribunal**

Where interest paid was allowed by Tribunal under section 37(1), question referred as to whether such interest was allowed under section 36(1)(iii) could not be said to arise from Tribunal's order.

*CIT v. National Chemical Industries (2005) 142 Taxman 400 (Delhi)(High Court)*

### **S. 256 : High Court – Reference – Academic questions**

Where issue in question had already been settled by Supreme Court's decision and regular assesment under section 143(3) was in progress, no useful purpose could be served by calling for reference under section 256(2).

*CIT v. Vipry Solvex Products Ltd. (2005) 143 Taxman 363 (MP)(High Court)*

### **S. 256 : High Court – Reference – Infructuous Reference**

Where reference is at assessee's instance and assessee does not appear before High Court, reference is not fit one to be answered

*Banoo E. Cowasji (Mrs) v. CIT (2005) 276 ITR 594 (MP)(High Court)*

### **S. 256 : High Court – Reference – Infructuous Reference**

Where another reference arising out of same impugned order of Tribunal, covering same question of law and same assessee had already been allowed in favour of revenue, in view of comprehensive question of law already framed and called by instant court by its order, instant reference application had become infructuous. (A.Y. 1987-88)

*CIT v. Vijaykumar Rajendrakumar & Co. (2005) 142 Taxman 85 (MP)(High Court)*

### **S. 256 : High Court – Reference – Power Review**

Review cannot be treated like an appeal in disguise and mere possibility of two views on subject cannot be a ground for review

*Appropriate Authority v. Rasiklal M. Dhariwal (2005) 277 ITR 370 / 144 Taxman 704 / 193 CTR 377 (Guj.)(High Court)*

### **S. 256 : High Court – Reference – Binding – Precedence**

Where revenue has not challenged correctness of law laid down by High Court and has accepted it in case of one assessee, then it is not open to revenue to challenge its correctness in case of other assessees, without just cause. (A.Y. 1986-87)

*CIT v. Janakiram Mills Ltd. (2005) 275 ITR 403 / 146 Taxman 40 / 196 CTR 551 (Mad.)(High Court)*

### **S. 256 : High Court – Reference – Binding – Precedence**

Where Tribunal declined to follow jurisdictional High Court's decision on ground that it did not lay down correct law, a question of law arose from Tribunal's order.

*National Textile Corpn. Ltd. v. CIT (2005) Tax LR 684 / 150 Taxman 39 / 203 CTR 374 / 286 ITR 496 (MP)(High Court)*

### **S. 256 : High Court – Reference – Filing of appeal – Tax effect is small**

CBDT Circular dated 27-3-2000 to effect that revenue should not file appeal where tax effect is less than that prescribed in that Circular (` 2 lakhs) is also applicable to old referred case. (A.Y. 1975-76)

*CIT v. Pithwa Engg. Works (2005) 276 ITR 519 / 197 CTR 655 (Bom.)(High Court)*

### **S. 256 : High Court – Reference – Writ Jurisdiction – The constitution of India [Article 226]**

Writ cannot be entertained where assessee is simply aggrieved by what he terms as excessive deduction of tax at source

*P.K. Bhattacharya v. Steel Authority of India Ltd. (2005) 193 CTR 285 (Delhi)(High Court)*

### **S. 256 : High Court – Reference – Writ Jurisdiction – The constitution of India [Article 226]**

Object of article 226 of the Constitution is enforcement and not establishment of right or title and, hence, a petition under article 226 cannot be converted into a suit and High Court cannot take up adjudication of disputed facts

*M.S. Associates v. Union of India* (2005) 275 ITR 502 / 147 Taxman 172 / 196 CTR 318 (Gau.)(High Court)

### **S. 256 : High Court – Reference – Writ Jurisdiction – The constitution of India [Article 226]**

Where appeal has been filed against assessment order, simply because appeal has not been decided, it would not give a cause to assessee to file writ petition under article 226. (A.Y. 2001-02)

*D.D. Shah & Bros. v. UOI* (2005) 278 ITR 572 / 143 Taxman 292 (Raj.)(High Court)

### **S. 256 : High Court – Reference – Writ Jurisdiction – The constitution of India [Article 226]**

Revisional jurisdiction cannot be an efficacious and alternative remedy to discourage writ court to entertain writ petition. (A.Y. 1984-85)

*Peico Electronics & Electricals Ltd. v. Dy. CIT* (2005) 278 ITR 319 / 199 CTR 407 (Cal.)(High Court)

### **S. 256 : High Court – Reference – Writ Jurisdiction – The constitution of India [Article 226]**

Where though assessee's registered office was at Moradabad, its principal place of business was in Calcutta and assessee filed return in Calcutta and was assessed in Calcutta, Calcutta High Court had jurisdiction to entertain writ against notice issued to assessee by Assessing Officer, Moradabad, to file returns

*India Glycols Ltd. v. CIT* (2005) 274 ITR 137 / 145 Taxman 549 / 196 CTR 191 (Cal.)(High Court)

### **S. 256 : High Court – Reference – Issue settled by Apex court**

If question sought to be referred is covered by Supreme Court decision, it is not necessary to allow application under section 256 (2). (A.Y. 1989-90)

*Sanmati Forest Industries (P.) Ltd. v. CIT* (2005) 142 Taxman 75 / 191 CTR 490 (MP)(High Court)

### **S. 256 : High Court – Reference – Precedent – Order of another Bench**

It is a general policy in income-tax matters that whatever the view of the bench at the time of hearing may be, bench should follow the view taken by another High Court on interpretation of a section. (A.Y. 1995-96)

*CIT v. SAE Head Office Monthly paid employees Welfare Trust* (2004) 271 ITR 159 / 141 Taxman 364 / 192 CTR 70 (Delhi)(High Court)

### **S. 256 : High Court – Reference – Reliance of decisions**



Court should not place reliance on decisions without discussing as to how factual situation fits in with the fact-situation of decision on which reliance is placed. (A.Ys. 1982-83 to 1984-85)

*Vinay Extraction (P.) Ltd. v. Vijay Khanna (2004) 271 ITR 450 / 140 Taxman 67 / 190 CTR 495 (Guj.)(High Court)*

#### **S. 256 : High Court – Reference – Review – Omission to consider Circular**

Omission to consider a circular by High Court would not be ground for review of its order.

*CIT v. Ruby Traders & Exporters Ltd. (2004) 270 ITR 526 / 192 CTR 618 (Cal.)(High Court)*

#### **S. 256 : High Court – Reference – Mistake – Review**

In exercise of jurisdiction to review, High Court cannot correct any mistake which is not apparent on face of record but requires long drawn argument to establish same or in respect where of two opinions are possible

*CIT v. Ruby Traders & Exporters Ltd. (2004) 270 ITR 526 / 192 CTR 618 (Cal.)(High Court)*

#### **S. 256 : High Court – Reference – Tax effect**

Effect of circular by which a decision has been communicated that appeal under section 260A/ reference under section 256 (2) before High Court should not be filed where amount of tax involved is less than ` 2 lakhs. (A.Y. 1976-77)

*CIT v. Dhampur Sugar Mills Co. Ltd. (2004) 270 ITR 576 / 142 Taxman 468 (All.)(High Court)*

#### **S. 256 : High Court – Reference – Small tax effect**

In a case where total amount involved is less than ` 30,000/- reference should be returned unanswered.

*CIT v. Padampat Singhanian (2004) 136 Taxman 200 (All.)(High Court)*

#### **S. 256 : High Court – Reference – Finding contrary to law laid down by Apex court**

If finding of Tribunal is clearly contrary to law laid down by Apex Court, a question of law would arise. (A.Y. 1985-86)

*CIT v. Munak Engineering (P.) Ltd. (2004) 271 ITR 361 / 190 CTR 403 (P&H)(High Court)*

#### **S. 256 : High Court – Reference – Specific question – Perverse**

In absence of a specific question challenging findings of fact of Tribunal as perverse, finding of Tribunal cannot be held as perverse. (A.Y. 1984-85)

*CIT v. Jibie K. John (2004) 265 ITR 73 / 135 Taxman 409 (Ker.)(High Court)*

#### **S. 256 : High Court – Reference – Issue settled by Supreme court**

Reference will not lie on an issue settled by Supreme Court. (A.Y. 1989-90)  
*CIT v. P.M. Steels (P.) Ltd. (2004) 141 Taxman 311 / 191 CTR 45 (MP)(High Court)*

**S. 256 : High Court – Reference – Writ – Alternative remedy – Constitution [Article 226]**

If writ is entertained and a direction has already been given for filing affidavit, and at that time of final hearing, plea of existence of alternative remedy cannot be raised. (A.Y. 1993-94)

*CESC Limited v. ITO (2004) 140 Taxman 646 / (2005) 272 ITR 513 / 192 CTR 557 (Cal.)(High Court)*

**S. 256 : High Court – Reference – Writ – Alternative remedy – Constitution [Article 226]**

Writ is not maintainable against order of commissioner (Appeal) as there is an alternative remedy of appeal to Tribunal against such order.

*Omprakash Bagadia (HUF) v. CIT (2004) 267 ITR 604 / 139 Taxman 275 (MP)(High Court)*

**S. 256 : High Court – Reference – Writ – Jurisdiction – The Constitution of India [Article 226]**

Where plea of jurisdiction was not raised by revenue at time of admission of petition when court entertained petition and passed an interim order, such plea by necessary implication must be taken as waived by revenue. (A.Y. 1990-91)

*Biswanath Tea Co. Ltd. v. Dy. CIT (2004) 267 ITR 687 / 140 Taxman 568 / 190 CTR 186 (Cal.)(High Court)*

**S. 256 : High Court – Reference – Writ – Alternative remedy – Constitution [Article 226]**

Writ petition against an order under section 273 or under section 154 (passed Commissioner) cannot be refused on ground of not availing alternative remedy. (A.Ys. 1984-85 to 1990-91)

*Satish Kapur v. CIT (2004) 265 ITR 673 / 136 Taxman 288 / 187 CTR 109 (Cal.)(High Court)*

**S. 256 : High Court – Reference – Writ Remedy – The Constitution of India [Article 226]**

When show – cause notice is questioned on ground of bar of limitation, it is not a case of inherent lack of jurisdiction and as such writ against show cause notice will not be maintainable. (A.Y. 1970-71)

*Soumyendra Chandra Gooptu (Dr). v ITO (2004) 270 ITR 170 / 192 CTR 472 / 148 Taxman 199 (Cal.)(High Court)*

**S. 256 : High Court – Reference – Writ – Territorial jurisdiction – The Constitution of India [Article 226]**

Territorial jurisdiction where writ is filed against notice and order under section 226(3). Revenue took the plea that Writ is not maintainable at Calcutta High court as the TRO did not have his place of business within the territorial limits of the Calcutta High Court as the impugned order was passed at Delhi.

The court held that as the notice under section 226 (3) was previously served within the territorial limit of the Calcutta High Court, and the petitioner was able to make out prima facie jurisdictional fact partly in order to get the relief in the matter. The Calcutta High Court had the jurisdiction based on cause of action, not in relation to the places of business of the respondents as it was permissible under article 226 (2) of the Constitution of India.

*Shaw Wallace & Co. Ltd. v. Union of India (2004) 269 ITR 88 / 191 CTR 223 (Cal.)(High Court)*

### **S. 256 : High Court – Reference – Perverse**

Findings of fact may also form a basis of a question of law if inference drawn from facts found is not in consonance with legal principles or findings are perverse and in such a case High Court may interfere.

*Hindusthan Tea Trading Co. Ltd. v. CIT (2003) 129 Taxman 601 / 263 ITR 289 / 182 CTR 585 (Cal.)(High Court)*

### **S. 256 : High Court – Reference – Small tax effect – Circular**

In spite of Circular directing department not to file appeal where tax effect is less than 25000, if the department wants to file reference application, the court should entertain that. (A.Y. 1988-89)

*CIT v. Registhan (P.) Ltd. (2003) 131 Taxman 505 / 186 CTR 260 (Raj.)(High Court) / CIT v. Registhan (P.) Ltd. (2003) 132 Taxman 894 / 185 CTR 283 (Raj.)(High Court)*

### **S. 256 : High Court – Reference – Binding – Precedent – Per incuriam**

A judgment can be said to be per incuriam only if it is rendered in ignorance of provisions of a statute or a rule having statutory force or a binding authority; but if relevant provisions of Act and binding judgments have been considered by Court in its judgment, then it cannot be said that judgment was delivered in ignorance of relevant provisions of Act or binding precedent. (A.Ys. 1992-93, 1997-98, 1999-2000)

*Saroop Lai Adlakha v. Dy. CIT (2005) 97 ITD 6 / 99 TTJ 724 (Delhi)(Trib.)*

### **S. 256 : High Court – Reference binding – Precedent – Other benches**

Judgement of Bombay High Court would not be binding on Chandigarh bench of Tribunal, even if same is the only High Court judgement available on the issue involved. (A.Y. 1994-95)

*ACIT v. Avon Cycles Ltd (2003) 86 ITD 156 / 82 TTJ 127 (Chd.)(Trib.)*

## **Section 257 : Statement of case to Supreme Court in certain cases**

### **S. 257 : Supreme Court – Statement – Appellate Tribunal – Speaking order – Judicial propriety**

The revenue placed reliance upon the Bombay High Court decision but the Tribunal instead of dealing with the same referred to other co-ordinate Mumbai Bench decision which though contained reference to the Bombay High Court's decision. The Delhi High Court held that judicial propriety demands that when there was a judgment of a superior Court, that judgment should be considered by Tribunal and clear reasons should be given as to why that decision was distinguishable either in its own words or in words of co-ordinate Benches. The High Court held that merely mentioning decision without otherwise referring to the facts or the law laid down in that decision does not amount to considering the decision. The appeal stood remanded to the Tribunal for a fresh disposal on merits.

*CIT v. Havell's (P) Ltd. (2007) 165 Taxman 510 (Delhi)(High Court)*

### **Section 260 : Decision of High Court or Supreme Court on the case stated**

#### **S. 260 : Decision of court – High Court – Reference – Power**

In second appeal, High Court is not entitled to set-aside concurrent findings of fact by giving its own findings contrary to evidence on record.

*Mahalingappa (G.) v. G. M. Savitha (2005) 147 Taxman 583 (SC)*

#### **S. 260 : Decision of court – High Court – Binding – Precedent**

Even if the High Courts have consistently taken an erroneous view, it would be worthwhile to let the matter rest, since large number of parties have modulated their legal relationship based on this settled position of law.

*UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 / 132 Taxman 373 / 184 CTR 450 (SC)*

#### **S. 260 : Decision of court – High Court – Academic interest**

From the provisions of section 260, it does not follow that Court is bound to answer question of law referred to it by Tribunal for its opinion or to give its decision even where a question raised is only and purely of academic interest and does not resolve the real controversy.

*CIT v. G.B.H. Exporters (2003) 133 Taxman 693 / 184 CTR 563 / 271 ITR 545 (Raj.)(High Court)*

#### **S. 260 : Decision of court – High Court – On case stated – Opportunity of hearing [S. 254]**

Though Tribunal is required to dispose of the appeal in conformity with the opinion expressed by High Court, that does not take away effect of section 254, which specifically provides for giving opportunity of hearing to parties in appeal.

*T. Raghavan v. ITAT (2003) 262 ITR 257 / 191 CTR 179 / 138 Taxman 265 (Mad.)(High Court)*

## ***CC. Appeals to High Court***

### **Section 260A : Appeal to High Court**

#### **S. 260A : Appeal – High Court – Substantial question of law – Cash credit [S. 68]**

It is manifest from a bare reading of section 260A of the Income Tax Act, 1961, that an appeal to High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the order of Tribunal, it is mandatory that such questions must be formulated. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and / or while arriving at the said finding, relevant evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. On the facts the Tribunal has given a finding that the assessee has failed to prove the source of cash credit satisfactorily hence, no question of law arise from the order. (A. Y. 1983-84).

*Vijay Kumar Talwar v. CIT (2011) 330 ITR 1 / 1 SCC 673 / 236 CTR 454 / 196 Taxman 136 / 48 DTR 179 (SC)*

#### **S. 260A : Appeal – High Court – Condonation of delay – Long delay due to procedural reasons in filing Dept. appeals cannot be condoned**

The SLP challenging the order of the Bombay High Court declining to condone delay of 656 days in filing the appeal was dismissed on the basis that several facts such as non traceability of case records, procedural formalities involved in the Department and the papers are to be processed through different officers in rank for their comments, approval etc. and then the preparation of the draft of appeal memo, paper book and the administrative difficulties such as shortage of staff does not make sufficient cause for condonation of delay.

*CIT v. Indian Hotels Co. Ltd. SLP Appeal (Civil) No. 21087/2010 dated 9-5-2011 (SC)*  
Source : [www.itatonline.org](http://www.itatonline.org)

#### **S. 260A : Appeal – High Court – Condonation of delay – Appeal by department**

The department delayed in filing appeal in the matter involving huge stakes. The High Court dismissed the appeal. Held, considering the amount of tax involved, the High Court ought to have decided the appeal before it on the merits. The matter was remanded to the High Court to decide de novo in accordance with law.

*CIT v. West Bengal Infrastructure Development Finance Corp. Ltd. (2011) 334 ITR 269 / 56 DTR 351 / 241 CTR 504 / 196 Taxman 321 (SC)*

#### **S. 260A : Appeal – High Court – Limit of 10 laks – CBDT's low tax effect circular not applicable to matters having "cascading effect"**

The High Court, relying on CBDT's Instruction No. 3/2011 dated 9-2-2011, dismissed the department's appeal as not maintainable on the ground that the tax effect was less than ₹ 10 lakhs. The department filed a SLP in the Supreme Court. The Apex Court allowing the petition held that, Liberty is given to the Department to move the High Court pointing out that the Circular dated 9th February, 2011, should not be applied ipso facto, particularly, when the matter has a cascading effect. There are cases under the Income-tax Act, 1961, in which a common principle may be involved in subsequent group of matters or large number of matters. The High Court shall not apply the Circular ipso facto. For that purpose, liberty was granted to the Department to move the High Court in two weeks.

*CIT v. Surya Herbal Ltd. (2011) 60 DTR 165 / 243 CTR 327 / 243 CTR 327 / 202 Taxman 462 (SC)*

**S. 260A : Appeal – High Court – Assessment – Article 226 of the Constitution – Opportunity to cross-examine – Alternative remedy – Validity of order [S. 143]**

Instead of setting aside the assessment order, the High Court should have directed the Assessing Officer to grant opportunity to the assessee to cross-examine the concerned witness; further, assessee having failed to avail the statutory remedy of appeal, High Court should not have quashed the assessment proceedings under section 226 of the Constitution, assessee given liberty to move CIT(A).

*ITO v. M. Pirai Choodi (2011) 334 ITR 262 / 245 CTR 233 / 63 DTR 187 (SC)*

**S. 260A : Appeal – High Court – Condonation of delay – Departmental Appeal**

The High Court dismissed the department's appeal on the ground of delay. On appeal to Supreme Court, the Court held that looking to the amount of tax involved in this case, we are of the view that the High Court ought to have decided the matter on merits. The Court further observed that in all such cases where there is delay on the part of the department, we request the High Court to consider imposing costs but certainly it should examine the cases on merits and should not dispose of cases merely on the ground of delay, particularly when huge stake is involved.

*CIT v. West Bengal Infrastructure Development Finance Corp. (2011) 241 CTR 504 / 334*

*ITR*

*269 / 196 Taxman 321 / 56 DTR 351 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Cash Credits [S. 68]**

All the authorities below, in particular the Tribunal, having observed in unison that the assessee did not produce any evidence to rebut the presumption drawn against him under section 68 by producing the parties in whose names the impugned amounts were credited in assessee's books of account, the conclusion of the Tribunal to the effect that the assessee has failed to prove the source of the cash credits cannot be said to be perverse, giving rise to a substantial question of law and therefore, no interference is warranted. (A.Y. 1983-84)



*Vijay Kumar Talwar v. CIT (2010) 236 CTR 454 / 48 DTR 174 / 330 ITR 1 / 196 Taxman 136 (SC)*

**S. 260A : Appeal – High Court – Condonation of Delay – Amendment**

In view of the amendment of the Act, giving power to the High Court to condone the delay in filing appeals, liberty is given to the department to move the High court by way of review of the impugned order dismissing department's belated appeal on the ground that it has no power to condone the delay. (A.Y. 1996-97)

*CIT v. ICICI Bank Ltd. (2010) 38 DTR 319 / 231 CTR 439 (SC)*

**S. 260A : Appeal – High Court – Substantial question of law – Expenditure on know how [S. 35AB]**

After insertion of section 35AB, of the Income Tax Act 1961, providing for allowance of expenditure on know-how, the question whether royalty paid as a percentage of the net sale price for transfer of technology and know how was revenue or capital would be a substantial question of law. The Supreme Court, accordingly, set aside the decision of the High Court and remitted the matter for a fresh consideration. (A.Y. 1995-96)

*CIT v. Swaraj Engineers Ltd. (2009) 309 ITR 443 / 216 CTR 365 / 171 Taxman 495 / 7 DTR 65 (SC)*

**S. 260A : Appeal – High Court – Delay of 481 days – Twenty years old appeal – SLP rejected – Direction to take an appropriate action to the officer concerned**

SLP filed by the Income Tax Department with a delay of 481 days relating to the matters which were more than twenty years old where no action had been taken against officers for whose default delay had occurred SLP was dismissed with the direction to Commissioner to consider desirability of taking appropriate action(s) against officers for whose fault delay had occurred.

*CIT v. Indian Express (Mum.) (P) Ltd. (2009) 180 Taxman 476 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Remand to High Court**

Case was remanded to High Court for a fresh decision in accordance with law, after framing a substantial question of law, in the light of judgment of Supreme Court, in Mahesh Maheswari v. ACIT (2007) 289 ITR 341 / 159 Taxman 258 (SC).

*Anwar Pasha v. CIT (2008) 167 Taxman 222 / 208 CTR 97 (SC)*

**S. 260A : Appeal – High Court – Condonation of Delay – Amendment**

In view of the amendment of the Act, giving power to the High Court to condone the delay in filing appeals, liberty is given to the department to move the High Court by way of review of the impugned order dismissing Department's belated appeal on the ground that it has no power to condone the delay.

*CIT v. ICICI Bank Ltd. (2008) 220 CTR 12 / 175 Taxman 193 / (2009) 208 Taxation 671 / (2010) 38 DTR 319 / 231 CTR 439 / 14 DTR 246 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Depreciation – Used – Block of Assets [S. 32(1), 43(6)(c)]**

The Appellate Tribunal had examined the statements of the witness and after analysing the material on record had come to the conclusion that there was nothing to show that the machinery of the assessee had remained idle for the entire block period April 1, 1998 to February 24, 1999 and the High Court had not admitted the appeal on the question of Law raised by the Department on this point. On appeal to the Supreme Court, the contention of the Department was that for allowance of depreciation to the assessee, particularly after the introduction of the concept "block of assets" in section 32 of the Income Tax Act 1961, the only requirement apart from the ownership was that the asset was put to actual use. The Supreme Court dismissed the appeal, agreeing with the view expressed by the Appellate Tribunal to the effect that the asset was actually used and held that it was not necessary for the Court to go into the larger question of law regarding the connotation of the word "used" in section 32 of the Income tax Act.

*Dy. CIT v. N. K. Industries Ltd. (2008) 305 ITR 274 / 216 CTR 114 / 170 Taxman 22 / 6 DTR 131 / (2009) 208 Taxation 673 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Validity of notice u/s. 142(1), 143(2)**

Assessee throughout had raised the question that reassessment made on him only after notice under section 142(1) was invalid as no notice was given within one year under section 143(2). The Supreme Court held that dismissal of appeal at preliminary stage was not proper. The High Court was directed to entertain and decide the substantial question of law. (A.Y. 1997-98)

*L. N. Hota & Co. v. CIT (2008) 301 ITR 184 / 215 CTR 481 / 168 Taxman 313 / 5 DTR 34 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Capital Gains – Conversion of Firm into Company – Part IX – Revaluation of Assets [S. 45(1), 45(4)]**

The questions (i) whether the revaluation of the assets of a firm on conversion to company would result in capital gains and (ii) whether there is no transfer involved when a firm itself registered as a company are substantial questions of law under section 260A of the Income Tax Act, 1961. Decision of High Court reversed and directed the High Court to fix the appeal for disposal at the earliest. (A.Y. 1995-96)

*CIT v. Well Pack Packaging (2008) 220 CTR 538 / 174 Taxman 102 / (2009) 309 ITR 338 / 16 DTR 73 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Remitted to High Court**

Where High Court had disposed of appeal without considering as to whether a substantial question of law was involved or without framing question(s) of law, case was remitted to High Court for fresh decision. (A.Y. 1989-90)

*Consolidated Engg. Enterprises v. ACIT (2008) 167 Taxman 223 (SC)*

### **S. 260A : Appeal – High Court – Substantial Question of Law – Remitted back to High Court**

Where High Court failed to frame substantial question of law as required under section 260A and interfered with concurrent findings given by the Commissioner (Appeals) and Tribunal without giving any reasons, matter was to be remitted to the High Court for reconsideration.

*P. Iya Nadar Charitable Trust v. CIT (2008) 167 Taxman 224 (SC)*

### **S. 260A : Appeal – High Court – Clearance of COD – Delay not fatal**

In *Oil & Natural Gas Commission vs. Collector of Central Excise* [1995] Supp. 4 SCC 541 / (2004) 6 SCC 437, while imposing the necessity for obtaining clearance from the Committee within one month did not indicate any rigid frame, mere existence of some delay in approaching the committee does not make the action illegal.

*CIT v. Oriental Insurance Co. Ltd. (2008) 304 ITR 55 / 172 Taxman 92 / 217 CTR 593 / 10 DTR 113 / 206 Taxation 537 (SC)*

### **S. 260A : Appeal – High Court – Summary Dismissal by High Court – Speaking Order**

Matter remanded back to the High Court for fresh consideration on merits as the High Court had merely dismissed the appeal of the assessee stating that no substantial question of law arose, without passing a speaking order.

*Speed Lines (P) Ltd. v. CIT (2008) 214 CTR 13 / 170 Taxman 243 / (2009) 316 ITR 102 (SC)*

### **S. 260A : Appeal – High Court – Appeal by the Revenue – Rule of Consistency**

When the revenue had not filed any appeal in other assessment year, it would be precluded from filing the appeal in the relevant assessment year on identical facts. (A.Ys. 1972-73, 1975-76 to 1982-83)

*CIT v. J. K. Charitable Trust (2008) 220 CTR 105 / 175 Taxman 251 / (2009) 308 ITR 161 / 15 DTR 41 / 210 Taxation 64 (SC)*

### **S. 260A : Appeal – High Court – Legislature intention – Duty of judge – Code of Civil Procedure Code 1908 [S. 100]**

Judges must administer law according to the provisions of law. It is the bounden duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. Indiscriminate and frequent interference under section 100 C.P.C. in cases which are totally devoid of any substantial question of law is not only against the legislative intention but is also the main cause of huge

pendency of Second Appeals in the High Courts leading to colossal delay in the administration of justice in civil cases in our country.

*Gurudev Kaur & Ors. v. Kaki & Ors. (2007) 1 SCC 546 (SC)*

**S. 260A : Appeal – High Court – Question of law – Refund – Interest [S. 244(1A)]**

When a question of law was admitted for the next assessment year, the appeals for the earlier years involving same issue also required to be admitted on the issue regarding the allowability of interest on refund when no claim is needed and the date from which to be reckoned. The matter remitted to the High Court for a fresh consideration.

*R. R. Holding (P) Ltd. v. CIT (2006) 284 ITR 674 / 204 CTR 35 / 155 Taxman 1 (SC)*

**S. 260A : Appeal – High Court – Charitable Trust – Question of Law – Donation – Foreign Contribution (Regulation) Act, 1976 [S. 11, 12]**

The assessee, a charitable trust, had received a sum of ` 30 lakhs, from Dubai in violation of the Foreign Contribution (Regulation) Act, 1976. The Tribunal held that the assessee entitled to exemption under section 11 and 12 of the Income Tax Act, 1961. The High Court dismissed the department's appeal under section 260A, observing that no substantial question of law arose. On appeal to Supreme Court, reversing the order of the High Court remitted the matter to the High Court for a fresh consideration as the matter required deeper consideration and the appeal could not have been dismissed on the ground that no substantial question of law arose.

*DIT v. Jag Shanti Charitable Trust (2006) 285 ITR 227 / 205 CTR 124 / 156 Taxman 148 (SC) / (2005) 13 SCC 692*

**S. 260A : Appeal – High Court – Third Party – The Constitution of India [Article 226]**

The petitioner, being a third party cannot seek any remedy by way of writ of mandamus directing the authorities to file appeals against the orders passed. An appeal is a statutory remedy available and it is not open to a third party to seek such remedies in collateral proceedings.

*Rajiv Ranjan Singh 'Lalan' & Anr. v. Union of India & Anr. (2006) 205 CTR 53 / 156 Taxman 512 (SC)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Memorandum of Appeal**

Without insisting on statement of substantial question of law in memorandum of appeal and formulating the same at time of admission, High Court is not empowered to generally decide appeal under section 260A. (A.Y. 1995-96)

*Janardhan Rao (M.) v. Jt. CIT (2005) 273 ITR 50 / 142 Taxman 722 / 193 CTR 585 / 185 Taxation 433 (SC)*

### **S. 260A : Appeal – High Court – Practice and Procedure in Appeal – Cogent reason**

In an order of affirmation by High Court, repetition of reasons may not be necessary; however, arguments advanced and points urged have to be dealt with and reasons for affirmation have to be indicated. (A.Y. 1995-96)

*Mangalore Ganesh Beedi Works v. CIT (2005) 273 ITR 56 / 142 Taxman 720 / 193 CTR 590 / 185 Taxation 440 (SC) / 2 SCC 329.*

### **S. 260A : Appeal – High Court – Committee on disputes – Clearance – Government and PSUs**

Dispute between government departments and / or public sector undertakings cannot come before courts without clearance from high powered committee.

*Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT (2004) 267 ITR 647 / 137 Taxman 242 / 189 CTR 97 / 181 Taxation 394 (SC)*

*Editorial:- Please see decision of Supreme Court in the case of ECI v. UOI and CEE v. BPCL 54 DTR 193 and 238 CTR 353 (SC)(5 Member Bench), where the instruction for COD are withdrawn by the Court as found to be no more relevant, no approval of COD required from the date of order.*

### **S. 260A : Appeal – High Court – Power of review – Civil Procedure Code**

Section 35G(9) of the Central Excise Act (= section 260A(7) of the IT Act) provides that "the provisions of Civil Procedure Code, 1908 relating to appeals to the High Court shall as far as may be apply in the case of appeals under this Section". Given that only the provisions of the CPC relating to "appeals" are made applicable and not those relating to "review", the High Court had to consider whether the provisions of section 114 and Order XLVII of the Civil Procedure Code which confer power on the High Court to review its judgments apply to appeals filed under the Excise Act. The assessee and the department were agreed that the High Court had that power. HELD accepting the claim:

- (i) The High Court is a Court of record as envisaged in Article 215 of the Constitution and has inherent powers to correct the record. As the High Court has plenary jurisdiction, it has inherent power of review to prevent miscarriage of justice or to correct grave and palpable errors committed by it. CCE v Hongo India (236) ELT 417 (SC) & D. N. Singh v. CIT 325 ITR 349 (Patna)(FB) followed;
- (ii) In dealing with matters under a special enactment, the practice and procedure of the ordinary Court will apply if the special enactment refers to and adopts the practice and procedure to be followed by the ordinary Court. Accordingly, all provisions of the CPC apply to appeals under the Excise Act;
- (iii) Section 35G(9) does not restrict the jurisdiction of the High Court to only the provisions of the CPC relating to appeal. Section 35G(9) is enacted out of abundant caution to provide that in respect of matters not dealt with by the special enactment, the provisions of the CPC shall apply. Even if section 35G(9) were not there, the ordinary law of the and court have to be applied in the absence of anything contrary in the special law;

- (iv) One of the grounds of review is an error apparent on the face of the record. Where a statute is amended retrospectively, a judgment applying the unamended law constitutes an error apparent on the face of record and can be reviewed.

*VIP Industries Ltd. v. CCE RPA No. 33/2010 dated 16-12-2010 (Bom.)(High Court)*  
Source : [www.itatonline.org](http://www.itatonline.org)

### **S. 260A : Appeal – High Court – Monetary limit – Pending appeals**

The Department filed an appeal in the year 2008 where the tax effect was less than ₹ 10 lakhs. The question arose whether in view of Instruction No. 3/2011 dated 9-2-2011 the appeal was maintainable. HELD dismissing the appeal:

In view of CIT v. P. S. Jain & Co. which followed Pithwa Engineering 276 ITR 519 (Bom.) & Ashok Patel 317 ITR 386 (MP) and where it was held that the CBDT Circular imposing limits on the filing of appeals by the department applied to pending appeals, Instruction No. 3/2011 dated 9-2-2011 also applied to pending appeals and as the tax effect was less than ₹ 10 lakhs, the appeal was not maintainable.

*CIT v. Delhi Race Club Ltd. ITA No. 128/2008 dated 3-3-2011 (Delhi)(High Court)*  
Source : [www.itatonline.org](http://www.itatonline.org)

### **S. 260A : Appeal – High Court – Monetary limit – CBDT circular – Pending appeal**

Circular dated 15.5.2008 laying down monetary limit controls the filing of the appeals and not their hearing. Appeals filed as per applicable limit at the time of filing cannot be governed by circular applicable at the time of hearing. The object of the Circular under section 268A is only to govern monetary limit for filing of the appeals. There is no scope for reading the circular as being applicable to pending appeals. [Abhinav Gupta 41 DTR 129 (P&H) (FB) reversed]

*CIT v. Varinder Construction Co. (2011) 51 DTR 290 / 239 CTR 1 / 198 Taxman 42 / 331 ITR 449 (FB)(P&H)(High Court)*

### **S. 260A : Appeal – High Court – Notice – Paper publication – Proper mode**

Income Tax Department having failed to serve notice on the assessee company (Respondent) other than by way of paper publication at the admission of the appeal, CIT is directed to set right the defect in the presentation of the appeal. Income Tax Department is deprecated for wasting public money by resorting to service of notice by paper publication as a matter of routine thereby incurring considerable unnecessary expenditure on cost of advertisement.

*CIT v. Happy Farms & Resorts Ltd. (2011) 51 DTR 334 / 239 CTR 110 (Karn.)(High Court)*

### **S. 260A : Appeal – High Court – Monetary limit – Instruction of Board No. 3/2001. F. No. 279/Misc.142/2007 – ITJ / Dt. 9th February, 2011. (2011) 332 ITR 1 (ST).**

Appeal before Appellate Tribunal ₹ 3,00,000.

Appeal under section 260A before High Court ₹ 10,00,000.



Appeal before Supreme Court. ` 25,00,000.

Appeal filed on or after 9th February, 2011. (A. Y. 1990-91)

Reference to case laws Bombay High Court.

*CWT v. Executors of late D. T. Udeshi (1991) 189 ITR 319 (Bom.)(High Court)*

*CIT v. Camco Colour Co. (2002) 254 ITR 565 / 173 CTR 255 / 122 Taxman 336 (Bom.)(High Court)*

*CIT v. Pithwa Engg Works (2005) 276 ITR 519 / 197 CTR 655 (Bom.)(High Court)*

*CIT v. Zeob Topiwalla (2006) 284 ITR 379 / 199 CTR 656 (Bom.)(High Court)*

*CIT v. Madhukar K. Inamdar (HUF) (2010) 229 CTR 77 / (2009) 318 ITR 149 / 185 Taxman 101 / 27 DTR 132 (Bom.)(High Court)*

*CIT v. Vitessee Trading Ltd. (2011) 331 ITR 433 / 202 Taxman 242 (Bom.)(High Court)*

*Editorial : Refer Virgo Marketing P Ltd. v. CIT (SC) Source : www.itatonline.org & CIT v. Varsha Dilip Koba (Bom.)(High Court) Editorial : www.itatonline.org*

### **S. 260A : Appeal – High Court – Question of law – Reference to DVO – Finding**

Where though the appeal was admitted on the question, as to whether the Dy. Director of Inspection has power to make reference to the Valuation Officer under section 131(1A) of the Act. The Hon'ble High Court dismissed the appeal of the revenue holding that the question did not arise for consideration of the High Court, as none of the lower authorities recorded the finding that the Dy. Director of Inspection was having no power to make reference to Valuation Officer. (A. Y. 1998-99).

*ITO v. Hotel Shyama (2011) 56 DTR 174 / 244 CTR 229 (MP)(High Court)*

### **S. 260A : Appeal – High Court – Abatement of appeal – Death – Condonation of delay**

If the assessee dies, the question of abatement of appeal filed under section 260A of the Act would not arise. Further, the Hon'ble High Court condoned delay of 523 day in filing the application for bringing the legal heirs on record by the Revenue, rejecting the objection taken by the assessee under Order 22 of Civil Procedure Code, which provides that, if there is delay in bringing legal heirs on record the proceedings abates does not apply to an appeal filed under section 260 A of the Act.

*CIT & Anr. v. V. Rukmini (Smt.) By LR's (2011) 53 DTR 30 / 240 CTR 134 / 331 ITR 102 / 202 Taxman 100 (Karn.)(High Court)*

### **S. 260A : Appeal – High Court – Small tax effect – Appeal before Tribunal [S. 253(2)]**

In cases where tax effect is below ` 2,00,000, Revenue cannot file appeal contrary to the terms of circular which is binding on the department. (A. Ys. 1997-98 & 1998-99).

*CIT v. Mangilal Jain (2011) 58 DTR 20 (MP)(High Court)*

**S. 260A : Appeal – High Court – Plea not raised before Tribunal – First time before High Court**

Plea not raised before Tribunal, cannot be raised for first time before High Court.

*CIT v. Vijaya Enterprises (2011) 332 ITR 235 / Tax L.R .497 / 59 DTR 98 / 243 CTR 488 / 201 Taxman 324 (AP)(High Court)*

**S. 260A : Appeal – High Court – Single appeal to High Court – Court fee is payable in respect of each appeal**

One appeal in respect of common order is maintainable however Court fee will be payable in respect of each appeal. (A. Y. 2006-07).

*DIT (International) v. Transocean Offshore International Ventures Ltd. and others (2011) 336 ITR 637 (Uttarakhand)(High Court)*

**S. 260A : Appeal – High Court – Tax effect less than 4 Lakhs – Reference returned unanswered**

In view of Instruction No. 2/2005 dated 24-10-2005, issued by CBDT, it has to be directed that wherever tax effect is less than 4 lakhs, department should not file appeal under section 260A, unless question of law involved or raised in appeal is of recurring nature which is to be settled by High Court.

*CIT v. Vitessee Trading Ltd. (2011) 331 ITR 433 / 202 Taxman 242 (Bom.)(High Court)*

**S. 260A : Appeal – High Court – No power to consider issue not raised before Tribunal**

The assessee filed an appeal before the Tribunal in which it argued that it had constructed a "temporary construction" which was eligible for 100% depreciation. This was rejected by the Tribunal on the basis that the construction was permanent. Before the High Court, the assessee argued for the first time that the expenditure was "revenue" in nature and admissible as business expenditure. HELD not permitting the assessee to raise the plea:

A contention/ issue, which is not raised, dealt with or answered by the Tribunal, cannot be raised before the High Court for the first time in an appeal under section 260A. Though section 260A(6) empowers the High Court to "determine any issue which has not been determined by the Appellate Tribunal", the word "determined" means that the issue is not dealt with, though it was raised before the Tribunal. The word "determined" presupposes an issue was raised or argued but there is failure of the Tribunal to decide or adjudicated the same. However, as the issue whether the expenditure is capital or revenue was not raised before the Tribunal, it does not arise from the order of the Tribunal and cannot be entertained (Mahalakshmi Textile Mills 66 ITR 710 (SC) distinguished).

*C & C Construction Pvt. Ltd. v. CIT (2012) 204 Taxman 363 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Grounds not raised First time before court**

Grounds not raised before Assessing Officer or Tribunal cannot be raised first time before High Court.

*Alok Todi and another v. CIT (2011) 339 ITR 102 / 247 CTR 345 / 66 DTR 501 (Cal.)(High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Issue not raised before the lower authorities**

Issue not raised before the lower authorities cannot be permitted to be raised for the first time in appeal under section 260A. (A.Y. 2002-03)

*CIT v. Chand Ratan Bagri (2010) 36 DTR 244 / 230 CTR 258 / 329 ITR 356 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Power of Review [Civil Procedure, 1908 – S. 96, 100, 114 & Order 47]**

Power of review has not been conferred on the High Court under the Income Tax Act, the review petition is not maintainable.

*CIT v. West Coast Paper Mills Ltd. (2010) 229 CTR 239 / (2009) 319 ITR 390 / 35 DTR 22 (Bom.)(High Court)*

**S. 260A : Appeal – High Court – Maintainability – Tax effect**

Where a substantial question of law is raised by the revenue in the appeal filed by it before the Tribunal, which would arise in several other assesses case repeatedly, the case would fall within the exception of clause 3 of instruction No. 2 of 2005 dated 24.10.2005 and therefore, the appeal filed by the revenue was maintainable even though the tax effect is below the threshold limit prescribed by the C.B.D.T.

*CWT v. John L. Chackola (2010) 36 DTR 239 / 337 ITR 385 (Ker.)(High Court)*

*Editorial:- CIT v. Madhukar K. Inamdar (HUF) (2009) 318 ITR 149 / 229 CTR 77 / 185 Taxman 101 / 27 DTR 132 (Bom.) – Dissented from*

**S. 260A : Appeal – High Court – Condonation of delay – Power of High Court**

In absence of specific provision for condonation of delay in filing appeal under section 260A of the Act, High Court has no power to condone the delay in filing appeal before it under section 260A of the Act. (A.Y. 2002-03)

*Shergarh Co-op. L & C Society Ltd. v. ITO (2010) 324 ITR 408 / 189 Taxman 194 / 34 DTR*

*193 / 229 CTR 193 (P&H)(High Court)*

*Editorial:- The sub-section (2A) to section 260A is inserted by the Finance Act, 2010 w.e.f.*

*1-10-2998 vesting discussion to condone delay.*

**S. 260A : Appeal – High Court – Question of Law – Amendment in appeal memo**

A pure question of law can be allowed to be raised by amendment to the appeal memo if the facts on which Tribunal has given its decision are not disputed. (A.Y. 2003-04)

*CIT v. Jindal Equipments and Leasing & Consultancy Services Ltd. (2010) 37 DTR 172 / 325 ITR 87 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Maintainability – Rule of consistency – Acceptance of order in earlier years**

If the revenue has not challenged the order of CIT(A) for assessment year 1990-91 and thus accepted the view of the CIT(A), then on principles of consistency it is not open to the revenue to challenge the similar findings in respect of earlier year. (A.Ys. 1988-89, 1989-90)

*CIT v. Prakash Industries Ltd. (2010) 324 ITR 391 / 40 DTR 20 / 194 Taxman 508 (P&H)(High Court)*

**S. 260A : Appeal – High Court – Failure to consider a Ground – Order under rectification**

The non consideration of a ground by itself could not be a reason for filing an appeal. The revenue could have approached the Tribunal pointing out the mistake in not considering the specific ground raised by the Revenue and obtained an order by rectification. Appeal was dismissed. (A.Y. 1999-2000)

*CIT v. Malladi Project Management P. Ltd. (2010) 324 ITR 87 (Mad.)(High Court)*

**S. 260A : Appeal – High Court – New Ground – First time before High Court**

Pure question of law can be raised before the High Court though not raised before the Tribunal. (A.Y. 2003-04)

*CIT v. Jindal Equipments and Leasing & Consultancy Services Ltd. (2010) 37 DTR 172 / 325 ITR 87 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Jurisdiction – ITAT Rules, 1963 – Rule 4(1)]**

Punjab and Haryana High court has no territorial jurisdiction to entertain an appeal arising out of an order passed by the assessing officer at Bangalore, though the registered office is shifted to Punjab. (A.Y. 1996-97)

*CIT v. Motorala India Ltd. (2010) 326 ITR 156 / (2008) 215 CTR 158 / 168 Taxman 1 / 2 DTR 227 (P&H)(High Court)*

**S. 260A : Appeal – High Court – Jurisdiction – ITAT Rules, 1963, R. 4(1)**

Order passed by Tribunal in Chennai, and subsequent shifting of assessee's office to Punjab. Punjab and Haryana High Court has no jurisdiction to consider appeal. (A.Y. 1998-99)

*CIT v. H. F. C. L. Infotel Ltd. (2010) 326 ITR 167 (P&H)(High Court)*

**S. 260A : Appeal – High Court – Issue pending before Supreme Court – Power of High Court**

In view of the importance and recurring nature of issue and the reference being made by Division Bench doubting the correctness of judgment pending in appeal before the Supreme court, the court can proceed to hear the case instead of deferring the same. (A.Y. 1999-2000)

*CIT v. South Indian Bank Ltd. (2010) 325 ITR 517 / 42 DTR 109 / 191 Taxman 272 / 233 CTR 214 (FB)(Ker.)(High Court)*

### **S. 260A : Appeal – High Court – Committee on disputes**

Appellant being the Income tax Department, and the respondent being a State owned corporation, before filing an appeal against the department, the appellant ought to have obtained clearance from the Committee on Disputes, since this has not been done, the appeal was not maintainable. (A.Y. 1997-98)

*CIT v. Tamil Nadu Industrial Investment Corporation Ltd. (2010) 327 ITR 68 (Mad.)(High Court)*

### **S. 260A : Appeal – High Court – Power – Review**

High Court has not only the power but a duty to correct any apparent error in respect of any order passed by it. High Court can entertain the application for review arising out of a judgment passed under section 260A.

*D. N. Singh v. CIT (2010) 235 CTR 177 / 45 DTR 259 / 194 Taxman 273 / 325 ITR 349 (FB)(Patna)(High Court)*

### **S. 260A : Appeal – High Court – Monetary Limit – Pending cases – Larger Bench**

Whether Circular issued in the year 2008 will have retrospective effect for pending appeals and references matter referred to larger bench.

*CIT v. Varindra Construction Co. (2010) 328 ITR 446 / 236 CTR 592 / 48 DTR 253 (P&H)(High Court)*

### **S. 260A : Appeal – High Court – Condonation of delay – Power of High Court**

While preferring appeal to High Court, Section 260A does not confer any power on High Court to condone delay in case appeal is filed beyond prescribed period.

*ACIT v. Shubhash Traders (2009) 226 CTR 372 / 318 ITR 402 / 29 DTR 217 (MP)(High Court)*

*Editorial:- The sub-section (2A) to section 260A is inserted by the Finance Act, 2010 w.e.f.*

*1-10-1998 vesting discussion to condone delay.*

### **S. 260A : Appeal – High Court – Condonation of delay – Limitation**

Period of limitation prescribed for filing an appeal under section 260A(2) of the Income Tax Act, 1961, is not subject to the provisions contained in section 4 to 24 of the Limitation Act, 1963 as provided under section 29(2) of the Limitation Act, therefore, High Court has no power to condone the delay in filing the appeal.

*CIT v. Mohd. Farooq (2009) 29 DTR 241 / 226 CTR 360 / 184 Taxman 191 / 317 ITR 305 (FB)(All.)(High Court)*

*Editorial Note:- See Bombay High Court CIT v. Grasim Industries Ltd. (2009) 319 ITR 154 / 225 CTR 127 / 27 DTR 130 (Bom.)*

### **S. 260A : Appeal – High Court – Condonation of delay – Power of High Court**

High Court has no power to extend the time-limit prescribed under section 260A which is absolute and even unextendable under section 5 of Limitation Act.

*CIT v. Reliance Capital Ltd. & Ors (2009) 225 CTR 275 / 181 Taxman 242 / 27 DTR 95 / 322 ITR 252 (Bom.)(High Court)*

*ACIT v. Mahavir Prasad Verma & Ors. (2009) 225 CTR 305 / 317 ITR 36 / 26 DTR 105 (Chattisgarh)(High Court)*

*CIT v. Grasim Industries Ltd. (2009) 27 DTR 130 / 225 CTR 127 / 319 ITR 154 (Bom.)(High Court)*

*Editorial:- The sub-section (2A) to section 260A is inserted by the Finance Act, 2010 w.e.f. 1-10-2998 vesting discussion to condone delay.*

### **S. 260A : Appeal – High Court – Monetary Limit**

Circular No. 5 of 2008 dated 15-5-2008, which provides that in case of an assessee where the disputed issue arises in more than one assessment year, appeal by the Revenue shall be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issue exceeds the monetary limits provided in the circular. This was held to be applicable to all the cases pending before the High Court either for admission or final hearing and it is binding on the Revenue authorities.

*CIT v. Madhukar K. Inamdar (HUF) (2009) 318 ITR 149 / 27 DTR 132 / 229 CTR 77 / 185 Taxman 101 (Bom.)(High Court)*

### **S. 260A : Appeal – High Court – Substantial Question of Law – Perverse finding of facts**

Where the finding of facts recorded by the Tribunal is perverse or contrary to the material on record, the High Court while exercising powers under section 260 A of the Act is competent to interfere with such a perverse finding of facts.

*Gauri Kanta Barkataky v. CIT (2009) 25 DTR 75 / 227 CTR 153 / 313 ITR 34 / 181 Taxman 316 (Gau.)(High Court)*

### **S. 260A : Appeal – High Court – Mistake Apparent from the record – Writ – Appeal not maintainable [S. 254(2)]**

Appeal under section 260A is not maintainable against order of Tribunal under section 254(2) and therefore, writ petition against order under section 254(2) cannot be rejected on the ground of availability of alter native remedy. (A.Y. 2004-05)

*Visvas Promoter's (P.) Ltd. v. ITAT (2009) 30 DTR 65 / 226 CTR 638 / 323 ITR 114 / 185 Taxman 145 (Mad.)(High Court)*

*Editorial Note:- See Bombay High Court Chem Amit v. ACIT (2005) 272 ITR 397 / 194 CTR 141 / 143 Taxman 348 (Bom.)(High Court)*



### **S. 260A : Appeal – High Court – State Owned corporation – C.O.D approval**

In case where the assessee is a State-owned Corporation, the appeal filed by the Income Tax Department is not maintainable if the clearance from Committee on Dispute (C.O.D.) is not obtained. (A.Y. 1992-93)

*CIT v. Poompuhar Shipping Corporation (2008) 12 DTR 103 (Mad.)(High Court)*

*Editorial : It is no more a good law in the light of Apex court decision in the case of ECI v. UOI (2011) 54 DTR 353 (SC)*

### **S. 260A : Appeal – High Court – Condonation of delay – Less than a year**

Delay in appeals filed by the Income Tax department before the High Court is liable to be condoned only where the delay is less than a year.

*Ornate Traders P. Ltd. v. CIT (2008) 12 DTR 241 / 219 CTR 256 / 312 ITR 193 / 173 Taxman 192 (Bom.)(High Court)*

### **S. 260A : Appeal – High Court – Claim before High Court for the First time**

The Assessing Officer while completing the assessment disallowed the claim of the assessee in respect of replacement expenditure of auto coner and moulds as revenue expenditure and treated the same as capital expenditure.

Aggrieved by the said order, the assessee went in appeal to CIT(A) who reversed the Assessing Officer's order on this ground. The revenue took up the matter to ITAT. The ITAT also decided the issue in favour of the assessee. Hence, department was in appeal to High Court. Department in its appeal raised one more question about the concept of Block of asset for the purpose of depreciation which was not before the ITAT. The High Court held that no claim of depreciation was ever made before any authorities either by the assessee or by the revenue, the same cannot be considered by High Court. (A.Y. 1996-97)

*CIT v. Fenner (I) Ltd. (2007) 292 ITR 605 / 169 Taxman 62 (Mad.)(High Court)*

### **S. 260A : Appeal – High Court – Questions not raised before the Tribunal – Power under section 260A**

The questions, which are not raised by the Appellant before the Tribunal, cannot be permitted to be raised in appeal before High Court under section 260A of the Act.

*CIT v. Jolly Engineer's Contractor's (2007) 200 Taxation 89 (P&H)(High Court)*

### **S. 260A : Appeal – High Court – Question of law – Must arise out of order Tribunal**

The assessee claimed that the activity of producing mushroom amounted to business activity and claimed deduction under section 80-IA. The Tribunal rejected assessee's appeal and claim under section 80-IA. Before the High Court however a question was raised as to whether the activity of producing mushroom was agricultural income and hence exempt. The High Court held that the aforesaid question did not arise for consideration out of the Tribunal's order.

*Himalaya International Ltd. v. CIT (2007) 199 Taxation 240 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Identical facts – Accepting one assessee – Cannot agitate the same in another assessee**

In the absence of any reasons the Department cannot resort to policy of pick and choose for filing appeals under section 260A. It was further observed that it would not be proper or in the interest of justice to allow revenue to seek to recover tax from one assessee while declining to recover tax from another assessee on identical facts.

(A.Ys. 1991-92, 1997-98, 1998-99)

*CIT v. Moonlight Builders & Developers (2007) 163 Taxman 134 / 307 ITR 197 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Maintainability – Tax effect**

If tax effect is below certain limit, Appeal should not be maintained as per CBDT Notification which is binding.

The H.C. after referring to the judgments of the Bombay High Court and Supreme Court dismissed the said appeal since the tax effect is less than ` 5,000/- per year on the ground of non-maintainability. (A.Ys. 1979-80 to 1985-86)

*CIT v. Digvijay Singh (2007) 292 ITR 314 / 213 CTR 490 / 174 Taxman 80 (MP)(High Court)*

**S 260A : Appeal – High Court – Maintainability – Single appeal for two orders – Second appeal against same order**

Second appeal against same order, single appeal challenging two orders of the Tribunal is not maintainable. Further, once the High Court has disposed of the appeal filed by the appellant challenging the order of the Tribunal, appellant cannot reagitate the same issue again.

(A.Y. 1998-99)

*Perfetti Van Melle India (P) Ltd. v. CIT (2007) 212 CTR 173 / 296 ITR 595 / 164 Taxman 493 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Consistency – Not preferring appeals for earlier years**

Where the Tribunal had decided an appeal before it following its earlier decision in the case of same assessee on same issue and the revenue had not preferred appeal against the earlier order, in such case, following the rule of consistency the High Court held that no substantial question of law arose.

*CIT v. DCM Sri Ram Industries Ltd. (2007) 201 Taxation 402 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Condonation of delay – Responsibility office**

Revenue filing appeal with inordinate delay without any acceptable explanation except providing the dates of exchange of correspondences with the Ministry of Law. No responsible officer had taken any responsibility for the delay. Application for condonation of delay was dismissed.

*CIT v. Texpore Tea Co. Ltd. (2006) 204 CTR 130 / 279 ITR 339 / 152 Taxman 387 (Cal.)(High Court)*

**S. 260A : Appeal – High Court – No substantial question of law – Shares held as stock in trade – Dividend income – Loss – Set-off [S. 72]**

Shares held as stock-in-trade. Income whether directly or incidentally from holding of such shares not income from other sources but business income. Assessee received Dividend Income and hence, entitled to set off brought forward business loss against dividend income. No substantial question of law arises. (A.Y. 1996-97)

*CIT v. Excellent Commercial Enterprises & Investments Ltd. (2006) 282 ITR 423 / 197 CTR 187 / 147 Taxman 558 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Substantial question of law – Appellate Tribunal – Additional Ground [S. 254, 10(22A), 11, 13]**

The court held that no question of law much less a substantial question of law arose when the Tribunal admitted the additional ground and remitted the matter back to the assessing officer to decide the matter by giving an opportunity to the assessee in respect of exemption under section 10(22A), read with sections 11 and 13, hence the appeal of department was dismissed. (A.Y. 1994-95)

*DIT (Exemption) v. Arunodya (2006) 286 ITR 383 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Jurisdiction – Assessment proceedings**

The assessee challenged the jurisdiction of the Hon'ble High Court to entertain the appeal filed by the Department. The Hon'ble High Court accepted the objection and observed that the test for determining the jurisdiction of the High Court would be whether the assessment proceedings were completed within its territorial limits. Viewed thus, not only were the assessment proceedings in the instant case completed in Bulandshahr, but even the appeals arising out of the said proceedings were heard and disposed of by the Commissioner (Appeals), Meerut. There was, in that view, no difficulty in holding that an appeal against the order passed by the Tribunal, even though located in Delhi, ought to be filed in the High Court at Allahabad. (A.Ys. 1993-94, 1994-95)

*CIT v. Digvijay Chemicals Ltd. (2006) 156 Taxman 64 / 204 CTR 234 / 294 ITR 359 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Power – Sufficient opportunity – Question of fact**

Question whether sufficient opportunity to be heard was afforded to assessee is a question of fact which cannot be raised before High Court under section 260A.

Question not raised before the Tribunal does not arise out of order of Tribunal. Question cannot be raised before High Court. (A.Y. 1996-97)

*CIT v. Bank of Punjab Ltd. (2006) 286 ITR 630 / 206 CTR 651 / 286 ITR 630 (P&H)(High Court)*

**S. 260A : Appeal – High Court – No substantial question of law – Settled by Supreme Court**

No substantial question of law, if it is settled by Supreme Court.

*CIT v. Saraswati Kunj Co-op. Hsg. Society (2006) 287 ITR 22 / 205 CTR 633 / 157 Taxman 166 (Delhi)(High Court)*

**S. 260A : Appeal – High Court – Maintainability of Appeal – Finding recorded**

There has to be a first finding recorded by Tribunal on question framed against appellant; it is only then that appellant becomes entitled to assail finding in appeal under section 260A. (A.Ys. 1986-87, 1987-88)

*CIT v. Kiran Devi Kailashchand (Smt) (2005) 147 Taxman 353 / 198 CTR 243 / 286 ITR 612 (MP)(High Court)*

**S. 260A : Appeal – High Court – Maintainability of Appeal – Factual finding**

Appeal would not lie if one is aggrieved, as against factual finding rendered by appellate authorities. (A.Ys. 1990-91, 1992-93)

*CIT v. Barmag AG, West Germany (2005) 272 ITR 603 / 147 Taxman 136 (Mad.) / CIT v. R. Ganesh (Minor) (2005) 272 ITR 610 / 144 Taxman 918 (Mad.)(High Court)*

**S. 260A : Appeal – High Court – Monetary Limit for filing Appeal [Rule 60A]**

The Central Board of Direct Taxes Circular No. 2 of 2005, dated October 24, 2005, lays down a monetary limit for appeals to the High Court. It applicable only prospectively and it makes no reference to pending matters. However, it clearly provides that whenever there is substantial question of law, or a question of law which is likely to recur in future, the Department is not prohibited from filing and pursuing appeals.

*CIT v. Pithwa Engg. Works (2005) 276 ITR 519 / 197 CTR 655 (Bom.)(High Court) dissented from.*

*CIT v. Chhajer Packaging and Plastics P. Ltd. (2008) 300 ITR 180 / 214 CTR 389 / (2007) 165 Taxman 109 (Bom.)(High Court)*

Editorial : Circular has been printed in AIFTP Journal, July 2008 issue page No. 37.

**S. 260A : Appeal – High Court – Maintainability of Appeal – Question of law**

Even if no appeal is filed by revenue before Tribunal on question of law, it can raise it before High Court. (A.Y. 1993-94)

*CIT v. United Marine Exports (2005) 278 ITR 155 / 149 Taxman 72 / 197 CTR 298 (Ker.)(High Court)*

**S. 260A : Appeal – High Court – Condonation of delay – Limitation**

Statute by prescribing special period of limitation for preferring appeal under section 260A does not by necessary implication exclude application of sections 4 to 24 of Limitation Act, 1963 for condoning delay in filing appeal under section 260A and, therefore, provision of section 5 of 1963 Act would be applicable for condoning delay on part of revenue in filing appeal under section 260A. (A.Ys. 1991-92, 1995-96)

*CIT v. Anandilal Poddar & Sons Ltd. (2005) 279 ITR 104 / 148 Taxman 513 / 199 CTR 539 (Cal.) (High Court)*

**S. 260A : Appeal – High Court – No appeal lies [S. 254(2)]**

An order passed by Tribunal on application for rectification under section 254(2) rejecting rectification application cannot be said to be an order passed in appeal by Appellate Tribunal within meaning of section 260A(1), and, hence, appeal will not lie from such order

*Chem Amit v. ACIT (2005) 272 ITR 397 / 143 Taxman 348 (Bom.) (High Court)*

**S. 260A : Appeal – High Court – Condonation of delay**

Where a delay of 458 days in filing appeal to High Court by Department was sought to be explained in a very slipshod manner and no responsible officer appeared to have taken responsibility as to why delay occurred in its own department, in these circumstances, there was no merit in application for condonation of delay

*CIT v. Tezapore Tea Co. Ltd. (2005) 279 ITR 339 / 204 CTR 130 / 152 Taxman 387 (Cal.) (High Court)*

**S. 260A : Appeal – High Court – Power De novo – Finding by lower authorities – Finality**

High Court in its appellate jurisdiction, which is defined under section 260A, cannot again de novo hold yet another inquiry with a view to find out whether explanation offered by assessee, and which found acceptance by two appellate authorities, namely, Commissioner (Appeals) and Tribunal, is good or bad, or whether it was rightly accepted or not.

*CIT v. Ashok Jain (Dr.) (2005) 275 ITR 350 / 158 Taxman 69 (MP) (High Court)*

**S. 260A : Appeal – High Court – Power Factual finding by tribunal – Finality**

Any factual finding once recorded and consistently upheld by Appellate Tribunal, is binding on High Court

*Kantilal Prabhudas Patel v. Dy. CIT (2005) 277 ITR 504 / 148 Taxman 569 / 198 CTR 351 (MP) (High Court)*

**S. 260A : Appeal – High Court – Power – Reappraisal of evidence – Finality**

Court cannot interfere with order only on ground that on reappraisal of evidence, as an appellate forum, different view can be taken

*Harish Kumar Singal v. ACIT (2005) 276 ITR 355 / 144 Taxman 449 / 193 CTR 0265 (P&H) (High Court)*

**S. 260A : Appeal – High Court – Power – Finding of facts – Finality**

If Tribunal accepts assessee's explanation and deletes additions, it does not involve any question of law as such

*CIT v. V. Raghavan (2005) 274 ITR 64 / 156 Taxman 246 (MP) (High Court)*

**S. 260A : Appeal – High Court – Power – Only question framed**

Section 260A only empowers court to hear appeal on question framed by court at time of admission of appeal; it cannot be heard and decided on any other question not framed.

(A.Y. 1991-92)

*Steel Ingots Ltd. v. Dy. CIT (2005) 275 ITR 209 / 147 Taxman 686 / 197 CTR 278 (MP)(High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – After admission**

Question as to whether appeal involves any substantial question of law can be examined even after admission of appeal. (A.Y. 1977-78)

*Sardar Machhisingh v. CIT (2005) 278 ITR 247 / 144 Taxman 8 / 193 CTR 633 (MP)(High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Question of fact**

Addition/deletion under various heads on account of seizure of some loose papers and documents, does not involve any substantial question of law.

*ACIT v. Rajaram & Brothers (2005) 274 ITR 122 / 193 CTR 248 (MP)(High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Concurrent finding**

Concurrent finding recorded by authorities against assessee on question of genuineness of firm cannot be assailed in further appeal under section 260A. (A.Y. 1977-78)

*Sardarmachhi Singh v. CIT (2005) 278 ITR 247 / 144 Taxman 8 / 193 CTR 633 (MP)(High Court)*

**S. 260A : Appeal – High Court – Practice and procedure in appeal – One appeal – Court fee for each cause of action**

There is no bar in joining several assessment years and several assessees in one appeal with leave of court or otherwise when question is identical within meaning of Order 1, rule 1 of Code of Civil Procedure (CPC), 1908, but court has no power to remit or reduce court fees payable thereon and court fee will become payable in respect of each cause of action concerning same assessee or different assessees involving one or different assessment years

*CIT v. Tata Tea Ltd. (2005) 272 ITR 42 / 144 Taxman 228 / 195 CTR 26 (Cal.)(High Court)*

**S. 260A : Appeal – High Court – Practice and procedure in appeal – Additional question**



High Court can frame any additional question of law though not framed but is noticed to have arisen or may hold that what is framed does not satisfy requirement of section 260A. (A.Y. 1992-93)

*CIT v. S.V. Electricals (P.) Ltd. (2005) 274 ITR 334 / 155 Taxman 158 (MP)(High Court)*

**S. 260A : Appeal – High Court – Invalid null order – Appeal not filed – Validity**

Non-filing of an appeal against an illegal order or an order which has become a nullity cannot, in any way, either validate such order or render it enforceable in law. (A.Y. 1986-87)

*CIT v. Rane Brake Linings Ltd. (2005) 272 ITR 405 (Mad.)(High Court)*

**S. 260A : Appeal – High Court – Binding – Precedence – Same bunch of cases**

Where an appeal arising out of same bunch of cases and same order, is dismissed by an earlier Division Bench of same High Court, it necessarily follows that all other appeals arising out of same order are to be disposed of on same lines and it is of no significance whether dismissal was based on reasons or no reasons

*CIT v. Shyamlal M. Soni (2005) 276 ITR 156 / 144 Taxman 666 (MP)(High Court)*

**S. 260A : Appeal – High Court – Territorial jurisdiction – Cause of action – Search of brand**

Where though petitioner had registered office in Delhi and branch office in Gauhati and DIT (Investigation), Gauhati, issued warrants of authorization based on information shared with DIT (Investigation) New Delhi/Calcutta, and search was carried out at Gauhati and Tinsukhia, part of cause of action arose under jurisdiction of Gauhati High Court and as such Gauhati High Court had jurisdiction to entertain writ against search

*M.S. Associates v. Union of India (2005) 275 ITR 502 / 147 Taxman 172 / 196 CTR 318 (Gau.) (High Court)*

**S. 260A : Appeal – High Court – Territorial jurisdiction – Finality by another court**

Where assessment had reached finality before Tribunal in another State, namely, Bombay, Calcutta Court could not assume jurisdiction in respect of such assessment.

*CIT v. J.L. Morrison (India) Ltd. (2005) 272 ITR 321 / 196 CTR 201 (Cal.)(High Court)*

**S. 260A : Appeal – High Court – Court fees – Block assessment**

Only one Court fee is payable for filing appeal against a block assessment because block assessment is one though it comprises several years

*Gita Dutta (Smt) v. CIT (2005) 275 ITR 12 / 195 CTR 0037 (Cal.)(High Court)*

**S. 260A : Appeal – High Court – Concession by revenue before tribunal – Finality**

There is no basis to file appeal where revenue has already conceded issue in question before Tribunal. (A.Y. 1995-96)

*CIT v. Sanghi Finance & Investment Ltd. (2005) 273 ITR 268 / (2004) 141 Taxman 466 / 191 CTR 150 (MP)(High Court)*

### **S. 260A : Appeal – High Court – Interlocutory orders – Order passed in appeal**

The expression 'every order passed in appeal' cannot be construed to take in its fold all interlocutory orders that may be passed by the Income Tax Appellate Tribunal, during pendency of appeal, particularly such orders which are procedural in nature  
*Zenith Ltd. v. Dy. CIT (2004) 271 ITR 135 / 193 CTR 149 (Bom.)(High Court)*

### **S. 260A : Appeal – High Court – Committee on disputes – Fresh approval for High Court**

Permission of committee on disputes is also required by appellant- Government Corporation for prosecuting appeal before High Court even when appellant had approached Committee on Disputes earlier which permitted appellant to pursue appeals before ITAT. (A.Ys. 1979-80, 1980-81)

*National Cooperative Development Corpn. v. ADIT (2004) 141 Taxman 551 / 199 CTR 60 (Delhi)(High Court)*

### **S. 260A : Appeal – High Court – Substantial question of law – Tests**

The tests laid by the Constitutional Bench in *Sir Chunilal V. Mehata & Sons Ltd v Century Spinning & Manufacturing Co. Ltd* AIR 1962, SC 1314, to decide substantial questions of law.

Five Tests to decide whether a question is a substantial question of law.

- (i) It is of general public importance, or,
- (ii) it directly or substantially affects the rights of the parties, or,
- (iii) It is open question in the sense that it is not finally settled by the Supreme court, or,
- (iv) It is not free from difficulty and,
- (v) it calls for discussion of alternative views.

*CIT v. S.R. Fragnances Ltd. (2004) 270 ITR 560 / 136 Taxman 575 / 187 CTR 4 (Delhi)(High Court)*

### **S. 260A : Appeal – High Court – Substantial question of law – Tests**

- To be substantial, a question of law must be debatable and must have a material bearing on decision of case and rights of parties
- If question raised in the appeal is already settled by the Highest Court of the Country or the Jurisdictional High Court, then the same can not be regarded as a substantial question of law.
- If the conclusions recorded by the Tribunal in the particular facts of the case are plausible, then it would not be a case of substantial question of law.

- Finding recorded by the Assessing Officer, or the First appellate Authority or the Tribunal can not be disturbed by the High Court in exercise of powers under section 260A unless, such findings is perverse or is such which no person of reasonable prudence could arrive at in the given facts of the case.

*CIT v. Monica Oswal (Ms) (2004) 267 ITR 308 / 138 Taxman 296 / 190 CTR 056 (FB)(P&H)(High Court)*

### **S. 260A : Appeal – High Court – Substantial question of law – Appreciation of facts**

Mere appreciation of facts, documentary evidence or meaning of entries and contents of the documents cannot be held to give rise to a substantial question of law. (A.Y. 1991-92)

*CIT v. Shehnaz Hussain (Ms) (2004) 267 ITR 572 / 136 Taxman 3 (Delhi)(High Court)*

### **S. 260A : Appeal – High Court – Substantial question of law – Words – Admit**

Mere use of words 'admit' in appeal or issuance of notice to other side does not conform to requirement of section 260A. (A.Y. 1987-88)

*CIT v. Sharad Kumar & Co. (2004) 142 Taxman 501 / 192 CTR 22 (MP)(High Court)*

### **S. 260A : Appeal – High Court – Issue covered by Jurisdictional High Court – Question of law**

Where matter is covered by jurisdictional High Court decision, no substantial question of law is involved.

*CIT v. Indore Paraspar Sahakari Bank (2004) 189 CTR 486 (MP)(High Court)*

### **S. 260A : Appeal – High Court – New issue – First time before court**

New issue cannot be raised for first time in appeal. (A.Ys. 1997-98, 1998-99)

*CIT v. Indocount Finance Ltd. (2004) 271 ITR 215 / 136 Taxman 23 (Delhi) (High Court)*

### **S. 260A : Appeal – High Court – Confusion – No substantial question of law**

Because there is confusion with regard to interpretation of Tribunal's order, it cannot be said that a substantial question of law is involved. (A.Y. 1995-96)

*CIT v. Maya Spinners Ltd. (2004) 189 CTR 485 / 144 Taxman 470 (MP)(High Court)*

### **S. 260A : Appeal – High Court – Rejection of application – Ex-parte order**

Appeal lies under section 260A against order of rejection of application for recall of ex-parte order passed by Tribunal

*Jagdish Chand & Sons v. ITAT (2004) 266 ITR 165 / 141 Taxman 266 / 188 CTR 231 (All.)(High Court)*

### **S. 260A : Appeal – High Court – Acceptance of order of earlier year – No appeal**

Where earlier orders of Tribunal in assessee's case on identical facts had been accepted by revenue, its appeal against Tribunal's order for assessment year in question was not maintainable. (A.Y. 1990-91)

*CIT v. Net Work Ltd. (2004) 191 CTR 427 / 142 Taxman 410 (Delhi)(High Court)*

### **S. 260A : Appeals – High Court – Difference in valuation – Marginal – Question of law**

Tribunal's order holding that though there was some variation between valuation made by assessee and others, 10 % difference in valuation made by two valuers usually occurs did not involve a substantial question of law.

*CIT v. Abeeson Hotels (P.) Ltd. (2004) 191 CTR 263 (MP)(High Court)*

### **S. 260A : Appeal – High Court – Cash Credits – Genuineness**

No substantial question of law could be said to arise from Tribunal's finding that assessee was not able to explain genuineness of cash credit. (A.Y. 1988-89)

*Krishan Kumar Aggarwal v. Assessing Officer (2004) 266 ITR 380 / 138 Taxman 1 (Delhi)(High Court)*

*Editorial: Appeal of assessee was dismissed by Supreme Court by observing that low tax effect and no substantial question of law. Krishan Kumar Aggarwal v. Assessing Officer (2015) 373 ITR 679 (SC)*

### **S. 260A : Appeal – High Court – Matter set a side – No substantial question of law**

Where whole issue of assessability of amount received by assessee had been remitted back to Assessing Officer for fresh adjudication and no finding had been returned by Tribunal on merit of case. Hence is no substantial question of law. (A.Ys. 1997-98, 1998-99)

*DIT v. Sheraton International Inc. (2004) 270 ITR 303 / 136 Taxman 159 / 186 CTR 666 (Delhi)(High Court)*

### **S. 260A : Appeal – High Court – Cross objection – Appeal – Code of Civil Procedure**

In an appeal under section 260A, code of Civil Procedure is applicable and in view of section 260A(6) High Court can pass appropriate order even if a party may not have filed a cross objections or preferred any appeal or preferred appeal against only a part of order. (A.Y. 1990-91)

*CCAP Ltd. v. CIT (2004) 270 ITR 248 / 141 Taxman 471 / 193 CTR 74 (Cal.)(High Court)*

### **S. 260A : Appeal – High Court – Court Fee – Kerala**

In any appeal filed before High Court of Kerala either by revenue or by assessee under Income Tax Act, 1961 and under Wealth Tax Act, 1957 against orders of Tribunal w.e.f. 26/10/2002, court fee is payable and has to be paid under section

52A, read with schedule II, article 3, item (iii) sub- item (c) of Kerala Court Fees and Suits Valuation Act, 1959.

*CIT v. A.N. Habeeb (2004) 268 ITR 344 / 137 Taxman 24 / 188 CTR 100 (Ker.)(High Court)*

#### **S. 260A : Appeal – High Court – Possible findings – No interference**

Finding reached by Tribunal being are possible findings, merely because Tribunal has revised concurrent findings of Assessing Officer and Commissioner (Appeals) is no ground for interference under section 260A. (A.Y. 1996-97)

*CIT v. Zuari Finance Ltd. (2004) 271 ITR 538 / 193 CTR 625 / 144 Taxman 113 (Bom.)(High Court)*

#### **S. 260A : Appeal – High Court – de hors – Factual findings – Finality**

It is only when factual finding is entirely de hors subject or is against provision of law, that a case for substantial question of law is made out for admission of appeal.

*ACIT v. Om Prakash Porwal (2004) 141 Taxman 281 (MP)(High Court)*

#### **S. 260A : Appeal – High Court – Powers – Remand – No question of law**

No question of law arises from order of remand

*Bhagyadaya Builders v. CIT (2004) 136 Taxman 305 (All.)(High Court)*

#### **S. 260A : Appeal – High Court – Scope – Code of Civil procedure, 1908**

Scope of interference under section 260A by High Court is similar to the power to be exercised by the High Court under section 100 of the Code of Civil Procedure, 1908. (A.Y. 1996-97)

*Avasarala Automation Ltd. v. Jt. CIT (2003) 133 Taxman 678 / 185 CTR 402 / 266 ITR 178 (Karn.)(High Court)*

#### **S. 260A : Appeal – High Court – Code of Civil Procedure – Applicability**

Provisions of Code of Civil Procedure which are applicable to appeals filed under section 260A contain no provision for return of memo of appeal. (A.Ys. 1992-93, 1993-94)

*Himachal Futuristic Communications Ltd. v. CIT (2003) 133 Taxman 708 / 186 CTR 374 / 264 ITR 629 (HP)(High Court)*

#### **S. 260A : Appeal – High Court – Miscellaneous Application – Identical plea [S. 254(2)]**

Appeal under section 260A against dismissal of assessee's miscellaneous petition under section 254(2) was not maintainable where assessee had taken up identical plea in reference application before Tribunal. (A.Y. 1986-87)

*J. N. Marshall & Co. v. ITO (2003) 183 CTR 603 / 164 ITR 690 / 134 Taxman 557 (Bom.)(High Court)*

#### **S. 260A : Appeal – High Court – Res Judicata – Admission of appeal**

No res judicata is involved in a mere matter of admission of appeals. (A.Y. 1993-94)  
*CIT v. Window Glass Ltd. (2003) 179 CTR 602 / 134 Taxman 739 (Cal.) (High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Power to formulate without hearing the respondent**

Substantial question of law can be formulated under sub-section (3) of section 260A without hearing respondent.

*CIT v. Kuwer Fibres (P.) Ltd. (2003) 132 Taxman 347 / 183 CTR 256 / 264 ITR 499 (Delhi) (High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Appreciation of evidence**

Appreciation of evidence does not fall within the realm of Courts jurisdiction under section 260A. No substantial question of law arise.

*Vijay Kumar Talwar v. ITO (2003) 260 ITR 266 / 175 CTR 674 / 123 Taxman 181 (Delhi) (High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Erroneous view of law**

If assessment is based on a completely erroneous view of law, such findings cannot be regarded as mere findings of fact, but must be treated as substantial question of law.

(A.Y. 1992-93)

*Nemi Chand Kothari v. CIT (2003) 264 ITR 254 / 185 CTR 635 / 136 Taxman 213 (Gau.) (High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Levy of interest [S. 234B]**

Where the Tribunal held that the levy of interest under section 234B was not justified as the assessee was under a bona fide belief that its income was not chargeable to tax, a substantial question of law arose. (A.Ys. 1990-91, 1991-92)

*CIT v. Insilco Ltd. (2003) 261 ITR 220 / 179 CTR 214 (Delhi) (High Court)*

**S. 260A : Appeal – High Court – Substantial Question of Law – Perverse**

Where Tribunal recorded a finding contrary to documentary evidence available on record, finding was perverse giving rise to a question of law.

*Dy. CIT v. H.V.S. Shantharam (2003) 128 Taxman 34 / 261 ITR 435 / 180 CTR 300 (Karn.) (High Court)*

**S. 260A : Appeal – High Court – Appeal by Department – Revenue Secretary & Central Board of Direct Taxes (CBDT) Chairman summoned for turning “deaf ear” to inefficiencies**

The department filed an appeal in the High Court and claimed that as the Tribunal's order was received on a particular date, the appeal was on time. However, the



assessee obtained information from the Tribunal under the Right to Information Act and pointed out that the order was served on an earlier date and that the appeal was belated. The Court taking a serious view of the matter summoned the Revenue Secretary and Chairman CBDT to be present before the court on 01-12-2010.

*CIT v. Preeti N. Aggarwala ITA No. 456/2007 dated 11-11-2010 (Delhi)(High Court)*  
Source: [www.itatonline.org](http://www.itatonline.org)

### **S. 260A : Appeal – High Court – Binding – Precedent – No substantial question of law**

Appeal dismissed holding that no substantial question of law arises amounts to affirmation of tribunals decision on merits which becomes binding on Tribunal. (A.Y. 1996-97)

*Medicare Investments Ltd. v. Jt. CIT (2008) 114 ITD 34 / 112 TTJ 889 / 19 SOT 223 (SB)(Delhi)(Trib.)*

### **S. 260A : Appeal – High Court – Substantial Question of Law – No decision on merit**

When High Court dismisses an appeal stating that no substantial question of law arises, there is no decision on merits on issues raised by parties. (A.Y. 1992-93)

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

## ***D. Appeals to the Supreme Court***

### **Section 261 : Appeals to Supreme Court**

#### **S. 261 : Appeal – Supreme Court – Adjournments – Awarded Cost**

For taking repeated adjournment the Department was directed to pay the cost of ` 10000/- and was directed to make an enquiry in that regard; if it was found that fault was with an officer, it would take necessary steps including recovery from him.

*CIT v. Varanashi Wines (2010) 190 Taxman 167 (SC)*

#### **S. 261 : Appeal – Supreme Court – Attachment – Shares and Bank Accounts – Bank Guarantee – Certificate Proceedings [S. 222]**

Pursuant to an attachment proceedings shares and bank accounts of assessee were attached. Subsequently, one G, undertook to furnish a bank guarantee of ` 3 crores in favour of the Registrar of Supreme Court. In view of undertaking of "G" regarding bank gurantee of ` 3 Crores, all attachment orders passed in respect of assessee's shares and bank accounts were released forth with.

*Subhash Arora Investments (P) Ltd. v. UOI (2010) 190 Taxman 45 (SC)*

#### **S. 261 : Appeal – Supreme Court – Cost to Department – Negligence**

Income Tax Department initiated proceedings against assessee, however, it could not file most relevant documents, namely enquiry, report, etc., for initiating said proceedings. The Court observed that virtual negligence of Department was required

to be taken note of and permitted it to file additional documents only on deposit of ₹ 5000/-.

*CIT v. M. Selvaraj (2010) 190 Taxman 300 / 227 CTR 439 / 32 DTR 88 (SC)*

**S. 261 : Appeal – Supreme Court – Advance Rulings – Writ Petition [S. 245R, Article 226]**

Assessee petitioner filed Special leave petition against the ruling given by the Authority for Advance Rulings and the petitioner could not explain as to why the petitioner had not moved the High Court under Article 226 of the Constitution. The petitioner was permitted to withdraw the Special Leave Petition with liberty to move High Court.

*Foster's Australia Ltd. v. CIT (2008) 174 Taxman 565 / 219 CTR 9 / 12 DTR 310 (SC)*

**S. 261 : Appeal – Supreme Court – Precedent – Appeal not filed in past by Department**

The fact that the department has not preferred an appeal in one case would not operate as a bar for the Department to prefer an appeal in another case where there is a just cause for doing so or it is in public interest to do so or for a pronouncement by a higher court when divergent views are expressed by the Tribunals or the High Court.

*C. K. Gangadharan & Anr. v. CIT (2008) 304 ITR 61 / 172 Taxman 87 / 10 DTR 161 / 218 CTR 1 / 206 Taxation 626 (SC)*

*Editorial:- Please see section 268A(3) introduced by the Finance Act, 2008 providing for the right of the Income Tax Department to file an appeal in such cases.*

**S. 261 : Appeal – Supreme Court – Ex-parte order – Restoration of matter**

A matter dismissed earlier for non appearance, can be restored on the oral or written request of the party or advocate. And, if the bench so desired, it can hear the matter immediately after restoration and there is no obligation on the bench to adjourn the matter to be heard on a future date once it is restored. (A.Y. 1989-90)

*Madhumilan Syntex Ltd. v. UOI (2007) 290 ITR 199 / 160 Taxman 71 / 208 CTR 417 / 199 Taxation 259 (SC) / 11 SCC 297*

**S. 261 : Appeal – Supreme Court – Law from inception – Precedent**

It is for the Supreme Court to indicate as to whether its decision in question will operate prospectively. Normally a decision of the Supreme Court is assumed to be the law from inception.

*Murthy M.A. v. State of Karnataka & Others (2004) 178 Taxation 397 / (2003) 264 ITR 1 / 185 CTR 194 (SC) / 7 SCC 517*

**S. 261 : Appeal – Supreme Court – Precedent**

High Court relying on its own decision disposed off appeal filed by revenue. Decision relied upon by High Court had been overturned by the Supreme Court. Respondent sought to reopen issues determined by Supreme Court by seeking to contend that

decision was incorrect. The Court held respondent was not justified. (A.Ys. 1989-90, 1990-91)

*DIT v. Bharat Diamond Bourse (2004) 192 CTR 506 / (2005) 142 Taxman 409 (SC)*

### **S. 261 : Appeal – Supreme Court – Decision of Supreme Court – Precedence**

Once a point is finally decided by Supreme Court it becomes a binding precedent; binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that point with reference to which an argument was subsequently advanced, was actually decided. (A.Y. 1980-81)

*CIT v. Ratilal Bacharilal & Sons (2006) 282 ITR 457 / (2005) 198 CTR 324 / 153 Taxman 86 (Bom.)(High Court)*

### **S. 261 : Appeal – Supreme Court – Precedent – Obiter dicta**

The obiter dicta of a High Court decision may not be binding on subordinate Courts and judicial and quasi-judicial bodies; however, obiter dicta of Supreme Court are binding.

(A.Y. 1999-2000)

*B. Sorabji v. ITO (2005) 95 ITD 540 / 96 TTJ 524 (SB)(Mum.)(Trib.)*

### **Section 262 : Hearing before Supreme Court**

### **S. 262 : Appeal – Supreme Court – Hearing – Additional Ground – Pure question of law raised first time – Article 131 of the Constitution of India**

A pure question of law was raised for the first time before the Supreme Court, which was not considered earlier, the Supreme Court set aside the orders of the High Court and the Appellate Tribunal and remanded the matter back to the Tribunal for a fresh consideration of the issue. (A.Ys. 1984-85, 1985-86)

*CIT v. Varas International Pvt. Ltd. (2006) 284 ITR 80 / 155 Taxman 202 / 204 CTR 120 / 195 Taxation 441 (SC)*

### ***E. Revision by the Commissioner***

### **Section 263 : Revision of orders prejudicial to revenue**

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views**

The phrase “prejudicial to the interest of revenue” in section 263 has to be read in conjunction with the expression “erroneous”. When the Assessing Officer takes one of the two views permissible in law and which the Commissioner does not agree with and which results in a loss of revenue, it cannot be treated as erroneous order prejudicial to the interest of revenue, unless the view taken by the Assessing Officer is completely unsustainable in law.

*CIT v. Max India Ltd. (2007) 295 ITR 282 / 213 CTR 266 / (2008) 166 Taxman 188 / 204 Taxation 1 (SC)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Merger – Reassessment**

When the Commissioner sought to revise a part of the order of assessment which was not part of the re-assessment, after four years of original assessment, the Supreme Court held that the doctrine of merger did not apply in such cases and that the period of limitation commences from the date of the original order.

The Supreme Court further held that there may not be any doubt or dispute that once an order of reassessment is reopened, the previous under-assessments will be held to be set-aside and the whole proceedings would start afresh, but that would not mean that even when the subject matter of reassessment is distinct and different, the entire proceedings would be deemed to have been reopened. (A.Ys. 1994-95 to 1996-97)

*CIT v. Alagendran Finance Ltd. (2007) 293 ITR 1 / 211 CTR 69 / 162 Taxman 465 / 201 Taxation 379 / 7 SCC 215 / 2007 AIR 3005 (SC)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Scope of power – Sub sequent order [S. 134]**

Revision proceeding under section 263 cannot be held to become bad only because subsequently, an order of rectification was passed by the assessing officer under section 154. In such cases, the consenting party should bring the subsequent development to the notice of the Commissioner so as to enable him to take same into consideration.

The principle that when an authority having discretionary power exercises the same for unauthorized purpose or on consideration of irrelevant facts, the same must be held to be bad in law is to be applied only in administrative jurisdiction; it cannot be applied in cases where an authority exercises a judicial or a quasi judicial function.

Further, the lower authority is bound by the order passed by the higher authority keeping in view the principles of judicial discipline. (A.Y. 1992-93)

*CIT v. Ralson Industries Ltd. (2007) 288 ITR 322 / 158 Taxman 160 / 207 CTR 201 / 198 Taxation 97 (SC) / 2 SCC 326*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Jurisdiction – Order passed by ITO with approval of IAC**

The Commissioner has jurisdiction under section 263 to revise an order passed by the ITO with approval of the IAC under section 144B. In any event, having regard to the subsequent amendments to the Act, from time to time, there was no scope for limiting the phrase "order passed by the Income Tax Officer" in section 263 to exclude orders passed by the ITO on the directions of a superior authority either under section 144A or 144B. (A.Y. 1977-78)

*T. N. Civil Supplies Corpn. Ltd. v. CIT (2003) 260 ITR 82 / 129 Taxman 69 / 180 CTR 307 (SC)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Scope of powers – Satisfaction – Order based on the decision of jurisdictional High Court**

Assessment orders passed based on the decision of the jurisdictional High Court. High Court decision not under appeal to the Supreme Court. Commissioner has no jurisdiction to revise on ground that order was prejudicial to revenue, even if the High Court decision relied upon is set aside by the Supreme Court, subsequently. Satisfaction must be one objective and based on material either legal or factual then available cannot be mere ipse dixit of the Commissioner. (A.Ys. 19985-86, 1986-87) *CIT v. G. M. Mittal Stainless Steel (P.) Ltd. (2003) 263 ITR 255 / 173 Taxation 363 / 179 CTR 553 / 130 Taxman 67 (SC)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – CBDT – Jurisdiction – Binding – Assessing Officer's self – Determination of ALP without referring to TPO is "erroneous & prejudicial to interests of revenue" – International transaction – Transfer pricing [S. 92C, 199]**

The assessee entered into international transactions with its AEs, the value of which exceeded ` 5 crores. The Assessing Officer passed an order under section 143(3) in which he recorded the finding that he had examined the transactions and found them to be at arms' length and no transfer pricing adjustment was required to be made. The CIT thereafter passed an order under section 263 on the ground that in view of Instruction No. 3 of 2003 dated 20.5.2003, the Assessing Officer ought to have referred the issue to the TPO instead of himself determining the arms' length price of the transactions and that the assessment order was consequently "erroneous and prejudicial to the interests of the revenue". On appeal, the Tribunal (114 TTJ (Delhi) 1) upheld the revision order. On further appeal by the assessee, HELD dismissing the appeal:

Though section 92CA enables the Assessing Officer to refer an international transaction to the TPO if he considers it "necessary or expedient" to do so, Instruction No. 3 dated 25.5.2003 makes it mandatory for the Assessing to make a reference to the TPO if the aggregate value of the international transaction exceeds ` 5 crores. This Circular, having been issued under section 119, is binding on the Assessing Officer. The Assessing Officer ought to have referred the matter to the TPO having regard to the fact that Specialized Cell was created to deal with complicated and complex issues arising out of the transfer mechanism. The Assessing Officer's omission to follow the binding Circular amounted to making assessment without conducting proper inquiry and investigation and resulted in the order becoming "erroneous and prejudicial to the interest of the Revenue". The observations in Sony India 288 ITR 52 (Delhi) (while upholding the constitutional validity of the aforesaid Circular) that the said Circular was a "Guideline" which did not take away the discretion of the Assessing Officer was made in a different context. (A.Y. 2004-05) *Ranbaxy Laboratories Ltd. v. CIT (2012) 204 Taxman 294 / 70 DTR 293 / 250 CTR 33 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Commissioner is not permitted to change view & revise under section 263 without changed circumstances**

It was held that as the department had examined the fundamental nature of the transaction in the earlier years and its nature remained unchanged, the department could not have changed its view as regards the nature of the transaction by dubbing it as erroneous. The department is not entitled to re-open an assessment based on a fresh inference of transactions accepted by the revenue for several preceding years on the pretext of dubbing them as erroneous.

Associated Food Products 280 ITR 377 (MP), Sirpur Paper Mills Ltd. (1978) 114 ITR 404 (AP) & CIT v. Gopal Purohit 228 CTR 582 / 336 ITR 287 / 188 Taxman 140 / 34 DTR 52 (Bom.) followed.

*CIT v. Escorts Ltd. (2011) 51 DTR 321 / 338 ITR 435 / 198 Taxman 324 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Depreciation – Goodwill [S. 32]**

Assessing Officer allowed depreciation on goodwill treating the same as intangible asset. Commissioner revised the order, the Tribunal quashed the order of revision. High Court confirmed the order of Tribunal. The Court held that where two views are possible and the assessing officer accepting one view which is plausible one, not appropriate to exercise power under section 263. (A. Ys. 2001-02 to 2003-04).

*CIT v. Hindustan Coca Cola Beverages P. Ltd (2011) 331 ITR 192 / 238 CTR 1 / 198 Taxman*

*104 / 50 DTR 122 (Delhi)(High Court)*

*Editorial:- Refer Hindustan Coca Cola Beverages (P) Ltd. v. Dy. CIT (2010) 132 TTJ 602 / 34 SOT 171 / 43 DTR 416 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Exempted income – Proviso to section 14A – Law prevailing on the date of order u/s. 263 [S. 14A]**

Partners of a firm, were assessed to tax in their individual capacity and the Assessing Officer gave deduction of interest paid on borrowings for investment in firm, the Court held that proviso to section 14A did not apply to the facts of the case as on date of orders of CIT under section 263 (29th December 1999), said proviso was not even existence, CIT was justified in revising the order of Assessing Officer and in directing him to compute the interest payable on such sum which has been invested in the partnership firm (Which was erroneously allowed by him earlier) and disallow those portions which can be attributable towards investment in partnership.. Favour of revenue(1995-96).

*Mahesh G. Shetty & Ors. v. CIT (2011) 51 DTR 104 / 238 CTR 440 / 198 Taxman 22 (Karn.)(High Court)*

*Editorial: SLP rejected . SLP (Civil) (Nos 14660-14663 of 2011 date 5-7-2011 (2012) 204 Taxman 189 (Mag.)*



## **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Export – Deduction**

### **[S. 80HHC]**

Where the Assessing Officer had allowed deduction under section 80HHC of the Act without excluding the certain receipts as mentioned in Explanation (baa) to section 80HHC of the Act. CIT was held to be justified in invoking jurisdiction under section 263 of the Act and setting aside the assessment order passed by the Assessing Officer under section 143(3) of the Act, as there was a prima facie error committed by the Assessing Officer while framing assessment under section 143(3) of the Act. (A. Ys. 1995-96-97)

*CIT v. N. C. John & Sons P. Ltd. (2011) 51 DTR 142 (Ker.)(High Court)*

## **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Effect order not passed within “reasonable time” – order becomes “infructuous”**

Even if there is no period of limitation prescribed under section 153(3)(ii) to give effect to section 263 orders, the Assessing Officer is required to pass the order within a “reasonable period”. Non-specification of period of limitation does not mean that the Assessing Officer can wait for indefinite period before passing the consequential order.

*CIT v. Goyal M. G. Gases Pvt. Ltd. ITA No. 335/2011 dated 23-2-2011 (Delhi)(High Court)*

Source : [www.itatonline.org](http://www.itatonline.org)

## **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views – One of the possible view**

Where the Assessing Officer has taken one of the possible views which resulted in loss of revenue, the order cannot be treated as ‘erroneous’ and the Commissioner cannot invoke jurisdiction under section 263. (A. Y. 1989-90)

*CIT v. Kelvinator of India Ltd. (2011) 332 ITR 231 / 201 Taxman 88 (Mag.)(Delhi)(High Court)*

## **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Exemption – Capital gains – Investment in house with in time specified under section 139(4) [S. 54F]**

Commissioner passed the order under section 263 withdrawing exemption under section 54F, on the ground that new house was registered in favour of the assessee beyond the due date prescribed under sub section (1), of section 139 and that the assessee failed to deposit the sale proceeds as provided under section 54F(4). High Court held that Tribunal was justified in setting a side the order of the Commissioner by holding that the investment made by the assessee being within time specified under section 139(4), the assessee is eligible for exemption under section 54F in view of the binding decision of the Jurisdictional High Court. (A. Y. 2006-07).

*CIT v. Vrinder P. Issac (Smt.) (2011) 64 DTR 376 (Karn.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous Order – Merger**

Where the Assessing Officer has applied his mind to the issue of applicability of section 40A(3), vis-à-vis block assessment and taken a possible view, the CIT is not justified in exercising powers of revision under section 263. Once the issue was considered and decided by the CIT(A) revision under section 263 cannot be done.

*Ranka Jewellers v. Addl. CIT (2011) 238 CTR 153 / (2010) 328 ITR 148 / 38 DTR 293 / 190 Taxman 265 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Block assessment – Documents seized**

In the block assessment order the assessing Officer made an addition of ₹ 90 Lakhs on the basis of the documents seized from the premises of Viswas R. Bhoir. The said addition was deleted by the Tribunal and the appeal is pending before the Bombay High Court. In the mean time the CIT passed a revision order under section 263 on 16-0- 2005, directing the Assessing Officer to consider the tax implication of Page Nos. 1 to 13 of bundle No. 12 seized from the residence of Viswas R. Bhoir. The Tribunal held that once taxability under both the documents has been considered by the Assessing Officer and the CIT(A), it is not open to CIT to invoke the jurisdiction under section 263. On appeal to the High Court, the High Court confirmed the order of Tribunal.

*CIT v. Mukesh J. Upadhyaya (ITA No. 428 of 2010 dated 13-6-2011 594 (2011) 43A-BCAJ – August – P. 30) (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views – Erroneous**

The condition precedent to the exercise of jurisdiction under section 263, was that the order sought to be revised must be erroneous in so far as it was prejudicial to the interest of revenue. When two views were possible, the assessment could not be revised. (A.Y. 1982-83)

*Grasim Industries Ltd. v. CIT (2010) 321 ITR 92 / 229 CTR 347 / 35 DTR 142 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views – Book Profit**

Assessing Officer taking plausible view vis-à-vis book profit under section 115JB. As by virtue of Explanation to section 115JB and in view of SC decision in 305 ITR 409 in *CIT vs. HCL Comnet Systems & Services Ltd.*, provision for bad and doubtful debts are not to be considered in terms of cl. (c) to the Explanation, the Order of revision by CIT was not justified. (A.Y. 2002-03)

*CIT v. DLF Power Ltd. (2010) 329 ITR 289 / 229 CTR 27 / 185 Taxman 356 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Time limit for revision of orders – Date of original order**

Assessment order is not affected in respect of items that are not subject of reassessment. Time limit for section 263 begins from date of original order for such items.

*Ashoka Buildcon Ltd v. ACIT (2010) 325 ITR 574 / 39 DTR 113 / 191 Taxman 29 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – AAR decision – Binding – Not amenable [S. 245S]**

AAR rulings are binding despite contrary rulings of AAR. Assessment order following binding precedent is not amenable to section 263 revision. (A.Ys. 2004-05, 2005-06)

*The Prudential Assurance Company v. DIT (2010) 324 ITR 381 / 38 DTR 337 / 232 CTR 12 / (2011) 222 Taxation 183 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous Order – Enquiry held by Assessee**

Since an enquiry was specifically held with reference to which a disclosure of details was called for by the Assessing Officer and made by the assessee, the observation of the CIT that the Assessing Officer had arrived at his findings without conducting an enquiry was erroneous and therefore the CIT wrongly exercised the powers by recourse to section 263. (A.Y. 2002-03)

*CIT v. Development Credit Bank Ltd. (2010) 323 ITR 206 / 40 DTR 61 / 196 Taxman 329 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Provision for non performing assets – Book Profits [S. 115JA]**

The Assessing Officer while passing assessment order under section 143(3) of the Act had not added back provision for non performing asset and investment and lease equalisation charges to the book profits of the assessee company under section 115JA of the Income-tax Act, 1961. The CIT invoked the provisions of section 263 of the Act and directed the assessing officer to add back the provision for non performing asset and investment and lease equalisation charges while computing book profits under section 115JA of the Act. On these facts the Hon'ble High Court held that the assessing officer had taken a possible view in computing the book profit of the assessee company under section 115JA of the Act as such the CIT was not justified in invoking the provisions of section 263 of the Act and directing the assessing officer to modify the assessment.

*CIT v. Shiva Texyarn Ltd (2010) 40 DTR 270 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of Enquiry by Assessing Officer – No revision**

Mere lack of inquiry by Assessing Officer is not sufficient for revision under section 263. (A.Y. 1982-83)

*CIT v. Vikas Polymers (2010) 236 CTR 476 / 47 DTR 348 / 194 Taxman 57 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue - Reasons indicated by CIT – Remand**

As the Tribunal has set aside the order of CIT, without dealing with the reasons indicated by CIT for exercising jurisdiction under section 263, therefore, matter remanded to the Tribunal for fresh decision. (A.Y. 2003-04)

*CIT v. KNR Patel (JV) (2010) 322 ITR 97 / 45 DTR 150 / 236 CTR 50 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous Order – Lack of proper enquiry**

Order under section 263 passed by the CIT setting aside the assessment order on the ground that the Assessing Officer has not made enquiries in respect of certain issues, without stating as to how the order of the Assessing Officer is erroneous and prejudicial to the interests of revenue cannot be sustained, more so when the issues pointed out by the CIT do not in fact, merit further investigation. (A.Y. 2001-02)

*CIT v. Leisure Wear Exports Ltd. (2010) 46 DTR 97 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper Inquiry – Not possible**

Tribunal having found that the Assessing Officer had made reasonably detailed enquiries, collected relevant material including the seized documents, and discussed various facts of the case with the assessee's Chartered Accountants before making the assessments, there was no valid basis for the CIT to exercise jurisdiction under section 263 and to direct the Assessing Officer to make fresh assessments by going deeper in to the matter. (A.Ys. 1983-84, 1984-85)

*CIT v. Hindustan Marketing & Advertising Co. Ltd. (2010) 46 DTR 109 (2011) 196 Taxman 368 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inquiry – Suo moto – Requirements**

Whether CIT has *suo motu* powers to pass the Order by merely stating that Assessing Officer has not properly enquired. Same materials were there before the Assessing Officer who had passed the impugned Order by applying his mind. Recourse to section 263(1) cannot be taken if the Order is erroneous but not prejudicial and vice versa. Held, provision 263 has not been rightly invoked. (A.Y. 1982-83)

*CIT v. Vikash Polymers (2010) 236 CTR 476 / 194 Taxman 57 / 47 DTR 348 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inquiry by Assessing Officer – Recording in order Assessment**

Where the assessing officer during the scrutiny assessment proceeding raised a query which was answered by the assessee to the satisfaction of the assessing officer but the same was not reflected in the assessment order by him, a conclusion cannot be drawn by the Commissioner that no proper enquiry with respect to the issue was made by the assessing officer, and enable him to assume jurisdiction under section 263 of the Act.

Further, the High Court also held that revision order passed by the Commissioner under section 263 of the Act on a ground in addition to the grounds mentioned in his show cause notice issued cannot be sustained. (A.Y. 2002-03)

*CIT v. Ashish Rajpal (2009) 23 DTR 266 / 320 ITR 674 / 180 Taxman 623 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Scope – Ground not specified**

Revision order passed by the Commissioner under section 263 of the Act on a ground not mentioned in his show cause notice issued cannot be sustained. (A.Y. 2003-04)

*CIT v. Contimeters Electricals (P) Ltd. (2009) 22 DTR 158 / 317 ITR 249 / 224 CTR 366 / 178 Taxman 422 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Application of mind – Share application money**

The assessee had given explanation with respect to the creditors and share application money received by it to the assessing officer during the assessment proceedings, to which the assessing officer applied his mind did not make any addition to the income of the assessee while passing order under section 143(3) of the Act. The Commissioner exercising jurisdiction under section 263 of the Act on the ground that the order of the Assessing Officer was prejudicial to the interest of revenue on the ground that the assessee failed to produce the share holders and the creditors before the Assessing Officer was held to be not justified. (A.Y. 2001-02)

*CIT v. Unique Autofelts P. Ltd. (2009) 30 DTR 231 (P&H)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of Inquiry – Revenue expenditure**

Assessing Officer having made enquiries, elicited replies and thereafter allowed the expenditure on tools and dyes as revenue expenditure, it cannot be said that it was "lack of enquiry" and therefore, the assessment order passed by the Assessing Officer cannot be revised under section 263. (A.Y. 2001-02)

*CIT v. Sunbeam Auto Ltd. (2009) 31 DTR 1 / (2009) 227 CTR 133 / 289 Taxman 436 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views – Erroneous order [S. 143(3)]**

Where two views were possible on the issue, and one view is taken by the assessing officer while passing order under section 143(3) of the Act, which was also a plausible view, merely because the view benefited the assessee, the action of the assessing officer cannot be held to be erroneous by the Commissioner for assuming jurisdiction under section 263 of the Act. (A.Y. 2002-03)

*CIT v. DLF Power Ltd. (2009) 31 DTR 93 / 229 CTR 27 / 329 ITR 289 / 185 Taxman 356 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Merger of Assessment order – Deduction under section 80-I**

Assessing Officer allowing partial deduction under section 80-I. CIT(A) allowing deduction in full. Commissioner invoking powers under section 263 and contending that eligibility of deduction under section 80-I (2) was never subject-matter before the Appellate Authority and that deduction had been granted by considering provisions of section 80-I(1) only. Held that the entire eligibility of deduction under section 80-I was before the Appellate Authority and hence the Assessing Officer's order had merged with that of the CIT(A). The prohibition of Explanation (c) to 263 was applicable and thus the Commissioner was not justified in invoking section 263. Deduction under section 80-I(1) cannot be independent of section 80-I(2). (A.Y. 1985-86)

*CIT v. Nirma Chemical Works Pvt. Ltd. (2009) 182 Taxman 183 / 309 ITR 67 / 222 CTR 593 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order as per direction of commissioner – Erroneous**

Assessment order was passed as per the direction of earlier CIT. In the absence of any error or anything unsustainable in law in the said Order, the Order could not be revised by the subsequent CIT. (A.Ys. 1980-81 to 1986-87)

*Virendra Kumar Jhamb v. CIT (2009) 222 CTR 88 / 176 Taxman 011 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Examination of facts – Elaborate order [S. 80HHC]**

Where the Assessing Officer after examining all the details with respect to assessee's claim of deduction under section 80 HHC allowed the claim, the High Court held that it cannot be said that the order of the Assessing Officer was erroneous or the same was passed without application of mind merely because the same was not elaborate order. (A.Y. 1995-96)

*CIT v. Design & Automation Engineers (Bombay) (P) Ltd. (2008) 13 DTR 145 / 323 ITR 632 / 177 Taxman 009 (Bom.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Levy of surcharge – Block Assessment [S. 113]**



The issue regarding levy of surcharge under the proviso to section 113 of the Act with respect to search action conducted prior to 1-6-2006 was a debatable issue on the date, the CIT issued notice under section 263 as such the action of the CIT issuing notice was without jurisdiction.

*CIT v. Ansal Properties & Industries (P) Ltd. (2008) 14 DTR 227 / 315 ITR 225 / 178 Taxman 201 (Delhi)(High Court)*

#### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Payment to sub-contractor – Verification**

Where the Assessing Officer allowed the payments to sub – contractors as genuine after verification of all the evidences placed on record by the assessee, the High Court held that under these circumstances the Commissioner was not justified in exercising his revisional jurisdiction under section 263 of the Act on the basis of material collected at the time of revisional proceedings. (A.Y. 2001-02)

*CIT v. R. K. Construction Co. (2008) 12 DTR 210 / 313 ITR 65 / 221 CTR 415 / 175 Taxman 165 (Guj.)(High Court)*

#### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Shares – Stock or Investment**

Assessee not holding shares as stock-in-trade but holding it as investment. Profit on sale of shares subsequently be treated as capital gains and not as business income. Order of Assessing Officer to that effect is not prejudicial to revenue. Hence, exercise of revisional jurisdiction by Commissioner was unjustified.

*CIT v. Rewshankar A. Kothari 2007 TLR 793 (Guj.)(High Court)*

#### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Penalty – Initiation of Proceedings**

Direction by Commissioner, in exercise of powers under section 263, to Assessing Officer to consider initiation of penalty proceedings under section 271(1)(a) of Act against assessee is not permissible, 1984 Tax LR 1133 (Delhi), dissented from

*CIT v. Parmanand M. Patel 2007 TLR 726 (Guj.)(High Court)*

#### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Second opinion possibility – Insurance Compensation**

The Commissioner cannot use his powers on the mere pretext that a second opinion is possible on a certain issue. In this case the assessing officer treated the insurance compensation as a capital receipt under an order passed under section 143(3), whereas the Commissioner ordered the Assessing Officer to consider it as revenue receipt. (A.Y. 1982-83)

*CIT v. Vinod Kumar Gupta (2007) 165 Taxman 225 (P&H)(High Court)*

#### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Audit objection – Two views**

On the basis of examination of records, the Assessing Officer had taken a possible view – Mere audit objection and merely because, a different view could be taken are not enough to hold that the original assessment order is erroneous or prejudicial to the interest of the Revenue. (A.Y. 1975-76)

*CIT v. Sohana Woollen Mills (2007) 207 CTR 178 / 296 ITR 238 (P&H)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views – Erroneous order**

When two views are possible upon an issue, it is not the case of CIT to hold that the view taken by Assessing Officer is not possible to accept or incorrect — Held, the CIT cannot invoke the jurisdiction under section 263. (A.Y. 1999-2000)

*CIT v. Mepco Industries Ltd. (2007) 207 CTR 642 / 294 ITR 121 / 163 Taxman 648 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Estimate of Income – Advance tax – Interest**

Enhancement of assessment by Commissioner in revision no under estimate of advance tax by assessee since he could not have anticipated the addition of income and levy of interest under section 215 was deleted in earlier year. (A.Y. 1986-87)

*CIT v. Jayendra H. Kharawala (2006) 282 ITR 205 / 200 CTR 420 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Summary assessment – No revision possible [S. 143(1)(a)]**

Summary assessment is made under section 143(1)(a). In view of the Circular No. RA/86-87/DT dated 26-8-1987, the CIT cannot assume jurisdiction to exercise powers under section 263. (A.Y. 1986-87)

*CIT v. Vikrant Crimpers (2006) 202 CTR 393 / 282 ITR 503 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Summary assessment – Writ**

The assessing officer issued intimation under section 143(1) (a) Income-tax Act, 1961 for the A.Y. 1999-2000. Thereafter, the CIT initiated proceeding under section 263 Income-tax Act, 1961 exercising its revisionary powers against the order under section 143(1) (a) Income-tax Act, 1961. On writ petition before the High Court, the Hon'ble High Court after examining in detail decisions of various High Courts including the Supreme Court held that by no stretch of imagination an intimation under section 143(1) (a) Income-tax Act, 1961 can be considered as order for the CIT to assume jurisdiction under section 263 of the Income-tax Act, 1961. Consequently, the initiation of proceeding under section 263 Income-tax Act, 1961 was held to be without jurisdiction.

*Hill Top Holdings India Ltd. v. CIT (2006) 192 Taxation 137 (Cal.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Direction of superior officer – Prejudicial**

Order passed on the dictates of superior officer directing the Assessing Officer to accept the return filed by the assessee without asking for further information. Held, order was erroneous and prejudicial to the interest of Revenue. Revision under section 263 is justified. (A.Y. 2000-01)

*Green World Corporation v. ITO (2006) 205 CTR 524 / 285 ITR 118 / 159 Taxman 35 (HP)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – KVSS – Certificates**

Where there was no concealment of facts by the assessee in declaration under K.V.S.S. and the CIT had not cancelled the certificate issued under the scheme, it is not permissible for CIT to pass revision order under section 263 of the Act, as there was full and final settlement of demand under the K.V.S.S.

*Siddhartha Tubes Ltd. v. CIT (2006) 195 Taxation 89 (MP)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Scope – Restricted to grounds**

Direction to assess only on two grounds – Assessing Officer is entitled to consider only those two grounds and not any other items to make fresh assessment. (A.Ys. 1979-80 to 1983-84)

*CIT v. D. N. Dosani (2006) 200 CTR 76 / 280 ITR 275 / 153 Taxman 13 (Guj.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Remedy – Appeal to Tribunal**

Appropriate remedy against the order passed by the CIT in exercise of its revision jurisdiction under section 263 is to file appeal before the Tribunal. As such the Hon'ble High Court while disposing of the writ filed by the assessee directed the petitioner to file an appeal before Tribunal within two weeks and directed the Income Tax department to suspend all the proceedings on the basis of revision order for four weeks.

*John George Vettath Mohan Vettath (2006) 193 Taxation 458 (Ker.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Orders prejudicial to revenue – Proceedings are dropped**

Section 263 is not limited to exercising revisional powers *qua* order of assessment only; it would take within its sweep even orders wherein either proceedings are dropped or proceedings are filed. (A.Y. 1983-84)

*New Jagat Textile Mills (P.) Ltd. v. CIT (2006) 282 ITR 399 / (2005) 196 CTR 110 (Guj.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Orders prejudicial to revenue – Amendment retrospective effect**

The consequence of Explanation (c) was introduced with retrospective effect in section 263 is that the powers under section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in the order passed in appeal on or before or after 1st June 1998. By using the words 'on or before or after' itself denotes that intention of Legislature is to embrace all orders, whether passed on or after or before 1-6-1988. (A.Y. 1980-81)

*CIT v. Ratilal Bacharilal & Sons (2006) 282 ITR 457 / (2005) 198 CTR 324 / 153 Taxman 86 (Bom.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of merger – Amendment**

In view of amendment of section 263 with retrospective effect from 1-6-1988, in respect of items which have not been considered in appeal, power of Commissioner shall be extended to them. (A.Y. 1982-83)

*CIT v. Amrit Banaspati Co. Ltd. (2005) 277 ITR 559 (All.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Rectification order – Not prejudicial**

Rectification order of Assessing Officer granting exemption under section 10(10C) to which assessee was entitled could not be treated as erroneous and prejudicial to interests of revenue. (A.Y. 2001-02)

*S.R. Koshti v. CIT (2005) 276 ITR 165 / 146 Taxman 335 / 193 CTR 518 (Guj.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Charge of interest at lower rate to sister concern – Erroneous**

Where assessee-firm debited accounts of partners to whom interest on their credit balance was being paid at 6 per cent, and credited corresponding amount to accounts of a sister concern to which interest was to be paid at 18 per cent, assessment order passed by Assessing Officer allowing deduction of interest paid to sister concern at 18% was erroneous and prejudicial to interests of revenue. (A.Y. 1981-82)

*Mannulal Matadeen v. CIT (2005) 277 ITR 346 / 152 Taxman 125 (All.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Not recording of evidence – Inquiry by Assessing Officer**

Where during scrutiny assessment most of credits were considered by Assessing Officer and after due enquiries, were treated as genuine while some of them were treated as non-genuine, merely because as regards credits which he accepted Assessing Officer did not record that evidence was satisfactory and acceptable, would not make his order erroneous and prejudicial to interest of revenue in respect of credits accepted as genuine by him. (A.Y. 1998-99)

*CIT v. Makal Suta Cotton Co. (P.) Ltd. (2005) 275 ITR 54 / 198 CTR 675 / 153 Taxman 590 (MP) (High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Intimation – Revision not possible [S. 143(1)]**

Commissioner cannot revise an assessment completed under section 143(1). (A.Ys. 1983-84 to 1985-86)

*CIT v. Brij Bala (Smt) (2005) 274 ITR 33 / 156 Taxman 244 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessment rectified under section 154 – Original order can not be revised [S. 154]**

Commissioner cannot exercise his power of revision under section 263 in respect of original assessment order which already stood rectified under section 154. (A.Y. 1984-85)

*CIT v. Kalyan Solvent Extraction Ltd. (2005) 276 ITR 154 / 197 CTR 475 (MP)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Initiation of penalty proceedings – failure to initiate – Revenue possible**

Omission by ITO to initiate penalty proceedings in course of assessment renders assessment order erroneous and prejudicial to interest of revenue. (A.Ys. 1980-81, 1986-87)

*CIT v. Surendra Prasad Agrawal (2005) 142 Taxman 653 / 275 ITR 113 / 194 CTR 161 (All.) / CIT v. Ashok Construction Co. (2005) 147 Taxman 37 / 280 ITR 368 (All.) / CIT v. Associated Contractors Corpn. (2005) 275 ITR 123 / 145 Taxman 356 / 198 CTR 593 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to the interest of revenue – Dropping of penalty – Revision**

Commissioner can revise order of Assessing Officer dropping penalty proceedings. (A.Y. 1977-78)

*CIT v. Braj Bhushan Cold Storage (2005) 275 ITR 360 / 145 Taxman 585 / 197 CTR 490 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Non speaking order – Without any reason**

A non speaking order passed without giving reason and without mentioning details which assessee was asked to furnish and details which assessee filed by submitting revised return, was erroneous and prejudicial to interests of revenue.

*Lashkari Ram (Pt) v. CIT (2005) 272 ITR 309 / (2004) 191 CTR 534 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Exemption – Without discussion**

Where ITO had granted exemption to assessee in respect of income from agriculture and poultry-farming without any discussion and without any application of mind,

assessment order was erroneous and prejudicial to interests of revenue. (A.Y. 1973-74)

*CIT v. Bhagwan Das (2005) 272 ITR 367 / 142 Taxman 1 (All.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Intimation – Possible after 1-4-1989 [S. 143(1)]**

Commissioner can exercise jurisdiction under section 263 in respect of assessment under section 143(1) as applicable after 1/4/1989. (A.Y. 1999-2000)

*CIT v. Anderson Marine & Sons (P.) Ltd. (2004) 266 ITR 694 / 139 Taxman 16 / 189 CTR 118 (Bom.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Possible view – Not prejudicial**

Where view expressed by Assessing Officer is a possible view, commissioner cannot hold assessment order as prejudicial to interest of revenue. (A.Y. 1992-93)

*CIT v. Max India Ltd. (2004) 268 ITR 128 / 191 CTR 397 (P&H)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Record – Wider scope**

'Record' does not mean only 'record' available with ITO at time of passing of assessment order. It would include the records available with the Commissioner at the time of passing of the order by the Commissioner. (A.Y. 1986-87)

*CIT v. K. Ramachandran (Dr.) (2004) 139 Taxman 320 / 187 CTR 654 (Mad.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger – Subject matter of appeal**

Matter not considered and decided in appeal can be subjected to revision

*CIT v. Ram Kishore Raj Kishore (2004) 135 Taxman 511 (All.)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger – Validity**

In a case where issues in revision are different from those in appeal, proceedings under section 263 would not be invalid during the pendency of an appeal.

*Aerens Infrastructure & technology Ltd. v. CIT (2004) 271 ITR 15 / 192 CTR 542 / 144 Taxman 472 (Delhi)(High Court)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Merger – Amendment**

In view of the amendment made in clause (a) and (c) of Explanation to section 263 that part of the order of the ITO which has not been challenged in appeal, does not merge in the order of the Commissioner (Appeals) and the Commissioner has jurisdiction to revise that order. (A.Y. 1976-77)



*CIT v. Dhampur Sugar Mills Co. Ltd. (2004) 270 ITR 576 / 142 Taxman 468 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Valuation of stock – Cession of business**

Where though facts showed that there was complete cessation of business of assessee-firm on division of assets/liabilities among partners, yet Assessing Officer accepted valuation of stock at cost price rather than market price, his order was rightly held as erroneous and prejudicial to interest of revenue by Commissioner. (A.Y. 1992-93)

*Naveen Harware & Electrical Stores v. CIT (2004) 266 ITR 308 / 140 Taxman 325 / 188 CTR 19 (Gau.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Explanation – Failure to apply [S. 36(1)]**

Failure by Assessing Officer to apply Explanation to section 36(1)(vii) would make his order erroneous and prejudicial. (A.Y. 1993-94)

*Jubilant Organosys v. CIT (2004) 265 ITR 420 / 137 Taxman 515 / 187 CTR 574 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Failure to verify confirmation letters – Effect – Share capital**

Effect of Assessing Officer's failure to verify genuineness of confirmation letters filed by contributors to assessee company's share capital. (A.Y. 1982-83)

*CIT v. Achal Investments Ltd. (2004) 268 ITR 211 / 136 Taxman 335 / 187 CTR 475 (Delhi)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Vague order by Commissioner – Cash credits**

Where assessee had furnished requisite information and ITO had considered the record before him and completed assessment after considering evidence filed and after his satisfaction about genuineness of cash credits, order of revision under section 263 on vague ground that the Assessing Officer did not make proper enquiry was not valid

*CIT v. Mehrotra Brothers (2004) 270 ITR 157 (MP)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Valuing stock at cost – Death of partner**

Where on death of one of two partners business was continued by surviving partner, it being not a case of dissolution of firm Assessing Officer's order valuing stock on cost or market price, whichever was lower, could not be held to be erroneous and prejudicial to revenue. (A.Y. 1993-94)

*Kwality Steels Suppliers v. CIT (2004) 271 ITR 40 / 141 Taxman 177 / 191 CTR 94 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Writ – Findings of commissioner**

If prima-facie opinion is recorded by commissioner that order sought to be revised is erroneous and prejudicial to revenue, Court in its writ jurisdiction cannot pre-empt proceedings under section 263.

*Pankaj Goyal v. CIT (2004) 270 ITR 201 (HP)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Summary order – Revision possible [S. 143(1)]**

Section 263 will cover a summary order of assessment. (A.Y. 1988-89)

*CIT v. R. G. Umaranee (Smt) (2003) 127 Taxman 265 / 262 ITR 507 / 181 CTR 104 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Intimation – Revision possible [S. 143(1)]**

There is no restriction on power of Commissioner to revise summary assessment made under section 143(1). (A.Y. 1985-86)

*CIT v. Chidambaram Construction Co. (2003) 261 ITR 754 / 181 CTR 542 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Summary order – Revision possible [S. 143(1)(a)]**

Commissioner has jurisdiction under section 263 to revise order passed by ITO in summary assessment under section 143(1)(a).

*CIT v. Sri Mahasastha Pictures (2003) 127 Taxman 162 / 263 ITR 304 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Direction issued by IAC – Revision possible [S.144B(4)]**

Revisional powers under section 263 can be exercised in cases where order was made by Assessing Officer pursuant to directions issued by IAC under section 144B(4). (A.Y. 1979-80)

*CIT v. Mehsana District Co-op. Milk Producers Union Ltd. (2003) 130 Taxman 235 / 263 ITR 645 / 184 CTR 608 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger [Explanation (c)]**

In view of the amendment of section 263 (1), Explanation (c) as interpreted by the Supreme Court in *CIT v. Arbuda Mills Ltd. (1998) 231 ITR 50 (SC)*, the Tribunal was legally not correct in holding that order of ITO had got merged in the order of the Commissioner (Appeals) and therefore the Commissioner had no jurisdiction to revise the order. (A.Y. 1976-77)

*CIT v. Span International (2003) 132 Taxman 28 / 270 ITR 538 (All.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger – Scope**

When the order taken in revision is already subjected to appeal and the appellate order has been made in respect thereof, revision of such order is not permissible. (A.Y. 1979-80)

*CIT v. Mehsana District Co-op. Milk Producers Union Ltd. (2003) 130 Taxman 235 / 263 ITR 645 / 184 CTR 608 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger – Findings of Commissioner (Appeals) [Ss. 80HH, 35B and 80J]**

Where the issues regarding the allowable deduction under sections 35B, 80J and 80HH had been thoroughly checked by Commissioner (Appeals) and findings had been given thereupon, such issues could not be considered in revision. (A.Y. 1980-81)

*CIT v. Farida Prime Tannery (2003) 259 ITR 342 / 135 Taxman 70 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Period of Limitation – Intimation**

Where the petitioner, without even service of the assessment orders, came to know of passing of the assessment orders and yet he applied for revision after period of limitation was over, dismissal of petition on ground of limitation was justified. (A.Ys. 1987-88 to 1989-90)

*Priyanka Metals (P.) Ltd. v. ACIT (2003) 133 Taxman 423 / 183 CTR 102 / 270 ITR 586 (MP)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two views possible – Erroneous order**

When two views are possible and Assessing Officer has taken one view with which Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to interest of revenue unless Assessing Officer's view is unsustainable in law. (A.Y. 1979-80)

*CIT v. Mehsana District Co-op. Milk Producers Union Ltd. (2003) 130 Taxman 235 / 263 ITR 645 / 184 CTR 608 (Guj.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – New Source of Income – Scope**

Commissioner cannot discover a new source of income which was not considered by ITO in assessment order, nor any notice was given by Commissioner under section 263 to treat it as undisclosed income. (A.Y. 1988-89)

*CIT v. R.G. Umaranee (Smt) (2003) 127 Taxman 265 / 262 ITR 507 / 181 CTR 104 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deductions – Failure to inquire by Assessing Officer [S. 80HH and 80HHC]**

Deductions under sections 80HH and 80HHC cannot be granted automatically but only after due enquiry and ascertaining that assessee has complied with requirements of said sections and where this was not done, Commissioner was justified in setting aside assessment. (A.Y. 1986-87)

*Jai Bharath Tanners v. CIT (2003) 128 Taxman 880 / 181 CTR 431 / 264 ITR 673 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Declaration in the course of survey – Inquiry**

Where assessment order was made following declaration of additional income during survey after due application of mind and not in a mechanical way, it could not be considered as erroneous and prejudicial to revenue. (A.Ys. 1998-99 to 2000-01)

*Paul Mathews & Sons v. CIT (2003) 129 Taxman 416 / 263 ITR 101 / 181 CTR 207 (Ker.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – View not unsustainable in law – Erroneous order**

Where view taken by Assessing Officer was not unsustainable in law, simply because Commissioner did not agree with it, that would not make assessment erroneous and prejudicial.

*CIT v. D.P. Karal (2003) 185 CTR 497 / 266 ITR 113 (Guj.)(High Court)*

**S. 263 : Revision of orders prejudicial to revenue – No finding of loss to revenue – Revision invalid**

In absence of any finding that there is loss of revenue, interference under section 263 is not justified. (A.Y. 1987-88)

*CIT v. G.R. Thangamaligai (2003) 185 CTR 560 / 259 ITR 129 (Mad.)(High Court)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Penalty – Two views**

The Assessing Officer dropped the penalty proposal holding that appeal against the quantum is pending before the High Court. The Commissioner of Income-tax revised the order. The Tribunal held that the view of Assessing Officer cannot be held to be erroneous in dropping penalty proceedings. The Assessing Officer can impose penalty even after appeal is determined by High Court. Two view possible hence revision was held to be not valid. (A. Y. 2004-05).

*V. K. Natesan v. Dy. CIT (2011) 128 ITD 81 / 49 DTR 233 / 135 TTJ 257 (TM)(Cochin)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Show cause notice – Reasons not stated in showcause notice – Order invalid**

If a ground of revision is not mentioned in the show-cause notice, it cannot be made the basis of the order for the reason that the assessee would have had no opportunity to meet the point (Maxpack Investments 13 SOT 67 (Delhi), G. K. Kabra 211 ITR 336 (AP) & Jagadhri Electric Supply 140 ITR 490 (P&H) followed);  
*Synergy Entrepreneur Solutions Pvt. Ltd. v. Dy. CIT (2011) 46 SOT 111 / (2012) 13 ITR 377 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Block Assessment – Time limit [S. 158BC, 158BE]**

Provisions of section 263 are applicable to the Block Assessment. In such cases question of restriction under section 158BE as regards time-limit for completion of fresh assessment does not arise. In such cases by virtue of section 156BH limitation as laid down in section 153(2A) would be applicable.

*Bhartiben M. Kelawala (Smt.) v. CIT (2011) 128 ITD 468 / 135 TTJ 455 (Ahd.)(Trib.) / Amita Devi Sanganerla (Smt.) v. ACIT (2011) 129 ITD 72 / 53 DTR 214 / 137 TTJ 521 (TM)(Gau.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Jurisdiction – Power of commissioner – Absence of notice under section 143(2) vis-à-vis limitation for completion of assessment**

When the assessment for Asst. year 1987-88 was completed under section 143(1)(a) and notice under section 143(2) had not been issued and time for completing asst. under section 143(3) expired on 31st March 1990, CIT could not direct Asst. under section 143(3) by his revision order under S. 263 dated 22nd March, 1991, the order was held to be contrary to provisions of section 143(2), 143(3) and 153(1)(a). (A. Ys. 1987-88 & 1990-91)

*V. Narayanan v. Dy. CIT (2011) 53 DTR 188 / 137 TTJ 403 / 127 ITD 133 / 2 ITR 446 (TM)(Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Business income – Capital gains – Income from purchase and sale of shares [S. 28(i), 45]**

Assessing Officer accepted the income declared by the assessee under the head long term capital gains without any application of mind or enquiry though the assessee was investment company, the assessment was erroneous and revision order under section 263 was justified. (A. Y. 2006-07).

*Spectra Shares & Scrips (P) Ltd. v. Dy. CIT (2011) 62 DTR 411 (Hyd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Power – Sweeping manner – Cannot direct Assessing Officer to frame entire assessment**

While exercising revisional jurisdiction under section 263 Commissioner can not ordinarily exercise this power in a sweeping manner directing Assessing Officer to

frame entire assessment afresh, when assessment order indicates consideration of majority of relevant issues. (A. Y. 2004-05).

*New India Assurance Co. Ltd. v. Addl. Commissioner (2011) 133 ITD 131 / 142 TTJ 312 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Penalty – Concealment – Cannot initiate penalty proceeding [S. 271(1)(c)]**

The Tribunal held that once revision order is passed, it is for assessing authority to consider whether penalty is to be levied or not and if assessing authority has not levied penalty where it is imperative, then only, Commissioner can in his wisdom interfere in the matter. Therefore when there is no penalty order subsisting at time of passing of revision order it is not proper on part of Commissioner to initiate penalty proceedings under section 271(1)(c). (A. Y. 2008-09).

*S. Sudaha (Smt) v. ACIT (2011) 48 SOT 335 (Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper enquiry – Details furnished**

Where all the details of expenditure was duly furnished by the assessee to the Assessing Officer the CIT cannot revise the assessment on the basis of lack of enquiry. (A. Y. 2004-05)

*Vodafone Essar South Ltd. v. CIT (2011) 141 TTJ 84 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Business income – Capital gains – Income from purchase and sale of shares – Revision [S. 28(1), 45]**

Assessee carried on the activity of buying and selling shares and units of mutual funds in a systematic and regular manner with high frequency and volumes and repetitive purchases and sales of the same scrip throughout the year, the Tribunal held it has to be assessed as business income and the revision order under section 263 directing the Assessing Officer to be assess the same as business income was held to be justified. (A. Y. 2006-07)

*Spectra Shares & Scrips (P) Ltd. v. Dy. CIT (2011) 62 DTR 411 / 142 TTJ 483 (Hyd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Non-examination of issue – ICAI merit of claim**

Non-Examination of issue by Assessing Officer does not per se make assessment order prejudicial to interest of revenue for revision under section 263. On merits Tribunal held that discharge of statutory function by ICAI does not amount to commercial or business activity and eligible for exemption under section 10 (23C)(iv) as also section 11 as educational institute. (A.Y. 2005-06)

*Institute of Chartered Accountants of India v. DIT (2011) 50 DTR 409 / 136 TTJ 548 (Delhi)(Trib.)*



**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of Inquiries – Findings in order**

Assessment Order was set aside by Commissioner on ground, that Assessing Officer had made Assessment without making proper enquiry.

Held, that when Assessing Officer has specifically mentioned in the order that books of accounts alongwith Purchase / Sales, Invoices, ledgers, Bank Accounts were examined, verified and test checked, setting aside by Commissioner, in absence of any finding that Assessing Officer's order is factually incorrect, and not justified.

*Vijay Kumar Mehta v. CIT (2010) 195 Taxman 63 (Mag.)(Patna)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Merger with Appellate Order – Will**

CIT(A) having deleted the addition made by the Assessing Officer on the basis of Assessee's mother's will, the order of the Assessing Officer on the issue of addition on the basis of will got merged with the order of the CIT(A), and therefore, CIT had no jurisdiction to invoke the provisions of section 263 on the issue of examination of veracity of bequeathal under the will. (A.Y. 2000-01)

*S. K. Jain v. CIT (2010) 43 DTR 1 / 132 TTJ 544 / 127 ITD 217 (TM)(Agra)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessing Officer taking possible view – Housing Project – Commercial Construction [S. 80IB(10)]**

The view that an element of commercial construction per se would not vitiate the claim of deduction under the pre-amended section 80IB(10), is not only a possible view of the matter, it is a view adopted by the Special Bench of the Tribunal and therefore, assessment order allowing assessee's claim for deduction under section 80-IB(10) on residential-cum-commercial project cannot be said to be erroneous and prejudicial order and cannot be revised under section 263. (A.Ys. 2004-05, 2005-06)

*Anik Development Corporation v. ACIT (2010) 134 TTJ 17 / (2011) 44 SOT 100 (UO)(Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – New benefit in Reassessment Proceedings – Claim by assessee**

Only in cases where assessment order is erroneous and prejudicial to interest of revenue, assessment can be reopened under section 263, and thus assessee is not eligible to claim any new benefit in assessment proceedings pursuant to section 263.

*ACIT v. ITW India (P) Ltd. (2010) 40 SOT 348 (Hyd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Goodwill – Depreciation**

Revision by CIT on the ground that depreciation was not allowable on goodwill was not sustainable, even if an amount is termed as "goodwill" in the books of account but it is a business or commercial right in the nature of knowhow, patent, copy rights trademarks, licences, franchises, the claim of depreciation is indeed admissible

thereon, it is not that "goodwill" is specifically excluded from the intangible assets eligible for depreciation.

(A.Y. 2001-02)

*Hindustan Coca Cola Beverages (P) Ltd. v. Dy. CIT (2010) 132 TTJ 602 / 43 DTR 416 / (2009) 34 SOT 171 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Possible view – Erroneous**

Once the view taken by the Assessing Officer is one of the possible views then the order of Assessing Officer cannot be termed as erroneous. (A.Ys. 1999-2000, 2000-01)

*Hindustan Shipyard Ltd. v. Dy. CIT (2010) 130 TTJ 76 / 6 ITR 407 (Visakha.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Subsequently – Judgment of Jurisdictional High Court – relating back**

When a High Court declares the law on the subject, the declaration goes back to the date of enactment of that particular law so as to state that law from the date of its enactment itself, was in the manner decided by Court subsequently. Commissioner was justified in revising the order under section 263 on the basis of judgment of jurisdictional High Court. (A.Y. 2004-05)

*Intellinet Technologies India P. Ltd. v. ITO (2010) 5 ITR 96 / 134 TTJ 744 / 48 DTR 129 (Bang.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – ESI – PF – Lack of Proper enquiry**

Assessing Officer having not made any enquiry in relation to late payment of employee's contribution towards ESI and PF, by assessee, CIT was justified in invoking the provisions of 263 and setting aside the order of the Assessing Officer for redoing the same. (A.Y. 2004-05)

*Star Drugs & Research Labs Ltd. v. ACIT (2010) 42 DTR 343 / 132 TTJ 305 / 127 ITD 85 (TM)(Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of Proper enquiry – Interest [S. 40(b)]**

Assessing Officer having allowed deduction of "interest" under section 40(b), to the assessee firm without making any enquiry or applying his mind on the aspect as to whether the interest paid by the assessee firm on capital accounts is disallowable in view of the fact that the capital accounts of the partners and that the dividend income on shares is exempt and whether the dividend income received by the partners on such shares has been entered in the P&L account of the firm or not, order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue, and therefore, the CIT rightly invoked the provisions of section 263. (A.Y. 2001-02)

*Shiv Automobiles v. ITO (2010) 43 DTR 345 / 133 TTJ 505 / 41 SOT 127 (TM)(Agra)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Non Application of Mind – Licences & Approvals – Intangible Assets – Depreciation [S. 32(1)(ii)]**

Revision only on ground of non-application of mind by Assessing Officer not proper. Licenses & Approvals are “intangible asset” under section 32(1)(ii) & eligible for depreciation. (A.Y. 2004-05)

*Piem Hotels Ltd. v. Dy. CIT (2010) 45 DTR 313 / 135 TTJ 228 / 128 ITD 275 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Non-Compete Fee – Possible view**

The view taken by the Assessing Officer on the date of passing of order being a possible view as per legal position, it cannot be said to be erroneous or prejudicial to the interest of revenue. (A.Y. 1999-2000)

*Double Dot Finance Ltd. v. ACIT (2010) 38 DTR 220 / 137 TTJ 403 / 53 DTR 188 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessment barred by limitation – Revision not possible**

Assessment barred by limitation, commissioner cannot direct Assessing Officer to pass fresh assessment order. (A.Ys. 1987-88, 1990-91)

*V. Narayanan v. Dy. CIT (2010) 2 ITR 446 / 127 ITD 133 / 137 TTJ 403 / 53 DTR 188 (TM)(Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous and prejudicial order – Lower ALV**

Assessing Officer having accepted the annual value of the property on the basis of the actual rent received by the assessee for the property from a group concern which was admittedly less than the annual value fixed by the Corporation, CIT was justified in setting aside the assessment order on this issue and giving appropriate direction to the Assessing Officer to examine the issue from all angles. (A.Y. 2001-02)

*Sical Logistics Ltd. Addl. CIT (2010) 34 DTR 350 / 128 TTJ 361 / 127 ITD 187 / 2 ITR 786 (TM)(Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Direction by Jt. CIT – Revision possible [S. 144A]**

As per Explanation to section 263(1), the power of revision extends to the assessment orders passed on basis of directions issued by Joint Commissioner under section 144A.

*Viswams v. ACIT (2010) 186 Taxman 25 (Mag.)(Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Issue Debatable – One of the Possible views – Revision not possible**

The issue whether the expenditure is capital or revenue in nature is always a debatable issue and the Assessing Officer follows one of the possible views then the CIT has no jurisdiction to revise the assessment under section 263. (A.Y. 2003-04)  
*Flextronic Software System Ltd. v. CIT* (2010) 128 TTJ 107 / (2009) 28 SOT 371 / 24 DTR 551 (Delhi)(Trib.)

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Judicial view – Not erroneous**

Order passed by Assessing Officer in accordance with law, judicial pronouncements and after considering relevant replies duly supported by evidence can not be branded as erroneous, merely because Commissioner is of other view or in his opinion order passed is weak and not a detailed order. (A. Y. 2005-06)

*Allied Engineers v. CIT* (2009) 180 Taxman 70 (Mag.)(Delhi)(Trib.)

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Prejudicial order – Inquiry by Assessing Officer**

Assessing Officer having taken a plausible view after investigation and proper enquiry, CIT cannot invoke revisionary power just to substitute his own view; assessment order cannot become erroneous where queries raised during the assessment proceedings are not recorded in final assessment order. (A.Y. 2004-05)

*V. B. Construction (P) Ltd. v. Dy. CIT* (2009) 28 DTR 84 (Kol.)(Trib.)

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of inquiry – Statement of Assessee**

Commissioner can regard order as erroneous on the ground that in circumstances of case Assessing officer should have made further enquiries before accepting statement made by the assessee. (A.Y. 1981-82)

*Rajalakshmi Mills Ltd. v. ITO* (2009) 121 ITD 343 / 123 TTJ 721 / 31 SOT 353 / 25 DTR 258 (SB)(Chennai)(Trib.)

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – On issue not mentioned in show cause notice – Scope**

In revision proceedings, Commissioner can not travel beyond reasons given by him for revision in show cause notice. Revision is not like reopening of assessment, entire assessment is not opened before the Assessing Officer. (A.Y. 2003-04)

*Geometric Software Solutions Co. Ltd. v. ACIT* (2009) 32 SOT 428 (Mum.)(Trib.)

*Editorial :- Also see CIT v. Contimeters Electricals Works P. Ltd.* (2009) 22 DTR 158 / 224 366 / 317 ITR 249 / 178 Taxman 422 (Delhi)

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Book profit – Possible view [S. 115JB]**

Held, that when Assessing Officer has taken a view, which is in tune with other decisions, and a possible view, then merely because the Commissioner does not

agree with the view of Assessing Officer, the action of Commissioner under section 263 is unjustified.

*Saluja Fabrics v. Dy. CIT (2009) 181 Taxman 132 (Mag.)(Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Additional reasons – Scope**

An order under section 263 cannot be passed for giving additional reasons or substituting reasons by a higher authority to support the same case. (A. Y. 2001-02) *Manisha R. Chheda v. ITO, ITA No. 5961/Mum/2004, Bench – B, dt. 17-8-2007 - BCAJ P. 17, Vol. 40-A, Part 1, April 2008. (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Reasonable view – Twin Condition**

It was held that if a reasonable view has been adopted by an Assessing Officer, then order passed by Commissioner under section 263, disturbing that view is liable to be set aside.

The Commissioner gets revisional power under section 263 where assessment order is erroneous and prejudicial to the interest of revenue. The twin conditions are required to be satisfied simultaneously.

*J. K. Construction Co. v. ITO (2007) 162 Taxman 46 (Mag.)(Jodh.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Satisfaction of Assessing Officer – Deduction [S. 80HHC]**

If Assessing Officer allows the claim, on being satisfied with the explanation of assessee, on an enquiry made during the course of Assessment Proceedings, the decision of Assessing Officer cannot be held to be erroneous, on ground that there is no elaborate discussion in that regard in the order. It is the practice that whenever any claim of the assessee is accepted, Assessing Officer may not discuss the same in his order.

*Anil Shah v. ACIT (2007) 162 Taxman 39 (Mag.)(Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper inquiry – Purchases and sale of goods**

Assessing Officer having fully verified the purchases / sales of goods, it could not be said that the Assessing Officer has not applied his mind to the relevant material and therefore, the order of Assessing Officer cannot be said to be erroneous and could not be revised by the CIT under section 263. (A.Y. 2000-01)

*Pawan Kumar v. Assessing Officer (2007) 106 TTJ 494 (Jodh.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Merger – Appellate order**

CIT was not justified in assuming jurisdiction under section 263 in respect of matters which were already considered and decided in appeal by CIT(A). (A.Y. 1998-99)

*Sadhu Ram & Sons v. CIT & Anr. (2007) 108 TTJ 373 (Amritsar)(Trib.)*

### **S. 263 : Commissioner – Revision – Possible view – Scope**

A possible view taken by Assessing Officer could not be unsettled by CIT in his revisional jurisdiction. (A.Ys. 1996-97, 1997-98)

*Indian Shaving Products Ltd. v. Addl. CIT (2007) 108 TTJ 1004 (Jp.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Two view – Erroneous order**

Where two views are possible the order of the Assessing Officer cannot be treated as an erroneous insofar as it is prejudicial to the interest of the Revenue. (A.Ys. 2001-02, 2002-03)

*Ajit Gupta v. ITO (2007) 108 TTJ 301 (Delhi)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Loss of revenue – Prejudicial to revenue**

Every loss of revenue as a consequence of order of Assessing Officer cannot be treated as prejudicial to the interest of revenue.

*Hero Briggs & Stratton Auto Ltd. v. CIT (2007) 161 Taxman 127 (Mag.)(Delhi)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Disagreement with Assessing Officer's view – Not Possible**

Order passed by Assessing Officer cannot be treated as erroneous, unless view taken by Assessing Officer is unsustainable in law. Merely when Commissioner does not agree with the view of Assessing Officer, revision under section 263 can not be made.

*Indian Shaving Products Ltd. v. ACIT (2007) 161 Taxman 166 (Mag.)(Jp.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Insurance claim – Year of accrual**

Mere filing of claim with insurance company by itself without its acceptance does not result in accrual of income and, therefore, the CIT was not justified in exercising power under section 263. (A.Y. 1999-2000)

*Rama Associates Ltd. v. Dy. CIT (2007) 106 TTJ 448 / 12 SOT 207 (Delhi)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Insurance claim – Year of accrual**

Order of Commissioner under section 263 was held to be set aside, when the proceedings under section 148 were still pending.

*Ritz (P) Ltd. v. Jt. CIT 158 Taxman 168 (Mag.)(Mum.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Limited scrutiny – Scope restricted [S. 143(2)(i)]**

CIT was not justified in invoking jurisdiction under section 263 on issues other than those decided in limited scrutiny assessment under section 143(2)(i).

*Gift Land Handicrafts v. CIT (2007) 108 TTJ 312 (Delhi)(Trib.)*



**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Jurisdiction of CIT – KVSS declaration – Undeclared items**

Under the KVSS, finality is assigned only to the matters which are subject matter of declaration by the assessee in relation to the disputed income and, therefore, jurisdiction of CIT under section 263 is not ousted vis-à-vis the matters which are totally unconnected with the disputed income for which assessee opted for the Scheme.

*Bhilwara Spinners Ltd. v. CIT (2006) 102 TTJ 838 (Jodh.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Possible view – DGPB – Deduction [S. 80HHC]**

Once the assessment Order passed under section 143(3) after taking all necessary details and after discussing the case with the representative, it was held that the Commissioner is not justified in invoking the jurisdiction under section 263 on the basis of different view on the issue involved, and it cannot be said that order of Assessing Officer was erroneous and prejudicial to the interest of the revenue.

*Crown Frozen Foods v. Addl. CIT (2006) 155 Taxman 86 (Mag.)(Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous order – Findings by Assessing Officer – Invalid**

Where two views are possible and ITO has taken one view which is permissible in law and with which Commissioner does not agree, said order cannot be treated as erroneous order prejudicial to interest of revenue, and order of Commissioner interfering with findings of Assessing Officer by exercising his powers under section 263 was held invalid.

*Hari Singh & Associates (AOP) v. ITO (2006) 154 Taxman 109 (Mag.)(Jodh.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Guess work – Elaborate order**

The error envisaged by section 263 is not one that depends on possibility or guess work, but it should actually be an error either of fact or of law. Merely on the ground that the order was not passed elaborately, it could not be said that order of Assessing Officer is erroneous and prejudicial to the interest of the revenue and needs to be set aside.

*ACIT v. Technip Italy Spa (2006) 150 Taxman 13 (Mag.)(Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Reason for revision – Material evidence**

CIT having passed the impugned order under section 263 without giving any reason or indicating any material evidence in his possession the precondition for invoking s. 263 was not satisfied and order of CIT was liable to be quashed. (A.Y. 2002-03)

*Sayaji Salunkhe v. ITO (2006) 99 TTJ 1222 (Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Stock of gold – Survey**

Stock of gold found with the assessee at the time of survey having been correctly valued at the rate prevailing on that day, CIT was not justified in initiating proceedings under s. 263 on the ground that there was under valuation of stock by relying on the rate taken by assessee for valuing the closing stock. (A.Y. 2001-02)

*Royale Sunrise v. ITO (2006) 99 TTJ 1305 (Bang.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Details and explanations – Examination**

Assessing Officer having called for the details and explanations with regard to the claim for full deduction of expenses shown as deferred revenue expenses during the assessment proceedings and allowed the same after verifying the details, his assessment order cannot be said to be erroneous and prejudicial to the interest of the Revenue. (A.Y. 1996-97)

*Charak Pharmaceuticals v. Jt. CIT (2006) 99 TTJ 1217 / (2005) 4 SOT 393 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Invalid return – Twin condition**

Order of Assessing Officer allowing legitimate claim of assessee though made on an invalid return cannot be termed as erroneous and prejudicial to the interests of the revenue, hence not amenable to revisional jurisdiction of Assessing Officer. (A.Y. 1999-2000)

*Shervani Industrial Syndicate Ltd. v. Dy. CIT (2006) 99 TTJ 123 (All.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inquiry under section 133A – Statement**

In the absence of any material to prove that the income disclosed by the assessee in his statement under section 133A(3) which was later retracted by him was actually earned, the order passed by Assessing Officer under section 143(3), without adding such income cannot be said to be erroneous or prejudicial to the interest of revenue. (A.Ys. 1993-94, 1994-95)

*Ashok Manilal Thakkar v. ACIT (2006) 99 TTJ 1262 / 97 ITD 361 (Ahd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Revenue expenditure – Findings of commissioner**

CIT was not justified in passing order under section 263 on the ground that the Assessing Officer allowed deduction for the same as revenue expenditure, moreso when the CIT himself could not come to a definite finding that the said expenditure was a capital expenditure. (A.Y. 2001-02)

*Sunbeam Auto Ltd. v. CIT (2006) 100 TTJ 209 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deferred revenue expenditure – Inquiry**

Expenditure shown as deferred revenue expenditure in the accounts allowed in full after due inquiry. The Assessing Officer action was proper and revision held to be bad in law. (A.Y. 1996-97)

*Charak Pharmaceuticals v. Jt. CIT (2006) 99 TTJ 1217 (AT) / (2005) 4 SOT 393 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of inquiry by Assessing Officer – Erroneous order**

Acceptance of explanation of the assessee without any enquiry renders the order erroneous as well as prejudicial to the interest of Revenue, and therefore revision under section 263 was justified. (A.Y. 1995-96)

*Ambika Agro Suppliers v. ITO (2006) 100 TTJ 405 / 95 ITD 326 (Pune)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Dies – Write off – Not a capital expenditure**

Expenses on replacement of worn out dies which admittedly had a life-span of approximately one year cannot be treated as capital expenditure and therefore, CIT was not justified in passing order under S. 263. (A.Y. 20001-02)

*Sunbeam Auto Ltd. v. CIT (2006) 100 TTJ 209 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper inquiry – Failure**

Acceptance of explanation of the assessee without any enquiry renders the order erroneous as well as prejudicial to the interest of Revenue, and therefore revision under section 263 was justified. (A.Y. 1995-96)

*Ambika Agro Suppliers v. ITO (2006) 100 TTJ 405 / 95 ITD 326 (Pune)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper Inquiry – Debtors**

The Assessing Officer having accepted the case of the assessee without any further inquiry as to whether the debtors had any trading relationship with the assessee or not, the assessment order was erroneous and prejudicial to the interest of the Revenue. (A.Y. 2000-01)

*Super Cloth v. ACIT (2006) 100 TTJ 944 / 99 ITD 300 (Chennai)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Defects in order of Assessing Officer – Specification**

Proceedings initiated under section 263 by Commissioner holding that order passed was a non-speaking or erroneous, and therefore prejudicial to the interest of the revenue, without mentioning any specific defects or basis in such order, is not justified.

*Modern Feed Industries v. ITO (2006) 152 Taxman 45 (Mag.)(Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Original order void – Scope of revision**

As the order of the Assessing Officer passed under section 147 / 143(3) was itself void, the order of CIT passed under section 263 for quashing this order was without jurisdiction. (A.Y. 1998-99)

*Inder Kumar Bachani (HUF) v. ITO (2006) 101 TTJ 450 / 99 ITD 621 (Luck.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Compensation – Termination of Agreement**

Assessing Officer having accepted the claim of the assessee company that the amount received by it from a US company as compensation for the termination of project contracts was a capital receipt without examining the relevant agreement which were relevant and material to ascertain the exact nature of the amount received by the assessee, his order was erroneous as well as prejudicial to the interest of the Revenue. (A.Y. 2000-01)

*Shyam Telelink Ltd. v. ITO (2006) 101 TTJ 387 / 99 ITD 576 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Capital gains – Dissolution**

Assessing Officer having accepted long term capital gains returned by assessee in respect of depreciable asset without applying the provisions of s. 45(4) r. w. s. 50(1), order of Assessing Officer suffered from non-application of mind making the order erroneous and prejudicial to interests of Revenue. (A.Y. 1994-95)

*Kiranjit Singh v. ACIT (2006) 101 TTJ 424 (Amritsar)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous and prejudicial order – Credit for tax paid**

Assessing Officer having given credit for tax paid by assessee it cannot be said that the Assessing Officer had allowed the credit without verifying the claim and, therefore, the order of the Assessing Officer could not be revised under section 263. (A.Ys. 1994-95 to 1996-97)

*Infosys Technologies Ltd. v. Jt. CIT (2006) 105 TTJ 802 / 103 ITD 399 (Bang.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Consistent view – Erroneous order**

View taken by Assessing Officer being plausible and consistent with the view taken by CIT(A) and for another year in assessee's own case, the order was not amenable to revisional jurisdiction of CIT. (A.Y. 1999-2000)

*Oil & Natural Gas Corporation Ltd. v. Dy. CIT (2006) 104 TTJ 900 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order of Assessing Officer as per law – Twin condition**

Once the regular assessment accorded fully with the provisions of law on all issues on which the revision under section 263 was considered necessary, the order of Commissioner cannot be sustained, on ground that order of Assessing Officer is erroneous and prejudicial to revenue.

*Amit Vegetable Oils Ltd. v. CIT (2006) 158 Taxman 36 (Mag.)(All.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Stock records – Detail to Bank**

The Assessing Officer on verification of the assessee's stock record, found it to include the customer's goods accepted by it against order(s) received in the regular course of its business. The assessee, however, while submitting the figures of its stock to the bankers, from whom overdraft facility against stock stood enjoyed, reported a higher borrowing capacity to its bank. The Tribunal held that there was sufficient discharge of onus by the assessee and there was no incorrect appreciation of facts by the Assessing Officer and therefore, the revisionary jurisdiction of the CIT was not in accordance with the law. (A.Y. 2000-01)

*Shree Mukta Jewellers v. ITO, ITA No. 948/Ahd/2003, dated 30th August, 2006 – Ahmedabad Chartered Accountants Journal, October 2006, P. 387 (Ahd.)(Trib.)*

### **S. 263 : Commissioner – Revision – Limitation – Date of original order – Appeal effect order**

Limitation prescribed in section 263(2) has to be reckoned from the date of original order of assessment and not from the date of order giving effect to the appellate order of the CIT(A). (A.Ys. 1994-95, 1996-97)

*Infosys Technologies Ltd. v. Jt. CIT (2006) 105 TTJ 802 / 103 ITD 399 (Bang.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Possible view – Twin condition**

If view expressed by Assessing Officer in assessment order is a possible view because majority of Tribunal Benches have taken same view, Commissioner would not be justified in treating Assessing Officers order as erroneous and prejudicial to interest of revenue. (A.Y. 1994-95)

*Nahar Exports Ltd. v. ACIT (2005) 92 ITD 484 / 93 TTJ 186 (Chd.)(Trib.)*

### **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Non existing order – Waiver of interest**

There cannot be revision of a non-existing order and where there is no order either for levy or waiver of interest under section 158BFA(I) or section 234A, 234B or 234C of Act in existence, Commissioner can have no jurisdiction to invoke provisions of section 263 for directing Assessing Officer to charge interest under section 158BFA(1).

*Anand Kumar Agarwal (HUF) v. ACIT (2005) 92 TTJ 81 (Agra)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – View of Assessing officer is in conformity with decision of Jurisdictional High Court – Appeal to Supreme Court**

Even though view of Assessing Officer is in conformity with decision of jurisdictional High Court or any other High Court, Commissioner is entitled to invoke jurisdiction under section 263 subject to condition that view of jurisdictional High Court is subject-matter of an appeal before Supreme Court. (A.Y. 1997-98)

*Hindustan Tin Works Ltd. v. Dy. CIT (2005) 92 ITD 101 / 92 TTJ 828 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Reference pending in High Court – Power to give effect**

Where order of Commissioner under section 263 cancelling original assessment was cancelled by Tribunal and department's reference application was pending before High Court, Assessing Officer had no jurisdiction to make second assessment in pursuance of a non-existing order under section 263.

*ITO v. Garg Enterprises (2005) 142 Taxman 42 (Mag.)(Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Subject matter of original assessment – Scope of set aside assessment**

Despite fact that Commissioner under section 263 has set aside whole assessment, it cannot be considered that Commissioner has also set aside that part of order which is not erroneous and prejudicial to interest of revenue or has also set aside those additions which have attained finality; therefore, in set aside assessment made by Assessing Officer under section 143(3)/263, neither assessee is allowed to challenge those additions which have attained finality nor revenue is permitted to make any other addition which was not subject matter of original assessment. (A.Y. 1998-99)

*ITO v. Uma Kant Newatia (2005) 97 ITD 414 / 99 TTJ 376 (Kol.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Proviso to section 14A – Power**

Since Assessing Officer has no power to reopen or to change or to increase or decrease liability of assessee on basis of section 14A (in respect of assessment year beginning on or before 1-4-2001), in view of introduction of proviso to section 14A inserted by Finance Act, 2002 with effect from 11-5-2001, Commissioner under section 263 has also no such power. (A.Y. 2000-01)

*Paul John, Delicious Cashew Co. v. ITO (2005) 94 ITD 131 / 98 TTJ 440 / 1 SOT 889 (Cochin)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order – Meaning – Communication under section 195(2)**

An 'order' open to revision under section 263 can be an order in any proceedings under Act and not necessarily an order in assessment proceedings alone; any communication by Assessing Officer under section 195(2) that disposes of application made under section 195(1) and determines liability towards tax to be deducted at



source in accordance with provisions of section 195(2), is an order not only for purposes of section 195(2) but also for purposes of section 263. (A.Y. 1996-97)  
*Board of Control for Cricket in India v. DIT (Exemption) (2005) 96 ITD 263 / 97 TTJ 751 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Opportunity of Hearing – Less than a day**

Granting an opportunity to comply with query raised in a proceeding under section 263 within less than a day, cannot under any stretch of imagination, be held to be a reasonable opportunity of hearing. (A.Y. 2000-01)

*Peerless General Finance & Investment Co. Ltd. v. ACIT (2005) 96 TTJ 834 / 5 SOT 17 (Kol.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of Merger – Findings of Commissioner (Appeals) [S. 80HHC]**

Where computation of deduction under section 80HHC was subject-matter of appeal before Commissioner (Appeals) who had given some findings on computation of deduction under section 80HHC, assessment order had merged with order of Commissioner (Appeals) and Commissioner could not exercise powers under section 263 to direct Assessing Officer to recompute assessee's income by disallowing deduction under section 80HHC. (A.Y. 1996-97)

*Sonal Garments v. Jt. CIT (2005) 95 ITD 363 / 98 TTJ 1020 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Loss of tax to revenue – Condition**

There should be an incorrect assumption of facts or an incorrect application of law by Assessing Officer to bring order of Assessing Officer within category of it being erroneous under section 263; similarly, to qualify an assessment order as an order being 'prejudicial to the interest of revenue', order should cause lawful loss of tax to revenue. (A.Ys. 1993-94, 1994-95)

*Ashok Manilal Thakkar v. ACIT (2005) 97 ITD 361 / 99 TTJ 1262 (Ahd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inadequate inquiry – Validity of order**

When Assessing Officer is expected to make an inquiry of a particular item of income and he does not make an inquiry as expected, that would be a ground for Commissioner to interfere with order passed by Assessing Officer since such an order passed by him is erroneous and prejudicial to interest of revenue

*Anil Kumar v. ACIT (2005) 147 Taxman 5 (Mag.)(Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inquiry – Adequacy**

Merely because from a perfectionist point of view it is felt that some more enquiries and verifications could have been made by Assessing Officer while making

assessment/assessment order cannot be declared to be erroneous and prejudicial to interest of revenue. (A.Y. 2000-01)

*Salora International Ltd. v. Addl. CIT (2005) 2 SOT 705 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Cryptic – No presumption**

Assessment order, which has been subject-matter of proceedings under section 263 may be a cryptic one, but that itself does not render assessment order to be erroneous and prejudicial to interest of revenue. (A.Y. 2000-01)

*Brij Bhushan Agarwal v. CIT (2005) 2 SOT 811 (Agra)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Acceptance of explanation without Inquiry – Erroneous and prejudicial order**

Acceptance of explanation of assessee without any enquiry renders order erroneous as well as prejudicial to interests of revenue. (A.Y. 1995-96)

*Ambika Agro Suppliers v. ITO (2005) 95 ITD 326 / 100 TTJ 405 (Pune)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Examination of material – Scope**

Where assessee had filed return declaring a reasonable income and, after examining relevant material Assessing Officer had assessed assessee at a particular income which was income on which assessee was liable to tax lawfully, after considering all materials and applying his mind, Assessing Officer having considered all materials, her order could not be said to be erroneous and prejudicial to interests of revenue on ground that Assessing Officer had almost accepted book results by making petty additions. (A.Y. 2001-02)

*Shaileshbhai Shah v. ACIT (2005) 98 TTJ 154 (Ahd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Explanation – Mind applied by Assessing Officer**

Where from a perusal of written submissions before Commissioner in respect of show-cause notice under section 263, it was seen that assessee had fully explained various issues which were raised by Commissioner in notice under section 263 and same had also been fully examined by Assessing Officer before completing assessment, Assessing Officer having taken possible view in matter, order passed by him could not be considered to be erroneous or prejudicial to interests of Revenue. (A.Y. 1999-2000)

*Indo Lahari Bio Power Ltd. v. ACIT (2005) 96 TTJ 985 (Nagpur)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order in the name of individuals – Partners – HUF**

Orders passed under section 263 in names of partners of a firm as individuals while they represented their HUFs in firm, were bad in law.

*Anand Kumar Agarwal (HUF) v. ACIT (2005) 92 TTJ 81 (Agra)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – NBFC – Deduction of interest – Bonus to Depositors.**

Where assessee-NBFC running deposit schemes claimed deduction of a sum of ` 657 crores on account of interest and bonus payable to depositors which was allowed by Assessing Officer and Commissioner alleged that since assessee had not credited said sum against each individual certificate-holder, said sum did not qualify as deduction while computing taxable profits and set aside assessment order in which such liability had been allowed as deduction, Commissioner was not justified in treating assessment order as erroneous and prejudicial to interest of revenue. (A.Y. 2000-01) *Peerless General Finance & Investment Co. Ltd. v. ACIT (2005) 96 TTJ 834 / 5 SOT 17 (Kol.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Mercantile system of accounting – Provision for warranty**

If deduction of provision for warranty expenses, made on estimate basis by assessee following mercantile system of accounting, is allowed, that would not make assessment order erroneous merely because actual expenditure on maintenance was incurred in following year.

*Hamilton Research & Technology (P.) Ltd. v. ACIT (2005) 142 Taxman 79 (Mag.)(Kol.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Long term capital gains – Exemption under section 54F**

Where Assessing Officer after considering the document in detail and after making proper inquiries and verification came to conclusion that transactions in which assessee was involved were genuine transactions and he accepted long term capital gains shown by the assessee and also allowed exemption under section 54F and Commissioner set aside order, simply on the basis of assumption that the assessee adopted a colourful device to generate funds through dubious sale/purchase of shares without paying a single penny as income-tax, Commissioner was not justified in setting aside assessment order. (A.Ys. 1996-97 to 1999-2000)

*Pargat Singh v. ITO (2005) 95 TTJ 295 (Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction – Export [S. 80HHC]**

Where a specific query was raised by Assessing Officer on question of deduction under section 80HHC and Assessing Officer being satisfied with said explanation of assessee, allowed claim, it could not be said that issue in question was not properly examined by Assessing Officer or there was no application of mind by him so as to treat assessment order as erroneous and prejudicial to interests of revenue. (A.Y. 1990-91)

*Eureka Sales Corpn. v. ACIT (2005) 1 SOT 490 (Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Trading activity – Exclusion from benefit [S. 80IA]**

Where while allowing deduction under section 80-IA Assessing Officer did not exclude profit earned by assessee from trading activity, fact that there was total non-application of mind on part of the Assessing Officer to said important issue rendered his order erroneous and prejudicial to interest of revenue and, therefore, Commissioner had rightly invoked his jurisdiction under section 263. (A.Y. 1995-96) *Recon Oil Industries Ltd. v. Jt. CIT (2005) 2 SOT 732 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Valuation of stock Consistent method – Acceptance in earlier year**

Where Assessing Officer had duly accepted valuation of stock which was based on method regularly followed by assessee, method was one of well recognized methods of valuation of closing stock and said method was alone accepted in earlier years, even if such order of Assessing Officer could be held to be prejudicial to interests of revenue, it could not be said to be erroneous. (A.Y. 1996-97)

*Metallizing Equipment v. Jt. CIT (2005) 96 TTJ 827 (Jodh.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction at source – Jurisdiction**

Where Commissioner had alleged in order passed under section 263 that Assessing Officer had failed to examine whether tax had been deducted at source by assessee on payments made to certificate-holders, who had made deposits under various deposit schemes with assessee, as examination of such matter did not fall within jurisdiction of the Assessing Officer and Commissioner, revision of assessment order on that ground was not justified. (A.Y. 2000-01)

*Peerless General Finance & Investment Co. Ltd. v. ACIT (2005) 96 TTJ 834 / 5 SOT 17 (Kol.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Show-cause notice – Order contrary to notice**

Show-cause issued must indicate the material and reasons and order under section 263 should not be contrary to the existing material and reasons for revision. No new case can be set out by the CIT or by the Department Representative. (A.Ys. 1987-88 to 1989-90)

*Shyam Biri Works (P) LTD. v. ACIT (2003) 84 ITD 124 / 79 TTJ 634 (All.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Power to revision – KVSS**

It is open to the CIT within his jurisdictional power to revise original order which was not covered by rectification or settlement under KVSS. (A.Y. 1995-96)

*Siddhartha Tubes Ltd. v. CIT (2003) 85 ITD 316 / (2004) 86 TTJ 820 (Indore)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Meaning of error – Fact or law – Actual not possible**

Error envisaged in Sec 263 is the actual error either of fact or of the law, and not one which depends on possibility.

*Pratap Footwear v. ACIT (2003) SOT 638 (Jab.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Prejudice – Meaning explained**

'Prejudice' contemplated under section 263 is prejudice to the income tax administration as a whole.

*Pratap Footwear v. ACIT (2003) SOT 638 (Jab.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Speaking Order – Need for**

Commissioner must pass a speaking Order. (A.Y. 1997-98)

*Jewel of India v. ACIT (2003) 87 ITD 527 / 86 TTJ 201 (Mum.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Erroneous Order – Material on record**

Whether an Order is erroneous insofar as it is prejudicial to the interest of revenue must be based on material on record of the proceedings called for by him.

*Pratap Footwear v. ACIT (2003) SOT 638 (Jab.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Finding of Commissioner – Error of Assessing officer**

Revisional jurisdiction cannot be exercised when there is no finding that order of assessing officer is prejudicial, and for the reason that the assessing officer adopted a view different from commissioner's view.

*Sunil Lamba v. Dy. CIT (2003) 131 Taxman 35 (Mag.)(Delhi)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of desired inquiry – Not erroneous [S. 143(3)]**

Assessment framed under section 143(3) cannot be revised on ground that desired inquiry was not made.

*Amrik Singh v. ITO (2003) 127 Taxman 87 (Mag.)(Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of desired inquiry – Not erroneous [S. 143(3)]**

Assessment framed under section 143(3) cannot be revised on ground that desired inquiry was not made.

*Baljees v. ACIT (2003) 127 Taxman 150 (Mag.)(Chd.)(Trib.)*

**S. 263 : Commissioner – Revision of orders prejudicial to revenue – Failure to initiate penalty proceedings – Scope**

Non initiation of penalty proceedings cannot be ground for invoking jurisdiction under section 263. (A.Y. 1992-93)

*Master Vijay R oswal v. ITO (2003) 87 ITD 98 / 87 TTJ 575 (Rajkot)(Trib.)*

*Ambica Chemical Products (Regd.) v. ACIT (2003) 86 ITD 1 / 82 TTJ 93 (Visakha)(Trib.)*

### **Section 264 : Revision of other orders**

#### **S. 264 : Commissioner – Revision of other order – Deduction at source – Lower rate of tax [S. 197]**

The expression "order" for the purpose of section 264 has a wide connotation and include a determination by the assessing officer an application under section 197.

Where the assessee filed revision application against order of Assessing Officer rejecting application under section 197, the Commissioner was not justified in rejecting the application on the ground that revision was not maintainable. Commissioner was directed to pass the order within four weeks. (A.Y. 2001-02)

*Larsen & Toubro Ltd. v. ACIT (2010) 190 Taxman 373 / 38 DTR 361 / 235 CTR 108 / 326 ITR 514 (Bom.)(High Court)*

#### **S. 264 : Commissioner – Revision of other order – Appeal – Condonation of Delay – Retrospective Effect – Exemption – Sikkimese [S. 10, 26AAA]**

In matters giving benefit to assessee, Department must avoid pedantic approach. Amendment made retrospectively exempting the interest and dividend income of sikkimese, the Court held Commissioner should have condoned the delay in filing the application under section 264 and ought to have granted the relief. (A.Ys. 1997-98 to 2005-06)

*Danny Denzongpa v. CIT (2010) 46 DTR 129 / 235 CTR 449 / 194 Taxman 415 (Bom.)(High Court)*

#### **S. 264 : Commissioner – Revision of other order – Set aside assessment – Power of AO**

Where the Commissioner exercising its revisional authority under section 264 of the Act, directed the Assessing Officer to adjudicate and examine a specific issues. However, the assessment was framed by the Assessing Officer on a higher income by assuming more powers than that of revisional authority. The action of the Assessing Officer was held patently illegal and without jurisdiction. (A.Ys. 1989-90 to 1999-2000)

*N. Seetharaman v. CIT (2008) 6 DTR 238 / 216 CTR 238 / 298 ITR 210 (Mad.)(High Court)*

#### **S. 264 : Commissioner – Revision of other order – Prejudicial to the interest of assessee – Revision not possible**



No order prejudicial to the interest of the assessee can be passed under section 264 of the Act and any order passed on revision application under section 264, cannot be sustained to the extent it is adverse to the interest of the assessee. (A.Y. 1993-94) *S. J. Sanghvi v. CIT & Anr. (2008) 10 DTR 98 / 219 CTR 138 (Guj.)(High Court)*

**S. 264 : Commissioner – Revision of other order – Business expenditure – Effect of subsequent decision of Supreme Court**

The learned CIT allowed the said claim but he dismissed the said petition on the ground that the ratio laid down by the Supreme Court, subsequent to the assessment of the assessee's case cannot be applied retrospectively.

Assessee filed writ before High Court who ultimately applied Supreme Court's judgment and held that as on the date of delivery of the apex court decision, the assessee's case was pending before CIT and hence ratio of apex court can be applied. *Jayshree Tea and Industries Ltd. v. CIT (2007) 288 ITR 386 / 211 CTR 338 / 169 Taxman 6 (Cal.)(High Court)*

**S. 264 : Commissioner – Revision of other order – Income cannot be taxed merely because shown in the return – No authority of law – Writ [S. 10(133)]**

The assessee filed return for the A.Y. 1990-91, 1991-92 and 1993-94 including the annuity received on superannuation as income. The assessee filed application under section 264 seeking exemption under section 10[13][ii] on the said annuities. The same was rejected as the assessee himself has offered the same for tax. The Hon'ble court, on a writ petition under Article 226 of the Constitution, observed that Article 265 of the Constitution mandates that no person shall be taxed without the authority of law. Since in the present case there is no authority to tax annuities received by the petitioner, we consider it appropriate to exercise out extraordinary power to correct the injustice. (A.Ys. 1990-91, 1993-94)

*S.D.S. Mongia v. C.B.D.T. (2007) 160 Taxman 101 / 211 CTR 357 (Delhi)(High Court)*

**S. 264 : Commissioner – Revision of other order – Genuineness of creditors – Additions by CIT**

The Assessing Officer and the CIT while exercising his jurisdiction under section 264 of the Income Tax Act 1961 concluded in their orders that the creditors appearing in the balance sheet are non-genuine on the basis of a alleged surrender made by the assessee. However, the High Court remanded the matter back to the Assessing Officer for verifying the genuineness of the creditors, as the said letter was non-existent on record, which fact was not examined by the CIT.

*Siya Nand Gola v. CIT (2006) 190 Taxation 449 (Delhi)(High Court)*

**S. 264 : Commissioner – Revision of other order – Over assessed due to assessee's own mistake or otherwise – Scope**

Regardless of whether revised return is filed or not, once an assessee is in a position to show that assessee has been over-assessed under provisions of Act, regardless of

whether over-assessment is as a result of assessee's own mistake or otherwise, Commissioner has power to correct such an assessment under section 264(1). (A.Y. 2001-02)

*S.R. Koshti v. CIT (2005) 276 ITR 165 / 146 Taxman 335 / 193 CTR 518 (Guj.)(High Court)*

**S. 264 : Commissioner – Revision of other orders – Agreed assessment – Scope of revision under section 264**

Assessee's revision petition was rightly dismissed where assessment originally completed was an agreed assessment. (A.Y. 1991-92)

*Vasant Gordhandas v. CIT (2005) 273 ITR 87 / 142 Taxman 33 / 195 CTR 415 (Ker.)(High Court)*

**S. 264 : Commissioner – Revision of other order – Non-appealable order – Scope of revision under section 264 [S. 179]**

Even if an order under section 179 is not appealable, it is revisable under section 264. *Afzal Ahmah v. UOI (2004) 136 Taxman 201 (All.)(High Court)*

**S. 264 : Commissioner – Revision of other order – Application for revision – Commissioner – Condonation – Delay due to appeal proceedings**

Time taken for prosecuting appeal or other proceedings, bona fide constitutes sufficient cause for condonation of delay in filing revision petition. The delay condoned and directed the commissioner to decide on merits.

*U.B. Distillery Ltd. v. CIT (2004) 269 ITR 558 / 152 Taxman 239 (Cal.)(High Court)*

**S. 264 : Commissioner – Revision of other order – Appeal – Maintainability [S. 246A(1)(a)]**

Appeal against fresh assessment order passed in pursuance of an order under section 264 is maintainable under section 246A(1)(a). (A.Y. 2002-03)

*ACIT v. Kalyan Mitra Trust (2007) 106 TTJ 241 (Delhi)(Trib.)*

**CHAPTER XX-A**  
**ACQUISITION OF IMMOVABLE PROPERTIES IN CERTAIN CASES OF**  
**TRANSFER TO**  
**COUNTERACT EVASION OF TAX**

**Section 269C : Immovable property in respect of which proceedings for acquisition may be taken**

**S. 269C : Acquisition of immovable property – Proceedings – Fair market value – Comparable Sale Instances – Reason to believe without any material – Proceeding held illegal**

Competent authority having arrived at the fair market value of semi-commercial property in question on the basis of the consideration stated in the sale deed of a residential property and applying the popular perception that the rates of semi-commercial properties are almost twice as much as that of residential properties, without referring to or relying upon any supporting material in this behalf and without looking in to valuation report of the approved valuer as submitted by the purchaser the “reasons to believe” as recorded by the competent authority were manifestly wrong and baseless and therefore, initiation of proceedings for acquisition of the property was illegal. There has to be some material on the basis of which the competent Authority can have a ‘Reason to believe.

*CIT v. Green Valley Agro Mills Ltd. (2010) 45 DTR 10 / 335 ITR 347 (Delhi)(High Court)*

**Section 269D : Preliminary notice**

**S. 269D : Acquisition of immovable property – Preliminary notice – Service of notice – Publication – Official Gazette**

The service of notice prior to the publication in the official gazette is merely an irregularity committed during the course of the proceedings and cannot have the effect of nullifying the entire proceedings which are validly commenced by publication in the official gazette.

*CIT v. Pearl Mech. Engg. & Foundry Works (P.) Ltd. (2004) 267 ITR 1 / 136 Taxman 586 / 188 CTR 289 / 181 Taxation 35 (SC)*

**S. 269D : Acquisition of immovable property – Preliminary notice – Purchase by Central Government – Validity of Notice**

The show cause notice for purchase of immovable property was quashed by high court holding that the notice was vague as it neither disclose the reasons, thereof nor material considered by Appropriate Authority, in reaching the conclusion. The High Court relied in the decision in *Sheyas Builders v. M. D. Kodnani, Laxman Ganesh Tulshibaughwala v. M. D. Kodnani (2002) 242 ITR 320 (Bom.)* As the SLP against the said matters were dismissed, the appeal of department against the High Courts judgement was dismissed.

*Appropriate Authority of Income Tax v. Jagdish Electronic India (P) Ltd. (2003) 264 ITR 468 / (2004) 186 CTR 90 (SC)*

**S. 269D : Acquisition of immovable property – Preliminary notice – Where consideration is less than 5 lakhs**

The Central Board of Direct Taxes has issued Circular No. 455 on May 16, 1986, reported at [1986] 159 ITR (St.) 105 wherein it has been stated that the Board has decided that where the acquisition proceedings had been initiated by issue of notice

under section 269D, the proceedings would be dropped if the apparent consideration of the immovable property was below ` 5 lakhs. The instant Court in *CIT v. Export India Corporation (P.) Ltd. [1996] 219 ITR 461* has held that on the basis of the said circular, the proceedings have to be dropped even in cases where appeals were pending in the High Court.

*Hindustan General Trading Co. (P.) Ltd. v. UOI (2005) 278 ITR 559 (P&H)(High Court)*

## **CHAPTER XX-B**

### **REQUIREMENT AS TO MODE OF ACCEPTANCE, PAYMENT OR REPAYMENT IN CERTAIN CASES TO COUNTERACT EVASION TO TAX**

#### **Section 269SS : Mode of taking or accepting certain loans and deposits**

##### **S. 269SS : Acceptance of loans and deposits – Mode – Refund in cash [S. 271D]**

Provisions of section 269SS and 271D, are not applicable in case where assessee received back money from borrower in cash and not advanced money or accepted loan in cash. (A.Ys. 2004-05 to 2006-07)

*Dy. CIT v. Ankush Rao Ingle (2010) 39 SOT 263 (Hyd.)(Trib.)*

##### **S. 269SS : Acceptance of loans and deposits – Mode – Penalty – Bona fide belief – Genuineness**

Money received by assessee co-operative society from its member/director and their relatives by way of deposits and loans given to them as part of its banking activities cannot be considered as “loan” or “deposit” so as to attract section 269SS or 269T, as the assessee is working on the concept of mutuality and its directors or members are not covered by the expression “any other person” occurring in section 269SS, more so when the assessing officer has accepted the genuineness of such deposits and the assessee was under bonafide belief the provisions of section 269SS and 269T are not applicable. (A.Ys. 2006-07 and 2007-08)

*Citizen Co-operative Society Ltd. v. Addl. CIT (2010) 41 DTR 305 (Hyd.)(Trib.)*

##### **S. 269SS : Acceptance of loans and deposits – Mode – Current account – Meaning**

Proceedings under sections 269SS and 271D are mandatory and if a default is created. Penalty is leviable. The assessee cannot take recourse of the argument that the transaction is genuine or no black money was introduced and hence penalty under section 271D is not leviable. (A.Y. 1990-91)

*Kans Raj & Sons v. ITO (2005) 92 TTJ 931 (Amritsar)(Trib.)*

##### **S. 269SS : Acceptance of loans and deposits – Mode – Share capital [S. 271D]**

Where initial character of money received was accepted as towards share capital, said transaction would not come within scope of section 269SS. Provisions of section 271 D were not applicable. (A.Ys. 1995-96, 1996-97)

*Sharad Holding Leasing (P.) Ltd. v. ACIT (2005) 95 TTJ 336 / 89 TTJ 1125 (Pune)(Trib.)*

### **S. 269SS : Acceptance of loans and deposits – Mode – Meaning**

Wife of the assessee sold a plot of land. She received out of the total consideration of to 5,00,000 to 2,60,000 in cash which was deposited in the bank account of assessee and utilized for purchase of land in the name of the son. The tribunal held that cannot be said that the wife has given a loan to assessee and hence, section 269SS and 271D cannot be made applicable.

*Narotam Singh Mann v. ITO (2003) 90 TTJ 683 (Amritsar)(Trib.)*

### **Section 269T : Mode of repayment of certain loans or deposits**

#### **S. 269T : Repayment of loans and deposits – Penalty [S. 271E]**

Since word 'loan' had been introduced in amended section 269T for first time in year 2002 with effect from 1-6-2002, penalty under section 271E could not be levied in respect of assessment year 1990-91 for contravention of section 269T where amount refunded was loan amount. (A.Y. 1990-91)

*CIT v. Motilal Subhodh Kumar Jain (2005) 277 ITR 524 / 145 Taxman 110 / 197 CTR 58 (MP)(High Court)*

#### **S. 269T : Repayment of loans and deposits – Meaning – Loan**

Section 269T covers only deposit, and scope of term 'deposit' therein cannot be enlarged to include transaction of loan. Thus, in case of a deposit payable on demand, section 269 T can not be invoked. (A.Ys. 1989-90 to 1999-2000 up to 24th Feb. 1999)

*ACIT v. Jai Bharat Fruit Co. Ltd. (2005) 4 SOT 445 (Jp.)(Trib.)*

#### **S. 269T : Repayment of loans and deposits – Amendment – 1-6-2002**

Re-payment of loan in cash is not covered by Sec 269T prior to 1.6.2002.

*Addl. CIT v. Prahati Baruah (Smt.) (2003) 133 Taxman 74 (Mag.)(Gau.)(Trib.)*

## **CHAPTER XX-C**

### **Purchase by Central Government of immovable properties in certain cases of transfer**

#### **Section 269U : Commencement of Chapter**

#### **S. 269U : Purchase by Central Government of immovable properties – Commencement of chapter – Sale instance – Notice**

Appropriate authority acquired property under Chapter XXC on the basis of evidence that the property was undervalued, in the form of comparable sales in adjacent area. Upon writ filed by the assessee before the High Court, the High Court held that sales instance of adjacent property compared with were not at all comparable with the assessee case at all, as there was vast variance. Further, the High Court observed that condition as prescribed under section 269UG(1) of tendering the consideration to the transfers within the period of one month was also not complied with and hence the of the appropriate authority is payable to be quashed for this reason also.

*Ashok Leyland Finance v. UOI & Ors. (2007) 200 Taxation 374 (Mad.)(High Court)*

**S. 269U : Purchase by Central Government of immoveable properties – Commencement of chapter – Conditions precedent – Comparable cases – Encumbrance**

The provisions of Chapter XX-C were introduced to prevent evasion of taxes by undervaluing the properties. Therefore, these would be applied only in case where there are materials to show that property has been undervalued to evade tax which is a primary proposition. In the present case the valuation of the property was made by the appropriate authority on the basis of some dissimilar properties without taking into consideration the fact of encumbrance by reason of conceivable tenants could not be accept as correct. Further the property was sold by public auction there was no attempt to and hence, provision of Chapter XXC not attracted.

*Appropriate Authority v. Lytton Hotel (P.) Ltd. (2003) 130 Taxman 524 / 263 ITR 498 / 183 CTR 212 (Cal.)(High Court)*

**S. 269U : Purchase by Central Government of immoveable properties – Commencement of chapter – Opportunity of hearing – Validity of notice**

Where the notice under section 269UD came to be issued virtually at the fag end of the period of limitation, leaving a short period at the disposal of the petitioner to defend them selves, it could not be said to be reasonable opportunity afforded to the petitioner to defend them selves. Principles of natural justice are not embodied in law. However, that by itself would not mean that the authorities would be justified at their own whims to refuse such opportunity to the petitioner. Further, The notice issued should disclose all relevant documents giving details of the property, sale transaction relied on by the appropriate authority and other relevant details so as to give an appropriate opportunity to the petitioner to defend its case.

*Prabhakar Manoharrao Deshpande v. Appropriate Authority (2003) 133 Taxman 448 / 186 CTR 270 / 266 ITR 292 (Bom.)(High Court)*

**S. 269U : Purchase by Central Government of immoveable properties – Commencement of chapter – No-objection Certificate**

On a statement being filed under section 269UC, the appropriate authority has two options available to it, namely; either to purchase the property by exercising the right to preemptive purchase by making an order under section 269UD or (ii) if it is not inclined to purchase the property, to issue a "no objection certificate". It has no third



option. It can not go into the question of validity of the agreement to transfer the property or the legality of the transaction or the title of the vendor.

*K. L. Suneja v. UOI (2003) 133 Taxman 77 / 184 CTR 86 / 266 ITR 204 (Delhi)(High Court)*

### **Section 269UA : Definitions**

#### **S. 269UA : Purchase by Central Government of immoveable properties – Definitions –Valuation of property – Apparent consideration – Principle of discounting**

Principle of discounting under section 269UA cannot be applied where payment made by the appropriate authority is subsequent to the date of payment prescribed in the agreement for payment.

*Mukund L. Vora v. UOI (2004) 136 Taxman 294 / 267 ITR 231 / 189 CTR 62 (Bom.)(High Court)*

#### **S. 269UA(f)(i) : Purchase by Central Government of immoveable properties – Definitions –Lease for 9 years – Renewable at the option for a further period of 9 years**

Lease for 9 years renewable at option of lessee for a further period of 9 years, amounts to lease for more than 12 years. Parties obliged to submit Form No. 37-I, within 15 days of draft agreement.

*Govind Impex P. Ltd & Others v. Appropriate Authority (2011) 330 ITR 10 / 1 SSC 529 / 236 CTR 449 / 196 Taxman 425 / 48 DTR 169 / (2011) Tax L. R. 1 (SC)*

### **Section 269UC : Restriction on transfer of immovable property**

#### **S. 269UC : Purchase by Central Government of immoveable properties – Restrictions on transfer – Undervaluation by more than 15% – Powers [S. 269UD]**

It is no doubt true that provisions of Chapter XX-C of the Income-tax Act do not confer an unfettered discretion on the appropriate authorities. However, the appropriate authority can always exercise powers conferred on them under Chapter XX-C whenever there is a significant undervaluation of the concerned property by 15 per cent or more and order pre-emptive purchase of such property under section 269UD(1). Therefore there is no merit in the contention that power under section 269UD can be exercised only when authority records satisfaction that value of the property in question has been understated with a view to "evade tax".

*Vidarbha Engineering Industries v. UOI (2004) 271 ITR 229 / 199 CTR 27 / 144 Taxman 270 (Bom.)(High Court)*

### **Section 269UD : Order by appropriate authority for purchase by Central Government of immovable property**

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Interest**

The appropriate authority passed an order under section 269UD of the Income Tax Act 1961, for the compulsory purchase of certain property and took possession of the property and paid the purchase price to the owners. The owners filed the writ petition challenging the purchase order. Single judge of the High court set aside the purchase order and directed the owners to return the money paid by the appropriate authority with 15% interest. But the division Bench of High Court on appeal by the owners set aside the direction of the single judge for payment of interest (2000) 242 ITR 652 (Mad.). The appropriate authority preferred an appeal to the Supreme Court. The Supreme Court set aside the decision of the Division Bench in so far as it did away with the grant of interest and directed payment of interest at a reduced rate of 7½ percent.

*Appropriate Authority v. R. Shannuganathan (Decd. by LRS) & Others (2006) 287 ITR 558 / (2007) 198 Taxation 373 / 207 CTR 649 / 158 Taxman 370 (SC)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Failure to tender amount of apparent consideration – Order Abrogated**

Failure of Central Government to tender amount of apparent consideration within time fixed by statute, order of purchase by Central Government abrogated.

*UOI v. A. K. Garg (Dr.) and Others (2002) 256 ITR 660 / (2003) 179 CTR 306 / 124 Taxman 315 (SC)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Sales instances not considered – Margin of 15% – Order set aside [S. 269UL]**

Since the sale instances cited by the Petitioners had not been taken into account in a proper perspective, it means that the authority failed to arrive at a fair market value. More so, considering the fair market value arrived at by the authority, the transactions fell within the prescribed limit of 15 per cent and, hence, the orders were not sustainable.

*Harish Kanayalal Thawani & Others v. SCP & Others (2009) 318 ITR 137 (Bom.) (High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Fair market value not determined – Sales instances not comparable**

The order under section 269UD was passed by the Appropriate Authority for acquiring an immovable property merely relying upon the sale instance which were neither comparable nor the assessee was given the documents of sales instance relied upon by the Appropriate Authority. Further, the Appropriate Authority had not even given any show cause notice to the assessee of its intention to purchase the immovable property. On these facts the High Court held that the order of acquisition of

immovable property was in violation of the principle of natural justice and the same was not sustainable.

*Geeta Navin Shah & Ors. v. Appropriate Authority & Ors. (2008) 13 DTR 53 (Bom.)(High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Fair market value not determined**

Failure to file relevant particulars of sale instances relied on by the revenue constituted a breach of the principles of natural justice. Moreover, the order had been passed without determining the fair market value of the property. Therefore the order passed under section 269UD(1) of the Act, had to be set aside.

*Shrikishan Jindal & Others v. S.K. Laul and Others (2008) 305 ITR 353 (Bom.)(High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Finding of receipt**

When there is no finding that the consideration received is allegedly less than the fair market value and some of the sale instances relied upon were found to be not comparable, the impugned order was liable to be quashed and set aside.

*Gobardhandas Odhavji Dhakan & Anr. v. Appropriate Authority (2008) 214 CTR 114 / 304 ITR 168 / 165 Taxman 482 (Bom.)(High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Opportunity of hearing – Fair market value not determined**

The Fair Market Value of the property in question was not determined by the Appropriate Authority and the sales instances relied upon by the revenue authorities were not supplied to the seller, despite specific request by the seller. The High Court held that the impugned order under section 269 UD of the Act was not sustainable.

*Inter Equipments (India) P. Ltd. v. Appropriate Authority & Ors. (2008) 11 DTR 286 (Bom.)(High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Principle of natural justice – Instance of comparable cases**

Notice must give instances of comparable sales. No data regarding comparable sales in the said notice held the order of pre-emptive purchase not valid.

*Jai Nadershah Karani v. CIT (2007) 290 ITR 594 / 208 CTR 287 (Bom.)(High Court)*

**S. 269UD : Purchase by Central Government of immoveable properties – Order – Fair Market Value – Date of agreement – Objective standards**

The valuation has to be made as on the date of the agreement and after taking into 'account all the advantages and disadvantages then existing. The measure with reference to which the value is to be tested is the market value. However, the Act 'does not define 'market value'. It does not lay down the guidelines as to how to arrive at the market value. Any such determination must be by adopting fair and

objective standard, and that fairness and objectivity should be evident from the order that the authority makes. A very large plot of land may not always fetch a value per sq. ft. which a smaller plot may fetch. The disputed file of the vendor is a material consideration in the issue. Appropriate authority not considering these issues, the matter remanded back.

*T. Amudha v. Appropriate Authority (2004) 269 ITR 501 / 141 Taxman 512 / 192 CTR 087 (Mad.)(High Court)*

### **Section 269UE : Vesting of property in Central Government**

#### **S. 269UE : Purchase by Central Government of immoveable properties – Vesting of property – Opportunity of Hearing – Satisfaction of Authority – Period of Limitation**

The requirement of hearing the parties as mandated by C. B. Gautam's case will not apply in cases where the property has already been sold by public auction before the decision of the Court. Further in the present case there was no challenge by the owner of property.

*Krishnaswamy S. Pd. & Anr. v. UOI (2006) 6 RC 228 / 281 ITR 305 / 201 CTR 183 / 151 Taxman 286 / 193 Taxation 194 (SC)*

#### **S. 269UE : Purchase by Central Government of immoveable properties – Vesting of property – Opportunity of hearing**

Where first statement filed in form no 37-I is found to be defective and a fresh statement is filed, it would give rise to a fresh period of limitation and it would be open for the appropriate authority to act upon fresh statement and pass an order under section 269UD(1), with in a period of 2 months of receipt of fresh statement.

*Hans Raj Agarwal & Another v. CCIT (2003) 259 ITR 265 / 126 Taxman 603 / 179 CTR 89 / 174 Taxation 221 (SC)*

### **Section 269UH : Re-vesting of property in the transferor on failure of payment or deposit of consideration**

#### **S. 269UH : Purchase by Central Government of immoveable properties – Re-vesting of property – Failure to pay**

The right to purchase exercised by the Central Govt. stood abrogated with the failure on the part of the department to pay the amount of apparent consideration. The High Court quashed the impugned order and declared that the property in question should re-vest with the assessee in accordance with the provisions of S.269 UH of the Act.

*Parasurampur Estate Dev. P. Ltd. v. S.C. Prasad (2006) 284 ITR 607 (Bom.)(High Court)*

**Section 271 : Failure to furnish returns, comply with notices, concealment of income, etc.**

**S. 271 : Penalty – Show cause notice – Revival of proceedings – Writ – Jurisdiction [S. 274]**

In a writ petition assessee challenged show cause notice issued for reviving penalty proceedings which was dropped earlier. The High Court held that where the issue of jurisdiction of fact was involved, the High Court should not exercise its writ jurisdictional power because such jurisdictional fact can be raised at first instance before competent authority. High Court accordingly directed assessee to move Assessing Officer in penalty proceedings. Apex Court held that High Court was justified. Matter remanded to Assessing Officer in terms of Judgment in case of *CIT v. Elli Lilly & Co. (India) (P) Ltd. (2009) 312 ITR 225 / 178 Taxman 505 / 223 CTR 20 (SC)*.

*Mitsubishi Corporation v. Jt. CIT (2010) 190 Taxman 88 / 230 CTR 16 / 35 DTR 158 (SC)*

**S. 271(1) : Penalty – Recording of satisfaction – Nature of amendment – Substantive**

Amendment of section 271(1) of Act by Finance Act w.e.f. 1-6-2002 which empower the CIT to record the satisfaction is not clarificatory.

*CIT v. Parmanand M. Patel 2007 TLR 726 / (2005) 278 ITR 3 / 198 CTR 641 / 149 Taxman 403 (Guj.)(High Court)*

**S. 271(1)(a) : Penalty – Failure to furnish returns – Delay – Interest**

Where a return is filed under section 139(4), both beyond the time allowed and beyond the extended period allowed to him, penalty under section 271(1)(a) is leviable notwithstanding that interest has been charged for the delay. (A.Ys. 1959-60 to 1965-66)

*Amin Chand Pyare Lal v. IACIT (2006) 285 ITR 546 / 155 Taxman 633 / 204 CTR 585 / 7 SCC 483 / (2007) 196 Taxation 383 (SC)*

**S. 271(1)(a) : Penalty – Failure to furnish returns – Minimum penalty – Power of tribunal**

The Tribunal is not competent to reduce quantum of penalty below minimum prescribed in section 271(1)(a). (A.Y. 1948-49)

*CIT v. Raja Sharda Narain Singh (2005) 272 ITR 374 / 142 Taxman 574 (All.)(High Court)*

**S. 271(1)(a) : Penalty – Failure to furnish – Delay – Below taxable limit – Reasonable cause**

Assessee's belief that his income is below the taxable limit constitutes a reasonable cause for non-furnishing of return and, therefore penalty under section 271(1)(a)

cannot be imposed in such case merely on the basis that the income estimated by the Assessing Officer was more than the exempt income. (A.Y. 1985-86)

*Mansukh Dass Soni v. ACIT (2006) 99 TTJ 894 (Jodh.)(Trib.)*

**S. 271(1)(b) : Penalty – Failure to comply with notices – Show cause for each defaulter**

For each default of non-compliance of Notice under section 143(2) show cause notice has to be issued separately for levying penalty under section 271(1)(b).

Proper procedure for levy of penalty should be followed and penalty in general without pointing out non-compliance of any specific notice could not be sustained.

Show cause notice and penalty order without referring to specific notice regarding which default was committed cannot be sustained.

*Babu Lal v. Deputy Comm. (Asstt.) Special Range (2006) 155 Taxman 37 (Mag.)(Jodh.)(Trib.)*

**S. 271(1)(b) : Penalty – Failure to comply with notices – Reasonable cause**

When Assessing Officer chose not to pass best judgment assessment under section 144 on date on which non-compliance by assessee was alleged, and particularly when assessee had sought adjournment for reasons mentioned in application, it was not a case of non-compliance which would attract penalty. (A.Y. 1994-95)

*Parmeshwari Textiles v. ITO (2005) 92 TTJ 764 / 146 Taxman 38 (Mag.)(Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Rejection of claims – Penalty not leviable**

Mere making of a claim not maintainable in law, will not amount to furnishing of inaccurate particulars. Merely because the assessee claimed of deduction of interest expenditure has not been accepted by the Revenue, penalty under section 271(1)(c) is not attracted. If the contention of the revenue is accepted, the assessee would be liable to penalty under section 271(1)(c) in every case where the claim made by the assessee is not accepted by the Assessing Officer for any reason. The court held that this cannot be the intention of the legislature (A.Y. 2001-02)

*CIT v. Reliance Petroproducts (P) Ltd. (2011) 220 Taxation 278 / (2010) 36 DTR 449 / 322 ITR 158 / 189 Taxman 322 / 230 CTR 320 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction**

High Court held that on a perusal of the assessment order, the Assessing Officer had not recorded the satisfaction that proceedings under section 271(1)(c), required to be initiated against the assessee consequently penalty deleted. S.L.P of Department rejected.

*CIT v. Fibro Tech Chemicals, S.L.P No. 6703 of 2010 dt. 22-2-2010 (2010) 325 ITR 12 (St.)(SC)*

*CIT v. Frontline Solutions (Baroda) Ltd. S.L.P. No. 8187 of 2009 dt. 22-2-2010 (2010) 325 ITR 12 (St.)*



### **S. 271(1)(c) : Penalty – Concealment – Expln. 4(a) : Interpretation of taxing statutes**

The purpose behind section 271(1)(c) is to penalize the assessee for (a) concealing particulars of income, and/or (b) furnishing inaccurate particulars of such income. Whether the income returned was a profit or a loss was really of no consequence. Therefore, even if no tax was payable, penalty is still leviable. Further the amendment in Explanation 4(a) to section 271(1)(c) was held to be retrospective and clarificatory.

A word occurring in different sections of the same Act can have different meanings, if the objects of the two sections are different and they operate in different fields. (A.Y. 1995-96)

*Jt. CIT v. Saheli Leasing and Industries Ltd. (2010) 324 ITR 170 / 232 CTR 1 / 39 DTR 1 / 191 Taxman 165 (SC) / 6 SCC 38*

### **S. 271(1)(c) : Penalty – Concealment – Income from undisclosed sources – Receipt of on money – Addition in one year – Direction [S. 292C]**

In the course of search of premises of partner of assessee, certain documents were recovered indicating on money received for sale of shops in addition to cheques. Amount taxed as income from undisclosed sources of one year. The High Court directed the Assessing Officer in appeal to determine whether additional amount was received on different dates and hence, amount chargeable in different year. In appeal to Supreme Court, the Supreme Court held that direction of High Court were proper. In addition also directed the Assessing Officer to consider whether the amount paid to the managing partner of the Firm can be brought to tax in the hands of the firm (A.Y. 1993-94)

*Fifth Avenue v. CIT (2009) 319 ITR 132 / 224 CTR 440 / 183 Taxman 216 / 26 DTR 17 (SC)*

### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

The High Court had relied upon the decision of *CIT v. Ram Commercial Enterprises* 246 ITR 568 (Del.) which was approved by the Supreme Court in the case of *Dilip N. Shroff v. Jt. CIT* 291 ITR 519 (SC). The Supreme Court set-aside the matter for fresh consideration to the High Court since in the case of *Union of India v. Dharmendra Textiles* 306 ITR 277 (SC) the Supreme Court has held that Dilip N. Shroff is no longer a good law. (A.Y. 2002-03)

*CIT v. Atul Mohan Bindal (2009) 317 ITR 1 / 183 Taxman 444 / 225 CTR 248 / 28 DTR 1 / 9 SCC 589 (SC)*

### **S. 271(1)(c) : Penalty – Concealment – Deduction at source – Good and Sufficient Reason**

Penalty under section 271C can only be levied on a person who does not have a good and sufficient reason for not deduction tax at source. The burden will be on the person to prove such good and sufficient reason.

*CIT v. Eli Lilly & Co. (India) Pvt. Ltd. (2009) 312 ITR 225 / 223 CTR 20 / 178 Taxman 505 / 21 DTR 74 / 211 Taxation 172 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Loss – Positive Income – Explanation 4 – Amendment of 2003 – Clarificatory – Retrospective**

Amendment in 2003, incorporating provision for imposing penalty even after addition of concealed income there was no positive income is clarificatory and retrospective in nature applies to assessment year 1996-97.

*CIT v. Moser Baer India Ltd. (2009) 315 ITR 460 / 222 CTR 213 / 210 Taxation 294 / 184 Taxman 8 / 19 DTR 283 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 4**

Decision of Supreme Court in *Virtual Soft Systems Ltd. v. CIT (2007) 207 CTR 733 (SC)* holding that amendment made by Finance Act, 2002 with effect 1-4-2003, in Explanation 4 to section 271(1)(c)(iii) is not retrospective needs reconsideration. (A.Y. 1996-97)

*CIT v. Raman Lal C. Hathi (2008) 171 Taxman 479 / 217 CTR 105 / 7 DTR 404 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Civil Liability – Mens rea**

The Supreme Court overruled the part of the judgment in the case of Dilip N. Shroff 291 ITR 519 (SC) and held that the Explanations appended to section 271(1)(c) of the Act entirely indicate the element of strict liability. Section 271(1)(c) read with the Explanation indicate that the said section has been enacted to provide for a remedy for a loss of revenue. The penalty under that provision is a civil liability and willful concealment is not an essential ingredient for attracting civil liability.

*CIT v. Dharamendra Textiles Processors (2008) 306 ITR 277 / 219 CTR 617 / 174 Taxman 571 / 14 DTR 114 / (2009) 208 Taxation 67 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Loss to loss – Explanation**

The Supreme Court overruled its earlier judgment of (2007) *Virtual Soft System Ltd. v. CIT (2007) 289 ITR 83 (SC)*. It held that Explanation 4 to section 271(1)(c)(iii) is clarificatory and not substantive and therefore, would apply even to assessment year prior to April 1, 2003. It further held that what the Finance Act, 2002, intended was to make the position explicit which otherwise was implicit.

*CIT v. Gold Coin Health Food (P.) Ltd. (2008) 304 ITR 308 / 11 DTR 185 / 172 Taxman 386 / 206 Taxation 147 (SC)*

**S. 271(1)(c) : Penalty – Concealment – Deliberate**

Section 271(1)(c) remains a penal statute. Rule of strict construction shall apply thereto. Ingredients of imposing penalty remains the same. The purpose of the legislature that it is meant to be deterrent to tax evasion is evidenced by the increase in the quantum of penalty, from 20% under the 1922 Act to 300% in 1985.

‘Concealment of income’ and ‘furnishing of inaccurate particulars’ carry different connotations. Concealment refers to deliberate act on the part of the assessee. A

mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. The court held that the burden is on the department to establish that the assessee has concluded the income. If the assessee gives an explanation which has been treated as bonafide the question of failing to discharge the burden does not arise (A.Y. 1985-86)

*T. Ashok Pai (Sri) v. CIT (2007) 292 ITR 11 / 161 Taxman 340 / 7 SCC 162 / 210 CTR 259 / 201 Taxation 390 (SC)*

### **S. 271(1)(c) : Penalty – Concealment – Disclosure – Opinion of Expert**

Clause (c) of section 271(1) categorically states that penalty would be leviable if the assessee conceals particulars of his income or furnishes inaccurate particulars thereof. But by reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable to penalty. Imposing of penalty is not automatic. The Supreme Court held that not only is the levy of the penalty discretionary in nature, but the discretion is to be exercised keeping the relevant factors in mind and the approach of the Assessing Officer in this behalf must be fair and objective.

“Concealment of income” and “furnishing of accurate particulars of income” are different. However both concealment and furnishing of inaccurate particulars refer to a deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

In the present case where the disclosure is based on the opinion of the expert, who is otherwise also a registered valuer having been appointed in terms of the statutory scheme, merely because his opinion is not accepted or some other expert gives some other opinion, the same by itself may not be sufficient to arrive at a conclusion that the assessee has furnished inaccurate particulars of his income. (A.Y. 1998-99)

*Dilip N. Shroff v. Jt. CIT (2007) 291 ITR 519 / 161 Taxman 218 / 210 CTR 228 / 201 Taxation 53 (SC)*

### **S. 271(1)(c) : Penalty – Concealment – Assessment at loss**

The Supreme Court has held that prior to the amendment in the year 2002, in the explanation 4 to section 271, if the return is filed declaring a loss and the assessment made only reduces the loss, and there is no positive income, then penalty under section 271(1)(c)(iii) of the Act cannot be levied. It was further held that the amendment in Explanation 4 with effect from April 1, 2003, would apply prospectively and not retrospectively. (A.Y. 1996-97)

*Virtual Soft Systems Ltd. v. CIT (2007) 289 ITR 83 / 159 Taxman 155 / 207 CTR 733 / 199 Taxation 423 (SC) / 9 SCC 665*

*Editorial:- Please see the decision in the case of Moser Baer India Ltd. 315 ITR 460 (SC) and also amendment of 2003 in Explanation 4 and the decision in the case of Gold Coin Health Food (P) Ltd., (2008) 304 ITR 308 / 218 CTR 359 / 172 Taxman 386 (SC).*

**S. 271(1)(c) : Penalty – Concealment – Revised return – After survey – Voluntary**

Revised return filed disclosing additional income as a consequence of follow-up proceedings taken by Deputy Director of Income Tax in respect of purchasers hence revised return cannot be said to be voluntary, hence, levy of penalty was justified. (A. Ys. 1985-86 and 1987-88).

*LMP Precision Engg. Co. Ltd. v. Dy. CIT (2011) 330 ITR 93 / (2009) 223 CTR 301 / 183 Taxation 12 / 20 DTR 294 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure of all facts – No penalty for concealment**

In penalty proceedings, it is incumbent on the Tribunal to examine independently, the evidence and material on record for the purpose of judging whether penalty proceedings are justified on account of concealment of income or furnishing of inaccurate particulars thereof. If the assessee has disclosed all the facts, then just because the department does not agree with the legal stand taken by the assessee, the same would not result into penalty. (A. Y. 1995-96).

*Devsons P. Ltd. v. CIT (2011) 196 Taxman 21 / 241 CTR 344 / 329 ITR 483 / 48 DTR 137 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Where the revised return was filed by the assessee within the time limit prescribed under section 139(5) of the Act and there was nothing to suggest that the assessee had filed revised return with the knowledge that the department had detected such additional income. Penalty under section 271(1)(c) of the Act was not leviable as there was no willful and deliberate suppression of income. (A. Y. 2005-06).

*CIT v. R. Gopalakrishnan (Dr.) (2011) 50 DTR 345 / 239 CTR 558 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Withdrawal of claim**

Where the assessee withdraw its claim of deduction under section 80-IA of the Act by filing revised return under section 139(5) of the Act immediately, after it received notice under section 154 of the Act proposing to withdraw deduction under section 80-IA of the Act for earlier year. Penalty under section 271(1)(c) of the Act was held to be not leviable as the claim under section 80-IA was made under a bona fide believe which was rectified later on by the assessee by filing revised return. (A. Y. 2001-02).

*CIT v. Backbone Enterprises (2011) 50 DTR 321 / 238 CTR 197 / 195 Taxman 200 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Surrender of income – Voluntary or not**

In the instant case the assessee has surrendered his income after the Assessing Officer had made substantial progress in the investigation and the assessee had also not co-operated with the enquiry. The High Court held that such surrender cannot

held to be voluntary nor made bona fide, so as to avoid penalty. The High Court relied on the decision in the case of Bhairav Lal Verma v. Union of India 230 ITR 855, where the meaning of word 'voluntary' in the context of waiver provisions under section 273A was discussed. (A. Y. 2004-05).

*CIT v. Rakesh Suri (2011) 331 ITR 458 / 233 CTR 184 / 41 DTR 175 (All.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Detection in survey – Included in return [S.133A]**

Penalty under section 271(1)(c) can be levied only if Assessing officer 'during the course of proceedings' is satisfied that there is 'concealment' or 'furnishing of inaccurate particulars'. Where assessee offers detected income in the return, there was neither concealment nor furnishing of inaccurate particulars. Thus penalty under section 271(1)(c) cannot be levied. (A. Y. 2002-03)

*CIT v. SAS Pharmaceutical (2011) 60 DTR 258 / 335 ITR 259 / 244 CTR 51 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Valuation of closing stock – Explanation 1**

Valuation of stock on account of deterioration of old stock and the same has not been accepted by the Revenue, penalty under section 271(1)(c) is not leviable, in the absence of any finding that the claim of the assessee was false or that it fudged the books of account. (A. Y. 1987-88).

*CIT v. H. P. State Forest Corporation Ltd. (2001) 56 DTR 113 / 241 CTR 413 / 202 Taxman 422 / (2012) 340 ITR 204 (HP)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Failure to file return – Explanation 3**

For the purpose of invoking the provisions of Explan. 3 to section 271(1), the conditions enumerated therein are required to be satisfied cumulatively. Assessing Officer having issued a notice under section 148 to the petitioner with in the period specified under section 153(1), the third condition, namely, the notice under section 142(1) or 148 should have been issued with in the period specified under sub-section (1) or of section 153 is clearly not satisfied and therefore, the failure on the part of the petitioner to furnish return with in the specified period cannot be deemed to be concealment with in the meaning of Explanation 3 to section 271(1)(c), and penalty under section 271(1)(c) could not be levied. (A. Y. 1994-95).

*Chhaganlal S. Uteriya v. ITO (2011) 58 DTR 89 / 242 CTR 528 / 337 ITR 350 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 5 – Disclosure u/s. 132(4)**

Unaccounted stock surrendered by assessee in the statement recorded under section 132(4), on the date of search is covered by 'other valuable articles or things' and

therefore, the conditions enumerated under explanation 5 to section 271(1)(c), were fulfilled and penalty under section 271(1)(c) is not leviable. (A. Y. 1989-90).

*CIT v. Bhandari Silk Store (2011) 242 CTR 443 / 337 ITR 153 / 47 DTR 259 (P&H)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Search and seizure – Explanation 5**

Income offered after detection consequent to search operations was rightly treated as concealed income, therefore, penalty under section 271(1)(c), was rightly levied; in the circumstances, Explanation 5 was not attracted. (A. Ys. 1982-83 & 1983-84).

*D. K. B. & Co. v. Dy. CIT (2011) 58 DTR 299 / 243 CTR 198 / 198 Taxman 339 (Ker.)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Search and seizure – Disclosure – Due date of filing of return – Explanation 5 [S. 132(4)]**

Assessee made disclosure under section 132(4), and paid the tax. Time for filing of return has not expired. Penalty cannot be imposed. (A. Y. 1989- 90).

*CIT v. Bhandari Silk Store (2011) 337 ITR 153 / 242 CTR 443 / 47 DTR 259 (P&H)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Finding by AO – “Inaccurate Particulars”**

Where there is no finding by the Assessing Officer that the assessee furnished inaccurate particulars and that its explanation was not bonafide, the imposition of penalty under section 271(1)(c) was a “complete non-starter”. A mere erroneous claim made by an assessee, though under a bonafide belief that, it was a claim which was maintainable in law cannot lead to an imposition of penalty. The claim for deduction was made in a bona fide manner and the information with respect to the claims was provided in the return and documents appended thereto. Accordingly, there is no furnishing of “inaccurate particulars”. Making of an incorrect claim for expenditure does not constitute furnishing of inaccurate particulars of income. (A.Y. 1998-99)

*CIT v. Mahanagar Telephone Nigam Ltd. (2011) 63 DTR 87 (Delhi)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Furnishing inaccurate particulars – LTCG**

The assessee owned a plot of land which in the earlier years was treated as “stock-in-trade”. In the year of sale, the assessee converted the stock into “investment” and offered the gains as Long term capital gain. Penalty under section 271(1)(c) was levied. It was held that though the Assessing Officer accepted the conversion, the assessee’s claim that the gains was a LTCG amounted to furnishing inaccurate particulars of income. The issue was not debatable as held by the Tribunal. When the order of the Assessing Officer in quantum proceedings was sustained by all successive authorities and the High Court also dismissed the appeal at the admission stage, albeit after admitting the same, it cannot be said that the issue was debatable.



*CIT v. Splender Construction ITA No. 1977 of 2010 dated 14-1-2011 (Delhi)(High Court)*

Source : [www.itatonline.org](http://www.itatonline.org)

**S. 271(1)(c) : Penalty – Concealment – Capital gains – Development agreement – Year of taxability – Debatable**

Assessee received only the initial payment of ₹ 6 crores and not the last installment as per the terms of the property development agreement with the developer in the relevant assessment year 2002-03, it was justified in not offering the capital gains to tax in the assessment year. Assessee has disclosed in the return as advance and the Assessing Officer himself was not sure till the date of passing of the assessment order so as to whether the assessee is liable to pay tax on the impugned amount and if so, in which assessment year and under which head of income. The Court held that penalty is not leviable. (A. Y. 2002-03).

*Metal Rolling Works Ltd. v. CIT (2011) 62 DTR 328 / 339 ITR 373 / 245 CTR 113 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Business loss – Capital loss**

Assessee treated certain sum as a business loss, where as the Revenue treated it as a capital loss, the penalty under section 271(1)(c) cannot be levied. (A. Y. 2004-05).

*CIT v. Praveen B. Gada (HUF) (2011) 244 CTR 463 / 62 DTR 23 (MP)(High Court)*

**S. 271(1)(c) : Penalties – Concealment – Non disclosure of salary – Deduction at source**

If an assessee does not disclose his salary for a part of the year notwithstanding the fact that he has worked as an employee for full 12 months and claims higher refund of TDS, such act amounts to concealment of income attracting penalty under section 271(1)(c). (A.Y. 2001-02).

*Pankaj Rathi v. CIT (2011) 62 DTR 185 / 245 CTR 218 / 202 Taxman 408 (Cal.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Deemed dividend**

Loan treated as deemed dividend and consequently penalty was levied. The Tribunal cancelled the penalty. The Court held that the Tribunal was not justified in cancelling the penalty, without considering facts relied on by Assessing Officer. The matter remanded to Tribunal to fresh decision. (A.Y. 1995-96)

*CIT v. Alkesh K. Patel (2011) 220 Taxation 308 / (2010) 325 ITR 118 / 195 Taxman 338 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Estimation of profit**

Assessee estimating the profit at 6.36% of gross profit. Assessing Officer estimating at 10% of gross profit. Penalty for concealment cannot be levied as the assessee cannot be said to have concealed any particulars of income or furnished any inaccurate

particulates of income.  
(A.Y. 1992-93)

*CIT v. Vijay Kumar Jain (2010) 325 ITR 378 / 232 CTR 288 (Chhattishgarh)(High Court)*

*Editorial:- Ratio of Apex Court in CIT v. Reliance Petroproducts (P) Ltd. (2010) 36 DTR 449 (SC) / (2010) 322 ITR 158 / 189 Taxman 322 / 230 CTR 320 (SC).*

### **S. 271(1)(c) : Penalty – Concealment – Write off of Capital Expenditure**

The assessee had claimed deduction on account of Income Tax paid and written off capital expenditure in the profit and loss account. The claim made by the assessee were not only incorrect in law but were also made with a *mala fide* intention as such, penalty was rightly levied by the assessing officer.

*CIT v. Zoom Communication (P) Ltd. (2010) 327 ITR 510 / 40 DTR 249 / 191 Taxman 179 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Estimate**

Penalty not leviable when income was estimated for addition. (A.Y. 1997-98)

*CIT v. Aero Traders (P.) Ltd. (2010) 231 CTR 524 / 322 ITR 316 / 38 DTR 150 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Affidavit of Chartered Accountant**

Assessee having offered an explanation as to why the impugned contract receipts was not included in the relevant assessment year but was offered in the subsequence . This was further supported by an affidavit of his chartered accountant as well auditor's report in Form No. 3CD. The CIT(A) and the Tribunal were justified in accepting the same and quashing the penalty under section 271(1)(c). (A.Y. 1992-93)

*CIT v. N. Nagaraj Ballal (2010) 33 DTR 156 (Karn.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Business loss as speculative loss – Change of Head**

Mere fact that the Assessing Officer had treated the business loss as speculative loss did not automatically result in the inference of concealment of income justifying levy of penalty under section 271(1)(c). (A.Y. 2003-04)

*CIT v. Aretic Investment (P) Ltd. (2010) 39 DTR 243 / 190 Taxman 157 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Malafide**

Where the assessee had made full disclosure in his return of income that it had employed cash method for accounting for subsidies penalty cannot be levied under section 271(1)(c) of the Act unless the revenue authorities are able to demonstrate that the claim of the assessee is per se mala fide. (A.Y. 2005-06)

*CIT v. Shyam Tex International Ltd. (2010) 48 DTR 19 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Claim for Deduction – No Concealment**

Merely making a wrong claim for deduction is not at par with concealment of income or giving inaccurate information and hence no penalty under section 271(1)(c) is leviable.

(A.Y. 1995-96)

*CIT v. The Shahabad Co-op. Sugar Mills Ltd. (2010) 322 ITR 73 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Capital loss set off against business income**

Loss suffered on sale of machinery set off against profit of business – Assessee on realizing the mistake committed accepted the decision of Assessing Officer. Mistake in furnishing of inaccurate particulars due to negligence of counsel was not a deliberate attempt to evade tax. Therefore penalty under section 271(1)(c) detected. (A.Y. 2005-06)

*CIT v. Sidhartha Enterprises (2010) 322 ITR 80 / 228 CTR 579 / (2009) 184 Taxman 460 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Assessment on estimate**

Where the assessment of the assessee was completed on estimated basis penalty under section 271(1)(c) of the Act was not imposable with respect to the additions made on such estimate by the Assessing Officer. (A.Y. 2000-01)

*CIT v. Modi Industrial Corporation (2010) 195 Taxman 68 / 34 DTR 158 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Deeming fiction – Not extended [S. 69]**

Section 69 of the Act is a deeming provision for making the additions. The same cannot be extended to proceedings for levy of penalty unless the Assessing Officer gives independent finding justifying the levy of penalty under section 271(1)(c). In any case since the issue in quantum has been decided in penalty ought to be deleted. (A.Y. 1996-97)

*S. V. Kalyanam v. ITO (2010) 327 ITR 477 / (2011) 237 CTR 491 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Book profit [S. 115JB]**

When computation of income was made under section 115JB and there was loss under normal provisions, concealment, if any did not lead to tax evasion at all and therefore, penalty under section 271(1)(c) could not be imposed. (A.Y. 2001-02)

*CIT v. Nalwa Sons Investments Ltd. (2010) 235 CTR 209 / 45 DTR 345 / 194 Taxman 387 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Treating the business loss as speculative loss**

Penalty under section 271(1)(c), cannot be leviable, where the addition was made on account of treatment of business loss as speculative loss as a mere change of treatment of the said loss would not amount to concealment under section 271(1)(c). (A.Y. 1994-95)

*CIT v. Bhartesh Jain (2010) 323 ITR 358 / 235 CTR 220 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Agricultural income**

Where assessee had declared income by filing revised return after the Investigating authority found that the agricultural income declared by the assessee was bogus, penalty under section 271(1)(c) of the Act was held to be correctly leviable as there was a deliberate attempt on the part of the assessee to conceal its particulars of income by filing false return. (A.Y. 1994-95)

*CIT v. Dass Trading & Holding P. Ltd. (2009) 29 DTR 77 / 226 CTR 533 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Deduction under section 37 – Bona fide claim**

The Hon'ble High Court held that the action of the assessee claiming deduction under section 37 of the Act was a bona fide action, as two views were possible on allowability of the compensation paid to the worker. As such, there was no concealment or furnishing of inaccurate particulars so as to attract penal provisions under section 271(1)(c) of the Act. (A.Y. 2001-02)

*CIT v. Dalmia Agencies P. Ltd. (2009) 29 DTR 332 / 186 Taxman 155 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalties – Concealment – Deduction under section 80HHC – Bona fide claim**

The Tribunal had held that penalty under section 271(1)(c) of the Act was not leviable because of a bona fide claim of deduction by the assessee under section 80 HHC of the Act supported by the certificate of a Chartered Accountant. The Tribunal also noted that when the claim was preferred by the assessee there was a conflicting judicial opinion on the issue. On these undisputed facts recorded by the Tribunal and also by the CIT (A), the High Court declined to interfere with the finding by the Tribunal that penalty under section 271(1)(c) is not leviable. (A.Y. 2000-01)

*CIT v. Lakhani India Ltd. (2009) 17 DTR 304 / (2010) 324 ITR 73 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Non filing of return – Explanation 3**

Penalty can not be imposed for concealment of income for the non-filing of return by an assessee who had been assessed for several A.Y. prior to the A.Y. 1984-85 as Explanation 3 to section 271(1)(c) is not applicable to person who has been assessed to tax in earlier years.

*CIT v. U.P. State Handloom Corpn. (2009) 310 ITR 54 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Bona fide claim – Disallowance**

Where the assessee had disclosed the entire facts and not concealed any particulars of his income a mere disallowance of a bona fide claim made by the assessee of deduction under section 10(29) of the Act does not amount to concealment so as to attract penalty under section 271(1)(c) the Act. (A.Y. 1993-94)

*CIT v. Haryana Warehousing Corporation (2009) 25 DTR 194 / 226 CTR 124 / 314 ITR 215 / 182 Taxman 107 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Disclosure before Appropriate Authority**

Disclosure in Form No. 34 A, to Appropriate Authority for obtaining clearance certificate with respect to the agreement to sell cannot be equated to the disclosure in return and therefore, assessee was liable for penalty under section 271 (1) (c) of the Act for not offering the capital gains to tax in the return of Income. (A.Y. 1977-78)

*Smt. Ram Piari v. CIT (2009) 27 DTR 22 / 327 ITR 318 / 225 CTR 330 / 187 Taxman 247 (P&H) (High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Disclosure after Notice under section 148**

Where the assessee declared a higher income after receiving a notice under section 148 of the Act, disclosure made by the assessee was held to be not a voluntary surrender of income by the assessee and the penalty was rightly imposed by the Assessing Officer.

*Prempal Gandhi v. CIT (2009) 27 DTR 35 / 335 ITR 23 / 231 CTR 100 / 185 Taxman 64 (P&H) (High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Surrender pursuant to notice under section 148**

Whether penalty is leviable on surrender of additional income in return filed pursuant to notice under section 148. Held, no. The penalty under section 271(1)(c) of the act was not leviable as the Revenue has not placed any evidence on record to discharge the onus of proving concealment and also the Assessee has offered the additional income for tax in goodfaith to buy peace. Therefore, the penalty under section 271(1)(c) deserves to be deleted. (A.Y. 1998-99)

*CIT v. Rajiv Garg & Ors. (2009) 224 CTR 321 / 313 ITR 256 / 175 Taxman 184 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Satisfaction**

High Court held that;

- i. Section 271(1B) is not violative of Article 14 of the Constitution.
- ii. The position of law both, pre and post amendment is similar, as regards initiation of penalty proceedings.
- iii. Prima facie satisfaction of the Assessing Officer is a must.
- iv. Satisfaction need not be in respect of each and every disallowances.

- v. Due compliance would be required to be made in respect of the provisions of section 274 and 275 of the Act.
- vi. The proceedings for initiation of penalty cannot be set aside only on the ground that the assessment order states that 'penalty proceedings are initiated separately' if otherwise, it conforms to the parameters.

*Madhushree Gupta (Ms.) v. UOI (2009) 183 Taxman 100 / 225 CTR 1 / 317 ITR 107 / 26 DTR 217 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Cash credits – Production of lenders**

No penalty under section 271(1)(c) of the Act can be levied on the assessee on the ground that the assessee failed to produce the depositors after a lapse of 17 years from the date of loan received by the assessee. The High Court also held that the Tribunal was not justified in confirming the levy of penalty on the addition made under section 68 of the Act, merely on the statement given by the depositors in some other proceeding without allowing the assessee to cross-examine the depositors. (A.Ys. 1966-67, 19967-68)

*Shree Nirmal Commercial Ltd. v. CIT (2008) 11 DTR 255 / 218 CTR 581 / 308 ITR 406 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Claim to deduction [S. 80-IB]**

Penalty under section 271(1)(c) was not leviable where the assessee claimed deduction under section 80IB of the Act by making a mistake in calculation of number of years, as in such a case it cannot be said that the assessee deliberately concealed or furnished inaccurate particulars of his income. (A.Y. 2003-04)

*CIT v. Himachal Agro Foods Ltd. (2008) 9 DTR 46 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Surrender before detection – Family names**

Assessee having filed revised returns surrendering the amounts reflected in various bank accounts in the names of family members as his own income before completion of process of detection of concealed income, penalty under section 271(1)(c) was not leviable. (A.Ys. 1985-86 to 1987-88)

*CIT v. Shankerlal Nebhumal Uttamchandni (2008) 4 DTR 238 / 311 ITR 327 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Interest on enhanced compensation**

Where the penalty was levied by the Assessing Officer on the ground that the assessee did not disclose the interest received by it on enhanced compensation received by the assessee upon the acquisition of land by the Government, the High Court confirming the order deleting the penalty holding that the claim of the assessee was a bona fide claim based on one possible view and therefore, penalty under section 271(1)(c) could not be levied. (A.Y. 1998-99)

*CIT v. Kartar Singh (2008) 14 DTR 68 (P&H)(High Court)*



**S. 271(1)(c) : Penalty – Concealment – Capital gains – Expert advise**

Penalty under section 271(1)(c) of the Act was not leviable, where the assessee furnished all the details of the capital gain earned by him in his return of income filed for the year. However, based on a legal advice, wrongly claimed the capital gain on sale of shares as exempt under section 10(36) of the Act. (A.Y. 2004-05)

*CIT v. Amar Nath (2008) 16 DTR 326 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Finding of facts – Binding**

Where concurrent findings are recorded by the Tribunal and the CIT (A) that the assessee was not liable for penalty under section 271(1)(c) of the Act such finding of facts unless found to be perverse cannot be interfered by the High Court in appeal under section 260A of the Act. (A.Ys. 1995-96 to 1997-98)

*CIT v. Unique Precured Retraders (2008) 13 DTR 215 (Raj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation of assessee not found to be false**

The explanation of the assessee was not found to be false. The revenue could not show as to what relevant material was not disclosed by the assessee. Therefore, the case is not covered by Explanation (A) to section 271(1)(c) and penalty is not leviable. (A.Y. 1977-78)

*CIT v. Ram Prakash (2008) 6 DTR 295 (All.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Deduction under section 80P – Bona fide**

Assessee a co-operative society engaged in manufacture of sugar claimed deduction under section 80P of the Act on the basis of various decision of High Courts, its claim was held to be a bonafide claim by the assessee and penalty under section 271(1)(c) of the Act was not leviable in such case. (A.Y. 1995-96)

*CIT v. Budhewal Co-operative Sugar Mills Ltd. (2008) 6 DTR 31 / 312 ITR 92 / 171 Taxman 173 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure in return**

Where assessee had furnished particulars of her income in Part IV of return, there was no concealment and penalty could not be levied under section 271(1)(c).

*CIT v. Roshan D. Nariman (Mrs.) (2008) 169 Taxman 1 / 295 ITR 280 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Assessing Officer imposed penalty under section 271(1)(c) on assessee on ground that in its profit and loss account, assessee had not reflected excess stock though assessee had placed certain documents before Assessing Officer which explained discrepancy in value of closing stock to some extent. Mere mention of discrepancy in figures in assessment order, which had some bona fide explanation, did not meet requirement of recording by Assessing Officer of his satisfaction that penalty

proceedings must be initiated. Therefore, in absence of express words to that effect, no such satisfaction was even discernible from assessment order and, hence, penalty proceedings initiated against assessee could not be sustained. (A.Y. 2001-02)  
*CIT v. National Marble & Sanitary (2008) 169 Taxman 32 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return to buy peace – Acceptance by AO**

The declaration of income made by the assessee-company in the revised return and the explanation that it had done so to buy peace with the Department and to avoid protracted litigation was accepted by the Assessing Officer. The assessment was completed accepting the net income returned in the revised return of income. The assessment order did not reflect any satisfaction as required under section 271(1) of the Act. Even the show cause notice dated September 17, 2001, was silent with reference to the satisfaction arrived at by the Assessing Officer as to the concealment of income by the assessee-company. Nothing had been placed before the court by the Revenue to show that any other material was available with the Assessing Officer to the effect that the assessee had concealed its income. Hence, it was held that penalty could not be imposed. (A.Y. 1995-96)

*V.V. Projects and Investments P. Ltd. v. Dy. CIT (2008) 300 ITR 40 / 216 CTR 196 / 171 Taxman 62 (AP)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure – Explanation 5 [S. 132(4)]**

Immunity under Explanation 5 of section 271(1)(c), is not taken away for the reason that income disclosed by assessee in his statement under section 132(4) for a particular year was spread over in the returns of several years, more so, when Assessing Officer had also made assessment as per the returns filed by assessee, though after making some quantum reshuffling. (A.Ys. 1984-85 to 1988-89)

*CIT v. Kanhaiyalal (2008) 2 DTR 10 / 214 CTR 611 / 299 ITR 19 (Raj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure – Explanation 5 [S. 132(4)]**

Assessee having declared the value of diamonds in his statement, and paid tax thereon, entitled to immunity from penalty, even though the statement did not specify the manner in which the income representing value of diamonds was derived. (A.Y. 1988-89)

*CIT v. Mahendra C. Shah (2008) 3 DTR 1 / 215 CTR 493 / 299 ITR 305 / 172 Taxman 581 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Recording satisfaction by Assessing Officer**

With insertion of sub-section (1B) in section 271 by Finance Act, 2008, with retrospective effect from 1.4.1989, in absence of satisfaction as to concealment of income or deliberately furnishing inaccurate particulars filed by the assessee,

recorded by the assessing officer in his order passed prior to 1.4.1989, initiation of such penalty proceedings under section 271 (1)(c) of the Act was held to be without jurisdiction. (A.Ys. 1996-97, 1997-98)

*CIT v. Rampur Engineering Co. Ltd. & Ors. (2008) 16 DTR 281 / 309 ITR 143 / 221 CTR 32 (FB) (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Addition to income – Charge**

A mere addition to the income of the assessee cannot give rise to any punishment for concealment of income. Thus, where there was only an omission on the part of the assessee in declaring his income it cannot be said that there was a concealment of income on the part of the assessee so as to attract penal proceedings. Further, the High Court held that for invoking explanation to section 271(1)(c) of the Act no separate charge is to be spelt out, as the explanation is part of the main section that is section 271(1)(c) of the Act.

*CIT v. Punjab Kesari Hosiery Factory (2007) 198 Taxation 301 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Bona fide belief – Advance against sale**

Where the assessee claimed that the money received on sale of plot was merely an advance on the sale of land and not a business receipt as held by the Assessing Officer. The High Court held that no penalty was livable in the present case as the assessee was under a bona fide belief that the receipt was not a business receipt, but an advance for sale of property.

*CIT v. Rekha Lands Pvt. Ltd. (2007) 198 Taxation 322 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Revised return – Buy peace of mind**

When an assessee files a revised returns showing higher income and gives an explanation that he offered higher income to buy peace of mind and avoid litigation, penalty cannot be imposed merely on account of higher income having been subsequently declared. (A.Ys. 1969-70, 1970-71)

*CIT v. Suraj Bhan (2007) 159 Taxman 26 / 203 CTR 230 / 294 ITR 481 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Revised return – Excise search**

Where during the search action conducted by the excise department it was noticed that the assessee had not recorded the processing charges received by it in its books of account. On enquiry being made with the assessee the assessee revised its return after two years of filing its return. The Assessing Officer imposed penalty under section 271(1) (c) of the Act. The High Court upheld the levy of penalty, taking into consideration the fact that, the revised return was filed only after the fact of concealment of processing charges received by the assessee had surfaced on record.

*Kholwadwala Dyeing & Printing Mills v. CIT (2007) 197 Taxation 304 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Amnesty Scheme**

Concealment of income doubted by the Assessing Officer before the issue of show cause notice which was disclosed subsequently by the assessee as additional income by way of Revised return. The assessee is not entitled to the benefits of immunity under Amnesty Scheme in respect of additional income declared in the revised return. Levy of penalty under section 271(1) (c) is justified. (A.Y. 1983-84)

*Deepak Construction Co. v. CIT (2007) 208 CTR 444 / 293 ITR 285 / 164 Taxman 334 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Unaccounted sales – Declaration in next year**

The Assessing Officer made an addition of ` 20 lakhs on the ground that a certain sale was not brought into books for A.Y 1998-99. Assessing Officer thereafter levied penalty under section 271(1)(c).

The High Court held that the purchaser received the goods in June 1998 even though assessee issued invoice on 31st March 1998, the assessee paid sales tax for 1998-99 with regard to sale of goods based on the invoice dated 31.3.1998 and claimed deduction under the general Sales Tax and also paid Central Excise Duty for the goods would not mean that it had concealed the income or furnished inaccurate particulars. It was also to be appreciated that the assessee paid income-tax on sale receipt in 1999-2000 voluntarily even before the scrutiny of the assessment for the A.Y 1998-99. So, there was no penalty for concealment. (A.Y. 1998-99)

*Rajarajan Electrical Equipments Ltd. v. Dy. CIT (2006) 284 ITR 448 / 203 CTR 299 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Mens rea – Method of accounting**

The assessee had been consistently adopting the same method of accounting; i.e., of not including the work-in-progress for the purpose of arriving at the taxable income since the incorporation of the Company. The said method was accepted by the Department. When the Department sought to take a different view view on the fourth year, the assessee submitted a revised return offering the item for taxation and accepted the assessment made. Held that Penalty could not be levied in such cases. (A.Y. 1990-91)

*CIT v. J.H. Parabia (I) P. Ltd. (2006) 284 ITR 361 / 201 CTR 98 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure – Search & seizure – Explanation 5 – Returns not filed in time – Immunity not available**

If immunity from penalty is to be availed of by the assessee by invoking the provisions of Explanation 5 to section 271(1)(c), tax on the surrendered income along with interest, if any, is required to be paid immediately and in any case before the due date of return, in view of scheme of law which is clear from the language of the statute itself. Non-availability of funds for payment of tax due on the surrendered income, payment of tax along with interest before the date of assessment or payment of interest for delayed payment of tax cannot be the circumstances which could be

pleaded by the assessee to claim immunity from levy of penalty in terms of Explanation 5. An assessee, who has surrendered his concealed income during the course of search and seizure but neither files the return in time nor deposits the tax on surrendered income immediately after the surrender, cannot be given benefit of Explanation 5 to section 271(1)(c). (A.Y. 1993-94)

*Ashok Kumar Gupta v. CIT (2006) 287 ITR 376 / 205 CTR 613 / 157 Taxman 339 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Capital gains – Subsequent claim for exemption – Agricultural land – Surrender**

Where the assessee initially offered capital gain on sale of land. However, thereafter, on the advice of the Tahsildar and Municipal Corporation claimed the land to be agricultural land and therefore claimed the consideration received on transfer of the land as exempt from capital gain tax liability. Thereafter, the assessee surrendered the claim and admitted that the land was not agricultural land. The Assessing Officer imposed penalty under section 271(1)(c). The Hon'ble High Court, deleting the penalty held that the assessee acted bona fide on the basis of advice of the Tahsildar and Municipal Corporation, as such it cannot be said that the assessee concealed any fact or attempted to hide any material fact.

*CIT v. Videon (Mrs.) (2006) 195 Taxation 292 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Withdrawal of claim for deduction**

Withdrawal of claim for deduction resulting in difference of opinion between the assessee and the Assessing Officer did not amount to concealment of income or furnishing of inaccurate particulars by the assessee and therefore, no penalty under section 271(1)(c) was leviable. (A.Y. 2001-02)

*CIT v. Bacardi Martini India Ltd. (2006) 206 CTR 250 / 288 ITR 585 / 158 Taxman 348 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Surrender [S. 132(4)]**

Income surrendered during the course of statement under section 132(4). No penalty could be levied on the ground that tax on such income was not paid before filing of return.

(A.Y. 1988-89)

*CIT v. Nem Kumar Jain (2006) 202 CTR 328 / 202 CTR 328 (All.)(High Court)*

**S. 271(1)(c) : Penalties – Concealment – Erroneous claim of deduction**

As there was no concealment of primary facts, the Assessee is not liable for penalty under section 271(1)(c) for making a claim of deduction which was not accepted by the Assessing Officer. (A.Ys. 1989-90, 1996-97)

*CIT v. International Audio Visual 208 CTR 328 / 288 ITR 570 (Delhi)(High Court)*

*CIT v. Nath Bros. Exim International 208 CTR 326 / 288 ITR 670 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Wrong claim – Oversight**

The Tribunal had found that assessee had, by oversight, claimed extra shift allowance. The High Court held that it was justified in deleting penalty imposed for making such claim.

(A.Y. 1978-79)

*CIT v. Glow Tech Steels (P.) Ltd. (2006) 280 ITR 133 / (2005) 148 Taxman 289 / 196 CTR 177 (Guj.)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Explanation 4**

In view of Explanation 4, penalty imposed on assessee cannot be deleted merely on ground that total income of assessee has been assessed at a minus figure/loss. (A.Y. 1989-90)

*CIT v. Aditya Chemicals Ltd. (2006) 283 ITR 458 / (2005) 147 Taxman 688 / 197 CTR 241 (Delhi)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Mens rea – General**

The word 'concealment', as appearing in section 271(1)(c), inherently carries with it element of mens rea. When the assessee has voluntarily disclosed the closing stock in the revised return, which was omitted in the original return no penalty can be levied on such income. (A.Y. 1981-82)

*Bharat Rice Mill v. CIT (2005) 278 ITR 599 / 148 Taxman 145 / 200 CTR 481 (All.)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Assessment proceedings**

Tribunal is well within its jurisdiction to record fresh finding in penalty proceedings and it will not amount to reviewing its earlier order in quantum appeal; thus even where Tribunal sustained an addition in quantum appeal, its order deleting penalty based on such addition could not be said to suffer from any legal infirmity. (A.Y. 1973-74)

*CIT v. Mata Prasad (2005) 278 ITR 354 (All.)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Opportunity of hearing**

Opportunity of hearing does not mean that even if a reply has been filed by assessee, ITO should give another opportunity and ask assessee as to whether he would submit any further reply or not. Assessee not being able to substantiate his explanation, penalty under section 271(1)(c) is leviable. (A.Y. 1975-76)

*Madanlal Kishorilal v. CIT (2005) 277 ITR 209 / 145 Taxman 131 / 197 CTR 144 (All.)(High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction of ITO**

Satisfaction under section 271(1) has to be of Assessing Officer and not of appellate authority; Commissioner cannot substitute his satisfaction in exercise of revisional powers under section 263. (A.Y. 1982-83)

*CIT v. Parmanand M. Patel (2005) 278 ITR 3 / 149 Taxman 403 / 198 CTR 641 (Guj.)(High Court)*



### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction of ITO**

Where an amount claimed to be receipt of compensation for acquisition of agricultural land was added to assessee's income by treating it as non-agricultural income though question as to whether land in question was agricultural land was pending in High Court, imposition of penalty was not justified as Assessing Officer had not recorded requisite satisfaction under section 271(1)(c) and he was not justified in imposing penalty merely because he had added the aforesaid sum. (A.Y. 1994-95)

*CIT v. B.R. Sharma (2005) 275 ITR 303 / 146 Taxman 1 / 196 CTR 454 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction of ITO**

Where during scrutiny assessment Assessing Officer noticed that though assessee had not made payment of certain amounts shown as provision for PF, Pension Fund, EFIC and bonus, it had not added same back under section 43B and, therefore, he directed levy of penalty under section 271(1)(c), a bare reading of above order passed by Assessing Officer showed that there was no application of mind and no opinion had been formed and no satisfaction had been recorded by Assessing Officer before or at time of initiating penalty proceedings and no satisfaction having been recorded by Assessing Officer as per law, penalty was to be deleted. (A.Y. 2001-02)

*CIT v. Auto Lamps Ltd. (2005) 278 ITR 32 / 196 CTR 459 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Estimated additions**

Where addition to assessee's income was made on an estimate on account of income from trucks and incorrect claim for depreciation on trucks which had been sold and the Tribunal deleted penalty holding that it was a case of estimate. The High Court held that in view of findings recorded by Tribunal that assessee had not deliberately concealed income, no penalty under section 271(1)(c) was imposable.

*CIT v. Raj Bans Singh (2005) 276 ITR 351 / 141 Taxman 542 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Surrender of income**

In case of surrender of income to buy peace, assessee was not able to offer any satisfactory explanation as to source of such sum, in view of Explanation to section 271(1)(c), levy of penalty on assessee was justified. (A.Y. 1991-92)

*Kamal Chand Jain v. ITO (2005) 277 ITR 429 / 196 CTR 541 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Where a search took place at residence of assessee's father in which a hand-written diary of assessee was seized wherein an entry in respect of some transaction was found and assessee surrendered said amount as its income in reassessment proceeding, imposition of penalty on assessee was justified. (A.Y. 1991-92)

*Shanti Swarup Bhatnagar v. CIT (2005) 279 ITR 451 / 144 Taxman 583 / 196 CTR 168 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Revised return**

No penalty under section 271(1)(c) could be levied in case where income returned in revised returns was accepted and assessed in hands of assessee, even though revised returns were filed after search and subsequent to inquiries made by department during course of assessment proceedings.

*CIT v. Shyamlal M. Soni (2005) 276 ITR 156 / 144 Taxman 666 (MP)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Amnesty scheme**

Assessee raised a ground before Tribunal that no penalty could be levied on it in view of immunity given to it under Amnesty Scheme, Tribunal was not justified in confirming penalty without disposing of ground of appeal claiming immunity under amnesty scheme. (A.Y. 1984-85)

*Harkatwat & Co. v. CIT (2005) 273 ITR 84 / 147 Taxman 552 / 197 CTR 686 (MP)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Assessing Officer can invoke Explanation 1 to section 271(1)(c), without giving an indication of same in notice issued to assessee.

*CIT v. Prabhu Dayal Lallu Ram (2005) 274 ITR 233 / 144 Taxman 634 / 195 CTR 351 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Merely giving an explanation without any further proof would not amount to discharging onus under Explanation to section 271(1)(c). (A.Y. 1975-76)

*Madanlal Kishorilal v. CIT (2005) 277 ITR 209 / 145 Taxman 131 / 197 CTR 144 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Explanation to section 271(1)(c) is attracted as and assessee failed to produce relevant vouchers to substantiate claim that he had disclosed all purchases and sales in his books, therefore, ITO was justified in imposing penalty for concealment of income as assessee had failed to discharge onus which lay upon him under Explanation 1 to section 271(1)(c). (A.Y. 1975-76)

*Vidya Shanker Dixit v. CIT (2005) 277 ITR 285 / 144 Taxman 909 / 200 CTR 196 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 4**

Penalty cannot be imposed where income assessed is negative figure. (A.Y. 1991-92)

*CIT v. Chirag Ingots (P.) Ltd. (2005) 275 ITR 310 / 142 Taxman 427 / 197 CTR 335 (MP)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 4 – Prospective**

Clause (iii) and Explanation 4 as amended by Finance Act, 2002, with effect from 1-4-2003, is prospective in nature and does not apply to assessment year 1985-86; amendment does not speak that it is clarificatory in nature.

*CIT v. Zam Zam Tanners (2005) 279 ITR 197 / 149 Taxman 55 / 197 CTR 221 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation (5)**

Under section 132(4) unless authorized officer puts a specific question with regard to manner in which income has been derived, it is not expected from said person to make a statement in this regard and in such case if in statement under section 132(4) manner in which income has been derived has not been stated but has been stated subsequently, that amounts to compliance with Explanation 5(2) to section 271(1); therefore, mere non-statement of manner in which such income was derived would not make Explanation 5(2), inapplicable. (A.Y. 1989-90)

*CIT v. Radha Kishan Goel (2005) 278 ITR 454 / 200 CTR 300 / 152 Taxman 290 (All.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Revised return**

When revised returns were filed after search and amounts which were subject matter of enquiry were included in revised returns, levy of penalty was justified. (A.Y. 1985-86)

*Man Mohan Gupta v ACIT (2005) 274 ITR 179 / (2004) 189 CTR 331 (Raj.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Totalling mistake**

Totalling mistake in accounts which is not deliberate will not be ground for imposition of penalty. (A.Y. 1979-80)

*CIT v. Pitambardas Dulichand (2005) 273 ITR 271 / (2004) 191 CTR 43 (MP) (High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Even where assessment year involved was 1975-76, Explanation 1(A) as it stood on date of filing of return, i.e., 10/2/1978, was applicable. (A.Y. 1975-76)

*Balwant Rai & Co. v. CIT (2005) 274 ITR 269 / (2004) 141 Taxman 411 / 190 CTR 337 (All.) (High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Income of Firm**

Where Assessing Officer found that firm was not genuine and income earned in name of firm was assessee-partner's income, imposition of penalty was justified. (A.Y. 1969-70)

*R.K. Bhargawa v. CIT (2005) 274 ITR 287 / (2004) 136 Taxman 18 / 188 CTR 130 (Raj.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Discretionary**

Power to levy penalty is discretionary. (A.Y. 1981-82)

*CIT v. P. Natarajan (2004) 266 ITR 219 / 140 Taxman 50 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Bona fide explanation**

If any explanation, which is bonafide within the totality of the case is offered and accepted, the assessee would be absolved of liabilities of penalty. (A.Y. 1992-93)

*CIT v. A.D. Kohli (2004) 138 Taxman 183 / 273 ITR 223 / 187 CTR 178 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Independent of Assessment proceedings**

Explanation given by assessee in assessment proceeding regarding alleged unexplained investment, could not be taken into consideration in penalty proceedings where assessee filed no explanation in penalty proceedings.

*Rukmini Bai v. CIT (2004) 192 CTR 437 / 140 Taxman 289 / (2005) 276 ITR 650 (MP)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

The assessee filed a revised return offering a higher amount after search and seizure under the amnesty scheme, but prior to issuance of notice under section 148, return must be treated as voluntary and one filed before detection in respect of the amount offered in said revised return and such income cannot be subjected to any penalty. (A.Y. 1982-83)

*CIT v. Central Stores (2004) 269 ITR 241 / 140 Taxman 636 / 191 CTR 287 (Ker.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Where assessee, following search, filed return disclosing additional income but assessee offered no explanation at all except to assert that he disclosed income only to buy peace with Department and reason for not having disclosed income earlier was not stated, imposition of penalty was justified. (A.Y. 1986-87)

*CIT v. C. Ananthan Chettiar (2004) 192 CTR 164 / (2005) 273 ITR 401 / 142 Taxman 556 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Revised return filed after a questionnaire had been issued to assessee asking for certain details, could not be said to be voluntary so as to justify non levy of penalty. (A.Ys. 1986-87 to 1991-92)

*Ravi & Co. v. ACIT (2004) 271 ITR 286 / (2005) 143 Taxman 287 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Mistake in calculating of depreciation**

In a case of bona fide mistake in calculating depreciation on asset by assessee, penalty cannot be levied under section 271(1)(c).

*CIT v. Skyline Auto Projects P. Ltd. (2004) 271 ITR 335 / 193 CTR 72 / 142 Taxman 558 (MP)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Deduction [S. 80HHC]**

No penalty can be imposed for erroneous claim of deduction under section 80 HHC by assessee due to inadvertent error on part of assessee's Chartered Accountant. (A.Y. 1994-95)

*CIT v. Deep Tools (P.) Ltd. (2004) 191 CTR 257 / 274 ITR 603 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Deduction u/s. 80-I – Certificate of CA**

Mere disallowance claim of assessee for deduction under section 80 I, duly supported by certificate of Chartered Accountant in prescribed format, being bona fide claim, would not justify levy of penalty under section 271(1)(c) for concealment of income. (A.Y. 1992-93)

*CIT v. S.D. Rice Mills (2004) 192 CTR 24 / (2005) 275 ITR 206 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Loss in trading shares**

Penalty cannot be imposed where loss in trading in shares claimed by assessee is disallowed in view of explanation to section 73. (A.Y. 1994-95)

*CIT v. SPK Steels (P.) Ltd. (2004) 270 ITR 156 / 189 CTR 255 / 144 Taxman 469 (MP)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Estimated additions**

Tribunal's order holding that though there was a justification for rejecting account books and making assessment on estimate basis but that did not mean that concealment of income had been proved, could not be sustained because burden to prove in such a case that there was no concealment was on assessee and assessee had not discharged such burden. Therefore, penalty under section 271(1)(c) was leviable. (A.Y. 1989-90)

*CIT v. Hotel Classic (2004) 140 Taxman 524 / 191 CTR 19 (Ker.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Non-compliance with section 64(1)**

Non- inclusion of income of assessee's wife under section 64(1), would amount to concealment within the meaning of section 271(1)(c). (A.Ys. 1982-83, 1983-84)

*CIT v. Gudivada Ramchandra Rao (2004) 265 ITR 668 / 139 Taxman 185 / 187 CTR 593 (AP) (High Court)*

**S. 271(1)(c) : Penalty – Concealment – Reassessment**

Penalty proceedings during course of reassessment proceedings can only be initiated if Assessing Officer has discovered any undisclosed income over and above income which had already been assessed in original assessment. (A.Y. 1988-89)

*CIT v. Ved Prakash (2004) 269 ITR 255 / 141 Taxman 377 / 193 CTR 95 (P&H)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Once Assessing Officer issued notice under section 271, it could not be said that he has not invoked the Explanation, to section 271 as explanation to section 271 is part of section 271.

*CIT v. T.J. Mathal (2004) 269 ITR 492 / 140 Taxman 259 / 190 CTR 2011 (Ker.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

There is no legal fiction introduced in Explanation 1 to section 271(1), that concealment ipso facto will attract penalty.

*CIT v. Susai kalyanamandapam P. Ltd. (2004) 271 ITR 138 / 142 Taxman 555 (Mad.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 5 – Disclosure under section 132(4)**

Where assessee had not disclosed his income in returns filed for previous year which had ended prior to date of search and, in statement given under section 132(4), assessee admitted receipt of undisclosed income for those years and also specified manner in which such income had derived and thereafter paid tax on that undisclosed income with interest, such undisclosed income would get immunized from levy of penalty. (A.Ys. 1985-86, 1986-87)

*CIT v. S.D.V. Chandru (2004) 266 ITR 175 / 136 Taxman 537 / 189 CTR 272 (Mad.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Explanation 5**

Where it is found that conditions laid down in clause (2) of Explanation 5 are satisfied, no penalty is leviable on assessee. (A.Ys. 1987-88, 1988-89)

*Gebilal Kanhailal (HUF) v. ACIT (2004) 270 ITR 523 / 190 CTR 233 / 143 Taxman 42 (Raj.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Method of accounting – Project completion**

Where reasons given for non-disclosure of certain income by assessee that it was following project-completion method was found to be unacceptable by both Assessing Officer and Tribunal, imposition of penalty was justified. (A.Y. 1985-86)

*New United Construction Co. v. CIT (2004) 270 ITR 214 / 137 Taxman 290 / 190 CTR 116 (Jharkhand)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Payment without sufficient bank balance**

The assessee had made payments on dates when the assessee was not having sufficient balance in the books. The assessee's explanation that it had borrowed money without there being any entry in the books and interest giving any details of



the parties from whom money's have been borrowed cannot be accepted. Hence penalty under section 271(1)(c) is leviable. (A.Y. 1975-76)

*Usha Fertilizers v. CIT (2004) 269 ITR 591 / 178 CTR 153 / 142 Taxman 414 (Guj.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Disclosure**

Where the assessee had made disclosure without any specific detection of concealed income, it would not attract penalty under section 271(1)(c). (A.Y. 1986-87)

*CIT v. Kohinoor Impex (P.) Ltd. (2004) 270 ITR 381 / 141 Taxman 304 / 188 CTR 0077 (Delhi) (High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Substantiation of explanation**

Unless the finding is given by the assessing Officer stating that assessee failed to substantiate the explanation offered, the officer can not proceed to hold that there has been concealment of income, attracting levy of penalty. (A.Y. 1982-83)

*CIT v. G.R. Rajendran (2003) 259 ITR 109 / 134 Taxman 729 (Mad.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Two views**

When two views are possible, penalty cannot be imposed. Unless the explanation is found to be false or *mala fide*, the mischief of section 271 (1) (C ) can not be attracted.

*Durga Kamal Rice Mills v. CIT (2003) 130 Taxman 553 / 183 CTR 223 / 265 ITR 25 (Cal.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Claim based on decision no longer good law**

Where Tribunal deleted the penalty relying on decisions which were no longer good law, matter was remitted to the Tribunal. (A.Y. 1989-90)

*CIT v. N.S. Babu (2003) 132 Taxman 773 / 184 CTR 231 / 266 ITR 616 (Ker.)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Cash Credit – Addition not challenged**

Mere fact that addition sustained in one assessment year on account of loan was not challenged by assessee would not ipso facto show that assessee had furnished inaccurate particulars of income; and penalty could not be sustained on basis of Tribunal's order in the quantum appeal. (A.Y. 1985-86)

*CIT v. Baljeet Jolly (Mrs.) (2003) 130 Taxman 273 / 263 ITR 239 / 183 CTR 419 (Delhi)(High Court)*

### **S. 271(1)(c) : Penalty – Concealment – Agreed additions**

Where assessee accepted additions as it was pursuing Amnesty Scheme and it was not revenue's case that assessee's explanation was false or had not been substantiated, levy of penalty on assessee on account of agreed addition was not justified. (A.Y. 1980-81)

*CIT v. P. Govindasamy (2003) 127 Taxman 272 / 263 ITR 509 / 179 CTR 566 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Agreed additions**

Tribunal's finding that respondent-assessee agreed for addition and then withdrew appeal to buy peace of mind and to avoid litigation on a clear understanding given by revenue, that no penalty would be levied, is a finding of fact and no question of law could arise there from. (A.Y. 1981-82)

*CIT v. Badrilal Chaturbhuji (2003) 129 Taxman 965 / 177 CTR 165 / (2004) 265 ITR 329 (Raj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Admission of mistakes – Effect**

Totalling mistakes which were corrected by assessee the moment assessee came to know about mistakes committed in books of account while preparing the accounts for the subsequent year, would not justify levy of penalty. (A.Ys. 1979-80, 1980-81)

*CIT v. Milex Cable Industries (2003) 261 ITR 675 / 132 Taxman 525 / 182 CTR 442 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – After search**

Revised return filed by assessee admitting additional income after a search of his premises and statement of his accountant regarding concealment of income by assessee, could not exonerate assessee and penalty under section 271(1)(c) is leviable in such a case. (A.Ys. 1972-73, 1973-74)

*CIT v. A. Mohd. Abdul Khadir (Dr) (2003) 260 ITR 650 / 183 CTR 543 / 133 Taxman 942 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – After detection**

Where revised return was filed after Assessing Officer pointed out deficiency in closing stock, imposition of penalty was justified.

*CIT v. Ajay Dal Mill (2003) 263 ITR 66 / 132 Taxman 880 / (2004) 186 CTR 674 (All.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Amnesty scheme – Search**

Where though there was a search, undisclosed income disclosed in revised return was not noticed during search operations and it was disclosed in revised return filed by assessee, assessee was entitled to benefit of Amnesty Scheme and, thus, no penalty under section

271(1)(c) could be levied. (A.Y. 1983-84)

*CIT v. Attar Mohd. Dawood & Bros. (2003) 129 Taxman 700 / 183 CTR 301 / (2004) 267 ITR 436 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance of claim – Capital gains**

No penalty was liable where assessee had disclosed capital gains and claimed exemption thereof which claim was disallowed by Assessing Officer. (A.Y. 1992-93)  
*Chandrapal Bagga v. ITAT (2003) 128 Taxman 632 / 261 ITR 67 / 182 CTR 185 (Raj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance of claim – Debatable issue**

Where claim of deduction by assessee which is debatable, is disallowed, no penalty can be imposed on assessee. (A.Y. 1988-89)

*CIT v. Harshvardhan Chemicals & Mineral Ltd. (2003) 259 ITR 212 / 133 Taxman 320 / (2004) 186 CTR 552 (Raj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance of claim – False claim**

In case of false claim of deduction under section 35(1)(iv) penalty is justified. (A.Y. 1983-84)

*CIT v. Coromandel Indag Products (P.) Ltd. (2003) 128 Taxman 675 / 183 CTR 90 / (2004) 265 ITR 611 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Explanation to section 271(1)(c) is a part of section 271 and, therefore, it would apply notwithstanding that it may not have been separately mentioned.

*CIT v. Lallubhai Jogibhai Patel (2003) 261 ITR 216 / 182 CTR 371 / (2004) 134 Taxman 381 (Guj.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Explanation is an integral part of section 271(1)(c) and therefore deletion of penalty on ground that Assessing Officer had not invoked Explanation could not be said to be justified. (A.Y. 1988-89)

*CIT v. S.M.J. Builders (2003) 262 ITR 60 / 180 CTR 315 / (2004) 135 Taxman 385 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 1**

If explanation of assessee was not considered by Assessing Officer while passing penalty order, right course for appellate authority would be to remit matter to Assessing Officer to consider matter keeping in view Explanation 1(B). (A.Y. 1985-86)

*CIT v. Issac John & Co. (2003) 130 Taxman 760 / 263 ITR 579 / 180 CTR 315 / 183 CTR 160 (Ker.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 4 – Reducing loss**

Explanation 4 applies to cases where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declaring in the return or it has the effect of converting that loss in to income.  
(A.Y. 1988-89)

*CIT v. Chemiequip Ltd. (2003) 129 Taxman 581 / 182 CTR 144 / (2004) 265 ITR 265 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 5 – Surrender of income on date of search**

No penalty is leviable where surrender of income was made on date of search and Tribunal found that surrender fell within immunity under Explanation 5. (A.Y. 1992-93)

*CIT v. Chhabra Emporium (2003) 130 Taxman 818 / 264 ITR 249 / (2004) 190 CTR 179 (Delhi)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction**

Where Tribunal held that satisfaction about concealment of income was not recorded by ITO who accepted assessee's revised return and reasons for filing thereof, deletion of penalty by Tribunal was justified. (A.Y. 1992-93)

*CIT v. Munish Iron Store (2003) 263 ITR 484 / 186 CTR 159 / (2004) 137 CTR 391 (P&H)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Remitted matter to Assessing Officer**

When the Appellate Tribunal had remitted the matter to the Assessing Officer to consider assessee's claim for certain deduction, penalty imposed on assessee could not be sustained. (A.Y. 1984-85)

*CIT v. Coromandal Indag Products (P.) Ltd. (2003) 260 ITR 289 / 129 Taxman 820 / 184 CTR 278 (Mad.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Addition in the assessment of firm – Partners**

Where authority had added amount under section 69A to income of assessee-firm and then again assessed same in hands of partners for relevant previous year, it could not conclusively be said that assessee was owner of said income so as to impose penalty on assessee.

*Durga Kamal Rice Mills v. CIT (2003) 130 Taxman 553 / 183 CTR 223 / (2004) 205 ITR 25 (Cal.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Sales tax collected**

Penalty is leviable in respect of amount of sales-tax collected by the assessee but not credited to the profit and loss account even though the assessee had maintained a separate account for sales-tax collected. (A.Y. 1992-93)

*CIT v. Bassein Metals (P.) Ltd. (2003) 263 ITR 518 / 182 CTR 393 / (2004) 139 Taxman 48 (Bom.)(High Court)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure**

Where a search was conducted in assessee's residence and it was thereafter that assessee made a disclosure under section 273A in respect of a sum as unexplained investment, levy of penalty for concealment was justified. (A.Ys. 1979-80, 1980-81)  
*B. Indira Rani (Smt.) v. CIT (2003) 263 ITR 525 / 183 CTR 399 / 133 Taxman 635 (Ker.) (High Court)*

#### **S. 271(1)(c) : Penalty – Concealment – Two sets of books of account**

In the present case, the assessee was maintaining two sets of books; one was meant for showing to Income Tax Authorities and the other for himself. In the second set, he was recording sales and certain expenses on the basis of these documentary evidence, addition had been made which had been confirmed up to the Tribunal. Thus it was not the case of simplicitor estimation of the income by disbelieving the books of account or other details submitted by the assessee during the course of assessment proceedings. In the present case the department was able to lay its hands on the documentary evidence exhibiting the conduct of assessee for avoiding tax and carrying out the business activity out of the regular books. In the above circumstances penalty under section 271(1)(c) of the Act, which was confirmed by the Commissioner (A) was upheld. (A. Ys. 1985-86 and 1990-91).

*Shyam Behari v. ACIT (2011) 43 SOT 129 (Delhi) (Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Return filed after survey**

The assessee disclosed the income in the Return filed after survey. The Tribunal held that what is punishable under section 271(1)(c) is actual concealment of income in the Return of income and not merely an attempt to make concealment. If the assessee rectifies it itself and declares the correct income in valid return of income and does not file return by concealing the income then such act is not punishable under section 271(1)(c). Hence, penalty under section 271(1)(c) cannot be levied. (A. Y. 2002-03).

*Sadhbav Builders v. ITO, ITA No. 1418/Ahd/2008, Bench 'D' dt. 21/1/2011, BCAJ Vol. 34 Part 10 January 2011, P. 480. (Adh.) (Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Admission by High Court – Mere admission is sufficient**

In quantum proceedings, the Tribunal upheld the addition of three items of income. The assessee filed an appeal to the High Court which was admitted. The Assessing Officer levied penalty under section 271(1)(c) in respect of the said three items. The penalty was upheld by the CIT(A). On appeal to the Tribunal, HELD allowing the appeal:

When the High Court admits substantial question of law on an addition, it becomes apparent that the addition is certainly debatable. In such circumstances penalty cannot be levied under section 271(1)(c). The admission of substantial question of law by the High Court lends credence to the bona fides of the assessee in claiming deduction. Once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not

completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition of penalty. (A. Y. 1995-96)

*Nayan Builders & Developers Pvt. Ltd. v. ITO (2011) 43A BCAJ, May Pg. 37 (Mum.)(Trib.)*

*Editorial:- Refer, Rupam Mercantile Ltd. v. Dy. CIT (2004) 91 ITD 237 / 85 TTJ 609 (TM)(Ahd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Book profit – Addition to regular income [S. 115JB]**

Pursuant to a search under section 132 and the detection of incriminating documents, the assessee offered additional income. The Assessing Officer computed the income under the normal provisions and levied penalty under section 271(1)(c) for concealment of income. However, as the book profits computed under section 115JB was higher, the assessee was assessed under section 115JB. The assessee's appeal against the levy of penalty under section 271(1)(c) was rejected by the CIT(A). However, on appeal to the Tribunal, HELD:

It was held by Hon'ble Mumbai Tribunal that, the concealment of income had its repercussions only when the assessment was done under the normal procedure. If the assessment as per the normal procedure was not acted upon and it was the deemed income assessed under section 115JB which became the basis of assessment, the concealment had no role to play and was totally irrelevant. The concealment did not lead to tax evasion at all. (A. Y. 2005-06)

*Ruchi Strips & Alloys Ltd. v. Dy. CIT BCAJ P. 39, Vol. 42-B, Part 6, March 2011 (Mum.)(Trib.) Source : [www.itatonline.org](http://www.itatonline.org)*

### **S. 271(1)(c) : Penalty – Concealment – Failure to apply S. 50C**

No penalty under section 271(1)(c) can be levied where assessee agreed to the addition made under section 50C as the fact that assessee agreed to addition is not conclusive proof that the sale consideration as per agreement is not correct or accurate. The addition made purely on the basis of deeming provisions of section 50C. (A. Y. 2006-07).

*Renu Hingorani v. ACIT BCAJ P. 38, Vol. 42-B, Part 6, March 2011 (Mum.)(Trib.) Source : [www.itatonline.org](http://www.itatonline.org)*

### **S. 271(1)(c) : Penalty – Concealment – Claim not sustainable in law**

Mere making of a claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. The assessee in the present case had made a bona fide claim and hence following the Apex Court's decision in the case of Reliance Petro Products Pvt. Ltd., it was held that penalty under section 271(1)(c) of the Act was not leviable. (A. Y. 2006-07).

*Walter Saldhana v. Dy. CIT (2011) 44 SOT 26 (Mum.)(Trib.)*



**S. 271(1)(c) : Penalty – Concealment – Additional income after survey – Revised return**

Assessee having declared additional income following survey under section 133A and further enhanced the same filing a revised return despite the fact that no incriminating material was found either during the survey action or during the post survey enquiries and the Assessing Officer having accepted the revised return without pointing out any inaccuracy therein or making any further addition, penalty under section 271(1)(c) was not leviable, more so as the additional income is not free from dispute as far as its ownership and the year of incidence of tax is concerned. (A. Ys. 2002-03 & 2003-04).

*Dillip Yeshwant OAK v. ACIT (2011) 55 DTR 113 / 138 TTJ 559 (Pune)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance u/s. 14A – No Rule 8D**

As there is no allegation by the Assessing Officer that there was collusion between the auditor and the assessee to ignore section 14A, it cannot be said that the explanation was not bona fide. Further, as Rule 8D was not enacted at the time, segregation of expenditure relatable to tax-free income would be disputable and lead to bona fide difference in opinion. So, penalty under section 271(1)(c) cannot be levied. (A Y. 2005-06).

*Dy. CIT v. Nalwa Investment Ltd. ITA No. 3805/Del/2011 dated 21-4-2011 (Delhi)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

**S. 271(1)(c) : Penalty – Concealment – Surrender during survey – No penalty [S. 133A]**

Where Assessing Officer has not brought on record any material to show that the additional income surrendered by the assessee during survey under section 133A was concealed income or that explanation was false, penalty under section 271(1)(c) is not leviable. (A. Y. 2006-07).

*Dy. CIT v. Bhanwar Lal Mahendra Kunar Soni (2011) 138 TTJ 381 / 54 DTR 271 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Capital gains – Difference in rate of taxation – Tax sought to be evaded**

In the return of income the assessee declared of ₹ 17 lakhs as long term capital gains arising from transfer of tenancy right and paid tax @ 20% applicable to long term capital gains. Claim of assessee was that amount paid for receiving the gift was from the cash received on surrender of tenancy right. Assessing Officer held that as there was no supporting evidence the amount was assessed as income from undisclosed sources.

The Tribunal held that as tax sought to be evaded is very clear as the tax rate applicable on the impugned receipt of ₹ 17 lakhs is 30% being income from undisclosed sources, whereas the assessee has paid 20% claiming the same to be capital gain on transfer of tenancy right, provisions of Explanation 1 are not

applicable to the instant case as tax sought to be evaded was because of the lower rate of tax paid and not because of any addition to the income and, therefore, penalty is imposable under the main provisions of section 271(1)(c). (A. Y. 1996-97)

*Harish P. Mashruwala v. ACIT (2011) 139 TTJ 563 / 38 SOT 398 / 58 DTR 182 / 9 ITR 752 (SB)(Mum.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Survey – Surrender of additional income**

Assessee having surrendered additional income following detection of certain discrepancies in the documents found during the survey proceedings at its premises despite filing an explanation and Assessing Officer proceeded to assess the said income on the basis of the surrender made by the assessee Penalty under section 271(1)(c) is not leviable. (A. Y. 2005-06).

*Ajay Sangari & Co. v. Addl. CIT (2011) 57 DTR 397 / 140 TTJ 388 (Chd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – AO reprimanded – Harassment**

In the instant case, the assessment order supplied by Assessing Officer to assessee did not contain any direction for initiation of penalty though assessment order filed by department with memo of appeal had a reference to issue of notice under section 271(1)(c). The Tribunal considering the case fit for awarding cost under section 254(2B) of the Act, held that they were inclined to record over here that Assessing Officer should have confined himself in making just and proper assessment only, as per the provisions of the law and harassment of assessee, which is not permitted under the statute should have been avoided at all cost.

*ITO v. Audyogik Tantra Shikshan ITA No. 106/PN/2010 dated 30-6-2011 (Pune)(Trib.)*

Source : [www.itatonline.org](http://www.itatonline.org)

### **S. 271(1)(c) : Penalty – Concealment – Revised return – Additional income – Explanation 2**

Additional income offered by way of revised return and accepted by Assessing Officer cannot be said to be an addition so as to attract Explanation 2 to section 271(1)(c). (A. Y. 2004-05).

*SVC Projects (P) Ltd. v. Jt. CIT (2011) 58 DTR 433 / 140 TTJ 79 / 132 ITD 11 / 10 ITR 552 (Visakha)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – ROC fees – Increasing authorized – Capital**

Assessee having claimed deduction of fees paid to the ROC for increasing authorized share capital contrary to the ruling of the Supreme Court, the claim is ex facie wrong and cannot be accepted as a bona fide claim as the circumstances in which the auditors committed the error of treating the same as revenue expenditure have not been explained and, therefore, levy of penalty under section 271(1)(c) is justified. (A. Y. 2006-07).

**S. 271(1)(c) : Penalty – Concealment – Disclosure – Legal opinion – Substantial question of law – Penalty confirmed by tribunal**

The assessee, a firm of Chartered Accountants, was one of the “associate members” of Deloitte Haskins & Sells pursuant to which it was entitled to practice in that name. Deloitte desired to merge all the associate members into one firm. As this was not acceptable to the assessee, it withdrew from the membership and received consideration of ` 1.15 crores from Deloitte. The said amount was credited to the partners’ capital accounts & claimed to be a non-taxable capital receipt by the assessee. The Assessing Officer rejected the claim though the CIT (A) accepted it on the ground that it had “great force”. The Tribunal reversed the CIT (A). The Assessing Officer levied section 271(1)(c) penalty which the CIT(A) deleted. On appeal by the department to the Tribunal, the assessee argued that penalty was not leviable because (i) there was a disclosure of the facts in the computation & the balance sheet, (ii) the opinion of 3 tax experts had been taken, (iii) the issue was debatable & (iv) the assessee’s appeal on the merits had been admitted by the High Court. HELD allowing the appeal:

- (i) Section 271(1)(c) imposes “strict civil liability”.
- (ii) The fact that the legal opinions were not furnished during the assessment proceedings (but were furnished only during the CIT(A) penalty proceedings) indicates that the assessee realized the ineffectiveness of these opinions and still ventured into making the non-allowable claim;
- (iii) Though there was disclosure in the computation and balance sheet, in order to minimize disclosure, the assessee took the “smart route” of directly crediting the receipt in the capital accounts of partners to evade tax;
- (iv) The fact that a substantial question of law on the merits was admitted by High Court does not mean penalty is not leviable (*Rupam Mercantiles* 91 ITD 237 (Ahd.)(TM) not followed);

*ACIT v. Khanna & Annadhanam (2011) 142 TTJ 1 / 48 SOT 120 (URO)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Transfer pricing – ALP – Explanation 7**

The assessee adopted the TNMM to determine the ALP in respect of the broking transactions entered into with its affiliates. The Assessing Officer & TPO held that the assessee ought to have adopted the CUP method and made an adjustment of ` 1.10 crores. This was accepted by the assessee. The Assessing Officer levied penalty under Explanation 1 to section 271(1)(c) on the ground that the assessee had filed inaccurate particulars of income. This was deleted by the CIT(A). On appeal by the department to the Tribunal, the Tribunal dismissing the appeal held that, Explanation 1 to section 271(1)(c) does not apply to transfer pricing adjustments. Penalty for transfer pricing adjustments is governed by Explanation 7 to section 271(1)(c). Under Explanation 7 to section 271(1)(c), the onus on the assessee is only to show that the

ALP was computed by the assessee in accordance with the scheme of section 92C in "good faith" and with "due diligence". The assessee adopted the TNMM and no fault was found with the computation of ALP as per that method. Instead, the method was rejected on the ground that CUP method was applicable. It is a contentious issue whether any priority in the methods of determining ALPs exists. So, when TNMM is rejected, without any specific reasons for inapplicability of the TNMM and simply on the ground that a direct method is more appropriate to the fact situation, it is not a fit case for imposition of penalty. (A.Y. 2004-05).

*Dy. CIT v. RBS Equities India Ltd. (2011) 133 ITD 77 / 60 DTR 273 / 141 TTJ 58 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Carry forward loss – Mistake of consultant – Deduction u/s. 80G**

Carry forward loss shown at a wrong figure due to mistake of tax consultant would not attract penalty under section 271(1)(c), as the correct figure was available with Assessing Officer from the assessment of earlier years and the mistake was rectified on being pointed out before finalization of assessment. Recognition to donee trust under section 80G being available earlier, there was bona fide belief to claim deduction under section 80G hence there was no case for levying penalty under section 271(1)(c). (A. Y. 2004-05).

*ACIT v. A. H. Wheeler & Co. (P) Ltd. (2011) 60 DTR 25 / 142 TTJ 112 / 132 ITD 34 (All.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure – Loss return**

In the course of search it was found from records that some loose papers were found having jottings on them, no other valuable assets like money, bullion, jewellery etc., were found and losses declared by assessee for four assessment years were accepted by Assessing Officer hence, there was no tax liability on assessee. The Tribunal held that penalty cannot be levied by invoking Explanation 5 to section 5 to section 271(1)(c). (A. Ys. 2002-03 to 2005-06).

*Lallubhai Amichand Ltd. v. Dy. CIT (2011) 133 ITD 205 / 64 DTR 442 / (2012) 143 TTJ 739 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Failure to deduct tax – Royalty – Advertisement – Publicity [S. 40(a)(ia)]**

The assessee not deducted the tax at source in respect of payments of royalty, advertisement and publicity, audit fee and recruitment expenses. In the audit report accompanying the return it was mentioned that the amount was not admissible under section 40(a)(ia). The assessee contended that due to inadvertently this amount was not reduced in the computation of income. The Tribunal held that the as the assessee disclosed the amount in accounts, there was no concealment and hence levy of concealment penalty was not justified. (A. Y. 2005-06).

*New Horizon India Ltd. v. Dy. CIT (2011) 12 ITR 332 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Survey – Additional income [S. 133A]**

Assessing Officer has not give a clear finding in penalty order whether addition on account of concealment of income or furnishing in accurate particulars of income. The Tribunal held penalty was not justified. (A. Y. 2006-07).

*ACIT v. Rmp Infotech P. Ltd. (2011) 12 ITR 581 (Chennai)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure – Revised return [S. 153A]**

A Search and seizure operation was conducted at assessee's premises. In response to notice under section 153A, the assessee filed return showing income of ₹ 2,11,297, without disclosing any unaccounted income. In response to further enquiry, assessee filed revised return disclosing additional income by way of declaring gross profit rate of 15% as against 6.93% which was declared in return filed under section 153A. Assessing Officer completed assessment by taking gross profit at 15%. The Tribunal held that since the assessee had failed to establish that disclosure of additional income in revised return under section 153A was made voluntarily and in good faith to buy peace with revenue and since, assessee filed the revised return only after concealment was detected by Assessing Officer, penalty under section 271(1)(c) was rightly imposed. (A. Y. 2005-06).

*Dy. CIT v. Sushma Devi Agarwal (2011) 133 ITD 155 (TM)(Kol.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure – Statement – Retraction**

There was a search in case of one of the trustees, during course of which several incriminating documents were found which among other showed unaccounted transaction by trust. The Trustees had clearly stated that unaccounted donations were received, though retracted after thought. The Tribunal held that assessee had concealed particulars of income with in meaning of provision of Explanation 1 to section 271(1)(c). (A. Ys. 1989 and 1990-91).

*Dy. DIT v. St. Xavier's Education Trust (2011) 133 ITD 576 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Survey – Stock – Addition [S. 69]**

On the date of survey, as per physical verification stock found was of value of ₹ 87,93,380, where as stock as per books of account maintained works out ₹ 78,93,380. Assessee had agreed pay tax on excess stock so worked amounting to ₹ 9 lakhs. In the trading account for period ending 31-3-2000 the assessee shown the said amount as other income, however the assessee increased the valuation of opening stock by ₹ 9 Lakhs and nullified the effect of declaration. The Assessing Officer made addition of ₹ 9 lakh as unexplained investment in stock under section 69 and also levied the penalty under section 271(1)(c). The Tribunal held that the assessee had deliberately prepared trading account in such away so as to nullify effect of excess stock found during survey, conduct clearly showed that assessee had concealed income hence justified the levy of penalty. (A. Y. 2000-01).

*Tribhovandas Chelaram v. ACIT (2011) 133 ITD 587 / (2012) 146 TTJ 578 (Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Goodwill – Depreciation – Intangible asset**

The assessee treated goodwill as 'certain other intangible assets' and claimed depreciation. The Tribunal held that such a false claim could not be considered as a debatable or possible claim and assessee was liable to penalty under section 271(1)(c). (A.Y. 2000-01).

*Mahindra Intertrade Ltd. v. Dy. CIT (2011) 133 ITD 597 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Commissioner – Revision – Cost [S. 263]**

The Tribunal held that once revision order is passed, it is for assessing authority to consider whether penalty is to be levied or not and if assessing authority has not levied penalty where it is imperative, then only, Commissioner can in his wisdom interfere in the matter. Therefore, when there is no penalty order subsisting at time of passing of revision order it is not proper on part of Commissioner to initiate penalty proceedings under section 271(1)(c). On merit the Tribunal held that whether the expenses relating to tiles, white washing electrical rewiring and wood work incurred after purchasing of property as part of acquisition on a bonafide belief that law permits such a treatment, there was no question of furnishing any inaccurate particulars or any case concealment of income, therefore penalty under section 271(1)(c) cannot be levied. (A. Y. 2008-09).

*S. Sudaha (Smt) v. ACIT (2011) 48 SOT 335 / 10 ITR 206 (Chennai)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Wrong claim of deduction**

Mere making a claim which is not sustainable in law will not amount to furnishing of inaccurate particulars for involving penalty under section 271(1)(c). (A. Y. 2006-07)

*Dy. CIT v. Pathankot Primary Co-op. Development Bank Ltd. (2011) 142 TTJ 401 / 59 DTR 67 (Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Bona fide belief that income not taxable**

Assessee having not offered capital gains on the sale of agricultural land and the interest income earned thereon under the impression that the sale of agricultural land did not give rise to any capital gain, and later filed a revised return before any enquiry was initiated by the Assessing Officer, there was no deliberate attempt to conceal income on the part of the assessee, more so when only interest income was held taxable, and, therefore, levy of penalty under section 271(1)(c) was not justified. (A. Y. 2006-07)

*Manjoor Ahmed v. ITO (2011) 62 DTR 70 / 141 TTJ 646 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure [S. 153A]**



Sales made outside books and not disclosed in original return, no bona fide explanation. Documents related to undisclosed sales found during search, Explanation I to section 271(1)(c) is applicable.

For immunity from penalty specific requirement of declaration of additional income in return. Penalty is leviable on difference of income declared in return filed under section 153A, and original return. (A.Ys. 1999-2000 to 2004-05)

*Dy. CIT v. K. Natarajan (2010) 2 ITR 273 / 128 TTJ 558 / 34 DTR 414 (Bang.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Assessing Officer made addition on the basis surrender made by the assessee and did not issue summons to the lenders to prove that there was concealment of income he was not justified in imposing penalty on the surrendered income.

*Raja Rani Mittal v. ITO (2010) 36 SOT 4 (Delhi)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Disallowance of deduction [S. 80HHC]**

Assessee having admittedly disclosed complete details of its claim for deduction under section 80HHC in its return, and the Assessing Officer having disallowed the claim on the basis of a ruling of the Supreme Court which was pronounced much after the date of the filing of return by the assessee, the claim cannot be said to be false and, therefore, no penalty under section 271(1)(c) is leviable. (A.Y. 2003-04)

*Dy. CIT v. Maharashtra Seamless Ltd. (2010) 36 DTR 36 (Delhi)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Disclosure of income – Estimate of income**

An assessee can never be held to be guilty of non disclosure of income which is determined by applying the provisions of section 40A(2)(b), because form in which return of income is to be filed by corporate assessee does not contemplate any disclosure of income earned by assessee which could be subject to scrutiny under section 40A(2)(b). Provisions of section 271(1)(c), are not attracted to cases where income of an assessee is assessed on as estimated basis. (A.Y. 2001-02)

*Jhavar Properties (P) Ltd. v. ACIT (2010) 123 ITD 429 / 28 DTR 26 / 124 TTJ 858 (Mum.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Withdrawal of claim**

When claim for deduction under section 80HHD was withdrawn prior to assessment, levy of penalty under section 271(1)(c), was not justified. (A.Y. 1977-78)

*Banyan Tours & Travels (P) Ltd. v. ITO (2010) 129 TTJ 422 / (2009) 120 ITD 404 (Mum.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – False claim of depreciation**

Assessee having entered in to an artificial arrangement of purchase and lease back transaction to evade tax liability. The transaction having found to be bogus transaction penalty under section 271(1)(c) is leviable. (A.Ys. 1996-97)

*Ultramarine & Pigments Ltd. v. ACIT (2010) 38 DTR 42 / 130 TTJ 31 / 39 SOT 115 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Advice of the Tax Consultant**

Where the claim of deduction was made on the basis of advice of the tax consultant supported by tax audit report, there was no concealment or furnishing of inaccurate particulars on the part of the assessee penalty can not be made merely because the claim of deduction was disallowed in assessment proceedings. (A.Y. 2003-04)

*Yogesh R. Desai v. ACIT (2010) 38 DTR 101 / 2 ITR 267 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance on Estimate basis**

Assessing Officer having disallowed assessee's claim for expenses on estimation basis and the Tribunal has sustained the addition partly, it cannot be said that there was conscious act of concealment of income or furnishing of inaccurate particulars of income and, therefore, levy of penalty under section 271(1)(c) was not justified. (A.Y. 2000-01)

*Dabwali Transport Company v. ACIT (2010) 38 DTR 434 / 3 ITR 785 / 137 TTJ 49 (Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Duty Draw Back – DEPB – Debatable claim**

Assessee having included duty drawback / DEPB in the amount eligible for deduction under section 80IB at the time when the issue was debatable regarding allowability or otherwise of such claim, penalty under section 271(1)(c) is not justified. (A.Y. 2001-02)

*Baldev Wollen International v. ITO (2010) 39 DTR 12 / 131 TTJ 338 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Set-off of LTCG against STCG**

In the absence of any falsity in the details submitted by the assessee regarding computation of income, penalty under section 271(1)(c) is not leviable in respect of inadvertent wrong claim made by assessee for adjusting the long term capital loss against short term capital gains. (A.Y. 2004-05)

*Mahinder Sidhu (Mrs.) v. ACIT (2010) 39 DTR 233 / 132 ITD 246 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Genuine payment proved in penalty proceedings**

Addition made to income on ground that payment for transport services had not been proved by the assessee. The assessee produced evidence in penalty proceedings that the payment was genuine, penalty cannot be imposed. (A.Y. 2001-02)

*Dhirajlal Manganlal Shah v. ITO (2010) 4 ITR 313 / 125 ITD 313 / 126 TTJ 644 / 32 DTR 69 (TM)(Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Change of head of income**

- (i) Mere change of head of income in assessment cannot be construed as concealment as envisaged in section 271(1)(c).
- (ii) Addition on account of valuation alone cannot be the basis to construe concealment for the purpose of penalty under section 271(1)(c). (A.Y. 2003-04)  
*CIT v. JMD Advisors (P.) Ltd. (2010) 124 ITD 223 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Deduction [S. 80-IB]**

Penalty under section 271(1)(c) is not leviable on assessee for wrongly claiming deduction under section 80-IB on export incentive i.e., DEPB and duty drawback. (A.Y. 2004-05)

*ITO v. Flora Exports. (2010) 40 DTR 70 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Purchase invoices was fictitious**

Transaction of sale was not genuine and the assessee had claimed depreciation on non-existent assets. It was further noticed that the assessee was a habitual concealer of income as it had been surrendering bogus depreciation year after year when it confronted with evidence of non existence of assets. On facts it was held that Assessing Officer was justified in imposing penalty upon assessee. (A.Y. 1998-99)

*ACIT v. TVS Finance & Services Ltd. (2010) 125 ITD 341 / (2009) 126 TTJ 302 / 30 DTR 81 (TM)(Chennai)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance – Deeming provisions**

In a matter of interpretation of provisions of the Act, merely because certain claim has been disallowed, and allowed in subsequent year, penalty under section 271(1)(c), cannot be levied. (A.Y. 2001-02)

*AT&T Communication Services India (P) Ltd. v. Dy. CIT (2010) 42 DTR 22 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Addition – Cash credits [S. 68]**

Assessee having produced confirmations for both the alleged loans, it cannot be said that the explanation of the assessee was not bonafied or that material facts were not disclosed merely because additions under section 68 have been confirmed for the reason that the first creditor denied that the amount was given to assessee as a loan and there was serious doubt about the genuineness of the source of source of second loan and, therefore, Expln. 1 to 271(1)(c) is not applicable and penalty is not leviable. (A.Y. 1994-95)

*Bhartesh Jain v. ITO (2010) 43 DTR 320 / 137 TTJ 200 / 4 ITR 370 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Provision for bad debts and diminution in value**

Assessee claimed deductions on account of provision for bad debts and provision for diminution in value of investments in express violation of provisions of law hence the revenue authorities were justified in imposing penalty under section 271(1)(c). (A.Y. 2001-02)

**S. 271(1)(c) : Penalty – Concealment – Bogus purchases**

Assessee failed to produce the parties at the time assessment, hence, the Assessing Officer treated the purchases as bogus. Penalty imposed was confirmed by the CIT(A), in appeal before the Tribunal, the tribunal held that when the assessee failed to produce the parties, the revenue authorities could have exercised the power under section 131, and as they have not exercised the power the penalty levied under section 271(1)(c) was required to be deleted. (A.Ys. 1996-97 to 1998-99)

*Chempure v. ITO (2010) 40 SOT 164 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disclosure after notice – AIR Information**

Where the assessee had not shown in the return, the investment in mutual funds but accepted the amount of investment only on the basis of the AIR information on the investment of the assessee in the mutual funds, it cannot be said that he had voluntarily offered the amount. A request made not to initiate the penalty proceedings, cannot be equated with a conditional offer. Levy of penalty in relation to the addition was justified. (A.Y. 2005-06)

*Charudutt H. Dangat v. ITO (2010) 132 TTJ 687 / 126 ITD 483 / 43 DTR 443 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure – Revised return – Explanation 5 [S. 132, 153A]**

As the assessee has filed the revised return subsequent to search and had not disclosed the speculative profit in original return, assessee is not eligible for immunity as per explanation 5 to section 271(1)(c) of the Income tax Act. (A.Y. 2003-04)

*Ajit B. Zota v. ACIT (2010) 40 SOT 543 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Unsustainable claims – Inaccurate particulars**

A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding income of assessee. When assessee had furnished full details and particulars of its income and it was under bonafide belief regarding allowability of claim penalty could not be levied.

*Hindalco Industries Ltd. v. ACIT (2010) 41 SOT 254 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Survey – Disclosure [S. 133A]**

In the course of survey, assessee declared unaccounted income of ` 32.84 lakhs, thereupon assessee filed his return of income wherein amount declared in survey was included. Assessing Officer completed assessment on basis of return of income. He also levied the penalty under section 271(1)(c). The Tribunal held that since the Assessing Officer had accepted income declared in return of income, in view of

aforesaid legal position, assessee could not be charged for any contumacious conduct, therefore, the impugned penalty order was set aside. (A.Y. 2006-07)

*Dy. CIT v. Satish B. Gupta (Dr.) (2010) 42 SOT 48 / 135 TTJ 611 / 49 DTR 262 (Hyd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Search and seizure – Included in Return [S. 132(4), 153A]**

Assessee had made disclosure with reference to all the items of jewellery in a statement under section 132(4) of the Act. Subsequently in the return filed under section 153A of the Act, the assessee had offered the said Income to tax the Assessing Officer levied penalty on the said amount. The tribunal held that as two views are possible in the issue and, therefore, penalty levied by the Assessing Officer was cancelled. (A.Ys. 2005-06, 2006-07)

*Dy. CIT v. Avinash CH. Gupta (2010) 6 ITR 173 (Kol.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Depreciation – Finance transaction – Not a genuine leasing transaction**

When a legal claim is made by an assessee it is obviously open to Assessing Officer to accept or reject, the interpretation canvassed by assessee, but then it does not follow that when claim is rejected, it would imply that there has been a concealment of income by the assessee so as to levy penalty under section 271(1)(c). Penalty levied on disallowance of claim of depreciation on leasing of assets was deleted by the Tribunal. (A.Ys. 1998-99, 2000-01)

*Industrial Development Bank of India Ltd. v. Dy. CIT (2010) 42 SOT 325 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction – Wrong Depreciation**

Due to bona fide mistake depreciation was claimed in reverse manner i.e., 50% on ` 6,35,492 and 100% on ` 4,25,79,639. Levy of penalty cannot be justified as there was no mala fide intention. Further, as the Assessing Officer did not record his satisfaction and did not initiate penalty at the time of assessment, levy of penalty was not justified for this reason as well.

*ACIT v. Chambal Fertilizer & Chemicals Kota (2010) Tax World (November, 10) Vol. XLIV, Part-5. Page 188 (Jp.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance [S. 40A(2)]**

Payments made to sister concern was disallowed as excessive and unreasonable payments under section 40A(2). It was held that disallowance under section 40A(2) could not be considered as concealment of income or furnishing inaccurate particulars and, hence, penalty under section 271(1)(c) was not warranted.

*Jhavar Properties P. Ltd. v. ACIT (2009) 317 ITR (AT) 278 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalties – Concealment – Return not filed**

If the assessee has not filed any return then there is no concealment and the penalty can not be levied under section 271(1)(c) for concealment of income. (A.Y. 1986-87)  
*T. Kodeeswaran v. ITO (2009) 123 TTJ 230 / 23 DTR 117 (Chennai)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Addition deleted**

Where the addition was deleted by the Tribunal in quantum appeal, the very foundation for levy of the penalty ceased to exist. Further, the explanation offered by the assessee was not found to be false, assessee's explanation was bonafide and all the facts relating to the claim was disclosed, penalty under section 271(1)(c) cannot be levied. (A.Y. 2000-01)

*ACIT v. VIP Industries (2009) 122 TTJ 289 / 21 DTR 153 / 30 SOT 254 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Estimation of yield**

The Tribunal held that penalty cannot be levied on additions made by estimating the yield, based on percentage of yield of preceding year, when there is no evidence on record to prove that there were sales outside the books. (A. Y. 1992-93 & 1993 -94)  
*Sangrur Vanaspati Mills Ltd. v. ACIT (2009) 179 Taxman 27 (Mag.)(Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Finding in assessment**

In penalty proceedings there has to be re-appraisal of material available at time of Assessment, as well as any additional material produced by assessee should be examined, to ascertain the concealment or furnishing of inaccurate particulars. (A.Y. 1997-98)

*Vijay Power Generators Ltd. v. ITO (2009) 180 Taxman 102 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Claim withdrawn – Simple mistake**

If the assessee had made a simple mistake while claiming deduction under Section 80-IA and thereafter filed a revised return, the same could not be a case of furnishing inaccurate particulars of income or concealment of income attracting the levy of penalty under S. 271(1)(c) of the Act. (A. Y. 1998-99)

*Niton Valve Industries (P) Ltd. v. ACIT (2009) 30 SOT 236 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Depreciation on fabricated evidence**

Assessee having claimed depreciation which was found to be based on fabricated invoice and assets having never been installed and used by the lessee and which claim was withdrawn after finding of false claim, it could not be said that assessee disclosed primary facts in a return originally filed and, therefore, penalty under section 271(1)(c) was validly levied. (A.Y. 1998-99)

*ACIT v. TVS Finance & Services Ltd. (2009) 126 TTJ 302 / 30 DTR 81 / 125 ITD 341 (TM)(Chennai)(Trib.)*



**S. 271(1)(c) : Penalty – Concealment – Disclosure – By a letter – Explanation 5**

Authorised officer having not recorded assessee's statement under section 132(4), during the course of search, the disclosure of additional income made by the assessee through a letter addressed to the Asstt. Director of IT (Inv.) immediately after conclusion of the search which has shown in the return of income, which has been accepted without any variation, has to be construed as a bona fide voluntary disclosure and therefore, penalty under section 271(1)(c) is not leviable in view of Expln. 5. (A.Y. 1995-96)

*Hissaria Brothers v. Dy. CIT (2009) 31 DTR 223 / 126 TTJ 391 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – ALV of property – Estimation**

Penalty levied on Addition to Income by estimating ALV of the property, which was reduced substantially by Tribunal, and which was based on satisfaction recorded in Penalty Order and not in Assessment Order was held as not justified and penalty was deleted.

Further held that, for imposition of penalty a definite finding about concealment is necessary, and penalty cannot be imposed if there is no conscious breach of law.

*Rishwa Rani (Smt) v. ACIT (2009) 184 Taxman 140 (Mag.)(Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Head of income – Set off of loss**

Non bifurcation of short-term capital loss from the overall business loss amounted to concealment of income and furnishing of inaccurate particulars of income. (A.Y. 2004-05)

*Nera (India) Limited v. Dy. CIT, ITA No. 107/Del/2009, Bench 'F', dt. 4-8-2009 – BCAJ P. 20, Vol. 41-B, Part 2, November 2009.(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Explanation furnished**

Payer having acknowledged payment, appeared before the Assessing Officer and led evidence, in support of services rendered to the assessee, there was no justification to term the assessee's explanation as false and therefore no penalty was leviable notwithstanding that the disallowance was confirmed in appeal by the Tribunal. (A.Ys. 2001-02)

*Dhirajlal Maganlal Shah v. ITO (2009) 32 DTR 69 / 126 TTJ 644 / 125 ITD 313 (TM)(Ahd.)(Trib.)*

Editorial Note:- UOI v. Dharmendra Textile Processors & Ors. (2008) 306 ITR 277 (SC), considered.

**S. 271(1)(c) : Penalty – Concealment – Transfer pricing adjustment [S. 92C]**

The fact that the assessee had accepted the addition and not challenged the same would not mean that assessee cannot argue that the issue is debatable. When there is full disclosure by the assessee the assessee and conduct being not mala fide or contumacious, penalty under section 271(1)(c), was held to be not justified. (A.Y. 2003-04)

*Dy. CIT v. Vertx Customer Services India (P) Ltd. (2009) 34 SOT 532 / 31 DTR 27 / 126 TTJ 184 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Head of income**

No penalty can be levied in a case where rental income is assessed under the head 'Income from house property' as against 'Income from Business'. (A.Y. 2001-02)

*ACIT v. Vazir Glass Works Ltd., ITA No.332/Mum/2007, Bench – F, dt. 24-11-2008 – BCAJ P. 671, Vol. 40-B, Part 5, February 2009. (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Additions confirmed in appeal**

Penalty under section 271(1)(c) can not be imposed only on ground that some additions had been made in the Assessment which were subsequently, confirmed in Appeal. Further, it was held that though findings given in Assessment is a good evidence, same is not conclusive in penalty proceedings. For penalty, it has to be seen that additions made are based on material from which an inference can be drawn that Assessee has concealed particulars of income.

*ITO v. Ravi Khurana (2008) 173 Taxman 26 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revision – Denial of deduction**

A) The denial of deduction by cancelling the assessment, by Commissioner acting under section 263 pursuant to subsequent judgment of the Supreme Court would not constitute concealment or furnishing of inaccurate particulars.

B) Imposition of penalty under section 271(1) (c) on expenses of foreign travel of Directors disallowed by Assessing Officer and upheld by Tribunal for non-business consideration, without holding that claim for expenses reflected any falsity or lacking in bonafide was held to be not justified as it was merely difference of opinion as regards allowability of claim.

*ACIT v. Vijay Kiran Hotels (P) Ltd (2008) 175 Taxman 126 (Mag.)(Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – TP adjustment – Expl. 7 – Bona fide [S. 92C]**

The question whether the provision for bad debt in respect of sum owed by the parent company is a matter falling in the ordinary course of trade or whether it is an extraordinary item warranting exclusion from operational cost is a debatable point on which there can be two opinions. The fact that the assessee accepted the addition and did not challenge the same will not change this aspect;

Penalty also cannot be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation;

The conduct of the assessee was not mala fide or contumacious. The computation claiming exclusion of the provision for doubtful debts in arriving at comparable profit margins cannot be said to have been done not in good faith or without due diligence. Accordingly, penalty under section 271(1)(c) Explanation 1 could not be levied. (A. Y. 2003-04)

*Dy. CIT v. Vertex Customer Services (India) Pvt. Ltd., (M/s) ITA No. 1506/Delhi/2008, Bench – C, dt. 21st Sept. 09. Source: www.itatonline.org (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Deduction – Debatable [S. 80-I and 80-IA]**

Penalty under section 271(1)(c) was levied on the ground of claiming excessive deductions under section 80I and 80IA.

Held, as all facts relating to claim under section 80IA was furnished in Return and in accounts submitted with Return, there was no attempt on part of Assessee to conceal its income, and hence no penalty under section 271(1)(c).

As regards claim of deduction under section 80I, since at time of filing of Return legal position was not settled and issue was debatable, it was held that assessee could not be said to have concealed its income and, hence, penalty under section 271(1)(c) was not leviable.

*ACIT v. Carrier Aircon Ltd. (2008) 172 Taxman 173 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Gift from NRI**

Gift received by an Assessee from a non-resident through a cheque from NRE A/c was treated as Income of the Assessee. In Appeal before CIT (A), the addition became final, as assessee did not press his appeal. Penalty levied under section 271 (1)(c) was deleted in absence of evidence or proof that the money belonged to the assessee, and that the compensatory payment had flowed from the assessee to the donor. Further, held that mere surrender of amount as Income do not mean that amount of Gift was income of the Assessee.

*ACIT v. Vishan Narayan Khanna (2008) 171 Taxman 136 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Specific charge – Condition**

Order levying penalty without specific mention as to whether assessee had concealed particulars of income or furnished inaccurate particulars thereof, was held to be invalid, inspite of fact that Assessing Officer had validly initiated penalty proceedings for furnishing inaccurate particulars of Income.

*Poonam Industries v. ITO (2008) 172 Taxman 87 (Mag.)(Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Assessing Officer merely mentioning towards the end of the assessment order that "Penalty notice under section 271(1)(c) is issued" does not amount to recording of valid satisfaction, hence, penalty imposed under section 271(1)(c) was invalid and without jurisdiction. (A.Y. 2001-02)

*Vikram Chadha v. ITO (2008) 4 DTR 435 / 115 TTJ 123 (Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction – Condition**

The requisite satisfaction if not derived or recorded by Assessing Officer during the course of original assessment proceedings, regarding concealment or furnishing

inaccurate particulars, then the initiation of penalty is bad in law and consequently penalty imposed is liable to be cancelled.

*British Airways plc v. Dy. DIT (2008) 166 Taxman 126 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Addition based on TDS certificate**

Interest on FDR declared on receipt basis was enhanced by Assessing Officer, at figure as disclosed in TDS certificate. Penalty imposed on account of said addition was deleted on ground that nothing was concealed, and full particulars of income were disclosed with Return by way of TDS certificate.

*ITO v. Purushottam Das Chopra (2008) 167 Taxman 86 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Conditional surrender – Independent material by Assessing Officer**

Assessing Officer brought the income to tax by independently referring to evidence gathered by him, and levied penalty, and did not consider the conditional surrender. Held, assessee's contention that penalty cannot be imposed having accepted the surrender was without force.

*Giri Raj Gupta v. I.T.O. (2007) 162 Taxman 81 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Independent proceedings**

If part addition has been sustained in quantum proceedings, it is not necessary that penalty would be leviable, as both are all together different. For levy of penalty under section 271(1)(c) clear finding as to concealment of particulars of income is necessary.

*ITO v. Kuldeep Sood Enterprises (2007) 160 Taxman 171 / 103 TTJ 573 (Mag.)(Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance [S. 43B]**

Penalty initiated against disallowance under section 43 B. Held, that as material facts necessary for disallowance were duly disclosed in audit report filed with Return of Income, assessee's contention that same being genuine, bona fide and innocent mistake was accepted, and that penalty cannot be imposed, as there was no mala fide intentions on part of assessee.

*Akshay Enterprises (P) Ltd. v. ACIT (2007) 161 Taxman 168 (Mag.)(Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Addition on Estimate – Debatable issue**

Penalty under section 271(1)(c) could not be imposed in respect of additions to income which were either deleted in appeal or were made on estimate basis. (A.Y. 1996-97)

*ACIT v. Allied Construction (2007) 106 TTJ 616 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Validity – Recording of satisfaction**

Assessing Officer having recorded no satisfaction as contemplated while framing the assessment order or at the time of initiating penalty proceedings under section 271(1)(c), penalty is not valid. (A.Y. 1988-89)

*Verma Tractors v. ACIT (2007) 106 TTJ 591 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Assessing Officer having not recorded the satisfaction in the assessment order as required for initiation of penalty proceedings under section 271(1)(c) penalty imposed by him could not be sustained. (A.Y. 2001-02)

*Balka Services (P) Ltd. v. ITO (2006) 102 TTJ 115 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Unaccounted sales – Revised return**

Assessee having not disclosed certain sales in the original return, explanation of assessee while filing revised return disclosing that income of cash sales of copper scrap escaped to be entered in the books was not *bona fide* and penalty was rightly imposed by Assessing Officer under section 271(1)(c), Expl. 1. (A.Y. 1992-93)

*Dy. CIT v. Grey Cast Foundry Works (2006) 101 TTJ 42 / 99 ITD 515 (Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Unexplained deposits – Loss**

Penalty under section 271(1)(c) could not be levied in respect of additions made on account of unexplained deposits as the assessee had filed a loss return and the assessment was also made at loss despite such additions.

*Azad Talkies v. ITO (2006) 100 TTJ 350 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Book profit [S. 115JB]**

Penalty under section 271(1)(c) cannot be levied on the income determined on the basis of provision of section 115JB, which was accepted and assessment was completed even though on a finding that interest income on FD and employee loans are not income derived from Industrial Undertaking and same being excluded while computing deduction under section 80-IB.

*Jayco India (P) Ltd. v. ITO (2006) 152 Taxman 14 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Interest – Accrual basis**

When assessee had offered an explanation, for not accounting interest income on accrual basis, and had declared that fact in audited accounts, keeping in view the accounting standard laid by ICAI, it could not be said that assessee had deliberately and consciously concealed the particulars, and no penalty under section 271(1)(c) can be levied.

*ITO v. SRF International Finance (P) Ltd. (2006) 152 Taxman 55 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Statement under section 132(4) – Offer for taxation**

Penalty under section 271(1)(c) cannot be sustained on income declared in a statement under section 132(4), by denying benefit of immunity under clause 2 of

Explanation 5 to section 271(1)(c), for not specifying the manner in which income had been earned, and more so when no specific question with that regards was asked, and also for not filing the return within the time limit prescribed under section 139(1).

*ACIT v. Lad Devi Kothari (Smt.) (2006) 153 Taxman 16 (Mag.)(Jp.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Depreciation**

Assessing Officer restricted depreciation to 25% by treating it as P & M, as against claim of assessee @60%, treating same as part of computer. As assessee had furnished all the details regarding assets, block and rate of depreciation, it could not be said that assessee intentionally furnished inaccurate particulars of income or concealed the particular of his income, and, therefore, penalty under section 271(1)(c) can not be levied.

*Dy. CIT v. N. Y. Dox Services Ltd. (2006) 153 Taxman 67 (Mag.)(Delhi)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Surrender of Income**

Conditional surrender of income during survey with a request not to impose penalty having been accepted by Revenue, no penalty for concealment could be levied. (A.Ys. 1998-99, 2000-01)

*Bhagat & Co. v. ACIT (2006) 101 TTJ 553 (Mum.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Claim for exemption under section 54**

Assessee having wrongly claimed exemption under section 54 in the relevant assessment year after withdrawing such claim made in an earlier year under *bona fide* misconception and belief, penalty under section 271(1)(c) could not be levied.

*Devi Dass Sukhani v. ITO (2006) 101 TTJ 551 (Jodh.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Proof of sale at higher price**

In the absence of positive proof of concealment and findings of any authority that assessee had sold liquor for higher price than shown in the books, penalty under section 271(1)(c) was not leviable. (A.Y. 1996-97)

*Sonu Liquor Traders v. Dy. CIT (2006) 102 TTJ 648 / 100 ITD 455 (Nagpur)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Search – Fresh return – Acceptance**

Assessing Officer having accepted the fresh returns filed by assessee offering additional income at a percentage of gross receipt following detection of unexplained discrepancies in the search and seizure operation, without pointing out any specific discrepancy either in the assessment orders or in the penalty orders, penalty under section 271(1)(c) was not leviable. The Tribunal held that the explanation of the assessee that higher income was declared to avoid pro and to buy peace was not found to be false. (A.Ys. 1987-88, 1989-90)

*Illumination India v. ACIT (2006) 100 TTJ 426 (Pune)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Claim against advise**



By a conscious act assessee having made the Revenue to believe that purchase of running business of publishing two titles was for a limited period and not in perpetuity and claimed deduction against the advice of auditors by filing inaccurate particulars, he was liable for penalty under section 271(1)(c).

*ACIT v. Jasubhai Business Service (P) Ltd. (2006) 100 TTJ 951 / 5 SOT 36 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Bogus purchase – Explanation 1**

Assessee having admitted bogus purchase on being confronted with material collected by Assessing Officer and having also agreed to penalty under section 271(1)(C), Explan. 1 was rightly levied. (A.Y. 1997-98)

*Hoshiarpur Roller Flour Mills v. ITO (2006) 100 TTJ 152 / 97 ITD 595 (Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Statement of creditors – Surrender**

Assessee having surrendered the amounts shown as payable to two concerns and made no attempt to rebut or challenge the statements of the creditors to the effect that the amounts shown by the assessee were not correct, penalty was justified. (A.Y. 1990-91)

*ACIT v. J. L. Kumar (2006) 100 TTJ 288 / 99 ITD 79 / 5 SOT 694 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 1 – Purchase of drafts**

The explanation of the assessee that High Court purchase of drafts by assessee was on behalf of weavers not being *bona fide* and without supported by any evidence was -- to be -- and there being no evidence that department had agreed not to impose penalty, penalty under section 271(1)(c), Explan. Was justified. (A.Y. 1987-88)

*Shivratan R. Tapadia v. ACIT (2006) 102 TTJ 483 (Pune)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Sale of car – Capital receipt**

Compensation received in respect of the car was rightly treated by the assessee as capital receipt and therefore, neither any addition nor consequential penalty under section 271(1)(c) was attracted. (A.Y. 2000-02)

*Prem Nath Vishwa Nath Nanda v. ACIT (2006) 102 TTJ 598 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Secret Commission – For the purpose of business – Not leviable**

Disallowance of expenses on secret commission paid on *ad hoc* basis as per prevailing practice in the business fully and exclusively for boosting sales will not amount to furnishing of inaccurate particulars of income or concealment of particulars of income justifying levy of penalty under section 271(1)(c).

*ITO v. Mugatlal B. & Sons (2006) 152 Taxman 29 (Mag.)(Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Validity**

Assessing Officer having nowhere recorded his satisfaction with regard to concealment of income or furnishing of inaccurate particulars of income in the

assessment order, initiation of penalty proceedings under s. 271(1) (c) was not in accordance with law and penalty was liable to be cancelled. (A.Y. 2001-02)

*Everplus Securities & Finance Ltd. v. Dy. CIT (2006) 102 TTJ 120 / 99 ITD 79 / 5 SOT 694 (Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Voluntary surrender of income**

Assessee having voluntarily surrendered an income of ₹ 3 lakhs in view of his inability to produce month-wise tally and other quantitative details to the satisfaction of the Assessing Officer, levy of penalty under section 271(1)(c) was not justified.

*ACIT v. J. L. Kumar (2006) 100 TTJ 288 / 99 ITD 79 / 5 SOT 694 (TM)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Agricultural income**

Agricultural income shown in Return was surrendered for reason that supporting evidence was misplaced and tax was paid thereon. Held mere surrender could not be considered as concealed income, and same being done before any inquiry, penalty under section 271(1)(c) could not be levied.

*Dy. CIT v. Rakesh Kumar (2006) 157 Taxman 71 (Mag.)(Chd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – No concealment of facts – Penalty cannot be levied**

There being no concealment of facts, penalty under section 271(1)(c) cannot be levied.

(A.Ys. 1989-90 to 1997-98)

*Thomas Cook (India) Ltd. v. Dy. CIT (2006) 105 TTJ 317 / 103 ITD 119 / 15 SOT 392 (Mum.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Disallowance of expenses – Particulars furnished**

Penalty under section 271(1)(c) is not leviable on account of disallowance of certain expenses particulars whereof were correctly furnished along with the return. (A.Y. 2001-02)

*Dy. CIT v. Indiahit Com (P) Ltd. (2006) 105 TTJ 501 / 15 SOT 440 (Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Mala Fide Intent**

In the absence of any finding indicating the mala fide intent on the part of the assessee or that the explanation offered by the assessee was not bona fide, penalty in respect of additions was not called for only on the ground that the explanation of assessee was not found satisfactory while making assessment. (A.Y. 1986-87)

*ACIT v. Modern Coal Company (2006) 103 TTJ 726 (Amritsar)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Excessive claim**

Tribunal having agreed with the Assessing Officer that the assessee has made excessive claim and the assessee having failed to prove the genuineness of the of

'security charges' said to be paid by it, levy of penalty under section 271(1)(c) was justified. (A.Ys. 1995-96, 1996-97)

*ACIT v. McLeod Russel (I) Ltd. (2006) 102 TTJ 871 / 101 ITD 39 (Kol.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance – Recording satisfaction – Mechanical**

Assessee having claimed depreciation for passive use of machinery which was ultimately allowed and other expense which were disallowed, it could not be per se said that assessee was guilty of concealment/furnishing of inaccurate particulars of income so as to attract penalty under section 271(1)(c). (A.Ys. 1997-98 to 1998-99)

Mere statement by the Assessing Officer in the assessment order that 'penalty under section 271(1)(c) is initiated for furnishing inaccurate particulars' does not constitute valid satisfaction for purposes of levy of penalty under section 271(1)(c).

*ITO v. Budge Budge Co. Ltd. (2006) 103 TTJ 139 / 100 ITD 387 (Kol.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Quantum Appeal**

Quantum proceedings and penalty proceedings being altogether different, penalty under section 271(1)(c) cannot be levied simply on account of the fact that an addition has been sustained in quantum appeal. (A.Y. 2002-03)

*ITO v. Kuldeep Sood Enterprises (2006) 103 TTJ 573 (Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Appeal not filed**

Mere non filing of appeal against addition made by Assessing Officer after rejecting the explanation does not ipso facto lead to levy of penalty under section 271(1) (c). For the levy of penalty which are penal in nature something more is required to be proved by the department and mere non filing of appeal would not lead to any conclusion that assessee has committed or omitted either of the ingredients of section 271(1)(c).

*Rajendra Kumar v. ITO (2006) 155 Taxman 88 (Mag.)(Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Inaccurate Particulars**

Penalty to be levied only in respect of income for which wrong claim for deduction under section 80P(2)(a)(vi) had been made in the return, i.e. in respect of which assessee made inaccurate particulars, and not on the entire income enhanced by applying 8% net profit rate under section 44AD.

*Universal Co-op. L/C Society Ltd. v. ITO 154 Taxman 35 (Mag.)(Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Book profit [143(1)(a), 115JB]**

Return of income was filed declaring net Loss was accepted under section 143(1)(a). Subsequently during scrutiny it was noticed that section 115JB is attracted, and demand was raised determining Book Profit. Notice under section 274 r.w. 271(1)(c) for concealment was issued. It was held that as P & L A/c and Balance Sheet were filed along with Return, from which the figure of book profit could be ascertained, it

cannot be said that assessee has attempted to conceal its income or furnish inaccurate particulars, and so penalty cannot be levied.

*Travel Club India (P) Ltd. v. ITO (2006) 154 Taxman 195 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Withdrawal of NSS**

Penalty under section 271(1)(c) levied on assessee, an Air Force Officer, for not including income from NSS withdrawal, under bonafide belief that as tax had already been deducted on NSS withdrawal and there was no necessity to include same in total income, was cancelled.

*Wg. Cdr. Gurmukh Sing v. ITO 154 Taxman 153 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Legal heir [S. 159]**

Penalty proceedings cannot be initiated against the legal heir for default committed by the deceased assessee taking recourse to section 159(2)(b).

Proceedings under section 159(2)(b) do not include penalty proceedings, as the phrase used is "any sum" and not "any tax".

*ITO v. V. P. Sharma (2006) 154 Taxman 34 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Estimation – Debtors**

Enhancement of assessee's income by Assessing Officer on estimate basis and sustenance of addition on account of debtors was not sufficient for imposition of penalty under section 271(1)(c) of the Act. (A.Y. 1985-86)

*Mansukh Dass Soni v. ACIT (2006) 99 TTJ 894 (Jodh.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Revised Return**

Assessee having voluntarily filed revised return offering additional income before detection by the Department, levy of penalty under section 271(1)(c) was not justified, particularly when such income was assessed in the hands of the assessee on protective basis. (A.Ys. 1990-91, 1991-92)

*K. Deedar Ahmed v. ITO (2006) 99 TTJ 927 / 97 ITD 240 (Hyd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Differential income**

In the absence of any material to prove that the differential income declared by the assessee in the revised returns was detected by the Department and that the explanation of the assessee that revised returns were filed to buy peace and to avoid vexatious litigation was not bona fide, penalty under s. 271(1)(c) could not be levied. (A.Ys. 1994-95 to 1997-98)

*A.V.R. Prasad v. ITO (2006) 99 TTJ 920 / 97 ITD 325 (Hyd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Revised Return – Excessive claim (80 P(2)(a)(iii))**

Assessee having bona fide belief, claimed deduction under section 80P(2)(a)(iii) on the basis of an appellate order of the CIT (A) for an earlier year allowing such claim and immediately corrected the same by filing a revised return giving up the excessive

claim it could not be held that the assessee had made a false claim or deliberately furnished inaccurate particulars of income simply because the claim was not allowable and, therefore, penalty under section 271(1)(c) could not be levied, more so, when no penalty was imposed in other years on similar facts. (A.Y. 1995-96)

*Jt. CIT v. Karnal Co-operative Sugar Mills Ltd. (2006) 99 TTJ 330 (Delhi)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Survey**

Penalty could not be imposed in respect of income surrendered by the assessee during the course of survey when the Assessing Officer had dropped penalty proceedings for the subsequent assessment year on materially similar set of facts — Penalties could not be sustained also for the reason that the circumstances surrounding the surrenders of income by the assessee do not establish that there was concealment of income. (A.Ys. 1993-94, 1994-95)

*Orient Press Ltd. v. Jt. CIT (2006) 99 TTJ 1091 (Mum.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Settlement commission**

Settlement Commission having settled the matter of three beneficiaries who had approached it and also waived concealment penalties in the case of the trust and said beneficiaries, there is no justification for levying concealment penalty on the remaining two beneficiaries (assesseees) in respect of their similar share of income from the trust. (A.Ys. 1984-85 & 1992-93)

*Alin A. Shah & Anr. v. ACIT (2006) 99 TTJ 1257 (Ahd.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Inadmissible claim [S. 80-I]**

Assessee having made an inadmissible claim for deduction under s. 80-I which cannot be accepted to be a bona fide mistake, and filed the revised return to withdraw the said claim only after notices were issued twice asking the assessee to justify the claim, levy of penalty was justified. (A.Y. 1998-99)

*Hardeep Engineers v. Dy. CIT (2006) 99 TTJ 447 (Chd.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Satisfaction of Assessing Officer – Mechanical**

Assessing Officer having merely stated at the end of the assessment order that penalty proceedings under section 271(1)(c) have been initiated separately without mentioning anything about the satisfaction in terms of s. 271(1)(c), penalty proceedings were not validly initiated and therefore, levy of penalty was invalid. (A.Y. 2000-01)

*Dy. CIT v. Ascom India (P) Ltd. (2006) 99 TTJ 728 (Delhi)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Recording of the satisfaction by Assessing Officer is condition precedent for initiating the penalty proceedings under section 271(1)(c) and mere observation that penalty proceedings are being initiated separately was not suffice. (A.Ys. 1992-93, 1997-98, 1999-2000)

*Saroop Lal Adlakha v. Dy. CIT (2006) 99 TTJ 724 / 97 ITD 6 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Unexplained deposits – Loss assessment**

Penalty could not be levied in respect of additions made on account of unexplained deposits as the assessee had filed a loss return and the assessment was also made at loss despite such additions. (A.Y. 1993-94)

*Azad Talkies v. ITO (2006) 100 TTJ 350 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Assessing Officer having not recorded any satisfaction in the assessment order to the effect that there was filing of inaccurate particulars of income or concealment of income by the assessee while making additions on account of disallowance of certain foreign tour expenses and disallowance of bona fide claim of deduction under section 80I, levy of penalty under section 271(1)(c) was not sustainable. (A.Y. 1994-95)

*Jay Bharat Maruti Ltd. v. Dy. CIT (2006) 100 TTJ 400 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Estimate**

Penalty under section 271(1)(c) cannot be levied in a case where addition has been made on estimate basis.

*Brijkishore Mittal v. ITO, (Jaipur) (Tax World – February 2006 – Vol XXXV – P. 35)(Jp.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Conditional offer**

The assessment was made relying on conditional offer of the assessee, that if same was not acceptable to Assessor then it would not be an admission and it would be free to contest additions.

For the purpose of penalty Assessing Officer should brought out independent material for concealment on record, and in absence of any material to establish concealment independently, penalty cannot be sustained.

*Ruchi Organisation (P) Ltd. v. ACIT (2006) 150 Taxman 22 (Mag.)(Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Assessing Officer having not recorded any satisfaction in the assessment order to the effect that there was filing of inaccurate particulars of income or concealment of income by the assessee while making additions on account of disallowance of certain foreign tour expenses and disallowance of *bona fide* claim of deduction under section 80-I, levy of penalty was not sustainable. (A.Y. 1994-95)

*Jay Bharat Maruti Ltd. v. Dy. CIT (2006) 100 TTJ 400 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Unexplained cash**

Unexplained Cash found in locker be added in the year in which locker is sealed. Date of opening of locker has no relevance. Penalty levied accordingly was upheld.



On account of non acceptance of evidence furnished by an assessee, an addition can be made but penalty under section 271(1)(c) should not be levied.

*Manilal G. Biyani v. ACIT 158 Taxman 31 (Mag.)(Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance upheld in appeal – Independent proceeding**

Mere fact that disallowance has been made and upheld in appeal, does not justify the imposition of penalty under section 271(1)(c), as both penalty and assessment proceedings are separate and independent. The findings recorded in the assessment order only lays down the foundation for levy of penalty

*ACIT v. Baldeep Singh Swani 158 Taxman 143 (Mag.)(Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Evidence**

When no evidence was adduced by revenue to show that there was any wilful default on part of assessee, nor Assessing Officer had recorded any satisfaction that assessee had concealed or furnished inaccurate particulars, penalty cannot be levied.

*Wg. Cdr. Ashok Amir Chand Dhawan v. ITO 161 Taxman 201 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Declaration in original return – Detection**

There cannot be any concealment where entire income had been declared by assessee in original return filed before the issue of notice under section 148 and assessment was completed on lesser income after allowing certain exemptions and in such a case, penalty could not be imposed on ground that return was filed belatedly. (A.Y. 1998-99)

*Tidewater Marine International Inc. v. Dy. CIT (2005) 97 TTJ 139 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Notice beyond statutory period**

Where notice under section 148 had been issued beyond statutory period prescribed under section 149(3), assessment made on basis of such notice would be null and void and in such a case, since very basis of imposition of penalty ceased to exist by virtue of void assessment order, penalty imposed under section 271(1)(c) was liable to be cancelled. (A.Ys. 1996-97 to 1997-98)

*Tidewater Marine International Inc. v. Dy. CIT (2005) 96 ITD 406 / 97 TTJ 137 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction**

Recording of satisfaction is a condition precedent for initiating penalty proceedings; mere observation of Assessing Officer that penalty proceedings were being initiated separately does not amount to satisfaction in terms of provisions of section 271(1)(c). (A.Ys. 1992-93, 1997-98, 1999-2000)

*Saroop Lai Adlakha v. Dy. CIT (2005) 97 ITD 6 / 99 TTJ 724 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction**

Mere initiation of penalty proceedings during assessment proceedings does not tantamount to recording of satisfaction regarding concealment.

*J. K. Traders v. ITO (2005) 148 Taxman 15 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Satisfaction**

Where assessee-company filed its return claiming depreciation on building and, subsequently, as the assessee withdrew the said claim, Assessing Officer imposed penalty under section 271(1)(c) for making false claim of depreciation in its return. Since Assessing Officer had not recorded any satisfaction for initiation of proceedings under section 271(1)(c), penalty imposed under section 271(1)(c) could not be sustained.

*Jt. CIT v. Ashoka Merchantile Ltd. (2005) 147 Taxman 96 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Satisfaction of ITO**

Assessee filed its return of income declaring loss, and the Assessing Officer completed assessment on loss after disallowing certain amount of depreciation and imposed penalty under section 271(1)(c), since reasons for satisfaction of Assessing Officer that assessee had concealed its income or filed inaccurate particulars thereof had not been spelt out in assessment order, penalty proceedings were bad and were therefore quashed.

*Jt. CIT v. Rakesh Fuel (P.) Ltd. (2005) 147 Taxman 109 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment of income – Satisfaction**

Where it was found from the assessment order that at end of order Assessing Officer had mentioned that notice under section 271(1)(c) for furnishing inaccurate particulars of income had been issued, that was sufficient compliance with requirements under provisions of section 271(1)(c) for recording satisfaction before initiating penalty proceedings against assessee.

*Dy. CIT v. Roadmaster Industries of India Ltd. (2005) 148 Taxman 18 (Mag.)(Chd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Where Income assessed was nil**

Where there was a bona fide mistake on part of assessee in not declaring capital gains in original returns and even after inclusion of capital gains, income assessed was nil, it was not a fit case for levy of penalty.

*Padra Taluka Co-op. Cotton Sales Ginning & Pressing Society Ltd. v. ACIT (2005) 142 Taxman 22 (Mag.)(Ahd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Concealment cannot be presumed merely because assessee has offered additional income.

(A.Y. 2001-02)

*Dy. CIT v. Rajan H. Shinde (2005) 93 ITD 1 / 92 TTJ 1185 (TM)(Pune)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Where to avoid litigation assessee offered for taxation certain deposits found during search with stipulation that if conditions of offer were not accepted it should not be treated as admission, in absence of independent material to establish concealment independently, imposition of penalty relying totally on conditional offer of assessee was not justified.

(A.Ys. 1993-94, 1994-95)

*Ruchi Organisers (P.) Ltd. v. ACIT (2005) 93 TTJ 242 (Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Where substratum of truth was that surrender of income made by assessee was only to avoid harassment and to purchase peace with department, it was also true that Department could not find out any adverse material on survey or otherwise and even from books of account of assessee no concealment was detected, penalty for concealment of income was not imposable merely on basis of surrendered income. (A.Y. 1997-98)

*Ishwar Enterprises v. Jt. CIT (2005) 96 TTJ 508 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Surrender of income**

Where during assessment proceedings, Assessing Officer made enquiries and found that purchases shown by assessee were bogus and assessee, admitting fact of bogus purchases, agreed to quantum addition and did not challenge assessment order before Commissioner (Appeals) and even at penalty stage assessee did not ask for cross examination of any party. Assessing Officer was justified in drawing adverse inference against assessee and levying penalty under section 271(1)(c). (A.Y. 1997-98)

*Hoshiarpur Roller Flour Mills v. ITO (2005) 97 ITD 595 / 100 TTJ 152 (Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Estimated additions**

Where penalty was levied on assessee on account of stock discrepancy discovered during survey and low gross profit rate, imposition of penalty on assessee was not justified as addition on account of low gross profit was based on estimation only and figure of stock discrepancy as discovered during survey went on changing from time to time. (A.Y. 1993-94)

*ITO v. C. Chhotalal Textiles (P.) Ltd. (2005) 95 TTJ 436 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Estimated additions**

Where addition on account of sale of copper wire and excess wastage had been made on estimate basis by merely rejecting assessee's explanation and not a single defect had been pointed out by Assessing Officer in books of account, levy of penalty for concealment of particulars of income was not justified. (A.Y. 1983-84)

*Jt. CIT v. VXL (India) Ltd. (2005) 94 TTJ 513 / 146 Taxman 77 (Mag.)(Amritsar)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Effect of rejection of assessee's explanation**

In case addition was made after rejecting explanation of assessee, that fact simpliciter would not lead to conclusion that penalty under section 271(1)(c) is attracted; mere non-filing of appeal against findings of Assessing Officer would not ipso facto lead to levy of penalty under section 271(1)(c). (A.Y. 1997-98)

*Rajendra Kumar v. ITO (2005) 94 TTJ 280 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised Return**

Mere filing of revised return will not automatically protect an assessee from levy of penalty under section 271(1)(c) but in a given case, where an assessee comes forward with clean hands, though after detection, and files return of income offering additional income and expresses remorse for his past conduct unhesitatingly, Assessing Officer may exonerate him from levy of penalty. (A.Ys. 1990-91, 1991-92)

*K. Deedar Ahmed v. ITO (2005) 97 ITD 240 / 99 TTJ 927 (Hyd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Inquiry by AO**

Where department had accepted revised return filed by assessee declaring additional income without making any addition to returned income, penalty under section 271(1)(c) could not be levied.

*ACIT v. Shailesh Kumar (Contractor) (2005) 148 Taxman 17 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Concealment of income in original return would attract penalty even if assessee submits a revised return before assessment is completed or penalty proceedings are started, where disclosure was made in revised return only after search and after a query was raised by Assessing Officer. (A.Y. 1998-99)

*ACIT v. Lad Devi Kothari (Smt.) (2005) 97 TTJ 421 (Jp.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Unless there is anything on record to conclusively establish that because of pressure or enquiries from Department assessee was compelled to file revised return, penalty cannot be levied on assessee, particularly, when assessee rectified its mistake by filing a revised return within available time as per rules. (A.Y. 1984-85)

*Johree Saree House v. ITO (2004) 4 SOT 938 / 92 TTJ 287 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return**

Explanation of assessee that he has filed revised returns to buy peace and to avoid vexatious litigation can be considered as a bona fide explanation depending on circumstances of case; in penalty proceedings where assessee has given such an explanation, duty is cast upon revenue to highlight that revised returns were filed not merely to buy peace with department but on account of detection by revenue authorities. (A.Ys. 1994-95 to 1997-98)

*A. V. R. Prasad v. ITO (2005) 97 ITD 325 / 99 TTJ 920 (Hyd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Disallowance – Depreciation**

Mere disallowance of claim of depreciation cannot be considered as concealment of income by assessee.

*ITO v. Tolaram Phusa Ram (2005) 147 Taxman 94 (Mag.)(Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Depreciation – Revised return**

Where assessee had claimed depreciation on a machine purchased during relevant previous year in original return and later it withdrew claim for depreciation following survey operation by filing revised return, simply because assessee had so withdrawn its claim, penalty could not be levied for furnishing inaccurate particulars of income. (A.Y. 1991-92)

*Dy. CIT v. Royal Metal Printers (P.) Ltd. (2005) 93 TTJ 119 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Depreciation**

Assessee's claim for depreciation under section 32 and investment allowance under section 32A on 1150 KVA DG set for assessment year 1990-91 was disallowed on ground that it was not ready for use during relevant financial year penalty under section 271(1)(c) was imposed but when the facts showed that there was trial run of DG set, trial run of DG set during the relevant year which is sufficient to substantiate bona fides of assessee's claim, imposition of penalty was not justified; on basis of materials on record neither Explanation 1(A) nor 1(B) section 271(1) was attracted. (A.Y. 1990-91)

*Dy. CIT v. Tata Refractories Ltd. (2005) 92 TTJ 1199 (Cuttack)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Revised return – Withdrawal of claim**

Where claim for deduction under section 80-IB was withdrawn by assessee in revised return on the basis of statement given at the time of survey that the claim under section 80-IB was not well founded; withdrawal of claim as such could not be treated as a case of furnishing of inaccurate particulars or concealment of income. (A.Y. 2001-02)

*Atul J. Doshi v. ITO (2005) 4 SOT 515 (Mum.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Valuation of stock**

Even where appellate authorities confirmed additions on account of change in method of valuation of stock and wrong deduction allowed on account of surtax liability and excise duty paid on closing stock, as all claims of assessee were bona fide on factual and legal position, penalty imposed on assessee on account of aforesaid additions was not justified. (A.Ys. 1983-84, 1985-86)

*Dy. CIT v. Hindustan Milk Food Mfrs. Ltd. (2005) 94 TTJ 436 / 148 Taxman 57 (Mag.)(Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Material facts**

Where assessee had disclosed all material facts relating to matter of its assessment for relevant assessment year and no case for concealment of income or filing of inaccurate particulars of income had been made out by revenue and it was a case of honest difference of opinion between assessee and revenue authorities which had resulted in disallowance of loss claimed by assessee, penalty under section 271(1)(c) was not leviable. (A.Y. 1995-96)

*General Fibre Dealers (P.) Ltd. v. ACIT (2005) 95 TTJ 1030 (Cal.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

On the basis of the report of the employees of the concern division the stock of timber was valued at below the cost price. The assessee has also disclosed all the facts about the valuation before the revenue authorities. It cannot be said that the explanation of the assessee was false simply because the assessment of stock was made on estimate book. Hence, levy of penalty was not justified. (A.Y. 1987-88)

*H. P. State Forest Corpn. Ltd. v. Dy. CIT (2005) 93 ITD 442 / 94 TTJ 792 (Chd.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Where during accounting period relevant to assessment year 1989-90 assessee had changed his method of mixed accounting to mercantile system of accounting but export incentive, interest on exports and interest received from IDBI were declared on receipt basis, assessee was regarded as deemed to have concealed particulars of income and, hence, invoking Explanation 1, Assessing Officer rightly imposed penalty on assessee. (A.Y. 1989-90)

*Dy. CIT v. Roadmaster Industries of India Ltd. (2005) 94 TTJ 859 / 148 Taxman 18 (Mag.)(Chd.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Inaccurate particulars**

Where assessee had consciously withheld from department, revised computation as per revised audit report, which pointed out incorrect claim of liability in original return, assessee should be treated as having filed inaccurate particulars of income and, hence, its case is covered under Explanation 1 to section 271(1)(c) and penalty was leviable. (A.Y. 1996-97)

*Cadbury Schweppes Beverages India (P.) Ltd. v. Jt. CIT (2005) 3 SOT 647 / 96 TTJ 773 (Mum.)(Trib.)*

#### **S. 271(1)(c) : Penalty – Concealment – Explanation 1**

Where assessee explained discrepancy between stock as per books of account and stock as declared in stock statement sent to bank and assessee took a position before Assessing Officer that stock figures given to bank were inflated with view to obtain maximum credit facilities and that book figure was correct stock figure, as assessee's explanation was plausible and reflected trade practice, penalty imposed on account of said discrepancy was deleted. (A.Y. 1997-98)

*ITO v. Shanur J. Farooqui (Smt.) (2005) 98 TTJ 65 (Mum.)(Trib.)*



**S. 271(1)(c) : Penalty – Concealment – Disclosure – Search and seizure – Statement u/s. 132 (4) – Late filing of return – Explanation 5**

Where assessee surrendered income during search and claimed immunity from penalty under Explanation 5, assessee having fulfilled all conditions under Explanation 5, could not be held as not eligible for immunity because of late furnishing of return as clause (2) under Explanation 5 to section 271(1)(c) does not contemplate such view. (A.Y. 1988-89)

*ACIT v. Lad Devi Kothari (Smt.) (2005) 97 TTJ 421 (Jp.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Cash credit**

Where though identity of creditor was proved but on basis of false statement creditor tried to explain source of deposit, cash credit was rightly treated as not genuine justifying levy of penalty. (A.Y. 1979-80)

*Indira Motors (P.) Ltd. v Dy. CIT (2005) 93 TTJ 783 (Chd.)(Trib.)*

**S. 271(1)(c) : Penalties – Concealment – Cash credits**

In case of penalty proceedings, one has to consider, on basis of evidence on record, as to whether explanation of assessee is plausible; where assessee furnished prima facie evidence in support of genuineness of credits, creditworthiness of creditors as well as genuineness of credits, such explanation of assessee was plausible and very fact that part of credit was accepted as genuine, supported view that remaining part of credit might also have genuinely come from creditor, penalty under section 271(1)(c) was not justified. (A.Y. 1990-91)

*Ronaq Ram Nand Lai v. ITO (2005) 92 ITD 514 / 92 TTJ 770 (Chd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Jewellery**

Merely because addition in assessee's hands on account of garments and jewellery shown by his daughter in her wealth-tax return was sustained since admittedly she was dependent on assessee till her marriage, penalty on assessee could not be levied as her claim that such ornaments had been received from her in-laws and other relatives had not been controverted by revenue.

*Atmaram Mahipal v. ITO (2005) 93 TTJ 553 (Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Commission paid**

Where neither proprietor of firm 'R' was produced nor any further evidence was filed to prove genuineness of claim on account of commission paid to that firm, levy of penalty under section 271(1)(c) was justified.

*Soni Associates (P.) Ltd. v. ITO (2005) 148 Taxman 29 (Mag.)(Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Advance from Government**

Where assessee had received an advance from Government for supply of bricks but claimed that it was not taxable as its income as bricks were supplied in following year, merely because addition on account of such advance was sustained in appeal,

penalty could not be imposed; matter was to be restored to Assessing Officer to make enquiry to see if assessee's claim was correct in light of evidence produced by assessee. (A.Y. 1982-83)

*R. P. K. Brick Manufacturers v. ITO (2005) 97 TTJ 258 (Amritsar)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – GP**

Where additions had been confirmed by Tribunal on account of fall in GP, it could not be said that assessee had concealed particulars of income or furnished inaccurate particulars of income; under those circumstances, assessee was not required to be saddled with penalty under section 271(1)(c). (A.Y. 1992-93)

*Sudesh Khanna v. ACIT (2005) 98 TTJ 106 (Ahd.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Agricultural land – Capital asset**

Where Assessing Officer holding that agricultural land sold by assessee was a capital asset and was liable to capital gains tax, and also imposed penalty under section 271(1)(c), the Tribunal held that the Commissioner (Appeals), was justified in cancelling penalty stating that assessee had made claim of exemption under sections 54B and 54F and he was under a bona fide belief that no capital gain was chargeable on same.

*ITO v. Ram Kishan (2005) 148 Taxman 70 (Mag.)(Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Disclosure – Search and seizure – Statement**

**u/s.**

#### **132(4) – Explanation 5**

Where assessee disclosed a certain sum in a statement under section 132(4) and declared same in his return, he was entitled to immunity claimed by him under Explanation 5 to section 271(1)(c). (A.Y. 1995-96)

*Dy. CIT v. Sunil Tolaram (2004) 4 SOT 891 / 90 TTJ 48 (Mum.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Recording of satisfaction**

Proceedings under section 271(1)(c) can be initiated only if assessing officer has recorded his expressed satisfaction in explicit words that there is concealment of income.

*Pramod Plastic Industries (P) Ltd v. ACIT (2003) SOT 1 (Delhi)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Not inclusion – Bona fide**

If on the basis of bonafide belief, the Income is not included in the taxable Income, than said return shall not be false return inviting imposition of penalty.

*Velayudhan Nair (Dr.) v. ITO (2003) 84 ITD 227 / 86 TTJ 737 (Bang.)(Trib.)*

### **S. 271(1)(c) : Penalty – Concealment – Revision [S. 263]**

Commissioner under section 263 cannot direct the Assessing Officer to initiate Penalty proceedings.

*Ambica Chemical Products (Regd.) v. ACIT (2003) 86 ITD 1 / 82 TTJ 93 (Vishaka)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Satisfaction**

It is not necessary that the assessing officer has to record the express satisfaction in the Order itself, if the satisfaction is recorded by way of noting in Order sheet, ITNS 140 etc. it would satisfy the conditions under section 275. (A.Y. 1987-88)

*Mrudulaben B Patel (Smt.) v. ACIT (2003) 85 ITD 463 / 80 TTJ 390 (Ahd.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Mere surrender of income**

Mere surrendering of additional Income, would not mean assessee has admitted concealment of income, or has furnished inaccurate particulars of Income.

*ITO v. Impex Plastic Enterprises (2003) SOT 399 (SMC)(Delhi)(Trib.)*

*Vinod Khurana v. ACIT (2003) 131 Taxman 87 (Mag.)(Amritsar)(Trib.)*

*Brij Bala Chaudhary (Smt) v. ITO (2003) 87 ITD 173 / 82 TTJ 355 (Luck.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Agreed addition – Peace of mind**

Addition agreed to buy peace and avoid litigation, when assessing officer had not recorded any finding against the explanation offered, Penalty levied was liable to be deleted. (A.Ys. 1980-81 to 1982-83, 1990-91)

*Kumar Agencies (India) v. ACIT (2003) 87 ITD 69 / 80 TTJ 868 (TM)(Mum.)(Trib.)*

*Sampathraj Ranka v. ACIT (2003) 78 TTJ 290 / 129 Taxman 30 (Mag.)(Jodh.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Estimated additions**

Additions made on estimate basis, does not represent concealed Income. Hence, penalty cannot be sustained on such addition. (A.Y. 1990-91)

*Brij Bala Chaudhary (Smt) v. ITO (2003) 87 ITD 173 / 82 TTJ 355 (Luck.)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 5**

Provisions of Explanation 5 to Sec 271(1) (c) are deeming provisions and scope thereof cannot be extended to assessment proceedings. (A.Ys. 1986-87 to 1996-97)

*Kay Cee Electrical v. Dy. CIT (2003) 128 Taxman 150 (Mag.) / 87 ITD 35 / 81 TTJ 734 (Delhi)(Trib.)*

**S. 271(1)(c) : Penalty – Concealment – Explanation 1 – Recording of reasons**

As per the Explanation 1 to Sec. 271(1)(c) a duty is cast up on the Assessing Officer to record reasons about concealment of income and explanation from the assessee. Concealment penalty can be levied only if the explanation offered is found to be false. And the Assessing Officer is required to record finding that the explanation offered was false and that the bona fide was not proved by the assessee. (A.Y. 1988-89)

*ITO v. Devibai H. Pammani (Smt.) (2003) 84 ITD 342 / 79 TTJ 493 (Mum.)(Trib.)*

**Section 271AA : Penalty for failure to keep and maintain information and document in respect of international transaction**

### **S. 271AA : Penalty – Failure to keep and maintain – Documents – Transfer pricing – International Transaction [S. 92D, Rule 1D]**

Assessee was engaged in business of manufacturing and distributing non-pharmaceutical health care products. It had entered in to an International transactions with its associated enterprises (AE). During the course of assessment proceedings the Assessing Officer observed that as the assessee failed to maintain books of accounts for international transaction levied the penalty of ₹ 13,57,720. The Tribunal held that the Assessing Officer did not specify what was the failure on part of assessee under section 92D read with Rule 10D, secondly in the course of assessment proceedings assessee had furnished all details required by Assessing Officer and International transaction with Associated Enterprise which had been accepted to be one confirming to arm's length price by the Assessing Officer. The Tribunal held that the penalty levied by the Assessing Officer was without any basis hence, cancelled the penalty order. (A. Y. 2003-04).

*ACIT v. Smith & Newpew Healthcare (P) Ltd. (2011) 48 SOT 607 / (2012) 16 ITR 253 (Mum.)(Trib.)*

### **Section 271B : Failure to get accounts audited**

#### **S. 271B : Penalty – Failure to get accounts audited – Delay – Filing Audit Report [S. 44AB]**

When audit reports as required under section 44AB for Asst. Years 1990-91 to 1993-94 had been obtained before the due date of filing the return of income and the same were furnished along with the return of income, penalty under section 271B was not leviable, since the amendment in section 44AB requiring to furnish the audit report by the due date was incorporated by the Finance Act, 1995, w.e.f. 1st July 1995 only. (A.Ys. 1990-91 to 1993-94)

*S. V. Pathak & Company v. CIT (2011) 330 ITR 410 / (2010) 42 DTR 227 / 192 Taxman 431 / 235 CTR 319 (Bom.)(High Court)*

#### **S. 271B : Penalty – Failure to get accounts audited – Books not maintained**

The requirement of getting the books of account audited could arise only where the books of account are maintained.

Assessee not maintaining books of account, penalty cannot be levied under section 271B. (A.Y. 1990-91)

*CIT v. S. K. Gupta & Co. (2010) 322 ITR 86 (All.)(High Court)*

#### **S. 271B : Penalty – Failure to get accounts audited – Audit Report – Prior to 1995 [S. 44AB]**

Prior to 1995, no penalty could be initiated / levied under section 271B of the Act for failure on the part of the assessee to file audit report under section 44AB of the Act along with the return, if the assessee had filed the same in response to the reassessment notice issued under section 148 of the Act. (A.Y. 1991-92)

**S. 271B : Penalty – Failure to get accounts audited – Filing audit report – Reasonable cause**

Where the assessee a co-operative society whose income was exempt under section 80P of the Act under a bonafide belief that as its income is exempt it was not required to get its accounts audited did not get its accounts audited within the time prescribed under the Act. On appeal the High Court held that as there was no intention on the part of the assessee to conceal its income or deprive the Government of revenue as the entire income was exempt under section 80P of the Act, as such the penalty under section 271B of the Act was not leviable in the assessee's case. (A.Y. 1999-2000)

*CIT v. Iqbalpur Co-operative Cane Development Union Ltd. (2009) 23 DTR 60 / 179 Taxman 27 (Uttarakhand)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Report obtained in time**

For the A.Y. 1990-91 though the audit report was obtained in time the same was filed late along with the return of income which, was delayed due to missing T.D.S. certificate. The High Court held that during the relevant period the requirement of law was only for obtaining the audit report within time specified.

*CIT v. Puran Lal Ramesh Chand (2007) 197 Taxation 543 (P&H)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Delay in filing Audit Report**

Provisions of section 271B do not provide for initiation of the penalty proceeding during the pendency of the assessment proceeding and such a proceeding could be initiated even after the completion of the assessment.

The Hon'ble High Court upheld the view of the ITAT since the proceedings were initiated within two years from the date of assessment. (A.Y. 1988-89)

*Assam Stock Warehousing Corporation v. CIT (2007) 288 ITR 25 (Gau.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Delay in Filing Audit Report**

The appellant company had reasonable cause for not filing the complete Audit Report in time since it did not get the details from its branches which were in USA and, hence, penalty under section 271B of the Act was not leviable. (A.Ys. 1996-97 to 1998-99)

*CIT v. Data Software Research Co. P. Ltd. (2007) 288 ITR 289 / 212 CTR 323 (Mad.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Belated filing of Audit Report**

Where the assessee had obtained audit report prior to the specified date for filing return under section 139(1), penalty under section 271B could not be levied if the report is filed belated along with the return filed under section 139(4).

*CIT v. Vanti Rani Kalia (2006) 190 Taxation 394 (P&H)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Audit – Reasonable cause**

Imposition of penalty under section 271B is not compulsory and mandatory and discretion vests with Assessing Officer not to impose any penalty if he finds that assessee has proved that there was a 'reasonable cause' for failure; where assessee-federation's accounts were to be audited by Chief Audit Officer, U.P. Co-operative Audit and Panchayati Raj Department, and action of Chief Audit Officer, U.P. was not under control of assessee and it was not possible for assessee to obtain statutory audit report within prescribed time, it was rightly held that assessee had reasonable cause because of which provisions of section 44AB could not be complied with and, hence, penalty was not imposable on assessee. (A.Y. 1990-91)

*CIT v. UP Co-operative Cane Union Federation Ltd. (2005) 147 Taxman 477 / 199 CTR 175 (All.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Report with belated return [S. 139(4)]**

Assessee filed audit report along with return under section 139(4) after delay but its contention was that report was obtained in time, in absence of evidence to contrary, Tribunal was justified in deleting penalty. (A.Y. 1993-94)

*CIT v. S.S. Banga (2005) 279 ITR 107 / 202 CTR 90 / 153 Taxman 313 (P&H)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Reasonable cause**

Where assessee explained delay in filing audit report by stating that its partners were not well educated, that its accountant had left service and that chartered accountant had delayed preparation of audit report, Tribunal was justified in deleting penalty. (A.Y. 1985-86)

*CIT v. Ashoka Dairy (2005) 279 ITR 32 / 149 Taxman 732 / 200 CTR 211 (P&H)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Impounded Book**

Where though assessee's books were impounded, photocopies of relevant documents were made available to assessee on its request, plea of assessee that it could not obtain and submit audit report as books were impounded could not be a ground for cancellation of penalty levied under section 271B. (A.Ys. 1991-92, 1992-93)

*CIT v. Khubi Ram Om Prakash (2004) 141 Taxman 608 / 190 CTR 126 / 275 ITR 131 (Raj.)(High Court)*



**S. 271B : Penalty – Failure to get accounts audited – Notice not signed by any person**

Where notice had not been signed by any person, penalty imposed on basis of such notice was not valid. (A.Y. 1985-86)

*CIT v. Aparna Agency P. Ltd. (2004) 267 ITR 50 / 139 Taxman 132 / 189 CTR 355 (Cal.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – No absolute failure**

Penalty is discretionary under section 271B but that discretion is limited within confines of section 273B. When the Tribunal gave a finding that there was no absolute default of the assessee in filing tax audit report penalty under section 271B cannot be levied.

*CIT v. Capital Electronics (Gariahat) (2003) 261 ITR 4 / 129 Taxman 731 / 181 CTR 402 (Cal.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Discretion**

Mere failure to file audit report in time will not justify levy of penalty as power under section 271B is discretionary. (A.Y. 1995-96)

*Thanjavur Silk Handloom Weavers Co-operative Production & Sales Society Ltd. v. UOI (2003) 263 ITR 334 / 132 Taxman 846 / 185 CTR 210 (Mad.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Discretion**

Where audit report was submitted within extended date of filing of return fixed by CBDT and assessee had also given adequate explanation, no penalty could be levied. (A.Y. 1986-87)

*CIT v. Sardar Industries (2003) 260 ITR 384 / 130 Taxman 589 (All.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Order passed before hearing**

The assessee took successive adjournment in the matter, when the order was passed by the Assessing Officer refusing the adjournment for two days. The High Court held that the order passed by the Assessing Officer was not void ab initio. (A.Ys. 1992-93, 1993-94)

*Shri Swastik Steels (P.) Ltd. v. ACIT (2003) 264 ITR 447 / 183 CTR 409 (Bom.)(High Court)*

**S. 271B : Penalty – Failure to get accounts audited – Delay – Accounts ready**

Where accounts were submitted to Accountant Generals Office for auditing before due date but were not audited by Accountant Generals Office before due date, assessee was to be held to have a reasonable cause for not submitting accounts before due date and, hence, penalty cannot be levied under section 271B of the Act. (A.Ys. 1990-91, 1991-92)

*Rajasthan Rajya Vidyut Prasaran Nigam v. ITAT (2003) 262 ITR 262 / 130 Taxman 840 / 183 CTR 361 (Raj.)(High Court)*

### **S. 271B : Penalty – Failure to get accounts audited – Reasonable cause**

Where Tribunal did not come to a definite finding that there was no reasonable cause, no penalty was imposable.

*CIT v. Capital Electronics (Gariahat) (2003) 261 ITR 4 / 129 Taxman 731 / 181 CTR 402 (Cal.)(High Court)*

### **S. 271B : Penalty – Failure to get accounts audited – Project Completion Method – Advance received cannot be treated as sale**

When the assessee was following the project completion method of accounting, the advances received against booking of flats could not be treated as sale proceeds/turnover/gross receipts. Thus penalty under section 271B is deleted.

*Siroya Developers v. Dy. CIT, ITA No. 600/Mum/2010, dt.12-1-2011, ITAT Mumbai 'I' Bench, BCAJ P. 38, Vol. 42-B, Part 6, March 2011 (Mum.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Limitation**

Since the penalty order has been passed after the expiry of six months from the end of June, 2005, it was barred by the period of limitation. (A.Y. 2003-04)

*Motilal Vishwakarma HUF v. ITO, ITA No.7055/Mum/2007, Bench – B, dt. 27-08-2007 – BCAJ P. 520, Vol. 40-B, Part 4, January 2009. (Mum.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Reasonable cause**

Assessee entertaining a *bona fide* belief that the accounts are to be audited only if the turnover of the assessee exceeds ` 40 lakhs, there was sufficient cause for default and therefore, levy of penalty under section 271B was not justified. (A.Y. 1997-98)

*Patel Ambalal Somnath Sarkar v. ITO (2008) 100 TTJ 735 (Ahd.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Partner**

Share of profit cannot be equated with income from profession. The Tribunal held that the assessee had reasonable cause for failure to get his accounts audited as required under section 44AB of the Act, hence penalty was deleted. (A.Y. 2003-04)

*Hitesh D. Gajaria v. ACIT, ITA Nos. 992/Mum/2007, Bench – K, dt. 22-2-2008 - BCAJ P. 16, Vol. 40-A, Part 1, April 2008. (Mum.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Total turnover**

Assessee having filed no agreement or document to show that the transportation receipts did not belong to him, same cannot be excluded from total turnover and therefore, penalty under section 271B was valid. (A.Y. 1996-97)

*Sardari Lal Oberai v. ITO (2007) 106 TTJ 1033 (Chd.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Reasonable cause**

No penalty is leviable where there is a reasonable cause for delay. It was not a case of the Revenue that there was a deliberate defiance of law or the assessee was guilty of conduct which is contumacious or dishonest or the assessee had acted in conscious

disregard of his obligation. Penalty under section 271B should normally not be imposed unless the explanation or cause for such commission or omission was not reasonable. (A.Y. 2000-01)

*S.D. Pharmacy v. ACIT, Bench, ITA No. 862/Coch/2005, dt. 29-5-2006 – BCAJ P. 402, Vol. 39-C, Part 4, January 2007 (Cochin)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Nursing home – Business or profession**

Activities of nursing home constituted business and not profession. Therefore, receipts from such business being below 40 lakh section 44AB was not attracted consequently penalty under section 271B was not leviable. (A.Ys. 1998-99, 1999-2000)

*Shalini Hospital v. ACIT (2007) 110 TTJ 690 / 108 ITD 534 / 10 SOT 662 (Hyd.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Unsigned Audit report – Mistake**

Furnishing of unsigned tax audit report along with the return can be accepted as an unintentional mistake on the part of the assessee if it has filed a copy of the same report during the course of the assessment proceedings, and levy of penalty under s. 271B would not be justified. (A.Y. 2001-02)

*Nulon Electronics Ltd. v. ITO (2006) 100 TTJ 698 (Delhi)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Freight – Turnover**

A *bona fide* belief that freight charged by assessee from different parties and re-paid to individual truck owner is not an assessee's own sales and thus gross freight receipts are not relevant for getting accounts audited, constitutes a reasonable cause and no penalty can be levied. (A.Y. 1996-97)

*Anoop Kumar Beri v. ACIT (2006) 152 Taxman 66 (Mag.) / 97 TTJ 275 (Delhi)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Presumptive taxation**

Having failed to furnish the audit report before the due date though the accounts were audited in time under *bona fide* impression that since the income is being disclosed under section 44AD, the same is not required to be furnished, there was reasonable cause for the default and, therefore, levy of penalty under section 271B was not justified. (A.Y. 2001-02)

*Parjanya Associates v. ACIT (2006) 100 TTJ 736 (Ahd.)(Trib.)*

### **S. 271B : Penalty – Failure to get accounts audited – Delay in Audit of earlier year**

Delay in completion of audit of the earlier year constituted reasonable cause for the delay in audit of the relevant year and the assessee having got its accounts audited within 4-5 months after the completion of audit of accounts of the earlier year levy of penalty under s. 271B was not justified. (A.Y. 1994-95)

*ACIT v. Kamlesh R. Agarwal (HUF) (2006) 100 TTJ 194 / 99 ITD 27 (Ahd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Turnover – Commission agent**

Assessee, a del credere agent. Commission received during each year was less than ` 40 lakhs – Items in balance sheet contained debtors and creditors. Assessing Officer not justified in holding that the assessee was a trader in goods and its turnover being more than ` 40 lakhs liable to get his accounts audited.

*Narayan Nivruty Shinde v. ITO, Bench "G", ITA Nos. 899 & 900/Mum/2004 dated 27-9-2005. (Mum.)(Trib.)*

**S. 271B : Penalty – Audit – Excess interest by Money-lender**

Sec. 271B r.w.s. sec. 44AB – Penalty for failure to get accounts audited – Assessee engaged in money-lending business. Interest charged in excess of prescribed rate under the law which was offered and taxed under the head "Income from other sources". Such interest is not to be considered while applying the provisions of section 44AB.

*Muthoot Bankers v. ACIT Bench, ITA No.843 & 844/Coch/2004 dated 22-12-2005. (Cochin)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Without P&L Account and balance sheet**

The assessee furnishing the Audit Report in Form 3CD along with Return in time, but without audited Trading Account, Profit & Loss A/c and Balance Sheet. It was held that Audit Report was not incomplete and illegal and penalty under section 271B cannot be levied.

*Pradeep Agarwal v. I. Tax Officer (2006) 150 Taxman 23 (Mag.)(Agra)(Trib.)*

**S. 271B : Penalty – Audit – Lower turnover – Bona fide belief**

Having failed to get the accounts audited entertaining a bona fide belief that the accounts are to be audited only if the turnover of the assessee exceeds ` 40 lakhs, there was sufficient cause for default and, therefore, levy of penalty under section 271B was not justified. (A.Y. 1997-98)

*Patel Ambalal Somnath Sarkar v. ITO (2006) 100 TTJ 735 (Ahd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Income below taxation limit**

Bona fide belief of the assessee that his income was below taxable limit constituted a reasonable cause for not getting accounts audited under s.44AB and hence, penalty under as s.271B was not exigible. (A.Ys. 1988-89 to 1995-96)

*ITO v. Narendra Kumar (2006) 103 TTJ 591 (Jodh.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Advocate's advice**

Assessee having failed to get his accounts audited under section 44AB acting on wrong advice of the advocate, there was reasonable cause for default and, therefore, penalty under section 271B is not leviable. (A.Y. 2003-04)

*Dr. Sunderlal Surana v. ITO (2006) 105 TTJ 907 (Jodh.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – No assessment order**

In case assessee fails to obtain requisite audit report, it has committed a default and penalty is exigible, even if no assessment order is passed. (A.Y. 1988-89)

*Pawan Cotton Mills v. ITO (2005) 1 SOT 388 / 90 TTJ 1057 (Jodh.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Contradictory stands**

Where as regards reasonable cause for not filing audit report in time, assessee took contradictory stands before Assessing Officer and Commissioner (Appeals) and also tried to mislead Bench by claiming that audit report was handed over to clerk of advocate who failed to furnish same to Income-tax Department, imposition of penalty on assessee was justified. (A.Y. 2004-05)

*Sukhwinder Singh v. ITO (2005) 94 TTJ 431 (Chd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Audit under Companies Act**

Where assessee being a chit fund company, had filed its return of income along with audit report audited under the Companies Act wherein it had disclosed its turnover from the business of chit funds as consisting of foreman's commission, interest, dividend, etc., but had not included chit subscription in turnover, its failure, if any, to get account audited under section 44AB could be said to be due to reasonable cause.

*Dy. CIT v. Mangal Dayak Chit Fund (P.) Ltd. (2005) 92 ITD 258 / 92 TTJ 889 (Hyd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Delay – Filing report**

Where assessee could not get accounts audited within time, due to non-availability of books of account which were in custody of department and, thus, beyond control of assessee-firm, there was a reasonable cause for delay in filing audit report.

*Chempho Chem Industries v. ACIT (2005) 148 Taxman 42 (Mag.)(Ahd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Delay – Reasonable cause**

Where there was delay on part of assessee carriage operator in getting accounts audited under section 44AB and in reply to show-cause notice, assessee explained that it had to deal with Army authorities, which were located at far-flung areas at Srinagar, Kargil, Leh and there was thus delay in collecting TDS certificate which was necessary before filing return, explanation for delay given by assessee being reasonable no penalty was leviable on it.

*ITO v. Road King Transport Service (2005) 97 ITD 227 / 97 TTJ 251 (Amritsar)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Delay in furnishing Audit report**

Where though assessee obtained audit report in time but did not file it by specified date and reason given by assessee was that it had made a declaration under VDIS and that it was under a bona fide belief that no return was required to be filed, once declaration under VDIS was filed, imposition of penalty on assessee was not justified.

*Naveen Oil & Ginning Mills v. ITO (2005) 96 TTJ 658 (Jodh.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Limitation [S. 275]**

Penalty under section 271B cannot be initiated at any time even after 5 yrs or 10 yrs. Bar of limitation prescribed under section 275 will be applicable to section 271B.

*S H Sopariwala v. ACIT (2003) 128 Taxman 23 (Mag.)(Ahd.)(Trib.)*

**S. 271B : Penalty – Failure to get accounts audited – Delay in furnishing Audit report**

Penalty under section 271B cannot be levied when when the Audit Report under section 44AB has been obtained before the due date, but was furnished with the belated Return under section 139(4). (A.Y. 1993-94)

*Kanmal Birla Textiles v. ITO (2003) 77 TTJ 742 (Jodh.)(Trib.)*

**Section 271BA : Penalty for failure to furnish report under section 92E**

**S. 271BA : Penalty – Failure to furnish reports – International transaction – Transfer pricing – Reasonable cause [S. 273B]**

Assessee has not obtained the audit report as required under section 92E due to failure of auditor to advice who has audited the accounts under section 44AB of the Act, however, filed the same immediately when he came to know that he was required to file such report in Form No. 3 CEB before completion of assessments for the relevant years, as there was bonafide reason for not obtaining the report in Form No. 3CEB in time and it was venial and technical default, penalty cannot be attracted. (A. Ys. 2003-04 & 2004-05)

*Ravi Kumar Rawat v. ITO (2011) 138 TTJ 254 / 48 DTR 230 (Jp.)(Trib.)*

**Section 271C : Penalty for failure to deduct tax at source**

**S. 271C : Penalty – Failure to deduct tax – Imprisonment [S. 192, 200, 206, 271C, 276B and 276BB, S. 482 of Cr. PC]**

Where the materials show that the proceeding is of a civil nature and cannot be adjudicated by the criminal court or, if it is an abuse of the process of the court, the High Court would be well within its power to exercise its inherent jurisdiction and quash the same. In view of the provisions of the Income-tax Act and the assertion of the appellants that deductions were being made for all the persons liable to pay tax in terms of the Income-tax Act, the proper remedy for the respondents was to approach the authority/officer concerned and not by filing a complaint.



**S. 271C : Penalty – Failure to deduct tax – Revision – Dropping of penalty [S. 263]**

The Assessing Officer having initiated penalty proceedings under section 271C against the assessee, disposed the proceedings stating that the penalty proceedings, in this case under section 271C read with section 274 "are hereby dropped". The Commissioner initiated revision proceedings under section 263 and directed the Assessing Officer to revise the order passed by him. The Appellate Tribunal came to the conclusion that the Assessing Officer had carried out due verification of the relevant facts and penalty proceedings were not casually dropped. On appeal the High Court of the view that the Appellate Tribunal could not have substituted its own reasons which were required to be recorded by the Assessing Officer to decide the issue in terms of the order of the Commissioner under section 263. The assessee has preferred an appeal to the Supreme Court, held dismissing the appeal, that it was not necessary to interfere at this stage, when the matter would be taken by the Assessing Officer. On remand it was his duty to take in to account all the relevant facts, including the materials, if any placed by the assessee and pass a reasoned order.

*Toyota Motor Corporation v. CIT (2008) 306 ITR 52 / 218 CTR 539 / 173 Taxman 458 / 12 DTR 106 (SC)*

**S. 271C : Penalty – Failure to deduct tax – Circular on TPA – Application of mind**

**[S. 194J, 273B]**

Following the ratio of Judgment of Bombay High Court in Dedicated Health Care Services TPA (India) (P) Ltd. v. ACIT (2010) 324 ITR 345, part of Circular No. 8 of 2009 dated 24-11-2009 which mandated levy of penalty that was set aside, the Assessing Officer and the appellate authorities were directed to apply the mind independently in exercise of their quasi judicial powers, without being tied down by the circular.

*Vipul Medcorp TPA (P) Ltd. v. CBDT (2011) 202 Taxman 463 / 63 DTR 65 / 245 CTR 125 (Delhi) (High Court)*

**S. 271C : Penalty – Failure to deduct tax – No penalty if no "mala fide intention" or "deliberate defiance" of law [S. 194C, 194I, 194J, 201]**

It was held that the fact that the assessee has not disputed the quantum is not a good ground for imposition of penalty unless and until material is brought on record to the effect that assessee deliberately defied the provisions (Anwar Ali 76 ITR 696 (SC) referred). Further, it was also observed that levy of penalty under section 271C is not automatic. (Woodward Governor India 253 ITR 745 (Delhi) followed). If no mala fide intentions of any kind are attributed to the assessee for deducting tax under one provision of law than other, thus no penalty could be levied.

*CIT v. Cadbury India Ltd. (2011) 55 DTR 318 (Delhi)(High Court)*

**S. 271C : Penalty – Failure to deduct tax – Expatriate – LTA – Paid by employees**

Penalty under section 271C was held not leviable where the recorded finding of fact was that the assessee acted bonafidely, as it constitute reasonable cause in accordance with the provisions of section 273B. In the present case, the expatriate employees of the assessee to whom salary was paid, had filed their return and paid taxes accordingly. Besides this the assessee had not deducted tax at source on the benefit it granted to the employees on account of L.T.A. as he acted upon the declaration given by the employees.

*CIT v. Owens Brockkwy India Ltd. (2006) 194 Taxation 342 (Delhi)(High Court)*

**S. 271C : Penalty – Failure to deduct tax – Lower deduction of tax – Bona fide belief**

Assessee-State-Electricity-Board had deducted less tax at source from a particular class of consumers as there was some confusion as regards the extent of percentage to be deducted from different class of customers and no sooner than it was clarified, Board made compliance from its own funds, as it was not a deliberate attempt to avoid payment by way of TDS, penalty imposed on assessee under section 271C was rightly deleted by Tribunal.

*CIT v. Senior Accounts Officer, Madhya Pradesh Electricity Board (2005) 276 ITR 84 / 197 CTR 276 / 154 Taxman 335 (MP)(High Court)*

**S. 271C : Penalty – Failure to deduct tax – Legal opinion – Retention pay – Expatriate**

Where based on legal opinion assessee did not deduct tax at source from retention/continuation pay given to expatriate employees in Japan, which was paid to them in addition to salary and perquisite paid in India, assessee had a reasonable cause for not deducting tax at source. (A.Ys. 1990-91 to 1995-96)

*CIT v. Mitsui & Co. Ltd. (2004) 140 Taxman 430 / 190 CTR 38 / 272 ITR 545 (Delhi)(High Court)*

**S. 271C : Penalty – Failure to deduct tax – Limitation – Six year [S. 201(1)]**

The Tribunal has quashed the order passed by the Dy. CIT (TDS) under section 201(1) and 201(IA), on the ground that initiation of proceedings was beyond a period of six years and hence was barred by limitation. The Tribunal in penalty appeal held that penalty under section 271C cannot be levied if the order under section 201(1) is barred by limitation. (A. Y. 2000-01 to 2002-03).

*ACIT v. American School of Bombay Education Trust (2011) TIOL 209 ITAT–Mum. (172) / (2011) 43A BCAJ, May P. 32 (Mum.)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – Accrual or payment**

When the assessee deducted the TDS at the time of payment and not at the time of accrual on the bonafide belief that it is not required to deduct at the time of accrual it was held that the penalty is not so leviable. (A. Ys. 1996-97 to 1999-2000)

*Sahara India Financial Corporation Ltd v. Addl. CIT (2009) 30 SOT 149 (Delhi)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – Lower deduction of tax – Bona fide belief**

Assessee having short deducted tax at source under bona fide belief that payee sister concerns would have no tax liability and in most of the cases payee sister concerns were entitled to refund, penalty under section 271C was not attracted. (A.Y. 1999-2000)

*ITO v. Muthoot Financiers (2007) 107 TTJ 141 / 103 ITD 108 (Cochin)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – Travel agent – Expert's opinion**

Assessee travel agent having acted on expert opinion, CIT (A) was justified in holding that the assessee bona fide believed that no tax was deductible on discount/rebate allowed to the passengers from printed price as the same was not commission to which statutory provision was applicable and hence penalty cannot be levied under section 271C of the Act. (A.Y. 2001-02)

*ITO v. G. B. Morrisson Travels (P) Ltd. (2006) 99 TTJ 117 (Delhi)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – Foreign company – Legal advice**

No penalty can be levied on a foreign company for not deducting tax under *bona fide* belief based on legal advice and guidance from respective Chamber of Commerce, that payment made is not taxable.

*ACIT (TDS), v. Samsung Corp. (2006) 152 Taxman 22 (Mag.)(Delhi)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – ESOP – Transfer – Amendment [S. 17(2)]**

No taxable benefit had accrued to the employees of the assessee-company on account of transfer of shares under ESOP in the financial years 1998-99 and 1999-2000 as shares given under ESOP are taxable as perquisite under s. 17(2)(iiia) only from A. Y. 2001-02 and therefore, no tax was deductible at source in respect of such transfer of shares and penalty under s. 271C could not be levied for short deduction of TDS. (A.Ys. 1998-99, 1999-2000)

*ITO v. Television Eighteen India Ltd. (2006) 101 TTJ 669 (Delhi)(Trib.)*

**S. 271C : Penalty – Failure to deduct tax – Form 15H – Reasonable cause**

Form No. 15H having been received by assessee on 1st April, 1999, one day after the close of the financial year, there was reasonable cause with the assessee for non deduction of tax and penalty under section 271 C could not be imposed. (A.Y. 1999-2000)

*Kamal Industries v. Jt. CIT (2006) 100 TTJ 451 (Jodh.)(Trib.)*

### **S. 271C : Penalty – Failure to deduct tax – Salary**

Liability to deduct tax on employer is on the amount of salary, which employer pays to employee, but if another employer also pays salary to that employee simultaneously or otherwise, then no liability can be fastened on first mentioned employer to deduct tax on that amount at source, particularly, where assessee is not informed by employee about receipt of salary from another employer; failure by assessee to deduct tax at source considering the salary received from other employer would not attract section 271C. (A.Y. 1998-99)

*Kinetics Technology (India) Ltd. v. Jt. CIT (2005) 94 ITD 63 / 94 TTJ 01 (Delhi)(Trib.)*

### **S. 271C : Penalty – Failure to deduct tax – Salary – Expatriate**

Where assessee's plea was that in various agreements executed between assessee and Government of India, it was clearly stipulated that tax and levy, etc., shall not be payable by assessee-company and that on basis of assurances given to assessee, it had entertained a bona fide belief that it was not liable to deduct tax at source while making payment to expatriate employees, penalty could not be imposed on assessee for non-deduction of tax at source.

(A.Ys. 1991-92 to 1999-99)

*Pacific Consultants International v. Jt. CIT (2005) 92 TTJ 818 (Delhi)(Trib.)*

### **S. 271C : Penalty – Failure to deduct tax – Tax paid by payee – Not leviable**

Where tax had already been paid by payee, no penalty could be levied on assessee-payer for failure to deduct tax at source. (A.Ys. 1997-98 to 2000-01)

*Wipro GE Medical Systems Ltd. v. ITO (2005) 3 SOT 627 (Bang.)(Trib.)*

### **S. 271C : Penalty – Failure to deduct tax – Credit of interest – Reversal of**

Plea that Interest was reversed in later year can not be accepted as a valid explanation for non deduction of TDS at the time of credit of Interest. (A.Ys. 1997-98 to 2000-01)

*Marg Constructions Ltd. v. Jt. CIT (2003) 81 TTJ 440 / 2 SOT 851 (Chennai)(Trib.)*

### **Section 271D : Penalty for failure to comply with the provisions of section 269SS.**

### **S. 271D : Penalty – Accept loans or deposits – Income of Director – Journal Entry [S. 269SS]**

The premises of K, a director of the assessee company were searched by the Income Tax Authorities. During the course of search, incriminating documents regarding unaccounted expenditure incurred by K were seized. In the proceedings initiated under section 153C, K offered for tax the undisclosed expenditure incurred by him for and on behalf of the company for construction activities. Accordingly journal entries were passed in the books of the company. Assessing Officer was of the opinion that the assessee has violated section 269SS and accordingly levied the penalty but the Tribunal deleted. High Court confirmed the order of Tribunal.

*CIT v. Motta Construction P. Ltd. (2011) 338 ITR 66 (Bom.)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Transaction bonafide – Technical default [S. 269SS]**

The assessee accepted the share application money of ` 20,000/-, in cash. As the transaction was bonafide, the default being technical, cancellation of penalty by the Tribunal was held to be justified. (A.Y. 2001-02)

*CIT v. Speedways Rubber Pvt. Limited (2010) 326 ITR 31 (P&H)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Advances from customers [S. 269SS]**

Provisions of section 269SS are applicable only in case of loans and deposits received by the assessee in contravention of the provision. Thus, when the assessee receives advance from his customers for supply of goods in cash exceeding the limits prescribed in section 269SS, penalty under section 271D was held to be not leviable. (A.Y. 1990-91)

*CIT & Anr. v. Kailash Chandra Deepak Kumar (2009) 32 DTR 336 / 317 ITR 351 (All.)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Loan from each person**

No penalty under section 271D r.w.s. 269SS if the Assessee has accepted cash loans of

` 20,000/- from each person as the loans are not in excess of ` 20,000.

*CIT v. Madhukar B. Pawar (2008) 218 CTR 59 / 319 ITR 255 / 10 DTR 129 (Bom.)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Prospective application [S. 269SS]**

No retrospective application of penal provisions for default under sections. 269SS and 269T – Transactions made before 1-4-1989 wherein sections 271D and 271E were not in the statute book prior to 1-4-1989. (A.Y. 1989-90)

*Kothari & Co. v. CIT (2007) 204 CTR 298 / 294 ITR 644 / (2006) 157 Taxman 433 (MP)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Unexplained income**

Penalty is not leviable when in a case the Revenue takes the stand that the alleged deposit was undisclosed income of the assessee.

*CIT v. Standard Brands Ltd. (2006) 204 CTR 48 / 285 ITR 295 / 155 Taxman 383 (Delhi)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Share Application Money [S. 269SS]**

Assessee-company received share application money in excess of prescribed limit in cash, though it could not be termed as a loan, it was a 'deposit' and, hence, penalty was imposable under section 271D. (A.Y. 1990-91)

*Bhalotia Engineering Works (P.) Ltd. v. CIT (2005) 275 ITR 399 / 196 CTR 619 (Jharkhand)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Advance [S. 269SS]**

Amount found to have been received as advance and not as loan or deposit would not attract section 271D

*CIT v. Kharaiti Lal & Co. (2004) 270 ITR 445 / 144 Taxman 178 (P&H)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Cash transaction [S. 269SS]**

Where cash transactions exceeding specified limit between assessee – advocate and its clients were clear from documents on record, imposition of penalty was justified. (A.Ys. 1990-91 to 1995-96)

*Dhanji R. Zalte v. ACIT (2004) 265 ITR 204 / 136 Taxman 644 (Bom.)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Genuine need [S. 269SS]**

If transaction is genuine and to satisfy immediate requirement of money a person borrows money from money lender, such person could be said to have a reasonable cause for not accepting money by account-payee cheque or draft. (A.Y. 1996-97)

*CIT v. Bhagwati Prasad Bajoria (HUF) (2003) 263 ITR 487 / 133 Taxman 426 / 183 CTR 484 (Gau.)(High Court)*

**S. 271D : Penalty – Accept loans or deposits – Reasonable cause [S. 269SS]**

On a reasonable cause being shown, the assessing authority has jurisdiction not to impose the penalty. (A.Y. 1996-97)

*CIT v. Manoj Lalwani (2003) 128 Taxman 635 / 260 ITR 590 / 180 CTR 394 (Raj.)(High Court)*

**S. 271D : Penalties – Accept loans or deposits – Adjustment of ` 20,000 [S. 269SS]**

If any loan is there exceeding ` 20,000 and any penalty is to be imposed, permissible amount of ` 20,000 has to be adjusted.

*CIT v. Ajanta Dyeing & Printing Mills (2003) 130 Taxman 442 / 164 ITR 505 (Raj.)(High Court)*

**S. 271D : Penalties – Accept loans or deposits – Journal entry [S. 269SS]**

Tribunal's finding that no payment was made in cash but the accounts were adjusted by journal entry in books of account of assessee and, hence, there was no violation of section 269SS. The High Court upheld the view of the Tribunal. (A.Y. 1998-99)

*CIT v. Noida Toll Bridge Co. Ltd. (2003) 262 ITR 260 / 184 CTR 266 / 139 Taxman 115 (Delhi)(High Court)*



**S. 271D : Penalties – Accept loans or deposits – Insufficient Bank balance [S. 269SS]**

Where loans were taken to clear cheques issued by assessee as assessee did not have sufficient bank balance, held to be reasonable cause and penalty was rightly deleted. (A.Y. 1990-91)

*CIT v. Parma Nand (2003) 180 CTR 489 / (2004) 266 ITR 255 / (2004) 135 Taxman 100 (Delhi)(High Court)*

**S. 271D : Penalties – Accept loans or deposits – Urgency [S. 269SS]**

Loan was taken in cash because it wanted to purchase a piece of agricultural land for developing the same as business proposition. It was further stated that there was an advantage of negotiating for purchase of agricultural land with ready cash backing. Besides when deal fell through, assessee deposited cash in bank and issued a cheque for discharging liability of loan. As the explanation offered by the assessee could not be regarded as improbable or impossible the penalty levied was deleted. (A.Y. 2002-03)

*Jitu Builders (P) Ltd. v. Addl. CIT (2010) 124 ITD 134 / 125 TTJ 721 / 29 DTR 458 (TM)(Ahd.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Common deposit – Parents [S. 269SS]**

When the Assessee takes money in cash from his parents out of business expediency, penalty under section 271D, cannot be levied.

*Swapan Dutta v. Jt. CIT (2010) Tax L.R. 166 (Kol.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Money lender – Reasonable cause [S. 269SS]**

Assessee money lender accepting cash deposits in violation of provision of section 269SS, penalty deleted considering the nature of business, status of the depositors and necessity from the point of view of the assessee. (A.Ys. 2002-03, 2003-04)

*P. Mallikharjuna Rao v. Addl. CIT (2010) 45 DTR 8 (Visakha)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Leviability – Block assessment [S. 269SS]**

Penalty levied under section 271D in respect of amount added as undisclosed income in block assessment was invalid.

*Dy. CIT v. G. S. Entertainment (2007) 109 TTJ 54 (Mum.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – No mala fide Intention**

In the absence of anything on record to suggest any *mala fide* on the part of the assessee to evade tax, levy of penalty under section 271D was not sustainable. (A.Y. 1991-92)

*Skyline Silk Mills v. ACIT (2006) 101 TTJ 798 (Amritsar)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – S. 138 of Negotiable Instrument Act**

**[S. 269SS]**

Cash deposits made by depositor to avoid consequences of section 138 of negotiable instruments Act, 1880, is a reasonable cause for deleting penalty under section 271D. *ITO v. Akik Tiles (P) Ltd. (2006) 152 Taxman 65 (Mag.)(Ahd.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Contravention – Reasonable cause [S. 269SS]**

Existence of reasonable cause for accepting loans/deposits otherwise than by crossed cheque/draft is not established and, therefore, penalty under section 271D was sustainable.

(A.Y. 1992-93)

*ACIT v. Jabalpur Hospital & Research Centre (P) Ltd. (2006) 103 TTJ 536 (Jab.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Reasonable cause [S. 269SS]**

No penalty is imposable if the failure to comply with provisions of section 269SS is proved to be on account of reasonable cause.

*Caravan Impex (P) Ltd. v. ITO 154 Taxman 150 (Mag.)(Delhi)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Genuine transaction [S. 269SS]**

Relying on Supreme Court's Decision in case of *Asst. Director of Inspection v. Kum. A.B. Shanthi* (255 ITR 258) the Tribunal held that genuine transactions are kept outside the scope of sec. 271D. (A.Y. 1998-99)

*ACIT v. Maha Developers, Bench – C, ITA No. 1113/Ahd/2002 dt. 7th July, 2006 – BCAJ Volume 30 Part 6, September 2006. (Ahd.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Guidance of receipt**

In the absence of any definite material to establish that the assessee had received loan/deposit in contravention of the provisions of s. 269SS, except for the photocopies of statement of loan submitted by the alleged creditor which was contradicted by the assessee and which has been shown to be incomplete and had been rejected by the CIT(A). Penalty under section 271D could not be levied. (A.Ys. 1995-96, 1996-97)

*Nvain Kumar v. Jt. CIT (2006) 99 TTJ 267 / 98 ITD 242 (TM)(Amritsar)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Urgency [S. 269SS]**

Urgent business requirement viz., demand by supplier for immediate payment of ₹ 50,000 constituted a reasonable cause for accepting two cash loans of ₹ 20,000 each on the facts of the case and, therefore, penalty under section 271D was not leviable — Also, penalty was not leviable as the provisions of s. 269SS are attracted only in cases where the loans amount exceeded ₹ 20,000. (A.Y. 1992-93)

*Rajiana Kheti Store v. ITO (2006) 99 TTJ 576 (Amritsar)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Initiation after 7 years [S. 269SS]**

Penalty under section 271D was invalid as, it was not initiated during any proceedings under the Act and was also initiated after a lapse of 7 years. (A.Y. 1996-97)

*Sharda Educational Trust v. ACIT (2006) 99 TTJ 212 (Agra)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Acceptance and repayment in cash [S. 269SS]**

Assessee having accepted loans and made repayment also in cash on account of ignorance of relevant provisions and lack of advice by his counsel, there was reasonable cause for the defaults and, therefore, levy of penalty under sections 271D and 271E was not justified. (A.Y. 1991-92)

*ITO v. Prabhulal Sahu (2006) 99 TTJ 177 (Jodh.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Wife & HUF – Not Mechanical [S. 269SS]**

Every breach of section 269SS does not automatically result in the imposition of penalty under section 271D; if surrounding circumstances not only indicate but lead to inevitable conclusion that accused could not have knowledge of law, he cannot be penalized for his default; further penalty under section 271D was not exigible in respect of loans accepted by the assessee from his wife and his HUF in violation of provisions of section 269SS. (A.Y. 2000-01)

*Narayan Ram Chhaba v. ITO (2005) 96 ITD 163 / 97 TTJ 297 (TM)(Jodh.)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Onus on assessee to explain cause [S. 269SS]**

Under section 269SS, even for genuine loans or deposits, assessee has to explain why it had obtained the same in cash and if he is able to explain a reasonable cause, then there will be no penalty leviable under section 271D. (A.Y. 1993-94)

*Thenamal Chhajjer v. Jt. CIT (2005) 96 ITD 210 / 98 TTJ 449 (Chennai)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Genuineness irrelevant [S. 269SS]**

Consideration as to whether deposits are genuine or not is not relevant, in so far as provisions of section 269SS are concerned. (A.Y. 1990-91)

*Kans Raj & Sons v. ITO (2005) 92 TTJ 931 (Amritsar)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Genuineness insufficient [S. 269SS]**

It is not sufficient to say simply that transaction was genuine, so section 269SS is not applicable; circumstances under which cash was accepted are to be explained; where assessee took cash loan from two ladies for purchasing machinery, since urgent requirement of machine was not known and machine was not purchased soon after

taking loan from 'ladies', it indicated that the assessee could have complied with requirement of section 269SS without much difficulty and, as such, penalty in respect of loan was justified. (A.Y. 1990-91)

*ITO v. Sunil M. Kasliwal* (2005) 94 ITD 281 / 80 TTJ 01 / (2004) 2 SOT 596 (TM)(Pune)(Trib.)

**S. 271D : Penalty – Accept loans or deposits – Genuineness not a defence [S. 269SS]**

Deletion of addition under section 68, leading to the upholding genuineness of the transaction of loan, would not justify the obliteration of penalty under section 271D as well, where loans accepted by assessee in cash were more than specified limit. (A.Y. 2000-01)

*Narayan Ram Chhaba v. ITO* (2005) 96 ITD 163 / 97 TTJ 297 (TM)(Jodh.)(Trib.)

**S. 271D : Penalty – Accept loans or deposits – Search material [S. 269SS]**

Where during search a rukka was found which showed that assessee had received a sum of

₹ 2 lakhs in cash but assessee explained that it was an advance rukka and no cash had passed, levy of penalty was not justified. (A.Y. 1997-98)

*Anand Prakash Gupta v. ACIT* (2005) 92 TTJ 766 (Jodh.)(Trib.)

**S. 271D : Penalty – Accept loans or deposits – Family members [S. 269SS]**

Where assessee took cash loan, *inter alia*, from his minor children, and wife, since assessee himself acted as guardian of minors and in said capacity had given loan and accepted in capacity of individual, even assuming that there was breach of section 269SS, it was only a technical and venial breach; and since loan taken from wife was of very small amount, it could not be construed to be transaction between borrower and lender; in those circumstances imposition of penalty on assessee under section 271D for violation of section 269SS was not justified. (A.Y. 1990-91)

*ITO v. Sunil M. Kasliwal* (2005) 94 ITD 281 / (2003) 80 TTJ 01 (2004) 2 SOT 596 (Pune)(TM)(Trib.) / *ITO v. Tarlochan Singh* (2003) 128 Taxman 20 (Mag.)(Amritsar)(Trib.)

**S. 271D : Penalty – Accept loans or deposits – Commission agent [S. 269SS]**

Where assessee, claiming to have acted as commission agent/kacha arhatiya, accepted certain loans/deposits from two agriculturists in cash and repaid those deposits but produced no evidence to prove same, penalty was rightly imposed on assessee.

*ACIT v. Jai Bharat Fruit Co. Ltd.* (2005) 4 SOT 445 (Jp.)(Trib.)

**S. 271D : Penalty – Accept loans or deposits – Ignorance of law**

Ignorance of law is no excuse for violation of provisions of S. 269SS and 269TT. (A.Y. 1990-91)

*Udaichand Santoshkumar Jain v. ITO (2003) 79 TTJ 88 / 131 Taxman 184 / (2004) 1 SOT 831 (Mag.)(Indore)(Trib.)*

**S. 271D : Penalty – Accept loans or deposits – Payment by father [Ss. 269SS & 269T]**

Penalty cannot be levied when the purchase consideration of a property was paid by father partly in cheque and partly in cash, and same was shown as loan from father, as there being no violation of Sec 269SS.

*Mahesh Prasad Soni v. Addl. CIT (2003) 128 Taxman 91 (Mag.)(Jab.)(Trib.)*

**Section 271E : Penalty for failure to comply with the provisions of section 269T**

**S. 271E : Penalty – Repayment of loan or deposit – Meaning of ‘loan’ and ‘deposit’ [S. 269T]**

A. Y. 2001-02, sections 269T and 271E of the Act as it existed during the relevant year dealt with repayment of ‘deposit’ made otherwise than by way of an account payee cheque or draft drawn in the name of the lender and not with repayment of ‘loans’ made otherwise than by account payee cheque. Therefore, penalty in the present case under section 271E was held not leviable.

*CIT v. Vikramjit Singh (2006) 194 Taxation 331 (Delhi)(High Court)*

**S. 271E : Penalty – Repayment of loan or deposit – Reasonable cause – Condition [S. 269T]**

Where the assessee fails to show reasonable cause for making payment in contravention of section 269 T penalty under section 271E was rightly levied.

*Madan Lal Mahaveer Prasad v. ITAT (2006) Tax L. R. 46 (Raj.)(High Court)*

**S. 271E : Penalty – Repayment of Loan or deposit – Amendment – Prospective [S. 269T]**

Amendment of s. 269T made by Finance Act, 2002, being effective from 1st June, 2002 repayment of loan in cash was not an offence in the relevant asst. yr. 1999-2002, and, therefore, penalty under section 271E was not leviable. (A.Y. 1999-2000)

*Star Electroplaters v. ITO (2006) 99 TTJ 640 (Ahd.)(Trib.)*

**S. 271E : Penalty – Repayment of loan or deposit – ‘loan’ not covered [S. 269T]**

Assessee having repaid loans in cash and not deposits, penalty under s. 271E was not leviable as the provisions of s. 269T as applicable to the relevant assessment year, did not apply to repayment of loans — Further, absence of any bank account of the lenders constituted a reasonable cause for repayment of amounts in cash. (A.Y. 1992-93)

*Rajiana Kheti Store v. ITO (2006) 99 TTJ 576 (Amritsar)(Trib.)*

**S. 271E : Penalty – Repayment of loan or deposit – Genuine [S. 269T]**

Revenue having failed to establish that repayments made by the assessee were of loans and deposits. Further the sources of amounts not being in doubt and transactions being bona fide and in normal course of business, penalty under section 271E was not attracted. (A.Y. 1994-95)

*ACIT v. Alfa Hydromec (P) Ltd. (2006) 99 TTJ 405 (Jodh.)(Trib.)*

**S. 271E : Penalty – Repayment of loan or deposit – Source of payment [S. 269T]**

Payments made in cash by the assessee-firm and the source of such payments not being in doubt. Penalty under section 271E was not leviable. (A.Y. 1991-92)

*Skyline Silk Mills v. ACIT (2006) 101 TTJ 798 (Amritsar)(Trib.)*

**S. 271E : Penalty – Repayment of loan or deposit – Society to members [S. 269T]**

Where Assessing Officer levied penalty on assessee-society under section 271E on ground that assessee had repaid deposits in cash to various persons in contravention of provisions of section 269T, but facts showed that repayments of deposits were made to members of assessee-society, such transactions were not impeached by department as non-genuine and were not noticed outside books of account and assessee-society entertained a bona fide belief that no contravention of any provisions of Act was being made while making repayment of loans/deposits in cash, there was a reasonable cause within meaning of section 273B and no penalty under section 271E could be imposed. (A.Y. 1998-99)

*Muslim Urban Co-op. Credit Society Ltd. v. Jt. CIT (2005) 96 ITD 83 / 97 TTJ 928 (Pune)(Trib.)*

**S. 271E : Penalty – Repayment of loan or deposit – Agriculturist – No Bank Account [S. 269T]**

Default in accepting of deposits in cash from agriculturists who had no bank account, would be merely a technical and venial, not resulting into any loss of revenue.

*ITO v. Ganesh Wooden Industries (2003) SOT 583 (SMC)(Ahd.)(Trib.)*

**Section 271F : Penalty for failure to furnish return of income**

**S. 271F : Penalty – Failure to furnish return of Income – Reasonable cause – Not a continuing default – Law applicable date of default [S. 273B]**

On conjoint reading of section 271F and section 273B there remains no scope of any doubt that it is not mandatory under section 271F that a penalty must be imposed in every case if conditions laid down in said section are established; penalty under section 271F is imposable only in event assessee fails to prove that there was reasonable cause for said failure; however burden to prove that there was reasonable cause for failure specified in section 271F lies on assessee as would be clear from language used in sections 271F and 273B. (A.Y. 2000-01)



Default as contemplated under section 271F is not a continuing default; therefore, levy of penalty under present section 271F is to be imposed as per law prevailing on date of default.

Case of assessee who has failed to file a return within required time on bona fide belief that he is not required to file such a return within required time because of there being no tax payable as a result of tax rebates admissible under Act or there being no further tax payable after adjustment of advance tax and tax deducted or collected at source, may be treated as for a reasonable cause unless otherwise something to contrary is brought on record. (A.Y. 2000-01)

*Manju Kataruka (Mrs) v. ITO (2005) 3 SOT 414 / 94 TTJ 873 (Kol.)(Trib.)*

### **Section 271G : Penalty for failure to furnish information or document under section 92D**

#### **S. 271G : Penalty – Documents – International transaction – Transfer pricing – No penalty for failure to respond to “omnibus” notice**

Section 271G authorizes the levy of penalty if the information/ documents prescribed by section 92D(3) are not furnished. Rule 10D prescribes a voluminous list of information and documents required to be maintained and it is only in rare cases that all clauses would be attracted. Some of the documents may not be necessary in case of some assessees. Before issuing a notice under section 92D(3), the Assessing Officer has to apply his mind to what information and documents are relevant and necessary for determining ALP. A notice under section 92D(3) is not routine and cannot be casually issued but requires application of mind to consider the material on record and what further information on specific points is required. The notice cannot be vague or call for un-prescribed information.

*Dy. CIT v. Leroy Somer & Controls (India) (P) Ltd. (2012) 65 DTR 205 / 143 TTJ 285 (Delhi)(Trib.)*

#### **S. 271G : Penalty – Documents – International transaction – Transfer pricing – Failure to furnish Information or documents – Satisfaction [S. 92A]**

Satisfaction need not be recorded before initiating proceedings under section 271G as provisions of said section are quite different from provisions of sec. 271(1).

*Cargill India (P) Ltd. ITO v. Dy. CIT (2008) 167 Taxman 114 (Mag.)(Delhi)(Trib.)*

### **Section 272A : Penalty for failure to answer questions, sign statements, furnish information, returns or statements, allow inspections, etc.**

#### **S. 272A(2) : Penalty – Failure to answer questions – Proviso w.e.f. 1-10-1991 – Prospective**

Proviso (inserted with effect from 1-10-1991) to section 272A(2) is not retrospective and hence would not have any impact on default relating to the assessment year 1989-90.

*CIT v. New Rajasthan Trading Co. (2003) 133 Taxman 388 / (2004) 186 CTR 268 / 271 ITR 511 (Raj.)(High Court)*

**S. 272A(2)(c) : Penalty – Failure to furnish information, return, etc. – Section 285B statement – Reasonable cause [S. 285B]**

Assessee, who had taken up production of film, failed to submit statements under section 285B because he was not aware of said provision and as soon as notice was issued to him, he submitted statements, penalty imposed upon assessee for non-compliance of section 285B was to be deleted.

*CIT v. Schell International (2005) 278 ITR 630 / 148 Taxman 446 / 200 CTR 243 (Bom.)(High Court)*

**S. 272A(1)(c) : Penalty – Reasonable cause – Not appearing before Assessing Officer**

Where it was held that looking to nature of business of assessee, assessee had a valid ground for not appearing before Assessing Officer and seeking adjournment and, hence, penalty had to be quashed

*O.P. Khaitan (Investigation) v. Dy. CIT (2005) 273 ITR 429 / (2004) 139 Taxman 266 / 191 CTR 231 (Delhi)(High Court)*

**S. 272A(2)(c) : Penalty – Failure to furnish TDS return – State Government**

Where default is made by officer of State Government in filing TDS return, there is no justification in the approach of the Income-tax Department to give notice straightaway treating the State as an ordinary assessee. Rather than to impose penalty for default made by the Officers of State in filing of the TDS return, the State Government would have been advised to approach the Chief commissioner for the waiver thereof after the order of levy of penalty. Instead of taking steps to recover the amount of penalty imposed, the attention of the appellant would have been drawn to the provisions of section 273A. Section 273A, section 273B of the Act. The Court is also directed the State Government to issue appropriate circular, order or direction to deduct and pay the taxes. (A.Y. 1990-91)

*State of Rajasthan v. ITAT (2003) 127 Taxman 648 / 259 ITR 686 / 176 CTR 196 (Raj.)(High Court)*

**S. 272A(2)(c) : Penalty – Failure to file TDS return – Quarterly return**

Failure to file quarterly return penalty is not leviable. Clause (c) of section 272A(2) relates to return / statement under section 133, 206 and 206C, which are unrelated to TDS, therefore, penalty under section 272A(2)(c) is not leviable for non submission of quarterly returns for TDS. (A. Ys. 2006-07 & 2007-08)

*Porwal Creative Vision (P) Ltd. v. Addl. CIT (2011) 139 TTJ 1 / 55 DTR 241 (Mum.)(Trib.)*

**S. 272A(1)(c) : Penalty – Failure to furnish information – Compliance**

Assessee, a State Government Officer (Sub Registrar), having supplied attested copies instead of photo copies of a conveyance deed as required by the Assessing Officer, did not commit any default so as to attract penalty under section 272A(1)(c). (A.Y. 2002-03)

*Sub-Registrar Rewari v. ITO (2006) 101 TTJ 671 (Delhi)(Trib.)*

**S. 272A(2)(c) : Penalty – Delay in furnishing TDS return – Form 26C**

When despite opportunities given none appeared before Assessing Officer to explain delay in filing return in Form 26C, belated plea taken by assessee before appellate authority that an employee was responsible for delay, would not help assessee and, hence, penalty was leviable. (A.Y. 1999-2000)

*Administrator, Municipal Council, Pinjore v. ACIT (2005) 96 TTJ 646 (Chd.)(Trib.)*

**S. 272A(2)(c) : Penalty – Failure to furnish information – Belated statement [S. 285B]**

Since reason for submitting information under section 285B is to check inflation of expenditure by film producers and to enable department to get information about recipient of payment for necessary action in their case, belated information submitted in this regard may tantamount to non-furnishing as department may not be able to take immediate benefit of information given by assessee and in such a case of belated submission of statement, if assessee has no reasonable cause, penalty under section 272A(2)(c) would be justified. (A.Y. 1996-97)

*Satish Y. Kulkarni v. Jt. CIT (2005) 3 SOT 46 (Mum.)(Trib.)*

**S. 272A(2)(e) : Penalty – Not liable file return – Educational Institution**

When assessee educational institution was not liable to file return under section 139(4A), no penalty was exigible under section 272A(2)(e).

*ADIT v. Rao Tula ram College (2003) SOT 570 (Delhi)(Trib.)*

**S. 272A(2)(f) : Penalty – Failure to furnish information, return, etc. – No liability to TDS – Form 15H**

Where assessee was neither required to deduct tax at source nor any loss of revenue had occurred on that account, default committed by the assessee in not filing Form No. 15H received by it from various depositors, within the stipulated period was only of technical nature for which no penalty under section 272A(2)(f) was leviable

*CIT v. State Bank of Patiala (2005) 277 ITR 315 / 191 CTR 256 (P&H)(High Court)*

**S. 272A(2)(f) : Penalty – Delay in submitting declaration in Form No. 15H – Voluntary compliance**

Reasonable cause Penalty under section 272A(2)(f) is not leviable for the delay in filing of declarations, especially when the assessee had filed all the declarations without any notice from the Department. (A.Y. 1998-99)

*Manager, Canara Bank v. CIT (2006) 102 TTJ 342 (Chd.)(Trib.)*

**S. 272A(2)(g) : Penalty – Failure to Issue certificate, etc. – Delivered next day – Speed post**

The tax had been deducted and deposited with the Government treasury. The TDS certificates were sent to the concerned persons by speed post on next day in compliance of section 203. Penalty cannot be imposed.

*CIT v. Ashapura Garments P. Ltd. (2010) 322 ITR 83 / (2008) 219 CTR 195 / 9 DTR 300 (Bom.)(High Court)*

**S. 272A(2)(g) : Penalty – Failure to issue TDS certificate – Reasonable cause**

Where the business activities of the assessee were hampered due to losses incurred year after year, labour unrests and there was no experienced staff left with the assessee company to look after the affairs of the company, the High Court held that in such circumstances the assessee was prevented by reasonable and sufficient cause from issuing T.D.S. certificate within stipulated time and the penalty was not leviable in such case.

*General Engineering Works v. CIT (TDS) (2008) 202 Taxation 488 (Delhi)(High Court)*

**S. 272A(2)(g) : Penalties – Failure to issue TDS certificate – Delay in payment of tax**

When there is compliance of section 203 of the act read with the relevant rules, penalty under section 272A(2)(g) of the Act cannot be imposed even though there is delay in payment of TDS amount by the assessee.

*CIT v. Ashapura Garments P. Ltd. (2008) 322 ITR 83 / 219 CTR 195 / 9 DTR 300 (Bom.)(High Court)*

**S. 272A(2)(g) : Penalty – Failure to issue TDS certificate – Venial and technical default**

Where assessee had to issue over 5000 TDS certificates, and TDS was duly deposited in time, delay in issuing just 8 TDS certificate to 8 contractors could only be treated as venial and technical default not justifying levy of penalty under section 272A. (A.Y. 1995-96)

*H.M.T. Ltd. v. CIT (2004) 140 Taxman 606 / 274 ITR 544 / 191 CTR 62 (P&H)(High Court)*

**S. 272A(2)(g) : Penalty – Failure to deposit – TDS – Reasonable Cause**

Failure to deposit TDS into the Government account cannot be accepted as a reasonable cause for non-issue of certificate in Form No. 16A, and penalty under s. 272A(2)(g) is leviable for default in issuing TDS certificate even if tax is not deposited. (A.Ys. 1997-98 to 1999-2000)

*ITO v. Labh Construction & Industries Ltd. (2006) 103 TTJ 269 / 8 SOT 475 (Ahd.)(Trib.)*

**S. 272A(2)(g) : Penalty – Failure to put dates – Sign – TDS – Certificates**

Merely because TDS certificates were undated, that would not make assessee liable to penalty for default under section 272A(2)(g) for late issue of TDS certificate. (A.Y. 1996-97)

*Salwan Furnishing Co. v. Jt. CIT (2005) 1 SOT 485 / 91 TTJ 103 (Delhi)(Trib.)*

### **S. 272A(2)(g) : Penalty – Failure to furnish Information – Quantum of penalty**

Penalty under section 272A(2)(g) cannot exceed the amount of TDS.

*Bhawani Dass Ashok Kumar v. Dy. CIT (2003) SOT 247 (Delhi)(Trib.)*

### **Section 273 : False estimate of, or failure to pay, advance tax**

#### **S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Reassessment**

Question whether penalty proceedings under section 273(2)(aa) can be initiated in reassessment proceedings is a question of law. The judgment of High Court refusing to admit the appeal was set aside. (A.Ys. 1985-86 to 1987-88)

*CIT v. L. M. P. Precision Engr. Co. (2005) 142 Taxman 547 / 193 CTR 592 / 186 Taxation 632 (SC)*

#### **S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Deemed income [S. 41(1)]**

Additions made by the Assessing Officer under section 41(1) to the assessee's returned income, after the assessee had filed estimate of income, could not be made basis for holding that estimate of advance tax earlier filed by the assessee was one which the assessee knew to be untrue so as to justify penalty under section 273(1)(a). (A.Ys. 1977-78, 1978-79)

*CIT v. Chaudhry Cotton Ginning & Pressing Factory (2005) 278 ITR 387 / 146 Taxman 696 (P&H)(High Court)*

#### **S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Delayed payment**

Any amount of advance tax, which is deposited subsequent to the date prescribed for depositing the tax in the relevant financial year is to be treated as advanced tax. (A.Y. 1980-81)

*Standard Chemical Co. Ltd. v. CIT (2005) 278 ITR 77 (All.)(High Court)*

#### **S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Recording of satisfaction**

Although the Assessing Officer must have satisfaction as required under section 273, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings.

*Shyam Biri Works Pvt. Ltd. v. CIT (2003) 131 Taxman 253 / 259 ITR 625 / 185 CTR 510 (All.)(High Court)*

**S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Ex parte**

Deletion of penalty imposed ex parte before assessee could appear before Assessing Officer was justified. (A.Y. 1988-89)

*CIT v. Minora Magnesite Ltd. (2003) 264 ITR 502 / 184 CTR 585 / (2004) 137 Taxman 385 (Uttaranchal)(High Court)*

**S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Deletion of addition**

Penalty cannot be sustained where addition on the merits had been deleted. (A.Y. 1987-88)

*CIT v. Cosmopolitan Trading Corpn. (2003) 133 Taxman 52 / (2005) 274 ITR 640 (Raj.)(High Court)*

**S. 273 : Penalty – Advance tax – False estimate – Failure to pay – Higher Assessment**

Merely because an assessee is assessed at a higher figure, that by itself is not sufficient to hold that estimate filed by the assessee was untrue resulting in assessee being penalized for filing incorrect estimate. (A.Y. 1980-81)

*CIT v. Kismet (P.) Ltd. (2003) 264 ITR 496 / 184 CTR 613 / (2004) 136 Taxman 198 (Guj.)(High Court)*

**S. 273 : Penalty – Advance tax – False estimate – Bona fide belief – Below taxable income**

Assessee having not filed statement of advance tax under the bona fide belief that his income is below the taxable limit and the additions made by estimating income having been reduced in appeal, imposition of penalty under section 273(1)(b) was not justified. (A.Y. 1985-86)

*Mansukh Dass Soni v. ACIT (2006) 99 TTJ 894 (Jodh.)(Trib.)*

**Section 273A : Power to reduce or waive penalty, etc. in certain cases.**

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Disclosure – Search and seizure – Voluntary – Block Assessment – Genuine hardship**

Any disclosure made subsequent to seizure of incriminating material would not be treated as voluntary. Assessee applying for waiver must make out a case of genuine hardship.

Where the petitioners had made disclosure of additional income consequent to search and seizure of a diary containing discriminating material, such disclosure cannot be treated to be voluntary within the meaning of section 273A. Where the petitioners had not produced the balance sheet or any material to show that the petitioners were not in a position to pay the penalty and if they had not paid the penalty, there would be adverse consequences to the petitioners, there was no case for the petitioners to plead genuine hardship as envisaged in section 273A(4). (A.Ys. 1970-71 to 1987-88)



*Shardadevi P. Jhunjhunwala v. CIT (2010) 327 ITR 211 / 190 Taxman 194 / 236 CTR 142 / 41 DTR 252 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Interest**

Assessee voluntary filing of return, waiver application for interest was rejected. The court held that rejection of application solely for failure to pay interest was not justified when no notice was issued by the department under section 139 or 148. (A.Ys. 1983-84 to 1985-86)

*Prakash Kumari (Smt) v. CIT (2010) 326 ITR 82 / (2008) 219 CTR 569 / 177 Taxman 350 / 13 DTR 245 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Speaking order**

Under section 273A Commissioner, essentially needs to pass speaking and reasoned order after taking into consideration scheme and object of section 273A including elements like voluntary act of filing return in good faith; full and true disclosure of income; payment of tax; and co-operation and once case is made out for waiver/reduction, Commissioner needs to exercise powers in favour of assessee. Section 273A(1)(a) requires a disclosure of full and true income and not filing of valid returns in time before issue of notice under section 139(2) or under section 148(1). (A.Ys. 1984-85 to 1988-89)

*Vasantbhai Jethalal Lathiwal v. CIT (2008) 174 Taxman 280 / 325 ITR 41 / 219 CTR 564 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Finding of compliance**

Where Commissioner (Appeals) recorded a categorical finding that assessee had not concealed particulars of her income and did not furnish inaccurate particulars of such income, Explanation to section 273A would get squarely attracted with full force and deeming fiction contemplated therein would come in play. (A.Ys. 1982-83, 1983-84)

*Usha A. Kalwani (Mrs) v. S.N. Soni (2005) 272 ITR 167 / (2004) 136 Taxman 708 / 188 CTR 409 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Amnesty scheme – Reduction – Waiver of penalty**

Where in preceding year, assessee's case was held to be governed by Amnesty Scheme and facts for Assessment Year under consideration were similar, assessee's request for waiver under section 273A for year under consideration should be considered. (A.Y. 1987-88)

*Shantaben R. Choksi v. CIT (2005) 272 ITR 295 / (2004) 190 CTR 491 (Guj.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Quasi judicial – Reasons**

Powers conferred on Commissioner under section 273A is a quasi-judicial power and whatever decision is taken is to be supported with reasons. (A.Ys. 1980-81 to 1982-83)

*Ganesh Trading Co. v. CIT (2004) 265 ITR 495 / 134 Taxman 441 / 187 CTR 382 (P&H)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Belated return – Full & true disclosure – Waiver of penalty**

For waiver of penalty and interest what is relevant is full and true disclosure made voluntarily and in good faith, whether by way of belated returns or otherwise. (A.Ys. 1981-82 to 1988-89)

*Anand B. Apte v. CIT (2004) 270 ITR 581 / 136 Taxman 656 / 188 CTR 416 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Disclosure by assessee**

Merely because Assessing Officer has initiated enquiry regarding assessee's source of income, it cannot be said that disclosure is to avoid or pre-empt exposure or penal action. (A.Y. 1988-89)

*Sudha Kankariya (Dr.) (Mrs.) v. CIT (2004) 270 ITR 296 / 136 Taxman 686 / 188 CTR 404 (Bom.) (High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Subsequent jurisdiction – *Suo moto* – Waiver of penalty**

CIT ought not to have rejected the application under section 273A on the ground that When the application was made. CIT did not have jurisdiction, if subsequently jurisdiction has been conferred to him by CBDT.

*Ply King v. CBDT (2004) 270 ITR 364 / 138 Taxman 206 / 191 CTR 484 (Patna)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Disclosure after search – Voluntary – Reduction**

Disclosure made after search cannot be treated as a voluntary disclosure. (A.Ys. 1984-85 to 1988-89)

*C. Christopher v. CIT (2004) 268 ITR 511 / 140 Taxman 485 / 190 CTR 527 (Mad.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Non payment of advance tax – Delayed return**

While considering application under section 273A, non payment of advance tax is an irrelevant consideration; similarly, absence of explanation for delayed filing of return is also extraneous consideration. (A.Ys. 1981-82 to 1987-88)

*Shrikrishna S. Bhagwat v. S.N. Soni, CIT (2004) 270 ITR 186 / 137 Taxman 222 / 188 CTR 396 (Bom.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Writ – Effect of sub-section (4)**

Writ petition can be entertained against order under section 273A as such order is not appealable under section 246 or 253. Sub-section (4) is not a provision overriding the provisions of sub-section (1). (A.Ys. 1984-85 to 1990-91)

*Satish Kapur v. CIT (2004) 265 ITR 673 / 136 Taxman 288 (Cal.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Reduction – Fresh application**

Where on dismissal of application by Commissioner, another application is filed, such application should be treated as fresh application and decided expeditiously.

*Ashwani Dhingra v. CCIT (2004) 140 Taxman 84 (All.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Condition fulfilled – Rejection**

If conditions in section 273A(1)(c) are fulfilled, Commissioner has to give some relief and cannot reject application in toto.

*Kailash Mills v. CIT (2003) 260 ITR 322 / 130 Taxman 608 (All.)(High Court)*

**S. 273A : Penalty – Commissioner – Power to reduce or waive – Subsequent payment of tax**

Where because no tax had been paid waiver of interest was not granted but subsequently tax had been paid, there cannot be any embargo in considering the matter on merits as regards waiver of interest and penalty under section 273A.

*Analab (India) Pvt. Ltd. v. CIT (2003) 262 ITR 596 / 133 Taxman 393 (Cal.)(High Court)*

**Section 274 : Procedure**

**S. 274 : Penalty – Procedure – Law Applicable – Concealment**

Where assessee had filed original return on 3-9-1975, even though subsequently notice under section 148 was issued, penalty under section 271(1)(c) was leviable as per provisions of the Act as those stood in statute on 3-9-1975, and not on date when return was filed on 3-11-1984 in response to notice under section 148 and as such only authority competent to levy penalty as on 3-9-1975 (IAC) could impose penalty. (A.Y. 1995-96)

*Aan Aam Prop. Narindra Palace v. ACIT (2005) 94 TTJ 850 (Amritsar)(Trib.)*

**Section 275 : Bar of limitation for imposing penalties**

**S. 275 : Penalty – Bar of limitation – Concealment – Not curbed by proviso – Penalty levied within six months of receipt of order from Tribunal – Not barred by limitation [S. 271(1)(c)]**

The period of six months provided for imposition of penalty under section 275(1)(a) starts running after the successive appeals from an assessment order have been finally decided by the CIT(A) or the ITAT. The proviso to section 275(1)(a) extends the period for imposing penalty from six months to one year of the receipt of the CIT(A)'s order after 1.6.2003. The proviso carves out an exception from the main section inasmuch as in cases where no appeal is filed before the ITAT the Assessing Officer must impose penalty within a period of one year of the date of receipt of the CIT(A)'s order. A proviso is merely a subsidiary to the main section and must be construed harmoniously with the main provision. The proviso to section 275(1)(a) does not nullify the availability to the Assessing Officer of the period of limitation of six months from the end of the month when the order of the ITAT is received. (A. Y. 2001-02).

*CIT v. Mohair Investment & Trading Co. (2011) 63 DTR 226 / 245 CTR 313 / (2012) 345 ITR 51 (Delhi)(High Court)*

**S. 275 : Penalty – Bar of limitation – Initiation and posting order [S. 271D]**

Penalty proceeding initiated on 7-4-1993. An order for penalty passed on 31-10-1997 was held to be barred by limitation since it could not be passed by 31-3-1994 and therefore, bad-in-law. Hence, penalty under section 271D was deleted. (A.Y. 1990-91)

*ITO v. Ramkishore Rewaram Tada (2006) 202 CTR 404 / 287 ITR 239 / 155 Taxman 265 (MP) (High Court)*

**S. 275 : Penalty – Bar of limitation – Revision [S. 263]**

Limitation prescribed by section 275 cannot be by-passed or indirectly extended by invoking powers under section 263. (A.Y. 1982-83)

*CIT v. Parmanand M. Patel (2005) 278 ITR 3 / 149 Taxman 403 / 198 CTR 641 (Guj.)(High Court)*

**S. 275 : Penalty – Bar of limitation – Law w.ef. 1-4-1989**

Penalty proceedings were initiated on 28-3-1980, and were dropped on 28-9-1984, the limitation having already expired much before substituted clause (b) of section 275(1) came on the statute book which was with effect from 1-4-1989, one could not give any retrospective operation to clause (b) as penalty proceeding had become barred by that time and as such penalty order passed as a result of order passed under section 263 would be barred by limitation in such a case. (A.Y. 1977-78)

*CIT v. Braj Bhushan Cold Storage (2005) 275 ITR 360 / 145 Taxman 585 / 197 CTR 490 (All.)(High Court)*

**S. 275 : Penalty – Bar of limitation – Financial year**

'Financial year' in the first part of section 275(1) (c) must be understood as financial year wherein assessment order is made in course of which proceedings for penalty could be initiated.

*Shanbhag Restaurant v Dy. CIT (2004) 266 ITR 393 / 134 Taxman 495 / 186 CTR 318 (Karn.) (High Court)*

### **S. 275 : Penalty – Bar of limitation – Unilateral recomputation**

In absence of any request for rehearing by an assessee, Department cannot invoke Explanation (i) to section 275 unilaterally to compute period of limitation. (A.Y. 1995-96)

*B. N. Amarnath v. CIT (2003) 126 Taxman 207 / 259 ITR 590 / 179 CTR 163 (Karn.)(High Court)*

### **S. 275 : Penalty – Bar of limitation – Concealment [S. 271(1)(c)]**

Assessee, a public Limited Company, filed a loss return. Assessing Officer completed assessment at positive income by making various additions and disallowances. The additions were confirmed by Commissioner (Appeals) and Tribunal on 30-8-2004 and 9-5-2008, respectively. Assessing Officer imposed penalty order under section 271(1)(c) on 30-1-2009. Assessee claimed that said order of penalty order of 30-1-2009 was barred by limitation in terms of section 275. The Tribunal held that where assessee had filed an appeal before Tribunal against quantum, section 275(1)(a) fixes time limit of six months from date of receipt of order of Tribunal by Commissioner / Chief Commissioner or passing an order of penalty, therefore, penalty levied was proper. (A. Y. 2000-01).

*Mahindra Intertrade Ltd. v. Dy. CIT (2011) 133 ITD 597 (Mum.)(Trib.)*

### **S. 275 : Penalty – Bar of limitation – Date of initiation**

As regards to provisions of sections 271D and 271E, period of limitation for purpose of section 275 is to be reckoned from date when penalty proceedings are initiated by Dy. Commissioner (Joint Commissioner) and not from date on which assessment proceedings are completed. (A.Y. 1993-94)

*Dewan Chand Amrit Lal v. Dy. CIT (2006) 98 ITD 200 / (2005) 98 TTJ 947 (SB)(Chd.)(Trib.)*

### **S. 275 : Penalty – Bar of limitation – Date of initiation**

Limitation under section 275(1)(c) for imposition of penalty would apply, reckoning it from date when Additional Commissioner issued show-cause notice for levy of penalty.

*ACIT v. Jai Bharat Fruit Co. Ltd. (2005) 4 SOT 445 (Jp.)(Trib.)*

### **S. 275 : Penalty – Bar of limitation – Time barred order**

Where action for imposition of penalty was initiated in February, 1992 and penalty was imposed in 2001, in view of section 275(1)(c) imposition of penalty was beyond period of limitation. (A.Ys. 1987-88 and 1989-90)

*ACIT v. Vaish Bros. & Co. Ltd. (2005) 93 TTJ 476 (Luck.) (Trib.)*

### **S. 275 : Penalty – Bar of limitation – Loans – Deposits**

Where Assessing Officer observing that assessee had accepted loans/ deposits otherwise than by account-payee cheques/demand drafts contravening provisions of section 269SS, referred matter to the Additional Commissioner proposing levy of penalty under section 271D and Additional Commissioner initiated penalty proceedings on 6-4-1999, in view of provisions of section 275(1)(c), penalty order passed on 13-3-2000 was barred by limitation. (A.Y. 1996-97)

*Chhajer Packaging & Plastics (P.) Ltd. v. Addl. CIT (2005) 95 ITD 319 / 97 TTJ 153 (Pune) (Trib.)*

## **CHAPTER XXII**

### **Offences and Prosecutions**

#### **Section 275A : Contravention of order made under sub-section (3) of section 132.**

#### **S. 275A : Offences and prosecutions – Prohibitory order – Contravention of order made u/s. 132(3)**

Income-tax department had issued prohibitory order under section 132(3) with regard to specified bank accounts but no transaction had admittedly taken place with regard to accounts in respect of which prohibitory order was subsisting, and Income-tax department had not passed any prohibitory orders with regard to account in question where transactions appeared to have taken place, no offence could be said to have been made out

*Sanjay Sinha v. UOI (2005) 145 Taxman 103 / 271 ITR 465 (Patna) (High Court)*

#### **Section 276AB : Failure to comply with the provisions of section 269UC, 269UE and 269UL.**

#### **S. 276AB : Offences and prosecutions – Transfer of immoveable property – Chapter XX-C – Failure to file form – Form 37I [S. 269UA(f)(i)]**

Petitioners having let out its property under a lease for a period of nine years which, Explanation to section 269UA(f)(i), is clearly attracted and, therefore, provisions of Chapter XX-C are applicable. Petitioners having failed to submit Form No. 37-I criminal proceedings under section 276AB r/w 278B cannot be quashed.

*Govind Impex (P) Ltd. & Ors v. Appropriate Authority (2010) 236 CTR 449 / 48 DTR 169 / (2011) 330 ITR 10 / 196 Taxman 424 (SC)*

#### **Section 276B : Failure to pay tax to the credit of Central Government under Chapter XX-D or XVII-B**



### **S. 276B : Offences and prosecutions – Failure to pay tax – TDS – Directors**

The Supreme Court held that it cannot be said that the prosecution against a company or its directors for default of deduction or payment of tax is not envisaged in the Act. The Supreme Court held that even if the tax deducted has been deposited with the Central Government, but if there is a delay then the assessee would be liable under section 276B for penalty for non payment of the tax within the stipulated time. (A.Y. 1989-90)

*Madhumilan Syntex Ltd. v. UOI (2007) 290 ITR 199 / 160 Taxman 71 / 208 CTR 417 / 199 Taxation 259 (SC) / 11 SCC 297*

### **S. 276B : Offences and prosecutions – Compounding of offences – Guidelines – Technical**

Under the guidelines of September 30, 1994, technical offences could be compounded by the Chief Commissioner or Director General on certain conditions. The Court held that compounding is not possible after filing of complaint. (A. Y. 1982-83).

*Anil Batra v. CCIT (2011) 337 ITR 251 (Delhi)(High Court)*

### **S. 276B : Offences and prosecutions – Failure to pay tax – Director [S. 2(35)]**

Director of a company is not "principal officer" within meaning of section 2(35) and in case Income Tax Officer seeks to prosecute a director along with company for an offence punishable under section 276B, then he has to issue a notice under sub-clause (b) of section 2(35), expressing his intention to treat such director as "principal officer" of company and in absence of such a notice prosecution against director would fail.

*ITO v. Delhi Iron Works (P) Ltd. (2010) 195 Taxman 372 (2011) 331 ITR 5 (Delhi)(High Court)*

### **S. 276B : Offences and prosecutions – Failure to pay tax – Notice – Time limit – S. 278B, Code of Criminal Procedure, 1973**

There is no provision in law which requires notice to be given to the accused before launching prosecution under the I.T. Act. Where the punishment prescribed under the Act is beyond three years, the provisions of sec. 468 of the Code of Criminal Procedure, 1973, would not apply. Where prosecution is launched under section 276B of the I.T. Act, 1961, the punishment prescribed is imprisonment up to seven years and hence s. 468 of CCP would not apply. Further there is no time limit for launching prosecution.

*UOI v. Gupta Builders P. Ltd. & Anr (2008) 297 ITR 310 / 215 CTR 74 (Bom.)(High Court)*

### **S. 276B : Offences and prosecutions – Failure to pay tax – Personal attendance**

Complaint was that directors and senior manager (petitioner) of company did not deduct tax from payments to employees and did not deposit amount with revenue, in view of fact that there was no allegation that petitioners misappropriated/defaulted

any amount and fact that they were holding responsible position and it would be inconvenient for them to appear in person in Court on every date, Magistrate should allow their application under section 205 of Code of Criminal Procedure, 1973, dispensing with their personal attendance in Court

*G.P. Pandey v. UOI (2005) 275 ITR 212 / 151 Taxman 79 (Jharkhand)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Circular dt. 28-5-1980**

Conditions for exempting assessee from prosecution are available as per circular dated

28-5-1980 of Finance Department, it will not be open for authorities then also to have discretion in matter of launching prosecution. (A.Y. 1985-86)

*Vijaysingh v. UOI (2005) 278 ITR 467 / (2006) 150 Taxman 117 / 199 CTR 653 (MP)(High Court)*

**S. 276B : Offences and prosecutions – Failure to comply with section 269U [S. 276AB]**

Fact that process has already been issued is no bar to drop proceedings if complaint on very face of it does not disclose any offence against accused.

*Aerens Entertainment Zone Ltd. v. Jt. CIT (2005) 275 ITR 483 / (2004) 139 Taxman 305 (Delhi) (High Court)*

**S. 276B : Offences and prosecutions – Not previously assessed to tax – Wilful evasion – Presumption (S. 276C/277) S. 132(4)**

A person who has not been previously assessed and has yet time to file return for relevant assessment year, cannot be prosecuted under section 276C. (A.Y. 1981-82)

*N. Srinivasan v. Uma Rani (Smt.) (2004) 270 ITR 77 / 141 Taxman 564 (Mad.)(High Court)*

**S. 276B : Offences and prosecutions – Wilful evasion of tax – Deletion of penalty**

**[S. 276 C, 277]**

Once penalties are cancelled on ground that there is no concealment, quashing of prosecution under section 276 C is automatic. (A.Y. 1981-82)

*Arvind Jain v. ACIT (Investigation) (2004) 271 ITR 31 / 154 Taxman 348 (P&H)(High Court)*

**S. 276B : Offences and prosecutions – Wilful evasion of tax – Deletion of penalty**

**[S. 276C, 277]**

Criminal prosecution will not be maintainable where penalty for concealment has been deleted. (A.Y. 1988-89)

*ITO v. Gagneja Traders (2004) 268 ITR 97 / 142 Taxman 303 / 191 CTR 111 (P&H)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax willful evasion of tax – Effect of deletion of penalty [S. 276C, 277]**

Adjudication on penalty cannot bind criminal court

*Atma Ram Properties P. Ltd. v. State thru ACIT (2004) 188 CTR 607 (Delhi)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Opportunity to examine witness**

Further opportunity to examine witnesses cannot be granted to petitioner accused if he failed to avail such opportunity earlier. (A.Y. 1996-97)

*G. Gopi v. G. Thiagarajan (2004) 266 ITR 378 / 138 Taxman 138 (Mad.)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Sleeping partner**

Where accused - partner was, admittedly, a sleeping partner, prosecution would not lie against her. (A.Y. 1986-87)

*ITO v. Karma Trading Co. (2004) 267 ITR 170 / 136 Taxman 568 / 197 CTR 536 (P&H)(High Court)*

**S. 276B : Offences and prosecutions – Extension to file return [S. 276CC]**

Where accused was granted extension of time to file returns and in three out of six cases against accused there was acquittal by trial court, conviction had to be set aside in other cases too. (A.Ys. 1983-84 to 1988-89)

*K. Palvannan (Dr) v. ACIT (2004) 271 ITR 38 / 144 Taxman 374 (Mad.)(High Court)*

**S. 276B : Offences and prosecutions – Material while framing charge – Failure to produce accounts and documents [S. 276D]**

In case of challenge to order framing notice under section 251 of the code of Criminal Procedure, 1973 on ground that relevant material had not been considered by trial court at the time of framing of notice, petitioners must approach trial court and place before it any material which needed any attention while framing of such notice.

*Mohan Anand v. UOI (2004) 139 Taxman 351 (Delhi)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Sanction for prosecution –Compounding of an offence [S. 279]**

Court cannot issue a direction to commissioner under section 482 of Code of Criminal Procedure, 1973, to compound an offence.

*V.G. Paneerdas & Co. P. Ltd. v. Nagarathna, ACIT (2004) 267 ITR 383 / 144 Taxman 467 (Mad.)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Sanction for prosecution – Permission to inspection [S. 279]**

The court has directed ITO to permit assessee or his representative to have inspection of declaration issued in Form No. 10-I in respect of those declaration where action was being contemplated.

*S. Karunakaran (Dr). v. ITO (2004) 141 Taxman 295 / 190 CTR 183 (Mad.)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay Tax – Position prior to 1-4-1997 – Omission of provision of section 276B**

Section 6 of the General Clauses Act, will not apply to omission of any provision in the Act but will apply only to repeal. Where penal provision of section 276C was completely omitted from 1-4-1989, it could be considered as if it had never been in the statute book and for the same no prosecution could be launched or continued. (A.Y. 1986-87)

*Narendrakumar Khandelwal v. UOI (2003) 259 ITR 593 / 128 Taxman 60 / 180 CTR 553 (MP)(High Court)*

**S. 276B : Offences and prosecutions – Failure to file – Form 15A and 20A**

Where assessee had shown in its return for relevant assessment year interest paid to concerned depositors but due to inadvertence it had not annexed Form No. 15A along with return and had also not filed return in Form No. 20A, as required under rule 37(2)(&), acquittal of accused was justified. (A.Ys. 1978-79 to 1984-85)

*UOI v. Pyarelal Tarachand (2003) 180 CTR 551 / 264 ITR 525 / (2004) 135 Taxman 97 (MP)(High Court)*

**S. 276B : Offences and prosecutions – Failure to pay tax – Writ**

Writ application at the stage of decision to initiate prosecution under section 276B was not maintainable.

*Shaw Wallace & Co. Ltd. v. CIT (TDS) (No. 1) (2003) 264 ITR 241 / 185 CTR 444 / (2004) 136 Taxman 155 (Cal.)(High Court)*

**Section 276C : Wilful attempt to evade tax, etc.**

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Return of firm – Proof of signing of return by accused [S. 277, 278]**

Accused partner of the assessee firm not having raised any objection at any point of time that the return did not bear his signature or that it was not filed by him and paid the penalty levied in the assessment, the accused could not be acquitted of the offences under sections 276C, 277 and 278 on the ground that the prosecution has not been able to prove that the return was signed by the accused partner : the impugned orders are set aside and the judgment of conviction passed by the Chief Magistrate is restored. (A. Y. 1988-89)

*ITO v. Mangat Ram Norata Ram Narwana and another (2011) 336 ITR 624 / 57 DTR 257 / 242 CTR 113 / 200 Taxman 432 (SC)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Purchase of property**

Assessee shown consideration far less than amount actually paid in application under section 230A, accused was charged on two counts under IPC and one count under Income Tax Act. Accused was sentenced for seven days. High Court confirmed the charge under IPC and set aside the conviction under Income Tax Act since the excess amount was paid by the accused's sister. On appeal the Supreme Court held that because of peculiar facts of the case and lapse of long time, sentence restricted to that undergone. Matter not to be taken as precedent. (A.Y. 1983-84)

*P. Soundarya v. ITO (2008) 301 ITR 50 / 171 Taxman 110 / 216 CTR 20 (SC)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty order set aside**

When the penalty order was set aside, the magistrate should decide the case of prosecution in accordance with law including the issue of whether prosecution should be quashed as penalty order has been set aside. (A.Ys. 1980-81 to 1982-83)

*V. Gopal v. ACIT (2005) 279 ITR 510 / 142 Taxman 549 / 193 CTR 392 / 185 Taxation 439 (SC)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Benefit of Pardon – Code of Criminal Procedure, 1973 [S. 277]**

If accused makes a full and complete disclosure to get benefit of pardon under section 306 of the Code of Criminal Procedure, 1973, the prosecution under section 276C / 277 should not be allowed to proceed. (A.Ys. 1989-90 to 1996-97)

*Dipesh Chandak v. UOI (2004) 270 ITR 85 / 140 Taxman 166 / 191 CTR 145 / (2005) 184 Taxation 17 (SC)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty Cancelled – Prosecution quashed**

Levy of penalty under section 271(1)(c) and prosecution under section 276C are simultaneous, hence once penalties under section 271(1)(c) are cancelled, quashing of prosecution under section 276C is automatic. (A.Ys. 1983-84 to 1986-87)

Levy of penalty under section 271(1)(c) and prosecution under section 276C are simultaneous. Once the penalty under section 271(1)(c) has been cancelled on the ground that there is no concealment, the quashing of prosecution is automatic. (A.Ys. 1983-84 to 1986-87)

*K. C. Builders & Anr. v. ACIT (2004) 265 ITR 562 / 135 Taxman 461 / 186 CTR 721 / 179 Taxation 418 (SC)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty set aside – No Prosecution**

Where penalty is set aside in appeal by the Tribunal which was confirmed by the High Court, holding that the non disclosure of the items of income was purely due to mistake on the part of the assessee. In the light of the decision of the Court it cannot

be said that the assessee has made a wilful attempt to evade taxes, therefore, assessee cannot be prosecuted for alleged offence under section 276C of the Act. (A. Y. 1989-90)

*N. S. Babu v. CIT (2011) 50 DTR 27 (Ker.)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Two different agreements for same construction – Charge – IPC [S. 193]**

Since two agreements for the same purpose with different values were found during search, as per explanation under section 276C, prima facie material is available against the petitioner to frame charge under section 276C. (A.Ys. 1985-86 to 1987-88)

*Vijayalalitha v. ITO (2010) 327 ITR 261 / 48 DTR 324 / 237 CTR 500 (Mad.)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

Where the penalty levied under section 271(1)(c) of the Act have been cancelled by the High Court, criminal complaint launched on the basis of the penalty order is also liable to be quashed.

*Harkawat & Co. & Ors. v. UOI (2009) 29 DTR 324 / 328 ITR 624 / 187 Taxman 33 (MP)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – 277 and 278 – Penalty deleted**

On deletion of penalty under section 271(1)(c). Prosecution to under sections 276C, 277 and 278 has to be quashed. (A.Y. 1980-81)

*SSR Pirodia & Ors. v. ACIT (2008) 219 CTR 295 / 302 CTR 1 / 171 Taxman 221 (MP)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

Tribunal on its merits given the finding that there was no case for penalty under section 271(1)(c) – Prosecution under section 276C has to be quashed. (A.Y. 1992-93)

*Rakesh Kalia v. ITO (2007) 210 CTR 342 / 295 ITR 486 / 161 Taxman 111 (Delhi)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Partner – S. 278 Prospective**

Sec. 278B was inserted w.e.f. 1-10-1975, being prospective in operation, the partner of firm cannot be prosecuted for offence under section 276 & 277 with the aid of s. 278B, which were committed before s. 278B was inserted. (A.Y. 1975-76)

*Kusumchand Sharadchand & Anr. v. UOI & Anr. (2006) 201 CTR 385 / 286 ITR 370 / 153 Taxman 458 (MP)(High Court)*



**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Pendency of appeal**

If appeal is pending against assessment order, prosecution proceedings should not be launched

*Naresh Prasad v. UOI (2005) 276 ITR 633 / 143 Taxman 291 (Patna)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax- Concealment of income**

Concealment of income would not ipso facto entail criminal prosecution where assessee's case is covered by Amnesty Scheme as per Circular No. 441, dated 15-11-1985. (A.Y. 1985-86)

*Bawa Mahesh Singh v. ITO (2005) 273 ITR 405 / 196 CTR 282 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Appeal partly allowed**

Where an appeal against assessment order, Tribunal partly allowed assessee's claim for deduction and remanded case on other claim of assessee, penalty imposed on assessee under section 271(1)(c) could not survive and, therefore, original assessment having been modified, prosecution proceedings too were to be quashed. (A.Y. 1983-84)

*Tata Robins Fraser Ltd. v. State of Jharkhand (2005) 275 ITR 268 / 197 CTR 156 (Jharkhand)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Successor can continue the proceedings**

Where initially the authorization was given to one officer who filed a complaint and, subsequently, he relinquished the office or was transferred, his successor could proceed with the same complaint as a complainant.

*ITO v. Balaji Chit Fund (No. 1) (2003) 264 ITR 428 / (2004) 186 CTR 293 (Mad.)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Assessment set a side**

There is no merit in contention that once order of assessment has been set aside, offence of tax evasion under section 276C cannot be tried. (A.Y. 1977-78)

*Gheru Lai Bal Chand v. ITO (2003) 264 ITR 355 / (2004) 137 Taxman 397 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Finding in assessment is not sufficient or conclusive**

Only assessment order based on estimate or opinion of the ITO that assessee had filed incorrect and false return to evade tax, is not sufficient to launch criminal

proceedings.

(A.Y. 1982-83)

*Raghunath Prasad Mohanlal v. UOI (2003) 259 ITR 663 / 179 CTR 48 / 126 Taxman 487 (MP)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

If penalty is quashed, prosecution need not continue. (A.Ys. 1985-86, 1986-87)

*Laxmi Stores v. UOI (2003) 131 Taxman 258 / (2004) 188 CTR 592 (Raj.)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

If penalty for concealment is deleted, criminal proceedings cannot continue. (A.Y. 1986-87)

*Ajay Tent House v. ITO (2003) 133 Taxman 807 / 264 ITR 266 / (2004) 189 CTR 93 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

If the penalty proceedings have been set aside in the departmental proceedings, then the very basis of launching of the prosecution against the assessee stands knocked down.

*Gupta Construction Co. v. ITO (2003) 260 ITR 415 / (2004) 135 Taxman 88 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Penalty deleted**

Prosecution is not maintainable where Tribunal had set aside the order levying penalty levied under section 271(1)(c). (A.Ys. 1985-86, 1986-87)

*UOI v. Smt. Birdibai Garg (2003) 127 Taxman 182 / 260 ITR 389 / 179 CTR 345 (MP)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Effect of delay in Prosecution**

Though the cause of action for initiating prosecution is furnished on the date when income is concealed or on date when concealment becomes known to the Department, once proceedings are finalised, the prosecution has to be commenced within a reasonable period. (A.Y. 1975-76)

*Narain Dev Dhablania v. ITO (2003) 262 ITR 206 / 184 CTR 54 / (2004) 134 Taxman 70 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Effect of Pendency of Reassessment**

Because of the pendency of reassessment, the prosecution cannot be whittled down and original assessment alone is to be considered for prosecution. (A.Y. 1982-83)  
*V. Sadasiva Chetty (HUF) v. ITO (2003) 264 ITR 527 / (2004) 136 Taxman 138 (Mad.)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Effect of Pendency of Appeal**

During pendency of appeal before Commissioner (Appeals), interim stay of criminal proceedings is to be granted. (A.Y. 1992-93)  
*Gauri Shankar Prasad v. UOI (2003) 261 ITR 522 / 133 Taxman 463 / 185 CTR 530 (Patna)(High Court)*

**S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Prima facie case**

Where no prima facie case was made out that assessee willfully concealed sale of bags of cement, prosecution of assessee under section 276C / 277 was unsustainable.  
*ITO v. Janta Trading Co. (2003) 263 ITR 24 / 132 Taxman 869 / 184 CTR 174 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Willful attempt to evade tax – Cancellation of bail**

Where bail was granted to accused partner in 2001 because he had been in jail custody for over 4 months, prayer for cancellation of bail was to be rejected. (A.Ys. 1987-88, 1997-98)  
*UOI v. Sharad Kumar (2003) 261 ITR 304 / 186 CTR 555 / 133 Taxman 870 (Patna)(High Court)*

**S. 276C : Offences and prosecutions – Willful attempt to evade tax – Order of acquittal**

Order of acquittal of accused cannot be reversed merely because a different view can be taken. (A.Y. 1980-81)  
*ITO v. Jagdish Ram Manak Chand Jain (2003) 133 Taxman 536 / 184 CTR 570 / 266 ITR 220 (P&H)(High Court)*

**S. 276C : Offences and prosecutions – Willful attempt to evade tax – Discharge application**

Where the petitioner had filed a petition for discharge even before the charges had been framed, petitioner's petition was rightly rejected. (A.Y. 1982-83)  
*V. Sadasiva Chetty (HUF) v. ITO (2003) 264 ITR 527 / 136 Taxman 138 (Mad.)(High Court)*

**Section 276CC : Failure to furnish returns of income**

**S. 276CC : Offences and prosecutions – Failure to furnish return of Income – Insignificant tax effect**

Where appellant had disclosed a tax liability of ₹ 644/- which on final assessment after appeal was determined at ₹ 1,360/- even though on basis of assessment completed Assessing Officer had determined tax liability at ₹ 4,450/- Prosecution was not maintainable in view of proviso (ii)(b) to section 276CC, as final tax assessed is below Rs 3000. (A.Y. 1982-83)

*Guru Nanak Enterprises & Others v. ITO (2005) 279 ITR 30 / 149 Taxman 565 / 199 CTR 710 / (2006) 192 Taxation 855 (SC)*

**S. 276CC : Offence and prosecutions – Failure to furnish return of Income – Belated return S. 139(4) [S. 278E]**

Inaction to file return under sub-section (1) of section 139 will not be condoned even if a return is filed under sub-section (4) of section 139.

Whether there is willful failure to furnish return is matter which is to be adjudicated factually by the court which deals with the prosecution. There is a statutory presumption prescribed in section 278E. The Court has to presume the existence of culpable mental state and absence of such mental state can be pleaded by any accused as a defence in respect to the act charged as an offence in the prosecution. (A.Y. 1988-89)

*Prakash Nath Khanna & Another v. CIT (2004) 266 ITR 1 / 135 Taxman 327 / 187 CTR 97 / 180 Taxation 18 (SC)*

**S. 276CC : Offences and prosecutions – Failure to furnish return of income – Karta liable for tax offence of the HUF**

Member of HUF cannot be held liable for delay in filing of the return of HUF, though he has participated in the assessment proceedings. (A.Y. 1980-81, 1981-82)

*Roshan Lal v. Special Chief Magistrate (2010) 322 ITR 353 / (2009) 177 Taxman 341 / 20 DTR 206 (All.)(High Court)*

**S. 276CC : Offences and prosecutions – Failure to furnish return of Income – Filing of return in response to notice under section 148 – (S. 148) Mens rea**

Assessee is not exonerated from prosecution under section 276CC for not filing the returns within statutory due date as per section 139(1) though the returns are filed in response to notice under section 148, further, as there is a statutory presumption prescribed under section 278E, the burden is on the assessee to show that there was no willful default.

*R. Inbavalli v. ITO (2010) 48 DTR 276 / 327 ITR 226 / 236 CTR 613 (Mad.)(High Court)*

**S. 276CC : Offence and prosecutions – Failure to furnish return of income – Reasonable cause [S. 278B]**

Where the delay in filing the return was explained by the accused firm due to the illness of the old part – time accountant of the accused firm, the cause shown by the

accused firm was held to be a reasonable cause for delay in filing the return of its income. (A.Y. 1981-82)

*UOI v. Bhavecha Machinery & Ors. (2009) 17 DTR 387 / 320 ITR 263 (MP)(High Court)*

### **S. 276CC : Offences and prosecutions – Failure to furnish return of income – Personal appearance**

Where department had filed petitions before Trial Court, under section 313 of Criminal Procedure Code, praying to fix a date for personal appearance of respondents for questioning under section 313(a) of Criminal Procedure Code and those petitions were pending before Trial Court, Income-tax Department could not approach High Court to direct Trial Court to fix date for personal appearance of respondents for questioning under section 313(a) of Criminal Procedure Code.

*ACIT v. J. Jayalalitha (Ms.) (2005) 273 ITR 38 / 146 Taxman 235 (Mad.)(High Court)*

### **Section 276CCC : Failure to furnish return of income in search cases**

### **S. 276CCC : : Offences and prosecutions – Search cases – Failure to furnish return – Failure to furnish return of income in search cases – Serving the notice on CA**

Where notice under section 158BC was served on assessee's CA and assessee admittedly had its knowledge but did not file return in response thereto and, hence, criminal proceedings were started against it, Trial Court was not justified in discharging assessee accused on ground that notice under section 158BC was not served on it.

*Y. Rajendra, Dy. CIT v. Khoday Eshwarsa & Sons (2005) 272 ITR 448 / 144 Taxman 629 / 195 CTR 0057 (Karn.)(High court)*

### **Section 276DD : Failure to comply with the provision of section 269SS [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

### **S. 276DD : Offences and prosecutions – Failure to comply with section 269SS – Effect of amendment**

Prosecution for alleged offence committed prior to coming into force of Direct Tax Laws (Amendment) Act, 1987, which deleted section 276DD, after coming into force of above amendment, would not be maintainable.

*UOI v. Abdul Zarkhan (2003) 127 Taxman 179 / 260 ITR 358 / 179 CTR 547 (MP)(High Court)*

### **S. 276DD : Offences and prosecutions – Failure to comply with section 269SS – Sleeping partner**

Complaints against partners which were not in any manner involved in running of partnership firm, had to be quashed.

*Mohan Singh v. ITO (2003) 262 ITR 547 / 138 Taxman 146 (P&H)(High Court)*

**Section 276E : Failure to comply with the provision of section 269T [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]**

**S. 276E : Offences and prosecutions – Failure to comply with section 269T – Effect of omission of s. 276E**

After omission of section 276E, prosecution there under for offences committed prior to omission was not permissible. (A.Y. 1984-85)

*Shewaram & Sons v. UOI (2003) 263 ITR 656 / 181 CTR 316 / 141 Taxman 16 (MP)(High Court)*

**Section 277 : False statement in verification, etc.**

**S. 277 : Offences and prosecutions – False Statement in Verification – Firm – Forgery of signature of partner**

Where in appeal against assessment of firm, firm had been found to be in existence, complaint on alleged ground of forgery of signature of one partner on declaration in section 184(7) would not lie. (A.Y. 1981-82)

*ITO v. Balaji Chit Fund (No. 2) (2003) 264 ITR 445 / 186 CTR 291 (Mad.)(High Court)*

**Section 278 : Abetment of false return, etc.**

**S. 278 : Offences and prosecutions – Abatement of false return – Company**

A company cannot be prosecuted for offence under section 276C, 277 and 278 read with section 278, since each one of these sections require imposition of mandatory terms of imprisonment coupled with a fine and leaves no choice to Court to impose only fine. (A.Y. 1985-86)

*ACIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 / 132 Taxman 165 / 184 CTR 193 (SC)*

**Section 278AA : Punishment not to be imposed in certain cases**

**S. 278AA : Offences and prosecutions – Reasonable cause – No punishment – Punishment not to be imposed in certain cases**

It is for appellant to produce sufficient evidence for non-deposit of tax deducted at source during criminal trial to avail of benefit of section 278AA. (A.Y. 1995-96 to 1999-2000)

*Shaw Wallace & Co. Ltd. v. CIT (TDS) (No. 2) (2003) 264 ITR 243 / 185 CTR 447 / 136 Taxman 346 (Cal.)(High Court)*

**Section 278B : Offences by companies**

**S. 278B : Offences and prosecutions – Companies – Partners of firm**



Complaints for offences under sections 276C, 277 and 278B was filed against the firm and all the partners. In absence of any specific allegation against the partners of the firm other than those who had verified the return of the firm that they were responsible for the conduct of the business of the firm, prosecution against these partners was held to be not sustainable.

*Onkar Chand & Co. & Ors. v. Income-tax Department (2009) 22 DTR 57 / 237 CTR 530 (HP) (High Court)*

#### **S. 278B : Offences and prosecutions – Companies – *Prima facie* case – Directors**

Unless complaint disclosed a *prima facie* case against applicant-directors of their liability and obligation as principal officers in the day-to-day affairs of company as directors of the company under section 278B, the applicants could not be prosecuted for offences committed by the company.

*Homi Phiroze Ranina v. State of Maharashtra (2003) 131 Taxman 100 / 263 ITR 636 (Bom.)(High Court)*

#### **Section 279 : Prosecution to be at instance of Chief Commissioner or Commissioner**

#### **S. 279 : Offences and prosecutions – Sanction – Chief Commissioner – Opportunity of Hearing – Commissioner**

No opportunity of hearing is required to be given to accused before the sanction is given under section 279 by Commissioner. (A.Y. 1985-86)

*ACIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 / 132 Taxman 165 / 184 CTR 193 (SC)*

### **CHAPTER XXIII MISCELLANEOUS**

#### **Section 281 : Certain transfers to be void**

#### **S. 281 : Certain transfers to be void – Recovery of tax – Sale and attachment of property**

Property transferred by assessee during pendency of recovery proceedings, can be attached and sold without filing suit, as section 281 statutorily declaring such transfer as void provides for such mode. Notice to transferee is invariably not necessary before taking such action.

*Karnail Singh v. UOI (2011) Tax. L. R. 648 / 63 DTR 336 / 245 CTR 437 / 200 Taxman 31 (P&H)(High Court)*

#### **S. 281 : Certain transfers to be void – Recovery – Civil suit of a creditor**

Where the Department desires to declare the transaction entered into by the assessee in default as void under the provisions of section 281 (1) of the Act, the department

being in the position of a creditor has to file a civil suit for a declaration that the transfer is void.

*Ryan Plast v. ITO & Ors. (2009) 19 DTR 285 (Bom.)(High Court)*

### **S. 281 : Certain transfers to be void – ITO cannot declare a transfer as void – Civil Court**

The assessee's property, which was acquired after a proper verifications, was attached by the TRO and declared the purchase as a void transfer. The Hon'ble High Court, on a Writ Petition by the assessee held that ITO could not have declared sale/transfer of land to assessee as void and such rights of department qua assessee could only be decided by a competent court of Civil Jurisdiction. Thus, initiation of proceedings under section 281(1) and attachment of the property by the Department is bad-in-law.

*Suchila (Smt.) v. UOI (2008) 175 Taxman 222 / 302 ITR 182 / 219 CTR 278 (P&H)(High Court)*

### **S. 281 : Certain transfers to be void – Recovery – Powers of IT Authorities**

Under Sec. 281, IT authorities having no power to declare a transfer null and void – Appropriate remedy is to file suit under section 11(6) of Schedule II to have the transfer declared Void.

*Shamim Bano G. Rathi & Anr. v. OBC Ltd. 214 CTR 110 / 306 ITR 34 / 1 DTR 29 (Bom.)(High Court)*

### **Section 281B : Provisional attachment to protect revenue in certain cases**

#### **S. 281B : Provisional attachment – Recovery – Attachment – Garnishee Proceedings – Fixed Deposits – Fixed deposit is not the property of the assessee [S. 222, 226(3)]**

Order of attachment passed under section 281B of the fixed deposits of the petitioners and encashment of the fixed deposits after the expiry of the period of bank guarantee, was illegal and unjustified.

*Gopal Das Khandelwal & Ors. v. UOI & Ors. (2010) 45 DTR 47 / 235 CTR 253 / 192 Taxman 54 (All.)(High Court)*

#### **S. 281B : Provisional attachment – Recovery – Basis of opinion – No past defaults**

In the absence of any material or circumstances on the basis of which requisite opinion could be formed under section 281B and in the absence of any history of Past defaults of the petitioner, the impugned order passed under section 281B provisionally attaching the bank accounts of the petitioner and extension thereof by the CIT was wholly illegal and unwarranted.

*Raghu Ram Grah P. Ltd. v. ITO & Ors. (2006) 194 Taxation 76 / 201 CTR 268 / 281 ITR 147 / 152 Taxman 448 (All.)(High Court)*

**S. 281B : Provisional attachment – Ownership of property to be attached – Transfer – Ordinary meanings**

Ordinary meaning of 'transfer' under Transfer of Property Act, 1882, read with Registration Act, 1908, is to be understood in a liberal sense for purpose of Income-tax Act; where everything for transfer of property excepting execution and registration of conveyance was completed, transferor-assessee could not be treated as owner of property for purpose of attachment of such property for recovery of his arrears.

*Electro Zavod (India) (P.) Ltd. v. CIT (2005) 278 ITR 187 / 149 Taxman 658 / 199 CTR 612 (Cal.)(High Court)*

**S. 281B : Provisional attachment – Jointly owned property – Attachment of undivided share**

In case of jointly owned property, only undivided share of assessee can be attached provisionally under section 281B and not entire property. (A.Y. 1987-88, 1988-89)

*S. Subramanian v. CIT (2004) 136 Taxman 635 (Mad.)(High Court)*

**S. 281B : Provisional attachment – Recording of reasons – Scope of Provision**

Extension of period of attachment without recording reasons would be invalid. (A.Ys. 1995-96, 1996-97)

*Seshasayee Paper & Boards Ltd. v. CIT (2003) 261 ITR 63 / 129 Taxman 979 / 186 CTR 567 (Mad.)(High Court)*

**Section 282 : Service of notice generally**

**S. 282 : Service of notice generally – Received by assessee – Service on counsel authorized to receive all documents (S. 288, Income Tax (Appellate Tribunal) Rules, 1963. R. 35, Code of Civil Procedure Code, O. 3. R. 3)**

The assessee's counsel who duly authorized to receive all documents on behalf of the assessee, received the certified copy of the order of the Tribunal, which was passed it on to another counsel of the assessee from whom the assessee collected the certified copy of order. On appeal to the High Court with an application for condonation of delay, in filing the appeal, contending that certified copy of the order of Tribunal was not served on the assessee by the office of the Tribunal in accordance with Rule 35 of the Income Tax (Appellate Tribunal) Rules, 1963. The Court held that the phrase "received by the assessee" means received by assessee either him self or through his authorized agent. The counsel was empowered to accept the copy of the order of the Tribunal and hence, the service on him was valid service for purposes of calculation of limitation for filing an appeal. Thus the appeal filed by the assessee was barred by limitation. (A. Y. 1997-98).

*Sultanpur Kshetriya Gramin Bank v. Jt. CIT (2011) 336 ITR 156 / 245 CTR 64 (All.)(High Court)*

**S. 282 : Service of notice generally – Process fee – Copies of Transfer Petition**

Petitioners were required to file process fee, copies of transfer petition and amendment petition with correct address of all respondents for effecting service of notice on respondents, however, petitioners filed an application before instant Court seeking an exemption from filing spare copies of annexures attached to transfer petition. Said application was dismissed. Accordingly, petitioners were directed to file process fee and to furnish correct and latest addresses of respondents. Since petitioners had not complied with said order transfer petition stood dismissed for want of correct address of respondents. Petitioners filed instant application for restoration of transfer petition, praying for restoration as against respondents on whom notices were served. Transfer petition was allowed to the extent the address were furnished and order of dismissal would operate only against those respondents whose addresses were not furnished.

*UOI v. Jayant Oils & Derivates Ltd. (2010) 187 Taxman 143 (SC)*

**S. 282 : Services of notice generally – Minor Son – Validity [S. 148](R. 17, Order 5 of CPC]**

There being nothing on record to show that the erstwhile accountant of the assessee to whom notice under section 148 was served was an agent empowered to accept the service and service of fresh notice upon minor son of the assessee was not valid service. (A.Y. 1995-96)

*Bhagirath Rajput v. CIT (2010) 36 DTR 372 (MP)(High Court)*

**S. 282 : Service of notice generally – ITAT President requested to require assessee to file form no 36 on change of address instead of vide letter**

In case of change of address of assessee, Tribunal to make it mandatory to amend their appeal memo or cross objections and form no 36 to facilitate proper service of notice and avoid passing of ex-parte order. (A.Y. 1993-94)

*Jagjivandas Nandlal & Co. v. ITAT (2010) 195 Taxman 157 / 47 DTR 145 / 236 CTR 274 / (2011) 333 ITR 374 (Bom.)(High Court)*

**S. 282 : Service of notice generally – No proof of service – Not curable**

Notice was not served within stipulated time. Mere giving of dispatch number will not render the said finding to be perverse. In the absence of notice being served, the Assessing Officer had no jurisdiction to make assessment. Absence of notice can not be held to be curable under section 292BB of the Income tax Act. (A.Y. 1996-97)

*CIT v. Cebon India Ltd. (2009)184 Taxman 290 / 229 CTR 188 (P&H)(High Court)*

**S. 282 : Service of notice generally – Presumption – Speed post – Proof of service within time**

There is no presumption in law that any notice sent by speed post must have been served upon the assessee within 24 hours. (A.Y. 2001-02)

*Nulon India (2009) 183 Taxman 229 (Delhi)(High Court)*

**S. 282 : Service of notice generally – Return of notice – Registered Post – Assessment**

Notice under section 143(2) was sent by registered post, which was received back undelivered. The notice ought to have been sent along with acknowledgment due. Hence, no notice under section 143(2) of the Act had been served upon the assessee within prescribed period, and therefore the assessment was invalid. (A.Y. 2001-02)

*CIT v. Eqbal Singh Sindhana (2008) 304 ITR 177 / 212 CTR 341 / 162 Taxman 107 (Delhi)(High Court)*

**S. 282 : Service of notice generally – Postal receipt – Proof of service**

In absence of any evidence in the form of postal receipt to demonstrate that the notice under section 148 of the Act was actually sent by registered post and was actually served upon the assessee, the notice is deemed not to be served upon the assessee. (A.Y. 1998-99)

*CIT v. Avtar Singh (2008) 5 DTR 55 / 304 ITR 333 / 219 CTR 588 (P&H)(High Court)*

**S. 282 : Service of notice generally – Notice sent by registered post – Not returned – Assumption of service**

Where notice is sent by registered post to the address given by the assessee and the notice is not received back unserved. The High Court held that notice was duly served as per section 282 read with Order V of the Civil Procedure Code.

*CIT v. Yamu Industries Ltd. (2007) 201 Taxation 220 (Delhi)(High Court)*

**S. 282 : Service of notice generally – Participated in the proceedings – Objection not sustainable**

In a case where assessee participates in proceedings, contests issue on merits and does not raise any objection, authorities have no jurisdiction to set aside orders on ground of irregularity in service of notice

*CIT v. Premium Capital Market & Investment Ltd. (2005) 275 ITR 260 / 198 CTR 680 / 151 Taxman 194 (MP)(High Court)*

**S. 282 : Service of notice generally – Burden of proof – Affidavit**

Assessee had filed an affidavit stating that it had not received notice under section 143(2), no substantial question of law arose from Tribunal's order holding that in face of affidavit filed on behalf of assessee, initial burden on assessee to prove non-receipt of notice had been discharged and that onus now lay upon revenue to prove that notice under section 143(2) had in fact been served upon assessee by registered post. (A.Y. 1995-96)

*CIT v. Lunar Diamonds Ltd. (2005) 146 Taxman 691 / 281 ITR 1 / 197 CTR 312 (Delhi)(High Court)*

**S. 282 : Service of notice generally – Validity of service – Service of notice on father of assessee**

Where notice was served on managing partner (father of assessee) of firm in which assessee was partner, there was sufficient compliance with section 282. (A.Y. 1975-76)

*Latha Chandy v. CIT (2003) 127 Taxman 226 / 260 ITR 385 / 179 CTR 463 (Ker.)(High Court)*

**S. 282 : Service of notice generally – Reassessment – Service of notice on Chartered Accountant [S. 148]**

Service of notice under section 148 on a chartered accountant who was not empowered to receive such notice on behalf of the assessee company or any other person who was not authorised to receive was not a valid service of notice on the assessee, more so when it was not shown that the assessee was keeping out of way for the purpose of avoiding service of notice or that there was any other reason that the notice could not be served on the assessee in the ordinary way and therefore, assessment completed pursuant to said notice was bad in law. (A. Y. 1999-2000).

*Harsingar Gutkha (P) Ltd. v. Dy. CIT (2011) 138 TTJ 318 / 129 ITD 315 / 54 DTR 122 (Luck.)(Trib.)*

**S. 282 : Service of notice generally – Member of Family – (Order V, Rule 15, of The Code of Civil Procedure, 1908)**

Where assessee is absent from his residence at time when service of notice is sought to be effected on him and there is no likelihood of his being found at his residence within reasonable time and he has no agent empowered to accept service of notice on his behalf, service of a notice can be made on any member of assessee's family residing with him, whether male or female.

*ITO v. Gurbax Singh Gill (2010) 123 ITD 226 / 6 ITR 129 / (2009) 123 TTJ 846 / 25 DTR 198 (Amritsar)(Trib.)*

**S. 282 : Service of notice generally – Reassessment – Registered Post [S. 148]**

Notice sent by registered post to correct address, notice not returned. Fact that notice not sent with "acknowledgement due" not conclusive. Power of attorney issued to Chartered Accountant after date of notice and subsequent notices issued, notice valid. (A.Y. 2001-02)

*Avneesh Kumar Singh v. ITO (2010) 2 ITR 663 / 126 ITD 1 / 127 TTJ 250 / 32 DTR 385 (TM)(Agra)(Trib.)*

**S. 282 : Service of notice generally – Notice by Affixture – Orders of Rule 12 of 20 of CPE**

Service of notice by affixture without following the procedures laid down under order V of Rule 12 to 20 of CPC is invalid. The Assessing Officer has to record a reasoning that despite best and reasonable efforts, the notice could not be served in the ordinary course before directing to invoke the substituted mode of service through



affixture. Further the assessment completed on the basis of an invalid service of notice shall also be invalid.

*Dwarka Construction pvt. Ltd. v. ITO, ITA No. 1688/JP/2008, Bench – B, dt. 25th February, 2010 / Tax World, Volume – XLIII – Part 3 – March, 2010 – Page 98 (Jp.)(Trib.)*

**S. 282 : Service of notice generally – Courier – Reassessment [S. 148]**

Where department reopened assessment of assessee by sending notices through courier, since the department failed to produce the copy of acknowledgement in token of service of notices, it could be said that notices were not actually served and therefore, reassessment proceedings were to be quashed. (A.Ys. 2003-04, 2004-05) *ACIT v. Ashiana Automobiles (P) Ltd. (2010) 124 ITD 425 / 128 TTJ 589 / 35 DTR 308 (Patna)(Trib.)*

**S. 282 : Service of notice generally – Service or wife – Validity**

Service of notice on the wife of assessee in his absence is proper service. (A.Y. 1997-98)

*ITO v. Gurbux Singh Gill (2009) 123 TTJ 846 / 123 ITD 226 / 25 DTR 198 / 6 ITR 129 (Amritsar)(Trib.)*

**S. 282 : Service of notice generally – Validity Chartered accountant – No power of attorney**

Where notice was served on assessee's CA but there was no power of attorney on record in favour of such CA, such service of notice could not be treated as valid and ex parte assessment framed in pursuant to such notice was invalid. (A.Y. 1988-89) *Rajeev Kumar Doneria v. ACIT (2005) 94 ITD 345 / 95 TTJ 732 (Agra)(Trib.)*

**S. 282 : Service of notice generally – Principal Officer – Validity**

Where notice was not served on principal officer of assessee-company but on security guard as factory was not working and only security guards were present, since security guard had not been authorized to receive notice on behalf of company, it could not be held that notice had been properly served upon assessee. (A.Y. 1995-96)

*Sudev Industries Ltd. v. ITO (2005) 98 TTJ 97 (Delhi)(Trib.)*

**S. 282 : Service of notice generally – Burden of proof on revenue – Validity**

Where burden of proof is not discharged by revenue by placing relevant material to substantiate plea that assessee was served with proper notice, substituted service cannot be said to be one which was validly effected. (A.Ys. 1986-87 to 1997-98)

*P. Mahender Reddy v. ACIT (2005) 2 SOT 696 (Hyd.)(Trib.)*

**S. 282 : Service of notice generally – Not identified by the server – Validity**

Where notice under section 143(2) was served through process server on one 'A' who was neither a partner of assessee-firm nor an agent duly authorised to receive notice,

nor even its employee, and person having received said notice was neither identified by server, nor service was witnessed as required by rule 18, Order V of Code of Civil Procedure there was no valid service of notice on assessee under section 143(2). (A.Y. 1996-97)

*Hind Book House v. ITO (2005) 92 ITD 415 / 93 TTJ 224 (Delhi)(Trib.)*

**S. 282 : Service of notice generally – Service by Affixture – No evidence of independence person – Validity**

Where various notices were served upon assessee-firm under section 143(2) which were returned either on refusal of assessee to receive same or with postal remark 'left without address' and, therefore, Assessing Officer issued notice to assessee through affixation by notice server and witnessed by Income-tax Inspector, since there was no evidence of any independent person having been associated with identification of place of business of assessee nor that process server or Income-tax Inspector had personal knowledge of place of business of assessee and were, thus, in a position to identify same, it could not be said that service of notice was effected in accordance with statutory provisions. (A.Y. 1998-99)

*Ess Aar Exports v. ITO (2005) 94 ITD 484 / 95 TTJ 1083 (Delhi)(Trib.)*

**S. 282 : Service of notice generally – Registered Post – Service offer last date**

Notice under section 143(2) sent by RPAD on the last date of period of limitation, and served few days later, would not amount to valid service of notice.

*Adarsh Traders v. ACIT (2003) SOT 12 (Delhi)(Trib.)*

**S. 282 : Service of notice generally – Affixture – Civil Procedure Code**

Service by affixture in utter disregard of the provisions of Order V, rules 17, 19 & 20 would not be valid.

Before Affixture, serving officer has to use his due and reasonable diligence, and affixture has to be in the presence of witness by whom the house is identified. (A.Ys. 1992-93 to 1995-96)

*K. C. Verma (Dr.) v. ACIT (2003) 84 ITD 33 / 89 TTJ 129 (Delhi)(Trib.)*

**Section 288 : Appearance by authorised representative**

**S. 288 : Appearance by authorized representative – Stamp Duty – Power of attorney**

Stamp duty is leviable on authorization to be produced before Assessing Officer to represent an assessee. It shall have all the trappings of a power of attorney as defined in section 2(p) of the Kerala Stamp Act. Stamp duty in terms of section 44 is leviable.

*Saju K. Abraham v. ITO (2005) 142 Taxman 345 / 195 CTR 95 (Ker.)(High Court)*

**S. 288 : Appearance by authorised representative – Need not be a registered Income-tax practitioner – Income tax Rule – Qualification**

Under Rule 49(a), of the Income-tax Rules, 1962, an authorized Income-tax practitioner means any authorized representative as defined in clause (v) or clause (vi) or clause (vii) of section (2) of section 288 of the Income-tax Act, 1961, for appearing before the Tribunal. It cannot be read to mean that an authorized representative as defined in sub-section (2) has to get him self registered as an authorized Income-tax practitioner. Section 288(2) does not say that the authorized representative shall also be an authorized income tax practitioner registered under rule 54 and 55 of the Rules. The right given in this respect by the Act can not be diluted by the Rules nor can it be restricted, by specifying a procedure for registration. The right given to an assessee to appoint a qualified authorized representative cannot be denied. (A. Y. 2009-10)

*Vidya Sikshaa Educational and Charitable Trust v. CIT (2011) 11 ITR 236 (Chennai)(Trib.)*

**S. 288 : Appearance by authorized representative – Ex-Members – Practice before the ITAT**

The Tribunal has inherent jurisdiction to consider whether the parties who are appearing before it are properly entitled under the law to make appearance; Such Members who had resigned and terminated their contract of employment with the Government before confirmation cannot be said to hold any post and there is no question of any conditions of services being applicable to them after resignation. They cannot be treated as having been "retired" from service for purposes of Rule 13E and were not disqualified from appearing before the ITAT; On a plain reading of Rule 13E, it is prospective and applies only to Members who were in service as of 3.6.2009 or who join service thereafter. It has no application to Members who retired prior to that date.

*Concept Creations v. ACIT, (2009) 125 TTJ 433 / 120 ITD 19 / 29 DTR 25 (SB)(Delhi)(Trib.)*

**Section 292B : Return of income, etc., not to be invalid on certain grounds**

**S. 292B : Return of income, etc. not to be invalid on certain grounds – Notice under section 148 – Jurisdiction issue [S. 148]**

A notice contemplated under section 148 is a jurisdictional notice and is not curable under section 292B if it is not served in accordance with provisions of Act. (A.Y. 1964-65)

*CIT v. Shital Prasad Kharag Prasad (2006) 280 ITR 541 / (2005) 147 Taxman 441 / 196 CTR 162 (All.)(High Court)*

**S. 292B : Return of income, etc. not to be invalid on certain grounds – Jurisdiction – Not curable**

If notice, summons or other proceeding taken by an authority suffer from an inherent lacuna affecting his/its jurisdiction, same cannot be cured by having resort to section 292B. (A.Y. 1978-79)

*CIT v. Norton Motors (2005) 275 ITR 595 / 146 Taxman 701 / 200 CTR 604 (P&H)(High Court)*

**S. 292B : Return of income not to be invalid on certain grounds – Scope – Penalty notice not signed**

If a penalty notice is not signed, it is invalid and such deficiency cannot be cured under section 292B. (A.Y. 1985-86)

*CIT v. Aparna Agency (P.) Ltd. (2004) 267 ITR 50 / 139 Taxman 132 / 189 CTR 355 (Cal.)(High Court)*

**S. 292B : Return of income not to be invalid on certain grounds – Non issue of mandatory notice – Not curable**

Provisions of section 292B cannot be pressed into service for holding an assessment valid even in a case of non-issuance of a mandatory notice. (A.Y. 1993-94)

*S. Kumar Enterprises (Synfabs) Ltd. v. Jt. CIT (2005) 4 SOT 412 (Mum.)(Trib.)*

**S. 292B : Return of income not to be invalid on certain grounds – Notice issued in name of partners – Valid on other facts**

Where notice issued under section 148 clearly mentioned GIR No. allotted to firm and reflected intention of Assessing Officer to reopen assessment of firm, mere fact that said notice was issued in names of partners, would not make notice invalid, in view of section 292B.

(A.Y. 1998-99)

*Rama Boiled Modern Rice Mill v. ITO (2005) 97 ITD 379 / 99 TTJ 607 (Hyd.)(Trib.)*

**Section 292BB : Notice deemed to be valid in certain circumstances**

**S. 292BB : Notice deemed for valid in certain circumstances – Prospective – W.e.f. 1-4-2008**

Provisions of section 292BB have been inserted w.e.f. 1-4-2008 and therefore, it is applicable from A.Y. 2008-09 and it is not retrospective.

*Kuber Tobacco Products P. Ltd. v. Dy. CIT (2009) 117 ITD 273 / 120 TTJ 577 / 28 SOT 292 / 18 DTR 1 (2009) 310 ITR 300 (AT)(SB)(Delhi)(Trib.)*

**S. 292BB : Notice deemed for valid in certain circumstances – Notice by affixture – Reassessment [S. 148]**

In the absence of anything to show that there was any urgency to serve the notice under section 148 on the very next day after it was issued or any material on record to show or suggest that any effort was made by the Assessing Officer to serve the notice in the normal course before issuing the directions to serve the same by

affixture was not valid service. Section 292BB inserted w.e.f 1st April 2008, has not retrospective operation and therefore, it was no application for Asst. Year 2001-02.

*Arun Lal v. ACIT (2009) 30 DTR 178 / 126 TTJ 346 / 124 ITD 85 / 1 ITR 1 (TM)(Agra)(Trib.)*

#### **S. 292BB : Notice deemed for valid in certain circumstances – Assessment – Notice – Block assessment**

Assessing Officer having, not issued any notice under section 143(2) before completing the assessment under section 158BC(c), assessment was bad in law and liable to be quashed. Section 292BB does not save the same.

*ACIT v. Supreme Appar & Associates (2009) 30 DTR 229 (Mum.)(Trib.)*

#### **Section 292C : Presumption as to assets, books of account, etc.**

#### **S. 292C : Presumption as to assets, book of account, etc. – Unexplained investments – Failure rebut**

Presumption under section 292C is a rebuttable presumption wherein Assessee could rebut the claim of the Department on the strength of documents seized from his premises. Assessee having failed to rebut the presumption and thus failed to discharge the burden cast on him, the addition made by the revenue is justified.

*Surendra M. Khandhar v. ACIT & Ors. (2009) 224 CTR 409 / 321 ITR 254 / 22 DTR 18 (Bom.) (High Court)*

#### **Section 293 : Bar of suits in civil courts**

#### **S. 293 : Bar of suits in Civil Courts – Assets seized – Claim of interest under section 132B(4)**

Assessee can effectively invoke provisions of section 132B(4) for claiming interest on assets seized during search and seizure and can ask for payment of interest on amount of loss, if any, that was caused to it; however, such a relief cannot be claimed by filing a civil suit as section 293 creates a bar in bringing a civil suit against an order made under Act.

*Prem Kumar & Sons (HUF) v. UOI (2006) 280 ITR 152 / (2005) 148 Taxman 103 / 198 CTR 512 (Delhi)(High Court)*

#### **S. 293 : Bar of suits in Civil Courts – Validity of sale – Application of provisions**

Suit filed by the plaintiff Trust challenging the validity of sale held by the ITO was not barred by provision of section 293. Merely because the plaintiff trust did not object to or assert its right at time of sale by public auction despite being aware of sale, it was not stopped from claiming any right and title over suit properties. Thus auction sale was held null and void.

*Institute of Education v. Sri Sowcar A. Siddanna Endowment & Sri K.H. Ramaiah Memorial Endowment Trust (2003) 126 Taxman 181 / 181 CTR 264 (Karn.)(High Court)*

### **Section 295 : Power to make rules**

#### **S. 295 : Power to make rules – Power of CBDT – Fringe benefit on amenity**

CBDT has power to determine what is meant by 'fringe benefit' or amenity.

*Federal Bank Officers' Association v. UOI (2004) 140 Taxman 173 / 192 CTR 1 (Ker.)(High Court)*

## **Wealth-tax Act, 1957**

### **CHAPTER I Preliminary**

### **Section 2 : Definitions**

#### **S. 2(e) : Wealth-tax – Asset – Land taken on lease**

Assessee was in possession of land after expiry of lease. As the assessee does not have vested interest in land for a period exceeding six years, following the earlier year, the property was not liable to wealth tax. (A. Y. 1992-93).

*George Oakes Ltd. v. Dy. CWT (2011) 339 ITR 630 (Mad.)(High Court)*

#### **S. 2(ea) : Wealth-tax – Asset – Urban land – Building constructed – Exemption**

The building in the process of construction could not be understood as a building which had been constructed. The wording being that urban land would mean land on which building stands, such lands alone would qualify for exemption. (A.Y. 2000-01)

*CWT v. Giridhar G. Yadam (2010) 325 ITR 223 / (2009) 211 CTR 43 / 163 Taxman 372 (Karn.)(High Court)*

#### **S. 2(ea) : Wealth-tax – Asset – Industrial plots – Exemption**

Two years tax exemption period qua industrial plots held by assessee would be reckoned from date of acquisition of plots by it and not from date when permission to change land in use for industrial purpose was granted. (A.Ys. 1996-97 to 1998-99)

*Rockman Cycle Industries Ltd. v. CWT (2010) 191 Taxman 399 / (2010) 35 DTR 35 / (2010) 229 CTR 398 (P&H)(High Court)*

#### **S. 2(ea) : Wealth-tax – Asset – Urban land – Exemption**

Land on which construction not permitted not to be considered urban land hence, the value of land not includible in net wealth. (A.Y. 1993-94 to 1995-96)



*Amrit Lal Jindal and Sons (HUF) v. WTO (2010) 327 ITR 161 / 228 CTR 189 / (2009) 184 Taxman 143 / 29 DTR 33 (P&H)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Urban land – Land on which construction not permissible**

Land on which construction of a building is not permissible under any law for the time being in force is not an urban land and as such, is not an asset within the meaning of section 2(ea).

*Prabhakar Keshav Kunde v. CIT (2010) 194 Taxman 306 / 235 CTR 119 / 45 DTR 267 (Bom.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Commercial assets – Business of letting**

Commercial asset used by an assessee in business of letting out properties cannot be treated as an "asset" for purpose of Wealth Tax. (A.Ys. 1997-98 and 1998-99)

*CWT v. Shankaranarayana Industries & Plantations (P) Ltd. (2010) 194 Taxman 189 (Karn.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Annuity – Compulsory deposit scheme**

Deposits made by assessee under Compulsory Deposit Scheme (Income-tax Payers) Act, 1974, being 'purchased' by assessee themselves could not be treated as 'annuity' within meaning of section 2(e)(2)(ii) and, hence, could not be excluded from definition of word 'asset'. (A.Ys. 1978-79 to 1984-85)

*S.N. Agrawal v. CWT (2006) 280 ITR 263 / (2005) 144 Taxman 733 / (2004) 198 CTR 396 (All.) (High Court)*

**S. 2(ea) : Wealth-tax – Asset – Motor car**

Assessee had purchased a car, merely because in view of some dispute with seller it had not been registered in assessee's name, assessee could not take plea that car was not includible in its taxable wealth. (A.Y. 1993-94 to 1999-2000)

*Oswal Chemicals & Fertilisers Ltd. v. CWT (2006) 282 ITR 451 / 153 Taxman 169 / (2005) 196 CTR 545 (Delhi)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Agricultural land**

Land, as per findings of Tribunal, had history of agricultural use, and was shown as agricultural land in revenue records, its potentiality for non-agricultural use and fact that it was surrounded by building sites, would not change its character into non-agricultural land. (A.Ys. 1976-77 to 1979-80)

*CWT v. Shashiben (2005) 193 CTR 140 (Guj.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Route permit**

Minimum period for which a route permit could be granted was three years and maximum period was five years under Motor Vehicles Act, 1939, it could not be said that assessee had interest of 6 years or more in route permit; as such, such interest was to be excluded from assessee's wealth. (A.Y. 1984-85)

*CWT v. Kiran Devi (Smt) (2005) 277 ITR 344 / 147 Taxman 40 (All.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Lease premises after expiry of lease**

In case where lessee continued in possession even after expiry of lease but lessor had filed suit for eviction, property was not eligible to wealth tax. (A.Ys. 1984-85 to 1991-92)

*George Oakes Ltd. v. CWT (2004) 267 ITR 677 / 140 Taxman 51 / 190 CTR 536 (Mad.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Building let out to tenant**

Building let out to a tenant for commercial purposes could not be treated to be as asset taxable under section 3. (A.Y. 1993-94)

*Maynak Poddar (HUF) v. WTO (2003) 130 Taxman 500 / 262 ITR 633 / 181 CTR 362 (Cal.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Right to receive compensation**

Right to receive compensation on acquisition of property by Government and interest accrued thereon, is an "asset" with in the meaning of section 2(ea). (A.Y. 1986-87)

*P.V. Jacob v. CWT (2003) 131 Taxman 313 / 183 CTR 303 / (2004) 265 ITR 238 (Ker.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Value of annuities**

Value of annuities purchased by producers at instance of assessee – film director from the LIC in respect of remuneration receivable by him from different producers, by paying single premium, insurance, is includible in the net wealth of the assessee. The assessee however was entitled to avail of the benefit of section 5(1)(vii), to the extent provided therein.

*A. Varaprasada Rao v. CIT (2003) 260 ITR 489 / 135 Taxman 137 (Mad.)(High Court)*

**S. 2(ea) : Wealth-tax – Urban asset – Schedule 1 – Business premises**

Business premises in which business is carried on by firm in which assessee is partner, is to be excluded while computing net wealth of assessee. (A.Ys. 1974-75 and 1975-76)

*CWT v. L. Dorairaj (2003) 130 Taxman 490 (Mad.)(High Court)*

**S. 2(ea) : Wealth-tax – Asset – Ware house – Purpose of business**

In a case where the assessee owns a warehouse which is let out on rental basis and the same is not used by the assessee for the purposes of its business but is used by the tenant for its business, the warehouse is to be excluded as an asset in view of Section 2(ea)(i)(5) of the Act.

*Dy. CWT v. Hind Ceramics Pvt. Ltd., WTA No. 42 & 43/Kol.2010, dt.07-01-2011, 'B' Bench, BC AJ P. 27, Vol. 42-B, Part 5, February 2011 (Kol.)(Trib.)*

**S. 2(ea) : Wealth-tax – Asset – Compensation**

After notification for acquisition of assessee's land, there remains only a right to receive compensation, and same is not an asset as contemplated in section 2(ea) of the Wealth Tax Act.

*WTO v. Jarnail Singh (2010) 186 Taxman 14 (Mag.)(Chd.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Stock-in-trade**

Building was held as stock in trade it could not be included in definition of "asset" as per section 2(ea) even though pending completion of sale transaction and it was given on rent to purchasing party. (A.Ys. 1997-98 and 1998-99)

*Dy. CWT v. Brilliant Estate Ltd. (2010) 124 ITD 8 / (2009) 17 DTR 406 / 120 TTJ 716 (Indore)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Factory building – Lease to holding company**

Commercial property (factory building) which was leased to holding company, is subjected to Wealth Tax, and will not be covered by exception under section 2(ea)(v).

*Dy. CWT v. MIPCO Seamless Rings (Gujarat) Ltd. (2006) 156 Taxman 80 (Mag.)(Mum.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Commercial building – Business asset**

Commercial buildings let out by the assessee in pursuance of his business would not fall in the definition of asset in Section 2(ea).

*TGV Projects and Investments (P) Ltd. v. ACWT (2006) 153 Taxman 15 (Mag.)(Hyd.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset Property – Business asset**

Once item (3) of section 2(ea)(i) prescribes that property is required to be used for purpose of business or profession carried on, then in view of this specific provision and otherwise also, a property which was let out could not be held as a 'business asset' where assessee had not established that letting out of such property was business of assessee. (A.Y. 1997-98)

*Mafatlal Industries Ltd. v. WTO (2005) 95 ITD 66 / 95 TTJ 723 (Mum.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Agricultural land**

Where though it was established that land was assessed to revenue as agricultural land and also subjected to payment of land revenue but assessee had not discharged its burden that it was actually put to use for agricultural purposes or any cultivation was done on that land, land in question could not be treated as agricultural land. (A.Ys. 1990-91 to 1993-94)

*Sapthagiri Traders Ltd. v. ACIT (2005) 97 TTJ 239 (Chennai)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Agricultural land – 8 Kms of Municipal limits**

Agricultural land, if falls within distance of 8 kms from limits of Municipal Corporation and is located in a town with population of more than ten thousand, would fall in definition of urban land and would be included in value of assets for purpose of levy of

wealth-tax and would be chargeable to wealth-tax; classification of assets in section 2(ea) has not been on basis whether it is productive or unproductive asset; mere fact that assessee has to follow procedure for getting permission to convert urban land into colony does not support claim that there is prohibition under any law for construction of buildings on land in question so as to exclude it from category of 'asset'. (A.Ys. 1995-96 to 1999-2000)

*Tara Singh v. Dy. CWT (2005) 97 ITD 482 / 97 TTJ 941 (Amritsar)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – House – Continuous occupation**

A perusal of section 2(ea)(i)(3) makes it clear that continuous occupation and usage of house for business purpose is not necessary to get exemption; even if house is kept ready for business purpose, house is entitled for exemption. (A.Ys. 1998-99 to 2000-01)

*Tracstar Investment (P.) Ltd. v. Dy. CWT (2005) 1 SOT 115 (Mum.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – House – Continuous occupation**

It was not permissible for assessee to take stand in income-tax proceedings to declare income from property as 'house property income' for availing deduction under section 24 of Income-tax Act, 1961 and treat same property as 'business asset' to claim exemption under section 2(ea); as such where properties in question were subject to letting year after year and income arising therefrom had been taxed as 'house property income', properties were rightly taxed for wealth-tax purposes. (A.Y. 1997-98)

*Mafatlal Industries Ltd. v. WTO (2005) 95 ITD 66 / 95 TTJ 723 (Mum.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Building**

Where more than one floor is covered with walls and roof, it can be classified as 'building' under section 2(ea)(i). (A.Ys. 1997-98 to 2000-01)

*Pushpalata Kanodia (Smt.) v. WTO (2005) 92 ITD 500 / 93 TTJ 1095 (Hyd.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Business – Rented property**

Property rented out to joint-venture companies could not be said to have been used by assessee for business purpose within meaning of section 2(ea)(i)(3). (A.Y. 1997-98)

*Triveni Engineering & Industries Ltd. v. Dy. CIT (2005) 93 ITD 561 / 93 TTJ 806 (Delhi)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Urban – Land – Covered under Tamil Nadu Town Planning Act**

Where assessee-company's land was covered under Tamil Nadu Town Country Planning Act and development of such land was possible with permission of planning authority, merely because no such permission had been sought/granted by Planning Authority, it could not be contended that assessee's land was such on which

construction was not permissible so as to exclude it from assessee's wealth. (A.Ys. 1993-94 to 2000-01)

*Binny Ltd. v. ACWT (2005) 96 ITD 500 / 98 TTJ 726 (Chennai)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Stock exchange membership Card**

A stock exchange membership card is an 'asset' within meaning of section 2(e). (A.Ys. 1990-91 to 1992-93)

*V.G. Gajjar v. Dy. CWT (2005) 93 ITD 624 / 93 TTJ 70 / 1 SOT (Ahd.)(Trib.)*

### **S. 2(ea) : Wealth-tax – Asset – Madras Stock exchange membership**

Membership of Madras Stock Exchange is not an asset. (A.Ys. 1990-91 to 1992-93)

*Dy. CIT v. Govindlal M. Parikh (2005) 94 TTJ 690 (Chennai)(Trib.)*

### **S. 2(ea)(i) : Wealth-tax – Asset – Building – Under construction**

An incomplete building under construction is not an asset and is not liable to wealth tax as it does not fall within the definition of a building nor within the purview of "urban land". (A.Y. 2003-04)

*CWT v. Neena Jain (Smt.) (2011) 330 ITR 157 / 220 Taxation 227 / (2010) 36 DTR 49 / 230 CTR 554 / 189 Taxman 308 (P&H)(High Court)*

### **S. 2(ea)(i) : Wealth-tax – Asset – Building – Letting out factory shed – Commercial**

Assessee having declared the income from the letting of the factory shed as "rental income" in its return which has been assessed accordingly and the occupant of the premises is purely that of the landlord and tenant, the factory shed is to be treated as an asset exigible to tax.

*Supreme Nonwovens Ltd. v. ACWT (2010) 43 DTR 326 / 189 Taxman 388 (Bom.)(High Court)*

### **S. 2(ea)(v) : Wealth-tax – Asset – Urban land**

Land belonging to the assessee on which he has unauthorisedly constructed a farm house stands excluded from the definition of 'urban land' as per Explan. 1(b) to section 2(ea) as no construction was permissible on said land and therefore, it cannot be treated as an asset under the WT Act. (A.Y. 1995-96)

*CWT v. Lt. Gen. (Retd.) R. K. Mehra (2010) 228 CTR 205 / 325 ITR 601 / 184 Taxman 286 (P&H)(High Court)*

### **S. 2(ea)(v) : Wealth-tax – Asset – Urban land – Under Construction – Commercial Use**

Urban land allotted for commercial purposes viz. industrial use. During period of construction urban land can not be assessed to Wealth Tax. (A.Y. 1998-99)

*Apollo Tyres Ltd. v. ACWT (2010) 231 CTR 498 / 38 DTR 213 / 325 ITR 528 / 189 Taxman 353 / Tax L. R. 364 (Ker.)(High Court)*

### **S. 2(ea)(vi) : Wealth-tax – Asset – Cash in Hand**

Cash in hand in excess of ₹ 50000 held by individual assessee forms part of assets under section 2(ea)(vi).

*CWT v. K. R. Ushasree & Ors. (2010) 33 DTR 112 / 229 CTR 52 / (2011) 332 ITR 75 (Ker.)(High Court)*

### **S. 2(ea)(3) : Wealth-tax – Asset – House – Business centre (S. 7 Schedule III, R. 3, 5 & 8)**

Premises in a business centre cannot be said to be a house within the meaning of cl. (3) of section 2(ea). The assessee had given the premises on lease under an agreement which had all the covenants that are usually found to be included in a lease and it cannot be said that the agreement was for a licence and therefore, it cannot be said that he was in occupation of the property for the purpose of a business or profession carried on by him so as to exclude it from the definition of the term "asset". (A. Ys. 1997-98 and 1998-99).

*Cravatex Ltd. v. Addl. CWT (2011) 52 DTR 123 / 138 TTJ 58 (Mum.)(Trib.)*

### **S. 2(m) : Wealth-tax – Net wealth – Debt owed – Security deposit**

Security deposit received against the lease of chargeable property, is debt owed, that deposit invested in securities exempt from wealth tax is not relevant. Debt deductible net wealth. (A.Y. 1986-87 and 1988-89).

*Denna J. Jeejeebhoy (Miss) v. WTO (2011) 330 ITR 149 / (2009) 222 CTR 202 / 180 Taxation 586 / 18 DTR 273 (Bom.)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Belonging to assessee – Asset – Contraband article**

Gold given on trust by the assessee to some persons which was neither returned by them nor recovered by the police is to be treated as lost once civil remedy has become time barred and it is not to be included in the net wealth of the assessee. Gold alleged to be given by assessee to third parties which was recovered from third parties and has been delivered to Gold control authority by an order of the Court, same being a contraband article, cannot be said to be assets belonging to the assessee on the relevant valuation dates and therefore, it is not includible in its net wealth. (A. Ys. 1966-67 to 1975-76, 1978-79 to 1981-82)

*Meghji Girdhar (HUF) v. CWT (2011) 52 DTR 397 / 239 CTR 411 (MP)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Debt owed**

Tax liability with respect to earlier year which is determined upon a settlement arrived at between the assessee and the revenue during the year under consideration was held to be an allowable deduction under section 2(m) (iii) of the Wealth – tax Act, 1957 for the purpose of computing net wealth. (A.Y. 1976-77)

*CWT v. Manna Lal Surana (2009) 24 DTR 105 / 184 Taxman 448 / (2010) 321 ITR 335 (Raj.)(High Court)*



### **S. 2(m) : Wealth-tax – Net wealth – Settlement in trust**

The assets of the trust created through the income of the assessee, in respect of which the assessee had no power of disposition or transfer cannot be included in the net wealth of the assessee.

*CWT v. Mahendrabhai D. Parmar (2007) 196 Taxation 213 / 292 ITR 622 (Guj.)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Asset – Agricultural land**

If the land is recorded as agricultural, it would continue to be agricultural land. If somebody, buys the land for a higher price and thereafter, changes the use for the first holder the property would not change its character so long as he himself does not change the use or put the land to some other use after getting the conversion of use from the competent authority/officer. The agricultural land's price would not be deciding factor for concluding that the land in dispute is agricultural or non-agricultural and even if it remains barrier or uncultivated for some time and even grass only is raised on the land, it would continue to be an agricultural land. (A.Ys. 1976-77 to 1978-79)

*CWT v. Shashiben (2007) 288 ITR 319 / (2006) 205 CTR 298 (Guj.)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Assets belonging to assessee**

Where in December 1965, assessee had given primary gold in safe custody of Collector for a particular purpose under Defence of India Rules, 1962, and then thereafter under Gold Control Act, 1968, ownership of gold in question ceased to vest in assessee on 30-4-1966 and it did not belong to assessee so as to be valued on each successive valuation dates but he had only a right to get money realised or money's worth. (A.Ys. 1970-71 to 1977-78, 1984-84 to 1999-2000)

*CWT v. Ganpat Lal (2005) 197 CTR 401 (2006) 280 ITR 168 / 150 Taxman 322 (Raj.)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Assets belonging to assessee – Full consideration paid – Pending Registration**

Where the assessee had paid full consideration of the value of the property but she did not get it transferred in her name, such property could not be assessed in hands of assessee.

*CIT v. Badhurani Deepinder Kaur (2003) 262 ITR 403 / 133 Taxman 591 / (2004) 184 CTR 359 (P&H)(High Court)*

### **S. 2(m) : Wealth-tax – Net wealth – Debt Owned – Loans for Working Capital**

Loans obtained for working capital against security of lands, is not debt incurred in relation to lands, hence can not be deducted while computing net wealth. There is marked difference between the two expressions "debt secured on property" and "debt incurred in relation to such property" used in the pre amended provisions of section

2(m)(ii) of the Wealth Tax Act, 1957. It is not necessary that every debt secured on a property is a debt incurred in relation to such property. (A.Y. 2002-03, 2003-04)  
*Phoenix International Ltd. v. Dy. CWT (2010) 5 ITR 787 / 122 ITD 279 / 129 TTJ 734 (Delhi)(Trib.)*

### **S. 2(m) : Wealth-tax – Net wealth – Right to receive compensation**

Right to receive compensation for acquisition of land is chargeable to wealth-tax notwithstanding fact that quantification of same was in dispute on relevant valuation date. (A.Ys. 1987-88 to 1992-93)

*Beg Raj Saini v. WTO (2005) 96 ITD 96 / 97 TTJ 934 (Delhi)(Trib.)*

## **CHAPTER II**

### **Charge of wealth-tax and assets subject to such charges**

#### **Section 3 : Charge of wealth Tax**

### **S. 3 : Wealth-tax – Charge of tax – Company – Exemption – Asset used for Business – Finance Act, 1983**

Land used for internal roads and play ground, is not entitled to exemption. (A.Y. 1990-91)

*Motwane Manufacturing Co. (P) Ltd. v. CWT (2010) 329 ITR 413 / (2009) 20 DTR 104 / 222 CTR 462 (Bom.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Interest free deposit**

For the purposes of determining net wealth for the purposes of calculation of wealth tax, the amount received as interest free deposit for permitting the use of premises on licensed basis was allowable to be deducted from the net wealth as liability. (A.Y. 1989-90)

*CWT v. Kalani Industries P. Ltd. (2006) 192 Taxation 409 / 286 ITR 425 / 155 Taxman 524 (MP)(High Court)*

### **S. 3 : Wealth tax – Charge of tax – Association of persons – Interest in AOP**

The assessee is liable to wealth tax on value of his interest in AOP. (A.Ys. 1978-79 to 1980-81)

*CWT v. J.K. Srivastava (2006) 280 ITR 470 / (2005) 145 Taxman 208 / 202 CTR 520 (All.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Cinema house – Exemption – No retrospective**

Exemption for cinema house and value of stock-in-trade granted from 1-4-1989 is not retrospective. (A.Ys. 1984-85 to 1988-89)

*CWT v. B.R. Theatres & Industrial Concerns P. Ltd. (2005) 272 ITR 177 / (2004) 135 Taxman 371 / 188 CTR 63 (Mad.)(High Court)*

### **S. 3 : Wealth tax – Charge of tax – Firms – Partner**

No additional wealth - tax was chargeable on value of interest of assessee - partner in firm's assets which includes urban assets

*CWT v. Ram Saran Kejriwala (2005) 145 Taxman 528 (All.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Companies – Land and Building [Finance Act, 1983. S. 40(3)]**

Land and building which was let out and income from which was assessed as 'property income' could not be treated as assets of assessee's business of dealing in real estate for purposes of treating same as exempt from wealth-tax under section 40(3) of the Finance Act, 1983.

*CWT v. Fagun Estates Pvt. Ltd. (2005) 272 ITR 472 / 195 CTR 280 (Mad.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Companies – Letting of godown (Finance Act 1983. 40(3) (vi)).**

Building leased out and lessee using building as ware house. Assessee not using building as ware house not entitled exemption. Nature of use is important. (A.Ys. 1984-85, 1986-87, 1988-89)

*CWT v. Indian Warehousing Industries Ltd. (2004) 269 ITR 203 / 139 Taxman 66 / 188 CTR 283 (Mad.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Closely held company – Hospital – Productive assets-Office for the purpose of business – Finance Act, 1983 [S. 40]**

The buildings used by the assessee company for running the hospital as its business would not qualify as a building as "office for the purpose of its business" envisaged under section 40(3) (Vi) so as to be exempted from wealth tax. All the buildings which are used as productive assets for the business of a closely held company are not intended to be excluded under clause (vi). It is only buildings used for "industrial purposes" which are to be exempted from wealth tax. (A.Ys. 1987-88, 1989-90, 1990-91)

*CWT v. Cosmopolitan Hospitals (P) Ltd. (2003) 185 CTR 111 / 133 Taxman 505 / (2004) 265 ITR 312 (Ker.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Companies – Club – Finance Act, 1983 [S. 40]**

The assessee – club which got itself declared as a company under section 2(h)(iii) but was not registered under the Companies Act, 1956, would not be covered by section 40 (1) of the Finance Act, 1983. Thus section 40 of the Finance Act, 1983 did not apply to assessee – club, which was deemed company under section 2 (h) (iii) by virtue of a declaration so made by the Central Board of Direct Taxes. (A.Y. 1984-85)

*CWT v. Kodaikanal Club (2003) 260 ITR 617 / 129 Taxman 356 / 181 CTR 534 (Mad.)(High Court)*

**S. 3 : Wealth-tax – Charge of tax – Closing Stock – Finance Act 1983 – S. 40 – Amendment Finance Act, 1988**

The amendment made by the Finance Act, 1988 inserting proviso to section 40(3) of the Finance Act, 1983 and excluding stock in trade from net wealth of closely held by company is remedial and curative in nature and as such retrospective in operation. (A.Ys. 1984-85 to 1988-89)

*CWT v. Jodhan Real Estate Development Co. (P) Ltd. (2003) 259 ITR 79 / 132 Taxman 567 / (2002) 178 CTR 305 (Raj.)(High Court)*

**S. 3 : Wealth-tax – Charge of tax – Closing Stock – Motor cars – Finance Act, 1983 S. 40 - Finance Act 1988**

The words used in section 40(3) of the Finance Act, 1983, as they stood in the assessment year 1984-85 do not permit the exclusion of stock in trade from the list of assets to be valued for the purpose of wealth tax. Thus the assessee was a dealer in motor cars, the value of motor cars which were its stock in trade was includible in wealth for the assessment year 1984-85. Though the section was amended subsequently late in the year 1989, to exclude the value of stock in trade. That amendment was not given retrospective effect so as to benefit the assessee in the assessment year 1984-85. (A.Y. 1984-85)

*CWT v. Reliance Motor Co Ltd. (2003) 260 ITR 571 / 181 CTR 86 / 135 Taxman 136 (Mad.)(High Court)*

**S. 3 : Wealth-tax – Charge of tax – Closely held company – Income from property assessed as business income – Business asset**

The Court held that just because the income from property was treated as business income under the Act, and therefore, the asset of the assessee should be taken as business asset could not be accepted. The fact that the income from the property was assessed as business income under the Act was not conclusive. Therefore the Tribunal should decide the question by taking in to consideration the terms of the lease, the period of lease and other relevant circumstances and then decide the question in the light of the law laid down by the supreme Court in *Universal Plast Ltd. v. CIT* (1999) 237 ITR 454 / 153 CTR 95 / 103 TAX 493 (SC). (A.Y. 1980-81)

*CWT v. Tirupur sri Meenakshi Sunderswar Finance Ltd. (2003) 127 Taxman 392 / 262 ITR 129 / 180 CTR 174 (Mad.)(High Court)*

**S. 3 : Wealth-tax – Charge of tax – Closely held company – Commercial complex**

Commercial complex does not fall with in exclusionary clause mentioned in section 40 (3) (vi) of Finance Act, 1983. (A.Ys. 1986-87 and 1988-89)

*CWT v. Ashoka Betelnut Co (I) (P) Ltd. (2003) 127 Taxman 331 / 180 CTR 178 / 260 ITR 573 (Mad.)(High Court)*

### **S. 3 : Wealth-tax – Charge of tax – Club – Prior to 1-4-1981 – AOP [S. 21AA]**

Section 21AA was introduced in the wealth tax Act w.e.f. 1-4-1981, providing for assessment of AOP in certain special cases. For the earlier years prior to 1-4-1981 there was clearly no provision subjecting the assessee's assets owned by AOP to wealth tax. Thus, the assessee club being an AOP was not assessable to tax under the Act prior to 1-4-1981. (A.Ys. 1979-80 and 1980-81)

*Coonoor Club v. CWT (2003) 179 CTR 333 / 135 Taxman 61 (Mad.)(High Court)*

### **S. 3 : Wealth tax – Charge of tax – Company – Co-op. Society – Section 40 of Finance Act, 1983**

- (i) A property cannot be said to be belonging to assessee unless its legal title absolutely vests in assessee despite the fact that such assessee may be owner of property in terms of section 22 and section 27 of Income-tax Act, 1961.
- (ii) Provisions of Wealth-tax Act would apply to the assessment of companies to the extent they are in conformity with provisions of section 40 of Finance Act, 1983.
- (iii) Provisions of section 4 of Wealth-tax Act, are not in conformity of section 40(2) of Finance Act, 1983. Therefore, assets covered under section 4 of Wealth-tax Act cannot be included in net wealth of a company even though such assets are includible in net wealth of non-company assessee.
- (iv) A right to occupy a flat in a co-operative society is not taxable asset under section 40 in case of a private limited company. (A.Y. 1990-91)

*Pallonji Shapoorji & Co. (P) Ltd. v. Dy. Com. of Wealth-tax, (2006) 102 ITD 101 / 103 TTJ 155 (SB)(Mum.)(Trib.)*

### **Section 4 : Net Wealth to include certain Assets**

#### **S. 4 : Wealth-tax – Deemed wealth – Flat in Society – Registration**

Assessee purchasing the flat before 1-4-1993, and admitted as member of society. Transfer not registered in books of society, not relevant, value of flat includible in net wealth of assessee. (A.Y. 1993-94)

*Bennett Coleman and Co. Ltd. v. ACIT (2010) 326 ITR 447 / (2008) 215 CTR 405 / 170 Taxman 491 / 2 DTR 361 (Bom.)(High Court)*

#### **S. 4 : Wealth-tax – Deemed wealth – AOP – Investment form gifted property**

Money was gifted by father of assessee to assessee jointly with his son and income from investment of such money was assessed as AOP's income under Income-tax Act, as donees had equal share in gifted property, value of assessee's interest was determinable under rule 2 and as such Assessing Officer was justified in including value of assessee's interest in AOP in assessee's wealth under section 4(1)(b); the fact that AOP is not a taxable entity under Wealth-tax Act was of little consequence in respect of provisions of section 4(1)(b). (A.Ys. 1967-68 to 1976-77)

*CWT v. J.K. Srivastava (2006) 280 ITR 470 / 2005 Tax LR 174 / 202 CTR 520 (All.)(High Court)*

#### **S. 4 : Wealth tax – Lease of immovable property – Belonging to assessee [R.W.S. 269 UA(f)(1)]**

Lease of immovable property for less than twelve years, shall not affect the legal ownership, hence, shall be liable to Wealth Tax. (A.Y. 1997-98 and 1998-99)

*Voltas Ltd. v. ACWT (2008) 1 DTR 1 / (2008) 113 ITD 19 / 19 SOT 542 / 113 TTJ 45 (SB)(Mum.) (Trib.)*

#### **S. 4 : Wealth-tax – Deemed wealth – Chargeability**

Crucial date under the Act is the valuation date and since the assessee had expired on 16th Jan., 1998, there was no question of any net wealth to be assessed in the hands of the assessee as on the valuation date i.e. 31st March, 1998. (A.Y. 1998-99)

*Manilal N. Tanna v. WTO (2006) 103 TTJ 205 / 100 ITD 232 (Mum.)(Trib.)*

#### **S. 4 : Wealth-tax – Deemed wealth – Licensee of property**

When licensee of property can be considered as a deemed owner. (A.Y. 1995-96)

*Reliance Consolidated Enterprises (P.) Ltd. v. ACWT (2005) 92 ITD 394 / 93 TTJ 726 (Mum.)(Trib.)*

### **Section 5 : Exemption in respect of certain assets**

#### **S. 5 : Wealth-tax – Exemptions – Ex-ruler's residence – Let out (clause iii)**

Where a part of official residence of ex-ruler stood let out assessee was not entitled to exemption of value of said property in its entirety under section 5(1)(iii).

*CWT v. Late Lokendra Singh (2005) 142 Taxman 412 / (2004) 191 CTR 489 (MP)(High Court)*

#### **S. 5 : Wealth-tax – Exemptions – House – Cinema Building**

Under section 5(1)(iv) exemption has been granted to one house or part of the house belonging to the assessee. House is a building where people live and reside. It is mainly for residential purposes. Cinema building cannot by any stretch of imagination be treated as a house. (A.Ys. 1975-76 and 1976-77)

*CWT v. Angoori Devi (Smt.) (2005) 273 ITR 500 / 144 Taxman 643 / CIT v. Urmila Devi (Smt.) (2005) 273 ITR 503 (All.)(High Court)*

#### **S. 5 : Wealth-tax – Exemptions – Charitable Trust – Education**

Carrying on a business and deriving income there from by a trust in course of actually carrying out its primary object of promoting education and charities, would not disqualify it from being regarded as charitable trust.

*Sri Aurobindo Ashram Harpegon Workshop Trust v. ACIT (2004) 271 ITR 553 / 140 Taxman*

*579 / 192 CTR 459 (Mad.)(High Court)*

#### **S. 5 : Wealth-tax – Exemptions – Charitable Trust – Trust by will**



Where author of trust, by a will, settled upon trust all his immovable and movable properties for benefit of three charitable institutions, on death of author a trust came into being and even in absence of execution trust deed, trustees were entitled to exemption in respect of such properties. (A.Y. 1981-82)

*CWT v. Devar Kavasji T. Modi Executors & Trustee of Late Dr. T.D. Edel Behram* (2004) 268 ITR 175 / 136 Taxman 541 / 187 CTR 148 (Guj.)(High Court)

### **S. 5 : Wealth-tax – Exemptions – Part of house – Complete house**

Exemption under section 5(l)(iv) is available not only for a complete house but also for a 'part of a house'. (A.Y. 1996-97 to 2000-01)

*Pushpalata Kanodia (Smt.) v. WTO* (2005) 92 ITD 500 / 93 TTJ 1045 (Hyd.)(Trib.)

### **S. 5(1) : Wealth-tax – Exemptions – House v. Building [S. 5(1)(iv)]**

Exemption under section 5(1) (iv) is available only in respect of house or part of a house or share in house belonging to assessee. A building is much wider term than a house which is a dwelling place, where people reside. As such a building not eligible for exemption under section 5(1) (iv).

*CIT v. Chauhan Bros.* (2006) 194 Taxation 99 (All.)(High Court)

### **S. 5(1)(iii) : Wealth-tax – Exemptions – Lands Appurtenant Thereto**

Building of erstwhile Ruler and lands in the same compound as palace and in its use. Land is considered as appurtenant to palace and exempt. (A.Ys. 1972-73 to 1979-80)

*Shrimant F. P. Gaekwad (Decd) v. ACWT* (2010) 3 ITR 476 (Ahd.)(Trib.)

### **S. 5(1)(iv) : Wealth-tax – Exemptions – Cinema building**

Exemption under section 5(1)(iv) of the Wealth Tax Act, 1957 for the Assessment Year 1980-81 is admissible to the assessee for a house or a part of house belonging to assessee. A cinema building for which the assessee had claimed exemption cannot by any stretch of imagination be called a house for the purpose of section 5(a)(iv).

*CWT v. Rajiv Kumar Agarwal* (2006) 190 Taxation 223 (All.)(High Court)

### **S. 5(1)(iv) : Wealth-tax – Exemptions – Charitable Trusts [S. 5(1)(i)]**

Various clauses of trust deed showed that predominant object of assessee-trust was to apply income of trust for benefit of executant during her lifetime and, after her death, for benefit of descendants, it was not entitled to exemption under section 5(1)(i). (A.Y. 1968-69)

*CWT v. Ma Shree Kishoriji Bishwa Hitakari Trust* (2005) 142 Taxman 668 (All.)(High Court)

### **S. 5(1)(iv) : Wealth-tax – Exemptions – House property – Firm – Partner – Immovable property of partner**

Partner was not entitled to exemption in terms of section 5(1)(iv) in respect of immovable property of firm. (A.Y. 1976-77)

*CWT v. Pramod Kumar (2004) 141 Taxman 305 / (2005) 193 CTR 159 (All.)(High Court)*

**S. 5(1)(iv) : Wealth-tax – Exemptions – Cinema building**

In common parlance a house means a place where people live. A residential building can also be given for commercial purpose and yet it will remain a house however a Cinema building can not be treated to be a house for the purpose of section 5(1)(iv).

(A.Ys. 1974-75, 1976-77, 1977-78)

*CIT v. Jai Kishan Gupta (2003) 264 ITR 482 / 185 CTR 340 / 137 Taxman 388 (All.)(High Court)*

**S. 5(1)(v) : Wealth-tax – Exemptions – Money brought to India by person of Indian Origin – Value of Benz Car**

Assessee was entitled to claim exemption of value of Benz Car brought by him from outside India or price received by him on sale of car. (A.Y. 1989-90)

*CWT v. K.O. Mathews (2003) 261 ITR 702 / 133 Taxman 418 / 183 CTR 406 (Ker.)(High Court)*

**S. 5(1)(vi) : Wealth-tax – Exemptions – Annuities**

After the amendment of section 2 (e)(ii) and clause (vi) of section 5(1), with effect from

1-4-1975, exemption in respect of annuities will be available only to the extent explained in the proviso to section 5 (1) (vi), irrespective of the date on which the policies are taken or the annuity contracts are entered in to. (A.Ys. 1982-83, 1984-85)

*CWT v. N.T. Rama Rao (2003) 129 Taxman 430 / 261 ITR 611 / 182 CTR 625 (AP)(High Court)*

**S. 5(1)(vi) : Wealth-tax – Exemptions – House property – Firm – Partners**

Since the House, which is said to belong to the firm, in reality belongs to the partners, the assessee – partner being one of the co-owners of the property, would be entitled to deduction of the value of his share in the house property from the net wealth for the purpose of wealth tax. (A.Ys. 1974-75 and 1975-76)

*CWT v. Laxmi Dutt (2003) 263 ITR 225 / 132 Taxman 37 (All.)(High Court)*

**S. 5(1)(vi) : Wealth-tax – Exemptions – House property – Firm – Rule 2**

In computing net wealth of a firm under rule 2 of the Wealth Tax Rules, 1957, the assets exempted under section 5 should be included and then apportioned among partners for granting exemption in their individual assessments in computing their own individual net wealth. (A.Ys. 1977-78 and 1979-80)

*CWT v. Mukund Das Vishnu Kumar Rathi (2003) 129 Taxman 976 / 182 CTR 438 (Raj.)(High Court)*

### **S. 5(1)(xii) : Wealth-tax – Exemptions – Jewellery – Art treasures – Work of art [S. 5(1)(xii)]**

Items of jewellery declared as “art treasures” by the Director – General, Archaeological Survey of India were to be treated as “work of art” so as to be exempt under section 5(1)(xii).

*CWT v. Sb Zainab Noorumal Sayeeda (2002) 262 ITR 306 / 131 Taxman 166 / 184 CTR 596 (AP)(High Court)*

### **S. 5(1)(xxxii) : Wealth-tax – Exemptions – Firm – Jewellery business [S. 5(1)(xxxii)]**

Manufacturing of jewellery and ornaments, whether firm was on Industrial undertaking for the purpose of wealth tax. The assessee was a partner in a firm which carried on business in gold jewellery and precious and semi-precious stones, and consequently the assessee's interest in the firm is exempted under section 5(1)(xxxii) of the Wealth Tax.

According to the Wealth Tax Officer, firm was not an industrial undertaking. On appeal to CIT(A) it was considered as an Industrial undertaking and he granted exemption under section 5(1)(xxxii) of the Act. The ITAT also upheld the order of CIT(A).

On a reference by the Department to High Court, it was held that the firm fell in the same category of firms being part of the gem industry and the activity of processing of gems beginning with the raw material and ending in marketable product was no different and hence, the value of the assessee's interest in the firm was exempt under section 5(1)(xxxii) of the Act.

*CWT v. Shyam Mohan (2009) 313 ITR 416 / (2007) 162 Taxman 400 / 210 CTR 219 (Raj.)(High Court)*

### **S. 5(1)(xxxiii) : Wealth-tax – Exemptions – Hindu Undivided family – Share in Industrial undertaking**

A Hindu undivided family is not entitled to benefit of exemption under section 5(1)(xxxiii) (Now section 5(v)). (A.Y. 1990-91)

*K.M. Periakaruppan v. CWT (2003) 130 Taxman 57 (Mad.) / V.E. Lakshmanan Chettiar v. CWT (2003) 130 Taxman 59 (Mad.) / P.R. Kumarappan v. CWT (2003) 130 Taxman 62 / K.M.N. Nagappa Chettiar v. CWT (2003) 130 Taxman 63 (Mad.)(High Court)*

## **Section 7 : Value of Assets, how to be determined**

### **S. 7 : Wealth tax – Valuation of cold storage – Method of valuation**

The question as to whether the Tribunal was legally correct in upholding the valuation of cold storage by average of land and building and yield method as against the valuation of the above property on land and building method adopted in view of the DVO's report obtained by the Assessing Officer on a legally valid reference, is not a referable question of law.

*CWT v. A. R. Sood (2004) 187 CTR 310 / 180 Taxation 650 (SC)*

**S. 7 : Wealth-tax – Valuation of asset – Interest of Remainder men**

Estate duty liability arising on assumed death of life interest holder on notional basis is liable to be deducted from valuation of asset in context of valuation of interest of remainder interest holder.

*CWT v. Trustees of HEH Nizam of Hyderabad (2003) 261 ITR 690 / 129 Taxman 485 / 181 CTR 385 / 174 Taxation 770 (SC)*

**S. 7 : Wealth tax – Valuation of assets – Applicable to Subsequent Years**

The valuation of the property having determined for A.Y. 1971-72 and such assessments having been finalized and attained finality as it was not challenged the same would be applicable to the subsequent years. (A.Ys. 1975-76 to 1980-81)

*CIT v. Rawal Rajeshwari Singh of Samod (2010) 322 ITR 39 / (2009) 23 DTR 353 (Raj.)(High Court)*

**S. 7 : Wealth tax – Valuation of House – Lands Appurtenant – Roads – Gardens**

Roads, gardens, etc., would be land appurtenant to house and would qualify exemption under section 7(4). (A.Ys. 1993-94 to 2001-02)

*Binny Ltd. v. ACWT (2010) 324 ITR 34 / 45 DTR 239 / 235 CTR 185 (Mad.)(High Court)*

**S. 7 : Wealth tax – Valuation of Asset – House – Building construction**

If two contiguous buildings in the same compound used for residential purposes then exemption under section 7(4) is allowable. (A.Ys. 1993-94 to 2000-01)

*CWT v. S. D. Jadeja (2006) 283 ITR 45 / (2005) 152 Taxman 202 / 199 CTR 503 (Guj.)(High Court)*

**S. 7 : Wealth-tax – Valuation of Immovable Property – Deduction for Non-residential [Rule 1BB]**

The High Court held that for valuation of house let out for residential purpose rule 1BB provides for deduction of one – sixth (1/6) for the repairs and six per cent (6%) as collection charges for the purposes of gross maintainable rent. Similar deductions should be allowed for valuation of house which is let out for non-residential purposes also.

*CWT v. Abdul Saeed Abdul Hamid Patel (2006) 192 Taxation 206 (Guj.)(High Court)*

**S. 7 : Wealth-tax – Valuation of assets – Section 7 r.w. Schedule III**

It was held that residential flat acquired for employees has to be valued as per rule 3 of Part B of Schedule III, and not on the basis of Rule 14 of Part D of Schedule III as valued by assessee, since Rule 14 provides for global valuation of assets of business and the net assets of the business as a whole have to be computed under the provisions of said rule i.e., all the assets of the business have to be taken together.

*National Stock Exchange of India Ltd. v. Dy. CWT (2006) 155 Taxman 231 (Mag.)(Mum.)(Trib.)*

### **S. 7 : Wealth-tax – Valuation of assets – Interest on deposits**

Interest on deposits received by licensor from licensee for granting pre-emptive rights to purchase said property, cannot be considered for determining annual rent and consequential valuation of property in terms of proviso (iii) to Explanation 1 to rule 5 of Schedule III. (A.Y. 1995-96)

*Reliance Consolidated Enterprises (P.) Ltd. v. ACWT (2005) 92 ITD 394 / 93 TTJ 726 (Mum.)(Trib.)*

### **S. 7 : Wealth-tax – Valuation of assets – Disputed property**

Where title to property held by assessee was disputed and assessee could neither sell that property nor construct any superstructure since building plan had to be sanctioned by municipal authorities, who were litigants, Assessing Officer was not justified in valuing property as per reports of Valuation Officer ignoring above factors. (A.Ys. 1986-87 to 1988-89)

*Ramaiya Reddy v. Dy. CWT (Invs.) (2005) 2 SOT 59 (Bang.)(Trib.)*

## **CHAPTER IV Assessment**

### **Section 15B : Self assessment**

#### **S. 15B : Wealth-tax – Penalty – Legal Representative [S. 18(1)(a) & 18(1)(c)]**

Where penalty proceeding initiated under the Wealth Tax Act, 1957, but not levied during his lifetime, the same could not be levied on the legal representative after his death. (A.Ys. 1968-69, 1970-71, 1971-72, 1983-84 and 1984-85)

*ACWT v. Late Shrimant F.P. Gaekwad Through L/H Smt. Mrinalini Puar (2008) 13 DTR 274 / 174 Taxman 551 / (2009) 313 ITR 192 / 221 CTR 423 (Guj.)(High Court)*

### **Section 16 : Assessment**

#### **S. 16 : Wealth-tax – Assessment – Wealth tax – Service of notice – Failure to serve notice within the time provided in proviso vitiates the assessment**

When Assessing Officer invokes Section 17, Provisions of Section 14 and 16 to the extent they are applicable for the purpose of making an order of reassessment, will have to be followed which will include time limit for notice under section 16(2). Thus, the Assessing Officer is bound, by mandates of proviso to section 16(2) and on failure to comply with it, order of reassessment will be without jurisdiction. (A.Y. 1989-90)

*CWT v. HUF of H H Late J. M. Schindia (2008) 174 Taxman 1 / 300 ITR 193 / 5 DTR 19 / 217 CTR 531 (Bom.)(High Court)*

#### **S. 16 : Wealth-tax – Assessment – There is no estoppels against statute**

A Property, which is not otherwise taxable, can not become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or his misapprehension. If in law an item is not taxable no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The department can not rely upon any such admission or misapprehension if it is not otherwise taxable. (A.Ys. 1993-94)

*Maynak Poddar (HUF) v. WTO (2003) 130 Taxman 500 / 262 ITR 633 / 181 CTR 362 (Cal.)(High Court)*

## **Section 16A : Reference to Valuation Officer**

### **S. 16A : Wealth-tax – Valuation – Reference to Valuation Officer mandatory**

The assessee filed his return of wealth which was supported by valuation report of registered valuer. The Wealth Tax Officer during the assessment proceedings made addition to the wealth of the assessee without making reference to valuation cell under section 16A of the Wealth Tax Act. The High Court held that when the assessee's valuation of the property was supported by a report of the registered valuer, the WTO cannot evaluate property of the assessee by adopting his own formula without making a reference to the valuation cell. (A.Ys. 1987-88, 1988-89, 1989-90 and 1990-91)

*CWT v. Raghunath Singh Thakur (2008) 6 DTR 56 / 304 ITR 268 / 216 CTR 268 (HP)(High Court)*

### **S. 16A : Wealth tax – Reference to valuation officer – No return filed**

WTO can make reference to DVO even where no return has been filed. (A.Ys. 1979-80, 1980-81)

*CWT v. Anil Tayal (HUF) (2005) 146 Taxman 239 / (2006) 285 ITR 243 / 195 CTR 420 (P&H)(High Court)*

### **S. 16A : Wealth tax – Reference to valuation officer – Legal disputes**

Where Assessing Officer valued property at rate of ` 200 per square feet based on rates obtained from office of District Registrar and case of assessee was that legal disputes with regard to title of property, were not taken into consideration while arriving at market value, Assessing Officer was to be directed to refer matter to Valuation Officer. (A.Ys. 1996-97 to 2000-01)

*Pushpalata Kanodia (Smt) v. WTO (2005) 92 ITD 500 / 93 TTJ 1045 (Hyd.)(Trib.)*

## **Section 17 : Wealth escaping assessment**

### **S. 17 : Wealth-tax – Reassessment – Notice to a person who is not in existence – Amalgamated company – Reasons [S. 42C]**

Notice under section 17 issued to a person who is not in existence at the time of issuing such notice is not valid. Fact that the assessee (Amalgamated company)



subsequently filed its return with the objection that notice in the name of amalgamating company is invalid cannot cure the defects which go to the root of the jurisdiction to reopen the proceedings. Reason for initiation of reopening proceedings need not be known to the assessee by reflecting the same in the notice.

*L. K. Agencies (P) Ltd. v. CWT (2011) 55 DTR 138 / 241 CTR 185 (Cal.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Report of Valuation Officer**

Report called for after completion of assessment. Not a ground for reassessment. Report called for during pendency of assessment but received after completion of assessment. Valid ground for reassessment. (A.Ys. 1988-89 to 1992-93)

*CWT v. Sona Properties P. Ltd. (2010) 327 ITR 592 / (2008) 216 CTR 217 / 5 DTR 269 (Bom.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Entire assessment to be made fresh – Rectification [S. 35]**

It is well settled that the circumstances under which an order under section 147 and an order under section 154, analogous to section 17 and 35 can be passed, are not mutually exclusive and may overlap. (A.Y. 1970-71)

If an assessment has been reopened, entire assessment is to be made afresh and, therefore, assets can be revalued also.

*Rama Shankar Gupta v. CWT (2005) 275 ITR 628 / (2004) 141 Taxman 596 / 191 CTR 460 (All.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Valuation – Different method**

For valuing a building let out for commercial purpose, Assessing Officer had adopted land and building method which was a well recognized mode of valuation, merely because by applying another mode of valuation, value would be a little higher. Reassessment was not valid. (A.Ys. 1982-83 to 1985-86)

*CWT v. Mohan Das (2005) 149 Taxman 545 / 295 ITR 580 / 196 CTR 204 (All.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Limitation**

Reliance on sub-section (1A) of section 17 is misplaced to connect period of limitation with quantum of estimated escapement even in cases falling under proviso to section 17(1). (A.Y. 1983-84)

*CWT v. Kamal Kumar Mansinghka (2005) 275 ITR 485 / (2004) 191 CTR 339 (Raj.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – No failure to disclose primary facts – Trust deed**

The trust deed was on record and allocation of income as per trust deed had also been disclosed by assessee, so far as the assessee was concerned, all primary materials were disclosed; it was not duty of assessee to suggest as to how inference

should be drawn on said material; there was no failure on part of assessee in disclosing primary facts and, therefore, initiation of proceeding under section 17(1)(a) was not justified. (A.Ys. 1970-71 to 1976-77)

*CWT v. C.M. Ghosh Trust (2005) 279 ITR 346 / 153 Taxman 413 / 199 CTR 47 (All.)(High Court)*

**S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Recording of reasons**

Before issuing notice only requirement is that the reasons have to be recorded. (A.Y. 1991-92)

*Daya Nand v. CWT (2004) 270 ITR 245 / 141 Taxman 480 / 192 CTR 602 (P&H)(High Court)*

**S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Notice bad ab-initio**

If earlier notice is ab-initio void, it cannot be said that any earlier reassessment proceedings are pending so as to bar issue of fresh notice. (A.Y. 1991-92)

*Daya Nand v. CWT (2004) 270 ITR 245 / 141 Taxman 480 / 192 CTR 602 (P&H)(High Court)*

**S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Furnishing of reasons**

Proper course of action is for Assessing Officer to furnish reasons within a reasonable time and on receipt of the reasons, the noticee is entitled to file objections to the issuance of notice and Assessing officer is bound to dispose of the same by passing a speaking order. (A.Ys. 1995-96 to 2000-01)

*Rayala Corpn. (P.) Ltd. v. CWT (2004) 190 CTR 181 (Mad.)(High Court)*

**S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Valuation report**

Valuation report may constitute information to reopen assessment, but there must be positive materials at the time of making assessment to show that wealth had escaped assessment. (A.Ys. 1979-80 to 1982-83)

*CWT v. Chidambaram (Ct) (2004) 270 ITR 341 / (2005) 144 Taxman 802 / 192 CTR 444 (Mad.)(High Court)*

**S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Failure to disclose facts**

Where gross maintainable rent had not been correctly shown for computing value of movable property, there was failure to disclose true and material facts. (A.Y. 1991-92)

*Daya Nand v. CWT (2004) 270 ITR 245 / 141 Taxman 480 / 192 CTR 602 (P&H)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Wealth Escaping Assessment – Objections to be disposed – Premature**

Where without dealing with and disposing of (preliminary) objections of assessee to notice Assessing Officer passed reassessment order on merits of controversy, his order was to be set-aside. (A.Y. 1997-98)

Writ against reassessment notice was to be dismissed as premature where assessee had filed a return in response thereto, reasons for reopening had been communicated and assessee had filed objections and Assessing Officer was to pass a speaking order thereon. (A.Y. 1997-98)

*Arvind Mills Ltd. v. ACWT (No. 2) (2004) 270 ITR 469 / 141 Taxman 210 / 191 CTR 235 (Guj.)(High Court)*

### **S. 17 : Wealth-tax – Reassessment – Precedent – Order of Tribunal – Pendency of reference**

Assessing Officer is bound by decision of Tribunal unless and until same is reversed by High Court or Supreme Court and mere pendency of reference application against such order cannot be a reason to reopen assessment in respect of an issue which has already been decided by Commissioner (Appeals) and subsequently confirmed by Tribunal. (A.Y. 1985-86)

*T.T. Narasimhan v. ACWT (2005) 97 ITD 197 / 98 TTJ 1089 (Chennai)(Trib.)*

### **S. 17 : Wealth tax – Reassessment – Amalgamated company – Factual error – Jurisdiction – Not filing the return**

Assessing Officer can proceed against amalgamated company and can also pass order in respect of matters of erstwhile amalgamating company. (A.Y. 1997-98)

Reopening of assessment is valid if factual error is pointed out by interest audit party to Assessing Officer.

If assessee does not file return in response to notice under section 17 and does not challenge jurisdiction of Assessing Officer at any stage of assessment proceedings, assessee cannot raise question of jurisdiction at appeal stage. (A.Y. 1997-98)

*Triveni Engg. & Industries Ltd. v. Dy. CIT (2005) 93 ITD 561 / 93 TTJ 806 (Delhi)(Trib.)*

### **S. 17 : Wealth-tax – Reassessment – Cryptic order**

Where though assessment under section 16(3) was made but order was brief and cryptic and immovable properties as disclosed by assessee were treated as 'business asset' and so exempt under section 2(ea), it could not be said that notice of reassessment issued to assessee was based on change of opinion; therefore reopening of assessment was valid. (A.Y. 1997-98)

*Mafatlal Industries Ltd. v. WTO (2005) 95 ITD 66 / 95 TTJ 723 (Mum.)(Trib.)*

### **S. 17 : Wealth-tax – Reassessment – Agricultural land**

Where assessee filed wealth-tax returns declaring value of house only, claiming that open land surrounding residential house was not liable to be included in net wealth as

it was a agricultural land and assessee also submitted a valuation report dated 11-6-1988 of registered valuer showing value of land and house and WTO completed assessment accepting assessee's claims, subsequently Assessing Officer was not justified in reopening assessment holding that assessee had failed to disclose truly and fully all material facts.

*Archana Singhania (Smt) v. WTO (2005) 146 Taxman 87 (Mag.)(Delhi)(Trib.)*

### **Section 17A : Time limit for completion of assessment and reassessment**

#### **S. 17A : Wealth-tax – Reassessment – Time limit**

For assessment year 1979-80 where return was due to be filed on 31-7-1979 but it was filed on 7-3-1986 and assessment was framed on 21-3-1986, assessment made by the WTO was within limitation and by no stretch of imagination, it could be treated as time-barred in view of provision of section 17A(1)(b). (A.Ys. 1979-80, 1980-81))

*CWT v. Anil Tayal (HUF) (2006) 285 ITR 243 / (2005) 146 Taxman 239 / 195 CTR 420 (P&H)(High Court)*

### **Section 18 : Penalty for failure to furnish returns, to comply with notices and concealment of assets, etc.**

#### **S. 18(1)(a) : Wealth-tax – Penalty – Late filing of returns**

Wealth disclosed in the Voluntary Disclosure Act, 1976 is eligible for exclusion from wealth base for purpose of reckoning penalty under section 18(1)(a) and limits mentioned in that section cannot be applied without considering section 14 of 1976 Act. (A.Ys. 1965-66 to 1972-73)

*CWT v. Palanimalai Grounder (2004) 136 Taxman 344 / 186 CTR 401 (Mad.)(High Court)*

#### **S. 18(1)(c) : Penalty – Concealment – Amnesty scheme – Revised returns – Question of Law**

Whether penalty under section 18(1)(c) could be cancelled on the ground that the assessee was entitled to the benefit under the amnesty scheme, particularly when the assessee had revised its return several times subsequent to the search operation is a substantial question of law.

*CIT v. C. A. Taktawala (2008) 215 CTR 399 / 4 DTR 187 / (2009) 309 ITR 340 (SC)*

#### **S. 18(1)(c) : Wealth-tax – Penalty – Concealment of wealth**

Assessee had declared value of certain property contributed by him as capital in a firm at ` 2.36 lakhs as per rule 1BB whereas, on dispute between partners, arbitrators awarded ` 75 lakhs to assessee in lieu of surrendering all its rights and title in favour of firm which included aforesaid property also, since assessee had declared value of the property in the return of wealth at ` 2.36 lakhs under a belief that it continued to be its legal owner, it could not be charged with having concealed particulars of its wealth. (A.Y. 1984-85)

*CWT v. Prince Raninder Singh Trust (2008) 296 ITR 668 / (2005) 146 Taxman 609 / 197 CTR 271 (P&H)(High Court)*

**S. 18(1)(c) : Wealth-tax – Penalty – For concealment of wealth**

Where assessee before completion of relevant assessment filed revised wealth tax return and showed value of building on basis of valuation arrived at by approved valuer, which differed from value shown in original return, it was duty of WTO to assess building as per value of building shown in revised return and in absence of *mala fide* intention of assessee to furnish inaccurate particulars of building in original return, no penalty under section 18(1)(c) could be levied upon him.

*CWT v. Chandrakant Gandadal (2004) 141 Taxman 19 / 184 CTR 517 (Guj.)(High Court)*

**S. 18(1)(c) : Wealth-tax – Penalty – Concealment of wealth – Revised return**

If revised return is filed declaring correct value of asset with in time limit before assessment is completed, it can not be said that assessee has furnished inaccurate particulars of wealth.

*CWT v. Hasmukhlal Gandadal (2003) 264 ITR 42 / 184 CTR 23 / 134 Taxman 507 (Guj.)(High Court)*

**S. 18(l)(c) : Wealth-tax – Penalty – Concealment of wealth – Explanation 3 – Old assessee**

Explanation 3 to section 18(l)(c) could not be invoked in case of an old assessee particularly in a case where though assessee had defaulted in filing wealth-tax return, but wealth was assessed as per wealth declared in return filed in compliance of notice. (A.Ys. 1996-97 to 1998-99)

*S.P. Hinduja Bigger (HUF) v. ITO (2005) 97 ITD 235 (Mum.)(Trib.)*

**Section 18B : Power to reduce or waive penalty in certain cases.**

**S. 18B : Wealth-tax – Penalty – Waiver – Reduction of penalty**

Only reason advanced by revenue for rejecting application for waiver of penalty moved by assessee was that assessee had not led any evidence to prove that petitioner had paid interest charged and penalty levied/leviable or had made satisfactory arrangements for its payment, on a plain reading of section 18B requirement of payment of penalty leviable does not appear and hence said reason was not germane to exercise of discretion, and therefore rejection of application for waiver was unjustified.

*Kiritkumar K. Shroff v. CWT (2005) 278 ITR 79 / 148 Taxman 540 / 199 CTR 19 (Guj.)(High Court)*

**S. 18B : Wealth-tax – Penalty – Waiver – Reduction of penalty**

Relief under section 18B being discretionary, dismissal of writ petition for waiver of penalty under section 18(1)(a) could not be interfered with.

*Subhash Kapoor v. CWT (2004) 136 Taxman 486 / 186 CTR 537 (Delhi)(High Court)*

**S. 18B : Wealth-tax – Penalty – Waiver – Reasoned order**

There was no reasons were found in the order as why penalty for some years was sustained totally and for some years reduced to 18 percent, while exercising power under the Act, the Court quashed the order under section 18B. A right to reason is, therefore, an indispensable part of sound system of judicial review. Where no reasons were to be found in the order as to why penalty for some years, was sustained totally and for some years reduced to 18 per cent, while exercising power under the Act, order under section 18B was to be quashed. (A.Ys. 1972-73 to 1979-80)

*Maneklal D. Shah v. P.K. Gupta (2003) 130 Taxman 469 / 184 CTR 523 / 267 ITR 340 (Bom.) (High Court)*

**CHAPTER V**

**Liability to assessment in special cases**

**Section 20A : Assessment after partial partition of a Hindu undivided family**

**S. 20A : Wealth-tax – HUF – Partition – Assessment after partition of HUF**

Section 20A is introduced with effect from 1-4-1980 would not make any difference to its applicability to partial partition taking place after 31-12-1978. (A.Y. 1979-80)

*CWT v. Parmatma Saran (HUF) (2005) 142 Taxman 194 / 270 ITR 389 / 191 CTR 282 / 144 Taxman 535 (All.)(High Court)*

**S. 20A : Wealth-tax – HUF – Assessment – Partition – Individual members**

Assessee was HUF consisting of three brothers and as a result of partition of HUF, only immovable properties were left with assessee family and other assets were divided and such divided assets were assessed in hands of smaller HUFs, in respect of partitioned assets, for purpose of deciding whether it was specified HUF or unspecified HUF for purposes of taxation, it was not income of a smaller Hindu undivided family but income of individual member of bigger Hindu undivided family which had to be taken into consideration. (A.Y. 1980-81)

*CWT v. Beni Ram Bansidhar Jain (HUF) (2005) 145 Taxman 342 (All.)(High Court)*

**Section 21 : Assessment when assets are held by Courts of Wards, administrators-general, etc.**

**S. 21 : Wealth-tax – Trust – Beneficiaries – Unborn children**

In case beneficiaries of a trust are a future wife and some unborn children, beneficiaries being unknown, assessment will have to be made only under provision of section 21(4) and not under section 21(1). (A.Ys. 1973-74 to 1977-78)

*Wife of Rakesh Mohan (P.) Trust v. CWT (2005) 276 ITR 443 / 142 Taxman 267 / 194 CTR 465 (All.)(High Court)*



**S. 21(4) : Wealth-tax – Trust – Assessment – Assets held by Court of Wards, etc.**

Section 21(4), can not be construed to mean that it will attract only such sections which provide for levy of tax and exclude section which grant exemption. The words 'to the same extent' show that the assessee is entitled to all the exemptions that are granted to an individual and there would not be any pick and choose in the application of statutory provision in the matter of levy of the tax. (A.Ys. 1982-83 to 1987-88)

*CWT v. K. Santhanam Trust (2003) 126 Taxman 484 / 263 ITR 428 / 182 CTR 582 (Mad.)(High Court)*

**Section 21AA : Assessment when assets are held by certain associations of persons**

**S. 21AA : Wealth-tax – AOP – Assessment**

An AOP was not an assessable entity up to assessment year 1980-81, but after insertion of section 21AA by Finance Act, 1981 with effect from 1-4-1981 i.e. from assessment year 1981-82 onwards, it became an assessable entity. (A.Ys. 1979-80 to 1982-83)

*CWT v. Meerut Race Club (2005) 148 Taxman 493 (All.)(High Court)*

**S. 21AA : Wealth-tax – AOP – Assessment**

Assessee-club claiming status of AOP in which shares of members were indeterminate, was assessable to wealth tax from assessment year 1981-82 onwards in view of insertion of section 21AA with effect from 1-4-1981. (A.Ys. 1980-81 to 1983-84)

*CWT v. Chikmanglur Club (2005) 149 Taxman 43 / 197 CTR 609 / 290 ITR 522 (Karn.)(High Court)*

**CHAPTER VI**

**Appeals, Revisions and references**

**Section 23 : Appeal to the Deputy Commissioner (Appeals) from orders of assessing officer**

**S. 23 : Wealth-tax – Appeal – Commissioner (Appeals) – Rejection of waiver application – Merger of penalty order with order under section 18B**

Appeal lies against penalty order even where assessee has filed application under section 18B for waiver of penalty which has been rejected. (A.Ys. 1974-75 to 1976-77)

*CWT v. Shyam Lal Bhatia (2005) 277 ITR 399 / 148 Taxman 210 / 193 CTR 459 (All.)(High Court)*

## **Section 24 : Appeal to the Appellate Tribunal from orders of the Deputy Commissioner (Appeal)**

### **S. 24 : Wealth-tax – Appellate Tribunal – Power – Constitutional validity**

Tribunal has no jurisdiction to go into constitutional validity of provisions of Act. (A.Ys. 1995-96 to 1999-2000)

*Tara Singh v. Dy. CWT (2005) 97 ITD 482 / 97 TTJ 941 (Amritsar)(Trib.)*

### **S. 24 : Wealth-tax – Appellate Tribunal – Binding nature – Order of Tribunal**

Assessing Officer is bound by decision of Tribunal unless and until same is reversed by High Court or Supreme Court. (A.Y. 1985-86)

*T.T. Narasimhan v. ACWT (2005) 97 ITD 197 / 98 TTJ 1089 (Chennai)(Trib.)*

### **S. 24 : Wealth-tax – Appellate Tribunal – Tax effect**

Appeal is not maintainable before Tribunal in cases where tax effect is less than ` 1 lakh. (A.Ys. 1993-94 and 1994-95)

*Dy. CWT v. Nb. Syed Jaffar Ali Khan (2005) 94 ITD 21 / 95 TTJ 376 / 1 SOT 691 (Hyd.)(Trib.)*

### **S. 24 : Wealth-tax – Appellate Tribunal – Circular of CBDT**

Appeal filed by revenue contrary to CBDT Circular laying down minimum tax effect for filing appeals was not maintainable. (A.Ys. 1987-88 to 1993-94)

*WTO v. Chetnaben J. Shah (Smt) (2005) 95 TTJ 939 (Ahd.)(Trib.)*

## **Section 25 : Power of Commissioner to revise orders of subordinate authorities.**

### **S. 25 : Wealth-tax – Revision by Commissioner – Valuation report after completion of assessment**

Commissioner can take into consideration valuation report which was brought on record after completion of assessment. (A.Y. 1975-76)

*CWT v. Phoolwati Agarwal (Smt) (2005) 145 Taxman 436 / 276 ITR 623 (All.)(High Court)*

### **S. 25 : Wealth-tax – Revision by Commissioner – Valuation report after completion of assessment**

Report of Valuation Officer even if received after framing of assessment, can very well be taken into consideration by Commissioner while initiating proceedings under section 25(2). (A.Y. 1975-76)

*CWT v. Shanti Meattle (Smt.) (2005) 276 ITR 201 / 145 Taxman 344 (All.)(High Court)*

### **S. 25 : Wealth tax – Revision by Commissioner – Subject matter of appeal**

With effect from 1-6-1988, Commissioner has power to revise an order which has been subject-matter of any appeal in respect to such matters as have not been considered and decided in such appeal. (A.Y. 1977-78)

*CWT v. Saroj Madhava Prasad (Smt) (2005) 273 ITR 427 / 145 Taxman 361 (All.)(High Court)*

#### **S. 25 : Wealth-tax – Revision by Commissioner – Revised return – Original order**

Once after assessment revised return was filed and assessment was made thereon, revision of assessment order made on revised return on a point dealt with not in such order but in original assessment order, was not permissible. (A.Y. 1977-78)

*CWT v. Darshan Singh (2005) 277 ITR 53 / 150 Taxman 417 / 200 CTR 614 (P&H)(High Court)*

#### **S. 25 : Wealth-tax – Revision by Commissioner – Valuation report**

Commissioner can revise assessment order taking into account subsequent valuation report obtained after assessment was completed on basis of original valuation report. (A.Ys. 1970-71 and 1971-72)

*CWT v. Phool Chand (2005) 272 ITR 239 / (2004) 191 CTR 528 (All.)(High Court)*

#### **S. 25 : Wealth-tax – Revision by Commissioner – Condonation of delay – Amendments in law**

Where in view of confusion due to various amendments petitioner - assessee did not claim exemption in respect of office premises under section 5(iv), delay in filing revision petition claiming such exemption was to be condoned. (A.Ys. 1997-98 to 2001-02)

*Dinesh Nagindas Shah v. CIT (2005) 273 ITR 229 / 142 Taxman 263 / 190 CTR 106 (Guj.)(High Court)*

### **Section 27 : Reference to High Court**

#### **S. 27 : Wealth-tax – Reference – High Court – Beneficiaries under Trust – Body of Individuals**

Assessee was beneficiary under a trust. The share income of the assessee from the partnership firm was assigned to the trust. That along with the other income of the trust was distributed amongst the beneficiaries. The beneficiaries in turn assigned their respective interests in favour of a body of individuals. The Tribunal held that assignment of assets was not sham or bogus. The Court held that rejection of reference was proper.

*CWT v. Lov S. Kinariwala (2003) 259 ITR 440 / 172 Taxation 470 / 179 CTR 9 / 126 Taxman 198 (SC)*

#### **S. 27 : Wealth-tax – Reference – High Court – Power of review – Inherent power to rectify mistake**

Though High Court does not have power of review, it has inherent power to rectify mistake in its order; while applying rule 1D; omission by High Court to note that assessee was an investment company, was a mistake apparent on face of record which it could rectify.

*Lalit Mohan Thapar v. CWT (2005) 272 ITR 563 / 145 Taxman 285 / 195 CTR 311 (Cal.)(High Court)*

#### **S. 27 : Wealth-tax – Reference – High Court – Small tax effect**

Where amount of tax involved in reference application before High Court was very meagre, reference was liable to be returned unanswered.

*CWT v. Surendra Nath Gupta (2004) 136 Taxman 329 / 189 CTR 50 (All.)(High Court)*

#### **S. 27 : Wealth-tax – Reference – High Court – Tax effect – CBDT Circular**

In view of CBDT's instruction, appeal having tax effect of less than 2 lakhs is not maintainable.

*CWT v. Mohan Murari Sawant (2004) 191 CTR 497 (Bom.)(High Court)*

### **Section 27A : Appeal to High Court**

#### **S. 27A : Wealth-tax – Appeal – High Court – Stay of penalty proceedings**

Stay of penalty proceedings is not permissible in appeal against assessment order. (A.Ys. 1990-91 to 1992-93)

*Bhabi Properties (P.) Ltd. v. Dy. CWT (2004) 267 ITR 583 / 141 Taxman 64 (Cal.)(High Court)*

### **Section 31 : When tax, etc., payable and when assessee deemed in default.**

#### **S. 31 : Wealth-tax – Waiver of Interest – Adjudication of claim**

Where delay in payment of tax by Official Liquidator was because of adjudication of claims as per section 529A of Companies Act, interest demanded under section 31(2) was to be waived

*S. Dorai Raj v. Official Liquidator (2004) 271 ITR 497 / 142 Taxman 542 / 193 CTR 318 (Mad.)(High Court)*

## **CHAPTER VIIA**

### **Refunds**

### **Section 34A : Refunds**

#### **S. 34A : Wealth-tax – Refund – Interest**

As per provisions of section 34A(3) simple interest is to be paid by Government from date on which refund was granted on amount which had been paid by assessee after 31st day of March, 1975 in pursuance of any order of assessment or penalty. (A.Ys. 1970-71 to 1977-78)

*CWT v. Shashi Agrawal (Smt.) (2005) 276 ITR 64 / 145 Taxman 560 / 198 CTR 305 (All.)(High Court)*

## **CHAPTER VIII**

### **Miscellaneous**

#### **Section 35 : Rectification of mistakes**

##### **S. 35 : Wealth-tax – Rectification of mistake – Recalling of order**

Words 'amend original order to rectify any mistake apparent from record' do not mean to recall original order, rehear the matter and replace original order by a fresh order.

*CWT v. McDowell & Co. (2004) 269 ITR 451 / 136 Taxman 716 / 188 CTR 518 (Karn.)(High Court)*

#### **Section 35B : Failure to furnish returns of net wealth**

##### **S. 35B : Wealth-tax – Offences and prosecutions – Wilful failure to file return – Sanction – Criminal Procedure Code – S. 245(1) [S. 350]**

Sanction authority has sanctioned the prosecution, without application of mind, there was no evidence that default was wilful. The Court held that prosecution was not valid. (A. Y. 1993-94).

*J. Jayalalitha v. ACWT (2011) 337 ITR 1 / 60 DTR 169 / 243 CTR 466 (Mad.)(High Court)*

##### **Sch. III, Rule 3, 4, 5 : Wealth-tax – Valuation – Immovable Property – Gross Maintainable Rent – Market Rent – Actual Rent**

Property in question being subject to Rent Control Act, and the "standard rent" thereof not being higher than the actual rent received which has been assessed by the IT authorities, valuation of property for wealth tax purpose is to be determined only on the basis of the actual rent received. (A.Ys. 1985-86 to 1988-89)

*Jt. CWT v. Prayasvin B. Patel (2010) 46 DTR 52 / 41 SOT 357 / 133 TTJ 754 (Ahd.)(Trib.)*

##### **Finance Act, 1983 – Wealth-tax – Valuation – Land – Urban Land Ceiling Act – Schedule III**

Assessee's land was declared as surplus under ULCRA but possession was not taken over by authorities and in view of sections 3 and 4 of repealed Act, 1999, the assessee continued to be owner of the land and its value was includible in net wealth. Land being subject to ULCRA, the same has to be valued taking into consideration restriction under ULCRA. (A. Ys. 1984-85 to 1989-90, 1991-92 & 1992-93).

*CWT v. Chelmsford Club Ltd. (2011) 243 CTR 89 / 56 DTR 145 (Delhi)(High Court)*

## **Gift-tax Act, 1958**

## **CHAPTER I**

### **Preliminary**

#### **Section 2 : Definitions**

##### **S. 2(xii) : Gift-tax – Shares – Deemed gift [S. 4(1)(a)]**

The Supreme Court held that the shares come into existence at the time of allotment of shares; i.e., the shares are created at that time, and therefore, the allotment of shares are not transfer and therefore, section 4(1)(a) of the Gift Tax Act would not apply. (A.Y. 1987-88)

*Khoday Distilleries Ltd. v. CGT (2008) 307 ITR 312 / 220 CTR 228 / 15 DTR 126 / (2009) 176 Taxman 142 / 209 Taxation 416 (SC)*

##### **S. 2(xii) : Gift-tax – Retirement – Dues**

There is no gift if a retiring partner takes less than what is his due from firm. (A.Y. 1989-90)

*CIT v. Asha Gulati (Smt) (2005) 142 Taxman 234 / 282 ITR 584 / 192 CTR 192 (Delhi)(High Court)*

##### **S. 2(xii) : Gift-tax – Immovable property – Date of gift – Registration**

Date of gift of an immovable property is date of registration of document and not date of execution of document. (A.Ys. 1985-86, 1988-89)

*CGT v. Shree Shyam Sayee Corpn. (2005) 272 ITR 327 / 148 Taxman 216 / 194 CTR 343 (Mad.) (High Court)*

##### **S. 2(xii) : Gift-tax – Transfer of agricultural land – Impartible estate – Family arrangement**

Transfer of agricultural land belonging to his impartible estate and creation of trusts out of his privy purse by erstwhile Maharaja would amount to gift and could not be treated as family arrangement of joint family property. (A.Y. 1972-73)

*CGT v. Maharaja Amarinder Singh (2005) 274 ITR 381 / (2004) 141 Taxman 228 / 191 CTR 358 (P&H)(High Court)*

##### **S. 2(xii) : Gift-tax – Mohammedan law – Validity of gift**

If a transaction satisfies the ingredients of 'gift' under the Gift Tax Act, 1958, question as to whether gift is valid under Mohammedan Law or not, is of no consequence.

*Azad Rahim v. GTO (2004) 271 ITR 468 / 137 Taxman 508 / 190 CTR 410 (Ker.)(High Court)*

##### **S. 2(xii) : Gift-tax – Gold sovereigns – Marriage of daughter**

Giving of gold sovereigns by assessee to his daughter at the time of marriage is a reasonable expense of assessee contemplated under section 3(b)(ii) of Hindu Adoption and Maintenance Act and would not constitute a taxable gift.



*CGT v. V. Sundaram Achari (2004) 266 ITR 681 / 137 Taxman 445 / 190 CTR 203 (Ker.)(High Court)*

**S. 2(xii) : Gift-tax – Retirement of partner – No liability**

No element of gift is involved when assessee retires from the firm in which he is a partner. (A.Y. 1987-88)

*CGT v. E.X. Jolly (2004) 265 ITR 399 / 136 Taxman 454 (Ker.)(High Court)*

**S. 2(xii) : Gift-tax – Reallocation of profits in partnership deed – No gift**

Reallocation of profits by an amendment of partnership deed does not amount to gift.

*K. Govindan v. CGT (2004) 140 Taxman 101 / 272 ITR 220 / 191 CTR 516 (Ker.)(High Court)*

**CHAPTER II**

**Charge of Gift-tax and assets subject to such charges**

**Section 3 : Charge of gift-tax**

**S. 3 : Gift-tax – Hindu Undivided Family – Ancestral property – Privy purse**

Privy purse of ex-ruler is not HUF property; however his agricultural land being part of ancestral impartible estate is to be treated as HUF property.

*CGT v. Maharaja Amarinder Singh (2005) 274 ITR 381 / (2004) 141 Taxman 228 / 191 CTR 358 (P&H)(High Court)*

**Section 4 : Gift to include certain transfers**

**S. 4 : Gift-tax – Contract Act, 1872 – Transfer of Property Act, 1982 – Minor – Disability – Contract**

A minor suffers disability from entering into contract but he is thereby not incapable of receiving property as gift. Where a gift is made in favour of the donee, who is the guardian of the child, the acceptance of gift can be presumed to have been made by him or on his behalf without any overt act signifying acceptance by the minor.

*K. Balakrishnan v. K. Kamalan (2004) 135 Taxman 48 / 181 Taxation 574 / 186 CTR 209 (SC)*

**S. 4 : Gift-tax – Deemed gift – Induction of New Partner – Consideration**

Where on induction of new partner share of assessee, an existing partner was reduced, contribution of ₹ 25,000/- by incoming partner towards the capital together with the obligations of sincerely and faithfully carrying on the business was adequate consideration and it could not be said that there was a deemed gift. (A.Y. 1983-84)

*Sree Narayana Chandrika Trust v. CGT (2003) 261 ITR 279 / 129 Taxman 477 / 181 CTR 395 / 175 Taxation 639 / 11 SCC 350 (SC)*

**S. 4 : Gift-tax – Deemed gift – Transfer of assets without consideration – Transfer of shares of company from one group to another [S. 5(1)(xiv)]**

The assessee company was managed by two groups of share holders, K and P. Disputes cropped up regarding the entitlement to the sum of ` 80 Lakhs receivable from S for the sale of surplus FSI. According to the decree of Court, the K group transferred all its shares in the assessee to the P group. In the annual accounts, the value of the properties alienated to the K group was shown at ` 35 Lakhs. The Assessing Officer held that the assessee had gifted ` 35 lakhs without any consideration and such amount was exigible to gift tax. The order was confirmed by CIT(A) and Tribunal. On reference the Court held that the K group had relinquished and waived its right, title and interest in the property and also the consideration which the assessee was to receive out of the land transaction and in lieu thereof it got properties free from all liabilities on ownership basis. The consideration was the transfer of property in favour of K group. The consideration for the transaction could be spelt out from the award of the arbitrator. There was no gift exigible to tax. (A. Y. 1983-84)

*Pannalal Silk Mills P. Ltd. v. CGT (2011) 338 ITR 1 (Bom.)(High Court)*

*Editorial: Judgment of Mumbai Tribunal Pannalal Silk Mills Pvt. Ltd. v. Dy. CIT (1993) 44 ITD 458 reversed.*

**S. 4 : Gift-tax – Deemed gift – Inadequate consideration – Retirement from firm [S. 2(xii), 2 (xxiv)]**

When a partner brings in his assets into the partnership firm by way of contribution he continues to have interest in the said asset, and the value thereof mentioned in the books of the partnership firm representing his interest does not truly reflect the market value of such property and therefore, such transfer cannot be treated as a deemed gift under section 4(1)(a) by taking into account the amount received by the partner on retirement from the firm. (A.Y. 1994-95)

*CGT & Anr. v. Jayalakshamma (Smt.) (2010) 45 DTR 61 / 235 CTR 146 (Karn.)(High Court)*

**S. 4 : Gift-tax – Deemed gift – Power of revocation – Death of donor**

Though donor cannot be said to have transferred property if while ostensibly handing it over, he holds on to it by keeping unrestricted power to take it back next minute, but a transaction with an unlimited power of revocation, however, becomes a gift under Act when donor dies without exercising his power of revocation or during his lifetime gives up power of revocation as thereafter there would be complete divesting of property which would be incapable of being recalled at any subsequent point of time. (A.Y. 1979-80)

*Ram Dulari Agrawal (Smt) v. CGT (2005) 146 Taxman 297 / 197 CTR 232 (All.)(High Court)*

**S. 4 : Gift-tax – Deemed gift – New partners**

Merely because new partners had invested capital in business or they were being paid salaries would not be determinative of question whether that consideration was adequate or sufficient for relinquishment of share in goodwill in their favour by old partners so as not to constitute gift. (A.Y. 1976-77)

*CGT v. Shyam Lal* (2005) 272 ITR 592 / (2004) 192 CTR 181 / 142 Taxman 509 (All.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Sale consideration – Stamp duty valuation**

Difference between sale consideration in sale deed and value of property taken for stamp duty purposes, cannot be taken as deemed gift. (A.Y. 1981-82)

*CGT v. Raj Kumari Vimla Devi (Smt)* (2005) 279 ITR 360 (All.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Immovable property**

Unless document transferring immovable property is validly registered, there is no gift under the Act. (A.Y. 1990-91)

*V. Srinivasan (Dr.) v. CGT* (2004) 270 ITR 97 / 141 Taxman 456 / 192 CTR 371 (Mad.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Dissolution of firm**

In case of dissolution of a firm, when the assets and liabilities are valued and entitlement of each partners determined in proportion to his share in firm and any of those partners relinquishes a part of his entitlement under partnership deed, and agrees to receive less, it can be said that there is a gift to the extent of that difference, but for coming to such a conclusion, it is first necessary that all assets and liabilities of firm should have been determined and entitlement of each partner ascertained.

*CGT v. S. Ashok* (2004) 270 ITR 240 / 192 CTR 513 (Mad.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Reconstitution of partnership firm**

On reconstitution of partnership firm, where existing partner surrenders portion of his share and incoming partner brings in capital, transaction does not amount to deemed gift. (A.Ys. 1979-80, 1980-81)

*CGT v. Rameshchandra Ravjibhai* (2004) 269 ITR 146 / 188 CTR 543 (Guj.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Difference in valuation**

Merely because according to Assessing Officer there is some difference between valuation of property transferred and consideration received, transaction cannot be held to be deemed gift. (A.Y. 1975-76)

*CGT v. Sree Visalam Chit Fund Ltd.* (2004) 140 Taxman 660 / 188 CTR 183 (Mad.)(High Court)

#### **S. 4 : Gift-tax – Deemed gift – Relinquishment of share in partnership**

Relinquishment of share in partnership in favour of new partner does not amount to deemed gift. (A.Y. 1981-82)

*CGT v. Ramniklal M. Bambhanja (2004) 269 ITR 438 / 136 Taxman 181 / 188 CTR 539 (Guj.) (High Court)*

#### **S. 4 : Gift-tax – Deemed gift – Sale of shares at lower price**

Where assessee sold certain shares of a private limited company held by him to his relatives at a price lower than the market value, it was a case of deemed gift.

*Wg. Cmdr. A.G. Mathews v. CGT (2004) 269 ITR 149 / 134 Taxman 236 / 186 CTR 331 (Ker.) (High Court)*

#### **S. 4 : Gift-tax – Deemed gift – Capital Gains – Addition**

Addition on account of deemed gift under section 4(1)(a) could not be made on the basis of fair market value of plot determined by DVO for the purpose of computing capital gains. (A.Y. 1998-99)

*Yash Pal Bajaj v. GTO (2007) 107 TTJ 294 (Delhi) (Trib.)*

#### **S. 4 : Gift-tax – Deemed gift – Family arrangement – Bonafide**

On mere doubting the bonafides of family arrangement, Assessing Officer cannot hold that assessee must have received more money, or otherwise, and the so called difference cannot be held as amount chargeable to Gift Tax.

*Susmita U. Desai (Smt.) v. ACGT (2006) 153 Taxman 33 (Mag.) (Ahd.) (Trib.)*

#### **S. 4 : Gift-tax – Deemed gift – Relinquishment – Resolution of family dispute**

Relinquishment of share in plot of land by Memorandum of mutual understanding amongst members of the family, to resolve the existing and future dispute, cannot amount to Gift.

*Navalchand Bavchand Danapith v. Gift Tax Officer (2006) 152 Taxman 63 (Mag.) (Rajkot) (Trib.)*

### **Section 5 : Exemption in respect of certain gift**

#### **S. 5 : Gift-tax – Exemptions – Conversion of proprietary business into partnership**

Conversion of proprietary business by assessee – doctor into a partnership firm is not exempt under section 5(1)(xiv) (A.Y. 1985-86)

*V. Mohandas (Dr.) v. CGT (2004) 271 ITR 558 / 141 Taxman 201 / 191 CTR 445 (Ker.) (High Court)*

#### **S. 5 : Gift-tax – Exemptions – Karta – Wife – HUF**

Gift made by Karta of HUF to his wife out of HUF's assets is entitled to exemption under section 5(1)(viii)

*CGT v. Banshilal Narsidas (2004) 270 ITR 231 / 137 Taxman 358 / 190 CTR 145 (MP) (High Court)*

## **Section 6 : Gift escaping assessment**

### **S. 6 : Gift-tax – Valuation of gifts – Yield method**

Yield method proper method for valuation of unquoted shares.

*Wg. Cmdr. A.G. Mathews v. CGT (2004) 269 ITR 149 / 134 Taxman 236 / 186 CTR 331 (Ker.)(High Court)*

### **S. 6 : Gift-tax – Valuation of Gifts – Schedule 11**

From assessment year 1992-93 onwards only, value of property as on date of transfer under section 4(1)(a) can be determined in the manner provided in Schedule II to the Act which in turn refers to Schedule III to the WT Act; for assessment year 1991-92, proper method of valuation of equity shares of private company was yield method. (A.Y. 1991-92)

*K.C. Mammen (Dr). v. CGT (2004) 269 ITR 167 / 139 Taxman 156 / 190 CTR 153 (Ker.)(High Court)*

## **CHAPTER IV Assessment**

## **Section 16 : Gift-tax reassessment report of internal audit party**

### **S. 16 : Gift tax – Reassessment – Report of internal audit party**

Report of internal audit party does not constitute 'information'. (A.Y. 1976-77)

*CGT v. Nabe Shah (2005) 279 ITR 383/ 146 Taxman 75 (All.)(High Court)*

## **Interest-tax Act, 1974**

## **Section 2 : Definitions**

### **S. 2(5) : Interest-tax – Interest on Bonds and debentures – Investment**

Interest earned on bonds and debentures by way of investment cannot be taxed under Interest Tax Act, 1974. (A.Y. 1992-93)

*CIT v. Sahara India Savings & Investment Corpn. Ltd. (2009) 32 DTR 57 / 227 CTR 425 / (2010) 186 Taxman 19 / 321 ITR 371 (SC)*

### **S. 2(5) : Interest-tax – Chargeable interest – Interest on loans and advances – Bills discounting [S. 2(7), 5, 6]**

Sections 5 and 6 of the Interest Act, specifically exclude the interest accruing or arising to a credit institution on loans and advances made to other credit institutions from the purview of chargeable interest and, therefore, interest received by the assessee on loans and advances made under the bills rediscounting scheme from

different banking companies to which Banking Regulation Act 1949, applies, does not form part of chargeable interest. (A.Y. 1992-93).

*National Insurance Co. Ltd. v. CIT (2011) 58 DTR 137 / 339 ITR 573 (Cal.)(High Court)*

### **S. 2(5) : Interest-tax – Chargeability – Refinancing Operations**

Interest earned on refinancing operations to be excluded from chargeable interest. (A.Y. 1996-97)

*CIT v. Punjab State Industrial Development Corporation (2010) 326 ITR 390 (P&H)(High Court)*

### **S. 2(5) : Interest-tax – Bank – Advance of loan – Compensation – Subsidy**

Where a bank extended credit facilities to exporters at lower rate of interest amount paid by RBI to compensate said bank to extent of loss suffered by bank for extending said credit, was in nature of interest and, not export subsidy and was, thus taxable. (A.Ys. 1985-86 to 1986-87)

*State Bank of Indore v. CIT (2004) 270 ITR 336 / 140 Taxman 500 / 191 CTR 522 (MP)(High Court)*

### **S. 2(5A) : Interest-tax – Chargeable interest – Financial company – Business of hire purchase and leasing – Appeal – Supreme Court – Interest Tax**

High Court has not examined whether the transactions entered into by the assessee constituted financial transactions so as to attract the provisions of the 1974 Act, apart from the fact that the issues covered a wide spectrum, the impugned order is set aside and matter restored back for fresh adjudication. (A. Y. 1995-96)

*Motor and General Finance Ltd. v. CIT (2011) 334 ITR 33 / 242 CTR 472 / 58 DTR 312 / 200 Taxman 10 (SC)*

*Editorial:- CIT v. Motor and General Finance Ltd. (2010) 236 CTR 487 / 48 DTR 118 / 327 ITR 530 (Delhi)(High Court) set aside.*

### **S. 2(5A) : Interest-tax – Chargeability – Financial company – Financial lease – Operating lease [S. 2(5B) & 4]**

For the purpose of applicability of sub. Cl. (iv) of section 2(5B), i.e. to determine whether the company carrying on lease business would be covered as loan company or not distinction will have to be drawn between a financial lease and an operating lease and financial lease would be relevant for applicability of sub. cl. (iv) as that would fall in the category of a loan company. (A.Ys. 1995-96 to 1999-2000)

*CIT v. Motor and General Finance Ltd. (2010) 327 ITR 530 / 48 DTR 118 (Delhi)(High Court)*

### **S. 2(7) : Interest-tax – Loans and Advances – Bonds and debentures**

The Supreme Court held that for the purpose of Interest-tax Act, 1974, interest on loans and advances will not cover under section 2(7) interest on bonds and debentures bought by the assessee as and by way of investment. (A.Y. 1992-93)



*CIT v. Sahara India Savings and Investment Corporation Ltd. (2010) 321 ITR 371 / 186 Taxman 19 / (2009) 32 DTR 57 / 218 Taxation 537 (SC)*

**S. 2(7) : Interest-tax – Interest on Government securities – Not chargeable [S. 4]**

Interest on Government securities is not liable to Interest Tax. (A.Ys. 1992-93 to 1995-96)

*CIT v. City Union Bank Ltd. (2009) 209 Taxation 135 (SC)*

*CIT v. Industrial Development Bank of India (2009) 209 Taxation 408 (SC)*

*CIT v. Ratnakar Bank Ltd. (2009) 210 Taxation 70 (SC) / 306 ITR 257 (SC) / 174 Taxman 592 (SC) / 14 DTR 241 (SC)*

*CIT v. The Bank of Rajasthan Ltd. (2008) / 5 DTR 245 (Raj.)(High Court)*

*CIT v. Nedungadi Bank Ltd. (2008) / 13 DTR 261 / 312 ITR 96 (Ker.)(High Court)*

**S. 2(7) : Interest-tax – Government securities – Not chargeable [S. 4]**

There is a basic difference between loans and advances on the one hand and investments/securities on the other. This difference is indicated in the Income-tax Act, the Companies Act, as well as the Banking Regulation Act, 1949. Interest earned by banks on dated Government Securities is not liable to interest tax under section 2(7) read with section 4 of the Interest-tax Act.

*CIT v. Corporation Bank (2007) 295 ITR 193 / 166 Taxman 388 / (2008) 214 CTR 302 (SC)*

**S. 2(7) : Interest-tax – Rediscount Interest – Development Scheme – Agency**

Scheme of IDBI to increase sales of indigenous machinery or capital equipment. Rediscount interest collected by Bank to pay IDBI under scheme. Bank only medium for disbursement of development fund for implementation of scheme. Rediscount interest is not "Chargeable interest" liable to interest tax in hands of Bank. (A.Ys. 1979-80 to 1985-86)

*CIT v. Canara Bank (2007) 293 ITR 115 / 211 CTR 437 / 165 Taxman 61 (SC)*

**S. 2(7) : Interest-tax – Hire purchase a loan – Motor financing**

Transaction of financing of motor vehicles by credit institution though termed as hire–purchase agreement, is a loan transaction and the finance charges recovered by the institution is held to be chargeable interest under section 2(7) of the Interest Tax Act, 1974.

*CIT v. Kallur Chit Funds & Finance (P) Ltd. (2009) 25 DTR 44 (Ker.)(High Court)*

**S. 2(7) : Interest-tax – Additional amounts – Payment of interest**

Amount received by a financial institution, as additional amount from borrowers towards payment of its Interest tax liability was not 'interest' within the meaning of section 2(7) of the Interest tax Act, 1974 and could not be treated a chargeable interest. (A.Ys. 1996-97, 1997-98)

*CIT & Anr. v. Canfin Homes Ltd. (2008) 11 DTR 211 / 218 CTR 473 (Karn.)(High Court)*

**S. 2(7) : Interest-tax – Interest on securities – Not chargeable**

Interest on securities does not form part of chargeable interest. (A.Ys. 1992-93 to 1995-96)

*CIT v. Vijaya Bank (2006) 285 ITR 97 / (2005) 149 Taxman 674 / 199 CTR 329 (Karn.)(High Court)*

**S. 2(7) : Interest-tax – Interest – Hire purchase**

Hire-purchase charges in genuine hire-purchase arrangements do not fall within definition of 'interest' under section 2(7). (A.Ys. 1992-93, 1993-94)

*Deep Hire Purchase (P.) Ltd. v. CIT (2005) 274 ITR 69 / 144 Taxman 417 / 195 CTR 174 (P&H)(High Court)*

**S. 2(7) : Interest-tax – Constitutional validity – Charge**

Interest tax Act is constitutionally Valid.

*Karnataka Bank Ltd. v. UOI (2003) 132 Taxman 607 / 185 CTR 18 (Karn.)(High Court)*

**S. 2(7) : Interest-tax – Security – Debenture**

Interest tax Act will not apply to interest received by assessee bank on securities / debentures held by the assessee under the category 'permanent'. (A.Y. 1993-94)

*CIT v. United Western Bank Ltd. (2003) 259 ITR 312 / 127 Taxman 238 / 181 CTR 285 (Bom.) (High Court)*

**S. 2(7) : Interest-tax – Miscellaneous Finance company – Interest on securities**

Where the principal business of the respondent company was to accept deposits under various schemes, it was not a miscellaneous finance company within the meaning of section 2(5). Interest on securities cannot be treated as 'interest' under section 2 (7).

*CIT v. Sahara India Savings & Investment Corporation Ltd. (2003) 185 CTR 136 / 134 Taxman 14 / 264 ITR 646 (All.)(High Court)*

**S. 2(7) : Interest-tax – Finance lease – Interest component**

Interest component of finance lease is not a chargeable interest under section 2(7) of the Interest-tax Act, 1974. (A.Ys. 1996-97 to 1998-99)

*Union Bank of India v. Addl. CIT (2007) 108 TTJ 720 / 14 SOT 75 (Mum.)(Trib.)*

**S. 2(7) : Interest-tax – Lease rent – Delayed payment – Compensation**

Interest on delayed payment of lease rent, hire-purchase instalment, etc. is not exigible to interest tax. (A.Ys. 1996-97, 1997-98)

*GE Capital Transportation Financial Services Ltd. v. CIT (2006) 101 TTJ 298 (Delhi)(Trib.)*

**S. 2(7) : Interest-tax – Short term deposit – Securities – Bonds**

Investments by way of short-term deposits, securities and bonds not being loans and advances, interest thereon is not exigible to interest tax. (A.Ys. 1992-93 to 1996-97)  
*Housing & Urban Development Corporation Ltd. v. Jt. CIT (2006) 102 TTJ 936 / 5 SOT 918 (Delhi)(Trib.)*

**S. 2(7) : Interest-tax – Bill discounting charges – Rediscounting**

Assessee, after discounting the bills, having rediscounted the same to other institutions, only the discounting charges, net of rediscounting charges, is chargeable to interest-tax. (A.Ys. 1996-97, 1997-98)

*GE Capital Transportation Financial Services Ltd. v. CIT (2006) 101 TTJ 298 (Delhi)(Trib.)*

**S. 2(7) : Interest-tax – Chargeability – Credit institution**

Assessee company's principal business was not of granting loans and advances and it having much larger income from other businesses than from loaning, it cannot be said to be a "credit institution" hence not chargeable to interest-tax. (A.Ys. 1993-94 to 1995-96)

*Kanoi Industries (P) Ltd. v. Dy. CIT (2006) 102 TTJ 285 / 100 ITD 462 (Kol.)(Trib.)*

**S. 2(7) : Interest-tax – Credit card – Service charges**

Service charges received by the assessee bank from credit card holders on overdue payments could not be considered as interest on loans and advances and consequently are not exigible under the Interest-tax Act, 1974. (A.Y. 1997-98)

*Central Bank of India v. Jt. CIT (2006) 102 TTJ 280 / 99 ITD 34 (Mum.)(Trib.)*

**S. 2(7) : Interest-tax – Hire purchase – Not chargeable**

Assessee having been found to be owner of the vehicles, the transactions in question were hire-purchase transactions for purposes of interest-tax and income was not chargeable to interest tax. (A.Ys. 1996-97 to 1998-99)

*Addl. CIT v. GE Capital Transportation Financial Services Ltd. (2006) 101 TTJ 304 (Delhi)(Trib.)*

**S. 2(7) : Interest-tax – Corporate deposit – Interest**

Inter-corporate deposit is neither a loan nor an advance and therefore, interest on inter-corporate deposit is not taxable under the Interest Tax Act. (A.Ys. 1998-99, 2000-01)

*Utkarsh Fincap (P) Ltd. v. ITO (2006) 99 ITD 259 / 101 TTJ 210 (Ahd.)(Trib.)*

**S. 2(7) : Interest-tax – Deposit – Interest**

Object and purpose of Interest Tax Act, 1974 is to levy tax on interest income earned on loans and advances. There is no provision in the Act which refers to deposit in contradistinction to loan or advances. Interest on deposit is not specifically excluded from definition under section 2(7).

*Bajaj Auto Holdings Ltd v. Dy. CIT (2006) 281 ITR (AT) 154 (Mum.)(Trib.)*

#### **Section 4 : Charges of tax**

##### **S. 4 : Interest-tax – Charge of tax – Refinancing operations**

Interest earned on refinancing operations is not taxable interest under the Interest-tax Act, 1974. (A.Ys. 1992-93, 1993-94)

*HP State Industrial Development Corporation Ltd. v. CIT (2009) 17 DTR 26 / 226 CTR 590 (HP)(High Court)*

#### **Section 5 : Scope of chargeable interest**

##### **S. 5 : Interest-tax – Method of accounting – Charge [S. 21]**

Assessee following cash system of account in respect of interest income. Computation of chargeable interest is to be on basis of total income received.

*Kerala State Industrial Development Corp. Ltd. v. CIT (2003) 259 ITR 51 / 174 Taxation 766 / 180 CTR 192 / 128 Taxman 29 (SC)*

##### **S. 5 : Interest-tax – Hire purchase – Not chargeable**

Where the assessee purchased the vehicles from manufacturer and then gave them to its customers on hire purchase agreement. In the event of default by the customer the assessee was entitled to repossess the vehicle. On these set of facts the Assessing Officer treated the transaction as finance transaction and levied interest tax. The High Court confirming the order of the Tribunal held that the transactions were in the nature of purchase agreement and not financing agreement so as to attract interest tax liability.

*CIT v. G.E. Capital Transportation (2007) 197 Taxation 451 (Delhi)(High Court)*

#### **Section 10(B) : Reassessment**

##### **S. 10(B) : Interest-tax – Reassessment – Information – Audit objection**

Reassessment on the basis of audit opinion on legal issue without application of mind is invalid.

*Kanoi Industries (P) Ltd. v. Dy. CIT (2006) 102 TTJ 285 / 100 ITD 402 (Kol.)(Trib.)*

#### **Section 26C : Power to credit institutions to vary certain agreements**

##### **S. 26C : Interest-tax – Interest – Rounding up – Illegal**

Higher amount of interest tax under Interest Tax Act and consequently, a higher amount of interest by way of rounding up collected by Banks from borrowers was illegal.

*Indian Banks' Association v. Devkala Consultancy Service (2004) 267 ITR 179 / 137 Taxman*  
*69 / 189 CTR 157 / 181 Taxation 43 (SC) / 11 SCC 1*

## **Business Profits-tax Act, 1947**

### **Section 12 : Definitions**

#### **S. 12 : Business Profits-tax Act – Rule 4A – Business Profit Tax Rules – Refund – Assessment Time barred – Not entitled to refund of tax**

Where claim for refund on cancellation of regular assessment was held to be time barred. Assuming that there was a right in the respondent to claim the money, such right ought to have been exercised within a period of three years under the residuary article of the limitation Act. There was no doubt that by the time the assessee asserted his so called right, even this period had expired in respect of the assessment years in question. The contention based on Article 265 of the Constitution must also fail. Thus the assessee was not entitled to claim refund of tax.

*UOI v. British India Corporation Ltd. (2004) 268 ITR 481 / 140 Taxman 357 / 190 CTR 385 / 183 Taxation 1 (SC)*

## **The Estate Duty Act, 1953**

### **Section 2 : Definitions**

#### **S. 2(15) : Estate Duty – Refunds – Property**

Refunds which became due after the death of Mr. V. G. Saraf cannot be considered to be a property available at the time of the death. [Bombay High Court in the case of *Estate of Late General Sir Shankar S. S. J. B. Rana v. CED (1990) 186 ITR 578* approved]. Thus claim of refund of income tax which was pending adjudication and stood determined only after death of deceased not to be considered as property passing on death.

*CED v. Nalini V. Saraf (2009) 227 CTR 437 / 319 ITR 303 / 32 DTR 25 (SC) / (2010) 1 SCC 510*

## **The Expenditure-tax Act, 1987**

### **Section 3 : Application of the Act**

### **S. 3 : Expenditure-tax – Residential unit – Word “any”.**

The word ‘any’ occurring in section 3 cannot be restricted to one unit of residential accommodation. If it is restricted to one, it will mean that all the persons, who are accommodated in a hotel of which one room is rented out for ` 400 per day, are liable to pay expenditure tax. It is not the intention of the statute. The words ‘any unit’ of residential accommodation mean all the units of accommodation. (A.Ys. 1989-90, 1990-91)

*CIT v. Abad Hotels India (P.) Ltd. (2005) 272 ITR 331 / 142 Taxman 29 / 193 CTR 408 (Ker.) (High Court)*

### **S. 3 : Expenditure-tax – Rent – Purview**

Tariff charged by assessee for some type of rooms being less than ` 1200, the assessee is out of the purview of the Expenditure-tax Act. (A.Ys. 1997-98, 1998-99)

*Breeze Hotels (P) Ltd. v. ACIT (2006) 103 TTJ 129 (Chennai)(Trib.)*

## **The National Tax Tribunal Act, 2005**

### **National Tax Tribunal Act, 2005 – Constitutional Validity – S. 5(5) & 7 – Article 323B**

On petitions challenging the constitutional validity of the National Tax Tribunal Act, 2005, the Supreme Court held :

- (i) The UOI had agreed that appropriate would be made in the Act to ensure that only lawyers, Chartered Accountants and the parties in person would be permitted to appear before the National Tax Tribunal.
- (ii) In regard to section 5(5) dealing with the transfer of Members of the Tribunal from one State to another, the UOI agreed that the expression “consultation with the Chairperson” should be read and construed as “concurrence of the Chairperson”.
- (iii) In regard to section 7 providing for a selection committee comprising the Chief Justice or a judge of the Supreme Court and the Secretaries of the Ministry of Law and the Ministry of Finance, it was held that there was no question of the two Secretaries overriding the opinion of the Chief Justice or Judge, since primacy of the Chairperson was inbuilt and this aspect would be clarified.
- (iv) Matters relating to the National Tax Tribunal and challenge to article 323B of the Constitution of India raising other issues had to be heard separately.

*Madras Bar Association v. CIT (2010) 324 ITR 166 / 190 Taxman 432 (SC)*

*Editorial:- Refer Y. R. Gandhi (2010) 156 Company Cases 392 (SC)*

### **National Tax Tribunal Act, 2005 – Proposal – Amendments – Direction to legislate [S. 13]**

The Hon'ble Court directed the Government to make necessary amendments that were proposed to be made. The Supreme Court agreed to examine the matters after such amendments as the Government might think appropriate were made giving liberty to



the Government to mention the matter for listing after the amendments in the provisions of the Act were made.

*Sandeep Goyal v. UOI (2007) 160 Taxman 171 / (2008) 298 ITR 10 / 204 Taxation 388 (SC)*

### **National Tax Tribunal Ordinance, 2003 – Constitutional validity – Prima facie**

National Tax Tribunal Ordinance, 2003 is constitutionally valid There is legislative competency and prima facie no violation of any provisions of the Constitution.

*Amar Nath Sen v. UOI (2004) 265 ITR 362 / 135 Taxman 546 / 186 CTR 686 (Cal.)(High Court)*

### **S. 3 : National Tax Tribunal Ordinance, 2003 – Stay on – S. 3 at ordinance**

Where the Constitutional validity of the National Tax Tribunal Ordinance, 2003 was challenged the respondents were restrained till the next date of hearing from issuing any notification as contemplated by or under section 3 of the Ordinance.

*ITAT Bar Association v. UOI (2003) 264 ITR 726 / 136 Taxman 484 (Guj.)(High Court)*

### **National Tax Tribunal Ordinance, 2003 – Pending cases – Transfer – High Court**

Stay of Ordinance –Vires of the National Tax Tribunal ordinance, 2003, was under challenge and pending the petition an interim application was filed praying for stay of operation of ordinance, inter alia contending that once a notification is issued under section 3 all pending appeals and reference in High Court will stand transferred to the National Tax Tribunal and in that case various parties in appeals and references that are pending in the High Courts will be seriously prejudiced in as much as it will not be possible for such Benches to take up urgent matters so long as sufficient infrastructure is not set up for the Benches. In view of the aforesaid, the opposite parties were to be directed not to issue any notification as contemplated by or under section 3 of the said Ordinance till the next date.

*All India Federation of Tax Practitioners v. UOI (2003) 133 Taxman 491 / 264 ITR 466 (Orissa)(High Court)*

## **Voluntary Disclosure Scheme, 1997**

### **Voluntary Disclosure Scheme 1997 – Finance Act (26) of 1997 – Criminal Procedure Code – Prosecution – Benefit of scheme**

Person against whom only F.I.R. filed is not a person against whom prosecution is pending. Prosecution gets initiated when summons is issued by court on report of investigating officer, therefore, the benefit of scheme cannot be denied to a person against whom only F.I.R. is filed, therefore the order of Tribunal was confirmed.

*CIT v. Meena Goyal (Smt) (2011) Tax. L. R. 936 / 334 ITR 428 / 243 CTR 178 / 59 DTR 337 (Uttarakhand)(High Court)*

### **Voluntary Disclosure Scheme 1997 – Purposive Construction – Revoking of Certificate**

When the certificate issued to the firm for disclosure under VDIS was declared null and void as the search was conducted on the partners of the firm before the disclosure was made in the hands of firm and this fact was not brought to the notice of the officer. The Supreme Court declined to interfere even though the firm and partners are different persons for the purposes of the Act, holding that keeping in view the purport and object which the scheme seeks to achieve; we are of the opinion that in place of literal interpretation, rule of purposive construction should be applied. (A.Ys. 1994-95, 1995-96)

*Tanna & Modi v. CIT (2007) 292 ITR 209 / 210 CTR 273 / 161 Taxman 329 / 201 Taxation 194 (SC)*

### **Voluntary Disclosure Scheme, 1997 – Time for Payment – Mandatory – No extension [S. 67]**

Time for payment fixed under section 67 of Voluntary Disclosure of Income Scheme, 1997 is mandatory and not extendable.

*Hemlatha Gargya v. CIT (2003) 259 ITR 1 / 128 Taxman 190 / 182 CTR 107 / 174 Taxation 758 (SC)*

### **Voluntary Disclosure Scheme, 1997 – Tax liability – Payment – Detail of payment**

Where entire tax liability was not paid within a period of three months as contemplated under VDIS, declarant was not entitled to get benefit of scheme and in such a case, amount paid by assessee beyond period of 90 days under scheme was to be refunded to petitioner subject to petitioner producing necessary proof of such payments

*Sajan Enterprises v. CIT (2006) 282 ITR 636/ 151 Taxman 164 / 200 CTR 548 (Bom.)(High Court)*

### **Voluntary Disclosure Scheme, 1997 – Payment after due date – Refund of tax paid**

Where payment of last instalment of tax due was made beyond prescribed period of ninety days, assessee became entitled to either refund or adjustment of such instalment which was paid after due date

*R. Ranganatha Reddiar v. ITO (2005) 194 CTR 479 (Ker.)(High Court)*

### **Voluntary Disclosure Scheme, 1997 – Limitation Act – Condonation of delay – Pendency before tribunal**

Where appeal was filed along with application under section 5 of Limitation Act for condonation of delay before Tribunal, once delay was condoned by Tribunal, appeal would be said to be pending before Tribunal on date when a declaration was filed. (A.Y. 1993-94)

*Janki Das Lachchmi Narain v. CIT (2005) 274 ITR 155 / 146 Taxman 641 / 196 CTR 53 (All.)*

**Voluntary Disclosure Scheme, 1997 and Wealth Tax, Act, 1976 – Form of declaration – Production in evidence [S. 12]**

A covering letter in respect of disclosure made under Voluntary Disclosure Scheme which only referred to fact of disclosure and did not contain disclosure itself, would not constitute a 'declaration' and cannot be barred u/s 12 from being required to be produced.

*Boman P. Irani v. Manilal P. Gala (2004) 267 ITR 555/ 134 Taxman 783 / 187 CTR 331 (Bom.)(High Court)*

**Voluntary Disclosure of Income Scheme, 1997 – Finance Act, 1997 – Condonation of delay – Payment of tax**

Condonation of delay in making payment of tax is not permissible. (A.Y. 1995-96)

*Elango Industries Ltd. v. CIT (2004) 141 Taxman 259 / 188 CTR 62 (Mad.)(High Court)*

**Kar Vivad Samadhan Scheme, 1998**

**Section 87 : Definitions**

**S. 87 : Kar Vivad Samadhan Scheme – Condition Precedent – Tax Arrears – Rectification of Order – Not communicated to the Assessee – Vitiates order of Rectification [S. 87, 90, 154]**

When the declaration was filed there was tax arrears, however, subsequently due to rectification order there was no tax arrears. Benefit of scheme cannot be denied. Relevant date is date of declaration. Order passed suffered from malice in law. (A.Y. 1996-97)

*CIT v. Shaily Engineering Plastic Ltd. (2002) 258 ITR 437 / 179 CTR 14 / (2003) 126 Taxman 177 / 179 CTR 14 (SC)*

**S. 87 : Kar Vivad Samadhan Scheme – Excise Duty – Penalty [S. 88, 91, 93]**

Declarations were filed by the company and also by the officers but tax already paid independently by directors against due from them. The Court held that settlement of company meant settlement of officers. Since directors having paid tax independently and nothing due from them, they have not to be allowed refund of tax paid.

*UOI v. Onkar S. Kunwar & Others (2003) 174 Taxation 213 / (2002) 258 ITR 761 / 125 Taxman 121 / 177 CTR 281 (SC)*

**S. 87 : Kar Vivad Samadhan Scheme – Declaration – Reassessment – Immunity [S. 88, 90, 91, 92, 94 – Income Tax Act - S. 142, 143, 156]**

Upon declaration being made tax arrears being determined, paid and certificate issued under KVSS, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under section 148 except where case falls under the proviso (2) of sub-section (1) of section 90 of the scheme and it is found that any particular material furnished in the declaration is found to be false. (A.Y. 1992-93)

*Killick Nixon Ltd. v. Dy. CIT (2002) 258 ITR 627 / 125 Taxman 1055 / (2003) 172 Taxation 373 / 178 CTR 387 (SC)*

### **S. 87 : Kar Vivad Samadhan Scheme – Tax Arrears – Pendency of Appeal [S. 88, 89, 95]**

The determination of the “tax arrears” under section 87(m) of the Finance Act (No. 2) Act, 1998 for Kar Vivad Samadhan Scheme is that which was modified and not the modification itself. There is no requirement under section 87(m)(i) for the modification to have been completed on or before March 31, 1998. Designated Authority had no power to question the possible outcome of appeal. No power to hold that appeal etc. is sham, ineffective or infructuous. Supreme Court directed the designated authority to consider the application. (A.Y. 1992-93)

*Renuka Datla (Dr.) (Mrs.) and Others v. CIT (2003) 259 ITR 258 / 173 Taxation 51 / 179 CTR 218 / 126 Taxman 427 (SC) / AIR 2003 SC 839*

### **Section 88 : Settlements of tax payable**

#### **S. 88 : Kar Vivad Samadhan Scheme – Time limit for payment – Relaxation**

Time limit for payment of amount payable under KVSS under section 88 of the Finance (No.2) Act, 1998 cannot be relaxed.

*Mangilal S. Jain v. CIT (2004) 267 ITR 693 / 136 Taxman 267 / 187 CTR 315 (Karn.)(High Court)*

#### **S. 89 : Kar Vivad Samadhan Scheme – Arrears – Excise Duty – Appeal Pending**

Assessee made application under Samadhan Scheme, when the appeal was pending before the Commissioner of Income Tax (Appeals). The Commissioner of (Appeals) holding that appeal to be barred by time. Designated authority dismissing application as out of time. Appellate Tribunal holding that appeal before the Commissioner of (Appeals) within time. Application under Samadhan Scheme, filed pending appeal, not barred.

*Swan Mills Ltd. v. UOI (2008) 296 ITR 1 / (2007) 211 CTR 78 / 165 Taxman 621 (SC) / 7 SCC 29*

### **Section 90 : Time and manner payment of tax arrears**

#### **S. 90 : Kar Vivad Samadhan Scheme – Immunity – Sales Tax laws [S. 91]**

The provisions of Kar Vivad Samadhan Scheme, 1998, such as finality of order under section 90(3) and immunity under section 91 thereof cannot be availed in proceedings under the Sales-tax laws of the State.

*Master Cables Pvt. Ltd. v. State of Kerala (2007) 296 ITR 8 / 210 CTR 86 / 162 Taxman 479 / 200 Taxation 246 (SC) / 5 SCC 416*

### **S. 90 : Kar Vivad Samadhan Scheme – Appeal – Revision – Tax arrears – Interest [S. 90(1)]**

If appeal or revision is pending on date of filing of declaration under section 88, it is not for department to hold that appeal / revision was sham, ineffective or infructuous. Where assessee's declarations filed under scheme were rejected by department and, on writ, High Court directed department to entertain declarations, and to determine payment of tax arrear under section 90(1) with an additional direction to make assessee liable to pay interest on amount so determined, High Court's direction was not justified as assessee was not liable to pay interest as his liability would accrue only after ascertainment of disputed tax under section 90. (A.Ys. 1984-85 to 1991-92)

*CIT v. Shatrusailya Digvijaysingh Jadeja (2006) 190 Taxation 3 / (2005) 277 ITR 435 / 147 Taxman 566 / 197 CTR 590 (SC) / 7 SCC 294*

### **S. 90 : Kar Vivad Samadhan Scheme – Reference application – Application for condonation of delay – Maintainability [S. 264]**

Pendency of application for condoning delay in filing petition under section 264 of the Income Tax Act, 1961, at the time of filing of petition under Scheme, would not make declaration under the scheme maintainable.

*Computwel Systems (P.) Ltd. v. W. Hasan (2003) 260 ITR 86 / 129 Taxman 67 / 184 CTR 92 / (2000) 10 SCC 403 (SC)*

### **S. 90 : Kar Vivad Samadhan Scheme – Indirect Taxes – Custom Duty – Prosecution – Criminal Law – Cheating [S. 87(j), 89, 95(iia), (iii)]**

If an assessee takes the option under the Kar Vivad Samadhan Scheme, 1998, he obtains immediate immunity under any proceedings under any law and all laws in force. The true fact and import of the Kar Vivad Samadhan Scheme, 1998, is that the Scheme is availed of and the formalities complied with including the payment of duty, the immunity granted under the provisions of the Customs Act 1962, also extends to such offences that may prima facie be made out on identical obligations, i.e., of evasion of customs duty and violation of any notification under the Act. If the disputed demand is settled by the Authority and the pending proceedings are withdrawn by the importer, the balance demand against the importer shall be dropped and the importer shall be immune from penal proceedings under any law on force.

*Hira Lal Hari Lal Bhagwati v. CBI (2003) 262 ITR 466 / 176 Taxation 231 / 182 CTR 1 / 129 Taxman 989 / 5 SCC 257 / (2003) 182 CTR 1 (SC)*

### **S. 90 : Kar Vivad Samadhan Scheme – Revision petition [S. 90, 264]**

Mere fact that assessee had filed revision petition under section 264 and declaration under scheme simultaneously on eve of closure of scheme, would not disentitle him from getting benefit of scheme.

*E.J. Thomas v. ACIT (2006) 281 ITR 40 / (2005) 149 Taxman 37 / 199 CTR 83 (Ker.)(High Court)*

### **S. 90 : Kar Vivad Samadhan scheme – Pendency of application before settlement commission – Validity of samadhan [S. 80, 245D]**

Where no order had been passed by Settlement Commission under section 254D(4) on assessee's application till the time designated authority granted certificate to assessee under section 90(2) of Finance (No. 2) Act, 1998 under Kar Vivad Samadhan Scheme, pendency of application before Settlement Commission would not make KVSS inapplicable and assessee was entitled to withdraw cases pending before Settlement Commission. (A.Ys. 1988-89 to 1993-94)

*D'souza Motors v. ITSC (2005) 277 ITR 517 / 200 CTR 163 / 154 Taxman 25 (Bom.)(High Court)*

### **Section 91 : Immunity from prosecution and imposition of penalty in certain cases**

### **S. 91 : Kar Vivad Samadhan Scheme – Immunity – Offences under Prevention of Corruption Act [S. 95]**

Immunity under Kar Vivad Scheme is not available in respect of offences under Prevention of Corruption Act. Public servants who can never file declaration would not come within the purview thereof. Section 95 Clause (iii) would be attracted, if inter alia, any prosecution for any offence enumerated there under has been initiated on or before filing of declaration.

*State, CBI v. Shashi Balasubramanian (2006) 157 Taxman 261 / 206 CTR 587 / 289 ITR 8 (SC)*

### **Section 95 : Scheme not to apply in certain cases**

### **S. 95 : Kar Vivad Samadhan Scheme – No appeal – Reference – Writ**

No appeal, reference, writ petition or application was pending hence, the rejection of declaration was proper.

*Lajya Dyeing & Bleaching Works v. UOI (2003) 263 ITR 763 / 185 CTR 329 / (2004) 178 Taxation 120 / 134 Taxman 345 (SC)*

### **S. 95 : Kar Vivad Samadhan Scheme – Finance Act, 1998 – Pending appeal**

For the purpose of admissibility of a declaration under the KVSS, it is enough that an appeal is pending, even if it is irregular or incomplete.

*Better Label Manufacturing Co. Ltd. v. Commissioner of Customs (2008) 11 DTR 338 / 219 CTR 205 (Mad.)(High Court)*



### **S. 95 : Kar Vivad Samadhan Scheme – Appeal Pendency – Admission**

Where appeal filed by assessee before Tribunal was not an admitted appeal on date of submission of declaration but it was only pending appeal, declaration was hit by section 95(1)(c) of the Finance Act, 1988 warranting its rejection.

*Shree Amarlal Kirana Stores v. CIT (2004) 267 ITR 48 / 138 Taxman 263 (MP)(High Court)*

### **Kar Vivad Samadhan Scheme 1998 – Finance (No. 2) Act, 1998 – Discrimination – Article 14 of Constitution of India**

Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of tax payers find them selves is not hit by Article 14 if Legislation as such is of general application and does not single them out for harsh treatment. Test adopted to determine whether a classification is reasonable or not are that classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of groups and that differentia must have rational relation to object sought to be achieved by statute in question. Section 87(m), (ii)(b), which denies benefit of Kar Vivad Samadhan Scheme to those who were in arrears of tax as on 31-3-1998 but to whom demand notices /show cause notices were issued after 31-3-1998 is based on a reasonable basis which is firstly amount to duties, cess, interest, fine or penalty must have been determined as on 31-3-1998 but not paid as on that date of declaration and secondly date of issuance of demand or show cause notice on or before 31-3-1998, which is not disputed but duties remain unpaid on date of filing of declaration. Therefore scheme 1998 does not violate equal protection clause where there is an essential difference and real basis for classification which is made.

*UOI v. Nitdip Textile Processors (P) Ltd. (2011) 203 Taxman 1 / 245 CTR 241 / 63 DTR 145 (SC)*

### **Kar Vivad Samadhan Scheme – Writ – Pendency – Admission**

Mere pendency of the writ petition is not enough for maintaining a declaration, under KVSS; it should be admitted and pending. (A.Ys. 1961-62 to 1990-91)

*Yuvraj Tukoji Rao Puar v. UOI (2004) 271 ITR 153 / 193 CTR 142 / 143 Taxman 167 (MP)(High Court)*

### **Kar Vivad Samadhan Scheme – Excess tax paid – Refund**

Excess amount paid by petitioner under protest under KVSS because of mistake by commissioner in computing amount payable by petitioner, had to be refunded. (A.Y. 1995-96)

*Marigold Engineers P. Ltd. v. UOI (2004) 141 Taxman 4 / 191 CTR 103 / 274 CTR 17 (P&H) (High Court)*

### **Kar Vivad Samadhan Scheme – Certificate – Delayed challenge**

Highly belated challenge to certificate if intimation determining amount of tax payable by petitioner, would have to be dismissed on ground of laches.

*Raj Kumar Jain (HUF) v. Designated Authority (as CIT) (2004) 265 ITR 175 / 136 Taxman 514 (P&H)(High Court)*

### **Kar Vivad Samadhan Scheme – Arrears – Protective assessment**

For purpose of settlement under KVSS, there should be factual arrears that could be demanded legally; where there was only protective assessment and protective demand assessee's declaration/application was rightly rejected. (A.Y. 1995-96)

*S. Jaganathan v. ACIT (2004) 266 ITR 305 / 135 Taxman 356 / 187 CTR 410 (Karn.)(High Court)*

## **ALLIED LAWS**

### **Andhra Pradesh Land Grabbing (Prohibition) Act, 1982**

#### **Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 : Tenancy and Land laws – Agricultural Land – User of land – Urban area**

Fact that agricultural land in question is included in urban area is not enough to conclude that user of the same had been altered with passage of time.

*N. Srinivasa Rao v. Special Court under the AP Land Grabbing Act & Ors. (2006) (4) SCC 214*

### **Bengal Agricultural Income-tax Act, 1944**

#### **Bengal Agricultural Income-tax Act, 1944 – Tea Estate – Green Tea Leaves**

Assessee having tea estate, assessee selling tea manufactured in its factory as well as Green tea leaves. Assessee is liable to pay agricultural Income Tax on 60% of agricultural income determined by Officer in the Centre for purposes of Income Tax Act, 1961. Assessee is also liable under Bengal Agricultural Income Tax Act, 1944, in regard to income from sale of green tea leaves.

*UOI v. Belgachi Tea Co. Ltd. & Others (2008) 304 ITR 1 / 206 Taxation 547 / 216 CTR 337 / 7 DTR 100 / 170 Taxman 209 (SC)*

### **Foreign Exchange Regulation Act, 1973**

#### **Foreign Exchange Regulation Act, 1973 – Prosecution – Ss. 8, 9, 50, 51 and 56**

Adjudication proceedings and criminal proceedings can be initiated simultaneously and independent of each other – finding in the adjudication proceeding is not binding in the criminal proceeding – adjudication proceedings does not attract the provisions of Art. 20(2) of the Constitution or section 300 of the Cr. PC. If the exoneration in the adjudication proceeding is on the merit, a criminal prosecution on the same facts cannot be allowed to continue.

*Standard Chartered Bank v. Directorate of Enforcement (2006) 130 Comp Cas 341 (SC) distinguished.*

*Radheshyam Kejriwal v. State of West Bengal and Anr. (2011) 333 ITR 58 / (266) ELT 294 (SC)*

### **Foreign Exchange Regulation Act – Offence – Company – Punishment with fine alone permissible – Interpretation – Penal Law**

Though a company cannot be sentenced to imprisonment, for that reason only company cannot be given complete immunity from prosecution for graver offences where mandatory punishment of imposition of fine which is also a prescribed punishment. Penal law strict interpretation.

*Standard Chartered Bank & Ors. v. Directorate of Enforcement (2005) 275 ITR 81 / 145 Taxman 154 / 195 CTR 465 / 188 Taxation 329 (SC) / (2006) 4 SCC 278*

### **Income-tax Appellate Tribunal**

#### **Income-tax Appellate Tribunal – Appointment of Members – Government's decision not to appoint ITAT Members till amendment providing for 2 years' appointment upheld – Income- tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963 - Rule 4**

Out of 23 vacancies in the post of Judicial Member (JM) & Accountant Member (AM), the Selection Board recommended 18 candidates in the main select list and 4 candidates in the wait list. Out of the 18 selected candidates, 2 were not cleared by Vigilance. On 26.04.2006, the 16 were approved by the Appointments Committee of the Union Cabinet for a period of 2 years. The Law Ministry was directed to first amend the ITAT (Recruitment and Conditions of Service) Rules, 1963, so as to provide for appointment of the members of the ITAT for a period of two years. As the selection list was not given effect to pending the amendment in the Rules, the Revenue Bar Association filed a Writ Petition in the Madras High Court for a mandamus to give effect to the selection list which was allowed. This was challenged by the UOI in the Supreme Court but the SLP was dismissed with the direction that all formalities to give effect to the Selection List should be completed. The Appointments Committee thereafter approved the names of all the 16 selected candidates and appointed them till the date of retirement on attaining the age of 62 years. On 31.08.2007, the Appointments Committee also decided that the appointment of members of the ITAT in future will be taken up only after the recruitment rules of ITAT are amended. In 2008, the candidates who were in the "wait list" filed applications in the Central Administrative Tribunal for directions for their appointment which was opposed by the UOI on the ground that the Appointments Committee had decided that no further appointment of members in the ITAT would be made until the ITAT Recruitment Rules were amended. The CAT allowed the applications and directed that the wait-listed candidates be considered for filling up the advertised vacancies existing in the posts of JM & AM. The UOI challenged the order of CAT in the Delhi High Court contending that the vacancies in the post of JM & AM can be

filled up only after the recruitment rules were amended as decided by the Appointments Committee. The High Court dismissed the challenge on the ground that the recruitment rules had already been amended by insertion of Rule 4(a) and there was nothing in the amendment which disqualified the wait-listed candidates from being appointed as members of the ITAT. It was also held that the selection having been conducted by a high-power Selection Board presided over by a sitting Judge of the Supreme Court deserved to be given due weightage and consideration. It was also held that the only way of reducing the backlog was to fill up the vacancies at the earliest and by not doing so, the UOI was prolonging the agony of a large number of assesses apart from depriving itself of its legitimate dues which depends upon the verdict of the ITAT. On appeal by the UOI, Supreme Court HELD reversing the CAT & High Court:

Under Rule 4, a person on the select panel has no vested right to be appointed to the post for which he has been selected, but he has a right to be considered for appointment. The candidates in the wait-list, not having been approved by the Appointments Committee, were not persons selected for appointment pursuant to the decision that further appointments would be made only after the amendment of the Rules. As the Central Government is both the rule making authority as well as the appointing authority of any member of the ITAT, if it has taken a decision to undertake appointments in future after amendment of the rules, it is difficult for the Court to hold that the reason given by the Government for not making any further appointments because of the proposed amendments to the rules is not a justifiable or proper reason and that the decision of the Government in not approving the wait list of candidates recommended by the Selection Board is not proper. The High Court's reliance of Rule 4(a) was wrong because this had been inserted on 26.04.2004 and was not in the mind of the Appointments Committee when it took the decision on 26.04.2006 and 31.08.2007 to make further appointments only after the Rules were amended. As the immediate need for filling up the vacancies has been met by the appointment of the 16 Members, the Court cannot compel the Government to make the appointments from the wait-listed candidates by a writ of mandamus.

*UOI v. Pradip Kumar Kedia (2012) 204 Taxman 71 (SC)*

### **Income-tax Appellate Tribunal – President – Power – The President of the Tribunal has no power to write the Members' ACR**

The Petitioner, a Judicial Member of the Tribunal, was superseded to the post of Vice President by his junior Mr. P. Mohanarajan. The Petitioner claimed that the supersession was on account of adverse Annual Confidential Reports ("ACRs") written by the President of the Tribunal which had misguided the high level Selection Committee without the Petitioner being given an opportunity to represent against the ACR. The Petitioner's challenge before the Central Administrative Tribunal was rejected on the ground that the Selection Committee had decided on the basis of merit. The Petitioner challenged the decision before the High Court and raised two issues: (i) whether the post of Vice President is a promotional post to that of the Member of the ITAT or not? & (ii) whether the President of the ITAT has the authority

to record the ACRs of the Members & if so, whether the Government has the right to review the ACRs of the Members? HELD by the High Court:

- (i) The Vice Presidents of the Tribunal are appointed from amongst the Members in terms of Rule 7A of the Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. Under Rule 7C, the criteria for selection is merit. The argument that because there is a merger of the pay scales of the posts of Members and Vice Presidents, there is also a merger of the posts and hence the Members cannot be subjected to selection process is not acceptable. There is only a unification of the pay and not a merger of the posts. Under the scheme of the Act, the post of Vice President is over and above the level of Member & carries higher responsibilities, higher pay band and is definitely a promotional post from that of the Member;
- (ii) The Tribunal is a judicial body and while the President exercises administrative control over the Benches, he has no power to write the ACRs of the Members. Further, being a judicial body, the Tribunal should have judicial autonomy and therefore, the Government cannot act like a reviewing authority;
- (iii) On merits, the Petitioner's ACR showed that while he was a hard working and knowledgeable person, he behaved in a rude manner with the colleagues and his rigid tendency and non-adjustable nature had invited many problems, resulting in his frequent transfers. These must have weighed with the Selection Committee. As the ACRs were illegally recorded by the President and reviewed by the Government, the Selection Committee must reconsider the claim of the Petitioner on merits de hors the ACRs;
- (iv) On the conduct of the Petitioner, the Court observed that it was "pained" & "disturbed" by the material on record that showed the he was "arrogant" and "would always throw to winds the well established judicial conventions" including "instances of keeping the matters for writing dissenting orders for months together and fighting with the other Members on silly aspects". It was noted that the Petitioner was "transferring his personal feelings against his colleagues into the orders circulated by them and nurturing unnecessary hatred and ill-feelings" and advice was given that the Petitioner should "mend his ways and conduct himself in a dignified manner and follow the established judicial conventions, so as to maintain the decorum on and off the dais".

*Uttam Bir Singh Bedi v. UOI (2012) 204 Taxman 284 (Mad.)(High Court)*

## **Indian Registration Act, 1908**

### **Indian Registration Act – Firm – Dissolution – Partners**

Firm is not an independent entity. Only a compendious name given to partnership for convenience, partners are real owners of assets of firm. So long as the partnership continues each partner is interested in all assets of the firm as each partner is owner of the assets to the extent of his share in the partnership. The assets which heretofore belonged to the partners will after dissolution of the firm stand allotted to the partners individually. There is no transfer or assignment of ownership in the assets. Award distributing residue of assets of firm, after settlement of accounts,

between partners in accordance with their shares does not transfer or assign interest in any asset, hence, does not require registration under section 17 of the Indian Registration Act 1908.

*N. Khadervali Saheb & Another v. N. Gudu Sahib (Decd.) & Other (2003) 261 ITR 1 / 175 Taxation 431 / 129 Taxman 597 (SC)*

### **Orissa Sales Tax Act, 1947**

#### **Orissa Sales Tax Act, 1947 – Refund – Interest – Stay Order – Order of High Court**

Refund should be made of amount deposited with interest from date of deposit of amount pursuant to order of High Court.

*Tata Refractories Ltd. & Anr. v. Sales Tax Officer & Ors. (2003) 260 ITR 312 / 129 Taxman 544 (SC)*

### **Plantations Tax (Kerala)**

#### **Plantations Tax (Kerala) – Finance Act – Revision of rates of tax**

The State can always revise the rates in the middle of the financial year provided the assessable extent of the land comprised in the plantation as on the first day of the financial year is not altered.

*State of Kerala v. Alex George and Another (2005) 185 Taxation 443 / 1 SCC 299 / (2004) 271 ITR 290 / 192 CTR 581 (SC)*

### **Right to Information Act, 2005**

#### **Right to Information Act – Exemption - Income Tax Assessment – Informer**

If an informer is using RTI to get information which can help him to claim a reward by showing that tax has been evaded, it cannot be considered to be misuse of information in any way, nor it can be considered to be unwarranted invasion of privacy of assessee.

*Rakesh Kumar Gupta v. Public Information Officer, New Delhi (2010) 190 Taxman 46 (CIC-New Delhi)*

### **Sales Tax**

#### **Sales Tax – Board of Revenue – Circulars – Binding Nature – Reassessment – High Court Judgments Contrary to Circulars**

Assessing Officer passing assessment order treating field latex and centrifuged latex as the same commodity and granting reliefs. High Court judgment holding that they were different commercial commodities. The Court held that reassessment is not permissible so long as Circular of Board of Revenue was there treating them as same commercial commodity. Circular is binding on the assessing Officer. (A.Ys. 1997-98, 1998-99)



**Sales Tax – Goods in Transport – Loss of Revenue – Penalty – Strict liability – Exclusion of Mens Rea – Civil Liability**

Declaration in Form No. 18A / 18C has to be given in respect of goods in the movement of inter state Sales. It is for contravention of section 78(2) that penalty is attracted under section 78(5). Whether the goods are put in movement under local sales, imports exports or inter State transactions they are goods in movement and therefore they have to be supported by the requisite declaration. It is not open to the assessee to contravene and say that the goods were exempt. Without disclosing the nature of transaction it cannot be said that the transaction was exempt.

*Guljag Industries v. Commercial Taxes Officer (2007) 293 ITR 584 (SC) / 7 SCC 269*

**Sales Tax – Goods – Transfer of Right to use Intellectual Property – Test – Corporeal or Tangible Property – Software Programme**

A transaction of sale of computer package off the self is clearly a sale of "Goods" with in the meaning of that in section 2(n) of the Andhra Pradesh General Sales Tax Act, 1957. The term "all materials, articles and commodities" in section 2(h) of the Act includes both tangible and intangible / incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programmes have all these attributes.

*Tata Consultancy Services v. State of Andhra Pradesh (2004) 271 ITR 401 / 192 CTR 257 / 141 Taxman 132 (SC)*

Editorial:- The Supreme Court did not decide the question whether customs made software would be goods.

**Service Tax**

**Service Tax – Activation of SIM – Sale or service – Liable to tax**

The amount received by the cellular company from its subscribers towards SIM cards forms part of the taxable value for levy of service tax, as SIM cards are never sold as goods independent of the services provided and therefore, the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. (A.Ys. 1997-98 & 1998-99)

*Idea Mobile Communications Ltd. v. CCEC (2011) 59 DTR 209 / 243 CTR 1 (SC)*

**Service Tax – Chartered Accountants – Legislative competence**

The Supreme Court held that the Parliament has legislative competence to levy service tax by way of provisions in the Finance Act, 1994 and Finance Act, 1998, under entry 97 of List I of Schedule VII of the Constitution of India. The taxes on service is a different subject as compared to taxes on profession, trade, calling, etc. therefore entry 60 of the List II and entry 97/92C of the List I operate in different spheres.

Therefore, the Supreme Court upheld the levy of service tax on chartered accountants, cost accountants and architects.

*All India Federation of Tax Practitioners v. UOI (2008) 202 Taxation 168 / (2007) 293 ITR 406 / 211 CTR 449 / 170 Taxman 274 / 7 SCC 527 / 9 VST 126 (SC)*

### **Service Tax – Legislative Powers – Principle of Discrimination**

Service tax imposed on provider of services singling out only customers of goods transport operators and clearing and forwarding agents for imposing liability to pay the tax not discriminatory. Power to remove infirmities in earlier legislation and make retrospective amendment is valid. Provision making customers receiving services liable in the case of services by goods transport operators and clearing agents held to be valid.

*Gujarat Gammon India Ltd. v. Spl. Chief Secretary & Ors. (2006) 6 RC 239 (SC) / 3 SCC 354 Gujrat Ambuja Cement Ltd. & Ann. v. UOI & Anr. (2005) 274 ITR 194 / 188 Taxation 360 / 194 CTR 428 / 144 Taxman 145 (SC)*

### **Service Tax – Photography Service – Letter of Minister**

A Mere challenge to the validity of a letter of the Ministry of Finance clarifying the provisions of the Finance Act, is not enough. The Challenge has to be the provisions of the Finance Act. Levy of service tax on gross amount charged by the service provider for service rendered by him is valid.

*C. K. Jidheesh v. UOI & Others (2005) 279 ITR 118 / 199 CTR 212 / 149 Taxman 446 / (2006) 192 Taxation 22 (SC)*

### **Service Tax – Broad Casting Agency – Interest - Retrospective Legislation – Interest**

Merely selling time slots for advertising, obtaining sponsors for serials, etc. on telecast channels, liability to pay service tax arises after amendment and validation section introduced in 2002. Liability to pay interest arises only thereafter. It is permissible for the legislature to retrospectively legislate, such retrospectivity not to create an offence retrospectively. Liability to pay interest would arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect.

*Star India (P.) Ltd. v. CCE (2006) 280 ITR 321 / 201 CTR 63 / 150 Taxman 128 (SC) / 4 SCC 130*

### **Service Tax – Arts. 246, 248, 366(29A) & Sch. VII, List I, Entry 97 & List II, Entry 54; Constitution of India – Ss. 65(10), 65(12), 65(72)(zm), 65(105)(zm) & 66 – Finance Act, 1994: Service tax on Lease and Hire Purchase Transactions – Constitutional Validity**

Service-tax imposed by the amended section 66 of the Finance Act, 1994 on the value of taxable services referred to in section 65(105)(zm) r/w 65(12) insofar as it relate to financial leasing services including equipment leasing and hire-purchase is

within the legislative competence of the Parliament under Entry 97 of List I of Sch. VII of the Constitution.

*Association of Leasing & Financial Service Companies v. UoI & Ors. (2010) 46 DTR 209 / 235 CTR 521 (SC)*

### **Service Tax – Maharashtra Co-operative Societies Act, 1960 – Chartered Accountant**

Service charges on Chartered Accountants.

Circular dated 4/6/1992 issued by commissioner of cooperative societies levying of service charge on CA/ auditors, has no legal sanction.

*Maharashtra Certified Auditors Association (Regd.) v. State of Maharashtra (2004) 141 Taxman 112 (Bom.)(High Court)*

### **Service Tax – Levy on Mandap keepers for services including Catering – Legislative Powers – Incidental encroachment**

The provisions of sections 65, 66, and 67(o) [Now 67(1)] of the Finance Act, 1994, and rule 2(1)(d)(ix) of the Service Tax Rules 1994, imposing Service Tax on the services, rendered by mandap keepers are within the legislative competence of Parliament and are valid. The service tax legislation is made by Parliament under the residuary provisions of Article 246(3) of the Constitution of India. The power to levy service tax can be traced to entry 97 of list I of schedule VII to the Constitution and Parliament does not lack legislative competence so far as the levy of service tax is concerned.

*Tamil Nadu Kalyana Mandapam Assn. v. UOI (2004) 267 ITR 9 / 181 Taxation 15 / 188 CTR 297 / 136 Taxman 596 (SC)*

### **Service Tax – Software – Goods**

Though software is "goods", its supply may be a "service" and not a "sale".

*Infotech Software Dealers Association v. UOI / (2010) 236 CTR 58 / 46 DTR 297 (Mad.)(High Court)*

### **Sur Tax Act**

### **Companies (Profits) Sur Tax Act, 1984 – Computation of Capital – Consideration less than book value – Schedule II**

Where assessee company was formed for purpose of taking over Indian undertakings of several sterling tea companies which were registered in UK and operating in India and RBI granted approval for such arrangement against payment of lump sum consideration which was lower than book value of assets shown by assessee as per RBI requirement, difference between book value of assets and consideration paid shown as 'other reserve' by assessee in its balance sheet was to be treated as capital for purposes of surtax assessment. (A.Ys. 1980-81 to 1982-83)

*George Williamson (Assam) Ltd. v. CIT (2005) 278 ITR 102 / 148 Taxman 252 / 198 CTR 106 (SC) / 7 SCC 541*

## **Special Courts (Trial of offences relating to transactions in Securities) Act, 1992**

### **Special Courts (Trial of offences relating to transactions in Securities) Act, 1992 – Recovery of Taxes – Special Court – Provisions of Special Court Act prevailing over the provisions of the Income Tax Act – Intervention Application by TRO**

M/S. Dhanraj Mills (Pvt.) Ltd., owning money from M/S. Killicks Nixon Pvt. Ltd. and its subsidiaries notified as a party under section 3(2) of the Special Court. Property of Killick Nixon Pvt. Ltd. & its subsidiaries put to auction in execution of decrees passed in favour of Dhanraj Mills Pvt. Ltd. The attached properties of Killick Nixon group became properties of the notified person under section 3(2) viz Dhanraj Mills Pvt. Ltd. The Court up held the dismissal of the intervention application of the Tax Recovery Officer and rejected the revenue's appeal.

*Tax Recovery Officer v. Custodian appointed under the special Court (2008) 202 Taxation 213 / (2007) 293 ITR 69 / 163 Taxman 441 / 211 CTR 369 (SC)*

## **The Benami Transactions (Prohibition) Act, 1988**

### **S. 3 : The Benami Transactions (Prohibition) Act – Proof of source – Purchase money**

Mere Proof of source of purchase money could not definitely establish benami nature of defendant's title.

*V. Suseelan v. T.P. Leela (2004) 139 Taxman 386 (Ker.)(High Court)*

### **S. 3 : The Benami Transactions (Prohibition) Act – Married female – Sale deed**

There is no presumption in the law that merely because female has her husband at the time of purchase, sale deed must be presumed to be benami for the husband.

*Usha Bhar (Smt) v. Sanat Kumar Bhar (2004) 135 Taxman 526 (Cal.)(High Court)*

### **S. 3 : The Benami Transactions (Prohibition) Act – Wife and unmarried daughter – Beneficiary**

Once property is purchased in name of wife and unmarried daughter, it shall be presumed that it is for their benefit unless contrary is proved.

*Idam Swarajya Laxmi v. Idam vani (2004) 140 Taxman 333 (AP)(High Court)*

### **S. 3 : The Benami Transactions (Prohibition) Act – Transfer in favour of nominee – Beneficiary**

Where purchaser to a contract sought transfer of property in favour of his nominees and consideration for said transfer was to be paid by said nominees seller could not claim that transaction in favour of nominees being benami was barred by section 3

*Chandra Kant Gupta v. Krishna Manohar Bhatwara (2004) 140 Taxman 465 (Raj.)(High Court)*

**S. 3 : The Benami Transactions (Prohibition) Act – Bank deposit – Wife – Beneficiary**

In case of amount deposited by plaintiff in bank account in name of his wife, presumption would be that amount was deposited for benefit of wife.

*U. Bhaskaran v. Bank of India (2004) 136 Taxman 228 / 189 CTR 277 (Mad.)(High Court)*

**S. 3(2) : The Benami Transactions (Prohibition) Act – Unmarried daughter – Presumption**

Section 3(2), makes it abundantly clear that a property purchased in name of an unmarried daughter is for her benefit, that would only be a presumption, but presumption can be rebutted by a person who is alleging to be the real owner of property by production of evidence or other materials before the Court.

*Mahalingappa (G.) v. G. M. Savitha (2005) 147 Taxman 583 / 147 Taxman 583 (SC)*

**S. 4 : The Benami Transaction (Prohibition) Act – Prospective application – Suit – Maintainability**

Where benami transaction had taken place in 1956 and claim was not pending on date on which 1988 Act came into force, bar under section 4 was not Benami Transaction Act, 1998 applicable and suit was not maintainable.

*Baburao Sonu Sakharkar v. Abhiman Sonu Sakharkar (2004) 136 Taxman 545 (Bom.)(High Court)*

**S. 4 : The Benami Transactions (Prohibition) Act – Suit – Limitation**

Where it was held that the suit in respect of property in question was barred by virtue of provisions contained in section 4(1) & (2).

*Patel Rajnikant Dhulabhai v. Patel Chandrakant Dhulabhai (2004) 137 Taxman 152 (Guj.)(High Court)*

**S. 4 : The Benami Transactions (Prohibition) Act – Real owner – Suit against benamidar**

In suit filed by real owner of property against his benamidar prior to coming into force of section 4, then alienations made by benamidar in favour of transferee before said section came into force would be bad in law.

*Gopal Jha v. Bhubhneshwar Jha (2004) 141 Taxman 103 (Patna)(High Court)*

**The Central Excise Act, 1944**

**S. 11AC : The Central Excise Act, 1944 – Penalty – Evasion of duty – Concealment**

Mensrea or conscious act of concealment is not essential in civil matter, yet the Assessing Officer must first ascertain whether conditions prescribed for imposition of penalty exist.

*UOI v. Dharmendra Textile Processors (2008) 306 ITR 277 / 208 Taxation 67 (SC)* referred to.

*UOI v. Rajasthan Spg. & Wvg. Mills / CCE v. Lanco Industries Ltd. (2010) 214 Taxation 474 / (2009) 180 Taxman 609 / 224 CTR 1 / 23 DTR 158 / 13 SCC 448 / 224 CTR 1 (SC)*

### **S. 35G : The Central Excise Act, 1944 – Appeal – Jurisdiction of High Court [S. 260A]**

Appellant herein carried on business at Lucknow. It was assessed at the said place. The matter, however, ultimately came up before the Central Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi. The said Tribunal exercises jurisdiction in respect of cases arising within the territorial limits of the State of Uttar Pradesh, National Capital Territory of Delhi and the State of Maharashtra. Having regard to the situs of the Tribunal, an appeal in terms of section 35G of the Central Excise Act, 1944 was filed before the Delhi High Court. A Division Bench of the said Court relying on an earlier Division Bench judgment in *Bombay Snuff Pvt. Ltd. vs. Union of India* had opined that it had no territorial jurisdiction in the matter. The Court held that jurisdiction not to be decided on the basis of location of Appellate Tribunal but on the basis of the place of assessment. High Court was correct in its view. Appeals dismissed.

*Ambica Industries v. Commissioner of Central Excise (2007) 9 RC 181 / 6 SCC 769 / 213 ELT 323 (SC) / (2009) 20 VST 1 (SC)*

### **S. 65 : The Central Excise Act, 1944 – Finance Act, 1994 – Computer Training Institute [S. 93]**

Notification dated 10th September, 2004 issued under section 93 of the Finance Act, 1994 did not include "computer training institute" within its ambit, viz. vocational and recreational training institute.

*CCE v. Sunwin Technosolution (P) Ltd. (2010) 47 DTR 113 / 236 CTR 117 (SC)*

### **The Central Excise Act, 1944 – High Court – Reference – Condonation of Delay – Powers**

The High Court has no power to condone the delay in filing a reference application beyond the period of 180 days under section 35H(1) of the Central Excise Act, 1944, prior to its omission by Act No. 49 of 2005 with effect from December, 2005.

*CIT v. Hongo India (P) Ltd. & Anr. (2009) 315 ITR 449 / 223 CTR 225 / 22 DTR 9 (SC)*

### **The Central Excise Act, 1944 – Assessment – Relief – Rights of an assessee – Wrong section applied**



It is now a well-settled principle of law that wrong mentioning of a section would not be a ground to refuse relief to an assessee if he is otherwise entitled thereto. If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him.

*Shree Hari Chemicals Export Ltd. v. UOI & Anr. (2006) 1 SCC 396 / AIR 2006 SC 693 / (2005) 193 ELT 257 (SC)*

### **The Central Excise Act, 1944 – Central Board Circulars – Administrative Directions**

Circular giving administrative directions allocating work between Officers of department cannot oust jurisdiction conferred by Act.

*Pahwa Chemicals P. Ltd. v. Commissioner of Central Excise (2005) 274 ITR 87 (SC)*

### **The Central Excise Act, 1944 – Circular – Binding Nature – Supreme Court Judgment – Larger Bench**

Question whether the law declared by Supreme Court prevails over, the contrary view expressed in a circular issued by the Revenue Department is referred to larger Bench for clarification.

*Commissioner of Central Excise v. Ratan Melting & Wire Industries (2005) 195 CTR 12 (SC)*

### **The Chartered Accountants Act, 1949**

#### **Chartered Accountants Act – Professional misconduct – Number of audits**

Accepting larger number of audits and charging higher or lower fee cannot be regarded as professional misconduct; as such Government's notifications stating that member of ICAI in practice shall be deemed guilty of professional misconduct if he accepts, in a financial year, more than specified number of tax audit assignments under section 44AB of the Income-tax Act and if he accepts audit fee below what is specified in notification, are arbitrary and violative of articles 14 and 19(1)(g)

*ICAI v. K. Bhagvatheeswaran (2005) 145 Taxman 405 (Mad.) (High Court)*

### **The Code of Criminal Procedure, 1973**

#### **S. 482 : The Code of Criminal Procedure, 1973 – Quashing of proceedings relating to TDS – Dispute as to TDS – Appropriate remedy – Income tax – Criminal proceedings**

Where proceeding is of civil nature which cannot be adjudicated by a criminal court, the High Court would be justified in exercising its inherent jurisdiction and quashing the same. The High Court erred in refusing to exercise its jurisdiction under section 482 and passing a cryptic order without assigning any reasons therefore when

complaint did not disclose any offence of criminal nature. In face of assertion made by appellants that deduction towards income tax were made from salaries of all employees liable to pay the same in view of the statutory provisions of the IT Act, appropriate remedy for respondent was to approach authority/officer concerned. Moreover, report of SI had indicated that the matter in issue was civil in nature. Proceedings against appellants were quashed.

*Rajeswar Tiwari and Others v. Nanda Kishore Roy (2010) 8 SCC 442 / 331 ITR 534 / (2011) 242 CTR 476 / 200 Taxman 139 / 59 DTR 75 (SC)*

## **The Companies Act, 1956**

### **Company Law Tribunal – Validity of Provision – Independence of Judiciary – Separation of power**

Parliament is competent to constitute Tribunals for special Acts. However, the failure to ensure independence of judiciary and separation of judicial and executive power renders the Company Law Tribunal unconstitutional. Suggestions given on how to remedy the defects

*Madras Bar Association v. UOI (2010) 324 ITR 166 / 156 Comp. Cases 392 / 190 Taxman 432 / (2011) 221 Taation 144 (SC)*

*UOI v. R. Gandhi (2010) 324 ITR 166 / 156 Comp. Cases 392 / 190 Taxman 432 (SC)*

### **S. 391 : The Companies Act, 1956 – Merger – Transaction in the nature of “Gift” – Scheme designed to avoid taxes cannot be sanctioned [S. 391-394]**

The Court held that section 391 does not contemplate all kinds of schemes, but only schemes that are either a compromise or an arrangement with creditors or members or any class of them. The transaction being in the nature of a “gift” is not an “arrangement”. The transaction is also not a “reconstruction” because the important criterion for “restructuring” is that the same persons carry on the same business. In the present case, the transferee is not carry on the same business of the transferor. The scheme being without consideration may be void under section 25 of the Contract Act. The Court held that avoidance of tax is taking place if the scheme is sanctioned. The Court has not sanctioned the scheme of merger. (A.Y. 2004-05)

*Vodafone Essar Gujarat Ltd., In re (2011) 239 CTR 229 / 52 DTR 293 (Guj.)*

## **The Constitution of India**

### **Article 14 – The Constitution of India – Doctrine of Promissory Estoppel**

Pursuant to incentives and concessions notified by State, appellant made expansion and diversification of its industries in State. Board of Revenue having found appellant eligible for sales tax exemption, under the notification granted tax exemption of seven years to appellant. Subsequently, State issued notification withdrawing tax exemption from a specific date. Assistant Commissioner of Sales Tax issued notices proposing to impose penalty on appellant for failure to pay purchase tax. Single Judge dismissed writ petition and remanded matter to sales tax authorities. Appeal was also

dismissed by Division Bench — Held, doctrine of promissory estoppel has been repeatedly applied by Supreme Court to statutory notifications. Where a right has already accrued, for instance, right to exemption of tax for a fixed period and conditions for that exemption have been fulfilled, then withdrawal of exemption during that fixed period cannot affect already accrued right. Impugned action on part of State Government was highly unfair, unreasonable, arbitrary and therefore, same was violative of Article 14 of Constitution. Appeal allowed.

*MRF Ltd., Kottayam v. Asst. Commissioner (Assessment) Sales-tax & Ors. (2006) 8 SCC 702 (SC)*

### **The Constitution of India – Art. 226 : Writ – Maintainability – Foundational facts to be established**

Where the foundational facts had to be established, the assessee ought not to have filed a writ petition. (A. Ys. 2002-03 to 2006-07)

*Coca Cola India Inc. v. Addl. CIT & Ors. (2011) 336 ITR 1 / 236 CTR 561 / 48 DTR 249 (SC)*

### **The Constitution of India – Art. 226 : Writ – Search and Seizure [S. 132A]**

Genesis for the entire episode of search seizure and detention having taken place at Hyderabad airport, cause of action arose at Hyderabad and therefore writ petition was maintainable at Andhra Pradesh High Court.

*Rajendran Chingaravelu (Mr.) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 / 227 CTR 520 / 186 Taxman 305 / 32 DTR 129 (SC) / (2010) 1 SCC 457 / 216 Taxation 30 (SC)*

### **The Constitution of India – Art. 226 : Writ – Dispute between Delhi Development Authority – Union of India – Accounts – Auditing [S. 142(2A)]**

The High Court had dismissed a writ petition filed by the Delhi Development Authority (DDA), challenging an order issued by the Additional Commissioner requiring it to get its accounts audited in accordance with the provisions of section 142(2A) of the Income Tax Act, 1961, see (2008) 296 ITR 693. On appeal, the Supreme Court directed the High Court to consider the writ petition filed by DDA on its merits afresh.

*Delhi Development Authority & Anr. v. UOI (2008) 214 CTR 106 / 1 DTR 113 / (2009) 314 ITR 342 (SC)*

### **The Constitution of India – Art. 226 : Writ – Nomenclature given in Writ petition – Appeal**

When a writ petition is heard by the High Court ought not merely to go by the nomenclature, i.e. The description given in the writ petition to be one under Article 227 of the Constitution of India. The High Court ought to consider the nature of controversy and the prayer involved in the writ petition. Where the prayer is to quash the order of assessment passed by the Assistant Commissioner, Commercial Tax levying purchase tax as well as entry tax, the writ petition would lie, in effect, one under article 226 and an appeal from the decision of a single judge of the High Court

lie to a Division Bench. Jurisdiction under Article 226 of the Constitution of India is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.

*M.M.T.C. Ltd. v. CCT (2008) 307 ITR 276 / (2009) 209 Taxation 565 / 177 Taxman 251 (SC)*

### **The Constitution of India – Art. 226 : Writ – Alternative Remedy – Jurisdiction – Reassessment [S. 148]**

Where the action of the assessing authority in issuing notice under section 148 was bad in law due to want / lack of jurisdiction then the availability of alternative remedy in form of appeal to the Commissioner of Appeals against the action of the assessing officer could not be a bar to invoke writ jurisdiction of the High Court. (A.Y. 1995-96)

*Mihir Textile Ltd. v. Jt. CIT (2010) 43 DTR 11 / 239 CTR 95 (Guj.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – Clearance from COD – Order of Settlement Commission – Writ Petition by CIT**

Clearance from COD is not necessary to maintain the writ petition filed by the Revenue to quash the order passed by the settlement commission as the lis is between the revenue and the first respondent (assessee) and not between the petitioner and the settlement commission. CIT has implied powers to file writ petition questioning the order passed by the settlement commission. (A.Y. 1997-98)

*CIT v. The Vysya Bank Ltd. (2010) 42 DTR 97 / 240 CTR 68 / 194 Taxman 533 (Karn.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – Alternative remedy [S. 254(1)]**

Where the final order of the Tribunal under section 254 (1) of the Act is recalled and fixed for hearing afresh, Writ petition challenging the action of Tribunal recalling its order under 254 (1) of the Act, on the ground that the order was passed without jurisdiction, cannot be dismissed on the ground that the petitioner has an alternative remedy in form of appeal under section 260 A of the Act.

*Apex Metchem (P) Ltd. v. ITAT & Ors. (2009) 26 DTR 1 / 224 CTR 488 / 318 ITR 48 / 184 Taxman 243 / 224 CTR 488 (Raj.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – Maintainability – CoD's approval**

A Public Sector undertaking cannot file a writ petition praying for direction to the Revenue authorities to modify the assessment, in absence of clearance from Committee on Disputes (CoD). (A.Ys. 2003-04 to 2005-06)

*Kolkata Port Trust v. ACIT (2009) 26 DTR 33 / 315 ITR 243 (Cal.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – High Court – Territorial Jurisdiction**

Where cause of action has arisen in Maharashtra State and even charge-sheet, if required, is to be filed in Maharashtra State, Delhi High Court cannot entertain writ petition.

*Centre for Public Interest Litigation v. UOI (2003) 130 Taxman 34 / 264 ITR 703 (Delhi)(High Court)*

### **The Constitution of India – Art. 226 : Writ – High Court – Territorial Jurisdiction**

Notice issued under section 163 by Dy. Commissioner, Mumbai, on representative assessee in Calcutta would not confer jurisdiction on High Court in Calcutta to entertain writ against such notice. (A.Y. 1998-99)

*CESC Ltd. v. Dy. CIT (No. 2) (2003) 131 Taxman 751 / 263 ITR 402 / 183 CTR 124 (Cal.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – High Court – Alternative remedy**

Presence of alternate statutory remedy would bar writ against order of Tribunal. (A.Ys. 1989-90 to 1993-94)

*L. Sohanraj v. Dy. CIT (No. 2) (2003) 260 ITR 155 / 179 CTR 106 / 132 Taxman 483 (Karn.)(High Court)*

### **The Constitution of India – Art. 226 : Writ – High Court – Alternative remedy**

If a statute provides for the remedy of revision, the writ petition is not maintainable.

*State of Uttar Pradesh v. Union of India (2003) 264 ITR 239 / 139 Taxman 413 (All.)(High Court)*

### **The Contempt of Courts Act, 1971**

#### **Contempt of Courts Act 1971 – Malicious Imputations against Judicial Officer – Apology tendered not accepted [S. 6]**

The contemner has made wild allegations against the judicial officer, when contempt proceedings were initiated he tendered apology. The Hon'ble Court refuse to accept the apology. Before discussing the facts the Hon'ble Court referred the observation of Apex Court in *M. R. Parashar v. Dr. Farooq Abdullah* AIR 1984 SC 615 which reads as under. "The Judges cannot defend themselves. They need due protection of law from unfounded attacks on their character. Law of Contempt is one such laws. We would like to remind those who criticise the Judiciary that it has no form from which to defend itself. The legislature can act in defence of itself from the floor of the House. It enjoys privileges which are beyond reach of law. The executive is all powerful and ample resources and media at its command to explain its actions and, if need be, to counter attack. Those, who attack the judiciary must remember that they are attacking the institution which is indispensable for the survival of the rule of law but which has no means of defending itself.

The sword of Justice is in the hands of Goddess of Justice, not in the hands of mortal judges. Therefore, Judges must receive the due protection of law from unfounded attacks on their character".

Accordingly the Hon'ble Court held that benefit of section 6 of the Contempt Courts Act 1971 may not be given to the contemner as the allegations imputed against the judicial Officer were not in good faith.

*High Court on its own motion v. Dnyandev Tulshiram Jadhav and State of Maharashtra (2011) Vol 113 920 Bom. L.R. 1145 (April)*

### **Hindu Succession Act, 1956**

#### **Hindu Succession Act, 1956 – Single Person – Alienation by father before son was born – HUF**

When a property remains in hands of a single person, same is to be treated as a separate property and thus, he would be entitled to dispose of coparcenary property as if same were his separate property, and if a son is subsequently born to him, alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten.

*Sheela Devi v. Lalchand (2006) 206 CTR 149 / 157 Taxman 527 (SC)*

#### **Hindu Succession Act, 1956 – Hindu Undivided Family – Gift of part of ancestral immoveable property to daughter – Valid**

A Hindu father can make a gift of ancestral immoveable property within reasonable limits, keeping in view the total extent of the property held by the Hindu undivided family, in favour of his daughter at the time of her marriage or even long after her marriage.

*R. Kuppayee & Another v. Raja Gounder (2004) 265 ITR 551 / 180 Taxation 1 / 186 CTR 106 / 135 Taxman 37 (SC)*

### **The Land Acquisition Act, 1894**

#### **Land Acquisition Act, 1894 – Agricultural Activity – Silk tread**

Manufacture of silk thread held not to be an agricultural activity.

*Special Land Acquisition Officer v. Karigowda & Others (2010) 5 SCC 708*

### **The Limitation Act, 1963**

#### **Limitation Act – Appeal – Delay – Limitation**

Where delay is only of few days, approach of the Court to be pragmatic. Approach of the Court should be of advancing substantial justice which is of prime importance. Delay was condoned.

*Vedabhai alias Vijayantabai Baburao Patil v. Shantaram Baburao Patil (2003) 173 Taxman*

*108 / AIR 2001 SC 2582 / (2001) 132 ELT 15 (SC)*

### **The Maharashtra Value Added Tax, 2002**



## **S. 61 : The Maharashtra Value added tax, 2002 – Constitutional validity – Audit – Chartered Accountants**

Section 61 of Maharashtra Value Added Tax Act which requires accounts of certain dealers to be audited by Chartered Accountants is constitutionally valid and it does not infringe Article 14.

*Sales Tax Practitioners' Association of Maharashtra v. State of Maharashtra (2008) 170 Taxman 371 (Bom.)*

*Editorial Note: SLP is rejected, see AIFTP Journal July '08 issue page No. 39 (High Court)*

## **Transfer of Property Act, 1982**

### **Transfer of Property Act, 1982 – Sale – Immoveable property – General Power of Attorney [S. 54]**

The Apex Court held that immoveable property can be legally and law fully transferred / conveyed only by a registered deed of conveyance. Transactions of nature of General Power of Attorney Sales (GPA Sales) or sale Agreement / General Power of Attorney /Will Transfers (SA/GPA/ Will transfers) do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immoveable property. Such transactions cannot be relied upon or made basis for mutations in Municipal revenue records.

*Suraj Lamp & Industries (P) Ltd. v. State of Haryana (2011) 202 Taxman 607 / (2012) 340 ITR 1 (SC)*

## **Foreign Judgments**

### **Transfer Pricing – Australian Tax Office – Restructuring**

The Australian Taxation Office has issued a 'Taxation Ruling' dated 9.2.2011 in which it has discussed the application of the transfer pricing provisions to business restructuring by multinational enterprises.

The Ruling considers situations where such transfers occur between MNE members to implement changes in the MNE's existing business arrangements or operations. Common examples are product supply chain restructurings involving conversion of a distributor into a sales agency arrangement or of a manufacturer into a provider of manufacturing services. Business restructurings also commonly involve the transfer of the ownership and management of intangibles such as patents, trademarks and brand names.

The Ruling explains the following process for setting or reviewing transfer pricing

Step 1: Characterize the international dealings between the associated enterprises in the context of the taxpayer's business

Step 2: Select the most appropriate transfer pricing methodology or methodologies

Step 3: Apply the most appropriate method and determine an arm's length outcome

The Ruling refers extensively to the "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)".

The Ruling also gives practical examples to explain the transfer pricing law.

*Commissioner of Taxation dated 9-2-2011. Source: [www.itatonline.org](http://www.itatonline.org)*

### **Transfer Pricing – Holding and Subsidiary Co. – Canada Court Ruling – "Implicit support" by holding company to subsidiary to be considered in determining "arms length" price**

In determining the arms length price, all economically relevant factors (including the "implicit support" that the subsidiary enjoys from the holding company) have to be considered. The explicit guarantee by the holding company also has a value to the subsidiary. The "yield method" can be adopted which requires a comparison between the credit rating which an arm's length party, in the same circumstances as the assessee, would have obtained and the credit rating which would have been obtained without the explicit guarantee.

*The Queen v. General Electric Capital Canada Inc. Source : [www.itatonline.org](http://www.itatonline.org)*

### **General Anti Avoidance Rule (GAAR) Law Explained – Canadian company – Tax benefit**

The assessee, a Canadian Co controlled by its sole director Peter Cohen, earned capital gain of \$7.7M from the transfer of property. Another company named "Rcongold Systems Inc" which was controlled by the assessee issued 8,000 voting "common shares" for a consideration of \$8M to the assessee. Thereafter, Rcongold issued 80,000 Class "E" non-voting preferred shares with a redemption price of \$100 each to the shareholders (the assessee) by way of dividend. The redemption price of the Class "E" non-voting preferred shares was identical to the fair market value ("FMV") of the common shares. The said 8,000 "common shares" of Rcongold were sold by the assessee to "the Peter Cohen Trust" for an amount of \$65, which resulted in the assessee reporting a capital loss of \$7.9 M. The assessee's claim to set-off the said capital loss of \$7.9M against the capital gain of \$7.9M was denied by the Assessing Officer on the ground that the scheme was one for "tax avoidance" and hit by the "General Anti Avoidance Rule" ("GAAR") in s. 245 of the Canadian Income-tax Act. HELD upholding the stand of the Assessing Officer:

- (i) For the GAAR in section 245 to apply, three aspects have to be satisfied
  - (a) the assessee must obtain a "tax benefit" from a "transaction" or "series of transactions",
  - (b) the transaction(s) must be an "avoidance transaction" in the sense of not having been "arranged primarily for bona fide purposes other than to obtain the tax benefit" and
  - (c) the avoidance transaction(s) must be abusive of the provisions of the Act, the burden being on the Assessing Officer to establish the abuse;
- (ii) On facts, all three requirements were satisfied because
  - (1) there were a "series of transactions" comprising of (a) the incorporation of Rcongold, (b) the subscription for shares of Rcongold by the assessee, (c)

the declaration of a stock dividend by Rcongold, (d) the creation of the trust and (d) the sale by the assessee of shares of Rcongold to the trust and there was a "tax benefit" as a result of the transactions;

- (2) the primary purpose of each transaction in the series was the avoidance of tax. While the incorporation of Rcongold and the issuance by it of common shares were not avoidance transactions in and of themselves, they were necessary steps taken in furtherance of the scheme. The primary purpose of the entire series of transactions was to obtain a tax benefit and so the entire series of transactions is an avoidance transaction;
- (3) The transactions amounted to "abusive tax avoidance" because they sought to defeat the underlying rationale of the capital loss provisions in the Act. The assessee sought to create an "artificial capital loss" without incurring any "real economic loss".

*Triad Getsco Ltd. v. H. M. the Queen (Canada Tax Court). Source : [www.itatonline.org](http://www.itatonline.org)*

### **Dependent Agent Permanent Establishment – Tests to determine Agent's right to bind – Dependence on principal**

The assessee, a company registered in the Netherlands but resident in Ireland for tax purposes appointed Dell AS, a Norwegian company, as its "commissionaire" for sales to customers in Norway. Dell AS entered into agreements in its own name and its acts (under the commission agreement and Commission Act) did not bind the principal. The assessee claimed that it was not taxable in Norway in respect of the products sold through Dell AS on the ground that Dell AS was not its "Dependent Agent Permanent Establishment" (DAPE) under Article 5(5) of the Norway-Ireland DTAA on the ground that (a) the agent had no authority to enter into contracts "in the name of the assessee" and legally bind the assessee and (b) the agent was not a "dependent" agent. However, the income-tax department took the view that Dell AS constituted a PE under Article 5(5) of the DTAA and that 60 percent of Dell Products' net profit on sales in Norway was attributable to the PE. This was confirmed by the Oslo District Court. On appeal by the assessee to the Court of Appeal, HELD dismissing the appeal:

- (i) Under Article 5(5) of the DTAA, an agent is considered a permanent establishment for the principal if two conditions are fulfilled (i) the agent must be "dependent" on the principal and (ii) the agent must have the right to conclude contracts "in the name of" the principal. The question whether the agent has the authority to conclude contracts on behalf of the enterprise has to be considered, not from a literal sense whether the contracts are "in the name of the enterprise", but from a functional sense whether the agent "in reality" binds the principal. The objective of Article 5 (5) is to protect the principle of source taxation, i.e. that the tax shall be due to the country where the revenue was created. This principle would be disregarded if only the commission relationship was considered despite the financial and legal attachment between the agent and the principal being strong. To ask if Dell AS "in reality" binds Dell Products is in accordance with the functional interpretation of Article 5(5). The "substance" must prevail over the

form. The fact that a commissionaire under the Commissionaire Act and the commission agreement does not bind the principal through his sales is not enough to rule out that a permanent establishment does not exist (Vienna Convention, OECD Model Convention Commentary, Commentaries by Klaus Vogel & ArvidSkaar considered, decision of the French SAT in Zimmer that as the commissionaire did not bind the principal, it was not a PE despite dependence on the principal not followed);

- (ii) On facts, Dell Products was “in reality” bound by the contracts concluded by Dell AS because (a) all sales were made under the trademark “Dell”; (b) the sales were made on standard / approved conditions laid down by Dell Products; (c) in practice, all of the agent’s agreements were honoured by the principal and (d) there were no instances where the agent’s sales have not been accepted by the principal;
- (iii) The question whether the agent is “dependent” on the principal has to be decided on the application of various tests such as the degree of instruction and control. On facts, Dell AS was “dependent” on Dell Products because (a) Dell AS was only allowed to sell permitted products on conditions of prices and guarantees determined by Dell Products, (b) there was an overlap of board members in the two companies and a board member of Dell Products was the general manager of Dell AS, (c) due to the integrated accounting system of the Dell companies Dell Products had full insight to the finances of Dell AS, (d) under the commission agreement, Dell Products had access to Dell AS’ premises, (e) Dell AS sold goods as a commissionaire only on behalf of Dell Products though it had the theoretical right to sell for others; (f) all business of Dell AS was done under the trademark Dell, its letterheads, agreements and advertisements had the logo “Dell”. Dell AS was thus “branded” identically as the rest of the Dell Group, but without owning the brand. All these facts made Dell AS fully dependent on the principal. Without the commission agreement, Dell AS may as well close down its operations. The fact that the agent acted independently in matters of staff hire, purchase and lease of assets and premises, etc was irrelevant because the “big picture” showed Dell AS to be dependent on Dell Products;
- (iv) The determination of profits “attributable” to the PE has to be done as if the agent was “independent” of the principal. On the methods to be used, Article 7(2) of the DTAA provides for the “direct method” of allocating all costs and revenue between the HO and the PE while Article 7(4) provides for the “indirect method” of allocating only the net profits using keys such as sales, revenues, expenses, number of employees, capital structure or a combination of these factors. In Norway, the “indirect method” is in practice. This is practical because the accounts do not permit individual items of income and expenditure to be identified for allocation purposes and also because it gives a result which is in accordance with the arm’s length principle. While under Article 7(2), a two-step procedure has to be adopted by first determining a commercial remuneration for Dell AS and then a commercial profit for other functions performed by the PE, under Article 7(4) it is sufficient that the result to a reasonable degree corresponds to the arm’s

length principle and requires that the PE should be allocated revenues in accordance with its functions, risk and assets used. On facts, the value creation occurred through sales made by Dell AS and it was "the major value driver". Dell Products' functions and contribution to the value creation was limited compared to the activity of Dell AS. Consequently, allocating 60% of Dell Products' profits from sales in Norway to the PE was reasonable (over & above the assessment of commission in the agent's hands).

*Dell Products v. Tax East (Norway Court of Appeal) Source : [www.itatonline.org](http://www.itatonline.org)*

### **Software License income is assessable as "Royalty" – IBM Programmes – Non-exclusive rights**

International Business Machines Corporation & IBM World Trade Corporation (IBM), both US companies, entered into a "Software License Agreement" with IBM Australia, an Australian company, under which they granted the latter "the non-exclusive rights (i) to license and distribute copies of IBM Programs for their ultimate use by customers, (ii) to use such IBM Programs in revenue producing activities, (iii) to use such IBM Programs internally, (iv) to make or have made copies for the purposes described above, for distribution to affiliated companies etc". In consideration, IBM Australia agreed to pay IBM a fee of 40% of the revenue billed for each copy of an IBM program distributed to a third party. IBM Australia initially withheld tax on the payments on the basis that it constituted "royalty" under Article 12(4) of the Australia-USA DTAA though it later sought a refund on the basis that the whole payment was not royalty which was rejected by the Department. IBM filed an application for a declaration that the whole of the amounts received was not assessable as "royalty". HELD dismissing the application:

- (i) Under Article 12(4) of the Treaty, "royalty" is defined to mean "consideration for...the right to use any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right" (Article 12(4)(a)(i)) or "...the supply of technical ... or commercial knowledge or information" or for "the supply of any assistance of an ancillary and subsidiary nature" to enable the application of the rights referred to in Article 12(4)(a)(i) or the knowledge/information referred to in Article 12(4)(b)(i) (Article 12(4)(b)(ii));
- (ii) On facts, the argument that the SLA is in essence a distributorship agreement for the marketing of IBM computer programs and that the IP licenses granted to IBMA is only to enable it to carry on the function of a distributor is not acceptable. The SLA is not a distribution agreement which confers distribution rights independently of the grant of IP rights. There is no reference in the SLA to the payments being for the exercise of general distributorship rights. Rather, the payments are described as being for the acquisition of the stated IP rights. The detail of the SLA concerns the definition of IP and IP rights. There is no such detail with respect to distribution rights. The rights/content granted by the SLA are, in each case, rights/content of a kind contemplated by Article 12(4) and so the whole of the consideration is assessable as "royalty".

*International Business Machines Corp v. Comm. of Taxation (Federal Court of Australia)*

Source : [www.itatonline.org](http://www.itatonline.org)

### **Interpretation**

#### **Interpretation – Special Leave Petition – Decision of earlier year not challenged**

The issue involved in this matter was whether the deduction under section 80HHC would be available to the assessee in respect of processing/fabrication charges received from other exporters. It was held that the Assessee having been allowed deduction under section 80HHC in respect of such processing/fabrication charges on goods which were ultimately exported by the other exporters following decision of the High Court in the earlier years, which decision not challenged by the Revenue, no Special Leave Petition could lie. (A.Y. 1994-95)

*Southern Sea Foods Ltd. v. Jt. CIT (2009) 28 DTR 108 / 184 Taxman 86 / 225 CTR 256 (SC)*

#### **Interpretation – Citizen Tax – Japanese Law – Change on payment to employees**

The Supreme Court remitted the matter to the Tribunal to decide whether the citizen tax as per Citizens Individual Inhabitant Tax Act in Japan was an overriding charge on the salary paid by the assessee to its employees. (A.Ys. 1988-89 to 1998-99)

*CIT v. NHK Japan Broadcasting Corporation (2009) 28 DTR 106 / 225 CTR 258 / (2010) 322 ITR 628 / 184 Taxman 39 (SC)*

#### **Interpretation – Precedent – Binding Precedent**

Although the judgments given by a High Court is not binding on another High Court(s), they hold persuasive value. A High Court when not following another High Court should record its dissent along with the reasons therefore. (A.Y. 1982-83)

*Pradip J. Mehta v. CIT (2008) 216 CTR 1 / 300 ITR 231 / 169 Taxman 453 / 5 DTR 250 / 206 Taxation 169 (SC) / 14 SCC 283*

#### **Interpretation – Precedent – Decision of High Court – Supreme Court – Retrospectively**

A judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a “new rule” but to maintain and expound the “old one”. In other words, judges do not make law they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.



It is no doubt true that the Court has accepted the doctrine of “prospective overruling”. It is based on the philosophy; “the past cannot always be erased by new judicial declaration”. It may, however, be stated that this is an exception to the general rule of doctrine of precedent. (A.Y. 1996-97)

*ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 / 12 DTR 346 / 173 Taxman 322 / (2009) 208 Taxation 90 (SC) / 14 SCC 171*

### **Interpretation – Penalty – Concealment – Notes to Clauses [S. 271(1)(c)]**

The Supreme Court held that the 2002 amendment in Explanation 4 to section 271 is prospective as it was consciously made effective from April 1, 2003. The fact that the notes to clauses mention the amendment to be clarificatory is also of no consequence and that the notes to clauses cannot bind the Court.

The Supreme Court further held that the penal provisions should be interpreted strictly. (A.Y. 1996-97)

*Virtual Soft Systems Ltd. v. CIT (2007) 289 ITR 83 / 159 Taxman 155 / 207 CTR 733 / 199 Taxation 423 (SC) / 9 SCC 665*

*Editorial: - Please see the subsequently decision in the case of CIT v. Gold Coin Health (P) Ltd. (2008) 304 ITR 308 / 218 CTR 359 / 172 Taxman 386 (SC) reversing the above decision.*

### **Interpretation – Creative Interpretation – Redundant**

(a) Creative Interpretation – The Act was enacted in the year 1948. Information Technology at that time far from being developed was unknown. Constitution of India is a living organ. Creative interpretation had been resorted to by the Court so as to achieve a balance between the age old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science.

(b) An interpretation of a provision which renders certain other provisions redundant or otiose cannot be accepted.

*State of Punjab and Others v. Amritsar Beverages Ltd. & Ors. (2006) 7 SCC 607*

*Sadhu Singh v. Gurudwara Sahib Narike (2006) 8 SCC 75 / AIR 2006 SC 3282*

### **Interpretation – Procedural Law – Retrospective**

It is well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted.

### **Interpretation – Exemption provisions – Liberal**

Principle for interpretation of exemption notification and exception thereto – Held, an exemption notification under an enactment has to be construed strictly – However, an exemption notification issued for implementing an industrial policy of the State, which had promised tax exemption for setting up new industries in backward area, held, should be construed not strictly but liberally keeping in view the objects of such policy.

*State of Jharkhand & Ors. v. Tata Cummins Ltd. & Anr. (2006) 4 SCC 57 / 145 STC 340 (SC)*

### **Interpretation – Amendment of a Statute – Retrospective Operation**

The question referred to the constitution bench for reconsideration was whether the amendment to a statute to be construed as being retrospective. The amended provision should indicate specifically or by necessary implication that it is to operate retrospectively. The Addl. Solicitor General conceded that the Supreme Court has consistently affirmed it over a period of year. The matter was accordingly remanded to the division Bench for disposal on merits.

*CIT v. Varas International Pvt. Ltd. (2006) 195 Taxation 441 / 283 ITR 484 / 204 CTR 119 / 154 Taxman 331 (SC) (Larger Bench five Judges)*

### **Interpretation – Res judicata – Precedents**

Principle of res judicata does not apply in matters pertaining to tax of different assessment years. The reason for following the earlier year decision is not because of principle of res judicata but because of theory of precedent. This is subject only to the gateways of distinguishing the earlier decisions and where the earlier decision is per incuriam.

*Bharat Sanchar Nigam Ltd. & Anr. v. UOI & Ors. (2006) 282 ITR 273 / 152 Taxman 135 / 201 CTR 346 / 194 Taxation 1 (SC)*

### **Interpretation – Precedent – Overruling – Implication**

Overruling a precedent by necessary implication – Constitution Bench of Supreme Court overruling a 1968 decision of a two judge bench of the Supreme Court – 1968 decision was followed by a two judge bench of the Supreme Court in a 1980 case – Held, though the 1980 case was not specifically overruled in its decision by the Constitutional Bench, the same stands overruled by necessary implication.

*State of Maharashtra v. Mana Adim Jamat Mandal (2006) 4 SCC 98 (SC)*

### **Interpretation – Doctrine of Reading Down – Ultra vires – Not a tool to save a statute**

Where provision of law is explicitly clear and interpretation leaves no room for more than one construction, it is not open to a court to invoke doctrine of reading down

with a view to save statute from declaring it ultra vires by carrying it to point of perverting the purpose of the statute

*Arun Kumar & Others v. UOI* (2006) 286 ITR 89 / 155 Taxman 659 / 205 CTR 193 / 7 RC 407 / (2007) 196 Taxation 353 (SC)

### **Interpretation – Penalty – General Clauses Act – Repeal of the Act**

In view of section 8 of the General Clauses Act action can be taken after repeal of provisions for levy of penalty for contravention of provisions prior to repeal of the Act  
*Gammon India Ltd. v. Spl. Chief Secretary & Ors.* (2006) 6 RC 239 / 145 STC 1 (SC) / 3 SCC 354

### **Interpretation – Rules – Partial validity – Reading down**

Reading down a provision - If a rule is partly valid and partly invalid, the part that is valid and severable is saved. Even the part which is found to be invalid, can be read down to avoid being declared invalid.

*State of T.N. v. P. Krishnamurthy & Ors.* (2006) 4 SCC 517 (SC)

### **Interpretation – Commercial & Technical Practice and Usage – Trade practice**

It is now well settled that the words and expressions in taxing statutes, unless defined in the statute itself, have to be construed in the sense in which the person dealing with them understands, i.e., in accordance with the trade understanding, commercial and technical practice and usage.

*Indcon Structurals P. Ltd. v. Commissioner of Central Excise* (2006) 6 RC 450 (SC) / 4 SCC 786

### **Interpretation – Retrospective or not – Prima facie prospective**

Every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. (A.Ys. 1984-85, 1987-88, 1989-90)  
*GEM Granites v. CIT* (2005) 185 Taxation 5 / 1 SCC 289 / (2004) 271 ITR 322 / 141 Taxman 528 / 192 CTR 481 (SC)

### **Interpretation – Fundamental Rights – Foreign Exchange Regulation Act, 1973**

Challenge to the provisions of, on the ground of violation of fundamental rights – Held, FERA being included in Schedule IX to the Constitution, none of its provisions can be challenged as violative of any of the rights conferred by Part III of the Constitution. Thus, provisions of FERA are immune from the said challenge and there is no need to read down those provisions. Provisions to be given natural interpretation and if necessary a purposive interpretation, keeping in view the object sought to be achieved by FERA.

*Standard Chartered Bank & Ors. v. Directorate of Enforcement* (2005) 275 ITR 81 / 145 Taxman 154 / 195 CTR 465 / 188 Taxation 329 (SC) / (2006) 4 SCC 278

### **Interpretation – Legislative Intention – Language**

What one may believe or think to be the intention of Parliament cannot prevail if the language of the statute does not support that view, thus object of the statute has to be gathered from language and not on what one believes or thinks. (A.Ys. 1984-85, 1987-88, 1989-90)

*GEM Granites v. CIT (2005) 185 Taxation 5 / 1 SCC 289 / (2004) 271 ITR 322 / 141 Taxman 528 / 192 CTR 481 (SC)*

### **Interpretation – Explanation – Retrospective**

An explanation, if it changes the law, is not presumed to be retrospective irrespective of the fact that phrase used is "it is declared" or "for removal of doubts". (A.Ys. 1992-93, 1993-94)

*Sedco Forex International Drill Inc. & Others v. CIT (2005) 279 ITR 310 / 149 Taxman 352 / 199 CTR 320 / (2006) 192 Taxation 27 (SC)*

### **Interpretation – Precedent – Review – Subsequent Judgment of Supreme Court**

Where a subsequent judgment of the Supreme Court is by way of review of the first judgment, the subsequent judgment rendered on a review petition is the only judgment rendered effectively and for all purposes the earlier decision is erased by entertaining the review petition. Normally, a decision of the Supreme Court enunciating a principle of law is applicable to all cases irrespective of the stage of pendency, because it is assumed that what is enunciated by the Supreme Court is in fact, law from inception. It is for the Supreme Court to indicate whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling unless it is so indicated in the particular decision.

*Murthy M.A. v. State of Karnataka & Others (2004) 178 Taxation 397 / (2003) 264 ITR 1 / 185 CTR 194 (SC) / 7 SCC 517*

### **Interpretation – Rule of Liberal Construction – Language of law**

Where the words are unequivocal, there is no scope for importing any rule of liberal interpretation. (A.Y. 1984-85)

*Pandian Chemicals Ltd. v. CIT (2004) 179 Taxation 2 / (2003) 262 ITR 278 / 129 Taxman 539 / 183 CTR 99 (SC) / 5 SCC 590*

### **Interpretation – Promissory Estoppel – State Government – Power to Exempt – Tax on purchase of Milk**

Speeches by Chief Minister and Finance Minister that such tax would be abolished. Dealers relying upon statements and providing benefit to milk producers. State Government is bound by such promise. Not entitled to demand purchase tax on milk till the date of a contrary decision by the cabinet.

*State of Punjab v. Nestle India Ltd. & Anr. (2004) 269 ITR 97 / 189 CTR 501 / (2005) 184 Taxation 1 (SC)*

### **Interpretation – Taxing Statutes – Finance Minister's Speech**

Finance Minister's speech before parliament while introducing Bill, can be relied on to throw light on object and purpose of provisions.

*Kerala State Industrial Development Corp. Ltd. v. CIT (2003) 259 ITR 51 / 174 Taxation 766 / 180 CTR 192 / 128 Taxman 29 (SC)*

### **Interpretation – Precedent – Doctrine of Merger [Art. 141]**

Mere dismissal of appeal as not properly constituted as necessary party was not impleaded. Merger only of final order of High Court and not reasoning. High Court constituted a full bench to consider that decision of High Court. Full bench can consider the correctness. Dismissal of appeal on technical ground that necessary party not impleaded has no binding nature. Where no reasons are given, dismissal simpliciter is not a declaration of law by the Supreme Court.

*S. Shanmugaval Nadar v. State of Tamil Nadu & Anr. (2003) 263 ITR 658 / 158 CTR 593 / (2004) 179 Taxation 409 (SC)*

### **Interpretation – Casus omissus – Intention – Power to make laws**

It is not open to court to add something or read something in statute on basis of some supposed intendment of statute. The maxim "Judicis est jus dicere, non dare" pithily expounds the duty of the Court. It is to decide what the law is and apply it, not to make. (A.Y. 1985-86)

*ACIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 / 132 Taxman 165 / 184 CTR 193 (SC)*

### **Interpretation – Retrospective Legislation – Validity – Legislative Powers**

The test of the length of time covered by the retrospective operation can not by itself necessary be a decisive test. Account must be taken of the surrounding facts and circumstances relating to the taxation and the legislative back ground of the provision. Retrospective legislation is valid. Concession of the Solicitor General for India before the High Court that amendment would apply only to assessments which were yet to be finalised can not be relevant consideration in up holding the amendment if it were found to be constitutionally infirm.

*National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. v. UOI & Ors. (2003) 260 ITR 548 / 174 Taxation 409 / 181 CTR 1 / 128 Taxman 361 (SC)*

### **Interpretation – Penal provisions – Criminal Jurisprudence [S. 278]**

A penal provision has to be construed strictly. (A.Y. 1985-86)

*ACIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 / 132 Taxman 165 / 184 CTR 193 (SC)*

### **Interpretation – Unjust Enrichment – Applicability to state**

Doctrine does not apply to State. Right to refund not an absolute or unconditional right. Manufacturer recovered tax from the customer, hence, the manufacturer cannot claim refund from the State.

*Shree Digvijay Cement Co. Ltd. & Anr. v. UOI & Anr. (2003) 259 ITR 705 / 174 Taxation 744 (SC) / 2 SCC 614*

### **Interpretation – Rule of Harmonious Construction – Liberal Construction**

Wherever it is possible to do so, the provision must be harmoniously constructed by avoiding a conflict. A construction which reduces the statute to a futility has to be avoided. A statute or any enabling provision therein must be so construed as to make it effective and operative on the principle expressed in maxim “UT RES MAGIS VALEAT QUAM PAREAT” i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible and carry in to effect the intention of the parties.

*CIT v. Hindustan Bulk Carrier (2003) 259 ITR 449 / 126 Taxman 321 / 179 CTR 362 / 173 Taxation 16 (SC)*

### **Interpretation – Binding nature of Supreme Courts’ judgment – Other parties [Art. 141, 226]**

In matters arising under public law, when the validity of a particular provision or levy is challenged, the legal position is that when the Supreme Court declares the law and holds either a particular levy to be valid or invalid it is wrong to contend that the law laid down by the Supreme Court in that judgment would bind only those parties who were before the court and not others in respect of whom appeal had not been filed. To do so would be to ignore the binding nature of a judgement of the Supreme Court under article 141 of the Constitution of India. To contend that the conclusion reached by the Supreme Court in a case relating to the validity of a levy would apply only to the parties before the court is to destroy the efficacy and integrity of the judgement and to make the mandate of Article 141 illusory.

*U. P. Pollution Control Board & Others v. Kanoria Industries Ltd. & Anr. (2003) 259 ITR 321 / 174 Taxation 629 / 180 CTR 402 (SC)*

### **Interpretation Precedent – Advance rulings – Similar facts – To be followed**

Decision of Authority on similar facts in respect of same subject matter can be followed.

*DIT v. Dun and Brand Street Information Services India P. Ltd. (2011) 338 ITR 95 (Bom.)(High Court)*

### **Interpretation – Precedent – Contextual interpretation**

A judgment cannot be read like a statute. Courts should not place reliance on decision without discussing factual situation involved in the said decision and how it would apply to the facts involved in the subsequent case. A ratio laid down by a higher forum should not be taken out context and construed like a statute. (A. Y. 2001-02)

*Iskrareco Regent Ltd. v. CIT (2011) 237 CTR 239 / 49 DTR 185 / 196 Taxman 103 / 313 ITR 317 (Mad.)(High Court)*



### **Interpretation Precedent – Binding – Subsequent decision of smaller Bench of Supreme Court – Article 149 of the Constitution of India**

If subsequent decision of smaller Bench of Supreme Court interpreting decision of larger Bench of Supreme Court is placed before a High Court, latter is bound to follow subsequent decision by smaller Bench which interprets decision of Larger Bench because that is interpretation of larger Bench of Supreme Court and High Court cannot make a different interpretation than one made by subsequent decision of Supreme Court which is binding upon it. (A. Y. 1996-97)

*CIT v. Oberoi Hotels (P) Ltd. (2011) 334 ITR 293 / 198 Taxman 310 / 59 DTR 272 (Cal.)(High Court)*

### **Interpretation – Precedent – Advance rulings – Binding on others**

The Andhra Pradesh High Court held that the Advance Ruling Authorities order under section 67(4)(11) was binding not only on the applicant but also similar situated other dealers.

*Tirupati Chemicals, Vijaywada & Anr. v. Dy. Commercial Tax Officer (2011) 52 APSTJ P. 48 (AP)(High Court)*

### **Interpretation – Term not defined under Income-tax Act – Definition in different acts and meaning in common parlance to be taken.**

The High Court held that though specific provisions are made in respect of investment in bonds of financial corporation State or Central Government that would not mean that one has to give restrictive meaning to the term debenture more particularly when the term is not defined under the Act. The principle of interpretation is that in the absence of any definition given to a particular term in a statute, the meaning which is to be given to the term is the meaning in which it is understood in common parlance.

*DIT v. Shree Visheshwar Nath Memorial Public Charitable Trust (2011) 333 ITR 248 / 46 DTR 49 / 194 Taxman 280 (Delhi)(High Court)*

### **Interpretation – External aid – Speech of Finance Minister [S. 10(26AAB)]**

Speech made by the Union Finance Minister while replying the debate to the Finance Bill is not conclusive regarding the intention of legislature whether or not a new provision is inserted by way of a declaration. (A. Ys. 2003-04 to 2008-09).

*CIT v. Agricultural Market Committee Tanuku & Ors. (2011) 336 ITR 641 / 244 CTR 417 (AP)(High Court)*

### **Interpretation Precedent – Dismissal of appeal by Supreme Court – One line order – Binding**

Though the appeal is dismissed by Supreme Court in one line order, High Court's order stand merged and operates as binding precedent.

*Binani Industries Ltd. v. CIT (2010) 329 ITR 323 / (2011) Tax L.R. 343 (Cal.)(High Court)*

### **Interpretation – Explanation – End of Section**

Explanation below a particular sub-section or a clause is intended to explain that particular sub-section or a clause only. But when Explanation is at the end of the section it is meant to explain the entire section. (A.Y. 2003-04)

*DIT (Exemption) v. Bagri Foundation (2010) 42 DTR 25 / 233 CTR 538 / 192 Taxman 309 (Delhi)(High Court)*

### **Interpretation – Precedent – Supreme Court granting leave to appeal and dismissing – Effect - Decision of High Court affirmed by Supreme Court**

Appeal were heard leave has been granted and dismissed. Placing reliance of the Supreme Court in Kunhayammed vs. State of Kerala (2000) 245 ITR 360 (SC), dismissal of appeal by the Supreme Court would amount to confirmation of law laid down by the High Court.

*CIT v. Natural Gems Ltd. (2010) 327 ITR 269 (Bom.)(High Court)*

### **Interpretation – Penal provisions – Strict construction**

Rule governing construction of provisions imposing penal liability upon subject is that such provisions should be strictly construed. Prior to insertion of Explanation to S. 194A(1) w.e.f. 1st June, 1987, there was no liability for determination of tax at source the amount of interest was credited 15 interest payable amount or surface amount is not credited to the amount of payee, and tractor assessee was not liable to deduct tax while crediting the liability to interest payable amount. (A.Y. 1985-86)

*CIT v. Swarup Vegetable Products (2008) 303 ITR 212 / (2005) 148 Taxman 297 / 197 CTR 138 (All.)*

### **Interpretation – “any other person” – Trustee Is not an employee hence amount paid cannot be disallowed – Rule 6D**

The true scope of the rule of ‘ejusdem generis’ is that the words of general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified. When the particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to the things of the same kind as those specified. The phrase “any other person” in rule 6D(2) of the Income-tax Rules, 1962, would draw its colour from the preceding word, namely, “employee”.

Held accordingly, that a trustee was not an employee or not akin to an employee and the amounts paid to trustees by the trust could not be disallowed under rule 6D(2). (A.Y. 1982-83)

*CIT v. Shivalik Drug (Family Trust) (2008) 300 ITR 339 / 214 CTR 450 (All.)(High Court)*

### **Interpretation – Precedent – Role of Building nature of decisions of court – Appellate Tribunal**

It is neither permissible nor legal for any Court and Tribunal to comment upon the decision of the Supreme Court/High Court. Similarly, it is also not permissible for the

Tribunal to comment upon the manner in which a particular decision was rendered by the Supreme Court/High Court. It is also not permissible for the Tribunal to sidetrack or/and ignore the decision of the High Court on the ground that it did not take into consideration a particular provision of law. If such an approach is resorted to by subordinate Courts/Tribunals, then it is held to be not in conformity with the law laid down by the Supreme Court. It was deprecated by the Supreme Court as being improper. (A.Y. 1989-90)

*National Textile Corporation Ltd., v. CIT (2008) 171 Taxman 339 / 216 CTR 153 / 338 ITR 371 / 5 DTR 117 (MP)(High Court)*

### **Interpretation – Precedent – Larger Bench – Division Bench – Binding order**

A Division bench of a High Court is fully bound by the view taken by a larger Bench of the Court, regardless of the fact that another High Court prefers a different view. (A.Ys. 2002-03 & 2003-04)

*KLM Royal Dutch Airlines v. ADIT (2007) 208 CTR 33 / 292 ITR 49 / 159 Taxman 191 (Delhi)(High Court)*

### **Interpretation – Procedural law – Retroactive – Retrospective**

Law relating to procedures is to be construed somewhat liberally so as to make it even effective retrospectively or retroactively. (A.Y. 1978-79)

*Remfry & Sons v. CIT (2005) 276 ITR 1 / 145 Taxman 22 / 195 CTR 66 (Delhi)(High Court)*

### **Interpretation – Provisions of limitation – Not retrospective**

Provision for limitation is not a mere procedure and unless it is made retrospectively, it cannot be acted upon retrospectively. (A.Ys. 1979-80 to 1984-85)

*Varkey Jacob & Co. v. CIT (2005) 275 ITR 146 / 146 Taxman 665 / 196 CTR 391 (Ker.)(High Court)*

### **Interpretation – Definition section – When inclusive**

Words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. (A.Y. 2000-01)

*DIT (Exemptions) v. Agri-Horticultural Society (2005) 273 ITR 198 (Mad.)(High Court)*

### **Interpretation – Proviso – Effect of main provision – Strict construction**

Proviso to a section would normally be controlled by main section; proviso normally should be construed strictly and more so when it relates to fiscal provisions even inviting penalty consequences, whenever there is default in compliance. (A.Y. 2002-03)

*Sony India Ltd. v. CIT (2005) 276 ITR 278 / 146 Taxman 98 / 196 CTR 81 (Delhi)(High Court)*

### **Interpretation – DTAA – Language – Beneficial or not**

Words in agreement (DTAA) could not be re-written merely because it would be more beneficial to assessee. (A.Y. 1996-97)

*Norasia Lines (Malta) Ltd. v. Dy. CIT (2005) 279 ITR 268 / 148 Taxman 522 / 199 CTR 377 (Ker.)(High Court)*

### **Interpretation – Statutes – Beneficial view**

Rule of Beneficial construction. Any doubt with regard to imposition of burden on taxpayer arising from any equivocal words used in statute will have to be resolved by giving benefit to taxpayer. (A.Y. 1985-86)

*CIT v. Nathan Mining Works (2005) 274 ITR 149 / 156 Taxman 239 (Mad.)(High Court)*

### **Interpretation – Rule of liberal construction – Incentive**

Ordinarily, provision in a taxing statute granting incentive for promoting growth and development, should be construed liberally. (A.Ys. 1976-77, 1977-78)

*CIT v. Sultan & Sons Rice Mill (2005) 272 ITR 181 / 145 Taxman 506 / 193 CTR 444 (All.)(High Court)*

### **Interpretation – Rule of Strict Construction – Function of Court**

While interpreting tax statute, function of Court of law is not to give words in statute a strained and unnatural meaning to cover and extend its applicability to areas not intended to be covered under said statute. (A.Y. 1998-99)

*Vidarbha Irrigation Development Corporation v. Addl. CIT (2005) 278 ITR 521 / 200 CTR 555 (Bom.)(High Court)*

### **Interpretation – Aid to construction – Letter simpliciter by Finance Minister**

Letter simpliciter written by Finance Minister to a Member of Parliament will not have any statutory force

*Vinod Rathore v. Union of India (2005) 278 ITR 122 / 146 Taxman 32 / (2005) 195 CTR 210 (MP)(High Court)*

### **Interpretation – Retrospectively of provision – Date of amendment**

The amendment, despite a particular date having been fixed as the date from which it will take effect, even when it is not made retrospective, if found to be clarificatory in the sense that even without the aid of that amendment the unamended provision was capable of comprehending what was sought to be made clear by the amendment, the amendment made subsequently does not have the effect of restricting the meaning of the original entry and the width of the entry remains the same. The facet of its content which had either been misconstrued or had not been recognised is only brought out when the clarificatory amendment is effected. (A.Y. 1983-84)

*CIT v. Soft Beverages (P.) Ltd. (2005) 272 ITR 270 / 195 CTR 286 (Mad.)(High Court)*

### **Interpretation – Statutes – Construction**

Interpretation of Statutes – Construction of statute.

Construction of statute does not imply interpolation therein. The meaning which suits the word in the context in which it has been used in statute, has to be accepted. (A.Ys. 1977-78, 1978-79, 1981-82)

*Sandvik Asia Ltd. v. CIT (2004) 267 ITR 78 / 137 Taxman 167 / 189 CTR 226 (Bom.) (High Court)*

### **Interpretation – Statutes – Meaning to expression**

One cannot ignore any expression used in statute; it has to be reconciled and given due meaning. (A.Y. 1988-90)

*Britannia Industries Ltd. v. Jt. CIT (2004) 271 ITR 123 / 143 Taxman 325 / 193 CTR 26 (Cal.) (High Court)*

### **Interpretation – Statutes – Rule of Literal Construction**

A statute should be read in its ordinary, natural and grammatical sense. (A.Y. 2003-04)

*Krishi Utpadan Mandi Samiti v. UOI (2004) 267 ITR 460 / 139 Taxman 258 / 188 CTR 556 (All.) (High Court)*

### **Interpretation – Statutes – Rule of Literal Construction**

Pure, simple and grammatical sense of language used by Legislature is best way of understanding as to what Legislature intended.

*Coal Mines Officers' Association of India v. UOI (2004) 266 ITR 429 / 137 Taxman 92 / 187 CTR 348 (Cal.) (High Court)*

### **Interpretation – Statutes – Rule of Strict Construction**

Provisions of the statute must be interpreted as per the language used therein. (A.Y. 1981-82)

*N. Srinivasan v. Uma Rani (Smt.) (2004) 270 ITR 77 / 141 Taxman 564 / 192 CTR 464 (Mad.) (High Court)*

### **Interpretation – Statutes – Proviso**

Normally a proviso is to be construed in relation to subject matter covered in section to which proviso is appended. (A.Ys. 1979-80 to 1982-83)

*CWT v. Ct. Chidambaram (2004) 270 ITR 341 / 192 CTR 444 / 144 Taxman 802 (Mad.) (High Court)*

### **Interpretation – Statutes – Proviso**

A proviso should not be read as if providing something by way of addition main provision. (A.Y. 1992-93)

*CIT v. Udaipur Distillery Co. (2004) 137 Taxman 201 / 274 ITR 429 / 187 CTR 369 (Raj.) (High Court)*

### **Interpretation – Statutes – Retrospectively of Statute**

A statute, which impairs vested rights or the legality of past transactions should not prima facie be held to be retrospective. (A.Ys. 1942-43 to 1977-78)

*Sanjay Khetan v. CIT (2004) 266 ITR 453 / 139 Taxman 190 / 188 CTR 361 (All.)(High Court)*

### **Interpretation – Statutes – Definition Provisions**

When a particular expression is clearly defined, the court has no alternative but to give the meaning to expression as defined in the statute.

*Shaw Wallace & Co. Ltd. v. UOI (2004) 267 ITR 248 / 189 CTR 1 (Cal.)(High Court)*

### **Interpretation – Statutes – Subsequent amendment**

When the language given in a provision of law is clear and unambiguous and interpretation to be placed on such a provision does not lead to any absurdity, it is not permissible for Court to take into account subsequent amendment made to such a provision while interpreting such a provision. (A.Ys. 1984-85, 1989-90)

*Mithy Granite P. Ltd. v. ITO (2004) 266 ITR 151 / 135 Taxman 435 / 187 CTR 386 (Karn.)(High Court)*

### **Interpretation – Judicial Institution – Voice of Citizens – Weapon of Contempt**

Voice of citizen who believes that judicial institution is not functioning well cannot be muffled by using the weapon of contempt.

*Indirect Tax Practitioners Association v. R. K. Jain (Supreme Court) : Source : [www.itatonline.org](http://www.itatonline.org)*

### **Interpretation – Precedent – Contempt – Failure to follow High Court Order – Sales Tax Officer**

The Sales Tax Officer passed an order refusing to follow the judgment of Bombay High Court in *CST v. Pee Textiles 26 VST 281* on the ground that the said judgment “is not accepted by the sales tax department and the department has appealed against the same”. On a writ petition filed by the assessee, the High Court has taken the view that as the said judgment in *Pee Vee Textiles* is not stayed “the refusal to follow and implement the judgment of this Court by the Sales Tax officer in our considered view prima facie amounts to contempt of this Court”

*Garware Polyester v. State of Maharashtra and Ors. Source : [www.itatonline.org](http://www.itatonline.org)*

### **Interpretation – Precedent – Binding – Authority for advance ruling – Deserves highest respect – Not binding**

Authority for Advance ruling deserves highest respect and consideration, however it can not be open to any one to treat this as a binding judicial precedent. If there is some thing which has not been considered in the process of arriving at their conclusions in the Ruling, the same has to be considered and adjudicated upon. (A. Y. 2005-06).

*G. D. Metasteel (P) Ltd. v. ACIT (2011) 47 SOT 62 / 64 DTR 161 (Mum.)(Trib.)*



### **Interpretation – Precedent – Binding nature – Non Jurisdictional High Court – Tribunal**

In the absence of any contrary view, decisions of non jurisdictional High Court have to be followed by the Tribunal. It is not permissible for the authorities below to ignore the decision of the higher forum on pretext that an appeal is filed in the Supreme Court, which is pending or that steps are to be taken to file an appeal. (A. Y. 2007-08).

*Addl. CIT v. Royal Bank of Scotland N. V. (2011) 130 ITD 305 / 138 TTJ 698 / 55 DTR 307 (Kol.)(Trib.)*

### **Interpretation – Precedent – Decision of jurisdictional High Court – Binding nature**

Tribunal has to follow the decision of the jurisdictional High Court without making any comment upon the said decision, it is not permissible for the Tribunal to sidetrack and / or ignore the decision of the jurisdictional High Court on the ground that it did not take into consideration a particular provision of law. (A. Ys. 1999-2000 & 2002-03)

*Dy. CIT v. Gujarat Ambuja Cements Ltd. (2011) 57 DTR 179 (Mum.)(Trib.)*

### **Interpretation – Precedent – Ratio – Conclusion – Binding nature – Supreme court – High Court**

It is also well settled that the judgment of the Hon'ble Supreme Court or the High Court must be read as a whole and the observations from the judgment have to be considered in the light of the question, context and the facts of that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Hon'ble apex Court, divorced from the context of the question under consideration and treat it to be the complete law laid down by the Hon'ble Court. It is also equally well settled that a decision is to be followed for what it actually decides and not necessarily for what logically follows from it. (A.Y. 1993-94)

*ACIT v. Affection Investments Ltd. (2003) 80 TTJ 278 / (2004) 2 SOT 165 (Ahd.)(Trib.)*

### **Appeal – Condonation of Delay – Substantial Justice – Unless mala fides are writ large, delay should be condoned – Matters should be disposed of on merits and not technicalities**

Justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it of on such technicalities and that too at the threshold. Unless malafides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned.

*Improvement Trust v. Ujagar Singh (2010) 6 SSC 786 / (2010) 6 Scale 173 (SC)*

### **Appeal – Inter departmental litigation – Public sector undertakings – Clearance from committee on disputes – Supreme Court recalls law requiring PSUs to obtain COD approval**

Larger Bench of Supreme Court recalled its order laid down in *ONGC v. CCE 104 CTR (SC) 31 and ONGC v. CIDCO (2007) 7 SCC 39*, that no litigation could be proceeded with in the absence of COD approval in case of dispute between Government and PSUs. It was held that the mechanism was set up with a laudatory object. However, the mechanism has led to delay in filing of civil appeals causing loss of revenue. Thus, in view of the said circumstances it was decided by Larger Bench to recall the directions of this Court.

*Electronics Corporation of India Ltd. v. UOI / CCE v. Bharat Petroleum Corpn. Ltd. (2011) 51 DTR 193 / 238 CTR 353 / 332 ITR 58 (SC) (5 Member Bench)*

### **Appeal – CBDT directed to formulate uniform policy with strict parameters on appeal filing**

It is high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. We are constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc on the part of the officers concerned.

*CCE v. Doaba Steel Rolling Mills Civil Appeal No. 3400 of 2003 dated 6-7-2011 (SC)*  
Source : [www.itatonline.org](http://www.itatonline.org)

### **Bias – Question of “bias” in judicial function – Must be seen from “reasonable man’s” perspective**

To decide whether there is “bias”, the “real likelihood test” has to be adopted. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct.

*P. D. Dinakaran, Justice v. Hon’ble Judges Inquiry Committee (2011) JT (10) 230 / 9 SCALE 437 (SC)*

### **Black Money – DTAA does not protect tax evaders – SIT formed to probe black money –Fundamental rights – Double taxation avoidance – DTAA – India-Germany**

We are convinced that the said agreement, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein. The “information” that is referred to in Article 26 is that which is “necessary for carrying out the purposes of this agreement”, i.e. the Indo-German DTAA. Therefore, the information sought does not fall within the ambit of this provision. It is disingenuous for the Union of India, under these circumstances, to repeatedly claim that it is unable to reveal the documents and names as sought by the Petitioners on the ground that the same is proscribed by the

said agreement. It is for the Union of India, and the courts, in appropriate proceedings, to determine whether such information concerns matters that are covered by the double taxation agreement or not.

*Ram Jethmalani and others v. UOI (2011) 339 ITR 107 / 200 Taxman 171 / 8 SCC 1 (SC)*

### **Tax evasion – Black money – Tax evasion & money laundering – Bail cancelled**

Respondent 1 having deposits in a Swiss bank were not satisfactorily accounted for. His total income for various assessment years between 2001-02 to 2007-08 was estimated by the department as ₹ 1.104 lakh crores. He was not able to discharge burden of proof on him under section 24 of the PMLA, 2002 that wealth possessed by him was neither proceeds of crime nor untainted property. In these circumstances, order granting bail by High Court Set aside.

*UOI v. Hassan Ali Khan and Another (2011) 10 SCC 235*

### **Legislative Powers – Taxation – Tax on Land and Buildings**

It is well settled that the power of “regulation and control” is separate and distinct from the power of taxation. A power to regulate, develop or control would not include within its ken a power to levy tax or fee except when it is regulatory. A reasonable tax or fee on mineral bearing land levied by State Legislation cannot be construed as trenching upon the Union’s power and freedom to regulate and control mines and minerals. “Land” cannot be assigned a narrow meaning so as to confine to it to the surface of the earth. It includes all strata above and below.

Royalty is not tax. For levy of taxation charging section necessary, no power to levy by implication.

*State of West Bengal v. Kesoram Industries Ltd. & Ors. (2004) 266 ITR 721 / 187 CTR (SC) / 10 SCC 201*

### **Finance Act, 1986, 1987 & 1988 – Trading Company – Tea collection – Auction**

Assessee company collecting tea from various tea gardens and auctioning it, could not be treated as trading company. (A.Ys. 1986-87 to 1988-89)

*J. Thomas & Co. Ltd. v. CIT (2004) 267 ITR 585 / 140 Taxman 1 / 190 CTR 1 (Cal.)(High Court)*

### **Finance Lease – Special Court – Borrower becomes owner**

Finance lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipment of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property in as much as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the

machinery equipment, undertakes indemnity and agrees to bear the risk of loss or damage if any. On the facts the lessee has held to be the owner. The direction of the Custodian to deliver the cars were quashed.

*Asea Brown Boveri Ltd. v. Industrial Finance Corporation of India* (2006) 154 Taxman 512 (SC) / (2005) AIR SC 17 / 126 Comp Cases 332 (SC) / (2004) 12 SCC 570

### **Industrial company – Concessional rate of tax – Manufacture or processing**

To earn the benefit of concessional rate of tax as an industrial company assessee must engage itself in manufacture or processing of goods either personally or by someone under its supervisory control or direction. (A.Ys. 1984-85 & 1985-86)

*Farichem Laboratories (P.) Ltd. v. CIT* (2005) 273 ITR 133 / 148 Taxman 70 / 203 CTR 377 (Cal.)(High Court)

### **Industrial Company – Production of Art Design Work – Base material**

Assessee engaged in production of art and design works serving as base material for publicity is an industrial company.

*CIT v. Shilpi Advertising Ltd.* (2003) 263 ITR 479 / 185 CTR 328 / 133 Taxman 666 / (2004) 178 Taxation 717 (SC)

### **Trading company – Principal business – Head of income – Not relevant**

Question whether assessee-company is a trading company is not dependent on head under which its income is assessed but on principal business of assessee. (A.Ys. 1989-90 to 1991-92)

*J. Thomas & Co. (P.) Ltd. v. CIT* (2005) 275 ITR 467 / 195 CTR 230 / 151 Taxman 86 (Cal.)(High Court)

### **Valuation of Shares – Compromise – Going Concern – Control Premium**

Valuation done without taking in to consideration the Brands owned by the company cannot be considered as erroneous as while valuing the shares past profits, future earnings also taken in to account.

*Renuka Datla (Mrs.) (Dr.) v. Solvay Pharmaceutical* (2004) 265 ITR 435 / 181 Taxation 136 / 135 Taxman 200 (SC) / AIR 2004 SC 321

## **Natural Justice**

### **Natural Justice – Adjudication – Duty of Disclosure – Extent and Scope – Foreign Exchange**

The documents which the appellants wanted were documents upon which no reliance was placed by the authority for setting the law in to motion. The demand for supply of all documents in possession of the authority was based on vague, indefinite and irrelevant grounds. The appellants were not sure whether they were asking for copies of documents in the possession of the adjudicating authority or in the possession of the authorized officer who lodged the complaint. The only object in making such demand was to obstruct the proceedings.

*Kanwar Natwar Singh v. Director of Enforcement (2011) 330 ITR 374 / (2010) 160 Comp Cas (SC)*

### **Natural Justice – Supply of Documents – Furnishing copies**

Non-furnishing of “all documents” does not violate principles of natural justice

*Kanwar Natwar Singh v. Directorate of Enforcement (2011) 330 ITR 371 (SC)*

### **Natural Justice – Orders – Speaking Orders – Guidelines**

Detailed guidelines laid down as to how judgements should be written. (A.Y. 1995-96)

*Jt. CIT v. Saheli Leasing & Industries Ltd (2010) 324 ITR 170 / 39 DTR 1 / 191*

*Taxman*

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*(SC) / 6 SCC 384*

### **Natural Justice – Need to show prejudice – Opportunity**

By now it is a well settled principle of law that doctrine of principle of natural justice is not an embodied Rule. It cannot be applied in a straight jacket formula. To sustain the complaint of violation of the principle of natural justice one must establish that he has been prejudiced by non-observance of principle of natural justice. As held by the High Court, the appellant has not been able to show as to how he has been prejudiced by non-furnishing of the copy of the enquiry report. The appellant has filed an appeal before Appellate Authority which was dismissed as noticed above. It is not his case that he has been deprived of making effective appeal for non-furnishing of copy of enquiry report. He has participated in the enquiry proceedings without any demur. It is undisputed that the appellant has been afforded enough opportunity and he has participated throughout the enquiry proceedings, he has been heard and allowed to make submission before the enquiry Committee.

*Om Prakash Mann v. Director of Education (Basic) & Ors. (2006) 7 SCC 558 (SC)*

### **Natural Justice – Application of principle – Natural**

Natural justice is an inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary.

*Suresh Chandra Nanhorya v. Rajendra Rajak & Ors. (2006) 7 SCC 800 (SC)*

### **Natural Justice – Award – Writ**

The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The Court will not insist on compliance of the principles of natural justice in view of the binding nature of the award. Its application would be limited to a situation where the factual position or legal implication arising there under is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principles of natural justice.

*Punjab National Bank & Ors. v. Manjeet Singh & Anr. (2006) 8 SCC 647 (SC)*

### **Natural Justice – Judicial Bias – Exclusion by statute**

No one shall be judge in his own cause. Principles may be excluded by statute. The question of bias will have to be decided on the facts of each case. If the assessee is able to establish that the Assessing Officer was in fact biased in the sense that he was involved or interested in his personal capacity in the out come of the assessment or procedure for assessment, no doubt, it would be a good ground for setting aside the assessment order.

*UOI & Others v. Vipin Kumar Jain & Others (2005) 9 SCC 579 / (2003) 260 ITR 1 / 174 Taxation 781 / 181 CTR 24 / 129 Taxman 59 (SC)*

### **Natural Justice – Fairness – Good conscience**

Settled principles of 'statutory interpretation' require that a provision in a legislative enactment is to be interpreted in a manner which conforms to rules of natural justice, i.e., which may not be against sense of 'fairness' and 'good conscience'. (A.Ys. 1998-99 to 2000-01)

*Mithlesh Kumar Tripathi v. CIT (2006) 280 ITR 16/ (2005) 149 Taxman 692 / 199 CTR 511 (All.) (High Court)*

### **Words & Phrases**

#### **Words & Phrases – Tax Liability – Precedence over other liabilities – Special Court (Trail of offence Offences Relating to Transactions in Securities) Act, 1992 [S. 11(2)(a)]**

The Special Court Constituted under Special Court (Trail of Offences Relating to Transactions in Securities) Act, 1992, has no jurisdiction to sit in appeal over the assessment of tax liability of a notified person, made by the authority or Tribunal or Court authorized to perform that function by the Statute under which the tax is levied. A claim in respect of tax assessed can not be reopened by the Special Court; and the extent of the liability, therefore, cannot be examined by the Special Court. The claims relating to tax liabilities of a notified person are along with revenues, cesses and rates for the statutory period, April 1, 1991 to June 6, 1992 to be paid first in the order of priority and in full as far as may be depending upon circumstances. The "tax due" refers to "taxes as finally assessed". (A.Ys. 1992-93, 1993-94)

*Dy. CIT v. State Bank of India & Ors. (2009) 308 ITR 1 / 221 CTR 14 / 209 Taxation 1 / 176 Taxman 116 / 16 DTR 163 (SC)*

#### **Words and Phrases – Manufacture – Production – Produce**

The word "production" or "produce", when used in juxtaposition with the word "manufacture", takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all by-products, intermediate products and residual products which emerge in the course of manufacture of goods. (A.Y. 1979-80)



*CIT v. Tara Agencies (2007) 292 ITR 444 / 210 CTR 454 / 162 Taxman 337 / 201 Taxation 359 (SC) / 6 SCC 429*

### **Words & Phrases – Manufacture – Commercially distinct – Product – Process**

Appellant contended that in the process of joining of three pipes by welding of different diameters with one another to obtain the desired length, the pipes did lose their original character, and got converted into something, which was a commercially distinctive product. Respondent contended that the poles manufactured by the appellants were classifiable under Residuary Entry pertaining to Structures. Held, activity of appellant did not amount to manufacture.

*Hindustan Poles Corpn. v. Commissioner of Central Excise (2006) 4 SCC 85 / 196 ELT 400 (SC)*

### **Words & Phrases – Ownership of Business – Going concern – Wilful**

1. "Ownership of Business" is much wider than mere ownership of discrete or individual business. Above all, transfer of "ownership of business" requires that the business be sold as a going concern so as to render the transferee a successor-in-interest of the transferor.
2. An act is said to be 'wilful' if it is intentional, conscious and deliberate. The expression 'Wilful' excludes casual, accidental, bona fide or unintentional acts or genuine inability. It is to be noted that a wilful act does not encompass accidental, involuntary, or negligence. It must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom. The expression 'wilful' means an act done with a bad purpose, with an evil motive.

*State of Orissa and Ors. v. Respondent: Md. Illiyas (2006) 1 SCC 275*

### **Words & Phrases – Software – Non-hardware items – Programming aids**

"Software" – Random House Compact Unabridged Dictionary refers to "software" as anything that is not hardware and is used with hardware. Encyclopedia Britannica refers to "software" to designate non-hardware items, namely internal programmes or routines and programming aids. Thus the programming aids are also known as software and thus the goods in question would fall within the meaning of the word "software".

*Commissioner of Customs v. Pentamedia Graphics Ltd. (2006) 6 RC 380 / 198 ELT 164 (SC)*

### **Words & Phrases – Tax – Fees – Compensatory Taxes**

Tax is levied as a part of common burden. The basis of the tax is the ability or the capacity of the payer to pay. There is no identification of specific benefit, even if there is identification; there is no direct measurement of such benefits.

A fee is generally a term of a licence. It is based on the "principle of equivalence". The basis of a fee or a compensatory tax is the same. The main basis for both fees and compensatory tax is the quantifiable or measurable benefit from payment of such fees or compensatory tax.

*Jindal Stainless Ltd. & Others. v. State of Haryana (2006) 283 ITR 1 / 152 Taxman 561 / 194 Taxation 525 (SC)*

### **Words and Phrases – Effect of word “shall” in a statute – Mandatory – Contextual**

The use of the word “shall” in a statute, ordinarily speaking, means the statutory provision is mandatory. It is to be construed as such, unless there is something in the context in which the word is used, which would justify a departure from such meaning.

*Hemlatha Gargya v. CIT (2003) 259 ITR 1 / 128 Taxman 190 / 182 CTR 107 / 174 Taxation 758 (SC)*

### **Words and Phrases – “Tax” Meaning of – Central Excise Act, 1944**

The word “Tax” in clause (ii) of section 4 (4) (d) of the Central Excise Act, 1944 defining “value” in relation to excisable goods, has been given a wide interpretation to include all monies raised: the levy has still to be by the Central or State Legislature or by some statutory authority. Therefore, the amount collected as per the A joint Plant Committee and a steel priority Committee set up under section 17B of the Essential Commodities Act, 1955, cannot be termed as “Tax”.

*Tata Iron and Steel Co. Ltd. v. Collector of Central Excise (2003) 263 ITR 466 / (2004) 178 Taxation 719 (SC)*

### **Words and Phrases – Processing of Goods – Cold Storage**

Business of cold storage was not an industry engaged in the “Processing of goods” and the respondent which carried on the business of cold storage was not entitled to the benefit of reduced electricity duty under notification dated November 1, 1965, issued under the Rajasthan Electricity (Duty) Act, 1962.

*State of Rajasthan & Others v. Rajasthan Ice & Cold Storage & Ors. (2003) 264 ITR 158 / (2004) 178 Taxation 732 / 134 Taxman 259 (SC)*

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