Seminar on " Taxation of business head of taxation w.r.t section 32; section 37; 40(a)(ia); adhoc disallowance; classification of shares and property sales income"

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Section 37 : Business expenses GIST OF LATEST orders

Delhi High Court in ORACLE INDIA PVT. LTD. MARCH 30, 2011 Section 37: Royalty to Holding co.

As noted above, Ms. Bansal, learned counsel for the Revenue had argued that since the payment of royalty on TPO was not the genuine basis as the goods had not been sold at IPP, but at much lesser price, payment of royalty on IPP rather than on actual sales is superfluous and not permissible under Section 37(1) of the Act. It is difficult to accept such an argument. Once it is held that the payment of royalty by the assessee to its parent company is not hit by the provisions of Section 92 of the Act and the price fixed is ALP as determined by the TPO himself, there is no reason to hold that the expenses would not be allowed under Section 37(1) of the Act.

It is well-settled that it is not open to the Department to adopt a subjective standard of reasonableness and disallow a part of business expenditure as being unreasonably large, or decide what type of expenditure the assessee should incur and in what circumstances.

Thus, the jurisdiction of the AO is only confined to deicide "Profits and gains of business or profession", i.e., whether the expenditure claimed was actually and factually expended or not and whether it was wholly and exclusive for the purposes of business. Reasonableness of the expenditure can be considered only from this limited angle for the purpose of determining whether in fact amount was spent or not.

The upshot of the aforesaid discussion leads us to conclude that the Tribunal was justified in law in allowing the deduction disallowed by the AO being royalty paid by the assessee to its holding company. (refer ***Atherton Vs. British Insulated & Helsby Cables Ltd.*** reported as **10 TC 155, 191 (HL)** Supreme Court in the case of ***Commissioner of Income Tax Vs. Walchand,*** **65 ITR 381)**

330 ITR 47:Delhi High Court On Section 37 Business Expense: held on 19 may 2010: (similar conclusion by DHC in Microsoft case 176 Taxman 395; 220 CTR 410)

It would be difficult to say that the expenses incurred in performance of the contractual obligation of the assessee-company would not be expenditure for the business of the assessee-company. An obligation incurred, while entering into a commercial contract, has to be taken as a business expenditure within the meaning of Section 37 (1) of the Act unless it is shown that the contract itself was a sham document and was made with an ulterior motive.

What is required to be established is a nexus between the expenditure incurred and the business purpose of the assessee. It is not permissible for the Assessing Officer to place himself in the position of the management of the assessee and take it upon himself to decide how much would be a reasonable expenditure for a particular business purpose. The matter has to be seen purely from the viewpoint of the management of the assessee, taking its commercial interests into consideration.

So long as the participation in the exhibition ensued to the benefit of the assessee-company in the form of increased commission on the products sold and serviced by it, it would be immaterial that part of the benefit on account of promotional activities undertaken during the exhibition would also accrue to the manufacturers of the machines being sold and serviced by the assessee-company.

Case Laws referred: CIT vs. Chandulal Keshavlal & Co. : 38 ITR 601 ***& Sassoon J. David and Co. Pvt. Ltd., vs. CIT, Bombay***: 118 ITR 261 ETC

Delhi High Court ON TRADE ADVANCE VS BAD DEBT SECTION 37 VS 36(1)(VII): Mohan Meakin Limited 11.05.2011:.... To bolster his submissions that the non-recovery of trade advances amounted to business loss and were allowed to be deducted under Section 28 and Section 37 of the Act, learned counsel has placed reliance on the cases of ***Chenab Forest Co. v. Commissioner of Income-Tax, Patiala, 96 ITR 568; and Commissioner of Income-Tax, Mysore v. Mysore Sugar Co. Ltd., 46 ITR 649.*** On the other hand, learned counsel appearing for the Revenue submitted that the advances, which had been made, cannot be regarded

as expenditure and it would be in the nature of debt. As it was not such a debt which would come within the purview of Section 36, so the assessee cannot claim any deduction on this account. With regard to submissions of assessee regarding applicability of Section 28 and Section 37, it was submitted by learned counsel for the Revenue that the assessee cannot seek protection under Sections 28 and 37 because when Section 36 is applicable, then Section 37 will not be applicable. HELD In view of the discussion as made by the Division Bench of J&K High Court and the Hon"ble Supreme Court, as quoted above, that the advances made by the assessee in the case were certainly of a type which would be within the contemplation of the words "laid out or expended wholly and exclusively for the purposes of the business". As no portion of the said advances could be stated to be loss of capital expenditure, but it being a plain case of business loss, it would certainly be allowable to be deducted under the provisions of Section 37 of the Act. (observed : *When the assessee had written off the dues recoverable from the Corporation and the same were accepted by the Department and it had also so written off, the advances made to M/s.Kanpur Boot House in its books of accounts, what else could be the proof with the assessee for its being unable to recover the same...In any case, the Revenue could not compel the assessee to have recourse to litigation to recover the amount against dead person or his legal heirs when in the given circumstances, the same may not be recoverable.; ...Merely because the claim was not made out under one particular provision of the Act, but was so made out under another provision of law, we failed to understand as to how the assessee could be debarred to raise such legal question. Having regard to all this, we are of the considered view that it was legally permissible to raise question of deduction under Section 37 of the Act even if it was not raised before the authorities below. SC 66 ITR 710. applied)*

Delhi High Court in EXXON Mobil 328 ITR 17:

5. Ms Prem Lata Bansal, learned counsel for the Revenue submitted that ITAT had erred in law in deleting the addition of Rs.1,34, 34,500/- made by the AO on account of prior

period expenses by holding that the expenditure was incurred in the Assessment Year under consideration though it had been admitted that these expenses were incurred w.e.f 01st January, 2002. Ms Bansal further submitted that ITAT had allowed expenses merely on the ground that invoices had been raised on 19th September, 2002 i.e during the Assessment Year under consideration.

…10. On the other hand, in our opinion, the present case is covered by the decisions in Nonsuch Tea Estate Ltd. v. Commissioner of Income Tax, 98 ITR 189 (SC); (supra); Surashtra Cement and Chemical Industries Ltd. v. CIT 213 ITR 523 (supra) and; Additional Commissioner of Income Tax v Farasol Ltd. 163 ITR 364 (supra).

… 14. Hence, we are of the view that liability of the assessee under the agreement had arisen and accrued in August 2002, when the Agreement was executed and, therefore, the liability of the assessee to pay for period January 2002 to March 2002 arose and crystallized in August 2002. It is pertinent to mention that CIT (A) had observed that the assessee had shown prior period expense of Rs.1,34,34,500/- against which the prior period income was shown as Rs 83,21,000/- and the net amount of Rs.51,13,000/- had been shown as expenditure in the P and L Account. CIT (A) held that if the assessee has shown prior period income and the AO has not excluded it while working out the current year's taxable income then there was no reason on the part of AO to disallow only one part of the prior period adjustments i.e the prior period expenditure.

(SAME CONCLUSIOB BY BOMBAY HIGH COURT IN IPCA Laboratories Ltd. Held : As regards question (c) is concerned, the Tribunal has recorded a finding of fact that in respect of the expenses incurred in the earlier year the assessee had received the debit note in the current assessment year and, therefore, the liability can be said to have accrued to the assessee in the year when the debit note was received. In this view of the matter the third question (c) is also answered in the affirmative i.e. in favour of the assessee and against the Revenue. Order dated 1.2.2011; same by DHC in 194 Taxman 158 JAGATJIT CASE*)*

P&H High Court order in M/s. S.G. Exports Date of decision: 8.2.2011 Labor expenses section 37 Onus on revenue

"Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in upholding the order of CIT(A) dated 11.2.2008 thereby deleting the addition of Rs 1,80,40,340/- made by the Assessing Officer on account of disallowance of bogus labour expenses"

During the course of a search operation under Section 132(1) of the Act at the business premises of Duggal Group in which the assessee is one of the constituents, certain incriminating documents pertaining to the assessee were seized. The assessment under Section 143(3) read with Sections 153A/153B of the Act was completed on 31.3.2006 at net taxable income of Rs. 1,49,36,800/- wherein an addition of Rs. 1,80,40,340/- was made by the assessing officer, vide order dated 31.3.2006, on account of disallowance of labour charges.

Learned counsel for the appellant/revenue argued that the CIT(A) and the Tribunal, while allowing the appeal of the assessee, had wrongly held that the onus lay on the Revenue to show that the payments were made to some in-genuine or non-existent parties, but such onus was wrongly placed on the Revenue. According to the learned counsel, it was for the assessee to establish that the expenses claimed by it on account of labour charges were genuine. The counsel further argued that the Tribunal had wrongly noticed that the labour charges were fully vouched and paid to identifiable persons, even if there was no specific material available on record in that behalf.

12. A perusal of the findings of the CIT(A) and the Tribunal shows that both the authorities have placed onus on the Revenue to establish the in-genuineness and non-existence of the parties which is wrong. Since the assessee had claimed that it had incurred expenses on account of the labour charges, the onus was on the assessee to prove the said fact by producing cogent and convincing evidence including the identity of the parties along with evidence of payment to those persons. Accordingly, the orders passed by the CIT(A) and the Tribunal cannot be legally sustained. The substantial question of law is, thus, answered in favour of the Revenue and the matter is remitted to the CIT(A) for decision of the aforesaid controversy afresh in accordance with law.

***Delhi High Court in* MODI STONE LTD. Judgment Pronounced on: 06.05.2011 ITA No. 1203/2006**

The Commissioner of Income Tax (Appeals) rightly noted that it was for the assessee who had claimed these payments to produce relevant material before the Assessing Officer to satisfy him with respect to these payments. But, strangely, the CIT(A) despite noting that the assessee had not discharged the onus placed on him and had not furnished necessary details, allowed these payments on the basis of the past record and nature of the claim alone. W*e fail to appreciate how commission of payment/discount in a previous year could by itself and without anything more have been made the basis for allowing such payments for the subsequent years. It is very much possible that the commission/discount paid during the previous assessment year (s) was not paid during assessment years in question or the payment was not to the extent claimed by the assessee. It was obligatory for the assessee to produce relevant evidence before the Assessing Officer to prove the alleged payments, particular when it was specifically called upon to do so and an opportunity was subsequently given to it for this purpose. Once it was found that the onus of proving the alleged payment on the assessee and he had not produced any evidence to prove those payments, neither CIT(A) nor ITAT could have allowed these payments, without having any material before them to substantiate such payments. The CIT(A) as well as the ITAT, in our view, committed a serious error of law* in upholding these payments despite finding that no material had been produced by the assessee to substantiate these payments.

For the reasons given in the preceding paragraphs, we hold that the ITAT committed an error of law in allowing the aforesaid payments despite onus of proving being on the assessee and no evidence having been produced by the assessee to prove those payments, and thereby misplacing the burden of proof on the Revenue.

Delhi High Court ITA 1820/2010,ITA 1974/2010 ITA 01/2011,ITA 05/2011 CITI FINANCIALCONSUMER FIN.LTD

8. From the facts noted above and on the basis of submissions of learned counsel for the parties, following aspects clearly emerge as undisputable

(a) The expenditure in question is incurred by the assessee in the relevant assessment years in which the assessee is claiming deduction thereof under Section 37 of the Act. Thus there is no dispute that the expenditure is in fact incurred.

(b) It is also not in dispute that the expenditure in question is business expenditure incurred wholly for the purpose of the business of the assessee

(c) The expenditure incurred in the nature of advertisement and publicity is incurred forever and in no manner any portion thereof reverts back to the assessee.

9. The aforesaid facts would demonstrate that the ingredients of Section 37 of the Act stand satisfied. Therefore, normally the expenditure is to be allowed as business expenditure in the year in question in which the same is incurred. In this backdrop, we have to consider the arguments of the Revenue predicated on the so called enduring benefit which is the expenditure on account of advertisement and publicity confers. This argument is based on the judgment of the Apex Court in ***Madras Industrial Investment Corporation Ltd.****(supra).* In that case, the Supreme Court had referred to this „matching concept". It was held that ordinarily revenue expenditure incurred wholly or exclusively for the purpose of business, can be applied in the year in which it is incurred. However, the facts may justify spreading the expenditure and claiming it over a period of ensuing years, where allowing the entire expenditure in one year could give a very distorted picture of the profits of a particular year. One such instance was issuing debentures at discount. The Supreme Court was of the opinion that though in such cases the assessee had incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure the benefit over a number of years. There was a continuing benefit to the assessee of the company over the entire period and, therefore, the liability was to be spread over the period of debentures.

10. We are unable to persuade ourselves by the aforesaid submission of the learned counsel for the Revenue

13. Applying the aforesaid principle to the facts of this case, it clearly emerges that the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it was incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee"s trading operations. No fixed capital was created by this expenditure. We may also add here that in the Income-Tax laws, there is no concept of deferred revenue expenditure. Once the assessee claims the deduction for whole amount of such expenditure, even in the year in which it is incurred, and the expenditure fulfills the test laid down under Section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in ***Madras Industrial Corporation*** (supra), the expenditure can be allowed to be spread over, that too, when the assessee chooses to do so.

Re: Expenditure on account of stamping fee, direct selling expenditure and commission payment

16. The CIT (A) was unimpressed with this argument and found that the assessee was spreading over the income during the number of years that the financing is spread over and, therefore, expenditure on the aforesaid counts was required to be spread over. The ITAT, however, denounced this reasoning of the CIT (A) and accepted the plea that the expenditure incurred had nothing to do with the period of length of time and had no linkage, whatsoever, to any period, the entire expenditure was allowable in the year in which it was incurred. The Tribunal has further held that the expenditure is incurred once for all in the form of stamping duty as well as commission paid to the direct selling agents for procuring the loan assignments and it is not dependent upon the working out of the agreements ultimately entered into between the assessee and the customers. Since the commission is paid to the direct selling agents, for their services in sourcing hire in the year in which the loan is disbursed, it is to be allowed as business expenditure

17. We are in agreement with the aforesaid view taken by the Tribunal and hold that the expenditure was required to be allowed as revenue/business expenditure incurred in that year. The reasons given by us while allowing the advertisement and publicity expenditure will apply here as well.

P& H High Court M/s. Voith Paper Fabrics India Ltd Date of decision: 7.2.2011
Corporate tax issues business head of taxation section 30/31 repairs etc

In this appeal, the Revenue has challenged the findings of the Tribunal on the three disallowances which were made by the assessing officer:

i) Disallowance of Rs. 21,90,435/- on account of repair of road etc. in the factory premises of the assessee; ii) The expenses amounting to Rs. 2,50,000/- incurred on software. iii) Bad debts amounting to Rs. 3,79,802/- claimed by the assessee.

SC in cases of Empire Jute Co. Ltd. Vs. CIT, 124 ITR 1 and Alembic Chemical Works Co. Ltd. vs. CIT, 177 ITR 377.

ITAT order as upheld by High Court: The decision of Hon'ble Supreme Court in the case of Saravana Spinning Mils P. Ltd. (supra) relied upon by the learned DR will not apply to the present set of facts. In the said case the entire machinery was sought to be replaced whereas in the present case, the machinery is not replaced by acquisition of new machinery but only surface of road within the factory premises is re-laid by laying Kota Stone and bricks on the ground …..HELD by High Court that A perusal of the aforesaid finding clearly shows that the assessee had incurred expenses on account of repair of road in its factory premises and said expenses had not been incurred for acquiring a new building or the road. It was further recorded that the road was existing in the premises and since the same was not conducive to use in a way it was desired, certain repairs were required to be carried out. On the basis of these findings, the expenses incurred thereon were held to be revenue in nature. No error or perversity could be pointed out by the counsel for the appellant in the aforesaid finding.

P& H High Court M/s G.E. Motors (I) Pvt. Ltd. (Now GEMI Motors (I) Pvt. Ltd.) Date of Decision: 25.1.2011

The appeal requires adjudication regarding deletion of following expenses by the CIT(A) and upheld by the Tribunal:- (i) expenses on account of repair and maintenance of building; (ii) expenses incurred on account of staff welfare; (iii) expenditure on account of personal use of car and telephone; and (iv) expenses on account of foreign travelling which were incurred by the employees of the assessee.

6. Learned counsel for the revenue submitted that the said expenses were not allowable under Sections 38(2) and 40A of the Act as the same are excessive and unreasonable. The Assessing Officer had rightly disallowed the said expenses. However, the CIT(A) and the Tribunal without appreciating the material on record had allowed the expenses as noticed aforesaid. Learned counsel relied upon the judgments in **Commissioner of Income Tax Vs. Chitram and Co. (P) Ltd. [1991] 191 ITR 96** and **Commissioner of Income Tax Vs. Madura Coasts Ltd. [2003] 263 ITR 241** in support of her submission.

Addition of Rs.12,27,611/- on account of repair and maintenance expenses:

On this account, the Assessing Officer made a disallowance of Rs.12,27,611/- and held that the expenditure to be capital in nature. On appeal, the CIT (A) deleted the said addition observing that no new asset has been created and the expenditure had been incurred on improvement of the existing assets and the same was an allowable expenditure. The Tribunal upheld the view of the CIT(A) while observing that the said expenditure was in the nature of current repairs, deductible under Section 30 of the Act.

Addition of Rs.25,73,283/- on account of foreign travelling expenses:

The Assessing Officer made an addition of Rs.25,73,283/- under this account treating it to be capital in nature. The CIT(A) deleted the said addition holding that the expenditure incurred was not in relation to any capital asset and such expenditure was allowable as revenue expenditure. The Tribunal while upholding the view of the CIT (A) observed that the continuous training was essential for the functioning of the company and such expenditure was deductible in computing the income.

8. Learned counsel for the revenue was not able to point out any illegality or perversity in the findings recorded by the CIT(A) and upheld by the Tribunal. In view of the finding recording by the CIT (A) and the Tribunal which has not been shown to be perverse, it could not be said that the expenses allowed were either excessive or unreasonable. Accordingly, the provisions of Section 38(2) and 40A of the Act do not help the appellant and the reliance on the judgments in **Chitram and Co. (P) Ltd.** and **Madura Coats Ltd. cases (supra)** do not advance the case of the revenue as they were on the individual fact situation.

P& H High Court M/s Chandigarh Construction Co. (P) Ltd. ITA No. 446 of 2006 Date of Decision: 22.2.2011 arbitral award accrual of income held arises on conclusion of LIS/litigation

The point for consideration in this appeal is whether the amount received by the assessee in pursuance of an award of the Arbitrator which had not attained finality being still under challenge before a Court would be exigible to tax. It is not in dispute that the assessee is following mercantile system of accountancy. The mercantile system of accountancy envisages accrual or arising of income or deemed to accrue or arise during the year in question. *10. Applying the aforesaid principles to the present case, where admittedly assessee is following the mercantile system of accountancy, the income shall accrue or arise to the assessee on finalization of the lis and therefore, no infirmity or illegality is noticed in the order of CIT(A) as affirmed by the Tribunal.* 11. A perusal of the judgment on which revenue has placed reliance shows that in those cases, the matter under consideration was

with respect to cessation of liability under Section 41 of the Act. The said pronouncements, thus, do not advance the case of the revenue. 12. In view of the above, the question of law is answered against the revenue and in favour of the assessee. The appeal is dismissed.

DHC IN INSILCO **CASE 320 ITR 322**	**DHC IN** INSILCO **CASE 320 ITR 322**
Whether provision made by assessee for "long service award" under a scheme operated by it for its employees which is based on tenure of service, as per actuarial valuation is allowable as accrued expense u/s 37 of the Income Tax Act?	Since assessee is following mercantile system of accounting, it is held by DHC that: "***If a liability arises within in the accounting period, the deduction should be allowed though it may be quantified and discharged at a later date***" and further subject "award" provision made for employees has been treated at par with gratuity provision and warranty provision since held to be allowed in number of other precedents.

Delhi high court Case Title: 239 CTR TRIVENI ENGINEERING & INDUSTRIES LTD ITA No. 346 of 2009 Pronounced On: November 29, 2010 Uniform rate of taxation: No controversy on year of taxability Applied [33 ITR 681],

The only dispute that the Revenue seeks to raise is regarding the year of allowability of expenditure. Considering that the assessee is a company assessed at uniform rate of tax, the entire exercise of seeking to disturb the year of allowability of expenditure is, in any case, revenue neutral.

ITA 499/2010: 1/12/2010: Explanation to section 37 and compensation paid to avoid suit for damages of copyright etc infringement of another person: **The assessee had received a notice from Mr. Michale Goldberg alleging that some of the passages in that book were incorporate in the book were taken from the book of Mr. Michale Goldberg and thus, plagiarism occurred. Mr. Goldberg had, by the said notice, demanded damagers in the sum of ` US$ 1,50,000. The assessee, after negotiations with Mr. Goldberg decided to settle the matter by paying compensation of US$ 27,000 as according to the assessee, had the assessee contested the case in US would have been much more. Under the aforesaid circumstances, we are of the opinion that even CIT (A) rightly allowed the aforesaid expenses as business expenses, which order is confirmed by the ITAT in the following manner…..** ***Ld. Counsel for the Revenue submits that as per***

explanation to Section 37 (1) of the Act, any 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 or profession and no deduction or allowance shall be made in respect of such expenditure. However, the expenditure which is incurred in the manner above would not come within the mischief of an expenditure incurred for the purpose which is an offence or which was prohibited by law. We are, therefore, of the opinion that no question law arises.

EXPENSES ON DIRECTION/REQUEST OF GOVT ETC:

Case Law	Ratio
Orissa Forest Development Corpn. Ltd. vs JCIT 75 TTJ 87, 80 ITD 300	*Assessee Company was an undertaking of Orissa govt. and was involved in using the forest products like timber, bamboo. etc., in specific areas allocated by state govt.The expenditure of afforestation programme incurred by assessee catered to his business needs as well as fulfilled his obligation to follow policies and directives of central and state government. Thus, these huge expenditure of plantation of new trees, can be treated as revenue expenditure making it allowable u/s. 37(1).*
Hindustan Petroleum Corp. Ltd. vs DCIT 92 TTJ 168	*What is the expenditure for the implementation of 20 Point plant after all? It is solely for the welfare of the oppressed classes of society, for which even the Constitution of India sanctions positive discrimination, and for contribution to all around development of villages, which has always been the Central theme of Government's development initiatives. An expenditure of such a nature cannot but be, to use the words employed by the Hon'ble Madras High Court in Madras Refineries Ltd.'s case (supra), 'a concrete expression of care and concern for the society at large' and an expenditure to discharge the responsibilities of a "good corporate citizen which brings goodwill of with the regulatory agencies and society at large, thereby creating an atmosphere in which*

	the business can succeed in a greater measure with the aid of such goodwill.".. It cannot but be in the business interest of the assessee-company to abide by the directions of the Government of India which also owns the assessee-company.. monies so spent therefore are required to be treated as business expenditure eligible for deduction under section 37(1) of the Act.
National Aluminium Co. Ltd. vs DCIT 101 TTJ 948	*The expenses incurred by the assessee company on rehabilitation of its displaced employees and on the directions of the Pollution Control Board were allowable as business expenditure, as the assessee did not acquire any capital asset on the expenses. S.37(1) of the Income Tax Act 1961*

P& h High court in Precision Galvanising Works, Faridabad ITA No. 361 of 2004 Date of decision: 9.2.2011 Business Closure: Expenses Claimed (ITAT & CIT-A reversed for PERVERSITY) HELD negligible business can be a ground to treat the claim of expenses as DEVISE

"1.Whether the Hon'ble ITAT has erred in law in holding that the business of the assessee continued particularly when electricity connection had been cut off and no regular business activities were done as all the business premises were lying closed?.. 3. Whether the Hon'ble ITAT has erred in law in deleting the disallowance of Rs.2,79,306/- made by the Assessing Officer by holding that the business of the assessee continued during the year?

The Assessing Officer did not accept the return and disallowed the expenses and brought forward loss on the ground that no business was being carried on by the assessee. Its electricity supply had been cut off and there was no transaction of business. The factory was lying closed. Operation of bank account also showed that no business was being run. No workers were employed. On appeal, the CIT(A) set aside the additions on the ground that the assessee had operated the bank accounts, its books of account were duly audited and thus, its business was continuing.

On further appeal, the said finding was affirmed. Learned counsel for the revenue submitted that the finding recorded by the Tribunal was perverse. There was no business transaction. The factory of the assessee was lying closed. Its electricity supply had been cut off.

6. We find merit in the contention. The Assessing Officer observed that except withdrawals and deposits in the Bank, there was no other transaction to show that the business was being carried on. The cash book was not properly maintained. The factory was lying closed. Electricity connection had been cut off. There was no staff. These circumstances showed that the assessee was not carrying on any business. The plea of carrying on business was merely a legal device to avoid tax It is clear that the CIT(A) as well as the Tribunal erred in holding that the assessee was still carrying on business. It has not been disputed that the electricity supply of the assessee had been cut off and the business had stopped. The expenses claimed also do not show any claim towards wages or electricity charges. Irrespective of meaning of the term 'business', entirety of facts and circumstances are required to be seen. No doubt, if business is being run, its volume may not be conclusive. However, where numerous circumstances indicate closure, insignificant turnover can be taken into account to determine whether such entry is only being used as device. The CIT(A) in the circumstances was required to go into the question whether plea of the assessee that it was carrying on business was merely a device to avoid tax by claiming carry forward of losses and business expenses which could be allowed only if the business was still continuing which has not been done. In the circumstances of the case, the finding of the CIT(A) as affirmed by the Tribunal cannot be sustained..

331 ITR 401:Larger 3 Judge Bench Punjab & Haryana High Court Feb'11 order in case of Rockman Cycle: Lifting of Corporate Veil; Prudence examination by Ld AO: Funds raised @ 18% p.a interest for earning income @4% p.a: section 36(1)(iii) & section 57(iii) examine

revenue's plea:

The Assessing Officer was of the view that there was no justification to borrow funds carrying interest @ 18% per annum for the purpose of making investment in shares which would have given dividend of only 4% p.a. In the aforesaid facts, the Assessing Officer opined that the expenditure incurred by the assessee in raising loans for the purpose of

investment in shares was not for the purpose of business and accordingly, expenditure to that extent was disallowed. It was submitted that in terms of the provisions of Section 57(iii) of the Income-tax Act, 1961 (for short, `the Act'), only that expenditure can be allowed, which was made to earn income. In the present case, expenditure on interest made by the assessee was not for the purpose of earning income because from the very beginning it was known to the assessee that the investment would result in income less than the expenditure being made to earn that. The companies between whom the transactions have taken place, may be group companies, otherwise they are separate legal entities

assessee's plea:

Investment by an assessee in a venture today may or may not result in profit immediately, but the steps may have been taken as long term investment. Merely because in a particular assessment year when the expense was incurred, there was no profit earned by the assessee, the cost so incurred or the expenses so made could not be disallowed. The Revenue has no authority to go into the prudence of a businessman as he is the best judge for running his business, which may be in the form of a single establishment or a group of establishments. Many a times, to keep the flag flying, the group companies have to be supported with funds from financially healthy companies. The manner in which the transaction has been entered into by the assessee can at the best be termed as tax planning, but in no way it can be opined as tax evasion. Tax planning is permissible. **Reliance for the purpose was placed upon M/s McDowell and Company Limited v. Commercial Tax Officer, (1985) 154 ITR 148 and Union of India v. Azadi Bachao Andolan, (2003) 263 ITR 706**

Question framed by Larger Bench of HC

This court is required to go into the question of jurisdiction to be exercised by an Assessing Officer with reference to some transactions entered into by an assessee with another group company on the issue of prudence, namely, whether a prudent person would enter into such a transaction during the course of his business and would incur that

expenditure, on account of which deduction is claimed as a business expense or otherwise. As to whether the Assessing Officer can lift the veil to see the real face ?

Answer

In view of our aforesaid discussion and pronunciation of law, as referred to above, the question referred for consideration by the larger Bench can very well be answered by opining that the Assessing Officer or the appellate authorities and even the courts can determine the true legal relation resulting from a transaction. ***If some device has been used by the assessee to conceal true nature of the transaction, it is the duty of the taxing authority to unravel the device and determine its true character. However, the legal effect of the transaction cannot be displaced by probing into the "substance of the transaction". The taxing authority must not look at the matter from their own view point but that of a prudent businessman. Each case will depend on its own facts. The exercise of jurisdiction cannot be stretched to hold a roving enquiry or deep probe.***

refer:

Commissioner of Income Tax v. Rajendra Prasad Moody, (1978) 115 ITR 519.Commissioner of Income Tax v. B. M. Kharwar, (1969) 72 ITR 603 (SC) Punjab Stainless Steel Inds. v. Commissioner of Income Tax and another, (2010) 324 ITR 396 Division Bench of Allahabad High Court in Commissioner of Income Tax v. Smt. Swapna Roy, (2010) 233 CTR 10 (All)

Jind Co-op. Sugar Mills Ltd./ Date of decision: 14.12.2010/I.T.A. No.694 of 2010 (O&M): Own order in Abhishekh Industries distinguished on section 36(1)(iii): HELD

…Learned counsel for the appellant submits that in view of judgment of this Court in ***CIT v. Abhishek Industries Ltd.*** 286 ITR 1, interest on borrowed capital could not be allowed as deduction if the assessee had itself advanced loan to its sister concern. 5. We are unable to accept the submission. The judgment relied upon is distinguishable.

Therein the case was of advancing loan to a sister concern and not where a bonafide loan was advanced for business purposes. In that judgment, the principle laid down in ***Mcdowell & Co. Ltd. v. CTO*** [1985] 154 ITR 148 (SC) was followed that where an assessee avoids tax liability by manipulation, the device so adopted can be checked to tax real income.

Siya Ram Garg HUF./ I.T.A. No.679 of 2010/Date of decision: 14.12.2010: Capital receipt and Subsidy SC Ponni Sugars applied in light of SC in Sawhney Rubber etc

It is clear from the findings recorded by the CIT(A), as affirmed by the Tribunal that the subsidy was given for setting up of industrial unit in backward area of Haryana and was to be determined with reference to capital investment. In such a situation, the plea of the assessee was supported by the view taken by the Hon'ble Supreme Court in ***CIT v. Ponni Sugars and Chemicals Ltd.*** [2008] 306 ITR 392 which has been followed by the Tribunal and the view taken in ***Sahney Steels & Press Works Ltd. & others*** and ***Abhishek Industries Ltd.*** Was distinguishable. On related party disallowance u/s 40A(2)(b) : up-HELD : "we find that indeed, the details filed by the assessee showed that its sister concerns were being taxed at the same rate at which the assessee was being taxed, proving that there was no reason for the assessee to show higher rate purchases made by the assessee from its sister concerns. The assessee's sister concern had offered their income from such sales, which fact has not been disputed. Therefore, the AO erred in invoking the provisions of S.40A(2) of the Act"

GIST OF CASE LAWS ON ADHOC DISALLOWANE SECTION 37

Delhi High Court HARISH MOHINI KATHURIA: HELD

After going through the orders of the authorities below, we are of the opinion that the Tribunal rightly observed that the disallowance of a part of expenditure on account of wages as well as consumable goods was on adhoc basis and there was no rational behind the same. The Tribunal also rightly recorded that the Assessing Officer had not pointed out any specific defect in the vouchers and there was no finding that any expenditure was not found to be genuine or not relating to the business. On this ground, the disallowance was rightly held. No substantial question of law arises for consideration. The present appeal is, accordingly, dismissed.

DELHI HIGH COURT: FRIENDS CLEARING AGENCY (P) LTD. Date of decision: 04.01.2011 ITA No. 3 of 1999 : NO PLACE FOR AD-HOC DISALLOWANCE OF EXPENSES

Insofar as the second question is concerned, it involves dis-allowance of expenses to the extent of Rs.50,000/- as against an amount of Rs.1,48,782/- claimed by the assessee. These expenses were claimed by the assessee on account of cartage, labour and sealing expenses. ***We notice that this claim of the assessee has been dis-allowed throughout. ...Having perused the reasoning of the CIT (Appeals) as extracted above and that of ITAT, we are of the view that the said reasoning cannot be sustained. There is no basis for an ad-hoc dis-allowance of Rs.50,000/-. Either it was case that evidence was produced or the evidence was not produced. The basis for deduction of Rs.50,000/- out of a total sum claimed amounting to Rs.1,48,782/- is not clear. ...As a matter of fact, the ITAT has accepted the case of the assessee that for minor amounts relating to conveyance etc. and other business expenses, it is impractical to have vouchers and that internal vouchers of the staff/employees of an organization will suffice. For the said assessment year, the amount claimed towards expenses was under the similar heads, that is, cartage, labour and sealing expenses. ..(HELD IN FAVOR OF ASSESSEE: ITAT ORDER REVERSED)***

Delhi bench of ITAT in TSL Defence Technologies ITA No. 4072 /Del/2010

5. We have heard both the parties and gone through the material available on record. From the assessment order, we find that the Assessing Officer had disallowed the entire expenses of ` 14,87,799/- on the ground that expenses were in the shape of hotel bills of the directors. He has not examined the case as to how the expenses were not incurred wholly and exclusively for the purpose

of business. Moreover, the books of account of the assessee have been audited. The auditors have not pointed out that expenditure was in the nature of personal expenses of the directors. In the case of a company the affairs are managed by its directors and employees. No doubt, expenditure incurred for non-business purposes cannot be allowed even if it is incurred by the Directors. For this purpose, the Assessing Officer has to make out the case. Therefore, the expenditure incurred by the directors for the purpose of business could not be disallowed. There is nothing in the assessment order to suggest that expenditure incurred by the assessee was not in the nature of business expenditure. Accordingly, we do not find any infirmity in the order of Ld. CIT(A) deleting the addition.

Delhi bench ITAT in M/s Matrix Inc I.T. A. No.54/Del of 2009 25th June, 2010

Wherever payment is made by cash, the name of the person concerned to whom the payment has been made in cash towards various expenses are mentioned. The AO has not made any sort of enquiry or cross verification from the respective person to ascertain the genuineness of the expenses. When the assessee did not produce supporting vouchers but details of payment were duly furnished, the AO should have examined and verified the expenses by making necessary enquiry, and if on enquiry, the expenses were found to be not genuine, the AO could have proceeded to disallow the expenses to certain percentage but that exercise has not been done by the AO despite the various details of expenses were furnished by the assessee. Therefore, in this background, the ad hoc disallowance of 1/3rd of all the expenses is not called for. We, therefore, delete the same

Sh. Gori Shankar Kansal,: I.T.A. No. 3059/Del/2010 Unsecured Loans and Adhoc Disallowance: "We have heard both the counsel and perused the records. We find that assessee has duly submitted affidavit and photocopy of return of income of these persons and they are also found to have been earning income. Under the circumstances, the presumption of the Assessing Officer that persons of low earning cannot accumulate ` 1,00,000/- is not sustainable. The additions has solely been made on presumption and the same cannot be sustained. Accordingly, we set aside the orders of the authorities below and delete the addition. ….We have heard both the counsel and perused the records. We find that this addition has been made by the Assessing Officer without

any cogent basis. It is not the case that the expenses are bogus and vouchers are missing. Under the circumstances, this adhoc disallowance is liable to be deleted."

M/s. Epcot Securities Pvt. Ltd., I.T.A.No. 395/Mum/2009 MUMBAI BENCH ITAT: Adhoc disallowance

After considering the rival submissions and perusing the material on record, we find no infirmity in the impugned order of the learned CIT(A) deleting the ad hoc disallowance of 10% made by the Assessing Officer out of commission and brokerage expenses claimed by the assessee. If the nature of the business of the assessee is taken into consideration, there was no reason to doubt the genuineness of the expenses incurred by the assessee on payment of brokerage and commission. As a matter of fact, even the Assessing Officer did not dispute this position and allowed 90% of the brokerage and commission expenses claimed by the assessee. He, however, disallowed the balance 10% of the expenses on the ground that complete details thereof were not furnished by the assessee. As rightly contended on behalf of the assessee before the learned CIT(A) as well as before us, there is nothing in the order of the Assessing Officer to show as to what details and documents were exactly called for by him, which the assessee failed to furnish. There is also nothing brought on by the Assessing Officer to show that the commission and brokerage expenses claimed by the assessee were excessive and unreasonable. The disallowance of 10% made by the Assessing Officer out of commission and brokerage expenses thus was not sustainable and the learned CIT(A), in our opinion, was fully justified in deleting the said disallowance. We, therefore, uphold the impugned order of the learned CIT(A) on this issue and dismiss ground No. 1 of the revenue's appeal.

Delhi Bench of ITAT in Meenu Chauhan order dated 29/10/2010 Para 7 Page 4 ITA/Del/1886/2010

7. With the assistance Ld. Representative we have gone through the record carefully. We do not find any reason to interfere in the order of Ld. CIT(A). Assessee has successfully demonstrated that expenses incurred on the domestic as well as foreign travelling were for the purpose of her business. AO has not pointed out any defects in those details. He simply formed an opinion that expenses incurred on artists was not for the purpose of business, rather assessee went with the artists for a pleasure trip. To our mind, there is no circumstance or the evidence for

harbouring such a belief at the end of the AO. Therefore, in view of the above discussion, this ground of appeal is rejected

Mumbai Bench of ITAT in Pearl Farben Chem Pvt. Ltd. I.T.A.No. 1122/Mum/2010 (order dated: 12th November, 2010.)

*We have perused the records and considered the rival contentions carefully. The dispute is regarding the estimated disallowance out of expenses under the heads 'repairs and maintenance', 'business promotion expenses' and traveling expenses'. There is no dispute that the assessee had failed to produce bills and vouchers in support of these expenses. The A.O. therefore, is entitled to consider disallowances of expenses claimed under the above heads****. However, the Assessing officer has to give basis for disallowance. The disallowance has to be based on some material and cannot be arbitrary.*** *The Assessing Officer has not placed any material on record to show that the expenses were excessive compared to the earlier year.* ***Therefore, the round figure estimated additions made by the Assessing Officer with out giving any basis cannot be sustained. The order of the CIT(A) confirming the addition is, therefore, set aside and the additions made are deleted.***

Rajat Tradecom India Pvt. Ltd. vs. DCIT - 3 ITR (Trib) 321(Indore ITAT)
Routine Ad-hoc disallowance of expenses without pin pointing specific reasons
Facts
The assessee challenged the ad hoc addition of Rs. 30000/- and Rs. 40000/- for both the years involved out of various administrative expenses. The assessee also challenged the addition of Rs. 26310/- and Rs. 21000/- for both the years being disallowance of depreciation at one-fifth. The assessee submitted before the A O that assessee is a company and the above expenses are incurred exclusively and solely for the purpose of business of the assessee-company and there is no element of personal user out of telephone expenses, vehicle expenses, car insurance expenses and office expenses.
The AO however disallowed the same without pointing out as to how these expenses are not verifiable. One-fifth depreciation was also disallowed accordingly. The learned Commissioner of Income Tax (Appeals) found that the assessee-company was controlled by family group and was running akin to partnership firm and accordingly confirmed the disallowance.
Held:
On consideration of the rival submissions, we are of the view that additions are ad hoc in nature and liable to be deleted. The AO has not pointed out as to which of the expenditure is not verifiable. The AO without mentioning anything specifically against the assessee made the routine disallowances. The learned Commissioner of Income-Tax (Appeals) without any justification has exceeded the reasons by saying that the assessee-Company is running like a partnership firm. We do not know from

where the learned Commissioner of Income-Tax (Appeals) has subscribed this view without bringing any material on record. The learned Commissioner of Income-Tax (Appeals) should confine to the issue before him and in case, any other reasons are to be quoted in the appellate order then the basis of the same should also be revealed in the order. We accordingly set aside the orders of the authorities below and delete the entire additions on both the grounds in both the years.

CASE LAWS ON SECTION 40(a)(ia) Income Tax Act, 1961

Hyd bench ITAT in K Srinivas Naidu 131 TTJ 17 (Jaipur Bench ITAT in Jaipur Vidyut Vitran Nigam Ltd 123 TTJ 888 & Hyd Bench of ITAT in Taja Constructions 129 TTJ 57; Pune bench of ITAT in M/s. Sanap Agroanimals Pvt. Ltd. ITA No. 1192/PN/09 12th January, 2011)

- Conclusion portion of the said decision in the case of Jaipur Vidyut Vitran Nigam Ltd., (supra):

..therefore, the payments could not be disallowed u/s 40(a)(ia); provisions of section 40(a)(ia) are not applicable also for the reason that they apply only when the amount is payable ie due whereas the assessee has made actual payment.

- Similarly in the case of Mrs. Shah Charulata Milind (supra), the pune bench of Tribunal vide para 3 held as under:

"3. In this background it was submitted that in assessee's case the amount in question has been paid so provisions of sec. 40(a)(ia) are not applicable for the reasons that was applied only when amount is payable. Nothing contrary was brought to our knowledge. On behalf of Revenue the facts being similar so following same reasoning we are not inclined to the concur with the CIT(A) who has disallowed the amount of Rs. 40,000/- by invoking provisions of sec. 40(a)(ia) because amount was not payable but already paid." (applied in *Sanap Agroanimals supra)*

- *Hyd bench In Teja Constructions (supra)*

a) The books of account of the assessee was not relied, it was rejected by the AO and the same was confirmed. Now, based on the reliance on the said books, for the purpose of invoking the provisions of s. 40(a)(ia) is improper. The estimation of income takes care of the irregularities committed by the assessee. Further addition by invoking s. 40(a)(ia) amounts to punishing the assessee for a same offence on double occasions, which is not permitted by law.-CIT vs. Devi Prasad Vishwanath Prasad (1969) 72 ITR 194 (SC) relied on.

b) if the assessee has paid the impugned amount and (the amount is) not payable at the end of the year on the date of balance sheet, then the provisions of s. 40(a)(ia) are not applicable

- Hyd bench in *in K Srinivas Naidu 131 TTJ 17*

In this view of the matter, an assessee may claim all his expenditure, except for those which are clearly covered by some other sections e.g. s. 30 covering rent, rates, taxes, insurance, etc., as allowable under s. 28. It may further be observed that all the expenditure, just as labour charges in the instant case, which represents direct costs and therefore, adjustable against revenue for the purpose of determining the profit under s. 28(i) of the Act, do not come within the provisions under s. 40(a)(ia). As such, it may be observed that it is only the deductions referred to in ss. 30 to 38 which would definitely fall for consideration of disallowance under s. 40 and they cannot be claimed as deduction under s. 28. This reasoning applies with equal force to the analogous provisions of s. 43, s. 44AD, s. 44AE, s. 44AF, s. 44B, s. 44BB, s. 44ABA, s. 44BBB, s. 44C, s. 44D, and so on which all relate to computation of business income and clearly start with a non obstante clause, which is similar to the one in s. 40, but reading 'notwithstanding anything to the contrary in ss. 28 to 43C'. In this view of the matter, it may be observed that the provisions of s. 40(a)(ia) are applicable only to items covered by s. 30 to s. 38 and not to s. 28 and all the direct cost/expenditure covered by s. 28 of the Act, are beyond the scope of disallowance under s. 40(a)(ia) of the Act.

10. Respectfully following ratio laid down by the Co-ordinate Bench, Hyderabad in the case of Tej Constructions cited (supra) we are inclined to allow the appeal of the assessee on issue relating to the applicability of s. 40(a)(ia). Similar view has been taken in the case of Jaipur Vidyut Vitran Nigam Ltd. vs. Dy. CIT (2009) 123 TTJ (Jp) 888 : (2009) 26 DTR (Jp)(Trib) 79. Further, the judgment relied by the Departmental Representative are relating to the upholding the constitutional validity of the provisions of s. 40(a)(ia) and not relating to the applicability of s. 40(a)(ia).

Hariom Organizers **ITA No.1946/Ahd/***2009 06/05/2011 ahd bench of ITAT*

Since, there is no dispute about the fact that assessee has not claimed the expenses in the profit and loss account and has capitalized them under the head 'preoperative expense' the disallowance of these expenses under the provision of Section 40(a)(ia) is not sustainable. Therefore we find no infirmity in the order passed by Ld. CIT(A) and same is hereby upheld. This ground of Revenue's appeal is dismissed.

Sumilon Industries Ltd. , Asst. Year 2005-06 12.11.10. ITA Nos.3296 & 3297/Ahd/2008 ahd bench of ITAT

9. The first ground of appeal for this year relates to disallowance u/s 40(a)(ia) for sum of Rs.10,35,838/-. It was payment of commission to agents for purchase of plant and machinery. It was not debited to profit and loss account but was capitalized. The views of ld. AO and the ld. CIT(A) are that the provisions of section 40(a)(ia) would be applicable even in cases of capital expenditure. *We, however, do not agree that if a sum is not debited in the profit and loss account then provisions of section 40(a)(ia) would be applicable. This provision is to disallow a claim of expenditure against the revenue receipt if tax is not deducted, if it is so required. Since tax is required to be deducted at source on* commission payment, the AO and the ld. CIT(A) thought merely on this basis that provisions of section 40(a)(ia) can be invoked. However, the second condition is that a claim of such expenditure should have been made in profit and loss account. If no such claim is made, then whether TDS is made or not, no disallowance can be made. The question is if TDS would have been made whether AO could have allowed the expenditure from the profit and loss account even though assessee is not claiming the same. In our view not, and, therefore, the addition is misconceived and is, accordingly, deleted.

P&H High court in M/s Grewal Brothers Income-tax Appeal No.662 of 2010 Date of decision: 5.4.2011 *i) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in law in holding that the provisions of Section 194C are not applicable on the payments of Rs.54,66,942/- made by the firm to its partners on account of transportation charges for use of trucks owned by the partners :* Learned counsel for the revenue submits that since the firm and the partners were separate persons under the income tax law and had separate income, the firm was liable to deduct tax on payment made to its partners as sub contractors. There was a deemed oral agreement between the firm and the partners for execution of transportation contract by the partners and thus mere fact that the companies had made deduction of tax from the payment made to the firm was no justification for the firm for not deducting tax from the payment made to the partners who were infact executing the work as sub contractors. 6. We are unable to accept the submission. HELD

No doubt the firm and the partners may be separate entities for income tax and it may be permissible for a firm to give a contract to its partners and deduct tax from the payment made as per Section 194C, it has to be determined in the facts and circumstances of each case whether there was any separate sub contract or the firm merely acted as agent as pleaded in the present case. Case of the assessee is that it was the partners who were executing transportation contract by using their trucks and payment from the companies was routed through the firm as agent. The CIT(A) and the Tribunal accepted this plea on facts. Once this plea was upheld, it cannot be held that there was a separate contract between the firm and the partners in which case the firm was required to deduct tax from the

payment made to its partners under section 194C. The view taken by the Tribunal is consistent with the view taken by the Himachal Pradesh High Court in ***Commissioner of Income Tax Vs. Ambuja Darla Kashlog Mangu Transport Co-op. Society (2009) 227 CTR (HP) 299*** and judgment of this court in ***Commissioner of Income Tax Vs. United Rice Land Ltd. (2008) 217 CTR (P&H) 332.***

P&h high court in matter of Truck Operators' Union I.T.A. No.865 of 2010 Date of decision: 23.3.2011 The assessee is a truck operators union for procuring contracts for its members. During the assessment of its income, the Assessing Officer made addition after disallowance under Section 40(a)(ia) of the Act on the ground that it failed to deduct tax at source as required under Section 194C(2) of the Act. On appeal, the CIT(A) set aside the said addition holding that there was no violation as held by the Assessing Officer. The appeal of the revenue against order of the CIT(A) was dismissed.

3. We have heard learned counsel for the appellant. 4. Learned counsel for the revenue fairly states and we are also of the same view that Section 194C(2) of the Act had no application in the circumstances of the case when the union was merely acting in representative capacity and there was no separate contract between the union and its members for performance of the work as required for applicability of Section 194C(2) of the Act. In such circumstances, Section 40(a)(ia) of the Act was not applicable, as rightly held by the CIT(A) and the Tribunal. Learned counsel for the revenue also points out that same view has been taken by the High Court of Himachal Pradesh in its order dated 20.10.2009 in I.T.A. No.30 of 2005 ***CIT v. M/sAmbuja Darla Kashlog Mangu Transport Co. Op. Society & ors.*** *against which SLP was dismissed by the Hon'ble Supreme Court on 17.1.2011 being SLP(Civil)……/2011 CC 259/2011* ***CIT Shimla v. M/s Ambuja D. ManguTransp. Coop. Society****.*

Delhi bench of ITAT in Grandprix case 34 DTR 248 Reimbursement to Clearing agent and TDS and section 40(a)(ia)

Assessee was not obliged to deduct tax at source from payments made by it to the clearing agent towards custom duty and other expenses paid by the latter while clearing the goods on behalf of the assessee as no element of income is embedded in reimbursement of expenses and therefore impugned payments cannot be disallowed u/s 40(a)(ia) of the Act.

Gujarat High Court in SCARLET Designs Pvt Ltd

Whether the Appellate Tribunal is right in law and on facts in reversing the order passed by the CIT(A) and

thereby deleting the disallowance of Rs.16,96,865/- made by the Assessing Officer invoking the provisions of section 40(a)(ia) of the Act?

The nature of expenses incurred by consultant and reimbursed by the company suggests that the same would not partake the character of payment made for the services rendered by the consultant. The payment is in the nature of reimbursement of expenses incurred by the consultant on behalf of the assessee. Simply because car was not provided and in lieu thereof consultant hired car and incurred expenses for which he submitted bills, only on that ground provisions of section 40(a)(ia) cannot be invoked. The finding arrived at by the tribunal on the basis of documents produced is in accordance with statutory provisions and the said expenses can not be disallowed by invoking provisions provisions of section 40(a)(ia).

Delhi bench of ITAT in Ahaar Consumer ITA NO.2910/DEL/2010

In our opinion, the AO went wrong in presuming that the difference in the wheat supply and the Atta or Dalia got in return represents sum paid for services rendered and payments for such services are claimed as deduction from the profit and gains of business u/s 32 to section 38. Only when the claim of the assessee for deduction is u/s 32 to section 38, the provisions of Section 40(a)(ia) can be pressed into service to disallow such claims for deduction. At the cost of repetition, we may say that to invoke said provision of Section 40(a)(ia), first of all, the case should be made out by the department that the assessee is contemplating deduction u/s 32 to 38 on which tax is deductible and the assessee has not deducted tax at source. In our opinion, tax is not deductible and the assessee has not claimed any deduction u/s 32 to section 38. This loss, if any, is in the net profit in the trading account which is a computation u/s 28 and 29 and not claims u/s 32 to 38 of the Income Tax Act. Even taking this view of the matter, in our opinion, the assessee is entitled to succeed and there is no question of deduction of tax at source and consequently no question of making any disallowance by invoking the provisions of Section 40(a)(ia) of the Act.

Mumbai bench of ITAT IN Jhaveri Flxi Laminate P.ltd. I.T.A No.7135 & 7136/ Mum/2008

On these facts, therefore, we are of the considered view that the fact the assessee having not discharged the tax deduction obligations from the payments made on re-engraving charges, thus indeed renders this expenditure disallowable under section 40a(ia) and the mere fact that the recipients of such income had paid the taxes, even if that be so, does not exonerate the assessee from disallowance under section 40(a)(ia) of the Act. We also see no legal sustainable merits in learned counsel's submission that because it was first year of the disallowance under section 40(a)(ia) having not been brought to the statute, a lenient view needs to be taken. We do not have any powers to relax the rigour of law on the ground that it was the first year of such law having been brought to the statute. In view of these discussions and bearing in mind the entirety of the facts, we uphold the disallowance sustained by the CIT (A) and decline to interfere. This ground is dismissed.

Citation: - (2010) 15 ITJ 228 (Tribunal) | Parties : - Dr. Bhiraj Gada Vs. Dy. Commissioner of Income Tax The ITAT, Indore BenchThe ITAT, Indore Bench Head Notes: -

Assessee incurred expenditure, but did not deduct TDS – Assessee submitted that disallowance was not called for in view of Hindustan Coco Cola Beverages Private Limited Vs. CIT (2007) 9 ITJ 433 (SC), as the deductee should have paid tax directly - It was held that, Hindustan Coco Cola Beverages Private Limited Vs. CIT(Supra) is in a different context of recovery of TDS not deducted and not on the applicability of provisions of section 40(a)(ia) - Expenditure is to be disallowed.

Ahd bench of ITAT in M/s. SaraswatI Construct ion Co **ITA No.2865/Ahd/2010** *22/02/2011*

5. In the present case before us, the facts are undisputed that the assessee had deducted TDS from gross contract payment to carting contractor but the same was not deposited into govt. exchequer before expiry of time prescribed under subsection 1 of Section 200 of the Act in view of section 40(a)(ia) of the Act. We find that this is not allowable as deduction while computing the income chargeable under the head '*profit & gains of business or profession*' for the year. We find from the orders of the lower authorities that there is no allegation that the payment of catering expenses on which TDS is deducted but not paid to Govt. exchequer is non-genuine or bogus. It is also a fact that the lower authorities

have not brought anything or not disputed that the payment is excessive or unreasonable. The disallowance is simply made either for non-deduction of TDS in view of provisions of Section 40(a)(ia) of the Act or non-payment of TDS deducted to the govt. exchequer. In view of the above discussion, that the legal fiction created by Section 40(a)(ia) will not apply to th e provisions of Section 271(1)(C) of the Act, the disallowance made simply by invoking the provisions of Section 40(a)(ia) of the Act will not attract penalty for furnishing of inaccurate particulars of income because there is no inaccurate particulars of income in the return. Accordingly, we confirm the order of CIT(A) deleting the penalty and this issue of the Revenue's appeal is dismissed.

Chennai bench of ITAT in G.F. Securities vs DCIT ITA No. 1215/Mds/09 Assessment Year 2006-07

…….Reliance was heavily made on decision of Hon'ble Bench of Jaipur Bench in the case of Jaipur Vidyut Vitran Nigam Ltd. vs. DCIT (2009) 123 TTJ (Jp) 888, to suggest that these provisions apply only to amounts payable but not to amounts paid. It was argued that payability preceeds payment and in such circumstances decision of ITAT (supra) squarely applies here. To counter the above submission of the learned counsel for the assessee it was argued that this plea has been raised for the first time before the Bench and it was never taken before authorities below. It was argued that to apply the Tribunal order (supra) the matter has to be examined afresh by the Assessing Officer.

8. On perusal of the entire evidences, it is found that the work, for which this payment was made, was in the nature of small time maintenance work carried out by two individuals. No formal agreement was executed between the parties. After the work entrusted was accomplished the payees submitted their bills and against the same Rs.3.5 lakh was paid, as mutually settled. Since, it is not any contractual payment as is envisaged in the Act paid to contractors, in our opinion the decision of Jaipur Bench helps the case of this assessee. We have to properly apply the law in its letters and spirit. Consequently, we set aside the finding of the ld. CIT(A) in confirming the impugned addition and delete this addition.

Kolkatta bench of ITAT in **Marc Signage vs ITO ITA No. 1543/Kol/2010 Assessment Year 2006-2007**

24.4 As regards the addition of Rs.6,30,352/- u/s.40(a)(ia), we are in agreement with the view taken by the ld.CIT(A). The ITAT, Kolkata, 'A' Bench in ITA No.1418/Kol/2009 has held that the provision of

section 40(a)(ia) will be applicable even when the amounts have been paid during the year under consideration. The undersigned was the author of the above order. In view of the above and taking into consideration the submissions made by either of the parties, we are of the considered opinion that the impugned addition was rightly made by the AO and confirmed by the ld.CIT(A). We, therefore, reject this ground of the assessee

GIST OF CASE LAWS ON SECTION 14A: DISALLOWANCE OF EXPENSE FOR TAX EXEMPT INCOME

***Gujarat High Court in* GUJARAT POWER CORPORATION LTD TAX APPEAL No. 1587 of 2009** *ON SECTION 14A: Having thus heard learned counsel for both sides and having perused the orders on record, we find that in the present case assessee had sufficiently explained its investment for borrowed funds pointing out that loan was obtained in assessment year 1997-1998 and its majority of the investment for tax free security were made before the said period. Only a small portion of investment was made subsequently. Assessee had demonstrated that it had other sources of investment and that therefore, according to assessee no part of the borrowed fund could be stated to have been diverted to earn tax free income. When CIT(Appeals) and tribunal both on facts in the present case found that the assessee did not invest borrowed fund for earning interest free income, we are of the view that not applying provision of Section 14A of the Act for taxing such interest was justified. No question of law therefore, is arising for our consideration*

Maharashtra Seamless Ltd ITA No. 4063(Del)2006 16.12.2010 Delhi ITAT in 138 TTJ 240; 249

Nothing has been brought on record to counter the assessee's contention that the investment in the tax free bonds had been made out of the share holders' funds.

8. We do not find any error in the order of the ld. CIT(A). It remains undisputed that the funds are mixed and it is not possible to ascertain as to whether the investment in the tax free bonds was out of the assessee's own funds. The source of investment in the tax free bonds was not identified. The AO did not establish any nexus between the borrowed funds and the investments in the tax free bonds. The cash flow of the assessee was not seen. Therefore, the ld. CIT(A) is correct in opining that the apportionment on a pro rata basis was improper in the absence of anything brought by the AO to

rebut the assessee's stand that the investment in the tax free bonds had been made out of the funds of the share holders of the AO. ***REFER: 'CIT v. Winsome Textile Industries', 319 ITR 204 (P&H); Minda Investments Ltd. v. DCIT Hero Cycles (323 ITR 518)[P&H] held*** that if there is sufficient material on record to establish that *investment in shares/units was made out of non-interest bearing funds*, then no disallowance has to be made out of interest debited to Profit & Loss account, even if there is dividend income from such investment. Where the expenditure incurred could not be related to exempted income, the provisions of section 14A would also not be attracted.

G M M Pfaulder Ltd, B ITA No.1241/Ahd/2006 Section 14A & section 36(1)(iii) disallowance of expenses on AD-HOC basis exhaustive analysis

We have considered the rival submissions and perused the material on record. In our considered view, the matter would go to the file of AO as per the decision of Hon. Bombay High Court in the case of Godrej Boyce Mfg. Co. Ltd. (supra) only when it is held that some amount is required to disallowed as there is a nexus between the exempted income and investment, i.e. if Revenue is able to show that interest bearing capital has been invested in shares but where no such nexus is established the question of determining any disallowance does not arise and, therefore, matter need not be sent to the file of AO as no determination of any disallowance would be necessary. In the present case we notice that loan funds have decreased this year as compared to earlier years. Even though investments have increased from Rs.940.32 lacs to Rs.1008.51 lacs but such increase in investment cannot be linked to any borrowed funds this year as assessee has in fact not borrowed any additional fund this year. Prior to the decision of Hon. Supreme Court in the case of Hon'ble Supreme Court in S.A. Builders vs. CIT 288 ITR 1(SC) onus was considered on the assessee to show the nexus between the interest free funds and investment on which no income is earned. After S.A. Builder's case (supra) onus is considered shifted to the Revenue and AO has to show that interest bearing capital alone were invested in investment on which no income was earned. Hon. Supreme

Court in the case of Munjal Sales Corporation vs. CIT (2008) 298 ITR 298 (SC) held where assessee had sufficient profits in the current year then interest free advances can be considered to be flowing from such profits. Hon'ble Bombay High Court in CIT vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom) held that if there are fund available both interest free and interest bearing, then a presumption arise that investment were out of interest free funds generated or available with the assessee. If the interest free funds were sufficient to meet the investment no disallowance of interest paid on borrowed funds would be necessary. Once such presumption is established claim of interest was allowable.

15. There is another aspect of the matter. If the assessee has made investment in subsidiaries out of mixed funds and for commercial expediency then no interest out of payment made on borrowed funds can be disallowed as held in S. A. Builders Ltd. vs. CIT (2007) 288 ITR 1 (SC). Hon'ble Punjab & Haryana High Court in CIT vs. Hero Cycles Ltd. (2010) 323 ITR 518 (P & H) held that no disallowance out of interest payment is permissible if AO does not establish nexus between the expenditure incurred and income generated.

16. Since assessee had sufficient profits generated this year and it had mixed funds and no nexus is established by the AO as to whether investment was made out of interest bearing funds, disallowance of interest cannot be made. Similarly no disallowance out of administrative expenditure can be made as there is no direct nexus. As a result, this ground is allowed.

Leena Ramachandran *235 CTR 512 Kerala High COurt*

In fact, in our view, assessee would be entitled to deduction of interest under Section 36(1)(iii) of the Act on borrowed funds utilised for the acquisition of shares only if shares are held as stock in trade which arises only if the assessee is engaged in trading in shares. So far as acquisition of shares is in the form of investment and the only benefit assessee derived is dividend income which is not assessable under the Act, the disallowance under Section 14A is squarely attracted and the Assessing Officer, in our view, rightly disallowed the claim.

Bombay High Court in Godrej case: 328 ITR 81

viii) Subsection (2) of Section 14A does not enable the Assessing Officer to apply the method prescribed by Rule 8D without determining in the first instance the correctness of the claim of the assessee, having regard to the accounts of the assessee. ***Subsection (2) of Section 14A mandates that it is only when having regard to the accounts of the assessee, the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of expenditure incurred in relation to income which does not form part of the total income under the Act, that he can proceed to make a determination under the Rules;***

(ix) ***The satisfaction envisaged by Subsection (2) of Section 14A is an objective satisfaction that has to be arrived at by the Assessing Officer having regard to the accounts of the assessee. The safeguard introduced by Subsection (2) of Section 14A for a fair and reasonable exercise of power by the Assessing Officer, conditioned as it is by the requirement of an objective satisfaction, must, therefore, be scrupulously observed.*** *An objective satisfaction contemplates a notice to the assessee, an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the Assessing Officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee;*

(xiv) ***In order to determine the quantum of the disallowance, there must be a proximate relationship between the expenditure and the income which does not form part of the total income. Once such a proximate relationship exists,*** *the disallowance has to be effected. All expenditure incurred in the earning of income which does not form part of the total income has to be disallowed subject to compliance with the test adopted by the* ***Supreme Court in Walfort*** *and it would not be permissible to restrict the provisions of Section 14A by an artificial method of interpretation*

CLASSIFICATION OF SHARE SALE/PURCHASE TRANSACTIONS Delhi High Court ITA No. 588/2011 Date of Decision: 31st March, 2011

The ITAT went into the entire gamut with the dispute all over again and accepted the aforesaid findings of the CIT(A). It took note of the judgment of Gujarat High Court in ***CIT v. Reqashanker A Kothari*** 283 ITR 338 wherein the High Court has given a few broader tests for determining the nature of transaction. These tests are as under:-

"(a) The first test is whether the initial acquisition of the subject matter of transaction was with the intentions of dealing in 6th term, or with a views to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guidance.

(b) The second test why and who for what purpose of the sale was effected subsequently.

(c) The third test is as to how the assessee dealt with the subject matter of transaction during the time and assets was with the assessee, whether it has been treated a stock in trade or been shown in the book of accounts of account and balance sheet as an investment. This inquiry, through relevant, is not conclusive.

(d) The fourth test is how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. The factor, though not conclusive, can afford goods and cogent evidence in judge the nature of transactions and would be a relevant circumstances to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in case of firms and companies is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activities.

(f) The most important test is as to the volume, frequency, continuity and regularity of transactions of purchasese and sale of the goods, concerned in a case where there is a repetition and continuity, coupled with the magnitude of the transactions, bearing reasonable proportion to the strength of holding, an inference can readily be drawn that the activity is in the nature of business."

It is clear from the aforesaid discussion that after taking into consideration the factual matrix on record, findings of facts are recorded by the two authorities below that the assessee was maintaining two portfolios, insofar as shares in JOL are concerned, they were taken as investment from the date of purchase itself and shown in investment portfolio. The profits resulted therefrom was capital gain. Learned counsel for the appellant could not show any perversity in these

findings. These are pure findings of facts. No substantial question of law arises for consideration in this appeal. Therefore, these appeals are dismissed in limine. **(see BHC in Gopal Purohit *228 CTR 582/29 SOT 117* and Luck bench of ITAT in Sarnath Infrastructure *120 TTJ 216; Mumbai bench order in Jayshree Shah : 137 TTJ 173 (800 transactions in 200 listed companies shares with borrowed funds in very short holding period : business income; Mumbai bench order in Wallfort 134 TTJ 656) ; 39 SOT 488 active vs passive dealings; Guj HC in CA Assessee: NIRAJ AMIDHAR SURTI 238 CTR 294: Para 14 important)***

Mumbai bench ITAT order in Shri Rajan R. Bahl ITA No. 36/Mum/2010 20th May 2011: Classification dispute (share income)

CIT-A order	ITAT observations (last Friday order)
It is also on record that frequency and volume of shares purchased and sold are found to be substantially higher in the relevant year in comparison to the earlier assessment year. Therefore the CIT(A) was of the opinion that the facts available on the case, eventhough are identical to the facts raised in the case of Shri Gopal Purohit in ITA No. 4854/Mum/2008	*a) We find that the artificial categorization made by the CIT(A) cannot be sustained as; (a) as pointed out by the learned counsel the shares of GLENMARK allotted to the assessee as bonus shares on 20th April 2005 to an extent of 10,000 shares on which assessee got `30,00,000/- profit cannot be considered as business transaction.* ***Naturally the sale of bonus shares cannot yield business income unless the shares are purchased as stock-intrade****. On the given facts of the case the findings of the CIT(A) treating the gains from the transactions of GLENMARK as business income*

dated 10.02.2009 (which was subsequently confirmed by the hon'ble High Court), he differed from the consistency principle holding that assessee has entered into transactions repeatedly and frequently, i.e. assessee has purchased a particular share, sold it and again purchased and sold thereby indicating that the transaction is of trading in nature. The CIT(A) also analysed various case laws/Board circulars and ultimately came to a conclusion that on the facts of the case, since assessee is having mixed/consolidated bank accounts through which both nature of transactions are carried out and also as assessee failed to prove that borrowed funds are exclusively used in his F&O business, he came to the	*cannot be upheld.* *b) Likewise the transactions in Birla Cash Plus units. These transactions are mutual fund transactions, not generally undertaken in Stock Exchanges.* ***Even though there are repetitive transactions with much frequency mutual fund transactions by very nature are not traded in the*** ***Stock Exchanges and cannot be considered as business transactions*** *c)A good indicator to know whether assessee is indulging in share transactions as business or as investment is to correlate with* *reference to the F&O dealings. If assessee is indulging in same shares both in physical delivery as well as in F&O on the same day this may indicate that the nature of transaction is that of business as an adventure. Investment in a particular scrip both in physical delivery and in speculation transaction of F&O cannot be considered different when undertaken at the same time and same nature of transaction on the same day.* ***Therefore one way of***

conclusion that repetitive share transactions fall under the category of business.	***<u>analysing the intention of the assessee of trading or investment in a particular scrip is to correlate with the F&O transactions</u>*** ***10. The frequency of transactions, volume of transactions, holding period of shares are only indicative in nature to analyse whether assessee is*** ***trading or investing. No single parameter can be considered to determine one way or the other.*** *There are various orders of the ITAT, both in favour of the assessee and against the assessee depending on the facts of each case. Therefore, relying alone on judicial principles is not a healthy practice to analyse the intention of the assessee of knowing whether the transactions are trading in nature or investment in nature*

DCIT Vs. Ravindra Agrawal Group (30 Appeals) 28th January, 2011. Ahd bench of ITAT:

Whether the transactions were 4,611 or 36,000, the facts remain that there were frequent transactions of purchase and sale of shares. However, except the parameter of frequency in purchase/sale of shares all other parameters indicate that the transactions were in the nature of investment and not the trade transactions. Even for frequency, it was explained by the learned counsel that

the assessee was mostly making the investment in B-Group scripts and to avoid risk he made investment in several scripts instead of investing in one script. For example, if the assessee had to invest Rs.10 lakhs instead of investment in one script, he used to investment in ten different scripts. He made a statement that the assessee never purchased and sold the same scripts frequently. He also stated that shares were kept for long period and there is no frequent purchase/sale of same scripts. This contention of the learned counsel appears reasonable and has not been factually controverted by the Revenue. There is a saying that "never put all your eggs in one basket" and if the assessee as a prudent person made investment in number of scripts instead of one scripts, it cannot be said that he was carrying on the business of purchase and sale of shares. There were substantial income from the dividend. In the case of Shri Ravindra M. Agarwal for A.Y.2001-2002, as per the revised return, the dividend income was as high as Rs.19,33,425/-. It is a settled law that, to determine whether the assessee is a trader or investor in shares, no single test is conclusive but cumulative effect of all the facts are to be seen. In the case of the assessee, one fact i.e. frequent purchase/sale of shares can be said to be against the assessee but all other facts which can be summarised as under are in favour of the assessee:

i) Shri Ravindra Agrawal is a qualified professional being Chartered Accountant, Company Secretary and Cost Accountant;
ii) Shri Agrawal was full time director of a public limited company at the relevant time, posted at Porbander;
iii) Shares were acquired with own money and there was no borrowing by Shri Ravindra Agrawal or any other family member;
iv) No office or any staff was maintained for looking after purchase and sale of shares;
v) There was substantial dividend income;
vi) His source of income was income from salary, capital gain, dividend and interest and he was not having any business income;
vii) In the original return of income furnished from time to time, income from sale of shares was disclosed under the head "capital gain" and was accepted by Revenue as such under Section 143(1).

When totality of all the above facts are considered, the inference drawn by the CIT(A) that the assessee is an investor in shares, appears to be correct. Apart from the above, on the principle of consistency also order of the CIT(A) on this point deserves to be upheld because in the original returns income from sale of shares was disclosed under the head "capital gain" and the same was accepted by the Revenue. ITAT, Mumbai Bench in the case of Goptal Purrohit (supra) held that though in income tax proceedings the rule of *res judicata* does not apply but there should be uniformity in treatment and consistency under the

same facts and circumstances. This decision is upheld by the Hon'ble Mumbai High Court in CIT Vs. Goptal Purohit, 228 CTR 582 (Bom). These decisions would be squarely applicable to the cases of the assessee under appeal because in these cases not only in earlier year but in the years under appeal also in original proceedings transaction of purchase and sale of shares shown as capital gain was accepted by the Revenue. Merely because, there was search at the assessee's premises, the nature of transaction would not change.

CASE LAWS REFERRED:

i) Mumbai Bench of the ITAT in the case of
Gopal Purohit (2009) 29 SOT 117 (Mum) approved in 228 CTR 582.
ia) Janak S. Rangwala, (2007) 11 SOT 627 (Mum);
ii) Sarnath Infrastructure Pvt. Ltd. (2009) 120 TTJ 216 (Luck);
iii) Sugamchand C. Shah, ITA No.3554 & 4024/Ahd/2008 (Ahd) and
ITA No.2219 & 1932/Ahd/2009 (Ahd)
iv) Himanshu J. Shah & Others, ITA No.2875 to 2889/Ahd/2008;
v) Smt. Belaben Himanshu Shah, ITA No.3196 to 32000/Ahd/2008;
vi) Nidhi Dying & Printing Mills Pvt. Ltd., ITA No.3579/Ahd/2008;
vii) SMK Shares & Stock Broking, ITA No.799/Mum/2009;
viii) Management Structure & Systems P. Ltd. 41 DTR 426 (Mum);
ix) Bharat Kunverji Kenia, 130 TTJ 86 (Mum)

Rekhaben Hasmukhlal **ITA No.3487-3491/Ahd/2008** *21/01/2011 Ahd bench of ITAT*

The Assessing Officer rejected assessee's submission as her first ground was the motive behind the investment/purchase. During the year, the assessee had earned dividend of Rs.1,74,120/- and this clearly showed that the main purpose of the investments was to earn profits from transacting in the shares and ratio of dividend to profit was 1:30. The motive therefore was clearly to earn profits from such transactions in a regular and systematic manner. The second ground was the frequency of transactions, the assessee had entered into more than 281 transactions during the year and in this respect of 65 scripts the assessee had purchased and sold each script more than three times. Therefore according to Assessing Officer such transactions could not be treated as an activity of investments. Accordingly, AO treated the assessee's STCG of business income and not accepted the plea of assessee of investment. Aggrieved, assessee preferred appeal before CIT(A).

HELD/APPLIED THE RATIO: We find that in a series of cases the issue has been considered by various Benches of Tribunal of Mumbai as well as Ahmedabad and Hon'ble courts have taken a view that one cannot go to decide merely on the basis of frequency or volume of transactions in the current scenario in which the persons are investing more and more as an invest or in the stock market. Most crucial is that assessee has

*continuously shown investment in the balance sheet which is made out of her own capital and shown gain on sale of shares as either STCG or LTCG even for assessment years 2003-04 and 2004-05 and hence without there being any change in the facts a consistent view needs to be adopted. This has been so held in the case of Gopal Purohit (supra)…*we allow the claim of assessee (THAT TRANSACTIONS ARE TAXABLE UNDER CAPITAL GAINS HEAD)

Ahd bench of ITAT in Zora Traders Ltd ITA.No.352/Ahd/2009 *31st December, 2010.*

Held : The assessee had acquired the shares long back. There is no frequent purchase and sale of shares. The allegation of the learned DR that the borrowed money has been utilised for purchase of shares, has not been proved. Moreover, the AO had not made any such allegations and there is no disallowance of interest. Capital and reserve of the assessee is much more than the investment in shares. Considering the totality of the above facts, we do not find any justification to interfere with the order of the CIT(A) on this point, the same is upheld and Ground No.1 of the Revenue is rejected.

ITA No. 1334/Mum/2010 Shri Praful D. Modi 30th December 2010. Mumbai bench of ITAT

We have considered the issue and examined the matter. The various Case laws relied upon were issues in the context of facts as available in each case law. The intention of the assessee has to be examined in the light of the merit of the transactions keeping in mind the CBDT circular issued in this regard and various case laws governing the issue. However, as stated by the learned counsel, the Revenue has treated the short term capital gain as business income in A.Y. 2005-06 and after the CIT(A) gave relief the Revenue did not prefer appeal. Not only that, in the later year when the assessee has short term capital loss of almost `1.37 crores the A.O. did not change the head of income but treated it as business income. Only in this assessment year, the Revenue preferred appeal. Keeping the stand taken by the Revenue in the earlier year and in the later year and also keeping in mind the order of the CIT(A) which is given on facts, we find that there is no merit in the Revenue's appeal. Accordingly, we reject Revenue's grounds.

ITA 6539/M/08. I.T.A. No. 6539/Mum/2008. Shri Kalpesh C. Shah Mumbai bench of ITAT

When we consider the period of holding in respect of these shares along with other attending circumstances , except those of Jet Airways, it becomes clear that the intention of the assessee at the time of purchasing these shares was to hold them as capital asset and not as stock in trade. We, therefore, hold that the assessee was justified in claiming profit from such shares as short-term capital gain. However the profit from the sale of shares of Jet Airways cannot be claimed as short term capital gain. As these shares were purchased and

sold at the gap of one day, in our considered opinion, profit of Rs2,579 on transfer of such shares has to fall under the `business income' and can't be considered as short term capital gain.

ITA No.6429/Mum/2009 & C.O. No. 136/Mum/2010. Naishadh V. Vachharajani, 25th February , 2011.

Coming to the sale of shares which resulted in Short Term Capital Gains, we do not find any intraday trading. In the case of SPIC shares the period of holding was more than 330 days. Similarly in many cases like Tata Tele, the period of holding was more than 200 days. Most of the shares, as pointed out by the CIT(Appeals), were held for a period of 2 to 5 months. The assessee has offered the income from speculation and income from Futures and Options as business income. Keeping in view the facts of the case, we are of the considered opinion that the order of the CIT(Appeals) at para 5, which is extracted below, is to be upheld..

Mumbai bench of ITAT in Wallfort Financial Services Ltd 134 TTJ 656

2.19 We have perused the records and considered the rival contentions carefully. The dispute is regarding nature of income from share transactions in delivery based shares entered into by the assessee during the year. **The assessee is a share broker**. ***In addition to the business as share broker from which the assessee has received brokerage income, the assessee has also been undertaking transactions in shares in his proprietary capacity***. The transactions in shares fall in two categories. *The transaction falling in the first category are those which have been squared up during the same day or within the same settlement period without taking any delivery and the transactions in future and option. The second category transactions were those in which the assessee had taken/given delivery of shares. In other words the assessee had dealt in both delivery based and non-delivery based share transactions in quoted shares.* ***Similar delivery and non-delivery based share transactions had been undertaken by the assessee in the earlier years also and income from both the types of transactions have been declared as business income.*** *However from this assessment year, i.e., from 1st April, 2004 delivery based purchases had been shown as investment activity and income from the sale of such delivery based purchases had been shown as short-term capital gain. Income from sale of shares appearing in the opening stock as on 1st April, 2004 has been shown as business income and the shares in this category which remained unsold as on 30th Sept., 2004 were converted into investment*

account from 1st Oct., 2004. As regards the income from non-delivery based transactions is concerned, the same has been declared as business income as in the earlier years.

2.22 We have carefully considered the various aspects of the issue raised before us. Whether a particular transaction is a trading activity or an investment activity will depend upon facts and circumstances of each case. There are several judgments of the Courts and Tribunal some of which have been quoted before us each turning on its own facts. Though trading and investment transactions have their own distinctive features difficulty arises in borderline cases in understanding the true nature of transaction. A trader in a commodity is basically motivated by profit in selling the commodity on each and every rise in value. He aims to earn profit by generating volume by frequently turning over the stocks in which he is dealing. High frequency, high volume and regularity of transactions are therefore the basic features of a trading transaction. An investor on the other hand makes purchases with a view to earning income from the investments. He is not tempted to sell the commodity to earn quick profit on each and every rise in the value and holds the commodity for a longer period so as to have income as well as appreciation in value. The true nature of transaction can be understood from the intention of the assessee at the time of purchase. The various factors which need to be considered in understanding the intention or the nature of transaction are frequency and volume of transactions, nature of entry in the books of account, the object clause in the memorandum of association authorizing such transaction, circumstances such as organized efforts made to earn income as well as loans and borrowings which are normally associated with a business activity, profit motive, etc. However no single factor is conclusive and totality of the facts and circumstances have to be considered in arriving at a fair conclusion in the matter.

2.23 Though frequency and volume are indicative of a trading transaction, the same are not conclusive. The volume will depend upon funds deployed by the assessee and therefore the same could be high even in case of investment. Frequency is also not conclusive because even an investor may be frequently buying and selling shares and still he may remain an investor because the shares he is buying he may not be selling during the year and the shares sold may be those purchased more than a year ago. Therefore even if the number of transactions are large and volume is high, the assessee may still be an investor. Crucial factor is the period of holding which will be very short in case of a trader and long in case of an investor because a trader buys the commodity not for holding it in contrast to an investor who buys the commodity for holding it so as to earn some income from investment and have decent appreciation. In case of shares, income is in the form of annual dividend and therefore an investor in shares will normally be holding shares for more than a year and any sale before one year has to be explained from the circumstances of the case. The profit

motive is also relevant but this is also not conclusive because even an investor may earn profit by way of appreciation.

…. Even if we consider the closing stock of Rs. 45.12 crores, the turnover to stock ratio is very high (about 80) which clearly shows the trading nature of transaction. In case of investment, turnover to stock ratio will normally be less than one as the assessee would be accumulating the purchases for investment and not for sale. The assessee has regularly dealt in purchase and sales of shares with high frequency and volume. The AO has brought on record several cases in which the assessee had made repetitive purchases and sales in the same scrip which also shows trading activity. An investor in a scrip will hold the shares and not indulge in buying and selling in the same scrip. Shares purchased have been sold mostly during the year. No shares sold have been held for more than one year as the entire capital gain has been shown as short-term capital gain. Further about 64 per cent of capital gain is from sale of shares held for less than four months and about 22 per cent of capital gain is from sale of shares held for less than a month. About 88 per cent of gain is from sale of shares held for less than six months. Profit motive is also clearly evident in making the transaction. The total delivery based purchases is about Rs. 3,500 crores and total gain is about Rs. 16 crores. Thus the assessee has been selling the shares on average profit of about 5 per cent which can happen only in a trading transaction and not in investments. The high frequency, volume, low holding period and profit motive clearly show the intention of the assessee to trade in shares.

Renato Finance & Investments Limited ITA No.: 115/Mum/09
Assessment year: 2005-06 19th day of January, 2011. HELD

The shares sold by the assessee were of a private company which are not tradable in the market, the period of holding these shares was almost four years, this was the only transaction in shares that the assessee was involved in, and the transfer of shares was only to the holding company, which owns the assessee company anyway. On these facts, and on the entirety of this case, we are unable to see any legally sustainable merits in CIT(A)'s conclusion that the assessee was engaged in business of trading in shares. In any event, when even solitary transaction is with a holding company, which fully owns the assessee company, it is wholly devoid of any rationale to suggest that the assessee was engaged in an adventure in the nature of trade.

AKG Consultants Pvt. Ltd I.T.A. No.665/Luc/10 Luck bench of ITAT 28.2.2011

Out of the 85 scripts (shares/securities) the assessee sold only 18 quoted investment for a sum of `1,02,96,189.77. Out of those 18 scripts, 8 scripts had given "short term capital gain" and 6 scripts had given "long term capital gain" while 4 scripts had given both long term capital gain and short term capital gain on the basis of holding of the scripts for the period of less than or more than 12 months as the case may be. The assessee sold the scripts through Stock Exchange. The frequency of purchase and sale was not so regular to show that the assessee was a regular trader to earn profit. The Assessing Officer also accepted a part of the same portfolio which was sold in short term as "short term capital gain" but did not accept profit of part of the same portfolio as long term capital gain, the said action of the AO was not justified. In the present case, the object clause in the Memorandum of Association of the assessee also did not reveal that the purchase and sale of shares was the business object of the assessee. In the instant case, the investments were accounted for and shown as such for several years by the assessee. The said investments were not doubted in the earlier years so it was not justified on the part of the Assessing Officer to change the stand for the year under consideration and consider the profit on sale of the investments as business profit instead of capital gain shown by the assessee. In the present case, the assessee explained before the authorities below with documentary evidence that sale of the scripts was not a regular feature to consider it as a business transaction and it was not the intention of the assessee to treat the investments as the scripts for regular trade

M/s.Kamlesh Real Estates Pvt. Ltd. ITA No.1451/M/2010 20.4.2011

We have perused the records and considered the matter carefully. The dispute is regarding nature of income earned by the assessee from share transactions. The assessee during the year had entered into sale and purchase transactions in respect of shares of 32 companies involving 97 transactions resulting into gain of Rs.14,47,865/-. The entire gain was shown as short term capital gain. The AO held that the assessee was regularly purchasing and
selling shares with profit motive and therefore assessed the income as business income. CIT(A) has noted that the maximum gain had come from shares sold after holding the same for more than three months and therefore the gain arising from sale of shares held for more than three months has been treated as income from capital gain whereas gain arising from sale of shares held for less than three months has been treated as business income. The decision of the CIT(A) treating the gain arising from sale of shares with holding period of
more than three months as capital gain has been accepted by the revenue The only issue before us is whether the income from share transactions with holding period of less than three months can be assessed as capital gain or business income.

Whether the particular share transactions constitute investment activity or trading activity will depend upon facts and circumstances of each case. The factors such as entry in the books of account as investment, transactions being funded from own funds and not borrowed funds etc, are some of the relevant factors in deciding the true nature of transactions but none of these factors is conclusive. The intention at the time of purchases is the most important factor but such intention has to be gathered from subsequent conduct of the assessee in dealing with these shares and not from the entry in the books of accounts. An investor purchases a share with a view to earning income in the form of dividend and for appreciation in value over a long period of time and is not motivated to sell shares on each and every rise in the value of shares which are in fact the attributes of a trader

In the present case the assessee has been frequently purchasing and selling shares and the sales in all cases have been made after holding the shares for less than 3 months and the overall profit earned has also been small clearly suggesting that the assessee had been selling the shares motivated by profit. Even an investor some times may sell shares after holding for a short period in order to reshuffle the portfolio when a particular share is not doing well or in case of exceptional appreciation. Such selling after short holding has to be explained. In this case the assessee has not explained why it has been selling the shares after holding for a short term. … It has been argued that in earlier years similar transactions have been accepted as investment activity but it has not been shown how the transactions in earlier years were exactly identical and whether the same had been accepted after examination. The assessee has also cited some tribunal decisions which in our view are distinguishable as each case has its own peculiar features. In our view, on the facts of the case, the income arising from sale and purchase of shares within the three months period has to be treated as business income. However we make it clear that in case any part of the gain is in respect of sale of shares appearing in the opening balance which has been treated as investment in the earlier year, it has to be treated as capital gain and excluded from the business profit. Subject to above we confirm the order of CIT(A).

Delhi bench of ITAT M/s. Datavision System (P) Ltd., ITA No. 5957 /Del/2010 31st Mar., 2011.

8. We have heard both the parties and gone through the material available on record. From the facts stated above it is evident that the assessee had invested in shares including IPOs. In the books of account the purchases have been treated as investment and had been valued at cost. No material has been brought out on record by the A.O. to prove that assessee held these shares as stock in trade. Moreover, in earlier years on identical facts, the A.O. had treated the profits arising on sale of shares as capital gain. Therefore, in absence of any material to prove that the shares were held as stock in trade, in our considered opinion ld. CIT(A) was justified in deleting the addition. Hence no interference is called for.

Mumbai bench of ITAT in Mr. Nehal V. Shah ITA. No. 2733/Mum/2009 15th day of December, 2010.

In this appeal various grounds have been raised. But only dispute before us raised by the assessee is that learned CIT(A) erred in confirming the short term capital gain of Rs.1,07,70,524/-.

Before us, the learned Counsel for the assessee reiterated the submissions made before the Assessing Officer and CIT(A) and emphasised that assessee was hardly engaged in the business of garment exports through M/s. Zen Clothing Co. wherein more than 100 workers were employed. Therefore, assessee was fully busy in his garments business. He further submitted that assessee was investing in shares from a long time and in earlier years such transactions were accepted by the department. Assessee had not made any borrowings. Assessee had never entered into the derivative transactions. Two transactions quoted by the Assessing Officer happened because of the mistake of broker and assessee had suffered loss in both the transactions which assessee had not contested in any case. *He argued that in this year, Government had already introduced the security transaction tax and the idea was that no share transaction should go without tax. He therefore, referred to pages 18 of the paper book which is copy of the list of the shares held as on 31st March, 2005 and pointed out that assessee was holding shares in only 15 companies cost of which was Rs.11,56,65,048/- whereas the market value of the same was Rs.17,69,58,313/-. This clearly shows that despite of gain of almost Rs. 6 crores in the shares which were carried on for next year by the assessee, assessee preferred to hold these shares than to sell the shares. This clearly shows that assessee was an investor. Then he referred to page 19 of the paper book and pointed out that total purchase transactions in the year was only 31 and total sale transactions were 25. Therefore, it is not correct to state that assessee had a very high volume of connections. In fact, he explained that what happened some time that when he made an order say 1000 shares of 'X' company, it is not necessary that whole lot of 1000 shares would be transacted in one transaction. The transaction in stock exchange happened through computer trading and the computer would match the trades and then execute the same, which means that transaction for 1000 shares may consist of many smaller lots.*

We have considered the rival submissions and carefully perused the record and find force in the submissions of the learned Counsel for the assessee. It seems that number of transactions have not been calculated properly by the Assessing Officer because it may happen some time that a single transaction would be 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. Let us say, if some one places an order for purchase of 1000 shares of 'X' company and the same is executed by the electronic trading system of stock exchange into 100 smaller transactions, it does not mean that this person has entered into 100

transactions. Assessee has carried out only 31 purchase transactions and 25 sale transactions which cannot be said to be a great volume of transactions. Further, assessee was holding shares worth Rs. 11.56 crores at the end of the year and market value of the same was about Rs.17.69 crores. If assessee was a trader, he would have definitely realised this huge profit of almost Rs. 6 crores immediately and not carried out the stock to the next year. As far as the two transactions narrated by the Assessing Officer in which no delivery was taken and transaction was settled in the same day we agree with the submission of the learned Counsel for the assessee that perhaps these particulars were wrongly carried out on behalf of the assessee by the broker that's why assessee got them settled on the same day and has not contested these two transactions. Assessee has also not borrowed any money and he already occupied full time business for garments through the firm M/s. Zen Clotyhing….

Mumbai bench of ITAT in Radha Birju Patel **I.T.A No. 5382 Mum/2009** 30th November, 2010

5. We have heard the rival contentions and perused the record of the case. We have noted that so far as the present transactions are concerned, these transactions are undisputedly carried out by the assessee's Portfolio Manager and, therefore, these items are clearly in the nature of transactions meant for maximization of wealth rather encashing the profits on appreciation in value of shares. The very nature of Portfolio Management Scheme is such that the investments made by the assessee are protected and enhanced and in such a circumstance, it cannot be said that Portfolio Management is scheme of trading in shares and stock….. In our consideration view, in circumstance, in which the assessee is engaged in a systematic activities of holding portfolio through a PMS Manager, it cannot, by any stretch of imagination, be said that the main object of holding the portfolio is to make profit by sale of shares during the course of maintaining the portfolio investment over the period.

Ahd bench of ITAT in Mr. Nishil Marfatia 12.11.10. *ITA No.1526/Ahd/2008 Asst. Year 2004-05*

7. When we apply the above principles to the present case, we clearly find that shares which are held for more than 12 months and shown as investment in the balance sheet the intention was clearly to hold them as investment and not held as stock in trade. Where shares are held for more than 30 days, should be treated as investment and what is earned should be treated as short term capital gains or loss as the case may be which in the present case is short term capital loss of Rs.1,70,841/-. Shares which are sold within 30 days should be treated as part of trade and therefore, sum of Rs.2,94,847/- should be treated as business profit and not as short

term capital gains. Thus sum of Rs.59,69,498/- is treated as long term capital gains and Rs.(-) 1,70,841/- as short term capital loss and Rs.2,94,847/- as business profit. Accordingly appeal of the Revenue is partly allowed.

Shantilal M. Jain vs. ACIT (ITAT Mumbai)

(157.2 KiB, 268 DLs) 

Despite large volume etc of share transactions, AO bound by Rule of Consistency to treat share gains as STCG

The assessee, engaged in the business of trading/investment in shares and securities offered STCG of Rs. 1.54 crores and LTCG of Rs. 2.91 crores. The assessee also *traded in intra-day stocks without delivery and in derivatives*, the gain or loss from which was offered as business income. While the LTCG was accepted, the AO & CIT (A) held that the STCG was assessable as business profits on the ground that (a) the purchases of Rs. 1098 lakhs and sale of Rs. 1241 lakhs during the year showed that the transactions were on a *regular basis and on a substantially high scale*, (b) The assessee had traded in as many as 85 scrips in 188 transactions and in as many as 1631852 shares during the year with *frequency and regularity*, (c) only in 21 scrips there have been some opening balances. The rest of the scrips had all been *purchased and sold during the year*, (d) the holding period in several shares has been merely a *few days* and in a few cases the *purchase and sale had been on the same day* and there is even one instance of forward sales, (e) there were *no details regarding delivery* of shares, (f) the assessee had not proved that the purchases were not out of *borrowed funds* and (g) there were *no separate* bank accounts. On appeal to the Tribunal, HELD allowing the appeal:

Though it is the case of the revenue that due to volume, magnitude, frequency, continuity, regularity, the ratio between purchase and sale clearly indicate that income on account of purchase and sale of shares should be treated as income from business and not as income from STCG, **the AO has, from AY 2003-04 to 2008-09 (except for the impugned year 2006-07), consistently accepted the income as being STCG**. In these circumstances, the **Rule of consistency** as propounded by the Bombay High Court in **Gopal Purohit** 228 CTR 582 (Bom) is squarely applicable and the income has to be treated as STCG.

Nagindas P. Sheth (HUF) vs. ACIT (ITAT Mumbai)

Despite Large number of transactions in shares, profit assessable as capital gains

The assessee HUF offered income from sale of shares as short-term capital gains (STCG). The AO held the income to be business profits on the ground that (i) the assessee had *158 share transactions* in the year which showed the intention to trade, (ii) The *regularity and frequency of transactions* showed no intention to hold shares to earn dividend and (iii) Instead of one or two demat accounts, the assessee had adopted a professional approach and transacted through *several brokers*. On appeal, the CIT (A) held that profit on sale of shares held for less than 30 days was business profits while other profits was STCG. On appeal by the assessee and department, HELD deciding in favour of the assessee:

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. The gains earned by the assessee deserve to be assessed as capital gains because:

(a) the assessee was holding the shares in its books as an investor; (b) the assessee did not have any office or administration set up; (c) the shares were acquired out of own funds and family funds and not through borrowings; (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 AO had vide scrutiny assessments treated the assessee as an investor.

ACIT vs. Naishadh V. Vachharajani (ITAT Mumbai)

(147.1 KiB, 881 DLs)

Despite high volume & short holding period, shares gain is STCG

The assessee, a marine consultant, offered income by way of LTCG, STCG, speculative profit & profit from futures trading. The AO held that as the *volume of transactions was high* (222), *the period of holding of the STCG shares was short* (2 -5 Months) & there was *speculation & F&O profit*, the *LTCG & STCG was assessable as business profit*. On appeal, the CIT (A) reversed the AO. On appeal by the department, HELD dismissing the appeal:

(i) As regards the LTCG, the shares were held for several years and so the assessee has acted as investor and not as a trader and so the gains are assessable as LTCG;

(ii) As regards the STCG, the view of the CIT(A) had to be upheld because

(a) there was no intra-day trading, (b) most of the shares were held for a period of 2 to 5 months, (c) In the preceding AY, the AO did not assess the STCG as business income and on the principles of consistency, a different view cannot be taken on the same facts, (d) the assessee has no borrowings and (e) merely because there was a speculative business does not mean that even delivery based transactions of shares should be assessed under the head business.

Shri Pratik S.Shah ITA No.883/M/2010 Mumbai bench of ITAT 31.12.2010.

We have heard the Learned DR, perused the records and considered the matter carefully. The dispute is regarding nature of income from share transactions undertaken by the assessee during the year. The transactions entered into by the assessee were both delivery based and non delivery based. The assessee had declared the delivery based transactions as investment activity. The case of the AO is that the assessee had an organized activity in purchase and sale of shares. There were regular transactions with a high volume and frequency. He has therefore treated the income as business income. CIT(A) has accepted the claim of the assessee on the ground that the shares were shown in the balance sheet as investment and 80% of the gain was from shares held for more than 3 months and the assessee had not used any borrowed funds. In our view merely because the shares were shown as investment in balance sheet and no borrowed funds were used, is not conclusive in understanding the true nature of transactions. The intention of the assessee in purchase and sale of shares has to be understood from the actual conduct of the assessee while dealing with the shares. Similarly the fact that the larger part of profit was because of shares sold after three months is also not conclusive. The cumulative effect of all the

factors have to be taken into account. There is nothing before us to controvert the finding of the AO that the assessee was dealing in shares as an organized activity with high volume and frequency. We are therefore unable to sustain the order of CIT(A) and on the facts and in the circumstances of the case decision by the AO has to be upheld. We accordingly set aside the order of CIT(A) and confirm the order of AO.

ITAT Mumbai bench in Bharat Kunverji Kenia – 130 TTJ 86 (URO) Held (where assessee engaged in pulses business- carried shares transactions- mere frequency and volume not decisive – book treatment and no borrowings emphasized – cap gains);

Bombay High Court in Shri Darius Pandole INCOME TAX APPEAL NO.3053 OF 2009 June 16, 2010 : Consistency: Securities Shares income classification: Held
"..The Tribunal was correct in holding that there was a due application of mind by the Assessing Officer to the very same issue during the course of the earlier two Assessment Years and that the assessments were finalized after considering the reply filed by the assessee specifically to the query raised by the Assessing Officer. In the circumstances, the Tribunal was, in our view, justified in following the decision of the Supreme Court in Radhasoami Statsang vs. C.I.T., (1992) 193 ITR 321 (SC). While the principle of res judicata could not as an abstract principle apply to assessment proceedings since each year of assessment has to be considered separately, yet when a fundamental aspect was duly considered after a query was raised by the Assessing Officer and was answered by the assessee on the same facts, a change in view, was evidently not warranted for the Assessment Year in question. So construed, we do not find that the decision of the Tribunal will give rise to any substantial question of law.."
ITAT Delhi Bench in Rajiv Anand 34 SOT Page 42 (capital gains held)- approved by DHC ; Refer Dinesh Mehta 39 SOT 488 (active versus passive dealings: Mumbai ITAT); Kunwarji 131 TTJ 87 (UO) ; Mumbai ITAT in Harsha Mehta 6 taxmann.com 75 (adverse)

Allahabad High Court Petitioner :- L.G. Electronics India Pvt. Ltd. Greater Noida **Case :-** WRIT TAX No. - 358 of 2011 On Inspection of records and right of taxpayer/assessee: HELD

Insofar as the inspection of documents/records before the Appellate Authority is concerned, in our opinion, once the records are of quasi judicial authority, any party is entitled to examine the same for the purpose of putting forward his/their case before the Authority. Therefore, the request made by the petitioner to inspect the documents/records before the Appellate Authority should be allowed before proceeding to hear and dispose of the appeal.

Allahabad High Court Petitioner :- Virendra Kumar, Prop. M/S Shri Bajrang Bali Transport Corp. Case :- WRIT TAX No. - 402 of 2011 On Stay against recovery of tax demand by CIT-Appeals: Misconception cleared

It is really very surprising that the Commissioner of Income Tax (Appeals)-II, Agra respondent No. 1 before whom the appeal and the stay application is pending since 31.01.2011 is not passing any order on the said application. According to the petitioner, in Paragraph 27 of the writ petition, it has been stated that the respondent No. 1 has declined to pass order on the stay application as the power to decide the stay application vests with the Commissioner of Income Tax (Administration) and not with the Commissioner of Income Tax

(Appeals) and had kept the application pending. The Apex Court as far back as in the year 1969 in the case of *Income Tax Officer, Cannanore Versus M.K. Mohamad Kunhi, AIR 1969 SC 430* has held that the appellate authority has inherent powers to grant interim protection in order to preserve the subject matter of appeal unless it is specifically prohibited by some statutory provision. In the present case under section 246 of the Income Tax Act, 1961, there is no specific provision placing restriction upon the appellate authority from granting any

interim protection. That being the position, we are of the considered opinion that the stand as alleged in Paragraph 27 of the writ petition if it is correct then the Commissioner of Income Tax (Appeals) is working under wrong impression and which is not in the interest of justice. We, therefore, direct the Commissioner of Income Tax (Appeals) respondent No. 1 to pass appropriate orders in accordance with law on the petitioner's application for grant of interim relief within a week from the date on which a certified copy of this order is filed before him.

Property transaction whether investment or business : classification **Bang bench of ITAT in Smt. Seema B. Gajria, L/R of Late Bharat R. Gajria I.T.A No.816/Bang/2010 (Assessment Year : 2006-07)**

07. In page 13 of his order, the Commissioner of Income-tax(A) has listed out the details of various purchases made by the late assessee from 1988-89 to 2003-04. The land was sold in financial year 2005- 06 which is the previous year relevant to the assessment year under appeal. The main chunk of land like 1 acre 1 gunta; 2 acres 64 guntas; 1 acre 23 guntas; 9 acre 20 guntas etc were in fact purchased by the assessee in financial years 1988-89, 1989-90, 1991-92, 1992-93, etc., At that relevant point of time when lands were purchased by the assessee, they were agricultural lands. The assessee sold those holdings in the financial year 2005-06 which means after a period of five to seven years. The holding of land for that long a period is primarily an indication of the fact that the assessee held the agricultural lands purchased by him as investment. There is no evidence on record to show that the assessee has been carrying on the activities as adventure in the nature of trade. Only for the reason that the agricultural land previously purchased by the assessee were developed and plotted and sold at a huge price, does not mean that the assessee was carrying on the activities in an organized manner in the nature of business. As a prudent investor, the assessee started saving his investments in land in anticipation of good price on sale. This prudence of the late assessee cannot be equated with an object of indulging in adventure in the nature of trade. Because of the development of Bangalore city, like many other persons, the assessee also might have benefited by a windfall. The rise in price of the land surrounding big cities is a natural thing with which alone the object of assessee cannot be tested. (also see DHC in Vardan Buildcon for principles on subject order dated 24/2/2011 ITA No 429 to 431 of 2011)

Delhi High Court in NALWA INVESTMENTS LTD. ITA No.1345 of 2010

Reserved On: March 31, 2011. % Pronounced On: May 11, 2011. Section 263 CIT revision (rev fav order) with detailed discussion on Importance of character of income in general versus head wise deemed classification of income (eg interest/dividend income) for SET OFF purposes etc

…However, the argument of Mr. Vohra was that even if under the scheme of the Act, the dividend income is to be charged under the head „Income from other sources", the character of that income could still be looked into and it could be treated as business income for the purpose of set off. Mr. Vohra is right to this extent.

10. In Chugandas & Co. 55 ITR 17 the Supreme Court held that the heads of income were intended merely to indicate the classes of income. These heads do not exhaustively delimit sources from which income arises. Business income is broken up under different heads only for the purpose of computation of the total income. By that breaking up, the income does not cease to be the income of the business, the different heads of income being only the classification prescribed by the Income-tax Act for computation. This principle was repeated by the Supreme Court in Cocanada Radhaswami Bank Ltd. 57 ITR 306. In that case, the facts situation was somewhat similar. The assessee had earned some interest income on the securities and the brought forward loss was sought to be set off against the income even computed under the head „interest on securities". The Court opined that the assessee was entitled to set off the loss brought forward against the entire income not only the income computed under the head „business" but also the interest and securities in succeeding years. ……Thus, even if the interest on securities is separately classified, view was taken that the said income would not cease to be part of income from business if the securities are part of trading assets. Gujarat High Court in the case of Additional Commissioner of Income Tax Vs. Laxmi Agents P. Ltd., 125 ITR 227 followed the aforesaid principles and summed up the legal position in the following manner…….*It would, therefore, be immaterial as to under what head specified under Section 14 of the Act that the income is computed. Even when it is not computed under the head „income from profession and business", the commercial character of that income could still be taken into account. If it is found that the particular income was derived from the business of the assessee, for the purposes of set off, it can be taken as business income. This Court in Excellent Commercial Enterprises and Investment Ltd. 282 ITR 423 has concurred with the aforesaid view*

…The assessment order is totally silent and there is no discussion as to how this dividend income was to be given the character of business income for the purpose of set off under Section 72 of the Act. It was for this reason that the CIT held that the AO had not conducted any inquiry. The Tribunal, instead of appreciating these facts, went into the merits of the issue which the AO is supposed to deal with. …

The Tribunal failed to appreciate the limited scope of appeal before it, viz., the validity of the order passed by the CIT exercising his revisionary power under Section 263 of the Act. Order of the CIT clearly revealed that he had applied his mind on the relevant aspect and had rightly noticed that the character of the said income was not investigated by the AO…The Tribunal was, thus, supposed to adjudge the validity of such an order and not to go beyond when the challenge before it was limited to the said order passed by CIT in exercising the powers under Section 263 of the Act. …We, thus, answer the question formulated above, in favour of the Revenue and against the assessee, as a result, the impugned order passed by the Tribunal is set aside.

BOOKS RESULTS SANCTITY:

Rajasthan High Court CIT vs Gotan Lime Khanij Udhyog 256 ITR 243, 120 TAXMAN 779, 180 TAXATION 156

Section 145 only provides the basis on which computation of income is to be made for the purpose of determining the amount of tax payable by an assessee. The provision by itself does not deal with addition or deletion in the income. ***Therefore, merely because there is some deficiency in the books of account or merely because of rejection of the books of account it does not mean that it must lead necessarily to additions in the returned income of the assessee.*** *What changes in either case is the basis for computing the income chargeable under the head "Profits and gains of business or profession" or "Income from other sources".* ***The result would depend on the other principles of computing the income.*** *Therefore, we hold that merely changing the basis or method of arriving at the end result of working out the computation of taxable income under the Income-tax Act, necessarily does not result in devising profits or gains from business or other sources different from one returned by the assessee, where he has returned his*

income and different from the result reached by the assessee as per the method of accounting employed by him, by adopting a different basis by the assessing authority….

…..…Thus, the finding has been reached on the ground that in the absence of recording any finding by the Commissioner of Income-tax (Appeals) that ***a expenses incurred on any account appear to be unreasonable or excessive****, the additions sustained merely on suspicion of* ***pilferage or leakage*** *were not justified.* ***This conclusion, in our opinion, is a finding of fact keeping in view that the additions in the profits and gains returned by the assessee are not a necessary concomitant of an order made under section 145(1) or 145(2).***

High Court of Rajasthan Malawi Hamjivan Jagannath vs ACIT 207 CTR 19 HELD

*..****When all the data and entries made in the trading account were not found to be incorrect in any manner****, there could not have been any other result except what has been shown by the assessee in the books of account. We are, therefore, unable to sustain the order of the Tribunal.*

CIT vs Sapthagiri Traders Ltd. and Ors. 305 ITR 438 Mad HC

….4.6. That apart, the Tribunal held that the transaction or purchase of packing materials were not proved to ***be sham*** *or that the* ***price paid was different from those shown in the books of account of the appellant*** *and therefore, there is no doubt as to the reality of the purchasing of the packing materials* ***as the payments were made to the parties only by way of cheques.***

CIT vs J.M.D. Computers and Communications (P) Ltd. 180 Taxman 485 Delhi High court

6. In view of this the Tribunal came to the conclusion that the deletion made by the CIT(A) had to be sustained. The Tribunal in particular, noted that the Department having accepted the purchases, it could not have been assumed that the assessee had inflated its purchase by introducing fictitious purchases. The Tribunal made a particular note of

the fact that the statement of Sh. Ashok Kumar who is the brother of Sh. T.R. Chadda, the source from which the revenue had received information about bogus purchases by the assessee had evidently made a statement on 26-2-2002 admitting therein that he was carrying on the business of issuing bogus accommodation bills on commission basis with the assessee; ***which was not put to the assessee, for rebuttal or cross-examination.***

7. Before us the Learned counsel for the revenue had laid great stress on the fact that the Department had carried out investigation which revealed that purchases have been made from non-existent parties and this was established by virtue of the fact that inquiries with the banks of the suppliers had revealed that they were operated by Sh. Ashok Kumar, who was the brother of Sh. T.R. Chadda or his employees. We note that this aspect of the matter was obviously not put to the assessee as this was not part of the report which the inspector had prepared for the perusal of the Assessing Officer. Therefore, this submission of the counsel for the revenue cannot in our view take his case any further.

8. As a matter of fact as noted in paragraph 1.5 of the CIT(A) orders the evidence regarding Sh. T.R. Chadda's operation collected by the investigating wing was not even available with the Assessing Officer

G.G. Diamond International vs DCIT 104 TTJ 809 MUM BENCH ITAT

60. There is no case for the Revenue that the assessee is not maintaining books of account. The purchases are recorded in the books of account. Payments are made by cheque to the immediate purchasers. They accepted and confirmed the sale. To hold otherwise, there should be some evidence in the possession of the Revenue. Suspicion, however strong, cannot take the place of evidence and that alone cannot be the criteria for deciding the matter… ……64. Coming to the results of the inquiry made by the AO with the third parties and the reliance placed by the assessee that no opportunity was provided to the assessee, we

are afraid, has no much relevance. Summons issued were received by these parties. They confirmed the sales. Payment made by cheque is confirmed. The only reasoning of the AO to disallow assessee's claim is that subsequently these parties withdrew the amount reflected in their accounts by cash and disappeared. But there is no evidence to show that the money has come back to the assessee. Further, as we have stated hereinabove already that the reasoning of the AO, as confirmed by the CIT(A) is that there is no evidence to show that the material has been transported from Surat to Mumbai. The third parties are not the parties who sold to the assessee directly. Surat parties claimed that they have delivered the goods to the sellers from whom assessee purchased. Therefore, this point also cannot be strictly taken against the assessee

CIT vs M. K. BROTHERS 163 ITR 249 Guj HC

On a perusal of the Order of the Tribunal, it clearly appears that whether the said transactions were bogus or not was a question of fact. The Tribunal has also pointed out that nothing is shown to indicate that any part of the fund given by the assessee to these parties came back to the assessee in any form. It is further observed by the Tribunal that there is no evidence anywhere that these concerns gave vouchers to the assessee. Even the two statements do not implicate the transactions with the assessee in any way. With these observations, the Tribunal ultimately has observed that there are certain doubtful features, but the evidence is not adequate to conclude that the purchases made by the assessee from these parties were bogus. It may be stated that the assessee was given credit facilities for a short duration and the payments were given by cheques. When that is so, it cannot be said that the entries for the purchases of the goods made in the books of account were bogus entries. We, therefore, do not find that the conclusion arrived at by the Tribunal is against the weight of evidence. In that view of the matter, we answer the question in the affirmative, that is, in favour of the assessee and against the Revenue. Accordingly, the reference stands disposed of with no Order as to costs.

Marghabhai Kishanbhai Patel and Co vs CIT 108 ITR 54…in any event he had no right to depart from the prices shown in the books of account unless he found the transaction not to be a bona fide one or to be a sham one or unless he found that the prices paid were not what was shown in the books of account and since none of these three conclusions had been reached by him, he had no right to depart from the books of account of the assessee-firm.

Orissa High Court in CIT vs Utkal Allloys Ltd 226 CTR 676: Principle spelt:

a) The basic principle is the same in law relating to income-tax as well as in civil law, namely, that if there is no challenge to the transaction represented by the entries or to the genuineness of the entries, then it is not open to the other side to contend that what is shown by the entries is not the same state of affairs in **CIT vs. Amitbhai Gunvantbhai (1980) 19 CTR (Guj) 105 : (1981) 129 ITR 573 (Guj) (at p. 580),**

b) ***When a return is furnished and the accounts are put in support of that return, the accounts should be taken as the basis for the assessment. They should not be rejected because they are complicated. The procedure of the AO is of judicial nature and in making the assessment; the AO should proceed on judicial principles. If the evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay or arbitrarily*** [George Commen vs. Commr. of Agrl. IT (1964) 52 ITR 977 (Ker)]. From the assessment order, it is clear that the AO has not mentioned any reason why the stock books or other books were not acceptable to him. Therefore, the action of the officers in straightway proceeding to inventories the stock on estimate basis, that too which is not accurate and correct, is not in order. The above discussion and the case laws clearly go to show that

the stocks shown by the assessee which has been mentioned in p. 2 of the assessment order should be accepted in the absence of any defects in the accounts or omission or commission by the assessee.

c) In **Vijaya Traders case Mys HC 74 ITR 279** , the question before the Mysore High Court was whether the Tribunal was right in law in holding that the ITO could act on the proviso to s. 13 of the IT Act, 1922, for completing the assessment for the asst. yr. 1961-62 and on the proviso to sub-s. (1) of s. 145 of the IT Act, 1961, for completing the assessment for the asst. yr. 1962-63. The High Court held that the Tribunal was not right in law in holding that the ITO could act on the proviso to s. 13 of the Act of 1922 or the proviso to s. 145(1) of the Act of 1961, for completing the assessments, as the accuracy of the accounts had not been doubted and the Tribunal did not also find that the manner in which the assessee maintained his accounts did not enable a proper determination of his income. ***So long as it is not impossible to deduce the true income from the accounts, its computation could not be made in any other way.***

***d*) The procedure of assessment is quasi judicial in nature and in making the assessment the AO must observe the judicial principles**. *Accounts regularly maintained in course of business have to be relied upon unless there are strong and sufficient reasons to disbelieve them.* Needless to say that discrepancy worked out on the basis of estimation of quantity and value of stock is not accurate, correct and scientific. Therefore, in absence of any defect found out in the books of account, maintained in regular course of business, no addition can be made to the income disclosed by the assessee in its return of income on the basis of discrepancy worked out on estimation of stock.

Delhi bench ITAT order in case of M/s Siel Limited,/ M/s Mawana Sugars Limited I.T.A. No. 3367/Del/2002 20/5/2011. books unavailable vs books lost in fire (rev fav order) Importance of Evidence for a CLAIM

6. We have heard the rival contentions and perused the records. We find that Ld. Commissioner of Income Tax (Appeals) has stated that assessee has failed to produce necessary documents and stated that the details were 10 years old. The assessee has only submitted a certificate from CA to support his case. In this

regard, ld. counsel of the assessee has placed reliance upon CBDT Circular No. 601 dated 4.6.1991 reported in 190 ITR 4 (St.). This reference was made by the ld. counsel of the assessee in support of the claim that for the purpose of section 43B in case there is difficulty in enclosing necessary challan etc. evidencing payment, a Certificate from a CA, as defined in the Explanation to section 288 of the Act would be sufficient.

6.1 However, we note that in this Circular in para 8 thereof it has clearly entioned that the same will be sufficient for the purpose of making prima facie adjustments under section 143(1)(a). Further evidence can be called for in cases selected for scrutiny & 143(3) assessment. Admittedly, we are not concerned with adjustment u/s 143(1)(a). Hence, this Circular does not support the case of the assessee. Hence, we are of the considered opinion that assessee has failed to submit the necessary evidence in this regard.

6.2 Furthermore, in this regard the ld. counsel of the assessee has also placed reliance upon the decision of the Hon'ble Jurisdictional High Court in the case of ACIT vs. Jay Engineering Works Ltd. 114 ITR 289. In this case it was held that "where the original books of the assessee had been destroyed in a fire it was held that the Appellate Tribunal, in allowing a deduction, could rely upon other material mainly consisting of the auditor's reports from which it could be inferred that the deductions were properly supported by the relevant entries in the accounts books." In this background, the Hon'ble High Court did not interfere in the order of the tribunal. In our considered opinion, this case law is not at all applicable in the present case. It is not the case that books of account and other material were lost in fire. Here assessee has simply stated that the evidence called for in this regard is 10 years old. Hence, the same was not available. In this background, we do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals) and accordingly, we uphold the same.

<u>also see DHC order in case of H.B.Stockholding reported at *325 ITR 316:*</u>

On the issue with regard to the disallowance of Rs. 5,64,90,487/-, we find that the Assessing Officer was not justified in relying upon the report of the Auditor by which the Auditor had said that the accounts do not reflect the true and complete affairs of the company. This is only a half truth. The fact of the matter is that the Auditor of the assessee company has given such a remark in the Auditor's report because on account of a search and seizure operation carried out by the Income Tax Department at the business premises of the assessee various records/books/documents were seized. Therefore, the Auditor said that on the basis of the limited records, the report was being prepared and consequently they made the endorsement that they are not able to say that the accounts reflect the true and correct position. We note that in this regard the ITAT has observed that it was a strange position indeed for the Assessing Officer to simply accept the report

of the Auditor, because, the seized material could have been examined by the Assessing Officer and he was competent to form an opinion on the same as to the genuineness of the transactions which he unfortunately did not***. The ITAT rightly observed that on the one hand the Assessing Officer kept the records with himself and on the other hand he blamed the assessee and which was clearly a travesty of justic***e. The learned counsel for the respondent during the course of the arguments has referred to the written submissions and the documents relied by him before the CIT(A) and which showed the genuineness of the share transactions of the assessee company and which documents showed that the transactions were entered into at market value, proof of the market quotations were filed, the transactions were through share brokers through the Stock Exchange. *There is no allegation that the transaction is not at the market price and something over and above declared price had been recovered by the assessee****. In fact, the Assessing Officer applied unfairly the pick and choose policy because in respect of the transactions with the same party which resulted in profit, the same was brought to tax but when the loss was claimed the Assessing Officer ignored the same on the ground that the same is sham***. We note that in para 34 of the order of the ITAT the ITAT has also examined the transactions on the basis of pages 22 to 30 of the paper book before it and has given its opinion as to the genuineness of the transaction. *The contention for the Revenue that the ITAT has, therefore, not applied its mind to the record and transactions are, therefore, clearly not correct. In fact, as stated above, even the CIT(A) had duly applied its mind to the transaction by reference to the record which was produced by the Assesee*

P&H High Court in **Sanjay Chhabra, Proprietor of M/s. Sanjay Chhabra Traders Income Tax Appeal No. 489 of 2005 Date of decision: 31.3.2011**

"Whether the Tribunal erred in law in taking only profit of unexplained transactions as undisclosed income instead of taking investment in the said transactions into account."

Appeal filed by the assessee before the Commissioner of Income-tax (Appeals) [in short "CIT(A)"] was allowed by order dated 23.12.2003 and the addition of Rs. 5,75,654/- made by the assessing officer was deleted. A direction was, however, given to the assessing officer to assess the commission earned by the assessee on the aforesaid sales, at the rate of 5%. The CIT(A) while allowing the appeal, relied upon a decision of the Gujarat High Court in *Commissioner of Income Tax vs. President Industries,* (2002) 258 ITR 654. 5. The Tribunal, in the appeal carried by the Revenue, affirmed the order of the CIT(A) by order dated 28.4.2005.

8. The sole point for consideration in this appeal is that once the Revenue had come to the conclusion that the assessee had made sales of apples amounting to Rs. 5,75,654/- to one Jagdish Chawla, whether it was the entire amount, or the

5% profit thereof, being commission on such sale, that was to be added to the income of the assessee. 9. According to the Revenue, the judgment of the Gujarat High Court reported in *President Industries's case (supra)*, was not applicable and the entire sale amount was assessable in the hands of the assessee.On the other hand, learned counsel for the assessee on the strength of the aforesaid decision argued that only 5% profit on the sale amount as commission was exigible to tax. 10. We find force in the contention of the learned counsel for the Revenue.

14. Reference is now made to judgment reported as *President Industries*'s case (supra). In that case, the CIT(A) and the Tribunal had found as a fact that there was no material on record to indicate that any investment was made outside the books of accounts to make the sales and in such circumstances the entire sale proceeds could not be added as undisclosed income of the assessee but the addition could be only of the profits embedded in the sales. The High Court in the light of the aforesaid finding of fact while dismissing the reference application under Section 256(2) of the Act filed by the Revenue had held that no question of law arose for consideration. In the present case, in the absence of any clear cut and unambiguous finding recorded by the CIT(A) and the Tribunal on the basis of the material on record, that the investment in the apples was accounted for in thebooks of accounts of the assessee, no advantage or support can be gathered by the assessee from the said decision. *15. Accordingly, the substantial question of law is answered in favour of the Revenue and against the assessee.*

M/s Hemla Embroidery Mills (P) Ltd. Depreciation section 32: Rate on electrical installation whether part of PLANT? HELD YES

5. Learned counsel for the revenue submitted that the CIT(A) as well as the Tribunal were not right in allowing depreciation at the rate of 25% on electric installations, air conditioners and electric fan etc. fitted in the building of a Mill treating these as plant instead of treating part of the block of furniture and fittings on which depreciation was admissible at the rate of 15% under the Income Tax Rules. Learned counsel referred to the order of the Assessing Officer, wherein it was so held. However, the CIT(A) while reversing the order of the Assessing Officer which were affirmed by the Tribunal had held that the aforesaid appliances formed part of the plant and machinery of the assessee and, therefore, were entitled to depreciation at the rate of 25%..... In view of the aforesaid findings which have not been shown to be perverse in any manner, the assets on which depreciation was allowed were held to be the part of plant and, therefore, the rate of 25% was rightly applied.

P.K.J. Builders Pvt. Ltd. Income Tax Appeal No. 127 of 2005

Date of decision: 29.3.2011 The primary point in issue in this case is, whether the agreement which was entered into by the assessee with its sister concern, M/s. K.P. Earthmovers, was a genuine transaction or not.

Assessee's contention: The hire-purchase agreement dated 30.1.1996 and agreement dated 3.2.1996 between the assessee and its sister concern, M/s. K.P. Earthmovers had resulted in conferring ownership rights on the assessee and, therefore, depreciation and interest on hire-purchase installments was admissible as expenditure.

Learned counsel for the Revenue supported the order of the Tribunal.

We have given our thoughtful consideration to the issue. The Tribunal on appreciation of evidence had come to the conclusion that the sister concern, M/s. K.P. Earthmovers, was owner of the equipment and the alleged agreement of the said concern with the assessee was not a bona fide transaction. The Tribunal further concluded that the agreement between the assessee and its sister concern, M/s. K.P. Earthmovers was invalid and void ab initio….Further, in the absence of a genuine and bona fide agreement between the assessee and its sister concern, M/s. K.P. Earthmovers, the assessee was not entitled to claim depreciation and interest on instalments alleged to have been paid there-under as an expense.

M/s O.K. Play India Ltd. **Income-tax Appeal No.414 of 2006 Date of decision: 25.2.2011 Depreciation computer software**

Whether on facts and in the circumstances of the case, the ITAT was right in treating the computer software expenses as revenue expenses despite the fact that the expenses were incurred in obtaining advantage of enduring nature and the expenditure was capitalized by the assessee itself?

We have heard learned counsel for the parties. 5. Learned counsel for the revenue submits that expenditure should have been treated to be on office equipment as per proviso to Explanation 5 of Section Section 32. 6. We are unable to accept the submission. Section 32 applies only for depreciation in respect of capital asset and not to revenue expenditure. In the present case, the Tribunal has recorded a finding that expenditure on the software development was revenue expenditure.. Learned counsel for the assessee points out that in identical circumstances, finding of the Tribunal was upheld by this Court in

Commissioner of Income-Tax Vs. Varinder Agro Chemicals Limited [2009] 309 ITR 272 (P&H) holding that no substantial question of law arose. Reference was also made to the judgment of Hon'ble Supreme Court in ***Alembic Chemical Works Co. Ltd. Vs. CIT [1989] 177 ITR 377 (SC)*** to the effect that it would be unrealistic to ignore rapid advances in research and to attribute a degree of endurability and permanence to the technical know how at any particular stage in fast changing area of science. 8. In view of above, we do not find any ground to interfere with the view taken by the Tribunal. Substantial question of law raised is decided against the revenue.

DELHI HIGH COURT PEPSICO INDIA HOLDINGS PVT. LTD [ITA No.149 of 2008] PRONOUNCED: 25.03.2011 Valuation report relevance:

After hearing the learned counsel for the parties, we are of the opinion that the approach of the Tribunal in addressing the issues was in accordance with law and has come to a correct conclusion. *It is not in dispute that specified lump sum consideration is paid for acquisition of specified assets by the assessee to the vendor companies. This consideration is paid as stipulated in the agreements entered into between the parties. The Assessing Officer or the CIT (A) assumed certain things which were non-existing. It was assumed that some consideration for goodwill must have been paid or the payments to the employees of the vendor companies must have been borne by the assessee. There was neither any material to arrive at this conclusion nor there were any circumstances from which this could be legitimately inferred or presumed. Likewise, there was no legitimate reason to discard the valuation report. Furthermore, as mentioned above, the consideration was actually paid which represented only the cost of these assets and thus the assessee could legitimately claimed depreciation on the said cost as per Section 43 (6) of the Act. For bifurcation of the cost, valuation of the assets was required for which valuation reports were produced.*

DELHI HIGH COURT GOVIND NAGAR SUGAR LIMITED Date of Pronouncement:25.03.2011

"(a) Whether ITAT was correct in law in holding that for carried forward of unabsorbed depreciation, it was not necessary that the return should have been filed within the time allowed under Section 139(1) read with Section 139(3) of the Income Tax Act? (b) Whether ITAT was correct in law in holding that the

provisions of Section 80 of the Income Tax Act do not apply to unabsorbed depreciation covered by Section 32(2) of the Act?"

From the above, it comes out that the effect of Section 32(2) is that unabsorbed depreciation of a year becomes part of depreciation of subsequent year by legal fiction and when it becomes part of current year depreciation it is liable to be set off against any other income, irrespective of the fact that the earlier years return was filed in time or not.

Cases referred: Gauhati High Court in CIT v. Singh Transport Co. [1980] 123 ITR 698 Commissioner of Income-Tax, Delhi-IV v. J.Patel & Co. [1984] 149 ITR 682 CIT v. Nagapatinam Import and Export Corporation [1975] 119 ITR 444Punjab and Haryana High Court in C.I.T. v. Haryana Hotels Ltd. (2005) 276 ITR 521Madras High Court in Shri Hari Mills Ltd. v. First I.T.O (1967) 65 ITR 348 Sathappa Textiles Pvt. Ltd. v. Second I.T.O. (1969) 71 ITR 260 Karnataka High Court in Brahmaver Chenicals Pvt. Ltd. v. Second ITO [1999] 239 ITR 807

Delhi High Court ORIENT CERAMICS & INDS. LTD ITA No.65 of 2011 17/01/2011: Depreciation section 32: Disputed customs duty capitalized and Glow Sign Board Revenue vs Capital Expense: HELD

*The assessee paid this amount without prejudice to its contention that the certificate issued by the Ministry of Finance was valid, legal and proper and no such custom duty was paid. While paying the custom duty, the assessee has contested the show cause notice issued by the Custom Department and these proceedings are still pending …….**The question, in these circumstances, arose as to whether the assessee who had made the payment in the meantime would be entitled to add the same to the cost of plant and machinery and claim depreciation thereon. … … … ……***

The CIT (A) as well as the Tribunal while accepting the course of action taken by the assessee in claiming depreciation on the said amount as well relied upon the judgments, i.e., ***Commissioner Of Income-tax, Bombay City I*** Vs. ***Messrs. Shoorji Vallabhdas And Co.*** 46, ITR 144 (SC); ***Tuticorin Alkali Chemicals & Fertilizers Ltd.*** Vs. ***Commissioner of Income Tax*** 227 ITR 172 (SC); ***Kedarnath Jute Manufacturing Co. Ltd.*** Vs. ***Commissioner of Income Tax*** 82 ITR 363 and ***Sutlej Cotton Mills Ltd.*** Vs. ***Commissioner of Income Tax*** 116 ITR 1 (SC) wherein it is held that even if the liability is challenged and the legal proceedings are pending, once the amount has gone out of the coffers of the assessee, the assessee would be entitled to capitalize the same.

We are in agreement with the aforesaid approach of the Tribunal which is in consonance with the law laid down by the Supreme Court and therefore, are of the opinion that no substantial question of law arises insofar as this issue is concerned

Coming to the expenditure on glow sign boards incurred by the assessee, the issue was as to whether the said expenditure is revenue or capital in nature. The plea of the assessee was that these glow sing boards are of perishable nature, which the assessee had displayed at the various outlets of its dealers and therefore, the entire amount should be treated as revenue expenditure and was allowable under Section 37 of the Act as business expenditure. ……..The order of the CIT (A) has been upheld by the Tribunal and in arriving at the conclusion that the expenditure was of revenue nature, the Tribunal has followed the judgment of the Punjab & Haryana High Court in the case of ***Commissioner of Income Tax*** Vs. ***Liberty Group Marketing Division*** **[(2009) 315 ITR 125]**. … Agreeing with the aforesaid view taken by the Punjab & Haryana High Court, we hold that no question of law arises on this aspect as well.

Delhi High Court in BSES **Computer Peripherals Dep Rate 60%:** BSES RAJDHANI POWERS LLD: ITA 1266/2010: Date of Decision: 31st August, 2010: Held 4. *We are in agreement with the view of the Tribunal that computer accessories and peripherals such as, printers, scanners and server etc. form an integral part of the computer system. In fact, the computer accessories and peripherals cannot be used without the computer.* Consequently, as they are the part of the computer system, they are entitled to *depreciation* at the higher rate of 60%.

328 ITR 297DHC in case of Yamaha Motor: Passive versus actual user : depreciation section 32: Discarded Machinery

"…9. We, therefore, answer the two questions of law by holding that the ITAT was correct in law in directing the Assessing Officer to re-compute depreciation after reducing the scrap value of the assets which have been discarded and written off in the books of accounts for the year under consideration from the written down value of the block of assets. Actual user of the machinery is not required with respect to discarded machinery and the condition for eligibility for depreciation that the machinery being used for the purpose of the business would mean that the discarded machinery is used for the purpose of the business in the earlier years for which depreciation has been allowed." (ALSO REFER : DHC IN PANACEA BIOTECH 324 ITR 311*AND INSILCO DHC RULINGS)*

SNAP SHOT OF DELHI HIGH COURT RULING/DHC IN INSILCO **CASE 320 ITR 322**

Issue for Consideration	**Proposition Laid Down/Re affirmed**
Whether spare parts of plant and machinery kept as stand by/ ready to use, are eligible to depreciation u/s 32 of the Income Tax Act, 1961?	Held by DHC that: "…**emergency spares which even though ready for use are not as a matter of fact consumed or used during the relevant period, as these are spares specific to a fixed asset and will in all probability be useless once the asset is discarded. In that sense, the concept of passive user which is applied by aforementioned cases to standby machinery will be applicable to emergency/insurance spares**…."

CIT vs Bharat Aluminium Co. Ltd.: *187 Taxman 111*

33. Once we look into the provisions of this angle, answer to the argument of the learned counsel for the Revenue predicated on second proviso to Section 32 shall also be provided. It was her submission that if a particular asset is acquired after 30th September during the previous year and is put to use for a period of less than 180 days in the previous year, the deduction under sub-section (1) of Section 32 is restricted to 50% of amount admissible. On that basis, she had argued that requirement of user of individual asset remains intact. Answer to this argument is that this would be the position in the first year when the particular asset is acquired. With the user, it would meet the requirement of Section 32. In the subsequent years, it is the use of block asset, which becomes the yardstick and not the individual asset already acquired in the earlier years, other than the previous year in which it is first brought into use.

Hyd Bench in The A.P.Paper Mills Ltd. : Held Assessee company derived numerous advantages in the form of increased market shares, acquisition of various licenses, and infrastructural advantages on amalgamation of another company with it, excess

consideration paid by the assessee on amalgamation over an above the excess of assets over liabilities is goodwill which is a commercial right of similar nature as enumerated in section 32 and is eligible for depreciation as intangible asset. 33 DTR 148

"**Even if an asset is described as goodwill but it fits in the description of section 32(1)(ii), depreciation is to be granted on the same; the true basis of depreciation allowance is the character of the asset and not it's description**. : Held In **Skyline Caterers Pvt Ltd Vs ITO (116 ITD 348)..** In this case, the assessee had shown goodwill of Rs 25 lakhs but claimed depreciation on the ground that "the payment under the head goodwill in the books of accounts represented the rights acquired by the assessee under the contract acquired by the assessee which amounted to commercial rights and, therefore, the depreciation was allowable under section 32". This claim did not find favour with the Assessing Officer or with the Commissioner (Appeals) but when the matter travelled to the Tribunal, Tribunal, inter alia, observed that "There is no dispute to the legal proposition that nomenclature given to the entries in the books of accounts is not relevant for ascertaining the real nature of the transaction, as held by the Hon'ble Supreme Court in the case of Kedarnath Jute Mfg Co Ltd Vs CIT (82 ITR 363)" and proceeded to ascertain the true nature of the asset by reference to the agreement between the parties. As a result of the exercise thus conducted by the Tribunal, the grievance of the assessee gainst disallowance of depreciation was partly upheld but that is not really relevant for our purposes; what is relevant for our purposes at present is the Tribunal's finding that depreciation on what is termed as goodwill is not a patently inadmissible claim. **We also share this perception" Delhi Bench of ITAT in Hindustan Coca Cola Beverages 34 SOT 171: APPROVED BY DELHI HIGH COURT IN**

CIT vs Hindustan Coca Cola Beverages (P) Ltd 331 ITR 192

"…21. It is worth noting, the scope of Section 32 has been widened by the Finance (No.2) Act, 1998 whereby depreciation is now allowed on intangible assets acquired on or after 1st April, 1998. As per Section 32(1)(ii), depreciation is allowable in respect of know-how, patent, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature being intangible assets. Scanning the anatomy of the section, it can safely be stated that the provision allows depreciation on both tangible and

intangible assets and clause (ii), as has been indicated hereinbefore, enumerates the intangible assets on which depreciation is allowable. The assets which are included in the definition of 'intangible assets' includes, along with other things, any other business or commercial rights of similar nature. The term 'similar' has been dealt with by the Apex Court in Nat Steel Equipment Pvt. Ltd. v. Collector of Central Excise, AIR 1988 SC 631 wherein the Apex Court has opined that the term 'similar' means corresponding to or resembling to in many aspects. In this regard, it would not be out of place to refer to the decision in Commissioner of Income Tax v. B.C. Srinivasa Setty, [1981] 128 ITR 294 (SC) wherein the concept of goodwill has been understood in the following terms:

"Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in Cruttwell v. Lye 1810 17 Ves 335 that goodwill was nothing more than "the probability that the old customers would resort to the old places" was expanded by Wood V.C. in Churton v. Douglas 1859 John 174 to encompass every positive advantage "that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business". In Trego v. Hunt 1896 A.C. 7 (HL) Lord Herschell described goodwill as a connection which tended to become permanent because of habit or otherwise. The benefit to the business varies with the nature of the business and also from one business to another. No business commenced for the first time possesses goodwill from the start. It is generated as the business is carried on and may be augmented with the passage of time. Lawson in his Introduction to the Law of Property describes it as property of a highly peculiar kind. In CIT v. Chunilal Prabhudas and Co. [1970] 76 ITR 566 the Calcutta High Court reviewed the different approaches to the concept (pp.577, 578):

"It has been horticulturally and botanically viewed as 'a seed sprouting' or an 'acorn growing into the mighty oak of goodwill'. It has been geographically described by locality. It has been historically described by locality. It has been historically explained as growing and crystallizing traditions in the business. It has been described in terms of a magnet as the 'attracting force'. In terms of comparative dynamics, goodwill has been described as the 'differential return of profit'. Philosophically it has been held to be

intangible. Though immaterial, it is materially valued. Physically and psychologically, it is a 'habit' and sociologically it is a 'custom'. Biologically, it has been described by Lord Macnaghten in Trego v. Hunt [1896] AC 7(HL) as the 'sap and life' of the business. Architecturally, it has been described as the 'cement' binding together the business and its assets as a whole and a going and developing concern." A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. and yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in IRC v. Muller and Co.'s Margarine Limited [1901] A.C. 217(HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. and in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business."

22. Regard being had to the concept of 'goodwill' and the statutory scheme, the claim of the assessee and the delineation thereon by the tribunal are to be scanned and appreciated. The claim of the assessee-respondent, as is discernible, is that the assessing officer had treated the transactions keeping in view the concept of business or commercial rights of similar nature and put it in the compartment of intangible assets. To effectively understand what would constitute an intangible asset, certain aspects, like the nature of goodwill involved, how the goodwill has been generated, how it has been valued,

agreement under which it has been acquired, what intangible asset it represents, namely, trademark, right, patent, etc. and further whether it would come within the clause, namely, 'any other business or commercial rights which are of similar nature' are to be borne in mind.

…. 24. It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of Section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person/company/business concern over a period of time. (***Techno Shares and Stocks Ltd. vs CIT 327 ITR 323 Supreme court depreciation allowable on Stock exchange membership card reasoning:*** Therefore, the right of membership, which includes right of nomination, is a "licence" or "akin to a licence" which is one of the items which falls in Section 32(1)(ii) of the 1961 Act. The right to participate in the market has an economic and money value. It is an expense incurred by the assessee which satisfies the test of being a "licence" or "any other business or commercial right of similar nature" in terms of Section 32(1)(ii).)

GIST OF CASE LAWS ON CONCEALMENT PENALTY Y/S 271(1)(c) Income Tax Act, 1961

Delhi High Court order in case of M/S. SAS PHARMACEUTICALS ITA No.1058 of 2009

Thus, no doubt, the assessee has surrendered certain income during the course of survey and discrepancies noticed by the survey team would suggest that the assessee was not maintaining proper accounts in respect to cash, stock and renovation expenses, etc. Therefore, there could be a possibility that but for this survey, the discrepancies brought to the notice of the assessee and physical verification of the stock and other accounts would have gone unnoticed and the assessee might have suppressed in the income tax return as well However, fact remains that it has disclosed this in the return filed by it.

In this context, the question would be as to whether the assessee can be imposed penalty under Section 271(1)(c) of the Act when the assessee has shown this income in the income tax return filed by it and contends that it has voluntarily declared the same in the „regular return filed for the relevant year".

After considering the respective submissions of the learned counsel for the parties, we are of the view that the argument of the learned counsel for the assessee has to prevail as it carried substantial weight. It is to be kept in mind that Section 271(1)(c) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed …It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income tax return filed by it.

M/s Lakhani Footwear Ltd. Date of Decision: 8.2.2011 section 271(1)(c) Income Tax Act, 1961

6. It was submitted that in view of Explanation to Section 271 (1)(c), the burden was upon the assessee to prove that there was no concealment and once the explanation of the assessee was not accepted in quantum proceedings, the penalty ought to have been levied, but the Tribunal had erred in deleting the same.

7. Controverting the aforesaid submissions, learned counsel for the assessee submitted that there was no concealment as all the particulars of the income had been disclosed and the only issue was - whether the said income would fall under the head "income from house property" or "business income". It was

further submitted that this issue was highly debatable and in the case of sister concern of the assessee, the plea which has been raised by the assessee in the present case was accepted and the said income was held to be "business income" in that case. That decision was not challenged by the revenue thereafter. It was also argued that the disallowance on account of depreciation on electric installation, fire fighting, plant and machinery and on building as well as relating to valuation of closing stock would not result in misstatement or concealment of facts. Learned counsel has placed reliance on the findings of the Tribunal and the judgment of this Court in **ITA No. 450 of 2009 (Commissioner of Income Tax, Faridabad v. M/s SSP Ltd.)** decided on 20.8.2009.

8. We have given our thoughtful consideration to the respective submissions of learned counsel for the parties and do not find any merit in the submissions made by learned counsel for the revenue. This Court in **M/s SSP Ltd's case (supra)** considering similar situation had opined as under:-

"A concurrent finding has been recorded on facts that there was valid explanation that the assessee had raised debatable issue for claiming the expenditure and disallowance is no ground for levying penalty. Mere erroneous claim in absence of any concealment or giving of inaccurate particulars is no ground for levying penalty."

M/s. Rubber Udyog Vikas (P) Ltd. Date of decision: 8.2.2011 Section 271(1)(c) Income Tax Act, 1961

The point in issue in this appeal is, whether the Tribunal was justified in deleting the penalty by holding that the claim of the assessee with regard to set off of unabsorbed business losses against capital gains did not amount to deliberate concealment or furnishing of inadequate particulars.

8. The Tribunal held that making incorrect claim would not tantamount to furnishing of inaccurate particulars unless it was established that the assessee had acted with mala fide intention or had claimed deductions being aware of the well settled legal position. Further, a perusal of the findings recorded by the Tribunal shows that the assessee had claimed deductions on account of set off of unabsorbed business losses against the income from the capital gains, which was held not to be mala fide. The Tribunal had observed in plain words that the assessee had disclosed all the particulars along with the return of income and, it was not a fit case for levy of penalty.

9. Learned coursed for the appellant could not show that the above findings of the Tribunal are illegal or perverse in any manner so as to persuade this Court to interfere therewith. 10. Accordingly, finding no merit in the appeal the same is dismissed.

M/s. VSB Investment Pvt. Ltd. through its Director Manoj Sharma Date of decision: 29.3.2011 *Section 271(1)(c) Concealment penalty*

10. A perusal of the order of the Tribunal, especially the observations contained in para 9 thereof, shows that in the opinion of the Tribunal, the judicial enunciations relied upon by the CIT(A) for deleting the penalty, were not applicable to the resolution of the controversy in hand and were clearly distinguishable on facts, and it was a clear case of non-compliance of Explanation-1 to Section 271(1)(c) of the Act. 11. No perversity or illegality could be pointed out by the learned counsel for the assessee in the findings recorded by the Tribunal that may persuade this Court to interfere therewith.

12. Referring to the judgment in **Reliance Petroproducts (P) Ltd's case (supra)** relied upon by the learned counsel for the appellant, suffice it to notice that the said case was not dealing with Explanation 1 to Section 271(1)(c) of the Act which is applicable in the present case and, therefore, it does not come to its rescue for the reason that the facts in the said judgment and that of the case in hand are noticeably different and have no application to the controversy directly in issue here.

13.. In view of the above, the substantial questions of law as claimed do not arise and there being no merit in the appeal, the same is dismissed.

(The Tribunal while embarking on the above issue observed that in the instant case the facts relating to disallowance of loss as per the provisions of sub-section (7) of Section 94 of the Act were not disclosed by the assessee in the return filed, and even if some explanation was offered by the assessee, the same was not bona fide because no reason had been given by the assessee for not making disallowance under Section 94(7) of the Act.; The Tribunal on analysis of the matter observed that it could not be said that the assessee was not aware of the provisions of Section 94(7) of the Act. It was noticed that the

assessee-company had been availing the services of a Chartered Accountant and in spite of that no reply was filed by the assessee on the issue why the provisions of Section 94(7) had not been complied with while working out the income shown in the income tax return)

Sh. Subhash Mittal Date of Decision: 15.2.2011 Concealment penalty section 271(1)(c)

The point for consideration in this appeal is whether the Tribunal was justified in holding that the alleged gift received by the respondent-assessee from a Non-resident Indian with whom the assessee had no relationship, was a genuine gift and consequently deleting the penalty imposed under Section 271(1)(c) of the Act.

5. The revenue had approached this Court by filing **ITA No. 356 of 2006 (Commissioner of Income Tax, Karnal v. Sh. Subhash Mittal)** challenging the legality and validity of alleged gift received by the assessee from Shri Sanjeev Gupta, wherein it has been held that the alleged gift from NRE, Sh. Sanjeev Gupta was not a genuine gift. Once that is so, the only conclusion is that the assessee had furnished inaccurate particulars of his income and the order of the Tribunal deleting penalty is unsustainable in law. Accordingly, it is held that the assessee had concealed the particulars of the income and was liable for penalty under Section 271(1)(c) of the Act. Further, the issue regarding recording of satisfaction for initiation of penalty proceedings in the course of assessment proceedings stands concluded against the assessee in the judgment of this Court reported in **Commissioner of Income Tax v. Pearey Lal & Sons (EP) Ltd. [2009] 308 ITR 438.**

6. In view of the above, the substantial questions of law are answered in favour of the revenue and against the assessee. The appeal is allowed.

P&H High Court M/s Sethi Industries Corporation Date of Decision: 6.4.2011 Concealment penalty

The point in issue is whether the penalty imposed under Section 271(1)(c) of the Act by the Assessing Officer and sustained by the Tribunal was justified.

Thus, the assessee had claimed loss of Rs.10,00,000/- twice over i.e. one in the return filed for the assessment year 1998-99 and second time in the return filed for the assessment year 1999-2000. The Tribunal while upholding the penalty under Section 271(1)(c) of the Act had recorded that the Explanation furnished by the assessee was not bonafide and the assessee was unable to substantiate its version.

16.3 Having considered the assessee's explanation, we are of the view that the default committed by the assessee is not a technical or venial default, as substantial tax is involved. There is no doubt that the assessee had claimed the same amount twice over, second time in this year. Having claimed the amount in assessment year 1998-99, there was no reason for the assessee to claim the same amount in this year again.

We are of the view that the instant case has been considered by both the lower authorities in the right perspective and, therefore, the penalty was rightly levied and upheld respectively by them. Thus, we do not find any reason to interfere with the order of the learned CIT(A)."

P&H HIGH COURT Careers Education & Infotech Pvt. Ltd Date of decision: 31.3.2011

Learned counsel for the appellant submits that concealment was rightly inferred and penalty was justified.

We are unable to accept the submission. No doubt even voluntary surrender of concealed income may not exonerate the assessee of its liability to pay penalty if it can be held that there was concealment of income or furnishing of inaccurate particulars. In the present case, the Tribunal has recorded a categoric finding that there was no material to infer concealment of income or furnishing of inaccurate particulars. The contention that in every case where surrender is made inference of concealment of income must be drawn under

Section 58 of the Evidence Act cannot be accepted. Judgment of the Madras High Court also does not lay down such wide proposition. The observations therein are on facts of that case. The said judgment is, thus, distinguishable. *(Madras High Court in **P. Govindaswamy v. CIT** {2000} 244 ITR 510. Therein, it was held that since under Section 58 of the Evidence Act, 1872, admitted facts need not be proved, once the assessee made surrender, it could be taken to be admitted that the assessee had concealed income; Hon'ble Supreme Court in the case of Suresh Chand Mittal – 251 ITR 9; Hon'ble Punjab & Haryana High Court in the case of Siddharth Enterprises, vide order dated 14.07.2009)*

*P&H high court in **Dabwali Transport Company** 15.3.2011*

Facts: The Assessing Officer, during the course of assessment, disallowed the labour expenses claimed by the assessee in respect of loading and unloading of wheat bags for Haryana Warehousing Corporation, FCI and other departments. It was observed that the assessee failed to produce evidence in support of the claim for the expenses and to rebut the information collected by the Assessing Officer that the charges paid were at a lesser rate...

Plea: Contention raised on behalf of the appellant/revenue's counsel is that addition on account of disallowance of expenses having been upheld by this Court, burden of proof was on the assessee to show that expenses were claimed on valid basis, in absence of which, it could be presumed that the assessee had consciously furnished incorrect particulars to conceal income by deliberately claiming excessive expenses.

HELD : We are unable to accept the submission….No doubt the assessee claimed expenses which could not be substantiated and on that ground, the same were disallowed and disallowance was partly upheld upto this Court, but mere fact that the assessee could not furnish evidence in support of the expenses claimed, was not by itself enough to hold that the assessee had furnished incorrect particulars of income consciously….As held by the Tribunal in the order reproduced above, the books of account of the assessee were duly audited and profit declared by the assessee was accepted by the department for the previous year. Substantial part of the expenses claimed was duly explained by the assessee..

Bombay High Court orders GIST:

K. Raheja Corporation P. Limited **INCOME TAX APPEAL NO.1260 OF 2009 8th August, 2011.**

Whether the Income Tax Appellate Tribunal was justified in deleting the disallowance of interest amounting to Rs.2.79 crores made by the assessing officer under Section 14A of the Income Tax Act, 1961 is the question raised in this appeal.

In the assessment year in question, the assessee had claimed deduction of interest amounting to Rs.8.70 crores on borrowed funds utilized for the business. Out of the said amount of interest, the assessing officer disallowed interest amounting to Rs.2.79 crores on the ground that the said amount was relatable to earning dividend income which are exempt under Section 10(33) of the Income Tax Act, 1961 (as it then stood) and hence disallowable under Section 14A of the Act.

Save and except contending that Section 14A was not on the statute book when the Income Tax Appellate Tribunal passed orders in the assessment years prior to the assessment year in question, Counsel for the Revenue could not point as to how interest on borrowed funds to the extent of Rs.2.79 crores was attributable to earning dividend income which are exempt under Section 10(33) of the Act (as it then stood). Therefore, in the facts of the present case, in the absence of any material or basis to hold that the interest expenditure directly or indirectly was attributable for earning the dividend income, the decision of the Income Tax Appellate Tribunal in deleting the disallowance of interest made under Section 14A of the Act cannot be faulted. 6. In the result, we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

ITA No.2502 to 2504/Ahd/2010: Seasons Hotels Pvt. Ltd (2(22)(e)) Deemed div.

9.1 Without prejudice to above, we are of the view that the provisions of section 2(22)(e) are not applicable, if the transactions are for business expediency as held in the following cases:

DCIT –vs- Lakra Bros. Reported in 106 TTJ 250
CIT-vs- Rajkumar reported in 23 DTR 304
Bharat C. Gandhi –vs- ACIT reported in 178 Taxman 83
In the impugned order, the ld. CIT(A) also accepted the plea of the assessee that these transactions are in the nature of inter-corporate deposits (ICDs) which was extended by the lender to the assessee for business expediency and therefore, within the purview of section 2(22)(e) of the I.T. Act, 1961. This view adopted by the ld. CIT(A) is also fair and reasonable. Therefore, on this ground also, in our considered opinion,

the ld. CIT(A) rightly held that addition cannot be made for all these three assessment…

Delhi ITAT in case of M/s Hidrive Finance Ltd. I.T.A. No.766/D/2011 (Sec. 14A)

The only ground taken by the revenue in this appeal is that the learned CIT(A) erred in reducing the addition to `22,214/- from `11,95,821/-, made by the Assessing Officer by invoking the provision contained in section 14A of the Income-tax Act, 1961.

3. We have considered the facts of the case and submissions made before us. We have ascertained that the assessee has not incurred any expenditure by way of interest in this year by examining the profit and loss account. We have also ascertained that the total expenditure claimed in this year amounts to `2,29,139/-. Therefore, by no stretch of imagination, expenditure of `11,95,821/- can be attributed to the earning of dividend income. The findings of the learned CIT(A) that the provision contained in Rule 8D is applicable to the proceedings of assessment year 2008-09 and subsequent years is supported by the decision in the case of Godrej & Boyce Manufacturing Company Limited Vs. DCIT, (2010) 194 Taxman 203 (Mumbai). He has taken into account various facts and rightly attributed the expenditure of `22,214/- only towards earning of dividend income. We are of the view that his order is right on facts and in law. 4. In result, the appeal is dismissed.

BHC M/s.Anil & Company **INCOME TAX APPEAL NO.269 OF 2010**
36(1)(iii)

Whether in the facts and circumstances of the case and in law, the Tribunal is right in deleting addition of interest of Rs.19,56,133/without any justification as the said advances to M/s.Shree Kedarling Udyog have not been justified by the respondent ?

As regards question (e) is concerned, addition of interest made by the assessing officer was deleted by the Tribunal by recording a finding of fact (see para11 of the judgment) that the assessee has commercial relationship with M/s.Shree Kedarling Udyog, sister concern of the assessee and the assessee was availing certain facilities of the said unit namely certain machineries and, therefore, the assessee had advanced money to the sister concern for the purpose of acquiring the machineries. The Tribunal has recorded a finding of fact that the assessee was using factory premises of the sister concern at a rate lower than the market rate, which is not disproved by the assessing officer. In these circumstances, in our opinion, the decision of the Tribunal in deleting the interest is based on finding of fact. Accordingly, question (e) is answered in favour of the assessee and against the Revenue

Ass. Fav. Section 36(1)(iii) disallowance of interest: M/s.Raptakos Brett & Co. **INCOME TAX APPEAL NO.2598 OF 2010** :The finding of fact recorded by the Income Tax Appellate Tribunal in the present case is that the investment in units and tax free bonds were not made by the assessee during the current year, but were made in the earlier assessment years, wherein no disallowance of interest on borrowed funds have been made. It is further held that if no disallowance of interest on borrowed funds is made in the year in which the investments are made, then there is no reason as to why disallowance of interest on borrowed funds should be made in the assessment year in question. In these circumstances, we see no reason to interfere with the order of the Tribunal. The appeal is accordingly dismissed with no order as to costs. **INCOME TAX APPEAL NO.2598 OF 2010 29th July, 2011.**

ITA no. 4099/Mum./2010 M/s. K. Raheja Corp. Pvt. Ltd. Mumbai ITAT (Sec. 14A)

The increase in non-interest bearing funds was ` 50,91,00,000 and whereas, the investment in shares increased by ` 14,44,00,000. Thus, it cannot be said that any interest bearing funds were diverted for investment in shares. The Tribunal, in assessee's own case for assessment year 2002-03, had held that the decision of Special Bench of the Tribunal in ITO v/s Daga Capital Management Pvt. Ltd. (2008) 119 TTJ (Mum.) (SB) 289, is not applicable to the facts of the case. In any event, the said Mumbai Special Bench decision in Daga Capital Management Pvt. Ltd. (supra), was reversed by the Hon'ble Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. v/s DCIT, (2010), 328 ITR 081 (Bom.). Further, the Hon'ble Bombay High Court in CIT v/s Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom.), has laid down that if there are interest free funds as well as interest bearing funds, a presumption could arise that the investments would have been made out of interest free funds. As in this case, the interest free funds are far in excess of the investments, we

uphold the order of the Commissioner (Appeals) that no amount of expenditure by way of interest is disallowable under section 14A of the Act. Consequently, these grounds are dismissed.

M/s HDFC Bank Ltd 29th, day of June 2011.Sec. 14A

4.1 In order to disallow the proportionate expenditure u/s 14A, there should be some proximate course and the nexus of the said expenditure with the tax exempt income. When it has been brought on record that no expenditure actually incurred for earning the exempt income, then the provisions of sec. 14A cannot be invoked. 4.2 In the case in hand, undisputedly, the assessee's own funds and noninterest bearing funds are more than the investment in the tax free securities then there is no basis for deeming that the assessee has used the borrowed funds for investment in tax free securities. Accordingly, on this factual aspect, we do not find any merit in the contention of the ld DR. Further, it is to be noted that it is not the case of investment in tax free securities every year; but the investment in the earlier years has been carried forward as it is evident from the particulars where the balance at the end of the year shows that the investment is appearing in all the earlier years. Therefore, we do not find any error or illegibility in the order of the CIT(A), qua, the issue of disallowance of interest u/s 14A.

Mumbai ITAT in M/s. J.P.Morgan India Pvt.Ltd. ITA No.6919/M/2004 20.04.2011 (Sec. 14A)

6.2 We have perused the records and considered the matter carefully. The dispute is regarding disallowance of expenditure in relation to dividend income received by the assessee. The shares of KCL from which dividend had been received were acquired during the F.Y.1996-97 out of own funds. This claim is not contraverted before us. Even the AO has not given any finding that the shares were acquired out of borrowed funds. Therefore there is no interest expenditure involved. However as held by Hon'ble High Court of Mumbai in case of Godrej & Boyce Manufacturing Co. Ltd, (supra) both direct and indirect expenses have to be considered for disallowance on a reasonable basis. Though the assessee in this case has received dividend only from one company some indirect expenses on collection of dividend and accounting of income etc have to be incurred even though this may be only nominal. In our view on facts of the case it will be reasonable to estimate such expenses at Rs.10,000/- . We accordingly set aside the order of CIT(A) on this point and confirm the addition to the above extent.

Mumbai ITAT in M/s.The Development Bank of Singapore ITA No.1787/M/2004 Assessment Year 1999-2000 20.04.2011. (Sec. 14A)

Respectfully following the said decision we have to hold that gross interest will be eligible for deduction under section 10(15)(iv). As regards the applicability of section 14A to which oblique references have been made by the AO in some of the years, we find that this aspect had been considered by the CIT(A) in A.Y.1998-99 who gave a clear finding that there were no nexus between borrowed funds and the investment. He therefore allowed the claim fully in A.Y.1998-99 and the said decision of the CIT(A) was accepted by the revenue. The interest income under consideration in these years is in respect of the same investment made in A.Y.1998-99 and therefore there being a finding that the investment in A.Y.1998-99 was out of own fund no interest expenditure can be attributed to the earning of income from the same investment in these years. This view gets support from the judgment of Hon'ble High Court of Karnataka in case of Sridev Enterprises (supra) in which the Hon'ble High Court held that nature and status of the investment on the first day of the accounting year was the same as on the last day of previous year and if in the previous year, the same was explained out of own fund, the revenue could not be permitted to take a different stand in the subsequent years. Therefore even if the provisions of section 14A applied, no disallowance could be made. We accordingly see no infirmity in the order of CIT(A) allowing the claim of the assessee and the same is therefore upheld

G M M Pfaulder Ltd, B ITA No.1241/Ahd/2006 Section 14A & section 36(1)(iii) disallowance of expenses on AD-HOC basis *exhaustive analysis*

We have considered the rival submissions and perused the material on record. In our considered view, the matter would go to the file of AO as per the decision of Hon. Bombay High Court in the case of Godrej Boyce Mfg. Co. Ltd. (supra) only when it is held that some amount is required to disallowed as there is a nexus between the exempted income and investment, i.e. if Revenue is able to show that interest bearing capital has been invested in shares but where no such nexus is established the question of determining any disallowance does not arise and, therefore, matter need not be sent to the file of AO as no determination of any disallowance would be necessary. In the present case we notice that loan funds have decreased this year as compared to earlier years. Even though investments have increased from Rs.940.32 lacs to Rs.1008.51 lacs but such increase in investment cannot be linked to any borrowed funds this year as assessee has in fact not borrowed any additional fund this year. Prior to the decision of Hon. Supreme Court in the case of Hon'ble Supreme Court in S.A. Builders vs. CIT 288 ITR 1(SC) onus was considered on the assessee to show the nexus between the interest free funds and investment on which no income is earned. After S.A.

Builder's case (supra) onus is considered shifted to the Revenue and AO has to show that interest bearing capital alone were invested in investment on which no income was earned. Hon. Supreme Court in the case of Munjal Sales Corporation vs. CIT (2008) 298 ITR 298 (SC) held where assessee had sufficient profits in the current year then interest free advances can be considered to be flowing from such profits. Hon'ble Bombay High Court in CIT vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom) held that if there are fund available both interest free and interest bearing, then a presumption arise that investment were out of interest free funds generated or available with the assessee. If the interest free funds were sufficient to meet the investment no disallowance of interest paid on borrowed funds would be necessary. Once such presumption is established claim of interest was allowable.

15. There is another aspect of the matter. If the assessee has made investment in subsidiaries out of mixed funds and for commercial expediency then no interest out of payment made on borrowed funds can be disallowed as held in S. A. Builders Ltd. vs. CIT (2007) 288 ITR 1 (SC). Hon'ble Punjab & Haryana High Court in CIT vs. Hero Cycles Ltd. (2010) 323 ITR 518 (P & H) held that no disallowance out of interest payment is permissible if AO does not establish nexus between the

expenditure incurred and income generated.

16. Since assessee had sufficient profits generated this year and it had mixed funds and no nexus is established by the AO as to whether investment was made out of interest bearing funds, disallowance of interest cannot be made. Similarly no disallowance out of administrative expenditure can be made as there is no direct nexus. As a result, this ground is allowed.

Mumbai ITAT in Mrs. Pallavi Shardul Shroff ITA no.3511/Mum./2010 Now, coming to the application of provisions of section 14A, the firm in which the assessee is a partner, is not paying remuneration and conveyance allowance or car allowance separately. As a matter of policy, a consolidated sum is paid as remuneration and the partner is required to incur expenditure on its own. Under these circumstances,

in our opinion, the expenditure incurred wholly and exclusively for the purpose of earning remuneration which is being brought to tax under section 28(v). The share of income of the firm has no nexus with the expenditure incurred on car by the assessee. All the expenditure of the firm are booked in the firm's account and the expenditure incurred by the partner on car cannot be held to have a nexus in the earning of share income from the firm. Hence, proportionate disallowance under section 14A, in our opinion, is uncalled for. Thus, the proportionate disallowance is disallowed.

Pradip Kumar Malhotra Judgment on: August 2, 2011. **I.T.A. No.219 of 2003 Deemed dividend Cal HC**

After hearing the learned Counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase "***by way of advance or loan***" appearing in sub-section (e) must be construed to mean those advances or loans which a share holder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right

to participate in profits) holding not less than ten per cent of the voting power; but if such loan or advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a share holder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of share holders would come within the purview of Section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such share holder.

In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its share holder but to protect the business interest of the company. The view we propose to take finds support from the two decisions, one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr. Khaitan as indicated earlier.

Gist of order in case of Sunil Chopra: ITA No.1879/2010 11.05.2011 (deemed div. section 2(22)(e) HELD

"(a) Whether ITAT was correct in law in deleting the additions of Rs.10,20,000/-, Rs.15,40,000/- and of Rs.20,70,000/- being the loans taken from M/s. Sisbro Promoters Pvt. Ltd., M/s. Fitwell Fashion Fabrics Pvt. Ltd. and M/s. National Capital Region Pvt. Ltd., made by the AO, treating the same as deemed dividend under section 2(22)(e) of the Act? (b) Whether ITAT was correct in law in deleting the addition holding that the money was taken by the assessee in the line of his business and therefore, could not be treated as deemed dividend?

With regard to the amount of `34,75,780/- received from M/s National Capital Region Electronics Pvt. Ltd., the assessee stated that the said amount was received against sale of property in terms of agreement dated 18th September, 2003. Here it may be noted that the companies are closely-held companies in which the only Directors are none other than the family members of the assessee.

The AO recorded the said agreement to be sham and rightly so, inasmuch as the agreement was executed on 18th September, 2003 and the handing over of the property was to be done before 31st December, 2008. In any case, this property was still being reflected in the balance sheet of the assessee as on 31st March, 2005, even though the agreement was entered on 18th September, 2003. The CIT(A) also disbelieved the claim of the assessee on this count. The Tribunal in this regard has recorded that the assessee was claiming this advance for investment in his books of accounts and the AO has not disputed this. Apparently, this was a perverse recording by the Tribunal inasmuch as it has been seen that AO and CIT(A) have categorically recorded this transaction as colourable device. It is unbelievable that an agreement was executed on 18th September, 2003 and the payment was made, but the possession of the property was to be handed over after more than five years. Even the property continued to be reflected in the balance sheet of the assessee after two years of the agreement.

Similarly, in respect of `27,90,125/- shown as loan/advance from M/s TSM Polymers Pvt. Ltd., the assessee had replied to the AO that this was received against sale of property under the terms of the agreement dated 18th September, 2003. With regard to this entry also, the Tribunal made a sweeping observation that the assessee was claiming these as advance for investment in his books of accounts and this aspect was not disputed by the AO. He also observed that the business of the assessee is earning brokerage from the business of real estate and this demonstrated that he had taken the money in the line of his business. The observation of the Tribunal that the AO had not brought any contrary material on record was equally perverse and against the facts recorded by the AO. In this regard also, it may be noted that though the agreement was executed on 18th September, 2003 for the sale of the property, but the property continued to be reflected in the balance sheet of the assessee as on 31st March, 2005. The AO rightly recorded both these aspects to be not covered by the exception to deemed dividend as contemplated under Section 2(22)(e). Consequently, he rightly held these transactions as sham and treated them as deemed dividend of the assessee under Section 2(22)(e).

…With regard to the payments made by the companies in which the assessee held shares, to the other companies in which he had substantial interest and which the assessee was taking to be towards allotment of shares, the AO recorded that the assessee was required to produce the certificate from the Registrar of Companies in support of his contention that shares had indeed been allotted to the investing companies. However, no evidence could be produced

regarding the allotment of shares. Consequently, AO treated these amounts of advances/ loans also as deemed dividend under Section 2(22)(e) in the hands of assessee. In this regard also, the observations of the Tribunal are not only unwarranted but devoid of any basis. It seems to have taken as correct what was stated by the assessee before it….

Though these were questions of facts which were recorded by the authorities below, but since great perversity and infirmity was pointed out by the learned counsel for the Revenue in the findings and observations recorded by the Tribunal, we chose to examine the factual matrix as noted above.

10. For all these reasons, the impugned order is not sustainable. Consequently, we answer both the questions in negative, i.e., in favour of the Revenue and against the assessee

ANKITECH PVT LTD. +ITA No.462 of 2009 with ITA Nos. 2087/2010, 901/2010, 902/2010, 903/2010, 960/2010, 1327/2010, 1436/2010, 1502/2010, 1865/2010, 461/2010, 998/2009, 1421/2009, 1618/2010, 1758/2010, 1978/2010, 622/2011, 623/2011, 270/20111588/2010, 211/2010, 352/2010 & 2014/2010. *Pronounced On: May 11, 2011 Deemed dividend 2(22)(e)*

It is rightly pointed out by the Bombay High Court in ***Universal Medicare (P) Ltd.*** **(supra)** that Section 2(22)(e) of the Act is not artistically worded. Be as it may, we may reiterate that as per this provision, the following conditions are to be satisfied:

(1) The payer company must be a closely held company.

(2) It applies to any sum paid by way of loan or advance during the year to the following persons:

(a) A shareholder holding at least 10 of voting power in the payer company.

(b) A company in which such shareholder has at least 20% of the voting power.

(c) A concern (other than company) in which such shareholder has at least 20% interest.

(3) The payer company has accumulated profits on the date of any such payment and the payment is out of accumulated profits.

(4) The payment of loan or advance is not in course of ordinary business activities

When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction .. The Revenue wants the deeming provision to be extended which is illogical and attempt is to create a real legal fiction, which is not created by the Legislature. We say at the cost of repetition that the definition of shareholder is not enlarged by any fiction.

Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in Section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders …

Finding of facts found by the CIT (A) and the Tribunal are that the transaction in question was a business transaction which had benefitted both the assessees and M/s Golden, and that the transaction did not represent giving any loan or advance simplicitor by M/s Golden to the assessee. 36. We are of the opinion that under no circumstances, the provisions of Section 2(22)(e) of the Act could be invoked. This appeal is accordingly dismissed.

Vinit Arun Phatak, Mumbai INCOME TAX APPEAL NO.4198 of 2009 15th June 2011

The question raised in this appeal is whether the Tribunal was justified in deleting the addition of Rs.79,31,016/confirmed by the C.I.T.(A) as deemed as dividend under Section 2(22)(e), Income Tax Act, 1961?

On further appeal, the Tribunal has deleted the additions sustained by the C.I.T.(A) by holding that if the Company, Omega Telecommunication Systems Limited thinks it fit to give security deposit for taking office premises on lease from the assessee, which is being acquired by the assessee, the security deposit given cannot be said to be a loan. In the present case, the genuineness of the transaction is not in dispute and in fact the asseessee on acquisition of the property has given it on lease to the Company, Omega Telecommunication Systems Limited. In this view of the matter, in our opinion, the decision of Tribunal is based on finding of facts and does not give rise to substantial question of law. The appeal is dismissed.

GIST OF DEEMED DIV. 2(22)E) orders:

In matter of Salrpuria Properties Pvt Ltd in context of deemed/dividend u/s 2(22)/(e) and related TDS obligation u/s 194, in ITA 401/2009, it is held by **Karnataka High Court** that payment to sister concern not shareholder in assessee co. as accommodation/loan-

advance, do not attract section 194 TDS. Further, relevant are detailed orders of delhi ITAT in S. Joginder Singh; International Land Development (P) Ltd (of Apr & May'11) wherein it is resp. held that:

a) ***Delhi bench ITAT*** *order in* S. Joginder Singh :The facts are that the assessee received an aggregate sum of Rs. 1,43,96,908/- from Gururakha Plastics Pvt. Ltd., in which he has substantial interest and in which public are not substantially interested. The monies were received in pursuance of collaboration agreement dated 01.04.2005, under which the assessee and the company agreed for development of plots of land for construction of commercial buildings The company was to pay a total sum of Rs. 4.00 crore to the assessee in lieu of which the vacant possession of plots of land and construction thereon was to be handed over to the company. This agreement was acted upon. The company passed a resolution to carry on the business of real estate developer, with the result that it became one of the main objects of the company. The question is-whether, the amounts so received are liable to be taxed as dividend under the provision contained in section 2(22)(e)?

5.4 Coming to the facts, the monies were advanced in pursuance of the memorandum of agreement for developing plots of land into commercial buildings, one of the objects of the company. The plots belonged to the assessee which were to be handed over to the company for construction as per approved plans. It was the business of the company to undertake real estate construction business. In a way, the assessee became a partner with the company to carry on real estate business, during the course of which the advances were received. In such a situation, the advances cannot be deemed to be dividend.

b) *Delhi bench ITAT order in* International Land Development (P) Ltd: *15. With regard to payment made to Shri Alimuddin, the assessee submitted before the learned CIT(A) that the payment made to Shri Alimuddin was not in the nature of any loan or advance but was made in the regular course of assessee's business in terms of MoU for the acquisition of land on behalf of the assessee) and, therefore, the payment is not covered by Section 2(22)(e) of the Act. In support of the contention that the money advanced in the regular course of business cannot be treated as deemed dividend, number of decisions were cited by the learned counsel for the assessee before the learned CIT(A).*

18. It is not in dispute that the moneys advanced in the regular course of business cannot be treated as deemed dividend as held in the following cases:-

(i) CIT Vs. Ambassador Travels (P) Ltd. – 173 Taxman 407; (Del).(ii) CIT Vs. Raj Kumar – 181 Taxman 155 (Del). (iii) CIT Vs. Nitin Shantilal Parikh – Income Tax Reference No.66 of 1999 (Gujarat). (iv) CIT Vs. Creative Dyeing & Printing (P) Ltd. – 184 Taxman 483 (Del). (v) CIT Vs. Sunil Sethi – ITA 569/2009. (vi) Atul Mittal in ITA No.3863/Del/2002 (ITAT Del). (vii) Nigam Chawala (page 303 of the paper book).

19. In the case of CIT Vs. Sunil Sethi – ITA No.569/2009, the Hon'ble High Court of Delhi has held that since the amount of `30 lakhs which was given to the assessee was in the nature of imprest payment, the same could not be treated as deemed dividend u/s 2(22)(e) of the Act. In this case, a sum of `30 lakhs was given to the assessee for the purpose of making advance in respect of certain land dealings which were proposed to be entered into by the company through the assessee and the Tribunal noted that no material was brought on record to suggest that whatever was explained by the assessee was incorrect. 20. In the case of CIT Vs. Creative Dyeing & Printing (P) Ltd. – 184 Taxman 483, the Hon'ble High Court has held that the amount advanced for business transaction between the parties would not fall within the definition of deemed dividend u/s 2(22)(e) of the Act. In this case, the Hon'ble Delhi High Court has followed its own decision in the case of CIT Vs. Raj Kumar – 181 Taxman 155 (Del). In the course of hearing of this appeal, the learned DR has not been able to controvert the fact that the payment was made by the assessee to Shri Alimuddin under MoU for the acquisition of land on behalf of the assessee nor this fact was disputed by the AO in his remand report.
HELD/CONCLUSION:

The AO stated merely in the remand report that he has made the addition within the ambit of Section 2(22)(e) of the act. It is thus clear that no adverse comments have been given by the AO in respect of the agreements and memorandum of undertaking executed by the parties on which reliance was placed by the assessee. 22. In the light of the discussions made above, we, therefore, hold that CIT(A) was justified in vacating the demand in respect of payment made to M/s ALM Infotech City (P) Ltd. as well as to Shri Alimuddin. ALSO RELEVANT CAN BE:

a) Case of SUNIL CHOPRA **HELD Delhi High Court**

Whether ITAT was correct in law in deleting the additions of Rs.13,00,000/- being the loans taken from M/s.National Capital Region Electronics Pvt. Ltd., treating the same as deemed dividend under Section 2(22)(e) of the Act?

We may record that the assessee had received the aforesaid amount of Rs.13,00,000/- from National Capital Regional Electronics Pvt. Ltd. as share application money. The CIT(Appeal), on that ground, deleted the addition as it was not loan or advance. The ITAT has upheld the same. We do not find any infirmity in the orders passed by the CIT(Appeal) as well as the ITAT. More particularly when we take note of the fact that the CIT(Appeal) has stated that this amount of share application money cannot be construed as loan or advance

and hence would fall beyond the definition of Section of 2(22)(e) of the Income Tax Act. This appeal is accordingly dismissed.

b) Allahabad High Court **Dt.01.04.2011 Income Tax Appeal No.99 of 2003:** Shyama Charan Gupta: HELD Deemed dividend Advance against Salary revenue fav order We do not find any error in the findings recorded by the Tribunal that the advance towards salary, which was due to the petitioner and was credited to his account every month could not be treated as deemed dividend, but that the advance of Commission on profits over and above that amount drawn during the course of the year before the profits was determined and accrued to the petitioner, would be treated as deemed dividend subject to tax. *The amount was not treated as separate addition in the personal hands of the assessee*

also refer Gujarat High Court cash loan/deposit penalty not apply to share application money as u/s 269SS/269T: 271D/271E:

ASIAN PETROPRODUCTS & EXPORTS LTD {B}

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that 'for the purpose of levy of penalty u/s. 271D, 'deposit' does not include any amount received from the director or a share holder of a private limited company?" held

The Tribunal upheld the order of CIT [A] deleting penalty on the ground that the money received by the assessee was not by way of loan or advance but towards share application money. **This factual finding is not disputed before us. That being the position, we find no error in the order of the Tribunal deleting penalty u/s. 271D of the Act, which is required to be imposed in case there is breach of provisions contained in Section 269SS of the Act.**

also refer: mum bench ITAT in seamist 95 TTJ 201; BHC in Paradise Multimedia Ltd on section 2(22)(e)

Guj High Court orders

SUBMERSIBLES LTD TAX APPEAL No. 868 of 2010 Section 14A : "Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by CIT (A) in deleting the disallowance of Rs. 13,82,778/= made under Section 14A of the Act ?"

As can be seen from the treatment accorded to the said issue by the Tribunal, the Tribunal decided on the basis of provisions contained in Section 14A of the Income-Tax Act, 1961 {"Act" for short} which states that no deduction could be allowed in respect of expenditure incurred in relation to income which does not form part of the total income under the said Act. It concluded that the funds of the assessee-respondent were mix funds in as much as investment was made in the preceding years and there was no fresh investment during the year under consideration. It also did not agree with the findings of the Assessing Officer that the investment was made by the assessee out of borrowed funds. Thus, from the entire gamut of facts, the Tribunal held that there was sufficient surplus funds available with the assessee to invest and there was no nexus that could be established with the expenditure incurred by the assessee for earning the dividend income. HELD:

Logic given for conclusion requires no interference. It was on the basis of evidence which was presented before the Tribunal that the conclusion had been arrived at with regard to availability of the free-funds for investment, and therefore, this Appeal merits no consideration. Accordingly, the present Tax Appeal is dismissed with no order as to costs

HIPOLINE LTD TAX APPEAL No. 870 of 2010 *"Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by CIT(A) deleting the addition of Rs.53,027/- made under Section 14A of the Act?"*

Upheld : The Tribunal was of the opinion on examination of the record that the assessee-respondent had substantial share capital and reserves, and therefore, after discussing at length facts brought on record as well as order of the CIT(A), Tribunal concluded that it was not possible to hold that

the investment in shares was made out of interest bearing funds and it concurred with order of the CIT(A), dismissing that ground of the Revenue.

SHREE MAHALAXMI TRANSPORT CO TAX APPEAL No. 1038 of 2009 ***TDS Section 194C vs 194I****: Held 9. Examining the facts of the present case in the light of the aforesaid statutory provisions, from the findings of fact recorded by the Commissioner (Appeals) it is apparent that the assessee has not taken the dumpers on hire/rent from the parties in question. The assessee has given contracts to the said parties for the transportation of goods and has not taken machineries and equipment on rent. In the circumstances, the Commissioner (Appeals) was justified in holding that the transactions in question being in the nature of contracts for shifting of goods from one place to another would be covered as works contracts, thereby attracting the provisions of section 194C of the Act. That since the assessee had given sub-contracts for transportation of goods and not for the renting out of machineries or equipments, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194I of the Act would not be applicable. The Tribunal was, therefore, justified in upholding the order passed by the Commissioner (Appeals).*

Mum ITAT Mr. Chirag Mahesh Bhakta Mumbai ITAT ITA No. 4138/Mum/2010 24th August 2011

6. We have examined the issue. It is on record that the said agent was rendering services in the field of booking orders and examining the creditworthiness of the buyer and overseeing the payment to assessee in the business of export of cycle and cycle parts. The said Shri Mahendra Singh Jamnadas is a resident of Portugal but was appointed as agent for Mozambique, South Africa. There is no evidence on record that these services are rendered in India.

On similar facts in the case of Armayesh Global vs. ACIT 45 SOT 69 (Mum) the issue was considered:

"HELD: The overseas agent did not render any services in India. It had no place or permanent establishment in India. It worked abroad and procured orders. The orders were sent directly by the foreign purchasers remitted to the assessee in India and even the payment for export was received by the assessee in foreign currency directly from foreign purchasers and the commission was paid to foreign

agent thereafter as a percentage of sales in terms of the agency agreement. The payment made to overseas commission agent by the assessee was not for technical/managerial services. Therefore, in the absence of any service having been rendered in India, no part of the commission paid to the overseas agent could be said to be chargeable in India and in the absence of any income chargeable to tax in India, question of applying section 195 did not arise." .,.. Similar view was also taken in the case of Divi's Laboratories Ltd. 10 ITR (Trib) 501 (Hyd) ..

8. Since the amount of commission paid was not taxable in India as no

services were rendered in India, mere remittance to non-resident does not

attract provisions of section 195(1) as held by the Hon'ble Supreme Court in

the case of GE India Technology Centre P. Ltd. vs. CIT 327 ITR 456. In view

of this, we do not see any reason to interfere with the orders of the CIT(A).

Comments of author of email:

(Also see Delhi ITAT order in case of Indo Count Industries Ltd on **Section 40(a)(i) Foreign Party Commission payment Sec. 195 TDS etc held :** *4.2 We have considered the facts of the case and submissions made before us. The impugned order deals with a situation where tax is deductible at source u/s 195, but it has been deducted and paid in a subsequent year. Such is not the case made out before us. The case of the ld. counsel is that all services were rendered by the concerned person outside India and payment was also made outside India. Therefore, tax was not deductible at source in respect of payment made to him. This proposition has not been*

displaced by any argument by the ld. DR. In absence thereof, it is held that the provision contained in section 195 and consequently section 40(a)(ia) is not applicable to the facts of this case. Accordingly, the disallowance is deleted ***(also see Jp ITAT in Modern Insulator 56 DTR 362; Luck bench ITAT in 50 DTR 225; SC in 327 ITR 456))***

HIVE COMMUNICTION PVT. LTD. ITA 306/2011 JUDGMENT DELIVERED ON: JULY 08,2011 Related party Payment (Section 40A(2)(b))

"**Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in upholding the disallowance of `13,20,000/- out of remuneration paid to Mr. Sushil Pandit by invoking the provisions of Section 40A(2) of the Act?" After considering the arguments of the counsel for the counsel for the parties, we are of the opinion that the question of law needs to be answered in favour of the assessee and against the revenue. Our reasons for this are as follows:-**

It is not in dispute that Mr. Sushil Pandit holds 65% share holding in the assessee company as against 20% and 15% held by Mr. R.P. Singh and Mr. Vishal Sharma respectively. For this purpose, it can also be safely assumed that provisions of Section 40A(2) of the Act can be attracted. However, in order to sustain the addition made by the AO it is also essential to show that the remuneration paid to Mr. Sushil Pandit was excessive or unreasonable. Having regard to the fair market value of the goods, services or facilities for which the payment is made. This yardstick is provided in sub Section (2) of Section 40A….

..The question whether the expenditure is excessive or unreasonable in a given case has to be examined keeping in mind the services (with which we are concerned in the present case) for which payment is made. In the

process the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to the assessee from such services is also to be kept in mind. After applying this test if it is found that the expenditure is excessive or unreasonable excess, excess or unreasonable portion of the expenditure is to be disallowed. We have also kept in mind the provisions of sub Section 2 (b) of Section 40-A of the Act as per which the burden is upon the assessee to establish that the price paid by it is not excessive or unreasonable as in this case Mr.Sushil Pandit was holding substantial portion of share namely 65% in the assessee company……

11. *We may also refer to the scope of Section 40A (2) as explained by CBDT in Circular No. 6P, dated 6th July, 1968. The CBDT clarified that while examining the reasonableness of expenditure the Assessing Officer is expected to exercise his judgment in a reasonable and fair manner. It should be borne in mind that the provision is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate concerns and should not be applied in a manner which will cause hardship in bona fide cases.*

Refer: Allahabad High Court in ***Abbas Wazir (P) Ltd***. Vs. ***CIT*** (2004) 265 ITR 77; Madras High Court in ***CIT Vs. Computer Graphics Ltd.*** (2006) 285 ITR 84; ***CIT*** Vs. ***Edward Keventer (Private) Ltd.*** (19720 86 ITR 370, The aforesaid judgment of Calcutta High Court was affirmed by the Apex Court in ***CIT*** Vs. ***Edward Keventer (Private) Ltd.*** (1978) 115 ITR 149 (SC). In the same line is the judgment of Bombay High Court in the case of ***CIT*** Vs. ***Shatrunjay Diamonds*** (2003) 261 ITR 258 (Bom).

ASHOK CHADDHA ITA 274/2011 JUDGMENT DELIVERED ON: JULY 05,2011 (Held We are, therefore, of the opinion that the findings of the Tribunal are totally perverse and far from the realities of life..) STREE DHAN

As far as addition qua jewellery is concerned, during the course of search, jewellery weighing 906.900 grams of the value amounting to ` 6,93,582/- was found. The appellant's explanation was that he was married about 25 years back and the jewellery comprised "stree dhan" of Smt. Jyoti Chadha, his wife and other small items jewellery subsequently purchased and accumulated over the years. However, the Assessing Officer did not accept the above explanation on the ground that documentary evidence regarding family status and their financial position was not furnished by the appellant. The Assessing Officer accepted 400 grams of jewellery as explained and treated jewellery amounting to 506.900 grams as unexplained and made an adhoc addition of ` 3,87,364 under Section 69A of the Act working on unexplained jewellery, by applying average rate of the total jewellery found. The CIT (A) confirmed this addition stating that the AO had been fair in accepting the part of jewellery as unexplained. The ITAT has also endorsed the aforesaid view

After considering the aforesaid submissions we are of the view that addition made is totally arbitrary and is not founded on any cogent basis or evidence. We have to keep in mind that the assessee was married for more than 25-30 years. The jewellery in question is not very substantial. The learned counsel for the appellant/assessee is correct in her submission that it is a normal custom for woman to receive jewellery in the form of "stree dhan" or on other occasions such as birth of a child etc. Collecting jewellery of 906.900 grams by a woman in a married life of 25-30 years is not abnormal. Furthermore, there was no valid and/or proper yardstick adopted by the Assessing Officer to treat only 400 grams as "reasonable allowance" and treat the other as "unexplained". Matter would have been different if the quantum and value of the jewellery found was substantial.

Section 41(1) remission/cessation of liability : Goodricke Group Limited I.T.A. No.617 of 2004 IN THE HIGH COURT AT CALCUTTA *In the case*

before us, it has not been established that for non encashment of the cheques in question, the money involved has become the money of the assessee because of limitation or by any other statutory or contractual right. Incidentally, it may be mentioned here that the aforesaid decision in the case of T. V. Sundaram Iyengar and Sons Ltd. (supra), was also relied upon by the learned counsel for the Revenue in the case of M/s. Kesaria Tea Co. Ltd (supra) and the Supreme Court in paragraph 6 of the judgement dealt with the decision by making the following observations.. We also propose to adopt the same observations in the above decision. Moreover, as pointed out in the case of Suguli Sugar Works (P) Ltd. (supra), vide the last five lines of the paragraph 6 of the judgement, ***the question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. 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*** *We, thus, find that the views taken by the Tribunal are totally opposite*

the ones taken by the Supreme Court mentioned above and consequently, are not tenable. The order of the Tribunal below is, thus, set aside and the Assessing Officer is directed to delete the aforesaid amount involved from the income of the assessee for the relevant year.

All High Court Case :- INCOME TAX APPEAL No. - 88 of 2008 Petitioner :- The Commissioner Of Income Tax-I Kanpur Respondent :- Km. Sonali Jain Petitioner Counsel :- S.C. *29.7.2011*

Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in law in cancelling the penalty u/s 271(1)(c) without appreciating that the surrender of income on account of bogus gift by the assessee partly by filing a revised return and partly by surrender before the Ld. CIT(A) was not voluntary but was only after the scam of giving and accepting bogus gifts was detected by the Investigation Wing of the Department.

Facts: In the light of the above legal position, if we examine the facts of the present case, we find that the assessee-respondent while filing her initial return of income disclosed her income to be Rs.1,34,696/- in the relevant assessment year and the said return finds mention of receiving gift of Rs.2,50,000/- from Ashok Jain. In the revised return the said amount

of gift was declared as part of her income. Thus, there was no concealment in respect of above amount in filing the return. She further surrendered a sum of Rs.2,50,000/- as additional income which was also received by her as gift from one Smt. Usha Jain. In this manner her taxable income was computed to be Rs.6,34,696/- by adding the aforesaid two amounts of Rs.2,50,000/- each as finally disclosed. *The assessing authority treated the above disclosure/ surrender by the assessee-respondent of the two gifts of Rs.2,50,000/- each as an act of compulsion on her part on account*

of the fact that the department had detected the racket of making of fake gifts for evading tax and further that the gift received by Smt. Usha Jain was not from any blood relative

Admittedly, the aforesaid gifts were received by the assessee respondent through account payee cheques. *The first gift was from the relative. The other gift was from a family friend but the same could not have been disbelieved on the ground that it was not from a blood relative as there is no legal bar in receiving a gift from a person outside the family*.

The assessee-respondent had produced Smt. Usha Jain, who also was an individual assessee to income tax, before the assessing officer. Her statement was also recorded. She accepted having made a gift to the assessee-respondent and proved the source of the gift by furnishing statement of her saving bank account. The explanation so furnished by the assessee-respondent was not found to be false and in fact no positive evidence was adduced the falsify the same In view of above, neither the assessee-respondent failed to furnish any explanation regarding the material facts for computation of her income nor the explanation so furnished by her was false. At least there is no finding to this effect. **At the same time, the assessee-respondent having surrendered the above gifts as part of her income just in order to buy peace of mind, may be on realizing that she may also be ultimately affected by the racket of gift deeds busted by the department without any such thing being deducted in respect of her return or gifts, cannot be said to have failed to prove or substantiate her explanation regarding the to be *bona fides* of the two transactions. The question of law raised above**

is answered in affirmative in favour of the assessee-respondent and against the revenue. *Apart from the above, there is no finding by the assessing or first appellate authority that there was a deliberate concealment of income or inaccurate furnishing of return on the part of the assessee-respondent with the intention to evade proper tax. This being the situation no penalty was liable to be imposed in exercise of power under Section 271(1)(c) of the Act upon the assessee-respondent and the same has rightly been cancelled/ deleted by the respondent*.

M/s.Kriti Resorts Pvt. Ltd. (in all cases) Date of decision: 08.07.2011 IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

"1.Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that depreciation on vehicles is allowable as a deduction against the interest income earned, even when such income had been held by the Tribunal to be income chargeable under the head "other sources' under section 56 of the Income Tax Act and in spite of the express provisions of Section 57 of the Act? 12. The first question which arises is whether the

assessee can still be said to be in business or not. No doubt the hotel of the assessee was washed away and in that respect it can be said that it has not conducted any hotel business thereafter. However, the Company does not cease to exist. The Company is a juristic entity and incorporated under the Indian Companies Act. It will have to fulfill its obligations imposed upon it by the Companies Act till it is wound up. Therefore, some staff will have to be maintained. It cannot be said that the business has come to an end. In this behalf reference may be made to the judgment of the Madras High Court in **Commissioner**

of Income-Tax vs. Vellore Electric Corporation Ltd., (2000) 243 ITR 529 and a judgment of the Calcutta High Court reported in **Commissioner of Income Tax vs. Karanpura Collieries Ltd. (1993) 201 ITR 498.** 13. Therefore, once the Company is in existence the assessee can seek depreciation. Reliance placed by the Therefore, as far as question No.1 is concerned the same is answered in favour of the assessee and against the Revenue.

Case Law Mum bench ITAT	Ankit Vijay Mithani	Shri Haresh P. Dadia	Securities Capital

			Investment India Ltd.,
On issue of share transactions income: classification : business income or capital gains	It may not be out of place to state here that the decision of the Hon'ble Bombay High Court in the case of Gopal Purohit was duly considered by the ITAT, Mumbai Benches on number of occasions and by applying the principles laid down therein it was held that each case has to be considered on the touchstone of the principles laid down therein and merely because assessee recorded the transactions as investment or purchased shares from own funds should not lead to a one-sided conclusion that assessee never	Every investor looks for making profits. All the reasons given by the Assessing Officer are qualities of a good investor. Study of markets monitoring, sells at opportune time, etc., is the hall mark of a good investor. Neither there are any intra day sales or speculation of income from future options nor huge turnover or investment by borrowing funds in this case so as to come to a conclusion that the assessee is a trader and not an investor.	This treatment given by the assessee in the last 14 years was never questioned by the Department and even the profit from the share transactions declared by the assessee as capital gains was accepted by the Department. The shares held by the assessee as investment were always valued at cost. The average period of holding of shares sold by the assessee giving rise to short term capital gains was 115 days and giving rise to long term capital gains was 523 days. As submitted by

	intended to carry on the business of purchase and sale of shares. Volume of transactions and frequency of transactions is also an important criteria which deserves to be taken note of. With these observations, the Order passed by the learned CIT(A) is set aside and he is directed to reconsider the matter afresh, after giving a reasonable opportunity of being heard to the assessee.	In view of the above discussions, we allow this ground of the assessee and hold that the assessee is an investor and not a trader. The income should be assessed under the head "Income From Capital Gain".	the learned counsel for the assessee before us, the average period of holding of shares in all the transactions of purchase and sale of shares was about 300 days. There were no funds borrowed by the assessee for making investment in shares and all these investments were made by it out of own funds. There was neither any intra day transaction made by the assessee in shares nor there was any trading in shares on futures and option basis. Even the turnover to investment ratio in shares was low as pointed out by the learned

			CIT(Appeals) in his impugned order. In our opinion, if all these relevant facts of the assessee's case are taken into consideration in totality, it becomes abundantly clear that transactions in shares were made by the assessee as an investor and not as a trader and the profit earned by it from the said transactions was capital gains and not business income as rightly held by the learned CIT(Appeals). We, therefore, find no infirmity in the impugned order of the learned CIT(Appeals)

			directing the AO to treat the profit earned by the assessee from share transactions as capital gains and upholding the same, we dismiss this appeal filed by the Revenue.
Trader vs Investor	Mr Hitesh Satishchandra Doshi Ld AR has summarised his contention as under: i) that the assessee recorded the investments in the books of account separately and consistently for very year and the assessee has proved his intention at the time of purchase of as investment; ii) the assessee always valued the investment at cost and never valued at market price or realized value; iii) the assessee admitted capital loss and never claimed as business loss out of sale of investment in shares which shows from the beginning and the assessee was treated the investment separately; iii) the assessee consistently treating the investment separately in the last many years, which has been accepted by the revenue except for the year under consideration. Even in the subsequent year, the claim of the assessee has been accepted through u/s 143(1). The amount of investment is booked through number of scrips to avoid the risk because it is not advisable to invest huge amounts in few scrips. The assessee is using his own funds. The transactions of		

	purchase and sale are Rs. 4.57% of the funds available and therefore, portfolio churning was not so high for a prudent investor. The long term capital gain has been accepted by the revenue; therefore, the revenue has accepted the status but being trader as well as investor. He has referred the following decisions: i*) CIT vs Gopal Purohit 188 Taxman 140 (Bom)* *ii) Gopal Purohit vs JCIT 122 TTJ 87(Mum)* *iii) Janak S Rangwala (ITA No.1163/Mum/2004 dt 19.12.2006)* *iv) ACIT vs Sundar Iyer (ITA No.295/Mum/2001 dt 15.10.2002)* *v) ACIT vs Motilal Oswal (ITA No.3861/Mum/2001 dt 28.8.6)* *vi) Management Structure & Systems P Ltd* *vs ITO (ITA No.6966/Mum/2007dt 30.4.2010)* *vii Walfort Financial Services Ltd vs ACIT* *(ITA No.847/Mum/209 dt 30.6.2010)* *viii) JM Share & Stock Brokers Ld vs JCIT* *(ITA No.28010/Mum/2000 dt 30.11.2007)* From the details of the short term capital gains, we find that the total short term capital gains arising from the shares sold within 30 days of purchase is Rs.15,19,938/- and a total amount of short term capital gains from the

	shares sold after 30 days but before one year is Rs. 37,76,143/-, which shows that the assessee's intention was to hold the shares for a longer period and to earn income of appreciation of the value of the shares and not earn the profit in the short period change in the price of the shares. Apart from the above, the assessee has been regularly earning dividend income. Profit motive is inherently embedded in the transaction of purchase and sale. The important aspect is the intention to earn profit from appreciation of value of capital asset or by way of transfer of trading asset. ***It is an accepted fact and practice that in order to reduce the risk of loss of capital or income, the investor may try to diversify the investment; therefore, there may be a case of reshuffling portfolios by selling of some scrips and buying of some other scrips to mitigate the scope of loss of capital or income. Therefore, the reshuffling in a short period is not necessary be taken as an activity of trading when the intention was to reduce the risk of loss of capital*** ***Imp. Factors:*** **Intention of the assessee at the time of purchase of shares; Valuation of items in balance sheet; Valuation of items in balance sheet; Own funds or borrowed funds used for purchase of shares and payment of interest**;

YASHODHAM MERCHANTS (P) LTD. 28th June, 2011 IN THE HIGH COURT AT CALCUTTA ITA No. 188 of 2004 Ass. Fav ITAT reversed

After hearing the learned Counsel for the appellant and after taking into consideration the provisions contained in Section 271(1)(c) of the Act, we are of the view that the approach of the Assessing Authority affirmed by the Commissioner of Income Tax (Appeal) and the Tribunal below was totally erroneous. It appears that the assessee claimed that its principal business was from the income of house property and as such was not covered by the Explanation to Section 73 of the Act. Such claim was turned down by the Assessing Authority. In our view, merely because

the claim of the assessee that it did not come within the purview of Section 73 was turned down, such fact cannot give right to the Assessing Officer to initiate proceeding under Section 271(1)(c)

of the Act unless it is found that the assessee has suppressed certain material facts or furnished false particulars. If the claim of an assessee is turned down as not tenable, such fact

cannot give right to impose penalty. The order imposing penalty under Section 271(1)(c) of the Act is, thus, set aside. Refer: *Reliance Petro Product Pvt. Ltd.,* reported in *2010(322) ITR 158*

Cal High Court M/S.USHA MARTIN VENTURES LTD. & ANR. ITA No. 90 of 2010 GA No. 953 of 2011 20th May, 2011. Ass. Appeal allowed and ITAT reversed

"(i) Whether in the facts and in the circumstances of this case the learned Tribunal erred in confirming the order of imposition of penalty as imposed by the Assessing Officer and affirmed by the Commissioner of Income Tax (Appeals) even after disclosing income in the return under Section 148 of the Income Tax Act, 1961 on discovery of mistake in the Tax Audit Report?"

After hearing Mr. Poddar, learned Senior Advocate appearing on behalf of the assessee and Mr. Nizumuddin, learned counsel appearing on behalf of the Revenue, we find that for the computation of the assessment the assessee on the basis of report given by the auditor in the Tax Audit Report claimed depreciation from the house property, although the same was a rented one.

Subsequently, when such mistake was detected, the assessee filed a revised return rectifying such mistake in response to a notice under Section 148/147 of the Income Tax Act. However, the Assessing Officer drew up proceeding under Section 271(c) of the Act and imposed penalty on the ground that the mistake was not a bona fide mistake

This is not a case where the assessee disclosed wrong materials or particulars in its return nor is it a case where in spite of demand of the Assessing Officer to produce evidence in support of claim of depreciation it refused to produce such document. It appears that this is a case where claim of depreciation, which is a mixed question of law and fact, was made on the basis of auditor's report which was not found to be tenable because of the fact that the house property was a tenanted one. It is not a case where the assessee has wrongly disclosed that it is in its possession as owner though it was in occupation of the property as a tenant. In such circumstances, we are of the opinion that in view of the decision of the Supreme Court in the case of C.I.T. vs. Reliance Petro Products Pvt. Ltd., reported in 2010 (322) ITR 138, no penalty should be imposed upon the appellant for wrong claim of depreciation in violation of the provisions contained in the Income Tax Act. ***We have already pointed out that such claim was initially made on the basis of the auditor's report and it has also been brought to the notice of the authorities below that after the detection of such mistake committed by the auditor, the said auditor was changed by the assessee. We, thus, find that the learned Tribunal below committed substantial error of law in affirming the order of imposition of penalty which is not in conformity with the view taken by the Supreme Court in the abovementioned matter***.

KOKILABEN A SHAH Concealment penalty and GIFT addition u/s 68 Guj High Court

Having perused the orders on record with the assistance of learned counsel for the Revenue, we see no reason to interfere. Tribunal observed that gift was received through normal banking channel. Identity of donor was disclosed and established. Assessee had furnished complete details of the gift. Tribunal noted that none of the departmental authorities made any attempt to find out whether the explanation of the assessee was false. Tribunal relied on decision of Division Bench of this Court in case of **National Textiles v. Commissioner of Income Tax** reported in 249 ITR 125, wherein Bench observed that if the assessee gives an explanation which is unproved but not disproved, it would not lead to inference that assessee's case is false. We are also in broad agreement with the same. Relying on the decision of **Nashaben H. Jariwala**, wherein it was observed that merely because assessee failed to prove the gift in the manner required by the department, it is not possible to conclude that assessee concealed her income, tribunal in the present case deleted penalty.

Mumbai benches of ITAT:

M/s. Bajaj Hindustan Ltd., 03/08/2011 ITA NO.63/MUM/09(2007-08)

9. On a consideration of the above features of the Agreement, the CIT(A) was of the view that the Assessee wanted to acquire sugar mills/distillery plants in Brazil. For that purpose, the Assessee had availed the services of KPMG. He found that the services were to be rendered in Brazil and that services are connected with the acquisition of sugar mills/distilleries in Brazil. The

CIT(A) was of the view that the words used in Sec.9(1)(vii) clause (b) second exception was " for the purposes of earning any income from any source outside India.". He was of the view that the services rendered by KPMG were to be used for the purpose of acquisition of sugar mill / distillery in Brazil for the purpose of earning income from sugar mill / distillery from Brazil. He was of the view that the words used in sec. 9(1)(vii) were vide enough to cover even future source of income. The CIT(A) therefore held that that the services rendered by M/s. KPMG was utilized by the Assessee for the purpose of earning income from a source outside India and therefore the payment by the Assessee of fees for technical services rendered by M/s. KPMG was outside the scope of Sec. 9(1)(vii) of the Income Tax Act. Hence it cannot be considered as income deemed to have accrued in India and not chargeable to tax in India and hence the Assessee is not liable to deduct tax u/s. 195 of Income Tax Act. The demand raised for tax and interest u/s.201(1) and 201(1A) of the Act was deleted.

14. We have considered the arguments of ld. D.R. There is not dispute that the payment in question made by Assessee to KPMG is in respect of services which otherwise fell within the definition of FTS as given in the Act. The dispute is whether the exceptions mentioned in clause (b) to Sec.9(1)(vii) of the Act would apply so that it can be said that the fees in the nature of FTS has not accrued or arisen to KPMG in India. As far as the first exception in Sec.9(1)(vii) clause (b) of the Act, is concerned viz., "where the fees are payable in respect of services utilized in a business or profession carried on

by such person outside India", we find that the Assessee carries on business in India and has utilized the services of KPMG in connection with such business. Therefore the case of the Assessee would not fall within the first exception, notwithstanding the fact that services were rendered only in Brazil. As far as the second exception mentioned in Sec.9(1)(vii) clause (b) is concerned viz., " for the purposes of earning any income from any source outside India.", the undisputed facts are that the Assessee wanted to acquire sugar mills/distillery plants in Brazil and for that purpose also wanted to set up a subsidiary company. In fact, the Assessee had set up a subsdiary company on 8.8.2006 in Brazil. Thus the Assessee was contemplating to create a source for earning income outside India. It is no doubt true that the source of income had not come into existence. ***But there is nothing in Sec.9(1)(vii) clause (b) of the Act, to show that the source of income should have come into existence so as to except the payment of fees for technical services.*** *The expression used is "for the purpose of earning any income from any source outside India".* ***There is nothing in the language of Sec.9(1)(vii) clause (b) of the Act, which would go to show that the same is restricted to only to an existing source of income****. We therefore agree with the conclusions of the CIT(A) on this aspect. We therefore uphold the order of the CIT(A) holding that the payment by the Assessee of fees for technical services rendered by M/s. KPMG was outside the scope of Sec. 9(1)(vii) of the Income Tax Act. Hence it cannot be considered as income deemed to have accrued in India and not chargeable to tax in India and hence the Assessee was not liable to deduct tax u/s. 195 of Income Tax Act. The demand raised*

for tax and interest u/s.201(1) and 201(1A) of the Act was therefore rightly

directed to be deleted. We find no grounds to interfere with the order of CIT-A

Mumbai ITAT in Mrs. Pallavi Shardul Shroff ITA no.3511/Mum./2010 Now, coming to the application of provisions of section 14A, the firm in which the assessee is a partner, is not paying remuneration and conveyance allowance or car allowance separately. As a matter of policy, a consolidated sum is paid as remuneration and the partner is required to incur expenditure on its own. Under these circumstances,

in our opinion, the expenditure incurred wholly and exclusively for the purpose of earning remuneration which is being brought to tax under section 28(v). The share of income of the firm has no nexus with the expenditure incurred on car by the assessee. All the expenditure of the firm are booked in the firm's account and the expenditure incurred by the partner on car cannot be held to have a nexus in the earning of share income from the firm. Hence, proportionate disallowance under section 14A, in our opinion, is uncalled for. Thus, the proportionate disallowance is disallowed.

- Connotation of Book Profits: ITAT rulings in Allen and SPS equipment 37 DTR 379 & 128 TTJ 68; Out of Income offered in Survey ACA Journal 598 Feb 2010 : Fashion World

- Authorise versus Quantify: Sufficient if Deed Authorizes – Mum ITAT in Suman Constructions 34 SOT 495 (difficult for current year)

- Revised/estimated by AO and not returned by assessee: 303 ITR 1 (P&H HC)

Sudarshan 35 MM Hyderabad **I**.T.A. No. 369/Hyd/2009	*Section 40(b): Partner remuneration: Regarding the other ground in I.T.A. No. 369/Hyd/2009, the learned counsel for the assessee submitted that the assessee claimed an amount of Rs. 22.16 lakhs towards remuneration of partner and the Assessing Officer allowed only Rs.*

	13,48,323. While disallowing the remuneration, the Assessing Officer wrongly set off the loss of share business with the income of the theatre business. According to the learned AR, the assessee is carrying two distinct businesses and maintained separate sets of books of account for each business i.e., for theatre business and share business and he has prepared separate trading and Profit and Loss A/c. and remuneration paid to the working partner relating to both the businesses has to be computed separately. The contention of the assessee is devoid of merit. For the purpose of computation of remuneration to the working-partner u/s. 40(b) of the Income-tax Act, 1961, the businesses of the assessee have to be considered as a whole. There is no provision under the Income-tax Act to consider the business of theatre and share business as distinct businesses to compute profit for the purpose of determining remuneration to the partner. As seen from the Explanation 3 to clause (v) of section 40(b), "book profit" means the net profit, as shown in the Profit & Loss A/c., for the relevant previous year, computed in the manner laid down in Chapter IV D as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit. Accordingly, we dismiss this ground. *Also see: Pune bench* ***Ladkat Brothers Service Station*** *The provisions of section 40(b) permits allowance for payment of a prescribed amount of remuneration to a partner, who is a working partner. Factually, in this context, assessee submitted that Mrs Nandini Ladkat is an active partner and also has signing authority for banking transactions, which has been confirmed by the Bank. In paragraph 5 the assessment order, the Assessing Officer also records that the assessee produced documents like bank passbook, cheques books, correspondence with banks, etc. in support of its claim that Mrs Nandini Ladkat was looking after the transactions related to the bank. In this*

	manner, the assessee sought to make out a case that Mrs *Nandini Ladkat was qualified to be a "working partner" within the meaning of section 40(b) of the Act. The said material has not been doubted by the Assessing Officer and, nor has it been found to be false…..The level of involvement or the type of work to be undertaken by a partner in order to quality to be a "working partner" is not to be viewed from the point of the Assessing Officer. Looking after the bank related work by the partner, would certainly make the concerned partner a "working partner" for the purposes of section 40(b) of the Act. It is certainly not mandatory that a partner needs to be involved in activities of the firm on a day to day and continuous basis to qualify to be a "working partner" for the purposes of section 40(b) of the Act.* *Further see: HP HC in 55 DTR 101 Durga Dass: Held even if the remuneration to partner was not fixed in [partnership deed (as it stated remuneration will be as per provisions of I.T.Act), the firm shall be entitled to deduction u/s 40(b)(v)*

Judgement		LexDoc Id: **231483**
Category	Direct Tax	
HC (Chennai)		
CIT vs Packwell (Karnataka) Industries		
Citation	140 TAXMAN 44, 183 TAXATION 433	

Topic	Remuneration paid to partner
Sub Topic	Remuneration as technical expert
Summary	A.Y. 1982-83. The assessee was a partner in a partnership firm. The firm paid him a technical consultation fee for the services he provided as an expert. The fee paid was remuneration paid to a partner and was hit by the bar u/s 40(b) of the Income Tax Act 1961.

High Court of Madras

Commissioner of Income-tax vs Packwell (Karnataka) Industries

Tax Case No. 99 of 2000

R. Jayasimha Babu and S.R. Singharavelu, JJ.

25 November 2003

Mrs. Pushya Sitaraman for the Applicant
P.P.S. Janardhana Rajafor the Respondent

IN THE HIGH COURT OF DELHI AT NEW DELHI

#12 and 13
ITA 1558/2010

CIT .....
Appellant
Through Ms. Rashmi Chopra, Adv.

versus

SAHNI NATRAJAN and BAHL ..... Respondent
Through Mr.R. Santharam with
Mr.A.P. Sinha, Adv.

WITH

2. ITA 1696/2010

CIT .....
Appellant
Through Ms. Rashmi Chopra, Adv.

versus

LUTHRA and LUTHRA ..... Respondent
Through Mr.Jatinder Pal Singh, Adv.

CORAM:
HON?BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

O R D E R
09.12.2010

Heard Ms. Rashmi Chopra, learned counsel for the revenue, Mr.R. Santharam
and Mr.Jatinder Pal Singh, learned counsel for the respondents.
The present appeal preferred under Section 260-A of the Income Tax Act,

1961 is admitted on the following substantial questions of law ?

ITA Nos. 1558 and 1696/2010 page 1 of 2
(i) Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that filing of certified copy of partnership deed during the assessment proceedings was sufficient compliance of provisions of Section 184 of the Income Tax Act, 1961 which requires certified copy of partnership deed to be filed with the return?
(ii) Whether on a true and correct interpretation of Section 184(4) of the Income Tax Act, 1961, the ITAT erred in confirming the order of CIT (A) holding that the obligation for filing of certified copy of partnership deed with the return in case of change of constitution of firm is not mandatory?

Issue notice.
As Mr.R. Santharam and Mr.Jatinder Pal Singh have entered appearance on behalf of the respondents, no further notice need be issued.
Filing of paper book stands dispensed with.
The matter is not to be treated as part-heard.

CHIEF JUSTICE

DECEMBER 09, 2010 MANMOHAN, J
kapil

Delhi High Court in **M/s. Bonanza Portfolio Ltd.**
ITA No.833 of 2011 Date of Decision : 10.08.2011 Ad Film expenses revenue in nature (sec. 37)

Vide the said order dated 11th July, 2011, notice was issued to the respondent only to the limited question as to whether the expenditure incurred on ad film is to be treated as capital or revenue in nature.

4. We have heard the counsel for the parties on this issue. The assessee has placed reliance on the case of CIT v Geoffrey Manners & Co. Ltd. 315 ITR 134 (2009); Patel International Films Ltd. 102 ITR 219 and CIT v Patel International Films Ltd. 102 ITR 219. On the other hand, revenue has placed reliance on CIT v Bose Corporation India Pvt. Ltd (ITA No.1494 of 2010). We have perused the judgments cited by the parties. The case of Patel Engineering (supra) was also referred to and discussed in CIT v Geoffrey Manners (supra). The undermentioned observations of the Bombay High Court in CIT v Geoffrey Manners (supra) with which we are in complete agreement and which distinguish the case of Patel International (supra), would be suffice to arrive at the conclusion that the appellant being engaged in the business of stock broking and share transactions, the expenditure incurred on ad films by way of advertisements for promotion and marketing of its products, being on the ongoing business, would be of revenue in nature and thus allowable as revenue expenditure.

Dt.04.08.2011 Allahabad High Court in case of M/s Shyam Enterprises **Vs.** Commissioner of Income Tax, Allahabad **Income Tax Appeal No.209 of 2008** preferred on substantial question of law as follows:-

"I. Whether on the facts and in the circumstances, the Ld. ITAT is justified in restricting the depreciation or cold storage chambers to 10% treating them as special type of buildings and not eligible to depreciation @ 25% as plant, in view of amendment to section 43 (3) with effect from 1.4.2004? II. Whether the amended provisions of section 43 (3) brought into force with effect from the assessment year 2004-05 exclude the cold storage chambers from the ambit of 'plant'?"

The amendment in S. 43 (3) w.e.f. 1.4.2004 is only clarificatory in nature, and which excluded the live stock or buildings or furniture and fittings from the plant. What was excluded in the context was building or furniture and fittings and not building of special nature, which does not have existence independent from the plant. In case of cold storage as it was found by Calcutta High Court, the building is required to be constructed for cooling chambers in a specific process and manner and without such specific process and manner a chamber cannot be commissioned, for which a licence is also required to be obtained. The whole building, which houses the chambers has to be constructed according to specifications in a particular manner. Without a thermocole a chamber cannot function independently and at the same time without the building the thermocole cannot have a separate existence. Both these parts are integral parts of each other. The cold storage has special facilities for refrigeration. Just as a refrigerator cannot be divided into two parts namely the cooling system behind or under the refrigerator, and the cabinet in front, or on top thereof, the plant of cold storage also cannot be

separated in a manner that the special chambers may have separate existence and be treated as building, sans cooling plant for providing a different rate of depreciation