CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2013 TO MARCH 2013

(**Journals Referred**: ACAJ /AIR/AIFTPJ/ BCAJ / BLR / IT Review//Comp Cas/CTR / DTR /E.L.T./GSTR/ ITD / ITR / ITR(Trib) /JT/ SOT /SCC / TTJ /Tax LR /Taxman / Tax World/ VST/ www.itatonline.org)

S 2(15):Charitable purpose-Trade business or commerce-Public utility-Activity of evolving, prescribing, standards Activities cannot be termed as business activity-Exemption was granted. (S.10) (23C).

The Bureau of Indian Standards (BIS), a sovereign entity created under the Bureau of Indian Standards Act, 1986, had been granted exemption under section 10(23C).

The Director of Income-tax (Exemption) withdrew the said exemption on the ground that activities of BIS were in the nature of business and hence, covered by the proviso to section 2(15). The assessee challenged the said order by way of Writ to the High Court, wherein it was held that, activities of Bureau of Indian Standards (BIS) in prescribing of standards of goods/articles and enforcing those standards through accreditation and continuing supervision through inspection, etc., cannot be considered as trade, business or commercial activity merely because testing procedures involves charging of fees. Accordingly allowing the Petition the DIG was directed to issue the exemption certificate under section 10(23C) of the Act.

Bureau of Indian Standards v DGIT (Exemptions) (2013) 212 Taxman 210 (Delhi) (High Court)

S.2(22) (e):Dividend- Deemed dividend-Share application money - Colour device - Not "loan or advance", cannot be assessed as deemed dividend.

The assessee was a beneficial shareholder of three companies named Kingston Properties P Ltd. (KPPL), New Dimensions Consultants P Ltd (NDCPL) & R. S. Estate Developers P Ltd (RSEDPL). NDCPL & RESEDPL advanced various sums of money to KPPL towards "share application money". However, some of the advances were returned by KPPL while some were adjusted towards allotment of shares. The AO held that the transaction was a "colourable device" and a "loan and advance" which fell within the ambit of s. 2(22) (e). The said "loan and advance" was assessed as "deemed dividend" in the hands of the assessee – beneficial shareholder – following Universal Medicare Pvt. Ltd. (2010) 324 ITR 263 (Bom). The CIT (A) reversed the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:

Share application money or share application advance is distinct from 'loan or advance'. Although share application money is one kind of advance given with the intention to obtain the allotment of shares/equity/preference shares etc., such advances are innately different form the normal loan or advances specified both in section 269SS or 2(22) (e) of the Act. Unless the mala fide is demonstrated by the AO with evidence, the book entries or resolution of the Board of the assessee become relevant and credible, which should not be dismissed without bringing any adverse material to demonstrate the contrary. It is also evident that share application money when partly returned without any allotment of shares, such refunds should not be classified as 'loan or advance' merely because share application advance is returned without allotment of share. In the instant case, the refund of the amount was done for commercial reasons and also in the best interest of the prospective share applicant. Further, it is self-explanatory that the assessee being a 'beneficial share holder', derives no benefit whatsoever, when the impugned 'share application money/advance' is finally returned without any allotment of shares for commercial reasons. In this kind of situations, the books entries become really relevant as they show the initial intentions of the parties into the transactions. It is undisputed that the books entries suggest clearly the 'share application' nature of the advance and not the 'loan or advance'. As such the revenue has merely suspected the transactions without containing any material to support the suspicion. Therefore, the share application money may be an advance but they are not advances which are referred to in section 2(22) (e) of the Act. Such advances, when returned without any allotment or part allotment of shares to the applicant/subscriber, will not take a nature of the loan merely because the same is repaid or returned or refunded in the same year or later years after keeping the money for some time with the company. So long as the original intention of payment of share application money is towards the allotment of shares of any kind, the same cannot be deemed as 'loan or advance' unless the mala fide intentions are exposed by the AO with evidence. (A. Y. 2002-03 to 2007-08)

DCIT v. Vikas Oberoi (Mum.) (Trib.) www.itatonline,org.

S.2(22) (e):Dividend-Deemed dividend-Loans and advances-Legal fiction does not extend to broaden the concept of shareholderto make tax loans or advances as deemed dividend in the hands of deemed share holder. (Companies Act, S.153, 187C)

Duringsearch various papers relatingshare holding pattern of Amod Stampings Pvt Ltd were seized. It was found that said company had granted loans to various companies wherein share holdings and voting power exceeded 10 percent.It was explained that on creation of Trust a part of said company were settled in favour of Trust and after excluding of shares the assessee did not have more than 10 percent voting power and the assessee had no beneficial interest in the said Trust. The Assessing Officer held that creation of Trust was an afterthoughtand taxed theamount as deemed dividend.Before Commissioner (Appeals) it was contended that as per section 153 of the Companies Acta company is not permitted to include the name of the trust in the register of members. It was also contended that the provision of section 187C have been madeineffective w.e.f.13th December, 2000 and therefore there is no requirement at present to declare beneficial interest etc., therefore suchbeneficial interest was is not declared in the register of the Company or the Registrar of the Companies. However Commissioner (Appeals) up held the addition.On appeal the Tribunal held that since the said Company was not permitted to include name of Trust in its register, name which was earlier noted as shareholders remainedsame, howeverthrougha Board meeting it was resolved to acknowledge change in vesting of shares, hence in view of the facts deemed dividendcould not be taxed in hands of assessee.Legal fiction created under section 2(22) (e) does not extend further for broadening concept of shareholder so as to tax loans or advances as 'deemed dividend' in hands of a 'deeming shareholder'. (.AY. 2006-07)

Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.) (Trib.)

S.2(22) (e):Dividend- Deemed dividend – Credit balance in Capital account – Non-encashment of cheque the amount is credited back to company's account cannot be assessed asdeemed dividend.

The assessee is running a proprietorship concern which was converted into private limited company. There was credit balance in capital account of the assessee in proprietorship concern against which payment was made by proprietorship concern to the assessee. However, because of conversion, cheque could not be encashed and same was returned to company which was credited to the assessee's account by company. Subsequently money was withdrawn by the assessee. It was held that the said amount could not be treated as deemed dividend. (A.Y. 2008-09)

Dy. CIT v. Radhe Shyam Jain (2013) 140 ITR 244 (Chandigarh) (Trib.)

S.2(22) (e):Dividend-Deemed dividend – Accumulated profits – Share premium account does not partake nature of commercial profit hence not be treated as accumulated profit.

Share premium account would not partake nature of commercial profits and thus cannot be treated as accumulated profit. (A.Y. 2008-09)

Dy. CIT v. Radhe Shyam Jain (2013) 140 ITR 244 (Chandigarh) (Trib.)

S.2(22) (e):Dividend-Deemed dividend – Advance given to company in which assessee holds substantial stake is held to be deemed dividend.

AO treated advance taken by assessee from a company in which having substantial stake as deemed dividend. It was case of the assessee that since they had mortgages their properties with bank to enable company to avail finance facilities from bank, advance by company was not a gratuitous loan or advance but in return for an advantage which company had already availed on account of mortgaging of properties done by assessee. However, it was a fact on record that assessee had not produced any documents to prove fact that personal properties of assessee were actually mortgaged with the bank for sake of availing loans by company. Assessee had also not produced any correspondence made either with bank or with company towards release of properties mortgaged. Thus, revenue rightly considered advances given by company to assessee as deemed dividend. (A.Y. 2002-03, 2003-04 & 2006-07)

Dy. CIT v. B. DhanunjayaRao (2013) 140 ITD 443 (Hyd.) (Trib.)

S.2(22) (e):Dividend-Deemed dividend—Advance towards Sale of Property -Matter remanded.

The assessee is engaged in real estate development. The assessee received advance towards sale of property. The Assessing Officer treated the said amount as deemed dividend. Commissioner (Appeals) deleted the addition. On appeal by department the Tribunal seta-side the order of Commissioner(Appeals) as he failed to pass as speaking order. Matter remanded. (A.Y. 2006-07, 2007-08)

ITO v. Nam Estates P.Ltd (2013)141 ITD 659/ 21 ITR 109 (Bang.) (Trib.)

S.2(22) (e):Dividend- Deemed dividend-Loans and advances-Business of finance-Loans would not be regarded as deemed dividend.

The company from whom the assessee had obtained loan was engaged in the business of finance and hence it was contended that the loan transaction from the company fell in the exclusionary clause and the amount of loan was out of the purview of section 2(22) (e). The Department's contention was that financing was not a 'major' part of the business of the company and hence the assessee could not take shelter under the exclusionary clause. Before the Tribunal the assessee relied upon the decision of the Hon'ble Bombay High Court in CITv.Parle *Plastics Ltd (2*011) 332 ITR 63 (Bom.) (High Court) wherein it was held that the said expression "substantial part of the business" in s.2(22) (e), clause (ii), does not connote an idea of being the "major part" or the part that constitutes majority of the whole.It was further explained by the Hon'ble Bombay High Court that any business of a company which the company does not regard as small, trivial or inconsequential as compared to the whole of the business is substantial business and various factors and circumstances would be required to be looked into while considering whether a part of the business of a company is its substantial business. It was held that sometimes a portion which contributes a substantial part of the turnover, though it contributes relatively small portion of the profit, would be a substantial part of the business. Similarly, a portion which is relatively small as compared to the total turnover, but generates a large portion, say more than 50% of the total profit of the company would also be a substantial part of his business. In view of the said decision of the Hon'ble Bombay High Court, it was held that the assessee's case fell in the exclusionary clause and hence section 2(22) (e) was not applicable. (A.Y. 2006-07)

Jayant H. Modi (2013)56 SOT 84 (Mum.) (Trib.)

S.2(28A): Interest - Discount charges-Deduction at source-Business income hence not liable to deduct tax at source. [S. 40(a) (i)]

The Court held that discount charges earned by assessee-financial service provider by way of discounting bill of exchange and promissory notes in favour of Indian companies is to be treated as business income, and not as interest income In favour of assessee. (A.Y.2005-06 to 2007-08)

DIT (IT) v.Cargil TSF PTE Ltd. (2013) 212 Taxman 16 (Delhi) (High Court)

S:2(29B):Capital gains – Short-term or long-term – Purchase of property by tenantwas held to be long term. (S. (2 (42A),45)

Assessee bought the property of which she was one of the tenants. All the tenants entered into an agreement on 10th June 1999 and formed a co-operative society. The old building was demolished and a new building was constructed thereon. The tenants got possession in A.Y. 2002-03. Assessee sold her property on 17th September 2004. Held that the agreement dated 10th June 1999 itself gave interest and right in the impugned property to the assessee along with other tenants, the transaction clearly involved long-term capital gains. (A.Y. 2005-06)

Nila V. Shah(Mrs) v. ITO (2013) 83 DTR 218(Mum.) (Trib.)

S.2(47): Transfer- Shares pledged with groupcompany-A transaction in respect of transfer of share pledged with a bank to a group company can be regarded as "Transfer" for income-tax purpose so far as requirement of s.2(47) are complied with-Loss suffered is allowable.

A transaction in respect of sale of shares pledged with a bank to a group company cannot be said to be a colorable device merely on the grounds thatsuch a transaction resulted into loss to the assessee and that the requirements of section 108 of The Companies Act, 1956 regarding registration of transfer of shares have not been complied with since the share were in possession of a bank owing to which such shares could not have been said to be transferred. So far as the requirements of section 2(47) of the Act are complied with the transaction is to be regarded as "Transfer" for the income-tax purposes. There is no restriction that such a transaction cannot be effected with a group company. Also it is not open for the revenue to doubt the loss suffered by the assessee unless it doubts the sale prices of the shares. (T.A. No. 260 of 2000, dated 07/08/2012)]

Biraj Investment Pvt. Ltd. (2012) BCAJ –November - Pg. 402 (Guj.) (High Court)

S.4: Charge of income-tax - **Addition – Income disclosed in the return amount reflected in the TDS certificate, addition was held to be justified.**

All authorities below arrived at similar conclusion that the assessee claimed higher credit for TDS by annexing TDS certificates but had not reflected all of them in its return. Held that Tribunal was justified in concluding that no useful purpose would be served by remanding the matter back to the AO. (A.Y. 1998-99)

Laxmi Ventures (Bombay) (P) Ltd. v. Dy. CIT (2013) 83 DTR 36 (Bom.) (High Court)

S. 4: Charge of income-tax- **Capital or revenue receipt – Sale of trees is held to be capital receipt.**

Assessee, an agriculturist, cut and sold trees to the forest department. Trees were cut in a manner such that they would not regenerate in near future as the species had no spontaneous growth. The receipts from the transaction were held to be in the nature of capital receipt. (A.Y. 1994-95)

CIT v. Mahendra Karma (2013) 83 DTR 153(Chattisgarh) (High Court)

S.4: Charge of income-tax –Interest on behalf of Government-If an assessee- company cannot allot share immediately in favor of State Government against investment made be it in Assessee Company, then interest earned on deposits made out of such funds shall belong to the State govt. and shall not be taxed in the hands of assessee.

The assessee company received certain funds from govt. of Gujarat as contribution toward it equity share capital. Till the time the assessee company allotted shares to govt. of Gujarat, the said funds were parked in short term deposits with a schedule bank on which it earned certain interest. The assessee company and govt. of Gujarat had entered into as arrangement according to which the said interest should belong to and be received on behalf of Govt. of Gujarat. It was held by the Hon'ble High Court that during the pendency of allotment of shares, the funds received toward equity share capital were held by the assessee company in trust for and on behalf of govt. of Gujarat and hence, any interest accrued by investment of such funds must belong to the govt. of Gujarat and till it remanded in the hands of the assessee company, it must be treated to have been held in trust. (T.A.no. 99 of 2000, dt26/06/2012]

Gujarat Power Corporation Ltd. (2012) BCAJ -November-P. 402) (Guj.) (High Court)

S.4: Charge of income-tax- Subsidy- Entertainment tax- Capital receipt-Held to be capital in nature.

The question raised before the Court on behalf of the revenue was the benefit of exemption from entertainment tax was available to assessee only once the multiplex was in operation and it is revenue receipt. High Court followed the Judgment of Bombay High Court in CIT v. Chaphalkar Brothers, Pune Tax Appeal no 1036 of 2010, and held that such exemption of entertainment tax was of capital receipt. Appeal of revenue was dismissed. (A.Y. 2003-04)

DCIT v. Inox Leizure Ltd (2013)213 Taxman 160/85 DTR 103(Guj.) (High Court)

S.4: Charge of income-tax - Non-compete fee –Assessable as capital receipt.

Payment received by assessee as non-compete fee under a negative covenant is a capital receipt not taxable under Act (A.Y.2001-02)

CIT v. Real Image (P.) Ltd. (2013) 213 Taxman169 (Mad.) (High Court)

S.4: Charge of Income-tax-Compensation- Capital receipt-Compensation to CA Firm for loss of referral work is a non-taxable capital receipt.

The assessee, a firm of Chartered Accountants, was one of the "associate members" of Deloitte Haskins & Sells for 13 years pursuant to which it was entitled to practice in that name. Deloitte desired to merge all the associate members into one firm. As this was not acceptable to the assessee, it withdrew from the membership and received consideration of Rs. 1.15 crores from Deloitte. The said amount was credited to the partners' capital accounts & claimed to be a non-taxable capital receipt by the assessee. The AO rejected the claim. The CIT (A) order reversed the order. The Tribunal reversed the CIT (A) order. On appeal by the assessee to the High Court, reversing the Tribunal order held that :

(i) There is a distinction between the compensation received for injury to trading operations arising from breach of contract and compensation received as solatium for loss of office. The compensation received for loss of an asset of enduring value would be regarded as capital. If the receipt represents compensation for the loss of a source of income, it would be capital and it matters little that the assessee continues to be in receipt of income from its other similar operations (Kettlewell Bullen and Co. Ltd. V. CIT (1964) 53 ITR 261 (SC) & Oberoi Hotel(P) Ltd. v. CIT (1999) 236 ITR 903 (SC) followed);

(ii) On facts, the compensation was for loss of a source of income, namely referred work from Deloitte because it is somewhat difficult to conceive of a professional firm of chartered accountants entering into such arrangements with international firms of CAs, as the assessee in the present case had done, with the same frequency and regularity with which companies carrying on business take agencies, simultaneously running the risk of such agencies being terminated with the strong possibility of fresh agencies being taken. In a firm of chartered accountants there could be separate sources of professional income such as tax work, audit work, certification work, opinion work as also referred work. Under the arrangement with DHS there was a regular inflow of referred work from DHS through the Calcutta firm in respect of clients based in Delhi and nearby areas. There is no evidence that the assessee had entered into similar arrangements with other international firms of chartered accountants. The arrangement with DHS was in vogue for a fairly long period of time -13 years- and had acquired a kind of permanency as a source of income. When that source was unexpectedly terminated, it amounted to the impairment of the profit-making structure or apparatus of the assessee. It is for that loss of the source of income that the compensation was calculated and paid to the assessee. The compensation was thus a substitute for the source and the Tribunal was wrong in treating the receipt as being revenue in nature (CIT v. Best & Co (1966) 60 ITR 11 (SC) distinguished). (A.Y.1997-98)

Khanna and Annadhanam v. CIT(2013)213 Taxman 347/258 CTR 72/85 DTR 164(Delhi) (High Court).

S.4: Charge of income-tax - Income or capital--Power subsidy received from State Government--Subsidy given year after year on actual power consumption is revenue receipt.

The power subsidy was granted after the commencement of production, and it was to the extent of 10 per cent. or 12.5 per cent., as the case may be. This was given on actual power consumption and had nothing to do with the investment subsidy given for establishment of industries or expanding industries in backward areas. The power subsidy given as part of an incentive scheme, after commencement of production, should be treated as subsidy linked to production, and therefore, a revenue receipt (A.Y. 1983-1984 to 1990-1991)

CIT v.Rassi Cements Ltd. (2013) 351 ITR 169(AP) (High Court)

CIT v. Deccan Cements Ltd (2013) 351 ITR 169(AP) (High Court)

S.4: Charge of Income-tax-Mutuality-Clubs-Interest on fixed deposit-Concept of mutuality cannot be extended.

Assessee, a club, received interest on fixed deposit with banks. It claimed that principle of mutuality applied in instant case and, hence, interest income was not taxable. In instant case, contributors/members of assessee made contributions, which had been kept in fixed deposit with third party banks and those third party banks had contributed to members fund, since members' fund had been expended not by contributors/members but by a third party, interest income could not be said to have been derived from any activity based on principle of mutuality. In order to be an income derived from activities based on principle of mutuality, it must be shown that contributions have been made by contributors and same can only be expanded or returned to contributors.In favour of revenue. (A.Y.1999-2000)

CIT v Dehradun Club Ltd. (2013) 212 Taxman 269(Uttarakhand)(High Court)

S.4: Charge of income-tax-- Hindu undivided family –Individual-Income from agricultural land which was received on partition assessable as HUF and income from remaining agricultural land assessable as an individual.

Assessee filed return in his capacity as karta of HUF. He claimed that he owned 20.88 acres of agricultural land in the status of HUF and the entire income earned from agricultural land was income from HUF property. Assessing Officer rejected the claim of assessee and assessed the entire income from the agricultural lands in the status as individual. He also made protective assessment at the hands of the assessee in the capacity of HUF. In appeal Commissioner (Appeals) held that inclusion of the income from the land in the individual assessment of the assessee was not correct. He also held that the assessment made in the hands of HUF as protective assessment should be treated as a substantive assessment. In appeal by revenue the Tribunal reversed the finding of Commissioner (Appeals). On appeal to High Court, it was held that Agricultural land to an extent of 4.63 acres was originally joint family property and vide partition deed dated 24-2-1981 executed between assessee, his brother and their father same was allotted to assessee. No material on record to show that balance 16.25 acres of land was in fact HUF property of assesse. Only agricultural income earned from 4.63 acres of land was assessable at hands of assessee in status of HUFand remaining agricultural income earned from balance 16.25 acres of land was assessable at individual hands of assessee. (A.Y. 1984-85, 1985-86)

K.P. Nachimuthu v CIT (2013) 212 Taxman 584 (Mad) (High Court)

S.4: Charge of income-tax-Accrual-Bank-Guarantee commission-If refundable on revocation of guarantee, commission to be spread over period of guarantee. Matter remanded.

The Tribunal held that if the guarantee commission is refundable on the revocation of guarantee, it cannot be said that the absolute right to the commission has accrued to the assessee at the time of execution of the contract for furnishing the guarantee, and the commission is to be spread over the period for which the guarantee is given. In all other cases, the amount is to be taxed in the year in which the guarantee has actually been given irrespective of the period of guarantee. Matter remanded. (A.Y.1998--99) (A. Y. 1998-1999 to 2003-2004)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.4: Charge of income - tax- -Mutuality--Interest paid to head office or overseas branches not considered as expenditure in hands of Indian branch-Interest received is also not to be considered as income in hands of head office or overseas branches.

The assessee received interest from its head office or overseas branches, which was not offered for taxation the Tribunal held that on the principle of mutuality the interest income received by the assessee from its head office or overseas branches was not chargeable to tax and interest paid to the head office or other overseas branches was not deductible. (A.Y.1998-99) (A. Y. 1998-1999 to 2003-2004)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.4:Charge of income-tax –Mutuality- Non-Government organisations managing self-help groups of villagers and their families principle of mutuality is applicable income is not liable to tax.

An all India national apex body called the Association of Sarva Seva Farms, a national level trust, formed for the upliftment of poor villagers who had received in the past, parcels of land distributed by the Boodhan movement but were not in a position to raise resources to carry on agricultural and other related activities in the land allotted to them, arranged for funds for distribution among the Boodhan land allottees, on the security of the Boodhan land. The national apex body was a charitable institution and a non-profit organisation. The assessee-trusts were non-Government organisations registered in Tamil Nadu, to manage self-help groups of villagers and their families and undertaking programmes to generate income for the benefit of the members of that self-help group. The assessee-trusts were under a common umbrella micro financing company, which obtained loans from statutory corporations and nationalised banks and distributed them to the assessees. The assessees, in turn, lent the money to the self-help groups under them. The umbrella company charged interest at the rate of 12 per cent on the net balance method for the amount advanced by it to the assessees. The assessees, in turn, advanced these loans to their self-help groups at a flat rate of 12 per cent. This differential method generated surplus income in the hands of the assessees. The bye-laws of the assessee-trusts provided that 95 per cent of such surplus would be distributed among the members of the self-help groups working under them and 5 per cent of the surplus retained by the assessee-trusts for their own maintenance and other administrative overheads. Field organisations like the umbrella company, the assessee-trusts and individual self-help groups worked under the overall guidance and policy formulation of the national apex body. In the course of the assessments of these assessee-trusts, the Assessing Officer held that because the distribution of 95 per cent made by the assessee-trusts to member self-help groups was not determinate with reference to individual recipients 95 per cent of surplus distributed by the assessee-trusts to their member self-help groups had to be treated as income of the respective trusts.Tribunal held thatmonies obtained by assessee-trusts from umbrella micro financing organisation lent to self-help groups under them - 95 per cent of surplus income of assessees distributed among members of self-help groups. Details of every member belonging to self-help group available on record. Details of loans availed of by various self-help groups properly recorded. Distribution of funds by self-help groups to individual members properly documented. Tribunal held that finding that share of every self-help group or share of every individual member indeterminate without any basis. Distribution by assessee trusts to self-help groups under them was assessable as income of those self-help groups themselves. Assessee is governed by principles of mutuality hence is not taxable income. (A.Ys.2007-2008, 2008-2009)

ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277(Chennai) (Trib.)

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

The question before the Special Bench was "whether in the facts and circumstances of the case, the excise duty refund set off is a capital receipt.""If the excise duty refund /set off is held to be revenue receipt, whether the said amount is to be included in the business profits for the purpose of deduction under section 80IB of the Income –tax Act."The Special Bench held that refund of excise duty is to be treated as capital receipt in the hands of the assessee, which is not chargeable to tax.As the first question is decided in favour of assessee the second question was not decided. (A.Y. 2006-07)

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

S.5: Scope of total income -Accrual of – Interest- Certificate of deposit-Interest received on maturity is taxable in the year of maturity.

Assessee-company purchased three certificates of deposit from three banks on 31-3-1997. Certificates of deposit issued by respective banks showed period of deposit as 92 days. In return filed for assessment year 1997-98, assessee offered a sum of Rs. 3.37 lakhs as interest relatable to 31-3-1997, i.e., date of purchase of certificates of deposit, and balance interest of Rs. 3.07 crores was offered in next assessment year 1998-99. Assessing Officer assessed entire interest income, i.e., Rs. 3.10 crores in assessment year 1997-98 itself. The Court held thatsince assessee received interest only on maturity date, i.e., on 1-7-1997, Assessing Officer would be entitled to assess a sum of Rs. 3.37 lakhs alone for assessment year 1997-98 and balance amount of Rs. 3.07 crores had to be assessed in next assessment year 1998-99. In favour of assessee. (A.Y. 1997-98)

Infrastructure Development Finance Co. Ltd. v. Jt. CIT (2013) 213 Taxman 28(Mag.) (Mad.) (High Court)

S.5: Scope of total Income – Accrual- Stock broker –Income by overriding title- Amount paid on behalf of public sector companiescannot be included as income of assessee.[S. 37(1)]

Assessee a registered stock broker he claimed to be a broker of Indian bank which purchased securities of different public sector undertakings (PSUs) at a particular rate quoted by Indian Bank and sold them to said bank through Bank of Madura, which acted as routing bank and charged service charges. Assessee was paid commission for transaction. Assessee claimed that his role was only of a conduit for taking demand drafts of Rs.14.79 crores favouring PSUs in respect of additional interest payable by bank to PSUs on deposits kept by them.This claim was confirmed by Indian BankThe Assessing Officer found that neither public sector orgainsations nor Indian Bank had any agreement with the assessee. Out of 8 Public sector companies only 3 had confirmed receipt of demand drafts. The Assessee also took alternative plea that the amount may be treated as business expenditure under section 37(1). The Assessing Officer included the amount in the assessee's income holding that the payments made to the public sector undertakings were not falling under the category of diversion of income by overriding title at source. On appeal Commissioner (Appeals) accepted the claim of assessee. In the meantime, the criminal prosecution was laid against the assessee and the Bank Chairman. The CBI acquitted them as the charges had not been proved beyond reasonable doubt. In appeal before the Tribunal the Tribunal set aside the order of Commissioner (Appeals) on the ground that the criminal Court's decision was not binding on the Tribunal and had no relevance in deciding the issue. On appeal by assessee the Court held that question with reference to status of assessee as a broker had been clearly spoken to by witnesses who were officers of bank, who had understood role of assessee and, accordingly, instructed assessee to act. Court held that since evidence recorded clearly proved status of assessee as a broker only, even going by theory of preponderance of probabilities, assessee could not be mulcted with any liability as regards sum of Rs. 14.79 crores as his income. In favour of assessee. (A.Ys. 1991-92, 1992-93, 1993-94)

T. Jayachandran v. Dy. CIT (2013) 212 Taxman 620 (Mad) (High Court)

S.5:Scope of total income - Accrual- Retention money-Accrues on performance of conditions in the agreement.

Customer retained money in respect of a completed contract for satisfactory performance of contract, for which due diligence was undertaken. Only on demonstration of satisfactory performance of contract, money was to be released finally to assessee, otherwise it had to repair fault or pay liquidated damages. Tribunal held that such retention money did not accrue as income to assessee on raising bill after completion of project, income arose on performance of conditionalities of agreement and, thus, it did not accrue as income in current year. In favour of assessee (A. Y. 2009-10)

Dy. CIT v.Angelique International Ltd. (2013) 55 SOT 226 (Delhi) (Trib.)

S.5: Scope of total income - Accrual – Revenue for services - Unused prepaid cards sold to users of telecom services is assessable in the year when talk time is actually used.

Talk time charges received by the assessee, a telecom service provider, on the sale of prepaid cards are to be recognized as income of the relevant year only to the extent the talk time has been actually used by the customers, and the amount referable to the unused talk time is to be recognized as income in the subsequent year when the talk time is actually used.

ACIT v. Shyam Telelink Ltd (2013) 151 TTJ 464 (Delhi. (Trib.))

S. 5 : Scope of total income – Amount payable to foreign entity did not constitute the income of foreign entity in the absence of permission obtained from RBI as required by FERA

The assesse, M/s. Broz Allen & Hamilton (BAH) India, is a foreign partnership firm and it has a branch office in India through which it renders management and technical consultancy services. BAH India has availed the services from various group entities and made the payments for the same. According to Assessing Officer, the payments made by BAH India to the group entities abroad were chargeable to tax as 'fees for technical services'. The Assessing Officer completed assessments under section 143(3) r.w.s. 148 treating BAH India as agent of group entities and the amount paid were taxable as fees for technical services. The CIT (A) upheld the validity of assessments made by the Assessing Officer.

The Tribunal held that the amounts payable by BAH India to three group entities in Germany, India and Panama (SE Asia) did not constitute their income chargeable to tax in the year under consideration as there was no accrual of income in the absence of permission obtained from RBI as required by FERA. Tribunal followed the two decisions of Hon'ble Bombay High Court namely, 1. CITvs. Kirloskar Tractors Ltd. (1998) 231 ITR 849 (Bom.) 2. CIT vs. John Fowler (I) Ltd., (1999) 239 ITR 312 (Bom.). (A. Y. 1998-99)

Broz. Allen & Hamilton (India) Ltd. v. ADIT (2013) 152 TTJ 497/83 DTR305(Mum.) (Trib.)

S.6(6): Residence in India - Not-ordinarily resident -Accrual of Income- Assessee has to prove that income had accrued or arisen outside India. (S. 5(1)(c)

The court held that for availing benefits of proviso to section 5(1) (c), mere claim that assessee is a person 'not ordinarily resident in India, is not sufficient. In absence of any proof that income that had accrued or arisen outside India was not on account of any business interest or trade in India, benefits of proviso to section 5(1) (c) could not be taken advantage of by a person 'not ordinarily resident' in India. In favour of revenue. (B.P. 1986-87 to 1996-97)

Kumari Kanagam (Mrs) v. CIT (2013) 213 Taxman 154 (Mad.) (High Court)

S.9(1) (i):Income deemed to accrue or arise in India - Business connection-Off shore supply equipment-Despite retrospective amendment to section 9(1) with effect from 1-6-1976 assessee would not be liable to tax under Explanation to said section.DTAA-India- Japan- (Art.7)

As per earlier Supreme Court decision in assessee's own case in Ishikawajima Harima Heavy Industries Co Ltd (2007) 288 ITR 408(SC),amount receivable by assessee in respect of offshore supply of equipment and offshore services was not liable to tax in view of article 7 of DTAA between India and Japan. Court held that, despite retrospective amendment to section 9(1) with effect from 1-6-1976 assessee would not be liable to tax in respect of such amount under Explanation to said section. In favour of assessee. (A.Y. 2003-04)

DIT(IT) v Ishikawjima Harima Heavy Inds. Co. Ltd. (2013) 212 Taxman 273 (Bom.) (High Court)

S.9(1)(i): Income deemed to accrue to or arise –Business connection-DTAA- India – Germany - Supply of imported equipment and materials from Germany and supervision of erection, start-up and commissioning of power project – Income be taxed as business profit. (S. 44D, 115A, Art.7)

The assessee a company was awarded a contract by State Government for renovation, modernization and up gradation of a power house. The scope of work included supply of imported equipment and materials from Germany and supervision of erection, start-up and commissioning of power project. The assessee offered the amount for taxation at the rate of 10% of contract value as per section 44BBof the Income-tax Act.The revenue taxed the consideration in respect of these activities as Business Profit. It was held that there was neither any other contrary view nor the assessee brought on record any material controverting the findings of the AO in this regards. Thus, the consideration be taxed under article 7 of DTAA r.w.s. 44D and S. 115A. Accordingly the appeal of assessee was dismissed. (A.Y. 2007-08)

Voith Seimens Hydro Kraftwerkstechnik Gmbh & Co. KG (2013) 140 ITD 216 (Delhi.) (Trib.)

S.9(1)(i): Income deemed to accrue or arise in India –Business connection- Service rendered abroad-Deduction at source-DTAA-India- UK-Poland- Brazil-Canada-Australia- Business profit- Assessee was not liable to deduct tax at source from said payments and Assessing Officer was not liable to deduct tax at source, hence the assessee cannot be treated as in default under section 201. (S.9(1) (vii), 195, 201)

Assessee company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. It was held that the services rendered by overseas service providers would not fall within ambit of technical services as given in Explanation 2 to section 9(1) (vii) instead they were in nature of commercial services and amount received for such services constituted business profit. (AY 2005-06 & 2006-07)

Yash Raj Films P. Ltd. v. ITO (IT) (2013) 140 ITD 625/23 ITR 125 (Mum.) (Trib.)

S.9(1)(i): Income deemed to accrue or arise in India - Business connection-Deduction at source-Commission-Foreign agent-Not liable to deduct tax at source.(S.40(a) (ia), 195)

Assessee paid commission to foreign agents for services rendered by them in connection with effectuating export sales. Assessing Officer observed that such foreign agents were paid by way of telegraphic transfer obtained from banks in India and formed an opinion that banks in India acted as agents of foreign agents and received payment on their behalf in India. Assessing Officer on such facts held commission so paid to be deemed to have been received in India and charged tax thereupon. Tribunal held that merely because commission were paid to foreign agents in their bank accounts by telegraphic transfer through banks in India, it could not be said that income were deemed to have been arisen to such foreign agents in India when there was no material on record to show that such foreign agents had rendered any part of services in India or had a permanent establishment and business connection in India. In favour of assessee. (A.Y.2005-06)

ACITv.Avon Organics Ltd. (2013) 55 SOT 260 (Hyd.) (Trib.)

S.9(1) (i): Income deemed to accrue or arise in India - Business connection- Deduction at source-OECD Model Tax Convention –Commission paid out side India is not liable to deduct tax at source. (S.40(a) (ia), 195).

In the course of its export business activities, the assessee paid commission to its foreign agents for their services. The assessee submitted that the agents operated out of India and provided their services outside India and none of them had any office or place of profit or any other business connection in India. Thus, no part of the income of the foreign agents arose in India and, consequently, no tax was to be deducted from the commission payments. The Assessing Officer held that the exporter utilizes the information, data and know how, as gathered by the agent, to further his business activities and thus, there was an element of consultancy, technical and managerial services for which the commission in question

was paid for services rendered regarding the nature of products and inspection, timing and prices of products and detailed technical and other formalities; that thus, the provisions of section 9 would come into play. Since the assessee had not deducted tax at source under section 195, the Assessing Officer disallowed the amount of commission paid under section 40(a) (ia). On appeal, the Commissioner (Appeals), following the first appellate order for the assessment year 2008-09 in favour of the assessee, deleted the addition of Rs. 37,87, 26,158 made by the Assessing Officer. On appeal by revenue, the tribunal held that where the export commission paid to a non-resident agent for services rendered outside India is not chargeable to tax in India favour of assessee. (A.Y.2009-10)
Dy. CITv.Angelique International Ltd. (2013) 55 SOT 226 (Delhi) (Trib.)

S.9(1) (vi): Income deemed to accrue or arise in India- Royalty-Royalty earned by non-resident from another non-resident is not taxable in India even if payer uses the know-how for sale of products to India.
The assessee, a USA based company, held patents to the CDMA mobile technology which it licensed to various unrelated wireless Original Equipment Manufacturers (OEMs) located outside India. The OEMs used the assessee's technology to manufacture CDMA handsets outside India which were sold to telecom companies in India (e.g. Reliance Com). The Indian telecom companies sold the handsets to Indian consumers. The AO and CIT (A) held that as the OEMs sold the handsets to customers in India, they were "carrying on a business in India" or had a "source of income in India" and so the royalty paid by them to the assessee was taxable in India u/s 9(1) (vii) (c). On appeal by the assessee to the Tribunal, held by the Tribunal allowing the appeal:

(i) U/s 9(1) (vi) (c) royalty payable by a person who is a non-resident is deemed to arise in India where the royalty is payable in respect of any right etc. utilised for the purposes of a business carried on by such person in India or for the purposes of earning any income from any source in India. S. 9(1) (vi) (c) is a deeming provision and the burden is on the Revenue to prove that the payer has a business/ source of income in India. What is important for s. 9(1) (vi) (c) is not whether the right to property is used "in" or "for the purpose of" a business, but to determine whether such business is "carried on by such person in India";

(ii) The first question is whether the OEMs have carried on business in India and used the assessee's patents for that purpose. The mere fact that the products manufactured by the OEMs outside India were sold to parties in India does not mean that the OEM's carried on business in India. For a business to be carried out in India there should be some activity carried out in India. A mere purchase and sale with an Indian party is not sufficient. The fact that the OEMs customized the handsets so as lock them to a specific operator and included Hindi and regional languages, etc. was irrelevant as such customization was not connected with the assessee's patents. There was no customization of the hand set qua the CDMA technology. Further, even if the OEM customized the handsets to Indian specifications that did not mean that the OEM was "carrying on business in India". The assessee's role ended when it licensed its patents to the OEMs and the OEMs role ended when they sold the handset to the Indian customer. The sale was of a chattel as a chattel and though the product is a combination of hardware and technology, the revenue's attempt to break down the sale into various components is not supported by the terms of the agreement and the facts and it cannot be said that every item other than software was sold and that the embedded software has been separately licensed. There is also no evidence on record to show that title to the handsets passed in India or that certain further activity was done by the OEMs in India after the sale. On the other hand, title to the equipment passed to the Indian customer on high seas and the profits made by the OEMs would not be chargeable to tax in India. The taxability of the assessee directly depends on the taxability of the OEMs and if the OEM is not taxable, the assessee cannot be made taxable (Ericsson AB 246 CTR 433 (Del), Skoda Export, Nokia Net Works followed). Even otherwise, the mere passing of title in imported goods in India does not mean that the OEM is carrying on business in India. It is "business with India" and not "business in India";

(iii) The second question is whether the OEMs have used the asssessee's technology to earn or make income from a "source" in India. A "source of income" is the activity that gives raise to income. The source of the royalty income for the assessee is the activity of manufacturing by the OEMs, which is carried out outside India (Rhodesia Metals 9 ITR (Suppl) 45 &Havells India followed). The department's argument that the assessee had made available the CDMA technology (software) to the OEMs in the form of chip sets and that OEMs have inserted these chip sets into the handsets manufactured by them and that these in turn have been licensed to Indian operators for which OEMs have received a consideration and hence they have a source of income in India is contrary to the facts. It is also not the basis on which the assessment was made by the AO &CIT (A). What was brought to tax was the royalty earned from the licensing of patents and not royalty earned on software embedded in the chip sets. (A. Y. 2000-01 to 2004-05)
Qualcomm Incorporated v. ADIT (2013) 23 ITR 239/85 DTR 156(Delhi) (Trib.)

S.9(1) (vi): Income deemed to accrue or arise in India –Fees for technical services-Permanent establishment-DTAA- India – USA - Creative fees and Database cost is held as Fees for Included Servicesandclient coordination feesis held as business profit could not be taxed in India. (Art 7, 12)

Assessee, USA based company, acted as a communication interface between its group concerns and group concerns and multinational clients.The assessee provided services to one of its group concern and received fees as creative fees, database cost and client coordination fees. It was held that fees under the head creative fees and database cost amounted to Fees for included services as per Art. 12 of DTAA and chargeable at the rate of 15%. However, client coordination fees which was taxed as business profit,could not be taxed in India, due to non-existence of PE. (A.Y. 2010 – 11)

DDIT (IT) v. Euro RSCG Worldwide Inc. (2013) 140 ITD 210/84 DTR 29/153 TTJ 378 (Mum.) (Trib.)

S. 9(1) (vi) : Income deemed to accrue or arise in India – Royalty – Consideration received for supply of shrink wrap software is not royalty-DTAA-India- USA. (Art 12(3))

Amount received for supply of shrink wrap software was not royalty within the meaning of Article 12(3) of the DTAA between India and USA. Tribunal held that the receipt would constitute business receipts in the hands of assessee and the assessee who is non-resident does not have a PE. Therefore, business income of the assessee cannot be taxed in India in the absence of PE. (A. Y. 2006-07)

Dy. DIT (IT) v. Solid Works Corporation (2013) 152 TTJ 570 (Mum.) (Trib.)

S. 9(1) (vi) : Income deemed to accrue or arise in India – Royalty –Computer software-Deduction at source. (S.40(a) (ia))

Payment made for use of computer software does not amount to royalty under Explanation 2 to section 9(1) (vi) and thus section 40(a) (i) does not apply to such payment. (A.Y. 2007-08)

SKOL Breweries Ltd v. A CIT (2013)142 ITD 49/ 84 DTR 271/153 TTJ 257 (Mum.) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India - Fees for technical services –Royalty-Software licence-Right to use said confidential information in form of computer programme software would itself constitute royalty and attract tax.DTAA-India-Ireland – (Art 12)

Assessee granted a non-exclusive non-transferable software license without right of sub-licence. Licensee might make a reasonable number of copies of licensed software for backup and /or archival purposes only, even if it was not transfer of exclusive right in copyright, right to use confidential information embedded in software in terms of aforesaid license which makes it abundantly clear that there was transfer of certain rights which owner of copyright possessed in said computer software/programme in respect of copyright owned. Therefore in terms of DTAA consideration paid for use or right to use said confidential information in form of computer programme software would itself constitute royalty and attract tax.Court held that it is not necessary that there should be a transfer of exclusive right in copyright and where consideration paid was for rights in respect of copyright and for user of confidential information embedded in software/computer programme, it would fall within mischief of Explanation (2) of section 9(1) (vi) and there would be a liability to pay tax. In favour of revenue. (2001-02 to 2003-04)

CIT v. Synopsis International Old Ltd. (2013) 212 Taxman 454 (Karn.) (High Court)

S.9(1) (vii): Income deemed to accrue or arise in India – Fees for technical services- Dependent agent-Market supportive services-DTAA –India- Switzerland-In the absence of Permanent Establishment, article 7 pertainingto business profits would cease to operate in assessee's case hence not liable to tax.(S. 90,115A, Art. 5, 7)

Assessee, a Swiss company, operated India specific websites. For this purpose, it entered into Marketing Support Agreement with two group companies in India. Assessee claimed that though it earned revenue from its websites in India, same was not taxable as business profits as it did not have PE in India. The Indian group companies at no stage negotiated or entered into contract for or on behalf of assessee. They simply provided marketing services to assessee or making collection from customer and forwarding same to assessee. Indian group companies were not required to manufacture or process goods or merchandise on behalf of foreign assessee. Further goods or merchandize were delivered by seller to buyer directly who enter into contract through assessee's website. It was held that though group companies were dependent agents as per article 5(6) because they exclusively assisted assessee in carrying on business in India, they could not be considered as 'Dependent agent PE' because they did not perform any function specified in clauses (i) to (iii) of article 5(5). Thus, in absence of PE, article 7 pertaining to taxing business profits would cease to operate in assessee's case.

eBay International AG v. ADIT (2013) 140 ITD 20/82 DTR 89 (Mum.) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India - Fees for technical services- Services rendered by machines is not "fees for technical services"-DTAA-India-Germany. (S.90, 195, Art 7, 12.)

The assessee made payment to a laboratory in Germany for carrying out certain tests on circuit breakers manufactured by the assessee and to certify that the said circuit breakers met with international standards. The assessee claimed that as the said tests were carried out by sophisticated machines without human intervention, the services did not constitute "fees for technical services" as defined in s. 9(1) (vii) of the Act. The AO &CIT (A) rejected the claim on the ground that the services were "technical" in nature and that even assuming human intervention was necessary, the same was present in the form of humans observing the process, preparing the report, issuance of certificate and monitoring the machines. On appeal by the assessee to the Tribunal, HELD allowing the appeal:

(i) Explanation 2 to s. 9(1) (vii) defines the expression "fees for technical services" to mean "any consideration for the rendering of any managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Applying the principle of noscitur a sociis, as the words "managerial and consultancy" have a definite involvement of a human element, the word "technical" has to be construed in the same sense involving direct human involvement. If services are provided using an equipment or sophisticated machine or standard facility, it cannot be characterized as "technical services" so as to fall within s. 9(1) (vii) (CIT v. Bharati Cellular Ltd (2009) 319 ITR 139 (Del) & Skycell Communications Ltd. v. Dy. CIT (2001) 251 ITR 53 (Mad) followed; fact that Bharati Cellular has been set aside by the SC in Bharat Cellular Ltd 330 ITR 239 (SC) does not affect this principle);

(ii) On facts, the services provided by the German laboratory for testing the circuit breakers was a standard service done automatically by machines and not requiring human intervention. The fact that humans are required for observing the process, preparing the report, issuance of certificate and for monitoring of machines is not a relevant criterion. The test is whether the services are rendered by a human or by a machine. If a human renders the technical services with the aid of a machine, the services are "technical services". But if the services are rendered by a machine without human interface or intervention, then it is not "technical services" as defined. The mere fact that certificates have been provided by humans after the test is carried out by the machines does not mean that services have been provided by human skills.

Siemens Limited v. CIT (2013)142 ITD 1/ 23 ITR 86 /84 DTR 1 (Trib.) (Mum.)

S.9(1) (vii): Income deemed to accrue or arise in India-Fees for technical services-Buying agency service commission-Procurement and incidental services rendered is not managerial or technical services, it being nature of Commission isnot taxable in India.

The assessee is a tax resident of Hong Kong. Its sourcing division provided buying agency services to various customers including an Indian company, an associate enterprise. For such services the assessee entered into a "buying agency services agreement" with the Indian company for sourcing of merchandise in respect to which the assessee received buying commission at 8.25 per cent. of the value of merchandise. The assessee provided services which included centralised media and advertisement planning, market research, public relations, sports marketing and other marketing services such as catalogue production, development of retail shop systems, etc. Another division of the assessee's group, provided certain regional marketing and administrative support services to the group's Asia-Pacific distribution entities (including the Indian company). Under the buying agency services agreement, the assessee was required to provide services to the Indian company in relation to purchase of goods from outside India, for and on behalf of the Indian company in accordance with the terms of the agreement. For the year under consideration, the assessee received remuneration in the form of buying commission at 8.25 per cent of the invoice amount of the merchandise. During the course of the assessment proceedings, the Assessing Officer held that the buying commission income received by the assessee was in the nature of fees for technical services and should be taxable in India in the hands of the assessee. Accordingly, it considered to be taxable on gross basis at 30 per cent on the ground that the agreement for providing such services was entered into on June 18, 1999. The Dispute Resolution Panel confirmed the view of the Assessing Officer. On appeal to the Tribunal, held, that the assessee was to receive commission for procuring the products for the Indian company and rendering incidental services for purchases. The services rendered by the assessee in this case were purely in the nature of procurement services and could not be characterised as "managerial", "technical" or "consultancy" services. Accordingly, the consideration received by the assessee was appropriately classified as "commission" as against "fees for technical services". It was not taxable in India. Appeal ofassessee was allowed (A. Y. 2007-2008)

Adidas Sourcing Ltd. v. Asst. DIT (2013) 21 ITR 697(Delhi) (Trib.)

S.9(1) (vii): Income deeded to accrue or arise in India- Fees for technical services-Effective management-DTAA-India- Denmark-Payment for procuring a global telecommunications facility is not for fees for technical services. (S.28(i), 115A)

Assessee a Denmark company was engaged in shipping business. It had procured a global telecommunication facility. It claimed that without this facility assessee could not conduct international shipping business nor would its agent be able to act as agent to the assessee. Since the assessee was recovering a share of total cost incurred for setting up system from its Indian agents, assessee contended that said amount just represented 'cost sharing arrangement' and hence payment so received was in nature of reimbursement of expenses. In light of judgement Dampskibsselskabet v. ADIT (IT) (2011) 130 ITD 59 (Mum), where it was held that such payment was only reimbursement of cost for shipping and not in business of providing any technical services, it was held that payment so made by assessee was not FTS. Issue was decided in favour of assessee. Assessee raised alternative plea to consider payments received from Indian agents for sharing assesse's global telecommunications facility as income from business of shipping is not chargeable to tax in India by virtue of article 9. Following the judgment in Dampskibsselskabet v. ADIT (IT) (2011) 130 ITD 59 (Mum),the Tribunal held that amount received from Indian agents was part of income from shipping and hence not taxable in India as per article 9 since place of effective management of assessee company was situated in Denmark. Accordingly the addition was deled.(A.Ys. 2001-02 to 2004-05)

Aktieselskabet Dampskibsselskabet Svendborg v. ADIT (IT) (2013) 140 ITD 515 (Mum.) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India-Fees for technical services-DTAA-India-Singapore-Testing of dog food and similar products--No technical knowledgeis made available, payments received by assessee not fees for technical services. (Art.12(4).

The assessee-company, incorporated under the laws of Singapore, is engaged in the business of rendering services relating to testing solutions, sample analyses and analytical testing of food and feed samples. During the year, the assessee provided services to Indian companies for testing of dog food and similar products. After testing, the test reports were sent to the Indian companies and the assessee received service fee therefor. The assessee claimed that these receipts were its business income. The Assessing Officer held that the assessee had made available technical knowledge, skill or know-how to the Indian customer and the payments made to it were in the nature of fees for technical services as defined under article 12(4) of the Double Taxation Avoidance Agreement between India and Singapore. The Commissioner (Appeals) confirmed this. On appeal the Tribunal held that, the assessee provided testing services and issued test reports. These reports could not be said to make available any technical knowledge, experience, skill, know how or processes which enabled the Indian company to acquire the services to apply the technology contained therein. Therefore, these receipts would not amount to fees for technical services under the "make available" clause in article 12(4) of the Double Taxation Avoidance Agreement between India and Singapore. (A.Y. 2005-2006)

Romer Labs Singapore Pte. Ltd v. ADIT (IT) (2013)141 ITD 50/ 22 ITR 224 (Delhi) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India-Fees for technical services -Deduction at source-DTAA-India-UK-Fabric design-Design supplied by consultant becoming property of assessee, payment is fees for technical service, assessee isliable to deduct tax at source-[S.195,Art. 13(4) (c)]

The assessee entered into an agreement with a consultant in the U. K., which was required to deliver 9,000 fabric designs for cotton shirting to the assessee every quarter. The consultant was also required to show or make available all documents and reports in respect of the transaction relating to this agreement and to provide detailed quantity report in writing to the assessee, along with specific or new design developed by the consultant. The compensation was payable by the assessee to the consultant for each design supplied by the consultant. On expiry or termination of this agreement, the consultant was required to return all the documents and other internal documents of the assessee but there was no clause in the agreement to say that the client, i.e., the assessee is required to return the designs supplied by the consultant. On the question whether the payment to be made to the consultant was covered by the definition of the term "fees for technical services" under article 13 of the Double Taxation Avoidance Agreement between India and the U. K. and hence is taxable in India and accordingly tax is required to be deducted at source under section 195 of the Act :On appeal by assessee Tribunal held that the design supplied by the consultant to the assessee became the property of the assessee and could be used by the assessee for its own business and be sold by the assessee to any outsider for consideration. The services rendered by the consultant to the assessee-company fell within article 13(4) (c) of the Double Taxation Avoidance Agreement and, therefore, the payment therefore was fees for technical services. According to the memorandum of understanding between India and the U.S.A., it was provided that there will be no fees for technical services if technology is not made available to the person acquiring the services. It was also specified that technology will be considered "made available" when the person acquiring the services is enabled to apply the technology. In the present case, fabric design was made available to the assessee and the assessee could apply such fabric design to process and produce garments and it could also sell and transfer such fabric design to outsiders for consideration and there was no restriction on the assessee in this regard in the agreement between the assessee and the consultant. Considering all these facts, the services received by the assessee and provided by the consultant were nothing but technical services and hence, tax was deductible by the assessee from the payments made by the assessee, to the consultant. (A.Y.2009-2010, 2010-2011)

Sintex Industries Ltd. v. ADIT (IT) (2013)141 ITD 98/ 22 ITR 182(Ahd.) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India - Fees for technical services –Royalty-Television news services- DTAA-India-Matter remanded. (Art 13)

Assessee, a tax resident of UK, is engaged in business of providing television news services including audio-visual feed together with textural scripting information, desktop library services, etc. Assessee received certain amount for rendering 'location special' service to customers in India. According to assessee 'location special' was a service wherein a customer requested assessee to film a particular event, meeting, etc., and, thus, payment was in respect of services for producing a television film - Which did not quality as royalty or fees for technical services under article 13 of Indo-UK treaty. Assessing Officer, however, took a view that amount received for rendering said service was covered as 'fees for technical services' under section 9(1) (vii) (b) read with Explanation 2. Tribunal held thatin absence of relevant material as well as agreement on record in terms of which assessee had rendered services and received payment, it was not possible to determine real nature of activity carried out /services rendered by assessee. Therefore, matter was to be remanded back for disposal afresh remanded. (A.Y. 2001-02)

Dy. CIT (IT) v.ReutersTelevision Ltd.(2013) 55 SOT 235 (Mum.) (Trib.)

S.9(1) (vii): Income deemed to accrue or arise in India – Fees for technical services-Website-DTAA-India – United Kingdom – Payment for subscription made by garment manufacturer to an online fashion storeis royalty matter remanded back to Commissioner (Appeals). (S.90, 195, Art.7, 13)

Assessee, a resident, was engaged in business of fashionable ready to wear garments. In order to get international trend analysis and other information relating to fashion design and style, it subscribed to internet site of a company located in United Kingdom and paid subscription charges of £ 17,000. Assessee sought certificate for payment without deduction of tax at source under section 195. Assessing Officer rejected application and directed deduction of tax at 15.30 per cent holding said payment as royalty. It was held that subscription made by garment manufacturer to online fashion website is royalty or not, to be decided in light of judgment of Karnataka High Court in *CIT (International Taxation)* v. *Wipro Ltd.* [2011] 203 Taxman 621/16 taxmann.com 275. Matter remanded to Commissioner (Appeals) for a specific finding on point of transfer of right to use copy rightin the light of Karnataka High Court’s decision.(AY 2005-06)

ADIT v. Globus Stores P. Ltd. (2013) 140 ITD 103/81 DTR 225/153 TTJ 248 (Mum.) (Trib.)

S:9(1) (vii): Income deemed to accrue or arise in India - Fees for technical services-**Absence of permission vis-à-vis amount payable to overseas group entities. (S.5)**

Income on account of the amount payable by the assessee to the overseas group entities would accrue to the said entities only on receipt of the required approval from RBI; as such approval was not received during the year under consideration, the amount could not be taxed as income in the relevant year. (A.Y. 2005-06)

Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR293/23 ITR 53/56 SOT 444/153 TTJ 153 (Mum. (Trib.)

S. 9(1) (vii) : Income deemed to accrue or arise in India – Fees for technical services-Amount not paid during relevant yearare not liable to tax in India- Absence of permission of RBI-Amount payable to overseas group entities. (S.5)

Amounts not paid during the relevant year are not liable to tax in India as fees for technical services.Additions made by the Assessing Officer and confirmed by the CIT (A) on account of the amounts payable by BAH India to the three overseas group entities in Germany, Singapore and UK were deleted by the Tribunal. Tribunal held that the amounts could not be brought to tax in India during the year under consideration as fees for technical services as per the relevant provisions of DTAAs. Since the same had not been paid to the said entities, Tribunal followed three decisions namely 1. DIT (Intl. Taxation) vs. Siemens Aktionqesell Schaft (IT Appeal No. 124 of 2010 dt. 22-10-2012, High Court of Bombay) 2. CIT vs. UHDE GmbH (1996) 54 TTJ 355 (Mum.) (Trib.) 3. CSC Technology Singapore P. Ltd. vs. ADIT (2012) 50 SOT 399 (Delhi). (A. Y. 1998-99)

Broz. Allen & Hamilton (India) Ltd. v. ADIT (2013) 152 TTJ 497/83 DTR305/56 SOT 96 (Mum.) (Trib.)

S.10(11) : Exempt income - Provident fund - Interest on Provident funds.

The assessee in the return of income filed, which was revised on two occasions, as well as in the two revised returns filed by him, offered for taxation under the head income from other sources, Rs.3,81,565 being interest on PPF. The Assessing Officer (AO) completed the scrutiny assessment by accepting the returned income. In an appeal to CIT (A), the assessee contended that he should be allowed exemption in respect of interest on PPF deposit u/s. 10(11) of the Act. The CIT (A), relying on the decision of the Apex Court in the case of Goetze India Ltd (284 ITR 323) held that no fresh claim can be made by the assessee. He dismissed the appeal filed by the assessee. ITAT can consider a new deduction which, inadvertently, was not claimed in the return filed by the assessee. Assessee is entitled to claim interest on PPF to be exempt even though the same was not claimed in the income tax return. (A.Y.2008-09) (ITA No. 7314/M/2011, dated on 17-10-2012)

Shri Rumi K. Pali v. Dy. CIT (2013) -BCAJ Pg. 19, Vol. 44-B Part 4, January 2013(Mum.) (Trib.)

S.10(13A): Exempt income -House rent allowance-Master and servant-Exemption to be allowed.

In return of income, assessee disclosed salary received from 'S' - Assessee claimed deduction under section 10(13A) on basis of rent paid by him which had been debited from his salary directly. Assessing Officer rejected assessee's claim taking a view that income received by assessee was not taxable under head 'salary' but under head 'income from other sources'. Court held that since it was not case of Assessing Officer that relationship between 'S' and assessee was not that of a master and servant, impugned order passed by him was to be set aside and, assessee's claim for deduction was to be allowed.In favour of assessee. (2001-02)

CIT v UK Bose (2013) 212 Taxman 399(Delhi) (High Court)

S.10(22): Exemptincome-Educational institution-Denial of exemption-Right of cross examination-Department disputing genuineness of transaction-Contributor to assessee denying transaction-Opportunity should be given to assessee to cross-examine disputant-Matter setaside. (S.68, 148)

For the assessment year 1998-99, the Assessing Officer made additions denying the exemption under section 10(22). For the assessment year 2000-01, an addition was made in respect of the loan. The Commissioner (Appeals) upheld the additions. The Tribunal held that the assessee did not have the right to cross-examine the witness who made the adverse report, especially when the records did not indicate that the assessee had made any attempt to produce witnesses. On appeals by the assessee the Court held that, when the authorities entertained a doubt about the genuineness of the transaction, the Tribunal ought to have afforded the assessee an opportunity to cross-examine the disputant. The Revenue had not accepted the explanation given by the assessee. The assessee would not have expected one of the contributors to have denied the factum of contribution. This view was inevitable because but for this the assessee would not have opted to cross-examine the contributor. Therefore, when there was unexpected change of facts, the party should not be deprived of the opportunity to cross-examine the witness branded as the assessee's witness. The Evidence Act also permits a party to cross-examine his own witness under stated circumstances. Unless it is proved that the income derived was covered under section 10(22) it could not be decided whether the addition under section 68 was possible or not. Therefore, the matter was remitted to the Assessing Officer for further consideration in the light of the legal position. (A.Ys. 1998-1999, 2000-2001)

Sri Krishna Educational and Social Trust v. ITO (2013) 351 ITR 178(Mad.) (High Court)

S.10(23C) (iv): Exempt income-**Charitable purpose-Seed certification-Activity of certification of seeds is not charitable purpose hence not entitled to exemption. (S.2 (15.)**

Activity of certification of seeds carried on by the assessee which is rendering its services not directly to the farmers but to its clients/agents engaged in trading of certified seeds with profit motive is outside the purview of "charitable purpose" in view of first proviso to s. 2(15) as such activity is "in relation to trade, commerce or business" and, therefore, assessee is not entitled for approval u/s. 10(23C) (iv). (A.Y. 2010-11)

Andhra Pradesh State Seed Certification Agency v. C CIT (2013) 83 DTR 23 (AP) (High Court)

S.10(23C): Exempt income-Educational institution-Incidental surplus-Upgrading facilities of college including for purchase of library books and improvement of infrastructure cannotbea ground for denial of exemption.

The Chief Commissioner denied the benefit of the exemption under sub-clause (vi) of section 10(23C) on the ground that the assessee was in receipt of the Government grants which formed a substantial part of the total receipts and, consequently, the case of the assessee would not fall within the purview of section 10(23C) (vi) for the reason that an institution which is wholly or substantially financed by the Government falls within the ambit of sub-clause (iiiab). Sub-clause (vi) applies to those institutions which do not fall within the ambit of sub-clause (iiiab) or sub-clause (iiiad). He was of the view that an institution which was in receipt of substantial grants from the Government would consequently not fall within the ambit of sub-clause (vi). The Chief Commissioner held that the fees which were collected by the assessee for the year ending on March 31, 2011, would indicate that the assessee did not exist solely for educational purposes. The Chief Commissioner had also noted that the assessee had collected from student's utility fees, project work fees, industrial visit fee and a magazine fee from which it was sought to be deduced that the assessee did not exist solely for educational purposes. Moreover, there was an increase in the asset base with a generation of surplus which indicated that the activities of the assessee were not devoted solely for educational purposes. The Chief Commissioner held on that basis that the assessee existed for the purposes of profit. On a writ petition, allowing the petition the court held that, though the Chief Commissioner inquired into the question for the purposes of his determination under sub-clause (vi) of section 10(23C), the requirement that an institution must exist solely for educational purposes and not for the purposes of profit is common both to sub-clause (iiiab) as well as sub-clause (iiiad). Hence, the grievance of the assessee was that while on the one hand the Chief Commissioner had held that sub-clause (vi) would not be applicable to an institution which was in receipt of substantial grants from the Government (such an institution being governed by sub-clause (iiiab), at the same time, the finding that the assessee did not exist solely for educational purposes and not for the purposes of profit would, in effect, not merely lead to the rejection of the exemption under sub-clause (vi) but would also affect the claim of the assessee to the grant of an exemption under sub-clause (iiiab) as well. The sole and dominant nature of the activity was education and the assessee existed solely for the purposes of imparting education. An incidental surplus which was generated, and which had resulted in additions to the fixed assets was utilized as the balance-sheet would indicate towards upgrading the facilities of the college including for the purchase of library books and the improvement of infrastructure. With the advancement of technology, no college or institution can afford to remain stagnant. The assessee was entitled to exemption under section 10(23C(vi). (A.Y. 2011-2012)

Tolani Education Society v. Dy. DIT (Exemptions) (2013) 351 ITR 184/214 Taxman 58/85 DTR 1 (Bom.) (High Court)

S.10(23C): Exempt income-Educational institution-Registration-Cancellation-Held to be notvalid. (S. 12A, 12AA)

Assessee was granted registration under section 12A being a charitable institution. Chief Commissioner disallowed assessee's claim of exemption under section 10(23C) (vi) on ground that it had not solely been established for educational purposes. Commissioner relying on said order cancelled registration granted to assessee under section 12A-.Tribunal restored registration. High court held thatsince (i) exemption under section 10(23C) (vi) could be claimed by an assessee without applying for registration under section 12A, and (ii) in order of Commissioner there was no whisper that assessee had not fulfilled any of conditions of section 11, Tribunal had rightly restored registration. In favour of assessee.

CIT v.Jeevan Deep Charitable Trust(2013) 212 Taxman 19 (All.) (High Court)

S.10(23C): Exempt income-Educational institution-Object of general public utility-Petitioner had not rendered its services directly to farmers but was rendering its services directly to its clients/agents who were engaged in tradinghence rejection of exemption was valid.[S.2(15)]

Petitioner is registered under Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli. It was carrying on functions of certification agency under Seeds Act, 1966.Seed growers were entering into contract with a society/agent, which approached petitioner for certification of seeds and after securing certification, they were selling certified seeds to farmers at a market price determined by them. Petitioner was also collecting fee for providing certification. Its application for approval under section 10(23C) (iv) was rejected by Chief Commissioner. The court held that thepetitioner had not rendered its services directly to farmers but was rendering its services directly to its clients/agents who were engaged in trading of certified seeds with profit motive and, therefore, its activities were not for 'advancement of any other object of general public utility' and hence not for 'charitable purpose' in view of second limb of first proviso to section 2(15). Therefore, its application for approval under section 10(23C) (iv) was rightly rejected. In favour of revenue. (A.Y.2010-11)

Andhra Pradesh State Seed Certification Agency v Chief CIT (2013) 212 Taxman 493(AP) (High Court)

S.10(23C): Exempt income-Educational institution-Registration is condition precedent. (S.11, 12AA)

Assessee-institution was formed to provide education to weaker sections of society.It claimed exemption under section 10(23C) (iiiad) in respect of donations received from various parties. It was noted that assessee did not exist solely for educational purpose and, moreover, amount of donations exceeded prescribed limit of Rs. one crore, further, there was neither any registration under section 12AA nor any evidence on record showing that donations were received with a specific direction that it would form part of corpus of assessee-institution. Tribunal held thatin view of above, assessee's claim for exemption could not be allowed. In favour of revenue. (A.Y.2007-08)

Manas Sewa Samiti v. Add. CIT (2013) 55 SOT 217 (Agra) (Trib.)

S. 10(23C): Exempt incomes– Educational institution – Annual receipts is to be taken into consideration and not total income of society.

The assessee society is running school activities. The Assessing Officer held that the annual receipts of the assessee including interestexceeded Rs. 1 crore ,but the assessee had not obtained prior approval ofChief Commissioner under section 10(23C) (vi). He accordingly the rejected the claim under section 10(23C) (iiid). Commissioner (Appeals) up held the order of Assessing Officer. On appeal, the Tribunal held that, in terms of provisions of section 10(23C) (iiiad), annual receipts of school or university may be taken into consideration and not total income of society running that school or university. However, income from interest on FDRs is an additional income of the society and it cannot be considered to be part of annual receipts of the school. Accordingly the appeal of assessee was allowed.(A.Y. 2006-07)

Param Hans Swami Uma Bharti Mission v. ACIT (2013) 140 ITD 429 (Delhi) (Trib.)

S.10A: Free trade zone- Newly established undertaking- Export turnover—Total turnover-Expenditure incurred by assessee not forming part of export turnover is excludible from total turnover.

Court held that when computing the relief under section 10A of the Income-tax Act, 1961, the expenditure incurred by the assessee should be excluded from the total turnover if they are reduced from the export turnover. CIT v. Tata Elxsi Ltd. [2012] 349 ITR 98 (Karn) followed. (A. Y. 2005-2006)

CIT v. Samsung Electronics Co. Ltd. (2013) 350 ITR 65 (Karn.) (High Court)

Editorial: The Supreme Court has granted special leave to the Department to appeal against this judgment : (2013) 350 ITR (St.) 3

S.10A: Free trade zone- Newly established undertakings-Blending of tea- is manufacture.

Deduction under section 10A was deniedon the ground that blending and packing of tea was not "manufacture". The Commissioner (Appeals) allowed the claim. On appeal by the revenue, the Tribunal held that the Commissioner (Appeals) had rightly allowed the claim of the assessee under section 10A. (A.Y.2004-2005 to 2006-2007)

Al-Gayathri Trading Co. P. Ltd. v.Dy. CIT (2013) 22 ITR 214(Trib.) (Cochin) (Trib.)

S.10A:Free trade zone-Newly established undertakings-Export of computer software is entitled to deduction.

The assessee-company provided computer system consultancy services to private sector, public sector, Government and other organisations, undertaking studies on matters relating to feasibility of computerisation, evaluating and selecting appropriate hardware and software, installing and assisting in using mainframe, mini and microcomputers, etc.Tribunal held that the assessee-company is entitled to the benefit of deduction available under section 10A of the Act. (A.Ys. 2003-2004, 2004-2005)

ACIT v. SRA Systems Ltd. (2013) 22 ITR 205(Chennai) (Trib.)

S.10A: Free Trade Zone-New industrial undertaking-Export turn over

Tribunal held that whatever is excluded from export turnover has to be excluded from total turnover also while computing deduction under section 10A. In favour of assessee. (A.Y.2004-05)

SITEL India (P.) Ltd v. ACIT (2013) 55 SOT 541 (Mum.) (Trib.)

S.10A: Free Trade Zone-Newly established undertakings-Foreign exchange gain and amounts written off is eligible for exemption under section 10A.

Tribunal held that foreign exchange fluctuation gain in respect of export proceeds was to be included in income eligible for deduction under section 10A. Excess provision made in relation to export proceeds in earlier years and written back in relevant assessment year was also includible in total income eligible for deduction under section 10A. In favour of assessee. (A.Y. 2007-08)

Headstrong Services India (P.) Ltd. v ACIT (2013)55 SOT 481 (Delhi) (Trib.)

S.10A:Free trade Zone - Newly established undertaking-Apportionment of income and Expenditure – Method consistently Accepted by Department -Satellite charges not telecommunication charges to be excluded from export turnover.

Assessee had two units, one of which qualified for exemption. There was apportionment of income and expenditure on basis of head-count of employees in two units. This method consistently used and accepted by department and is not to be disturbed. UK company was providing training to employees of assessee in India. Payment for services rendered by UK company. Technical services are not provided outside India. Expenses relating to technical services are not to be deducted. Satellite charges not telecommunication charges to be excluded from export turnover. (A. Y.2006-2007)

Wills Processing Services (India) P. Ltd. v. Dy. CIT [2013] 21 ITR 1/ 151 TTJ 555(Mum.) (Trib.)

S.10B:Hundred per cent export - Oriented undertakings - Newly established – Receipt from Local Stitching charges not local sales for the purpose of section 10 B.

Where the assessee is engaged in export of garments, contract receipts in the form of stitching charges could not be treated as local sales for the purposes of exemption under section 10 B of the Act.(A.Y.:2001 – 02)

CIT v. First Garments Manufacturing Co. India (P) Ltd. (2013) 81 DTR 372 (Mad) (High Court)

S.10B: Hundred per cent export-oriented undertakings - Newly established - Local sales – Not eligible for exemption under section 10B.

Assessee is engaged in business of purchase of textile material, stitching and exporting garments. Apart from export receipts, it received certain amount by way of stitching charges. It claimed exemption under section 10B in respect of receipts of stitching charges. It submitted that whenever stitching machines were relatively free, same were utilized for purpose of undertaking job work for outsiders. Assessing Officer disallowed claim of exemption.Tribunal treated receipts of stitching charges as local sales and held that since said receipts were less than 25 per cent of total sales, assessee was entitled to exemption under section 10B. On appeal by revenue the Court held that in view of provisions of second proviso to section 10B(1) and section 10B(4) Tribunal committed error in treating receipts of stitching charges as

amounting to local sales for purpose of granting exemption. The assessee was not eligible for exemption under section 10B. In favour of revenue(A.Y. 2001-02)
CIT v. First Garments Mfg. Co. India (P.) Ltd. (2013) 212 Taxman 142(Mag.) (Mad) (High Court)

S.10B: Hundred per cent export-oriented undertakings- Newly established-Computation of profits-Set off of loss- Losses of eligible units during tax holiday period is not be allowed to be set-off against income of non-eligible units. (S.2 (45), 10A)
Assessee had three units, two were section 10B eligible units and one was non- eligible unit. There were losses incurred in eligible units during the year which were sought to be set-off from profits of non-eligible unit. It was held that losses of eligible units during tax holiday period could not be allowed to be set-off against income of non-eligible units as per provisions of S. 10B(6) allow such losses to be kept in suspense to be set-off only after tax holiday period is over. Therefore the claim of set off made by assessee was disallowed. Appeal of assessee was dismissed. (A.Y. 2008-09)
Karle International (P.) Ltd. v. ACIT (2013) 140 ITD 261 (Bang.) (Trib.)

S.11: Property held for charitable purposes – Business held by trust – There being no connection between the carrying on of the business and the object of the trust,the Assessee isnot entitled to exemption under section 11.
Where business was commenced by the trustees after formation of the trust with the financial aid and assistance from relatives and banks, it cannot be said to be held under trust and the business also cannot be incidental to the attainment of objects of the trust which are directed towards promotion of education, running hospitals, etc. and the assessee is not entitle to exemption under section 11 of the Act. (A.Y. 1992 – 93 to 94 – 95, 01 – 02 and 05 – 06 to 07 – 08)
CIT v. Mehta Charitable Prajnalay Trust (2013) 81 DTR 104 (Delhi) (High Court)

S.11: Property held for charitable purposes-Business held in trust-Trust entitled to exemption which was created for mainly educational and charitable purposes.
Assessee-trust was created mainly for educational and charitable purposes. Founders gifted land and running business with a stipulation that said business shall be run by trustees and income therefrom shall be utilized for charitable objects. Assessee claimed exemption under section 11 in respect of income earned from aforesaid business. Assessing Officer denied exemption on plea that there was no evidence to hold that business carried on by trust was in course of actual carrying on of primary objects. The court held that since Assessing Officer had also recorded a finding of fact in assessment order that primary objects of trust were charitable in nature, he was wrong in denying exemption. In favour of assessee. (A.Ys.1990-91, 1991-92)
CIT v. Janakiammal Ayyanadar Charitable Trust (2013) 212 Taxman 274 (Mad) (High Court)

S.11: Property held for charitable purposes - **Accumulation of income –Form no 10 can be filed in the course of assessment proceedings. (Income –tax Rules, 1962,Rule 17, Form no 10)**
The Tribunal rejected the assessee's claim for accumulation of income on the ground that Form No. 10 had not been furnished along with the return but was filed during the course of reassessment proceedings. The Court held that form No. 10 could be furnished by assessee-trust for purposes of section 11 (2), i.e., for accumulation of income, during reassessment proceedings. In favour of assessee. (A.Ys.1998-99, 2000-01)
Association of Corporation & Apex Societies of Handlooms v ADTI(2013) 213 Taxman15 (Delhi) (High Court)

S.11: Property held for charitable purposes-Business held in trust-Trust is entitled to exemption. (S.13(1) (bb))
Assessee-trust was formed to aid and assist in establishment, maintenance of hospitals, educational institutions, houses for poor, to conduct poor feeding, etc. Subsequently, a unit dealing in safety matches got settled in favour of assessee through a trust deed. Trust deed enabled assessee to exploit proprietary trademark 'camel' which was a well-known brand of safety matches. Subsequently, assessee leased out said business. It claimed exemption under section 11. Assessing Officer viewed that even though trust had as its object relief of poor, education, medical relief and advancement of general public utility, assessee's activities in exploiting trade constituted business income and hence, claim of assessee was hit by provisions under section 13(1) (bb); consequently, it was not entitled to deduction. Court held that since primary purpose of trust was to afford relief to poor, education and medical relief, means employed by exploiting its assets to earn income to achieve objects, could not in any manner, defeat claim of assessee under section 11.In favour of assessee. (A.Y. 1981-82 to 1983-84,1989-90,1992-93,1995-96).
CIT v P. Iya Nadar Charitable Trust (2013) 213 Taxman 48 (Mad) (High Court)

S.11:Property held for charitable purposes-Registration-Maintenance Public lavatories is incidental to object which is eligible for exemption (S.2(15), 12, 13)

Object of society is construction of public lavatories. Maintenance of public lavatories being incidental to object of society,amounts spent on such maintenance is entitled to exemption. As there was no evidence of diversion of funds to the founder of society, section 13 is not applicable.Hence, the Society is entitled for registration.(A.Y. 2006-07)
Dy. CIT v. Sulabh International Social Service Organisation (2013) 350 ITR 189 (Patna) (High Court)

S.11: Property held for charitable purposes- Exemption of income from property treated as Business - Income is exempt if there is no profit motive. (S.2(15), 28(iii))
Receipts derived by a Chamber of Commerce and industry for performing specific services to its members, though treated as business income, would still be entitled to exemption under section 11, provided there is no profit motive. Issueis decided in favourof assessee. (A.Y.2006-07, 2007-08)
PHD Chamber of Commerce & Industry v. DIT (2013) 212 Taxman 194 (Delhi) (High Court)

S. 11: Property held for charitable purposes-Exemption-Objects -Merely on basis of one or two objects trust cannot be held purely religious trust. Exemption allowed for earlier years as the facts are same exemption cannot be denied for the relevant year. (S.13(1) (b))
Assessing Officer denied the benefit of exemption under section 11 of the Act on the ground that the objects of the assessee-trust included propagation of the Islamic faith and promotion of religious activities of the Islamic faith, that the trust was a mixed trust and the provisions of section 13(1) (b) were applicable. On appeal, the Commissioner (Appeals) took the view that the objects of the trust did not reveal that the benefits were meant only for a particular religious community but were available to the general public at large and that the provisions of section 13(1) (b) were not applicable. On appeal : The Tribunal held that major expenses of Trust was on conducting peace conference and merely on the basis of one or two objects Trust cannot be heldpurely religious trust. Even if the assessee was a mixed trust, section 13(1) (b) could not be applied as it was applicable to a purely charitable trust therefore benefit of section 11 could not be denied to the assessee under section 13 (1) (b). Exemption was allowed in earlier yearsthe principle of consistency was also applicable. Accordingly the appeal ofdepartment was dismissed. (A. Y. 2008-2009)
Add. DIT (Exemption) v. Islamic Research Foundation (2013) 21 ITR 588 (Mum.) (Trib.)

S.11: Property held for charitable purposes-Application of income-Capital expenditure- Depreciation is allowed. (S.32)
Tribunal held that granting exemption in respect of capital expenditure as application of income under section 11 and claiming ofdepreciationunder section 32 is valid. Appeal of revenue was dismissed. (ITA no 2658 /Ahd/2012 Bench A. dt 31-1-2013(A.Y. 2009-10)
ADIT (Exemption) v. Friends of WWB,India (2013) BCAJ –March –P. 604(Ahd.) (Trib.)

S.12: Voluntary contributions-Trust or institutions-Corpus donation is not taxable.
Assessee-trust received donation of agricultural land from 'M'. Assessing Officer taking a view that donor had not made any specific stipulation in gift deed indicating that it would be towards corpus of trust, held that said gift was not entitled to exemption under section 11.Tribuanl held that in view of fact that donation was made by donor in order to establish an engineering and management college in name of his grandfather, donation in question was a corpus donation and, it was not a taxable income in hands of assessee under section 12(1). In favour of assessee. (A.Y. 2008-09)
Add. CITv.Chaudhary Raghubir Singh Educational & Charitable Trust(2013) 55 SOT 211 (Delhi) (Trib.)

S.12A:Registration-Trust or institution-Condonation of delay in making application was held to be valid.(S.80G(5))
Tribunal condoned the delay in making application u/ss. 12A and 80G as the assessee was led to believe that appropriate applications were already filed with the income taxauthorities on account of irregularities and illegalities committed solely by its treasurer who owned up the responsibility for having misled the assessee representing that the necessary application was made in time and that the assessee has filed police complaint against the said treasurer for his unscrupulous activities and also taken prompt remedial action by filing applications for registration both u/s. 12A as well as s. 80G, the order of the Tribunal cannot be said to be perverse, unreasonable or irrational.
DIT (Exemption.) v. Vishwa Jagriti Mission (2013) 83 DTR 47 Delhi) (High Court)
S.12A:Registration-Trust or institution-Restorationof application-An application submitted for registration under section 12A once rejected, it cannot be restored.
The assessee, an educational institution, submitted application for registration under section 12A.The Commissioner issued communication requiring the assessee to rectify the defects mentioned therein. For non-compliance ofhe rejected the application Thereafter the assessee submittedan application stating that the defects were rectified and requested for reconsideration of its application. The Commissioner issued communication requiring the assessee to cure the defects

mentioned therein and also asked it to attend his office. Further, the Commissioner having noticed that the assessee had also filed an application for the benefit under section 10(23C) (vi) before the Chief Commissioner, presumed that the assessee was not pursuing the application and on that basis, closed the said application as withdrawn. In the meanwhile, the assessee applied for registration under section 12A for the year 2010-11, which was granted.The assessee also filed a writ petition before the High Court contending that application was pending before the Commissioner. The High Court disposed of the writ petition. It held that the stand taken by the assessee regarding pendency of the application for registration under section 12A was not true and correct. Therefore, the relief sought for could not be granted. Ithaving noticed that registration under section 12A had already been granted to the assessee on the basis of a subsequent application with effect from the assessment year 2010-11 onwards permitted the assessee to seek appropriate remedy for applying for registration under section 12A with respect to the periods prior to the assessment year 2010-11. Thereupon the assessee approached the Commissioner by submitting fresh application under section 12A. The Commissioner held that since application was not disposed of as provided under section 12(AA) (b) (ii), a fresh application was not maintainable. Thereafter the High Court by judgment modified its earlier judgment dated 28-1-2011 and permitted the assessee to seek appropriate remedy to restore application, if permissible under law. The assessee again approached the Commissioner. The Commissioner considered the matter afresh and passed order holding that application could not be restored in law. The court held that an application submitted for registration under section 12A once rejected, it cannot be restored. In favour of revenue.
Kadakkal Educational Trust.v. CIT (2013) 213 Taxman 7(Kerala) (High Court)

S.12A: Registration - Trust or institution –While granting the registration objects of Trust is only to be seen. (S.12AA)
The Trust has made an application u/s12A, as it is supposed to do the same within one year from the commencement of its activities. The Hon'ble court held that, under the provisions of s. 12AA, satisfaction regarding the genuineness of the activities of the trust is to be seen at the stage for application of income, that is, when the trust or institution files its return, and not at the stage of commencement stage when the activities have not commenced in full, therefore held that the trust was not entitled to benefit of registration was not sustainable. Therefore, where the trust was in nascent stage and was yet to work towards its object, Commissioner could not deny registration on ground that it was not utilizing its income for charitable purposes; at stage of granting registration, objects of trust only had to be considered by Commissioner. In favour of assessee.
CIT v B.K.K. Memorial Trust (2013) 213 Taxman 1/ 82 DTR 299 (P&H) (High Court)

S.12A: Registration- Trust or institution- Cancellation of registration is held to be not justified. (S.10 (23C), 11, 12AA)
Assessee was granted registration under section 12A being a charitable institution. Chief Commissioner disallowed assessee's claim of exemption under section 10(23C) (vi) on ground that it had not solely been established for educational purposes.Commissioner relying on said order cancelled registration granted to assessee under section 12A.Tribunal restored registration. On appeal by revenuethe Court held that since (i) exemption under section 10(23C) (vi) could be claimed by an assessee without applying for registration under section 12A, and (ii) in order of Commissioner there was no whisper that assessee had not fulfilled any of conditions of section 11, Tribunal had rightly restored registration. Appeal of revenue was dismissed.
CIT *v.* Jeevan Deep Charitable Trust(2013) 212 Taxman 19 (All.) (High Court)

S.12A: Registration- Trust or institution-Cancellation-Amendment of section 2(15) barring exemption where receipts exceed Rs. 10 lakhs is not sufficient reason for cancellation of registration. (2(15), 11)
The objects of the assessee-club, a registered society, were to promote sports related to motor car and motor cycle and conduct motor races, competitions, etc. For the assessment year 2009-10, the Assessing Officer recommended cancellation of registration granted to the assessee under section 12A(a) of the Income-tax Act, 1961. The Director of Income-tax (Exemptions) held that the motor sports were for the purpose of promotion of business of sponsors. The sponsorship proceeds were commercial receipts in the hands of the assessee. Therefore, the assessee was hit by the proviso to section 2(15) inserted from April 1, 2009. Accordingly, the objects and activities of the assessee could not be considered charitable in nature. Therefore, he cancelled registration granted to the assessee. On appealthe Tribunal held that the order of the Director (Exemptions) mentioned that the assessee's objects were in the nature of advancement of object of general public utility coming within the ambit of section 2(15) of the Act. The Director (Exemptions) cancelled registration on the ground that receipts exceeded Rs.10 lakhs. If the receipts exceeded Rs. 10 lakhs under the second proviso to section 2(15) of the Act, the Assessing Officer would be justified in denying exemption under sections 11 and 12 of the Act; however, this would not be sufficient reason for cancelling the registration granted to the assessee under section 12A(a) of the Act. If in the very next year, the assessee's receipts were less than Rs. 10 lakhs, it would have to be

granted the exemption under sections 11 and 12 of the Act, if other conditions were satisfied. In other words, the nature of the objects of the assessee could not fluctuate in tandem with the quantum of receipts mentioned in the first proviso. Therefore, the Director (Exemptions) fell in error in cancelling the registration granted to the assessee under section 12A(a) of the Act. (A. Y. 2009-2010)
Madras Motor Sports Club v. DIT (Exemptions) (2013)/141 ITD 1/ 22 ITR 175(Chennai) (Trib.)

S.12A:Registration-Trust or institution-Trust of primary purpose of public welfare is predominant then the trust is entitled for registration. (S.2(15))
The assessee trust was established under the Rajasthan Urban Improvement Act, 1959 with the main object to construct roads, provide water and electricity facilities, construct drainage system, improve gardens and open spaces and to provide housing facilities by allotting the residential plots. The Tribunal held that the primary purpose of public welfare was predominant object of the assessee, therefore, the assessee was entitled for registration under section 12A. (A. Y. 2003-04 to 2007-08)
Urban Improvement Trust Sriganganejor v. CIT (2013) 152 TTJ 507/83 DTR 282(Jodh.) (Trib.)
S.12A:Registration-Trust or institution- Cancellation of registration under section 12AA(3) (S.12AA(3), 13(1)(C).)
Tribunal held that a mere finding that the objects of the appellant have been altered without the consent of the department would not be sufficient to exercise the power under section 12AA(3) without giving a finding that the objects of the trust are no longer charitable. On this score the impugned order is liable to be set aside. None of the reasons given in order under section 12AA(3) can be the basis to cancel the registration already granted to the assessee. Assessee was already granted registration under section 12A, it shows that the revenue was satisfied that the objects of the assessee trust was charitable, the amendment in the deed makes it clear that the benefits of the trust is open to all caste, creed and religion. One fails to see how the amendment will make the assessee not existing for the purpose of education or not existing for charitable purpose. Thus, the assessee is entitled to registration under section 12A and it cannot be cancelled under section 12AA(3) without giving a finding that the objects are no longer charitable. (A. Y. 2009-10)
Krupanidhi Educational Trust v. DIT (Exem.) (2013) 152 TTJ 673/84 DTR 120 (Pune) (Trib.)
S.12AA: Procedure for registration-Trust or institution-Commissionerwas not justified in refusing registration when activities of the Trust have not commenced.
Assessee made an application for registration under section 12A(1) (a). Commissioner noted from trust deed that objectives of trust were mainly religious. Commissioner called upon assessee to produce evidence regarding expenses incurred towards objects of organization. On failure of assessee to bring on record any such evidence, Commissioner rejected assessee's application for registration. Tribunal, however, granted registration to assessee-trust.
On appeal the court held that even though Commissioner has power to call for such documents or information from trust as he thinks necessary, yet it does not mean that if activities of trust have not commenced, Commissioner has authority to reject its application for registration on ground that trust failed to convince him about genuineness of activities. Therefore, the Tribunal was justified in setting aside impugned order of Commissioner. In favour of assessee.
CIT v Kutchi Dasa Oswal Moto Pariwar Ambama Trust (2013) 212 Taxman 435 (Guj.) (High Court)

S.12AA:Procedure for registration - Trust or institution –Condonation of delay- Mistake of chartered accountant delay was condoned. (S.12A, 80G)
Assessee, a charitable institution, filed an application seeking registration under section 12A with delay. Assessee attributed delay in filing registration application to its erstwhile treasurer 'S', who was a chartered accountant.DIT (Exemption) rejected assessee's application. Tribunal found that it was because of irregularities, illegalities and mis-representations of 'S' that assessee-society was led to believe that appropriate applications under Act were already filed with revenue authorities for registration.Tribunal further found that as soon as assessee-society came to know about irregularities on a complaint from donor and on further enquiry conducted by governing body, it hastened to take remedial action by filing applications for registration both under sections 12A and 80G. Tribunal thus condoned delay in filing registration application and granted registration to assessee-society. On appeal by revenue the Court held that on facts, impugned order passed by Tribunal granting registration did not require any interference. In favour of assessee.
DIT. V. Vishwa Jagriti Mission (2013) 213 Taxman 65 (Delhi) (High Court)

S.12AA: Procedure for registration-Trust or institution-Institution incorporated under section 25 of Companies Act and engaged in facilitating literacy programmes, rejection of application based on assumption, order set aside with direction to grant registration. [S. 2(15)].
The objects of the assessee-company were providing education and facilitating social and economic empowerment, economic development programs, literacy programs, training programs for villagers and downtrodden people. It applied

for registration under section 12AA of the Act. The Director of Income-tax (Exemptions) rejected the application on the ground that the objects and activities of the assessee were not inconformity with the definition of charitable purpose under section 2(15) and hence did not qualify for registration under section 12AA of the Act. On appeal,the Tribunal held that rejection of registration by the Director of Income-tax (Exemptions) was based on assumption. The fact that the assessee had been incorporated under section 25 of the Companies Act, 1956 showed that it had been formed for promoting charity or any other useful object and intended to apply its profits, if any or other income in promoting its objects. In other words, it was a non-profit earning organisation. Therefore, the order of the Director of Income-tax (Exemptions) was to be set aside with a direction to grant registration to the assessee under section 12AA.
Social Pedia Knowledge Foundation v. DIT(Exemptions) (2013)141 ITD 398/22 ITR 238 (Chennai) (Trib.)

S.12AA: Procedure for registration -Institution –Registration is condition precedent for claiming exemption. (S.10(23C), 11)
Tribunal held that grant of registration under section 12AA is a condition precedent for claiming exemption under section 11. (A.Y. 2007-08)
Manas Sewa Samiti v. Add. CIT (2013) 55 SOT 217 (Agra) (Trib.)

S.14A: Disallowance of expenditure-Exempt income-Taxable income-Expense specifically relatable to taxable income cannot be disallowed. (Rule 8D)
For AY 2008-09, the AO computed the s. 14A disallowance under Rule 8D by excluding from the total general expenditure of Rs.1,16,94,912, an amount of Rs.19,96, 228 being expenses related to house property income, interest expenditure and demat charges. The balance expenses were allocated as relating to tax exempt income in the ratio of tax exempt receipts to total receipts. On this basis, 46.68% of the balance expenditure was disallowed u/s 14A read with Rule 8D. In appeal before the CIT (A), the assessee claimed that an amount of Rs. 57,14,450 was incurred exclusively on building maintenance and service expenses and as no part of these expenses could be attributed to tax exempt income, it had to be taken out of computation of 14A disallowance. This was upheld by the CIT (A). On appeal by the department to the Tribunal, HELD dismissing the appeal:
Once it is found that an expense is specifically relatable to a taxable income, no portion of such an expense can be disallowed u/s 14A. The allocation of general expenses vis-à-vis tax exempt income and taxable income can only be made in respect of expenditure which cannot either be wholly allocated to taxable income, then or which cannot be wholly allocated to tax exempt income; the allocation can be made, even on the basis of formula set out in Rule 6D (iii) (should be Rule 8D (2) (iii), in respect of such expenses which do not fall within any of these categories. (A. Y. 2008-09)
JCITv. Pilani Investment & Industries Corpn. Ltd (Kol.) (Trib.),www.itatonline.org

S.14A: Disallowance of expenditure - Exempt income –Stock in trade-Shares-Rule 8D(2) (ii) & (iii) do not apply to shares held as stock-in-trade.
For AY 2008-09, the assessee, a dealer in shares, received dividend of Rs. 18.91 lakhs but did not offer any disallowance u/s 14A and Rule 8D on the ground that they were not applicable to shares held as stock-in-trade. The AO rejected the claim and computed the disallowance under Rule 8D at Rs. 21.45 lakhs. On appeal, the CIT (A) held that even if Rule 8D was not applicable to shares held as stock-in-trade, a disallowance had still to be made u/s 14A and this was estimated at Rs. 1.89 lakhs. On appeal by the department to the Tribunal HELD dismissing the appeal:
Though s. 14A applies to shares held as stock-in-trade, Rule 8D (2) (ii) & (iii) cannot apply if the shares are held as stock-in-trade because one of the variables on the basis of which disallowance under rules 8D(2) (ii) & (iii) is to be computed is the value of "investments, income from which does not or shall not form part of total income". If there are no such "investments", the rule cannot have any application. When no amount can be computed under the formula given in rule 8 D(ii) and (iii), no disallowance can be made under rule 8D (2) (ii) & (iii) either. As held in CIT v B. C. Srinivas Shetty (1981) 128 ITR 294 (SC), when the computation provisions fail, the charging provisions cannot be applied, and by the same logic, when the computation provisions under rule 8 D (2) (ii) and (iii) fail, disallowance there under cannot be made either as the said provision is rendered unworkable. However, this does not exclude the application of rule 8 D(2) (i) which refers to the "amount of expenditure directly relating to income which does not form part of total income". Accordingly, in a case where shares are held as stock-in-trade and not as investments, the disallowance even under rule 8 D is restricted to the expenditure directly relatable to earning of exempt income. The result is that the scope of disallowance under Rule 8D is narrower than that of S.14A. (A. Y. 2008-09)
DCIT v. Gulshan Investment Co Ltd (Kol.) (Trib.) www.itatonline.org

S.14A: Disallowance of expenditure-Exempt income- Bank-Interest on tax-free securities Interest-free funds available with assessee as capital and reserves in excess of amount invested in bonds hence no disallowance of interest, however administrative and other expenses to be disallowable on reasonable basis. [S 10(15) (iv) (h)]

The assessee earned interest on tax-free securities which it claimed as exempt under section 10(15) (iv) (h) of the Act on gross basis. The Assessing Officer held that the gross interest from tax-free securities was not eligible for exemption under section 10. He computed the amount of net interest applying rate of 20.61 per centafter taking into account the income after reducing interest cost but before indirect expenses. This led to restriction of the exemption under section 10(15). On appeal the Commissioner (Appeals) held that the investments in the tax-free bonds being much less than the available capital and reserve, the Assessing Officer failed to establish nexus between investments in deposits and deployment of interest bearing funds. He, therefore, set aside the action of the Assessing Officer restricting the amount of exemption under section 10(15) (iv) (h). On appeal by the revenue the Tribunal held that the Commissioner (Appeals) had recorded a categorical finding that the interest-free funds available with the assessee in the shape of capital and reserves were far in excess of the amount invested in bonds. In that view of the matter there could be no disallowance of any interest under section 14A. However, the administrative and other expenses were required to be disallowed under section 14A on some reasonable basis. Appeal of revenuewas partly allowed(A.Y.1998-99) (A. Y. 1998-1999 to 2003-2004)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.14A: Disallowance of expenditure-Exempt income-Quantum of disallowance –Restricted to 2.5%.

Assessee earned exempt income from its investment in shares and mutual funds to tune of Rs. 3.24 crore and 8.51 crore respectively. Assessee quantified disallowance of Rs. 82.80 lakh under section 14A as expenditure incurred to earn such exempt income on basis of time spent by staff for managing said investments. Assessing Officer found that assessee's reserves and surplus stood at Rs. 6135.60 crore and its investment stood at Rs. 3459.50 crore; and on such fact Assessing Officer opined that management would have certainly devoted more time to safeguard earnings deployed in investments - Accordingly Assessing Officer estimated 5 per cent of exempt income as expenditure disallowable under section 14A.Tribunal held thatestimation made by Assessing Officer was to be upheld but quantum of disallowance was to be restricted to 2.5 per cent, 5 per cent being on higher side. Decided partly in favour of revenue. (A.Y.2006-07)

Wipro Ltd. v. Add. CIT v(2013) 55 SOT 3(URO) (Bang.) (Trib.)

S.14A: Disallowance of expenditure-Exempt income- No dividend income- NO disallowance -(Income-tax Rules, 1962, R. 8D)

Tribunal held that as no dividend incomewas declared by assessee during the relevant assessment year hence disallowance held to be not proper. (A.Y.2008-09)

GurudasMannv. Dy.CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.14A: Disallowance of expenditure--Exempt income- Banking business-Interest expenditure. [S.10(15)]

Assessee, carrying on banking business, was maintaining nostro accounts for receipt and payment of money in foreign currency. Interest earned from overseas branches chargeable hence no disallowance of interest expenditure paid by assessee. Interest on foreign currency loans was allowable on gross interest and not on net interest. Assessee was utilising interest-free funds at its disposal for investment in interest-free securities. No disallowance qua the investment in tax-free securities. (A. Y.1997-1998)

Asst. DIT (IT v. Credit Agricole Indosuez (2013) 21 ITR 345(Mum.)Trib.)

S.14A:Disallowance of expenditure - Exempt income - Rule 8D is applicable only from A.Y. 2007-08(Rule 8D.)

Disallowance u/s. 14A for the years prior to A.Y. 2007-08 has to be made by adopting some reasonable method. Impugned order of the CIT (A) was set aside and the matter was restored to the AO with a direction to recompute the disallowance of expenses to be made u/s. 14A by applying some reasonable method. (A.Y. 2005-06)

Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293/23 ITR 53 /56 SOT 444/153 TTJ 153(Mum.) (Trib.)

S. 14A : Disallowance of expenditure – Exempt income-Interest free funds are more no disallowance can be made-No disallowance of administrative expenses unless the Officer identifies.

If the interest free funds available with assessee are more than the impugned investments then no disallowance can be made under section 14A of the Act.The Tribunal held that no disallowance could be made out of interest, management or administrative cost as the Assessing Officer has not identified any expenditure which has been actually incurred by the assessee for earning the exempt income. (A. Y. 2002-03)

Dy. CIT v. Jammu and Kashmir Bank Ltd. (2013) 152 TTJ 522 (Asr.) (Trib.)

S.14A:Disallowance of expenditure - Exempt income - Interest on borrowings has to be treated as business expenditure, it cannot be disallowed under section 14A, even though the dividend earned from the unit is exemptunder section. (S.10(33), 36(1) (iii)).

The assessee has incurred interest expenses for purchase of shares and units of mutual fund and the borrowed funds, have been used for acquisition of units are not in dispute. The Assessing Officer has held that the assessee is in business of purchase and sale of shares and also while framing the assessment under section 143(3), the loss incurred on the sale / purchase of units has been treated as business loss. The Tribunal held that once the purchase and sale of shares is held to be a business activity, the interest paid thereon has to be treated as business expenses and no disallowance can be made under section 14A. (A. Y. 2004-05)

Zaveri Virjibhai Mandalia v. ACIT (2013) 152 TTJ 20(UO) (Ahd.) (Trib.)

S.14A: Disallowance of expenditure - Exempt income –Shares held as stock in trade.(Rule 8D.)

The assessee received exempt income in the form of dividend from personal investments and also from shares held for trading. It also received tax free interest from relief bonds. The assessee maintained separate accounts including separate bank accounts and balance sheets for personal investments and trading activities in which expenses relating to those two activities were shown separately. The Tribunal held that no disallowance can be made in respect of expenses in relation to dividend received from trading in shares. In view of the judgment of Karnataka High Court in the case of CCI Ltd vs. JCIT, the decision of the Special Bench of the Tribunal in the case of Daga Capital Management P. Ltd. cannot be followed. (A.Y. 2008 – 2009) ('F' ITA No. 6332/M/11, dated 11-1-2013)

Vivek Mehrotra v. A CIT (2013)BCAJ Pg. 17, Vol. 44-B Part 6, March 2013(Mum.) (Trib.)

S.14A:Disallowance of expenditure – Exempt income –Rule 8D is not applicable. (Rule 8D)

The Assessing Officer allocated expenses relating to exempt income on proportionate basis. In appeal before the CIT (A), the CIT (A) directed the Assessing Officer to recompute the disallowance by applying Rule 8D of Income Tax Rules. On appeal,the Tribunal held that Rule 8D is applicable only from A. Y. 2008-09 and the disallowance had to be made on reasonable basis after hearing the assessee fresh in the light of the decision of Hon'ble Bombay High Court in case of Godrej & Boyce Mfg. Co. Ltd. vs. Dy. CIT (2010) 328 ITR 81 (Bom.) (A. Y. 2004-05)

Forever Diamonds (P) Ltd. v. Dy. CIT (2013) 152 TTJ 682 (Mum.) (Trib.)

S. 14A : Disallowance of expenditure - Exempt income-No exempt was earned in the relevant year. (Rule 8D)

The Assessing Officer made disallowances under section 14A towards expenditure on investment by applying Rule 8D. The Tribunal upheld the action of Assessing Officer on the point that disallowance under section 14A can be made in the absence of any exempt income but sent the matter back to the file of Assessing Officer to compute the disallowance on some reasonable basis not as per Rule 8D. (A. Y. 2006-07)

Stream International Services v. ADIT (2013) 152 TTJ 553 (Mum.) (Trib.)

S. 16 : Deductions from salaries – Director of the Company – No Employer employee relationship – claim of standard deduction under section 16 (i) rightly denied.

A director of the company holds office under the company, but, as a director he is not a servant or employee of the Company and being so the assessing officer had rightly disallowed the assessee's claim of standard deduction under section 16(i) of the Act. (A.Y. 1993-94 to 1997-98)

Sandeep Kohli v. CIT (2013) 81 DTR 307 (All) (High Court)

Vishel Kholi (Dead)through LRs v. CIT (2013) 81 DTR 307 (All) (High Court)

S.17(1):Salary –Non compete fee- Non compete commission received from employeris Liable to be taxed as Salary. (S.28(va)).

Non Compete commission received by the employee for not competing with the employer is liable to be taxed under the inclusive definition of salary under section 17 of the Act.Even otherwise the amount was liable to be taxed under section 28 (va) of the Act. (A.Y. 2003 – 04)

CIT v. Kanwaljit Singh (2013) 81 DTR 208 (Delhi) (High Court)

S.17(2):Perquisite-Rent free accommodation–As the assessee was not provided with any accommodation by his employer, that no furniture or security guards or cooks were provided to him and that telephone was provided in name of firm in which assessee was a partner addition on the basis of estimation was deleted.

Assessee was an employee of one 'S' Ltd. In assessment proceedings, Assessing Officer noticed that assessee was provided with several perquisites by his employer. He thus made certain addition to assessee's income. Commissioner (Appeals) deleted addition on ground that it was made on hypothetical and estimated basis. Tribunal noted that assessee was not provided with any accommodation by his employer, that no furniture or security guards or cooks were provided to him and that telephone was provided in name of firm in which assessee was a partner.Tribunal thus held that Commissioner (Appeals) rightly deleted perquisites brought to assessment. Court held thatsince there was no material to show that finding of fact recorded by Tribunal was contrary to record or was untenable, impugned order passed by Tribunal was to be upheld. In favour of assessee. (A.Y. 2000-01)

CIT v UK Bose (2013) 212 Taxman 399 (Delhi) (High Court)

S.17(3) (iii):Profits in lieu of salary - Dearness relief received by retired High Court Judge.

Dearness relief received by a retired High Court Judge constitutes profits in lieu of salary u/s. 17(3) (iii). (A.Y. 1998-99)

Justice G.K. Mathur (Retd.) v. CIT (2013) 83 DTR178 (All) (High Court)

S.22: Income from house property –Annual value-Unsold flats held as stock in trade-Annual value of unsold flats to taxed as income from house property is held to be justified.

Assessee is in construction business. Some flats constructed by assessee were lying unsold. Assessing Officer assessed ALV of those flats as income from house property. Assessee contended that said flats were its stock-in-trade and, therefore, ALV of flats could not be brought to tax under head 'Income from house property'. Assessing Officer did not accept stand of assessee. Commissioner (Appeals) has deleted the addition, which was confirmed by Tribunal. On appeal to High Court by revenue, the Court held that levy of income tax in case of one holding house property is premised not on whether assessee carries on business as landlord, but on ownership.The incidence of charge is because of fact of ownership, therefore, Assessing Officer rightly brought ALV of unsold flats to tax as income from house property. In favour of revenue.

CIT. v. Ansal Housing Finance & Leasing Co. Ltd. (2013) 213 Taxman 143 (Delhi) (High Court)

S.22: Income from house property - Business income –Leasing of hotel –Assessable as property income. (S.28(i))

As assessee is incurring losses in hotel business run by it, it gave hotel along with furnishings and fittings on license basis for seven years. This period of seven years was to stand automatically extended in a certain contingency. Assessee's claim that licence fee received by it was assessable as business income was rejected by Assessing Officer who assessed it as property income. Tribunal held that intention of parties had to be considered to decide whether lease/rental income was assessable as house property income or business income.On facts though it was mentioned in agreement that operation of hotel was leased out, it was only leasing out of hotel building along with furniture, fittings etc. therefore license fee was rightly assessable as property income rather than as business income. In favour of revenue. (A. Y. 2005-06)

ACITv.PalmshoreHotels (P.) Ltd. (2013) 55 SOT 198 (Cochin.) (Trib.)

S. 22 : Income from house property–Rental income from lease hold premises-Business income-Income from other sources. (S. 27(iiib), 28(i), 56.)

The assessee had taken property on lease for a period of 3 yrs. The assessee is neither owner nor a deemed owner within the meaning of section 27(iiib). The Tribunal held that the rental income derived by subletting property cannot be charged to tax under the head income from house property or as business income. It is assessable under the head income from other sources. (A. Y. 2006-07)

Stream International Services v. ADIT (2013) 152 TTJ 553 (Mum.) (Trib.)

S.24: Deductions- Income from house property- Interest--Interest on borrowed capital utilised for purchase of flats to be allowed in equal proportions in hands of assessee and her husband.

The assessee claimed deduction against the rental income of Rs. 10,49,604 on account of interest paid to the bank on borrowed capital, under the head "Income from house property". The Assessing Officer disallowed the claim. The Commissioner (Appeals) upheld this. On appeal, the Tribunal held thatadmittedly, the total interest paid by the assessee with her husband on the borrowed loans during the year under consideration was Rs.10,39,604 out of which deduction of Rs. 5,14,802 had been allowed in the hands of the husband. When the rental income from the individual flats owned by the assessee and her husband had been included in their respective hands, deduction on account of the interest paid on borrowed capital utilised for the purchase of the flat was to be allowed in equal proportions in the hands of the assessee and her husband.(A.Y. 2006-07)

Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

Manjit Mann (Smt) v. Dy.CIT (2013) 21 ITR 57(Chandigarh) (Trib.)

S. 24 : Deductions – Income from house property – Expenditure on repairs of lodge.

Assessing Officer disallowed the claim for deduction stating that the expenditure on repairs could not be allowed from estimated income. Tribunal held that claim of repairs cannot be denied in so far as specific repairs were carried out on the lodge. The assessee is entitled to deduction of expenditure on repairs of lodge under section 24(a) from the estimated income from the lodge.

Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25(UO) (Ctk.) (Trib.)

S.28(i):Business income-Adventure in the nature of trade – Sale of land after plotting and development was rightly assessed as business income. (S.2(13),45(2).)

Assessee partly inherited from his father, land in urban area for which Zamindari was abolished on 1st July 1961 and the remaining part of the land was purchased by him between 16th December 1958 and 16th May 1959. He sold the land between1984 to 1991. Held that the income tax authorities rightly concluded that capital asset was converted into stock-in-trade and sale of plots would be treated as business activity; s. 45(2) was rightly invoked. (A.Y. 1989-90, 1990,91 1991-92)

Rajendra Kumar Dwivedi v. CIT (2013) 83 DTR 65/257 CTR 263 (All.) (High Court)

S.28(i):Business income - Joint venture-Addition without any additional evidence was deleted.

Assessee and one, KM, agreed to form a joint venture and make investment in 60:40 ratio for carrying out construction work jointly undertaken by them. Out of their relation and in view of robust nature of undertaking, receipts were divided in ratio which was not strictly in 60:40 ratio. The Court held that same cannot be a ground for any addition in hands of assessee, that too without any additional material evidencing that assessee had actually received additional payments not reflected in books.In favour of assessee

CIT v. G.K. Patel & Co (2013) 213 Taxman 44(Mag.) (Guj.) (High Court)

S.28(i): Business income -Estate business-Purchaseand sale agricultural land as per memorandum of understanding is assessable as business income.

Assessees, engaged in real estate business, had entered into an Memorandum of Understanding (MOU) with N for acquiring and delivering agricultural land of 63 acres at rate of Rs. 4 lakhs per acre - Assessees purchased 39.9 acres land at rate of Rs. 1,61,000 per acre and as part performance of said MoU, delivered it to 'N' at rate of 4 lakh per acre - 'N' confirmed completion of transaction.The court held that thedifference in purchase and sale price would be assessable as assessee's income from real estate business ,since for remaining portion of land to be acquired, there was no evidence that any advance was made, said sum could not be treated as assessee’s income. Partly in favour of assessee. (A.Y.1996-97)

CIT. v. Krishnappa (2013) 213 Taxman 137 (Karn.) (High Court)

S.28(i):Business income – Construction of software technology park-Company- Rental income-Assessable as business income.

When assessee-company had taken land on lease with objects of constructing IT company with all infrastructural facilities and same was according to objects of Memorandum of Association, income received by assessee by way of lease rentals would be assessable as business income. In favour of assessee. (A.Ys. 1995-96, 1996, 97, 2001-02)

CIT. v. Elnet Technologies Ltd. (2013) 213 Taxman 129 (Mad.) (High Court)

S.28(i): Business income- Trading – Investment-Shares-Purchase of shares in initial public offer and sale thereof within few days after allotment, profits to be treated as business profits not short-term capital gains. (S.45)

The assessee earned short-term capital gains on sale of shares, which the Assessing Officer treated it as business income of the assessee rejecting the assessee's claim that similar transactions carried out by the assessee in earlier years were held to be taxable under the head "Capital gains". On appeal, the Commissioner (Appeals) found that the assessee had applied for and was allotted shares in 40 companies and these shares were immediately sold on allotment after an average period of holding of 3-4 days, that the intention of the assessee was not to hold the allotted shares but to sell them on allotment to take advantage of market imperfections and that the Assessing Officer was right in holding that this was a business asset and treating the short-term capital gains as business profit. On Tribunal also confirmed the order of lower authorities. (A. Y. 2006-2007)

Shreyas M. Jhaveri v. ITO(2013) 21 ITR 644 (Mum.) (Trib.)

S.28(i): Business income-Capital gains-Sale of shares-No material considered to verify whether shares held as investment or stock-in-trade--Matter remanded. (S.45)

The assessee sold certain shares and offered for taxation the resultant profit twice, that is, a sum of Rs. 66.57 lakhs as business income and long-term capital gains at Rs. 63.10 lakhs. The Assessing Officer deleted the long-term capital gains from inclusion in the total income allowing as business income to continue. The claim of the assessee was that the converse should be done. The Commissioner (Appeals) upheld the assessment order observing that no material was placed before the Assessing Officer or him to prove that the assessee's claim was on account of investment in shares resulting in long-term capital gains and not business income. On appeal the Tribunal held that no material had been considered or referred to verify whether such shares were held as investment or stock-in-trade. The matter was to be restored to the file of the Assessing Officer to determine whether such shares were held by the assessee as stock-in-trade or investment. If such verification showed that the shares were held as investment, the income from their transfer should be considered under the head "Capital gains", if not as "Business income". Matter remanded (A. Y.:2003-2004, 2004-2005)

Bayer Material Science P. Ltd. v. ACIT (2013)142 ITD 22/ 22 ITR 287(Mum.) (Trib.)

S.28(i):Business income-Amount claimed in compensation suit, cannotbe treated as income.

The assessee, manufacturer and domestic seller of grey fabric, filed its return of income for the AY 08-09 declaring a loss of Rs.31,31,568/- in the course of assessment proceedings, the AO noticed that the assessee had acquired a 1250 MW windmill, from M/s. Suzlon Energy, for captive consumption. The purchase order contained compensation clause, which provided that the assessee was entitled to compensation in case of any loss of generation on account of non availability of the machine below 95% @ 3.67/ KWH or as per the TNEB tariff during the warranty period. He also noticed that the generation of power unit did not touch the assured level of 37 lakh units. The assessee had filed a compensation case before the Jurisdictional High Court raising claim of Rs.17,58,014 up to 15-9-2007 for shortfall in generation of power. Since the other party had not accepted the assessees claim for compensation and also the case was pending before the Court, the assessee had not declared the amount claimed as its income. The AO held that, since the assessee was entitled to compensation as per the agreement, he taxed the sum of Rs.17,58,014 as the income of the assessee. The Tribunal held that merely by initiating the compensation suit, the amount claimed therein cannot be treated as assessee's income unless the other party admits the liability to pay compensation or there is a decree in favour of the assessee. AY 08-09(Chennai 'A' Bench, ITA No.1169/Mds/12, dated 17-12-12)

ACIT v. Trident Textile Mills Ltd. (2013) BCAJ Pg. 17, Vol. 44-B Part 6, March 2013(Chennai) (Trib.)

S. 28(1):Business loss-Bad Debt –-Inter-corporate deposit - Main business of the assessee, telecom venture – Deduction of amount non recoverable inter corporate deposit not trade debt or part of any money lending business – Not allowable as bad debts or business loss. (S.36(1) (vii).)

Where the assessee was engaged in telecom business, and not engaged in money lending business, loss of inter corporate deposit due to non-recovery of some amounts, did not fall within parameters of provisions of section 36(1) (vii) therefore not allowed as bad debts nor allowable as business loss.

Bharti Televentures Ltd. v. Addl. CIT (2013) 81 DTR 225 (Delhi) (High Court)

S.28(1): Business income-Business expenditure- General principle Section 28 does not itself provide for expenditure. (S. 37(1), 29 30 to 43D, 40(a) (ia))

The Assessing Officer disallowed the interest by applying the provisions of section 40(a) (ia). On appealthe Commissioner (Appeals) held that interest expenses in the hands of the assessee trusts are deductible under section 28 itself and therefore, section 40(a) (ia) does not apply as that section covers only the expenses claimed by assessee under sections 30 to 38. He accordingly deleted those disallowances made by the assessing officer under section 40(a) (ia). On appeal by revenue,the Tribunal did not agree with legal proposition of Commissioner (Appeals). Tribunal held that,section 28 is an explanatory section which describes various types of receipts of income which are to be included under the head "Profits and gains of business or profession". Apart from this general description, section 28 does not provide for deduction of any expenditure incurred by an assessee in earning profits and gains of business or profession. Section 29 provides that the income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D. Law has provided a comprehensive system for deciding what are profits and gains of business or profession and how profits and gains of business or profession will be computed. When such an exhaustive provision is made in the Act, it is not possible to hold that section 28 itself provides for expenditure and, therefore, the assessee can claim the expenditure of interest payment as an expenditure deductible at source itself under section 28. However the Tribunal deleted the disallowance on principle of mutuality. (A.Y.2007-2008, 2008-2009)

ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277(Chennai) (Trib.)

S. 28(i): Business income-Capital gains- Share dealing-Held as business income. (S.45)

Where assessee has made several transactions of purchase of shares during year under consideration, and if there is high volume, frequency and regularity of activity carried on by assessee in a systematic manner, it would partake character of business activities carried on by assessee in shares. Appeal revenue was allowed. (A. Y 2007-08)

ACITv.Anil Kumar Jain (2013) 55 SOT 77(Hyd.) (Trib.)

S.28(i): Business income–Capital gain-Capital asset-Real estate business- Sale ofagricultural land held to be business income. (S.2(14) (iii), 45)

Assessee was engaged in real estate business.It had made purchase of lands at frequent intervals during the earlier years. Subsequently, in the return the assessee has declared profit of Rs. 69,00, 224 on sale of agricultural lands and claimed the same as exempt from tax. The Assessing Officer noted that purchase of lands at frequent intervals during the earlier years points to the intention of the assessee of engaging in business activity. He stated that such purchases made by the assessee, were with a motive to earn profit from sale of such lands at a later date. The said lands purchased by the assessee were dry lands and from mere declaration of lease rental from the same during the earlier years at Rs. 15,000, it could not be said that the assessee was actually having agricultural income from such lands. He further, noted that the intention of the assessee at the time of purchase of said lands was to earn profit by selling them subsequently and it was a fact that real estate activity being carried out in the vicinity of the said lands. The Assessing Officer held that the profit from sale of those lands, had to be taxed as business income. Accordingly, he rejected the claim of the assessee for exemption of such profit from tax. After adding the said amount of Rs. 69,00, 224 treating the same as income from business, to the returned income of the assessee, he completed the assessment on a total income of Rs. 75, 21,624. On

appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. Tribunal held that though assessee had taken plea that land was leased for agricultural operations, evidence brought on record did not suggest that agricultural operation was actually carried on said land, instead facts of case suggested that intention of assessee was to deal in land and earn profit and therefore, income arising out of this activity was nothing but business income and it had to be taxed accordingly. In favour of revenue. Principle of res judicata does not apply in income tax proceedings.(A. Y. 2007-08).
G.K. Properties (P.) Ltd. v.ITO (2013) 55 SOT 86 (Hyd.) (Trib.)

S.28(i): Business income – Capital gains-Share dealing – Shares sold after a short duration of holding – Assessed as business income. (S.45)
Assessee declared income arising from sale of shares as short-term capital gain. Assessing Officer finding that number of transactions was very large with high frequency, opined that assessee was engaged in trading of shares. Accordingly, Assessing Officer treated short-term capital gain declared by assessee as business income.Tribunal noted that in most of cases shares had been sold on very date of purchase which showed that sales had been made even without taking delivery. In fact, assessee while giving details of transactions had himself mentioned 'Speculative Short-term Capital Gain' - Besides, other shares had also been sold after a short duration of holding. Tribunal held that aforesaid pattern of transactions clearly showed that assessee was trading in shares and was not an investor.Therefore, the impugned order passed by Assessing Officer was to be upheld assessing the income as business income. (A. Y. 2007-08)
Devji Nenshi Palani v. ITO (2013)55 SOT 192 (Mum.) (Trib.)

S.28(i): Business loss-Obsolete stock-Disallowance of claim at 25% of costwas held to be justified.
The assessee wrote offin the books of accountstores / spares which are of obsoletehaving zero value. The Assessing Officer disallowed the claim.In appeal Commissioner (Appeals) considered the scrap value of such obsolete items at 25% of cost and disallowed the assessee's claim to the extent of 25% of cot of stores/spares. On appeal by revenue and assessee the Tribunal affirmed the order of Commissioner (Appeals). The Tribunal also held that the scrap value of stock has to be considered as opening stock in the year of sale. (A.Ys. 2001-02 to 2002-03)
Gujarat Mineral Development corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.) (Trib.)

S.28(i): Business loss- Writing of interest on share loan to staff allowable as business loss.
Assessee company gave share loan to staff members for subscribing 200 shares of company. It offered interest charged on such loan for tax in earlier years. Subsequently on representation made by employees in current year had written off such interest and debited same to profit and loss account. Lower authorities disallowed the said interest written off. On appeal to Tribunal the Tribunal held that once the interest on such loan was offered to tax by assessee in earlier year and same was written off in current year, the disallowance was not justified. Appeal of assessee was allowed. (AY 2001-02 to 2002-03)
Gujarat Mineral Development corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.) (Trib.)

S.28(i): Business loss-Foreign currency-Forward contract-Loss on account of revaluation of contract on last date of accounting period is allowableas deduction.
The Tribunal held that the forward contract is entered into by the assessee to buy or sell foreign currency at an agreed price at a future date falling beyond the last date of the accounting period, the loss incurred by the assessee on account of revaluation of the contract on the last date of the relevant accounting period is an allowable deduction. (A.Y.1998-99) (A. Y. 1998-1999 to 2003-2004)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.28(i):Business loss-Transfer of business-Slump sale-Year of taxability-Transaction of transfer of business took place in previous year relevant to assessment year 2003-04 and income from transfer to be considered in that year- Additions cannot be made on presumption.
The assessee sold a part of its business to S on September 30, 2002 for a lump sum consideration of Rs. 7,12,41,450 resulting in loss of Rs. 2,10, 26,593. Pending certain legal formalities, the assessee agreed to carry out the business on behalf of the buyer S, as its custodian in India with the clear understanding that any loss/profit arising out of the operations would belong to the buyer. It contended that the loss of Rs. 2.10 crores should be allowed under the head "Profit and gains of business or profession". The Assessing Officer held that the transaction was not a slump sale transaction. From the total sale consideration of Rs. 7.12 crores towards the business, the Assessing Officer reduced a sum of Rs. 5.97 crores, being the consideration for transfer of all other items of assets at their book value. He worked out that the inventory valuing Rs. 3.24 crores was transferred to the transferee only at Rs. 1.18 crores, that the closing stock was required to be valued at the market rate. Considering the gross profit rate of 36.50 per cent as declared by the

assessee for the year in question, the Assessing Officer computed the market value of inventories at Rs. 4.43 crores compared with the actual value of transfer of inventories at Rs. 1.18 crores, and held that the assessee suppressed the income of Rs. 3.28 crores. Taking into consideration the fact that the business was transferred on September 30, 2002 and thereafter it was carried on by the assessee as a custodian of the transferee, the Assessing Officer held that the income of Rs. 3.28 crores was required to be included in the total income for the assessment year 2003-04. He, therefore, disallowed the assessee's claim of loss of Rs. 2.10 crores in the year under consideration and initiated reassessment proceedings for the assessment year 2003-04 and completed the assessment accordingly. When the appeals for both the years came up before the Commissioner (Appeals), he upheld the action of the Assessing Officer. On appealthe Tribunal held that admittedly, the assessee's business was transferred to S on September 30, 2002. The assessee in fact, carried out business on behalf of S as its custodian in India from October 1, 2002 till March 31, 2004 and transferred profit/loss arising out of such operations to the buyer. The assessee could not be considered simultaneously as agent of the buyer and also the owner of the business between October 1, 2002 to March 31, 2004. The transaction of transfer of business took place in the previous year relevant to the assessment year 2003-04 and accordingly income from such transfer of business was to be considered in that year alone. The business of the unit with all its assets including stock-in-trade was transferred by the assessee to S, an altogether different concern. The assessee discontinued the business of the unit, thereby necessitating the valuation of stock at market price. The assessee agreed to sell the assets of its unit including stock-in-trade for a total sum of Rs. 7.12 crores. The Assessing Officer computed the market value of stock in the assessment order for the assessment year 2004-05 applying the gross profit rate of 36.50 per cent for that year. He, however, made addition in the year relevant to the assessment year 2003-04 holding that the transaction of transfer of stock-in-trade of the business along with assets took place in such earlier year. The transaction of transfer of the business including stock-in-trade actually took place on September 30, 2002, which was relevant to the assessment year 2003-04. The calculation of market value of the stock at Rs. 4.43 crores on the date of transfer of such stock was not correct.

That even if such a value was presumed to be correct, the authorities had nowhere held that such value of stock actually realised by the assessee did not represent its true market price or that the market value of stock was more than what was actually realised from the buyer of the business. The transferor and transferee companies were unrelated to each other. In such circumstances, the only logical conclusion was that the assessee transferred its stock at the market value recorded in the agreement at Rs. 1.18 crores. When the transferee company had paid a total sale consideration of Rs. 7.12 crores, which included a sum of Rs. 1.18 crores towards the value of inventories, the Assessing Officer could not presume the market value of such inventories at Rs. 4.43 crores without any cogent reason.

That it was not possible to make addition of Rs. 3.28 crores by taking the market value of stock transferred as on the date of transfer without considering the second part of the transaction, being the transfer of stock at actual price realised at Rs. 1.18 crores, which event also took place in the rele-vant year. There was a net loss as claimed by the assessee on the composite transaction of firstly valuing the stock at market price on September 30, 2002 and then its sale during the year. The Assessing Officer considered only the first part of the transaction overlooking the second part, which also ought to have been considered. Therefore, the Assessing Officer's computation of income of Rs. 3.28 crores was to be reversed.

The assessee claimed that the profit or loss from the transaction of transfer of stock of the business was to be considered under the head "Profits and gains of business or profession" as against the Commissioner (Appeals) and the Assessing Officer including it under the head "Capital gains". The Assessing Officer took the item wise value of assets (both fixed and current) of the business. He considered all other assets of the business as having been transferred by the assessee at book value. In that view of the matter, he held that no chargeable income arose from the transfer of other assets. Thereafter, he computed income from the transfer of stock-in-trade by assigning some market value to it. The resultant profit was held to be chargeable to tax as capital gain. On appeal

Held, that profit or gain chargeable under Chapter IV-E can arise only on the transfer of capital asset. Stock-in-trade is not a "capital asset". Resultantly, no profit or gain from the transfer of stock could be charged to tax under the head "Capital gains". The loss from the transfer of stock amounting to Rs. 2.10 crores was deductible under the head "Profits and gains of business or profession" in relation to the assessment year 2003-04. (A. Y.:2003-2004, 2004-2005)

Bayer Material Science P. Ltd. v. A CIT (2013)142 ITD 22/ 22 ITR 287(Mum.)Trib.)

S:28(i): Business loss-Foreign exchange forward contracts- Loss on revaluation of unmatured forex contracts- Heldto be allowable.

Assessee claimed deduction of Rs. 7.14 crore on account of loss on revaluation of unmatured foreign exchange forward contracts on basis of valuing such contracts at rate of exchange prevailing at end of year. Assessing Officer denied deduction on ground of it being contingent in nature. The Tribunal held thatin view of decision of Tribunal in Dy. CIT (IT) v. Bank of Bahrain & Kuwait [2010] 41 SOT 290 (Mum.) (SB) deduction so claimed by assessee was allowable, however, with a rider that loss so allowed should not be allowed again in succeeding assessment year. Appeal was decided in favour of assessee (A.Y.1988-89)

Dy. CITv.Banque Indosuez (Known as Credit Agricole Indosuez) (2013) 55 SOT 38 (Mum.) (Trib.)

S.28(i): Business loss- Bad debts- Expenses on behalf of principal was held to be business loss. [S36(1) (vii)]

Assessee incurred exhibition expenses on behalf of its principal. On failure of assessee to recover said amount from principal, it was written-off as bad debt. Assessing Officer rejected assessee's claim. Tribunal held that the Assessing Officer rightly concluded that exhibition expenses could not be allowed as bad debt under section 36(1) (vii), however having regard to fact that exhibition expenditure was incurred by assessee on behalf of its principal in ordinary course of business, non-recovery of same could be allowed as business loss. In favour of assessee. (A.Y. 2003-04)

A.T.E. Enterprises (P.) Ltd. v.Dy. CIT (2013) 55 SOT 175 (Mum.) (Trib.)

S.32: Depreciation-Ownership of asset-No requirement of usage of assessee himself-Registration in the name of lessee-A "Financier" satisfies the "ownership"and "user" test for depreciation. (Motor Vehicles Act1988 S. 2(30),2 (13), 2(24))

The assessee, a NBFC, bought vehicles and leased it out to its customers. The vehicles were registered in the names of the customers. The AO held that as the vehicles were registered in the names of the customers and were used by them, the assessee was not eligible for depreciation u/s 32 as it was not the "owner" of the vehicles nor had it "used" the vehicles for purposes of business. The CIT (A)& Tribunal allowed the assessee's claim. However, the High Court reversed the Tribunal on the ground that the assessee was only a "financier" and not the "owner" of the vehicles and so was not eligible to claim depreciation. On appeal by the assessee to the Supreme Court, held reversing the High Court:

(i) S.32 requires that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". The Department's argument that the assessee is not the "owner" of the vehicles is not acceptable because the lease agreement specifically provided that the assessee was the exclusive owner of the vehicle at all points of time and that it was empowered to repossess the vehicle (and not merely recover money) if the lessee committed a default. At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee. Also, the assessee had the right of inspection of the vehicle at all times. As the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. The fact that at the end of the lease period, the ownership of the vehicle is transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle does not make a difference. Also the fact that the Motor Vehicles Act deems the lessee to be the "owner" has no relevance;

(ii) The Department's argument that the assessee had not "used" the vehicles is also not acceptable because the vehicle was "used" by the assessee in it's business of leasing. Once it is held that leasing out of the vehicles is one mode of doing business by the assessee and the income derived from leasing out is treated as business income it would be contradictory, in terms, to say that the vehicles are not used wholly for the purpose of the assessee's business. The physical user of the vehicles is not necessary (CIT v Shaan Finance (P) Ltd. (1998) 231 ITR 308 (SC) followed) (A.Y. 1991-92 to 1996-97)

I. C. D. S. Ltd v. CIT (2013) 350 ITR 527/212 Taxman 550/255 CTR 449/82 DTR 33(SC)

S.32: Depreciation- Rate –Leasing business-Higher rate forVehicles used in business of hire.

Assessee inbusiness of leasing vehicles is entitled to depreciation at higher rate. (A.Y. 1991-92to 1996-97)

I.C.D.S. Ltd v. CIT (2013) 350 ITR 527/212 Taxman 550/255 CTR 449/82 DTR 33 (SC)

S.32: Depreciation-Block of assets-Once the assets are put to use in earlier years and from part of block of assists, depreciation can be claimed on the same in subsequent years even if all the items in block are not used simultaneously. (S.2(11))

Once the assets have been put to use in earlier years, such assets from part of block of assets and depreciation thereon has been allowed in the past then depreciation on the assets can't be restricted or disallowed in subsequent years on the pretext that only a portion thereof has been put to use. Items falling within the block of assets cannot be segregated for the purpose of granting or restricting depreciation. Once the assets are used for business, it is not necessary that all the items falling within the concerned block have to be simultaneously used for being entitled to depreciation. (T.A No. 84 of 200,dt 19/06/2012)

S. K. Patel Family Trust. (2012) BCAJ -November-P. 401) (Guj.) (High Court)

S.32: Depreciation-Lease back-Purchase of electric meters from RSEB and leasing back the same to RSEB is genuine transaction and depreciation can be claimed on such electric meters:

The assessee bought eclectic meters form Rajasthan state Electricity board(RSEB) and leased them back to RSED on hire purchase basis. The Department didn't allowassessee's claim of depreciation on the said electric meters as it was of the view that the said transaction was a shamtransaction in light of the ratio laid down in McDowell's case(154 ITR 148). It was held by the Hon'ble High Court that the said transaction was a genuine transaction and the assessee was eligible for depreciation on the said electric meters. (T.A. No. 166 of 2000, dt,17/07/12)
Parampount Pollution Control Ltd. (2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.32: Depreciation-Method of accounting-Substantive right of claiming deduction under the Act - Duty of assessing Officer to allow the claim. (S.145)
Assessee claimed set-off of depreciation on assets used for construction of National Highway against interest income. Assessing Officer found that assessee itself had capitalized all expenditures incurred on construction of Highway and in audited profit and loss account, no expenditure or depreciation had been claimed by assessee; he, thus, disallowed assessee's claim under section 145(3) It was held that section 145(3) had no manner of application as uniform accounting system was followed by assessee, therefore depreciation was allowable. Court also held thatwhile making assessment of any returns, if any deduction is sought for, it is duty of revenue official to examine not only account but also substantive right of claiming deduction under Act.In favour of assessee (A.Y. 2003-04)
Mapex Infrastructure (P.) Ltd. v. CIT (2013) 212 Taxman 23 (Cal.) (High Court)

S.32: Depreciation-Lease transactions – LPG Cylinders-finance- Assessee could not prove purchases of cylinders directly purchased by the lessee,hence depreciation could not be allowed.

Assessee claimed depreciation on LPG Cylinders, Air Jet Spindle Assembly and Positar Disc which were claimed to have been leased out. Assessing Officer disallowed depreciation forming a view that assessee did not purchase said assets, but merely financed their purchase. It was held that in case of LPG cylinders, transaction was only a financing transaction and not a lease, with no material to show that assessee became owner of cylinders and leased them. In case of air jet spindles and Positar Disc, the very existence of assets and genuineness of purchase of assets by assessee was not proved, and, therefore, assessee was not entitled to depreciation. In favour of revenue. (A.Y.1995-96)
CIT v. Ganapati Finance Ltd. (2013) 212 Taxman 278/82 DTR 49(Delhi) (High Court)

S.32: Depreciation - Succession of business-Written down value-Block of assets-Transfer to subsidiary-Number of days of predecessor and successor was to be taken. (S.43(6),170)
Assessee-company had two units viz. unit A and unit B. It transferred unit B to its 100 per cent subsidiary company with all assets and liabilities at book value on 1-11-1996.It claimed depreciation on written down value of assets of unit B proportionately for period from 1-4-1996 to 31-10-1996. Tribunal rejected claim of assessee. Court held that the assessee was entitled to depreciation as provided for in fourth proviso to section 32(1), in working out depreciation number of days for which assets were used by predecessor and successor was to be taken into consideration and apportionment was to be worked out based on number of days for which assets were used by predecessor and successor company respectively. Matter remanded (A.Y. 1997-98)
Sree Jayajothi & Co. Ltd. v CIT (2013) 212 Taxman 238 (Mad) (High Court)

S.32: Depreciation - Higher rate-Moulds-Moulding tools-Matter remanded.
Assessee is engaged in manufacture of electrical equipment used in power generation. It claimed depreciation at rate of 40 per cent as per rule 5 in respect of moulds and moulding tools used in manufacture of plastic covers, seals, shrouds, etc. - Said claim was disallowed on ground that no material was produced to show that assessee had a separate unit to manufacture plastic parts when it was manufacturing heavy electrical equipment. Assessee submitted that it had separate unit and it had also applied for recognition of its unit before Government. In earlier year, Commissioner (Appeals) had allowed depreciation finding that though assessee did not have rubber or plastic goods factory, but it had a unit where moulds were installed.In interest of justice, matter be remitted back to find out whether recognition had been granted to assessee as separate unit. Matter remanded. (A.Y.1995-96 to 1998-99)
Areva T & D India Ltd. v. Jt.CIT (2013) 212 Taxman 429(Mad) (High Court)

S.32: Depreciation-Leased assets-Purchase not disputed hence depreciation to be allowed.
Assessee purchased machinery and leased back same to 'B' Ltd. Assessee's claim for depreciation was rejected by revenue authorities on ground that there were discrepancies in payment of rental by lessee and received by assessee. Court held that when revenue had not disputed purchase by assessee from 'B' Ltd., in such a case, mere discrepancy in lease rental payment per se did not negate claim of assessee as owner of machinery. Therefore, assessee's claim for depreciation was to be allowed. In favour of assessee. (A.Y.1996-97)

Dy.CIT v First Leasing Co. of India Ltd. (2013) 212 Taxman 417(Mad.) (High Court)

S.32: Depreciation-Owner-Lease back-Finance lease-Matter remanded.
Assessee purchased and leased back MPP Shut Capacitors to 'A' Ltd. which was engaged in manufacturing of capacitors - 'A' Ltd. sub leased those capacitors to MSEB. Assessing Officer rejected assessee's claim of depreciation on capacitors holding that it was merely a financial transaction. Tribunal pointed out that to claim ownership of assets, assessee should produce purchase invoice and mere furnishing of insurance certificate was not sufficient. Accordingly, Tribunal upheld order of Assessing Officer. On instant appeal, documents produced before Court in form of purchase invoice showed installation and commission of capacitors in lessee's premises, which were given for use by MSEB, in view of above, there was no justifiable ground to reject case of assessee on ground that purchase invoice was not filed before authorities below. Therefore, matter was to be remanded back to Assessing Officer so as to enable assessee to produce other evidence on record for purpose of satisfying him as regards ownership of machinery. Matter remanded. (A.Y.1996-97)
Dy.CIT v. First Leasing Co. of India Ltd. (2013) 212 Taxman 417(Mad.) (High Court)

S.32: Depreciation-Method of accounting-Duty of tax officials-Claim of depreciation against interest income held to be allowable. (S.145)
Assessee claimed set-off of depreciation on assets used for construction of National Highway against interest income. Assessing Officer found that assessee itself had capitalized all expenditures incurred on construction of Highway and in audited profit and loss account, no expenditure or depreciation had been claimed by assessee; he, thus, disallowed assessee's claim under section 145(3).Section 145(3) had no manner of application as uniform accounting system was followed by assessee, therefore depreciation was allowable. While making assessment of any returns, if any deduction is sought for, it is duty of revenue official to examine not only account but also substantive right of claiming deduction under Act. Matter decided in favourof assessee. (A.Y.2003-04).
Mapex Infrastructure (P.) Ltd. v.CIT [2013] 212 Taxman 23/81 Taxman 202/255 CTR 272 (Cal.) (High Court)

S.32: Depreciation- Non-compete fee-Amortisation-Non-Compete fee is not eligible for depreciation or amortization.
The assessee acquired the business of manufacture of glass from Piramal Enterprises Ltd. It also entered into a non-compete agreement with Piramal Enterprises whereby it agreed to pay Rs. 18 crores for the seller agreeing not to carry on a competing business for a period of 18 years. The assessee claimed the said payment as a revenue deduction and in the alternate, as a depreciable asset. The AO rejected both claims. The CIT (A) held that though the non-compete fee was not a depreciable asset, the amount paid for it was entitled to be amortized over the period of the agreement. The assessee filed an appeal before the Tribunal challenging the non-grant of depreciation while the department filed an appeal challenging the grant of amortization. In the first round, the Tribunal rejected the assessee's plea by relying on the Third Member verdict in Paper Products. However, as this verdict was not put to the assessee, the matter was reposted for hearing. In the second round, the assessee relied on CIT v. Smifs Securities (2012) 348 ITR 302 (SC) where goodwill was held to be eligible for depreciation and several other judgements. Held by the Tribunal rejecting the plea:

The expression "any other business or commercial rights of similar nature" in the definition of "intangible asset" in s. 32 (1) (ii) shows that the initial part, i.e. know how, patents, copyrights, trademarks, license, franchises, has been disjointed by the conjunction 'or'. The use of the disjunction 'or' has a very relevant role, because, the legislature accepts the difference and distinction of intangibles and rights. The legislature has used 'or' in the provision for explaining the distinction of application of like nature with that of the unlike nature, which is an accepted principle i.e. doctrine of ejusdem generis. Taking note of the word 'or', used as a disjunction is essential to carve out a meaningful genus. The argument whether non compete rights constitute is a right in rem or a right in personam is a matter to be decided by an appropriate higher judicial forum. The judgement of the Supreme Court in CIT v. Smifs Securities (2012) 348 ITR 302 (SC) that goodwill is an intangible asset eligible for depreciation is not applicable to a non-compete right. Non-compete fee does not fall within the ambit of any other commercial or business rights. As regards the claim of amortization, since the payment of Rs. 18 crores is a capital expenditure, it cannot be allowed as an expense and also can(not) be amortized (Sharp Business System v. CIT (2012) 254 CTR 233(Del) followed. ACIT v. Real Image Tech (2009) 120 TTJ 983) (Che), ITO v. Medicorp Technologies India Ltd. (2009) 30 SOT 506 (Che), Bunge Agribusiness (India) (P) Ltd. (2011) 132 ITD 549 (Mum), Serum Institute of India v. ACIT (2012) 135 ITD 69 (Pune) treated as not good law). (A. Y. 1999-2000)
Gujarat Glass Private Limited. v. ACIT (Mum.) (Trib.)www.itatonline.org.

S. 32: Depreciation-Deduction at source- Disallowance of expenses-Capital expenses. (S. 40(a) (i), 195, 200)

During the relevant year the assessee made payments to a foreign company for acquiring its trade name. The amount so paid was capitalized and depreciation was claimed in respect of it. The Assessing Officer held that the said payment attracted the provisions of section 195 read with section 200. Since the assessee failed to deduct tax at source while making said payment said payment, it was disallowed under section 40(a) (ia). The DRP also confirmed the said disallowance. On appeal the Tribunal held that the depreciation is a statutory deduction and not an outgoing expenditure therefore provisions of section 40(a) (ia) are not attracted on such deduction. (A.Y.2007-08)

SKOL Breweries Ltd v. A CIT (2013)142 ITD 49/ 84 DTR 271/153 TTJ 257 (Mum.) (Trib.)

S.32: Depreciation-Sale and lease back-Special Bench verdicts on Sale & Lease Back & lease finance are not good law-Assessee entitled for depreciation.

The assessee, a Bank, bought assets from its customers and leased it back to them ("sale and lease back"). It also purchased assets identified by its customers and leased it to them ("finance lease"). The assessee claimed depreciation on the assets on the ground that it was the owner and had used the assets for business purposes. The AO, relying on MidEast Portfolio Management Ltd. v. Dy. CIT (2003) 87 ITD 537 (Mum) (SB) and IndusInd Bank Ltd. v. Add. CIT (2012) 135 ITD 165 (Mum) (SB), disallowed depreciation on the ground that the transactions were an "eyewash" and "colourable device". The CIT (A) partly confirmed the disallowance. On appeal by the assessee to the Tribunal, HELD allowing the claim:

The issue of whether the lessor is entitled to claim depreciation in the case of a "sale and lease back" transaction as well as in a "finance lease" have been laid to rest by the judgements in ICDS v. CIT (2013) 350 ITR 527 (SC), CIT v. Kotak Mahindra Finance (2009) 317 ITR 236 (Bom) and CIT v. Cosmo Films Ltd. (2011) 338 ITR 266 (Del) where it was held that the lessor is eligible to claim depreciation. The judgements of the Special Bench in MidEast Portfolio Management Ltd. v. Dy. CIT (2003) 87 ITD 537 (Mum) (SB) and IndusInd Bank Ltd. v. Add. CIT (2012) 135 ITD 165 (Mum) (SB) are impliedly overruled. (A.Y. 96-97)

Development Credit Bank Ltd. v. DCIT (Mum.) (Trib.)www.itatonline.org.

S.32: Depreciation-Windmills-Rate of depreciation.

Following the judgment of Tribunal in K. Ravi v. ACIT (2010) 2 ITR 752 (Chennai) (Trib.) the Tribunal held that the Assesseeisentitled to depreciation at higher rate. (A. Y. 2005-2006, 2008-2009)

ABT Ltd. v. A CIT (2013) 21 ITR 534/83 DTR 178/56 SOT 42 (Chennai) (Trib.)

S.32: Depreciation--Buildings –Business-Leased

Depreciation in respect buildings used for purpose of business to be allowedand depreciation pertaining to portion let out alone to be disallowed. Depreciation in respect of flatsgiven to directors for purpose of business to be re-examined, matter remanded. (A. Y.2004-2005 to 2006-2007)

Al-Gayathri Trading Co. P. Ltd. v.Dy. CIT (2013) 22 ITR 214 (Cochin) (Trib.)

S.32: Depreciation-Office–Depreciation is to be allowed.

The authorities below disallowed depreciation in the hands of the assessee on the ground that the office was not being utilised for business purpose, as it was given for re-development. The claim of the assessee was that the re-development agreement was signed on January 18, 2010 and re-development started in the assessment year 2009-10. The assessee claimed to have utilised the office during the year under consideration. On appealthe Tribunal held that the claim of depreciation was to be allowed to the assessee. (A.Y.2006-07)

Manjit Mann (Mrs) v. Dy. CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S. 32: Depreciation – Cinema hall -Income shown on estimate basis - depreciation is allowable.

Depreciation is a charge on an asset, it has to be granted in accordance with the provisions of the Act. Depreciation is allowable irrespective of the fact that the assessee has shown estimated income which is less than the amount of depreciation. Depreciation is held to be allowable on cinema hall owned by the assessee. (A. Y. 2009-10)

Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25(UO) (Ctk.) (Trib.)

S.32: Depreciation –Non compete fee - Non-Compete Fee not eligible for depreciation or amortization.

The assessee acquired the business of manufacture of glass from Piramal Enterprises Ltd. It also entered into a non-compete agreement with Piramal Enterprises whereby it agreed to pay Rs. 18 crores for the seller agreeing not to carry on a competing business for a period of 18 years. The assessee claimed the said payment as a revenue deduction and in the alternate as a depreciable asset. The AO rejected both claims. The CIT (A) held that though the non-compete fee was not a depreciable asset, the amount paid

for it was entitled to be amortized over the period of the agreement. The assessee filed an appeal before the Tribunal challenging the non-grant of depreciation while the department filed an appeal challenging the grant of amortization. In the first round, the Tribunal rejected the assessee's plea by relying on the Third Member verdict in Paper Products. However, as this verdict was not put to the assessee, the matter was reposted for hearing. In the second round, the assessee relied on CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC) where goodwill was held to be eligible for depreciation and several other judgements. HELD by the Tribunal rejecting the plea:
The expression "any other business or commercial rights of similar nature" in the definition of "intangible asset" in s. 32 (1) (ii) shows that the initial part, i.e. know how, patents, copyrights, trademarks, license, franchises, has been disjointed by the conjunction 'or'. The use of the disjunction 'or' has a very relevant role, because, the legislature accepts the difference and distinction of intangibles and rights. The legislature has used 'or' in the provision for explaining the distinction of application of like nature with that of the unlike nature, which is an accepted principle i.e. doctrine of ejusdem generis. Taking note of the word 'or', used as a disjunction is essential to carve out a meaningful genus. The argument whether non compete rights constitute is a right in rem or a right in personam is a matter to be decided by an appropriate higher judicial forum. The judgement of the Supreme Court in CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC) that goodwill is an intangible asset eligible for depreciation is not applicable to a non-compete right. Non-compete fee does not fall within the ambit of any other commercial or business rights. As regards the claim of amortization, since the payment of Rs. 18 crores is a capital expenditure, it cannot be allowed as an expense and also can(not) be amortized (Sharp Business System v. CIT (2012) 254 CTR 233(Del) followed. ACIT v. Real Image Tech (P.) Ltd. (2009) 120 TTJ 983) (Che),ITO v. Medicorp Technologies India Ltd. (2009) 30 SOT 506 (Che), Bunge Agribusiness (India) (P) Ltd. v. DCIT (2011) 132 lTD 549 (Mum), Serum Institute of India Ltd.v. Add. CIT (2012) 135 ITD 69 (Pune) treated as not good law). (A. Y. 1999-00)
Gujarat Glass Private Limited v. ACIT (Mum) (Trib.) www.itatonline.org

S.32: Depreciation- UPS-Entitled to 80% depreciation.
UPS being energy saving device is entitled for higher depreciation @ 80 percent. (A.Y. 2006 – 07, 2007 – 2008) ('G' ITA No.7682/M/10 and ITA No.8549/M/10, Dated 22-10-2012.)
Godfrey Phillips India Ltd. v. Addl. CIT(2013) BCAJ Pg. 25, Vol. 44-B Part 5, February 2013(Mum.) (Trib.)
S.32: Depreciation-Goodwill-Retail clientele- On amount paid to purchase clientele, depreciation is allowable.
The assessee, a share broker purchased clientele business ofone party; the said party assigned all its clients to the assessee for a consideration of Rs.2.50 crores. The assessee treated this purchase consideration as 'purchase of goodwill' and claimed depreciation. The AO as well as the CIT (A) disallowed the same on the ground that the payment of Rs. 2.50 crores was not for goodwill but for purchase of clientele business.The Hon'ble Tribunal held that the assessee was entitled to depreciation, by virtue of sec. 32 (1) (ii), under which an asset in the nature of"any other business or commercial rights of similar nature" was entitled for depreciation. The said expression "any other business or commercial rights of similar nature" would include all kinds of commercial rights and the principle of 'Ejusdem generis' ought to be applied while interpreting the said expression. Mere fact that the assessee had treated the said amount as 'goodwill' in its books, does not disentitle the assessee from claiming depreciation. (A.Y.2006-07).
India Capital Markets (P.) Ltd.v. DCIT(2013) 56 SOT 32 (Mum.) (Trib.)
S.32:Depreciation- Additional depreciation onplant and machineryacquired during relevant period but installed during the subsequent period. (S.32(iia))
The assessee had claimed additional depreciation on plant and machinery which were acquired in year relevant to A.Y 2005-06, but its installation was completed on 31.1.2006. The AO and the CIT (A) held that the assessee was ineligible for claiming additional depreciation since the asset was not 'installed' and the mandate of s.32(iia) is that the asset should be both 'acquired' and 'installed' during the relevant period. On Appeal before the Tribunal, the Hon'ble Tribunal held that the requirement of s.32(iia) was that both the conditions had to be satisfied viz. acquired as well as installed. Since the machinery was not acquired after 31-3-2005, the assessee was not entitled for additional depreciation u/s. 32(iia). (A.Y. 2006-07)
International Cars & Motors Ltd (2013) 56 SOT 50 (Delhi.) (Trib.)

S.32(2): Depreciation - Unabsorbed depreciation- Set-off -Set off against income from other sources-Section 72(2) does notcontrols operation of section 32(2) to have set off of unabsorbed depreciation against income from other sources.[S.72(2)]
The assessee had unabsorbed depreciation as well as unabsorbed loss. The Assessing Officer adjusted loss brought from earlier years against business income and arrived at the business income as NIL. The assessee sought for adjustment of

carried forward of unabsorbed depreciation in the income from other sources. The claim of the assessee was negatived by the Assessing Officer for reason that the assessee should have exhausted first the unabsorbed carried forward loss for earlier years before claiming any set off on unabsorbed depreciation. The Commissioner (Appeals) upheld the order of the Assessing Officer. The Tribunal held that the assessee was entitled to set off unabsorbed depreciation as against the income from other sources. On appeal High Court held that in cases where after having set off of business loss as against current year income from business, there existed no further business income, assessee was entitled to set off unabsorbed depreciation against income from other sources. The court held that section 72(2) does notcontrols operation of section 32(2) to have set off of unabsorbed depreciation against income from other sources. In favour of assessee.A.Y.1998-99)

CIT v. SPEL Semi Conductor Ltd. (2013) 212 Taxman 506 (Mad.) (High Court)

S.32(2): Depreciation–Unabsorbed Depreciation–depreciation for Block of assessment year which could not have been set-off earlier is cannot be allowed in subsequentAssessment year.

In view of amendment brought out in section 32(2) w.e.f. 1/4/1997 by Finance Act (No. 2) of 1996 and again on 1/4/2002 Finance Act, 2001 unabsorbed depreciation for block of assessment years 1997-98 to 2001-02 which could not have been set-off earlier, cannot be allowed to be set-off in subsequent AY. (A.Y. 2005-06)

Liberty Plywood (P.) Ltd. v. ACIT (2013) 140 ITD 490 (Chd.) (Trib.)

S.33AC: Shipping business - Reserves–Insurance claim-Matter remanded.

Assessee claimed deduction under section 33AC on insurance claim amount received towards repairs carried out in respect of a vessel. Assessing Officer held that such insurance receipt could not be taken to be assessee's business income and, therefore, same was not eligible for deduction under section 33AC - Commissioner (Appeals) however allowed assessee's claim. Tribunal held that only if insurance claim was found to be assessee's profits derived from business operation of ships, amount so received shall be taken as an eligible profit for purpose of creating reserve and allowing deduction in terms of provision of section 33AC. Matter remanded. (A.Y. 2003-04)

Dy. CIT v.Mercator Lines Ltd. (2013) 55 SOT187(Mum.) (Trib.)

S.35AB: Expenditure–Know-how-Provision of S.35AB is not applicable to revenue expenditure.

Provision of Section 35AB dealing with expenditure on know-how shall be applicable only if any such expenditure incurred is capital in nature. The revenue expenditure on know-how would be continued to be governed by the provision of S.37(1) of the Act. Provision of S. 35AB won't apply to revenue expenditure even if the same is in respect of know-how, (T.A. No. 326 of 2000, dt. 03/07/2012)

Sayaji Industries Ltd. (2012) BCAJ -November-P. 400) (Guj.) (High Court)

S.35AB: Expenditure on know-how- Depreciation-Acquired prior to 1-4-1998-Allowable deduction. [S.32(1) (ii), 43(2)]

The assessee acquired the technical know-how from a foreign company as per the terms of Joint Venture Agreement dt. 25/11/1994. However, the payment for the same was made in installments during the period 1998-99 to 2001-02. The assessee claimed deduction in respect of the know-how fee under S. 35AB. It was held that in view of harmonious interpretation of the provisions of S. 32(1) (ii) and section 35AB, in respect of technical know-how acquired prior to 1/4/1998, deduction u/s 35AB will be allowed even if payment is made after 1/4/1998. (A.Y. 2002-03 to 2004-05)

Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277/151 TTJ 421 (Mum.) (Trib.)

S.35B:Export markets development allowance - **Insurance business – (S.44, Sch. I, r. 5)**

Tribunal rightly rejected assessee's claim for weighted deduction u/s. 35B. CIT v. Hero Cycles Ltd. & Ors. (1997) 228 ITR 463 (SC) followed. (A.Y. 1980-81 & 1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 83 DTR 185 (Delhi) (High Court)

S.35B:Export markets development allowance - Insurance business – Reserve for export. (44 && Sch. I, r. 5)

Reserve for export market development allowance could not be added to the balance of profits disclosed by the annual accounts of assessee insurance company. CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC) applied. (A.Y. 1980-81 & 1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 83 DTR 185(Delhi) (High Court)

S.35D: Amortisation of preliminary expenses–Expanding production capacity.

Expenditure incurred by assessee-company for expanding production capacity of vehicles at two of its plants was eligible for deduction under section 35D, however, types of expenditure which would go for amortisation under section 35D, particularly with reference to sub-clause (c) (iv) of sub-section (2) of section 35D, would be only those expenditure which are specifically mentioned therein and nothing beyond. Partly in favour of assessee. (A.Y.1995-96)

CIT. v. Ashok Leyland Ltd. (2013) 213 Taxman 204 (Mad.) (High Court)

S.35D: Amortisation of preliminary expenses-Expenditure not for expansion of industrial undertaking or for setting up new industrial undertaking-Deduction is not available- Interpretation-General principles-Principle of consistency not applicable to perpetuate mistake.
The assessee claimed deduction under section 35D of expenses comprising fee to Registrar of Companies, stamp fee and printing charges. The Assessing Officer held that fee paid to Registrar of Companies was not fee for extension of the company but for expansion of capital. The Assessing Officer held that the assessee had not fulfilled the requirement of sub-section (1) and (2) of section 35D and therefore, the assessee was not eligible for deduction under section 35D. The Commissioner (Appeals) observed that the deduction under section 35D claimed in this year was in respect of expense incurred in the financial years 1994-95 and 2000-01 and the assessee was claiming amortization of these expenses under section 35D and it was allowed in the assessment years 1995-96 and 2002-03 and, therefore, in the present year, there could not be any disallowance on this account. On this basis, the Commissioner (Appeals) deleted this disallowance in all the three years. On appeal to the Tribunalthe Tribunal held that the Assessing Officer had given a specific finding that the assessee had not fulfilled the conditions under sub-sections (1) and (2) of section 35D and there was no finding given by the Commissioner (Appeals) in his order that the assessee fulfilled these conditions. The order of the Commissioner (Appeals) was on this basis that since the deduction was allowed in the earlier years, the same could not be disallowed in the present year. The assessment order for the assessment year 1995-96 was available in the paper book and there was no discussion in the assessment order on this aspect. Regarding the rule of consistency followed by the Commissioner (Appeals) in deleting this disallowance, if the view taken by the Assessing Officer in the earlier year was a possible view then there may be a case for taking the same view in the present year under the rule of consistency. But if the view taken in the earlier year was not a possible view then a mistake could not be perpetuated in the name of consistency. The Commissioner (Appeals) was not justified in deleting the disallowance made by the Assessing Officer under section 35D.(A. Y. 2003-2004 to 2006-2007)
Gujarat Power Corporation Ltd. v. Add. CIT (2013) 21 ITR 683 (Ahd.) (Trib.)

S.35D: Amortisation of preliminary expenses-Financial institutions-Not allowable.
A financial institution recognized by the RBI guidelines cannot be treated as an industrial undertaking. Words 'industrial undertaking' have a definite meaning in taxation, thereforea non-banking financial companycannot be treated as an industrial undertaking andit is not entitled to deduction under section 35D. (A.Y. 2005-06)
Instant Holdings Ltd v. Dy.CIT (2013) 81 DTR 1 (Mum.) (Trib.)

S.36(1)(iii): Deduction-Interest on borrowed capital- Setting of new unit for production of new product, interest is not allowable.
The borrowed funds were not used for setting of a new unit of existing running business, but it was setting up of a new unit for production of an existing business, but it was setting up a new unit for production of altogether new product, interest paid on borrowing was not allowable (A.Ys. 2001-02 to 2002-03)
Gujarat Mineral Development corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.) (Trib.)

S.36(1) (iii): Deductions-Interest on borrowed capital-Firm
Funds were advanced to firm in which directors of assessee-company had interest matter remanded to verify whether funds used by firm for business or for personal needs of partners to be examined. (A.Ys. 2004-2005 to 2006-2007)
Al-Gayathri Trading Co. P. Ltd. v.Dy. CIT (2013) 22 ITR 214(Cochin) (Trib.)

S.36(1)(iii): Deductions-Interest on borrowed capital-Debit balance due to loss- Disallowance was not justified.
Tribunal held that,where outstanding debit balance in names of partners was on account of losses suffered by assessee-firm and not because of withdrawal of borrowed funds, Assessing Officer was not justified in disallowing assessee's claim of interest paid on borrowed capital. In favour of assessee. (A.Y.2006-07)
ACITv.Meerut Rubber Factory (2013) 55 SOT 325 (Delhi) (Trib.)

S.36(1) (iii): Deductions-Interest on borrowed capital-Matter remanded.
The tribunal held that if loans relatable to specific purpose and not part of general pool of funds available to assessee, no disallowance of any part of interest relatable to such secured loans to be disallowed. Assessee was advancing interest-free loans. Matter remanded for finding on nature of secured loans raised by assessee. (A.Y.2008-09)
GurudasMann v. Dy. CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.36(1) (iv):Deductions - Contribution to recognized provident fundContribution to deferred compensation plan held to be not allowable as business expenditure. (S.36(1) (v), 37(1), 40A(9)).

Assessee company constituted a deferred compensation plan for its whole time director (WTD) employed in US. Under said plan assessee contributed a proportion of basic salary of WTD to a grantor trust which accumulated to Rs. 12.15 crore.Said sum was released to WTD on his separation from assessee-company and such released sum of Rs. 12.15 crore was claimed as deduction under section 37(1). Tribunal held that since trust so formed did not fall under provisions of section 36(1) (iv)/(v) and specific prohibition contained in section 40A(9) attracted in instant case, contribution so released could not be allowed. Further, in view of principle of law that when there are specific provisions governing a deduction under section 40A(9) read with section 36(1) (iv)/(v), general deduction under section 37(1) can not be invoked, and, hence, claim of assessee under section 37(1) could not be sustained.Decided in favour of revenue. (A.Y.2006-07)

Wipro Ltd. v. Add. CIT (2013) 55 SOT 3(URO) (Bang.) (Trib.)

S.36(1) (va): Deductions-Any sum received from employees--Deduction only on actual payment-Employee's Contribution - Provident fund and ESI contributions made before filing return held allowable. (S.43B)

The Court held that the deletion of the second proviso to section 43B which specifically made a reference to section 36(1) (va) was curative in nature and, hence, would apply with retrospective effect from April 1, 1988. The second proviso to section 43B(b) specifically referred to the due date under section 36(1) (va) of the Act and as such, it cannot be urged that the provisions of section 43B and section 36(1) (va) should not be read together. The law was enacted to ensure that the payment of the contributions towards the provident funds, the ESI funds or other such welfare schemes must be made before furnishing the return of income under sub-section (1) of section 139. On a conjoint reading of section 36(1) (va) and section 43B it is obvious that earlier section 43B made reference to the due date as prescribed under section 36(1) (va). There was a conflict between the first and the second provisos and the second proviso was deleted. The benefit of this amendment must be extended to the employees' contribution also. Appeal of revenue was dismissed.(A.Y.2001-2002).

CIT v. Nipso Polyfabriks Ltd. (2013) 350 ITR 327/84 DTR 424 (HP) (High Court)

S.36(1) (vii): Deductions- Bad debt- **Insurance business –Provision for bad and doubtful debts. (S.44)**

Provision for bad and doubtful debts could not be added to the balance of profits disclosed by the annual accounts of the assessee insurance company. CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC) followed. (A.Y. 1980-81 & 1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 83 DTR 185(Delhi) (High Court)

S.36(1) (vii):Bad debt –Business loss- Contribution of assessee as a foreman in place of defaulting subscriber. (S.28(i).)

Contribution of the assessee as a foreman in the place of a defaulting subscriber was deductible as a bad debt u/s. 36(1) (vii) or a business loss u/s. 28(i). (A.Y. 1992-93 to 1994-95)

CIT v. Shriram Chits & Investments Ltd. (2013) 83 DTR 208(Mad.) (High Court)

S. 36(1) (vii): Deductions-Bad debt-After 1-4-1989 it is not necessary to establish that debt had in fact become irrecoverable in previous year. Amount written off in accounts allowable as deduction. (S.36(2))

Tribunal held that after April 1, 1989, it is not necessary for the assessee to establish that the debt in fact has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in accounts of the assessee. The amounts were deductible. Appeal of assessee was allowed. (A. Y. 2002-2003)

HSBC Securities and Capital Markets (India) P. Ltd. v. ACIT (2013) 21 ITR 445 (Mum.) (Trib.)

S.36(1) (vii):Dedcutions- Bad debt-After 1-4-1989 no requirement that assessee should establish debt to have become bad.

The assessee-company derived income from carrying out the activity of designing advertisements. In the profit and loss account for the previous year relevant to the assessment year 2008-09, the assessee debited a certain sum as bad debts written off and claimed deduction thereof in computing its total income. The Assessing Officer disallowed the claim of the assessee on the ground that the assessee had not established that the debts had become bad. The Commissioner (Appeals) allowed the deduction. Held, dismissing the appeal, (i) that after April 1, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. That the Assessing Officer was not justified in disallowing the claim for deduction on account of bad debts on the ground that the debts in question had not been established to have become bad. The assessee had given all the details and it was not the case of the Assessing Officer that any other condition for grant of deduction under section 36(1) (vii) of the Act, had not been satisfied. The order of the Commissioner (Appeals) called for no interference. (A. Y.:2008-2009)

Dy. CIT v. Ray Keshavan Design Associates P. Ltd. (2013) 22 ITR 259 (Bang.) (Trib.)

S.36(1) (vii): Deductions-Bad debt- Inter-corporate deposits- -Resolution for writing off interest in May 2002,would relate back to accounting year relevant for assessment year 2002-03.-Interest assessed on basis of accrual in earlier years hence deductible. Inter-corporate deposits part of business of assessee hence loss on investment is allowable as business loss. [S.28(i)]

The assessee had debited a sum of Rs. 1,94,49,012, as interest receivable written off during the year under consideration. The Assessing Officer disallowed the claim and this was confirmed by the Commissioner (Appeals).The Assessing Officer further disallowed the claim for loss of inter-corporate deposits along with interest written off. This was also upheld by the Commissioner (Appeals). On appeal to the Tribunal, the Tribunal held that there is no condition in section 36(1) (vii) that the decision for treating a debt as bad or irrecoverable should be taken in the previous year itself. If the books of account are not closed and completed, it is permissible to make adjustments before they are finally closed. The board resolution passed in May 2002, with regard to the approval of writing off the amount as irrecoverable in the accounts, would relate back to that previous year in which it was treated as irrecoverable. In the earlier years the assessee's interest income shown under the head "Business income", had been accepted by the Department. Thus, on these facts, once the interest income had been offered on accrual basis, which had been credited in the profit and loss account as business income in the earlier years and the sum had been written off as irrecoverable in the accounts in this year, the sum had to be allowed as bad debt. The assessee had shown accrued interest on inter-corporate deposits in the profit and loss account and had offered it for tax as business income. This had been accepted by the Department also. The corollary, therefore, was that interest was earned during the course of business. The interest which had been written off was deductible. Tribunal also held that investment in inter-corporate deposits was part of the business activities as the interest accrued there from had been treated as business income. The loss arising on such investment was thus consequently allowable as business loss and therefore, the sum of Rs. 32 lakhs was deductible as business loss. (A. Y. 2001-2002)

Jindal Iron and Steel Co. Ltd.v. Dy. CIT [2013] 21 ITR 414 (Mum.) (Trib.)

S.36(1) (viia): Deductions-Provision for bad and doubtful debts-Schedule bank-Bad debts.-(S. 36(1) (vii),119)

Revenue contended that by virtue of proviso, claim of assessee-bank for deduction for debts written off, should be reduced by closing balance of assessee-bank in its account for provision of bad and doubtful debts. The assessee contended that such diminution should be limited to opening balance of such account. Court held that statutory provision is silent on precise method of working out deduction; however, CBDT clarified issue vide Instruction No. 17/2008, dated 26-11-2008,following same, assessee's contention was to be admitted. In favour of assessee.(A.Y.1998-99)

CIT v UTI Bank Ltd. (2013) 212 Taxman 296 /82 DTR 168(Guj.) (High Court)

S.37(1):Business expenditure -Installation charges incurred for installation of plant and machinery are capital in nature.

Installation charges and other charges necessary to bring an asset into existence and to put the machinery in a working condition would constitute capital expenditure.Moreso, when the amount is reflected in balance sheet under head 'Plant and machinery given on lease'.

Bharti Televentures Ltd. v. Addl. CIT (2013) 81 DTR 225 (Delhi) (High Court)

S.37(1):Business expenditure – Provision for Warranty allowable as deduction.

Provision for warranty is allowable as deduction. (1994 – 95 to 1996 – 97)

CIT v. Maruti Suzuki India Ltd. (2013)212 Taxman 603/ 81 DTR 152 (Delhi) (High Court)

S.37(1): Business expenditure-Forfeiture of the bank guarantee is compensatory-No disallowance can be made by applying theExplanation to S. 37(1) in respect ofcompensatory payments.

The assessee, a manufacturer of garments, was granted an entitlement by the Apparel Export Promotion Council (APEC) for export of garments and knit wares. In consideration for the export entitlement the assessee furnished a bank guarantee in support of its commitment that it shall abide by the terms and conditions and produce proof of shipment. It was also provided that failure to fulfill the export obligation would render the bank guarantee to being forfeited/encashed. The assessee did not utilize the export entitlement which led APEC to encash the bank guarantee. The assessee recorded the said payment as penalty in its books of account and claimed deduction u/s 37(1). The AO rejected the claim on the ground that as the payment was by way of "penalty" it could not be allowed under the Explanation to s. 37(1). However, the CIT (A) and ITAT allowed the claim. On appeal by the department to the High Court, dismissing the appeal, the High Court held that, theassessee took a business decision not to honour its

commitment of fulfilling the export entitlement in view of loss being suffered by it. The genuineness of the claim of expenditure being for business purpose is not disputed. The assessee has not contravened any provision of law and the forfeiture of the bank guarantee is compensatory in nature and does not attract the Explanation to s. 37(1).
CIT v. Regalia Apparels Pvt. Ltd(2013) 352 ITR 71 (Bom.) (High Court) www.itatonline.org

S.37(1): Business expenditure-Freebies to medical practitioners-CBDT circular - CBDT Circular disallowing expenditure on freebies to medical practitioners is held to be valid.
The CBDT issued Circular No. 5/2012 dated 1.8.2012 stating that as the Indian Medical Council had imposed a prohibition on medical practitioners taking any Gift, Travel facility, Hospitality, Cash or monetary grant from pharmaceutical and allied health sector Industries, the expenditure incurred by the assessee in providing such "freebies" had to be regarded as incurred "for a purpose which is either an offence or prohibited by law" and disallowed under the Explanation to s. 37(1) of the Act. The assessees challenged the validity of the Circular on the basis that it went beyond s. 37(1) and was invalid. HELD by the High Court rejecting the contention:
The regulation of the Medical Council prohibiting medical practitioners from availing of freebies is a very salutary regulation which is in the interest of the patients and the public. This Court is not oblivious to the increasing complaints that the medical practitioners do not prescribe generic medicines and prescribe branded medicines only in lieu of the gifts and other freebies granted to them by some particular pharmaceutical industries. Once this has been prohibited by the Medical Council under the powers vested in it, s. 37(1) comes into play. The Petitioner's contention that the circular goes beyond the section is not acceptable. In case the assessing authorities are not properly understanding the circular, then the remedy lies for each individual assessee to file an appeal but the circular which is totally in line with s. 37(1) cannot be said to be illegal. If the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the AO that the expense is not in violation of the Medical Council Regulations.
Confederation of Indian Pharmaceutical Industry v. CBDT (H.P.) (High Court) www.itatonline.org

S.37(1): Business expenditure-Capital or revenue-Corporate membership-Golf club-Expenditure on corporate membership of club is revenue expenditure, it does not bring in to existence an asset or an advantages for the enduring benefit of the assessee.
The assessee obtained corporate membership of the Golf Club on payment of Rs.6 lakhs. The AO disallowed the expenditure on the ground that it was capital expenditure. This was reversed by the CIT (A)& Tribunal which held that the expenditure was revenue in nature. The department filed an appeal to the High Court and relied on Majestic Auto Ltd where the High Court had held that expenditure on corporate membership is in the nature of capital expenditure. As the Bench was of the view that Majestic Auto was not the correct law, the issue was referred to the Full Bench. HELD by the Full Bench:
In order to decide whether the expenditure is a revenue or a capital one has to look at the expenditure from a commercial point of view. Not every advantage of enduring nature constitutes capital expenditure. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. On facts, the corporate membership was for a limited period of 5 years. It was obtained for running the business with a view to produce profit. Such membership does not bring into existence an asset or an advantage for the enduring benefit of the business. It is an expenditure incurred for the period of membership and is not long lasting. By subscribing to the membership of a club, no capital asset is created or comes into existence. By such membership, a privilege to use facilities of a club alone, are conferred on the assessee and that too for a limited period. Such expenses are for running the business with a view to produce the benefits to the assessee. Consequently, it cannot be treated as capital asset (Otis Elevator co. (India)Ltd. v. (1992) 195 ITR 682 (Bom), CIT v. Engineers India Ltd. (1999) 239 ITR 237 (Del), Gujarat State Export Corp. Ltd. v. CIT (1994) 209 ITR 649 (Guj) followed; Framatone Connector OEN Ltd. v. Dy. CIT (2007) 294 ITR 559 (Ker) dissented from; Majestic Auto overruled)
CIT v. Groz Beckert Asia Ltd (2013) 351 ITR 196 / 257 CTR 1 (FB) (P&H) (High Court)

S.37(1): Business expenditure-Capital or revenue expenditure-Brand name-Royalty-Assessee allowed to use know-how and information royalty is deductible.
For use of the brand name of MMB and for the technical assistance rendered by MMB to the assessee for manufacturing beer, the assessee paid royalty to MMB. The Assessing Officer, the Assessing Officer held that they were capital expenditure. The Commissioner (Appeals) and the Tribunal held that they were revenue expenditure. On appealthe Court held that in terms of the technical assistance agreement, the assessee was entitled to use the know-how supplied

by MMB for the manufacture of the products. The know-how and the information received by the assessee directly or indirectly from MMB was to be kept strictly confidential. The assessee was entitled to use the trade mark Golden Eagle of MMB. The payment of royalty was, therefore, in the nature of expenditure incurred for carrying on business with the available know-how rather than for accretion to the capital base or gaining an advantage in the capital field of the assessee. Moreover, for assessment years 1980-81 to 1982-83, the Assessing Officer himself had come to the conclusion that the payment of royalty made by the assessee was in the nature of revenue expenditure. The payment of royalty was deductible in the assessment years 1983-84 to 1988-89. (A. Y. 1983-1984 to 1988-1989)
CIT v. Artos Breweries Ltd. (2013) 351 ITR 133(AP) (High Court)

S.37(1): Business expenditure-Bogus purchases-Estimation of profit-Tribunal applying twelve and half per cent held to be justified.
The assessee isin the business of trading in iron and steel. During the reassessment proceedings, it was found that purchases worth Rs. 61.40 lakhs were not supported by sufficient evidence. Purchase of such goods from various suppliers was verified, but it was found that such parties had not supplied the goods as named by the assessee. The Assessing Officer made an addition of the entire amount of purchase of Rs. 61.40 lakhs. The Commissioner (Appeals) found that though the purchases were not made from the parties from whom the assessee claimed, there was complete quantitative tally of the materials purchased and sold. He was of the view that such materials were purchased from the open market incurring cash payment and bills were procured from various sources. He added only the profit element and not the entire amount of the purchases, for the limited addition to 30 per cent of the total amount and reduced the amount to Rs. 18.42 lakhs. The Tribunal allowed further relief to the assessee and retained the addition to the level of twelve and half per cent in pursuance of the various purchases. On appeal, dismissing the appeal, the Court held that the assessee was a trader and the Tribunal having retained twelve and half per cent of the purchase towards its possible profit, there was no reason to interfere in the order of the Tribunal. (A. Y. 2003-2004)
CIT v.Sathyanarayan P. Rathi (2013) 351 ITR 150(Guj.) (High Court)

S.37(1): Business expenditure-Loss on account of change in rates of foreign exchange-Notional loss-Matter remanded to Assessing Officer to decide whether claim allowable.
The assessee claimed deductions by way of loss in its business income, due to fluctuations in the rate of exchange on the outstanding dues payable in foreign exchange, which the assessee had raised for the purpose of buying its stock-in-trade. The Assessing Officer rejected the claim on the ground that it was notional loss and, therefore, not allowable. The Commissioner (Appeals) and the Tribunal held that the assessee could claim deduction on notional basis. On appeal:

Held, allowing the appeal, such claim would have to be examined in the light of the fulfillment of the conditions as indicated by the Supreme Court, for which purpose, the matter was remitted to the Assessing Officer, who had to apply the tests to the claim made by the assessee and then either admit the claim or reject it depending upon the assessee satisfying the conditions.
The Court held that the claim of notional can be entertained subject to the fulfillment of the six conditions that (i) the system of accounting followed by the assessee is the mercantile system; (ii) the same system is followed by the assessee from the very beginning and if there was a change in the system, the change was bona fide; (iii) the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it ; (iv) the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) the method adopted by the assessee for making entries in the books both in respect of losses and gains is in accordance with nationally accepted accounting standards; and (vi) the system adopted by the assessee is fair and reasonable and not adopted only with a view to reducing the incidence of taxation.

The ratio of CIT v. Woodward Governor India Pvt. Ltd. [2009] 312 ITR 254 (SC) applied. **(**A. Y**.** 2000-2001)
CIT v.Wipro Finance Ltd. (2013) 351 ITR 153 (Karn.) (High Court)

S.37(1): Business expenditure - Capital or revenue –Additions cannot be made only on the basis of statement of director-Matter remanded.
Assessee-firm filed return claiming depreciation on iron rolls of machinery. Later on it filed revised return contending that during production rolls were used to avoid friction and such rolls suffer damage necessitating frequent replacement and hence, be treated as 'current repairs. However, only on basis of no objection of managing partner to treat rolls as depreciable assets, Assessing Officer held same as capital expenditure. when a specific question was raised before Tribunal as regards nature of expenditure, Tribunal should have adverted to issues raised viz., to consider whether expenditure was, in fact, a 'revenue' or 'capital expenditure'; it should not have based its decision on statement of managing partner. Matter remanded. (A.Y.1992-93)

Chamundi Steel Rolling Mills v.ACIT (2013) 212 Taxman 30 (Mad.) (High Court)

S.37(1): Business expenditure-Sales promotion expenses –Held to be allowable

Amount paid by assessee to sales/field organisers who rendered specific services under sales agreements after sale of cement was decontrolled, was to be allowed as business expenditure. In favour of assessee. (A.Y.1985-86)

CIT v Dalmia Cement (Bharat) Ltd. (2013) 212 Taxman 126(Mag.) (Delhi) (High Court)

S.37(1): Business expenditure-Pooja expenses–At temple located inside the factory is allowable.

Expenditure incurred by assessee on Pooja performed at temple located inside factory premises was to be allowed as business expenditure. In favour of assessee (A.Y.1985-86)

CIT. v. Dalmia Cement (Bharat) Ltd. (2013) 212 Taxman 126(Mag.) (Delhi) (High Court)

S.37(1): Business expenditure- Capital or revenue- Operating license fee-PSTNcharges –Dealers commission-After–Setting up of business- before Commencement of business- Allowable as revenue expenses-Foreign tour Expenses - revenue expenditure. (S. 35ABB)

The Court held that the operating license fee for providing cellular mobile service paid by assessee to J.T.Mobiles Ltdwho had receivedtelecom license from Government is allowable as business expenditure. The fact that the assessee had in its books of accounts spread over the expenditure over a period of 10 years would not change the nature of expenditure. Provisions of section 35ABB would not apply. Expenses incurred on account of PSTN charges and dealer's commission after setting up of a business and before the commencement of business is allowable as revenue expenditure. Expenditure on foreign travel did not give rise to any enduring benefits but only enabled the assessee to run its business to achieve higher profits and therefore the said expenditure is allowable as revenue expenditure.The appeal of revenue was dismissed. (A.Y. 1998-99)

CIT v. Evergrowth Telecom Ltd (2013) 81 DTR 412/256 CTR 84/ 213 Taxman 299 (Bom.) (High Court)

S.37(1): Business expenditure--Capital or revenue-Repairs and renovation - Leased business premises - revenue expenditure.

The assessee is in occupation of leased premises, carried out renovation work by providing false ceiling and furniture modification spending Rs. 1.71 lakhs and Rs. 9.19 lakhs. The assessee claimed that the sums were eligible for depreciation at 100 per cent. However, this expenditure was treated as capital expenditure eligible for depreciation at 10 per cent. This was upheld by the Tribunal. On appeal to the High Court,held, that the temporary structure by means of false ceiling and office renovation had not resulted in any capital expenditure. Appeal of assessee allowed. (A. Y. 1995-1996)

Thiru Arooran Sugars Ltd. v. Dy. CIT (2013) 350 ITR 324(Mad) (High Court)

S.37(1): Business expenditure-Professional charges –Director-Deduction at source-Salary-Once commercial expediency is accepted and tax deduction at source effected deduction to be allowed. (S.40(a) (ia), 192, 194J)

The assessee made a certain payment as professional charges to director of the assessee-company, after deduction of tax at source under section 194J of the Act,treating the payment as a payment for professional services rendered. According to the Assessing Officer, the payment should have been considered as salary paid to an employee and that the assessee-company had misrepresented the salary as professional charges specifically to give an undue advantage to claim additional expenses in her return of income. He disallowed the sum. On appeal the Commissioner (Appeals) held that once the commercial expediency of a payment was not questioned, and the tax deduction at source was actually effected, the question of a perceived misapplication of the particular provision was academic and that the provisions of section 192 being outside the purview of section 40(a) (ia), the addition was unsustainable. On appeal by revenue the Tribunal held that once the commercial expediency of a payment was accepted and tax deduction at source had been effected, the deduction would have to be allowed. There was a consultancy agreement and the payment in question prima facie was a payment for professional services rendered. The payment could not be treated as a payment of salary. In any event, the disallowance of this legitimate business expenses in the hands of the assessee was without any basis and could not be sustained. (A. Y.:2008-2009)

Dy. CIT v. Ray Keshavan Design Associates P. Ltd. (2013) 22 ITR 259 (Bang.) (Trib.)

S.37(1): Business expenditure–Capital or revenue-Expenditure on entirely new line of business is held to be as capital expenditure.

Assessee was engaged in the manufacture of lignite. It set up a new project and claimed deduction of expenditure incurred as revenue expenditure. The power project was a new line of assessee's business. The product manufactured in

power project was an altogether new product. Hence the expenditure was not allowable as revenue expenditure. (AY 2001-02 to 2002-03)
Gujarat Mineral Development Corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.) (Trib.)

S.37(1): Business expenditure-Salary paid to staff at residence of chairman was held to be allowable as business expenditure.
Assessee claimed deduction of salary paid to staff appointed at residence of company's chairman. Lower authorities disallowed the claim on the ground that it was in violation of guidelines issued by Government of Gujarat dated 28-8-1998 and was also against article 192 of association of Corporation and thus Explanation to section 37(1) was attracted. The Tribunal held that the said expenditure was not for any purpose which was an offence and also did not tantamount to an expenditure which was prohibited by law, disallowance of same was not justified. (A.Ys. 2001-02 to 2002-03)
Gujarat Mineral Development corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.) (Trib.)

S.37(1): Business expenditure-Capital or revenue - Software Licence fee is revenue.
The assessee had spent a certain sum towards various licence fees paid for acquiring software for running its computers. The Assessing Officer was of the view that the software expenses gave an enduring benefit and were capital in nature. The Commissioner (Appeals) deleted part of the disallowance. On appeal to the Tribunal held that, even though the expenditure on software might give an enduring benefit, since no asset had been created by paying licence fees for utilisation of the software, the expenditure was allowable as revenue expenditure. Appeal of assessee was allowed. (A. Y. 2002-2003)
HSBC Securities and Capital Markets (India) P. Ltd. v. ACIT (2013) 21 ITR 445 (Mum.) (Trib.)

S.37(1): Business expenditure-Capital or revenue-Expenditure on acquiring software-Matter remanded.
Assessee claimed thepurchase of computer software as revenue expenditure. The Assessing Officer rejected the claim. The Commissioner (Appeals) held that the expenditure in relation to warranty module, sales module and parts module were revenue in nature while the expenditure in relation to the factory module was capital in nature. On appeal to the Tribunalthe Tribunal held that there is no single definitive criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The "once for all" payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a common-sense way having regard to the business realities. The Tribunal in Amway India Enterprises v. Deputy CIT [2008] 301 ITR (AT) 1 (Delhi) [SB] laid down the following tests: (a) where the assessee acquires a computer software or licence to use such software, the assessee acquires a tangible asset and becomes owner thereof; (b) where the life of computer software is shorter, it may be treated as revenue expenditure. Any software having its utility to the assessee beyond two years can be considered as accrual of benefit of enduring nature; (c) once the test of ownership and enduring benefit is satisfied, the question whether expenditure on computer software is capital or revenue is to be seen on a case to case basis from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business. The licensing agreement in the instant case had not been placed before the Tribunal. The Commissioner (Appeals) had not examined as to how the assessee carried on its functions before acquiring the integrated software and nor even as to whether or not the software was part of infrastructure for commencing the business operations in India and whether or not each of the four modules could function independently in the light of the economic and functional test while confirmation dated September 6, 2012 of H, Japan was not before the lower authorities. Matter remanded.(A.Y.1999-2000)
Dy. CITv.Honda Siel Cars Ltd. (2013) 21 ITR 497(Delhi) (Trib.)

S.37(1): Business expenditure-Capital or revenue-Software-Maintenance of software is revenue expenditure.
Assessing Officer disallowed the expenditure incurred on software. On appeal it was submitted by the assessee that the expenditure was not incurred for purchase of software but for maintenance of software and technical support services. The Commissioner (Appeals) set aside the disallowance. On appeal to the Tribunal the Tribunal held that the software expenses were revenue in nature and hence deductible (A.Y. 2007-2008)
Dy. CIT v. Ovira Logistics P. Ltd (2013) 21 ITR 436(Mum.) (Trib.)

S.37(1): Business expenditure-Capital or revenue-Renovation-Leas hold premises- Renovation expenses is capital expenditureand the assessee is entitle to depreciation. Expenditure on demolishing and dismantling is revenue in nature. (S.32)
The assessee-company had a Maruti dealership and service station and for the purpose of setting up the service station took premises on lease throughout the State of Tamil Nadu. To make the buildings suitable according to its requirements, the assessee carried out renovations, interior decoration, new construction and repairs to the buildings taken on lease and claimed the entire expenditure incurred on the leased premises as revenue expenditure. The Assessing

Officer treated the said expenditure as capital in nature and allowed depreciation at 10 per cent. In appeal, Commissioner (Appeals) partly confirmed the order of Assessing Officer.On appeal to the Tribunal, the Tribunal held that it could not be ascertained whether the assessee was getting an enduring benefit of a revenue nature from the additional structure or renovation/repairs undertaken by the assessee on the leased out premises. The case of the assessee fell within the ambit of Explanation 1 to section 32(1) of the Act. The Commissioner (Appeals) had rightly disallowed expenditure on construction of overhead tank, washing ramp, oil change, final inspection and wheel pit and extension of shed from the existing workshop for the front office.The expenditure on renovation of existing shed and new electrical fittings was capital in nature. The expenditure on demolition, dismantling etc. alone, was revenue. Therefore, the order of the Commissioner (Appeals) was to be modified to exclude expenditure incurred on renovation of existing shed and electrical fittings from revenue and treat it as capital in nature. (A.Y. 2005-2006, 2008-2009)
ABT Ltd. v. ACIT (2013) 21 ITR 634 (Chennai) (Trib.)

S.37(1): Business expenditure-Business income-Interest for broken-period received on Government securities charged to tax as business income-Interest for broken-period paid at time of purchase of securities allowable. (S.28(1))
The Tribunal held that once the broken-period interest received by the assessee-bank on Government securities was charged to tax as business income under section 28 of theAct, deduction for payment made for broken-period interest at the time of purchase of these securities could not be denied when the assessee's method of accounting does not result in loss of revenue for the Department. (A.Y.1998-99) (A. Y. 1998-1999 to 2003-2004)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.37(1): Business expenditure-Commencement of business-Commercial production-Expenses incurred before commencement of business is not deductible. (S.35E)
The assessee claimed deduction under section 35E of the Act. The Assessing Officer came to the conclusion that the assessee had not complied with the requirement of section 35E because, mining work was carried out by the Commissioner Geology and Mining in respect of lease granted in the year 1988 and the expenditure incurred on account of payment to this party had been shown under the head "consultancy fee" towards project, pending allocation. He also observed that there was no evidence of commercial production and, therefore, held that the assessee was not eligible for deduction under section 35E of the Act. The assessee appealed before the Commissioner (Appeals) but without success. On appeal to the Tribunal it contended that even if the claim was not allowable under section 35E, it should be allowed under section 37 because the assessee proposed to sell the project and recover the expenses. The Tribunal held that the assessee claimed deduction under section 37 because the assessee proposed to sell the project and recover these expenses from the buyer. No evidence had been produced in support of this argument that the assessee had ultimately sold the project in a subsequent year and recovered these expenses from the buyer. Moreover, even if this was done, no deduction was allowable in the present year because even if the expenditure was to be debited in the profit and loss account, it had to be considered in the credit side of the profit and loss account also as the closing stock of work-in-progress and there could be no resultant deduction in the present year. The Tribunal also held that the land was purchased for the proposed joint venture power project and none of the power projects had commenced business. In the present case, the Assessing Officer had given this finding that the rates and taxes before commencement of production in a project were capital expenditure. The basis of the order of the Commissioner (Appeals) was that this expenditure did not enhance the value of the asset, i.e., the land in the present case. Even if it did not enhance the value of the land in question it could not be allowed as revenue expenditure because the business had not commenced and therefore, it was a pre-operational expenditure. It was not deductible.(A. Y. 2003-2004 to 2006-2007)
Gujarat Power Corporation Ltd. v. Add. CIT (2013) 21 ITR 683 (Ahd.) (Trib.)

S.37(1): Business expenditure-Advertisement-Disallowance merely on ground that instead of products, chairman was being promoted is not proper.
The assessee incurred advertisement expenditure which the Assessing Officer considered high. The Assessing Officer disallowed the expenditure on the ground that an attempt has been made by the company to promote the chairman and not the product. The Assessing Officer therefore, disallowed 20 per cent. of the advertisement expenditure. (A. Y. 2005-2006 to 2007-2008)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S.37(1):Business expenditure-Capital or revenue-Expenditure on development of software is revenue.
Tribunal held that the Commissioner (Appeals) had rightly allowed the claim to deduction of expenditure on development of software. (A.Y.:2003-2004, 2004-2005)
ACITv.SRA Systems Ltd. (2013) 22 ITR 205(Chennai) (Trib.)

S.37(1): Business expenditure–Capital or revenue-Repairs-Held to be capital in nature.
Assessee had incurred expenditure on repairs and maintenance of plant and machinery and a building. Assessing Officer rejected assessee's claim in respect of said expenditure holding it to be capital in nature.Tribunal held thatsince assessee failed to bring on record evidence showing that expenditure incurred was on purchase of spare parts of plant and machinery and miscellaneous work done to building and there was no new capital asset acquired by assessee as a result of said expenditure, impugned disallowance made by Assessing Officer was to be upheld. In favour of revenue. (A.Y. 2004-05)
Dresser Rand India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 167 (Mum.) (Trib.)

S.37(1): Business expenditure-Software expenses-Allowableas revenue expenditure.
Assessee made payments for availing e-mail infrastructure, which was owned by its parent company. It was using e-mail infrastructure facilities for communication between its employees and outside business partners. It had debited said payments in profit and loss account under head 'software expenses' and claimed deduction for same - Whether said expenditure was purely revenue in nature and was allowable. In favour of assessee(A.Y.2007-08)
Evonik Degussa India (P) Ltd v. ACIT (2013) 55 SOT 566 (Mum.) (Trib.)

S.37(1): Business expenditure-Custom duty–Capital goods–Not allowable as business expenditure.
Tribunal held that payment of custom duty for debonding of capital goods increases value of those goods and, therefore, same cannot be allowed as business expenditure. In favour of revenue. (A.Y. 2007-08)
Headstrong Services India (P.) Ltd. v ACIT (2013)55 SOT 481 (Delhi) (Trib.)

S.37(1): Business expenditure-Electricity connection-Expenditure on initialization of electricity connectionis capital in nature.
Expenditure incurred on initialization of electricity connection granted benefit of enduring nature to assessee and, therefore, same was not allowable being capital in nature. In favour of revenue. (A.Y.2007-08)
Headstrong Services India (P.) Ltd. v ACIT (2013)55 SOT 481 (Delhi) (Trib.)

S.37(1): Business expenditure- Warranty provision–Allowable as deduction.
In course of assessment, assessee claimed deduction in respect of provision created for warranty support on products sold during relevant year. Assessing Officer disallowed provision treating it as an unascertained liability. It was noted from records that assessee took into account warranty liability for accounting period after bifurcating likely cost on account of labour, material etc. It was also apparent that wherever excess provision was made in an earlier year, same was reversed in subsequent period. Tribunal held that on facts, estimate made by assessee in respect of warranty liability was on scientific and reasonable basis and, thus, same was to be allowed as deduction. In favour of assessee. (A.Y.2006-07)
Textronix India (P.) Ltd. v Dy. CIT (2013) 55 SOT 512 (Bang.) (Trib.)

S.37(1): Business expenditure–Capital or revenue – Selling of diamonds under the brand name –Expenditure not capital in nature as profit derived from selling of premier product, no right either on mark or in IPR or goodwill of mark.
The assessee company is engaged in the business of licensing, manufacturing, distribution and selling of diamonds under the brand "Nakshatra". 'B', a Swiss-diamond manufacturer was owner of mark "Nakshatra" B' licensed said mark to 'D', who in turn, had sub-licensed to assessee. Assessee sold diamonds under brand name "Nakshatra". Assessee made payment to 'D' for its share on promotion of mark 'N' and claimed sales promotion expenses. Assessing Officer disallowed 20 per cent of payment holding same to be capital in nature. It was held that facts revealed that entire rights and goodwill through marketing campaign and advertisement would be owned by 'B' and 'D'; assessee had no right either on mark or in intellectual property right or goodwill of mark; and what assessee was enjoying was only profit from selling of premium products under said mark. Therefore, expenditure incurred was revenue in nature and was to be allowed. (A.Y. 2006-07)
Brightest Circle Jewellery (P.)Ltd. v. ACIT (2013) 140 ITD 11 (Mum.) (Trib.)

S.37(1): Business expenditure –Capital or revenue- – Warranty expenditure – Deduction allowed if provision made on scientific basis.
Assessee had acquired personal computer and laptops division of IBM India and continued business of trading and manufacture of PCs and MCs. It provided either 1 year or 3 years warranty on sale of PCs and laptops made to its customers in India. Assessee debited actual warranty expenditure incurred during year and also made additional

provision on basis of assessment of warranty liability on sales made for unexpired period to profit and loss account and claimed it as deduction. It was held that since IBM was carrying on business in India in earlier assessment years and it was making provision for warranty on basis of its global data, assessee could use data used by IBM for past years for making estimation and if assessee had made provision on a scientific basis, it had to be allowed as deduction. (A.Y. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1): Business expenditure – Capital or revenue – Fees for services rendered as per market support agreement – Payment for efficient running of business and deriving revenues there from,fees allowable as deduction.

Assessee acquired personal computer business from IBM. As IBM had well-established enterprise sales force and established global sales infrastructure, such as client representation centre, etc., for more than 52 years, assessee wanted to take support from IBM and for that purpose had entered into market support agreement with IBM. Assessee paid certain feed to IBM for services rendered under market support agreement.Assessing Officer treated same as payment for acquisition of goodwill and considered it to be in nature of capital expenditure not allowable under section 37. It was held that since support services were for purpose of sale of products manufactured by assessee, it was clearly established that it was for efficient running of business and deriving revenues therefrom and, therefore, fee paid by assessee for marketing support services rendered by IBM was allowable as deduction under section 37(1). (A.Y. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1): Business expenditure – Capital or revenue–Payments made to maintain dealership/ business relationship revenue expenditure.

Assessee acquired business of PCs and laptops division from IBM during previous year, and continued to carry on manufacturing and trading operations of PCs using same facility and same dealership network as used by IBM in its business prior to acquisition. Future billing adjustment reserve of certain amount was a liability towards various claims/special discounts payable to distributors/dealers of IBM India, whereas,the actual payout relating to period up to effective date of takeover was a much higher amount.Accordingly, the amount of difference was charged to profit and loss account and claimed as revenue expenditure. It was held that since assessee was to carry on business with said dealers in future, it was bound to make payments to maintain business relations with dealers and such payments had to be considered as business expenditure of assessee. (A.Y. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1):Business expenditure –Capital or revenue –Duty free replenishment certificates (DFRC) written off as not utilized – Deduction allowable as assessee was in same line of business.

As part of personal computer business acquired by assessee from IBM, assessee had also taken over duty free replenishment certificates (DFRC) receivable from IBM India and same were available for utilization against import of inputs used in manufacture of goods without payment of customs duty. However, Government of India vide Notification No. 24/2005 - Customs dated 1-3-2005 exempted custom duty on all imports of computer parts and, therefore, DFRC receivable was no longer utilizable and was, hence, written off and charged to profit and loss account as revenue expenditure, since assessee was also in same line of business, assessee was entitled to deduction of aforesaid expenditure as revenue expenditure. (A.Y. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang) (Trib.)

S.37(1):Business expenditure-Sharing of expenses- Debit note from parent Company - In the absences of vouchers and bills 50% ofdisallowance is held to be justified.

The Assessee claimed the expenditure on the basis of debit note received from its parent company without producing any evidence to establish that the said expenditure was incurred for the purpose of business.Considering the facts the Tribunal held that disallowance of 50% expenses are held to be justified. (A.Y. 2005-06)

Instant Holdings Ltd v. Dy.CIT (2013) 81 DTR 1(Mum) (Trib.)

S.37(1):Business expenditure—Provision-Assessee engaged in development and maintenance of roads - provision for road renewal isheld to be not deductible.

The assessee-company is engaged in the business of development, operation and maintenance of toll roads. For the assessment year 2002-03, it claimed deduction of Rs. 1,61,37,960 being expenditure on road overlay or renewal. It was observed by the Assessing Officer that a certain sum was debited to the profit and loss account. When the details were called for the assessee explained it to be provision made on a scientific basis. The Assessing Officer disallowed the claim and this was confirmed by the Commissioner (Appeals). On appeal to the Tribunal held thatit was evident that the entire

expenses claimed by the assessee were a provision made in the books of account and did not pertain to actual expenses incurred by the assessee during the year. The expenses were not deductible. (A. Y. 2002-2003, 2005-2006)
Dy. CIT v. Gujarat Road and Infrastructure Co. Ltd. (2013)141 ITD 642/ 21 ITR 88 (Ahd.) (Trib.)

S.37(1): Business expenditure-Project completion method-Expenses and title registration expenses not attributable to common expenditure for running businessis held to be not allowable. (S.145)
The assessee is a film maker and an event manager. The assessee followed the project completion method, showed loss from film business and profit from music albums. In addition to this, the assessee showed receipts from old films, i. e., royalty, telecast rights of films, satellite rights of movies and corresponding expenditure in respect of each of her ventures separately. Over and above this the assessee claimed common expenditure under various heads like Diwali expenditure, printing and stationery, professional fee, conveyance, credit card charges, depreciation, dress and costume, interest on loan, miscellaneous expenses and telephone charges. The Assessing Officer held that the expenditure booked on account of professional fee, publicity, business promotion, dress and costume, etc. was not in any way linked to old film income and was not allowable. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal, the Tribunal held that expenses and title registration expenses not attributable to common expenditure for running business is held to be not allowable. (A.Y. 2006-07)
Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.37(1):Business expenditure-Vehicle –Telephone-Conveyance-Personaluse - Disallowance not proper.
Tribunal held that vehicle related expenses and telephone expenses, disallowance of 20 per cent for personal use is proper. Conveyance, lodging and boarding, travelling staff welfare, business promotion and publicity expenses no disallowance can be made for personal use. (A.Y. 2008-09)
Manjit Mann (Mrs.) v. Dy. CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.37(1): Business expenditure—Ad hoc disallowance- Not proper.
The tribunal held that disallowance for bills and vouchers not verifiable made after discussion with assessee cannot be challenged. Ad hoc disallowance without pointing out nature of discrepancies and head of to which expenditure related disallowance is not proper. (A.Y. 2008-09).
Manjit Mann (Mrs.) v. Dy.CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.37(1): Business expenditure-Foreign shows- Disallowance confirmed.
The Tribunal held that the Assessee unable to explain nature of expenditure and date of incurrence of foreign show.-Expenditure booked by assessee on dates at variance with dates of foreign shows. Disallowance was confirmed. (A.Y. 2006-07)
GurudasMannv. Dy.CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.37(1):Business expenditure- Capital or revenue- Repair and maintenance- Not in nature of replacement is capital in nature.
The Tribunal held that expenditure on purchase of new furniture not replacement hence capital expenditure, not allowable. The Tribunal also held that there was no material to show replacement of electric installation or nature of electric installation replaced hence deduction is not allowable. (A.Y.2007-08)
GurudasMannv. Dy.CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.37(1): Business expenditure-Expenditure on levelling and fencing land- Expenses not verifiable - Disallowance of part of expenditure isheld to be justified.
Assessee engaged in real estate development. The Assessing Officer made an ad hoc disallowance of 25 per cent. of the expenditure claimed on levelling and fencing charges. After examining details the Commissioner (Appeals) held that such expenses appeared to be genuine and were generally incurred in the course of the assessee's line of business. He also found that some of such expenses were supported only by self vouchers and cash receipts which were not verifiable, and therefore restricted the disallowance. On appeal to the Tribunal held thatthe assessee had not furnished any cogent evidence to establish that the expenses, which stood disallowed, were verifiable. The disallowance was justified. (A. Y.2006-2007, 2007-2008)
ITO v. Nam Estates P. Ltd [2013]141 ITD 659/21 ITR 109(Bang.) (Trib.)

S.37(1):Business expenditure—Brokerage-Commission- TDS deducted allowable balance disallowance was confirmed.

Assessee is engaged in real estate development. Out of the total expenses claimed under the head "Brokerage and commission", the Assessing Officer holding that in this line of business of land transactions the average percentage of commission and brokerage was one per cent., disallowed the balance. The Commissioner (Appeals) examined the matter in detail and came to the view that expenses on commission and brokerage charges, on which tax had been deducted at source and remitted to the treasury, were genuine according to the facts placed before him and accordingly allowed the assessee relief and Confirmed the disallowance of Rs 4,44, 342. Tribunal confirmed the order of Commissioner (Appeals) and dismissed the cross appeal of assessee. (A. Y.2006-2007, 2007-2008)
ITO v. Nam Estates P. Ltd (2013)141 ITD 659/ 21 ITR 109(Bang.) (Trib.)

S.37(1):Business expenditure-Foreign tour expenses of accompanying spouse- Disallowance held to be proper.
The assessee claimed the foreign tour expenses of accompanying spouse of directors of assessee-company. As the assessee failedto provide any evidence disallowance of such expense,was held to be proper. (A. Y.2005-2006)
Harinagar Sugar Mills Ltd. v. ACIT[2013] 21 ITR 383(Mum.) (Trib.)

S.37(1): Business expenditure--Club expenses—Allowable.
Tribunal held that the disallowance under the head "club expenditure" was not justified. (A. Y. 2001-2002)
Jindal Iron and Steel Co. Ltd.v. Dy. CIT [2013] 21 ITR 414 (Mum.) (Trib.)

S.37(1):Business expenditure – Capital or revenue – Repairs of flats or buildings.
Expenditure incurred in connection with sofa, recreation central table, electrical fittings and design consultancy and supervision charges was in the nature of capital expenditure, while the remaining amount of the impugned expenditure was revenue in nature as it was incurred for maintenance / repairs of the fixed assets viz., buildings or structures. (A.Y. 2002-03)
Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 (Mum.) (Trib.)
S.37(1):Business expenditure- Commission to dealers-Agreement and addendum not disputed, commission paid held to be allowable.
The Assessing Officer disallowed the commission on the basis that the assessee had paid commission to its channel partner in excess of the slab rates mentioned in theagreement. In appeal,the Commissioner (Appeals) deleted the addition on the basis of addendum to the agreement which was filed as additional evidence before the Commissioner (Appeals).Commissioner (Appeals) referred the additional evidence for the comments of Assessing Officer. On appeal to the Tribunal by revenue the Tribunal held that as the Assessing Officer has not disputed the veracity of theaddendum to the agreement between the assessee and its channel partner which was filed as additional evidence, order ofCommissioner (Appeals) deleting the disallowance was held to be justified. (A.Y. 2003-04, 2004-05, 2006-07)
ACIT v. Shyam Telelink Ltd (2013) 151 TTJ 464 (Delhi) (Trib.))
S. 37(1) : Business expenditure – Repair and maintenance of machinery-Ad hoc disallowance was held to be not justified.
The Assessing Officer made adhoc disallowance of 20% of the expenditure incurred on repair and maintenance of machinery as capital expenditure. The Tribunal deleted the disallowance on the basis that similar disallowances for Asst. Years 2003-04 & 2004-05 were deleted by Tribunal. (A. Y. 2006-07)
Goodyear India Ltd. v. Dy. CIT (2013) 152 TTJ 458 / 83 DTR 233(Delhi) (Trib.)
S.37(1):Business expenditure – Provision for warranty is allowable as deduction.
Tribunal held that courts have consistently held the view that liability for provision for warranty for replacement on account of manufacturing defects arises at the time of sale and is to be allowed as deduction in that year on the basis of rational / scientific estimate, notwithstanding that the exact amount of liability is ascertained at a later date. Tribunal followed the decision of Hon'ble Apex Court in the case of Rotak Controls India P. Ltd. vs. CIT (2009) 314 ITR 62 (SC) and held that provision for warranty made by the assessee is allowable. (A. Y. 2006-07)
Goodyear India Ltd. v. Dy. CIT (2013) 152 TTJ 458/83 DTR233. (Delhi) (Trib.)

S.37(3): Business expenditure-Transit house-Not deductible.[S.37(4),(37(5)]
Following the ratio in Britania Industries Ltd v. CIT (2005) 278 ITR 546(SC), the Court held that the expenditure on maintenance of a transit house was not deductible. (A.Y. 1983-1984 to 1990-1991)
CIT v.Rassi Cements Ltd. (2013) 351 ITR 169(AP) (High Court)
CIT v. Deccan Cements Ltd. (2013) 351 ITR 169(AP) (High Court)
S.37(4):Business expenditure- Insurance business – Expenditure on guest house. (S.44, Sch. I, r. 5)
Payment on account of expenditure on lease rent, taxes and repairs and maintenance of a guest house was not allowable. Britannia Industries Ltd. v. CIT & Anr. (2005) 278 ITR 546 (SC) followed. (A.Y. 1980-81,1981-82)
Oriental Insurance Co. Ltd. v. CIT (2013) 83 DTR185 (Delhi) (High Court)

S. 37(4) : Business expenditure – Guest house rent – cannot be allowed as deduction.
Rent of guest house paid cannot be allowed as deduction (A.Y. 1993 – 94)
CIT v. Forbas Ewart (P) Ltd. (2013) 81 DTR 436 (Ker.) (High Court)
S.40(a) (i): Amounts not deductible-Deduction at source-Interest-DTAA-India-USA-Payment of development expensesis not liable to deduct tax at source. (S.195, Art.12(4))
Assessee made payment of development expenses to 'D' Ltd., a US based company, without deducting tax at source. Assessing Officer thus, invoked provisions of section 40(a) (i) and disallowed development expenses claimed by assessee. Commissioner (Appeals) deleted said disallowance taking a view that since amount paid to non-resident company was not chargeable to tax in its hands in India, there was no obligation to deduct tax at source from amount in question. Commissioner (Appeals) also held that 'D' Ltd. was covered by Indo-US DTAA and as per article 12(4) of said treaty, technical and consultancy services were not taxable in India and, thus, there was no obligation to deduct tax at source from payment of such technical and consultancy services. Tribunal held that in view of specific finding recorded by Commissioner (Appeals), there was no justification to interfere with impugned order deleting disallowance made under section 40(a) (i). In favour of assessee. (A.Y. 2004-05)
Dresser Rand India (P.) Ltd. v.Dy. CIT (2013) 55 SOT 167 (Mum.) (Trib.)

S.40(a) (i): Amounts not deductible- Deduction at source- Outside India-Non-resident- Interest- Discount charges is not interest. (S. 2(28A))
Discount charges earned by assessee-financial service provider by way of discounting bill of exchange and promissory notes in favour of Indian companies is to be treated as business income, and not as interest income, hence provisions of section 40(a) (i) cannot be applied. (A.Ys. 2005-06 to 2007-08)
DIT (IT) v.Cargil TSF PTE Ltd. (2013) 212 Taxman 16 (Delhi) (High Court)
S.40(a) (ia): Amounts not deductible - Deduction at source –Amount paid during the year-Freight charges- Special Bench verdict in Merilyn Shipping is not good law. (S.194C)
The assessee incurred expenditure of Rs. 31 lakhs on freight but did not deduct TDS thereon u/s 194C. The AO held that as there was a failure to deduct TDS, the expenditure could not be allowed as a deduction u/s 40(a) (ia). However, the CIT (A) allowed the claim on the ground that the freight charge was a part of the price of the goods and there was no contract between the assessee and the transporter. On appeal by the department, the Tribunal dismissed the appeal by relying on the Special Bench verdict in Merilyn Shipping & Transports Ltd. (2012) 146 TTJ 1 (Viz) (SB) where it was held (by a majority) that s. 40(a) (ia) had no application to amounts that were already "paid" during the year but it was confined to amounts remaining "payable" as at the end of the year. On further appeal by the department, HELD reversing the Tribunal:
We already have delivered a judgment on 3rd April, 2013 in ITAT No. 20 of 2013, G.A. No. 190 of 2013 (CIT, Kolkata-XI Vs. Crescent Export Syndicates) holding that the views expressed in the case of Merilyn Shipping & Transports (ITA.477/Viz./2008 dated 20.3.2012) were not acceptable. That is one reason why the matter should be remanded to the Tribunal. Another reason for remanding the matter to the Tribunal is that the finding of facts recorded by the CIT (Appeal) was not tested by the Tribunal. For the aforesaid reasons, the order under challenge is set aside and the matter is remanded to the Tribunal for a decision de novo.
CIT v. Md. Jakir Hossain Mondal (Cal) (High Court).itatonline.org

S.40(a) (ia): Amounts not deductible - Deduction at source-Contractor-Freight charges- Special Bench verdict in Merilyn Shipping is not good law. (S.194C)
The assessee incurred expenditure of Rs. 31 lakhs on freight but did not deduct TDS thereon u/s 194C. The AO held that as there was a failure to deduct TDS, the expenditure could not be allowed as a deduction u/s 40(a) (ia). However, the CIT (A) allowed the claim on the ground that the freight charge was a part of the price of the goods and there was no contract between the assessee and the transporter. On appeal by the department, the Tribunal dismissed the appeal by relying on the Special Bench verdict in Merilyn Shipping 146 TTJ 1 (Viz) (SB) where it was held (by a majority) that s. 40(a) (ia) had no application to amounts that were already "paid" during the year but it was confined to amounts remaining "payable" as at the end of the year. On further appeal by the department, HELD reversing the Tribunal:

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(Appeal) was not tested by the Tribunal. For the aforesaid reasons, the order under challenge is set aside and the matter is remanded to the Tribunal for a decision de novo.
CIT v. Md. Jakir Hossain Mondal (Cal.) (High Court)www.iatonline.org.

S.40(a) (ia): Amounts not deductible-Deduction at source-Online advertisement charges-Advertisement charges paid to Google & Yahoo is not chargeable to tax in India. [S.5(2) (b), 9(1) (i)].
The assessee, a florist, paid a sum of Rs. 30.44 lakhs to Google Ireland Ltd and Yahoo USA for online advertising. The AO held that the assessee ought to have deducted TDS and since there was a failure, the expenditure was not allowable u/s 40(a) (i). This was deleted by the CIT(A) on the ground that Google and Yahoo did not have a PE in India. On appeal by the department to the Tribunal, HELD dismissing the appeal:

U/s 5(2) (b), income accruing or arising in India is chargeable to tax in India. A website does not constitute a 'permanent establishment' unless the servers on which websites are hosted are also located in the same jurisdiction. As the servers of Google and Yahoo are not located in India, there is no PE in India. As regards the second limb of s. 5(2) (b) of "income deemed to accrue or arise in India", one has to consider s. 9. S. 9(1) (i) does not apply as there is no "business connection" in India nor are the online advertising revenues generated in India serviced by any entity based in India. As regards s. 9(1) (vi), it is held in Yahoo India (P) Ltd. (2011) 140 TTJ 195 (Mum) and Pinstorm Technologies (P) Ltd.(2012) 54 SOT 78 (Mum) that the advertising revenues are not assessable as "royalty". As regards s. 9(1) (vii), the services are not "managerial" or "consultancy" in nature as both these words involve a human element. Applying the rule of noscitur a sociis, even the word "technical" in Explanation 2 to s. 9 (1) (vii) would have to be construed as involving a human element. If there is no human intervention in a technical service, it cannot be treated as a technical service u/s 9(1) (vii). On facts, the service rendered by Google & Yahoo is generation of certain text on the search engine result page. This is a wholly automated process. In the services rendered by the search engines, which provide these advertising opportunities, there is no human touch at all. The results are completely automated. Consequently, the whole process of actual advertising service provided by Google & Yahoo, even if it be a technical service, is not covered by the limited scope of s. 9(1) (vii). Consequently, the receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the provisions of the Act or the India US and India Ireland tax treaty.(A. Y. 2005-06)
ITO v. Right Florists Pvt. Ltd. (Kol.)(Trib.) www.itatonline.org

S.40(a) (ia): Amounts not deductible-Deduction at source-Dumper hire charges-Contractor- Special Bench verdict binding despite suspension by High Court. (S.194C)
The assessee paid dumper hire charges of Rs. 36.37 lakhs and claimed it as a deduction. The AO disallowed the claim u/s 40(a) (ia) on the ground that the assessee had not deducted TDS thereon u/s 194C. Before the Tribunal, the assessee argued that it was not liable to deduct TDS u/s 194C as there was only no "contractual agreement". In the alternative, it was argued that in accordance with the Special Bench judgement in Merilyn Shipping& Transports v. Add. CIT (2012) 136 ITD 23 (SB), the disallowance u/s 40(a) (ia) had to be confined to the amounts "payable" as at the end of the year and it did not apply to the amounts already paid during the year. The assessee also argued that though the Andhra Pradesh High Court had granted an "interim suspension" against the said judgement of the Special Bench, it was still binding. Held by the Tribunal:

The argument that s. 194C does not apply in the absence of a written contractual agreement is not acceptable. Even a verbal contract is sufficient. As regards the judgement of the Special Bench in Merilyn Shipping& Transports v Add. CIT (2012) 136 ITD 23 (SB) where the view was taken that s. 40(a) (ia) can apply only to the amounts remaining payable as at the end of the year and not to the amounts paid during the year, though the Andhra Pradesh High Court has granted "interim suspension" of the said judgement, the said stay/ suspension applies only to the parties to that proceeding and does not destroy the binding effect of the judgement of the Special Bench. There is a difference between "stay of operation" of an order and "quashing of an order". While, in the case of a "quashing", the order of the lower court ceases to exist, in the case of a "stay", the order of the lower court continues to operate and have binding effect. Accordingly, the judgement of the Special Bench in Merilyn Shipping still holds ground and the TDS provisions will apply, for purposes of invocation of s. 40(a) (ia), only on the amounts remaining payable at the end of the year and not on the amounts paid (Shree Chamund Mopeds Ltd. vs. Church of South India Trust Association AIR 1992 SC 1439, 1444 &Pijush Kanti Chowdhury vs. State of West Bengal 2007 (3) CHN 178 followed). (A. Y. 2007-08)
ITO v. MGB Transport (Kol.) (Trib.). www.itatonline.org

S.40(a) (ia): Amounts not deductible-Deduction at source–Contractor-Transportation charges paid before end of financial year relevant to assessment year-disallowance of charges for failure to deduct tax at source not proper. (S.194C)

The assessee claimed deduction of expenditure towards transportation charges. The Assessing Officer disallowed the transportation charges paid under section 40(a) (ia) of the Act, as no tax was deducted at source while making the payment. The Commissioner (Appeals) set aside the Assessing Officer's order. On appeal by the Department the Tribunal held that the entire expenditure in respect of transportation charges was paid during the financial year relevant to the assessment year under consideration. The balance-sheet as on March 31, 2007 indicated that there were no liabilities which meant that the assessee had paid the transportation charges before the end of the financial year relevant to the assessment year under consideration. Therefore, there was no justification in making the disallowance by the Assessing Officer under section 40(a) (ia) of the Act. Merilyn Shipping and Transports v. Addl. CIT [2012] 16 ITR (Trib) 1 (Visakhapatnam) [SB] followed. (A.Y.2007-2008)

ITO v. Vinod Datta (2013) 22 ITR 243 (Mum.) (Trib.)

S.40(a) (ia):Amounts not deductible-Deduction at source-Rent-Form no 15G was filed hence no disallowance can be made. (S.194-I,197A, form no. 15G)

Assessee paid rent to land lady, which was below taxable limit, without deduction of tax at source under section 194-I. It filed form No. 15G being given by land lady. Assessing Officer having found that there were infirmity in Form No. 15G disallowed rent paid by applying section 40(a) (ia). Tribunal held that since assessee had reason for non-deduction of tax at source, disallowance under section 40(a) (ia) of rent paid was unjustified.In favour of assessee. (A.Y.2008-09)

Pareek Electricals v. ACIT (2013) 55 SOT 338 (Cuttack) (Trib.)

S.40(a) (ia): Amounts not deductible –Deduction at source-Matter remanded.

The tribunalfollowing the judgment of Special Bench inMerilyn Shipping and Transports v. Addl CIT (2012) 16 ITR 1 (Trib.) (SB) held thatif the amounts paid during the year under consideration,
No disallowance warranted. Matter remanded. (A.Y.2007-08).

Gurudas Mannv. Dy.CIT(2013) 21 ITR 57 (Chandigarh) (Trib.)

S.40(a) (ia): Amounts not deductible-Royalty-Satellite link charges- Not liable to deduction of tax at source. (S.201)

Payments for satellite link charges for use of standard facility-is not royalty hence not liable to deduction of tax at source. Tribunal holding in favour of assessee in proceedings arising out of section 201 proceedings sameis followed in proceedings arising out of assessment. (A. Y.2006-2007)

Wills Processing Services (India) P. Ltd. v. Dy. CIT [2013] 21 ITR 1/151 TTJ 555 (Mum.) (Trib.)

S.40(a) (ia):Amounts not deductible – Deduction at source-Royalty – Payment for purchase of software assessee is not liable to deduct tax at source. (S.9(1) (vi).)

Assessee is engaged in the business of purchase and sale of software. While computing its income from business the assessee had claimed expenditures on account of service charges paid to SSC (Sonata Software Ltd.) and deputation charges in respect of personnel deputed by SSC (Sonata Software Ltd.). Book the expenses were allowed by Tribunal by following the Tribunal decision in assessee's own case for earlier years. The assessee made payment for purchase of software from persons who are resident in India. The assessee did not deduct tax at source while making payment towards such purchases. The Assessing Officer treated the payment as royalty on the basis that the assessee as a purchaser of the software had a right to use the software. The CIT (A) deleted the addition made by Assessing Officer. The Tribunal held that the payment made by assessee for purchase of software from various resident entities was not in nature of royalty and therefore, there was no obligation on the part of assessee to deduct tax at source from such payment and consequently no disallowance of the payments can be made under section 40(a) (ia) for non deduction of tax at source. (A. Y. 2006-07)

ACIT v. Sonata Information Technology Ltd. (2013) 152 TTJ 590 (Mum.) (Trib.)

S.40(a) (ii): Amounts not deductible-Rates or tax-Dividend tax-Interest for delay in remitting tax deducted at source--Expenses incurred for delay in UTI dividend payments is not deductible. [S.2(43, 37(1)].

The Tribunal held that the delay charges attributable to dividend tax partook of the character of dividend tax itself. Dividend tax as such is not deductible. Therefore the delay charges also were not deductible. The same was the case in respect of interest for delay in remitting tax deducted at source. There cannot be a different view on expenses incurred for delay in UTI dividend payments. Therefore, these expenses claimed by the assessee were not deductible in computing its income. (A.Ys. 2003-2004, 2004-2005)

ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 (Chennai) (Trib.)

S.40(b): Amounts not deductible-Firm-Book profit- Income from Other Source included in P&L a/c - Cannot be discardedqua book profit for computation of remuneration payable to partners.

The assessee-firm derived its income from profession as an advocate. In the profit and loss account, the assessee-firm credited certain amount received as licence fee and compensation for use of shared facilities. In the course of assessment, the Assessing Officer opined that since the aforesaid income was not a professional income, the same could not form part of 'book profit' for computation of allowable remuneration to partners under section 40(*b*). It was held that Income from other sources included in profit and loss account to ascertain net profit cannot be discarded *qua* book profit for computation of remuneration payable to partners. The Tribunal allowed the appeal of assessee. (A.Y. 2005-06)

Suresh A. Shroff& Co. v. JCIT (2013) 140 ITD 1 (Mum.) (Trib.)

S.40(b) (v): Amounts not deductible–Partner-Remuneration-Partnership deed specifically providing for payment of remuneration to working partners, remuneration paid to partnerswere within statutory fixed limit hence no disallowance on ground expenditure excessive. (S. 40A(2))

While considering the provisions of section 40(b) (v) read with section 40A(2) (a), the Court held that the Assessing Officer is only required to see whether the partners are the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and whether the remuneration provided is within the limits prescribed under section 40(b) (v). If all the conditions are fulfilled he cannot disallow any part of the remuneration on the ground that it is excessive. (A.Y. 2005-06)

CIT v.Great City Manufacturing Co. (2013) 351 ITR 156/256 CTR 420/83 DTR 13 (All) (High Court)

S. 40A(2):Expenses or payments not deductible - Excess or unreasonable -Payment to sister concern –As no investigation is done, disallowance was not sustainable.

In the instant case the AO held that the assessee had made payments to its sister concern without citing any cogent reasons. The High Court held that the AO had not carried out any investigation as to if the payments made to the sister concern were excessive with reference to third parties or fair market charges payable for similar nature of work. In the absence of the same, disallowance cannot be sustained. (A.Y. 2002-03)

CIT v. Superior Crafts (2013) 82 DTR 209 (Delhi) (High Court)

S.40A(2): Expenses or payments not deductible-Excess or unreasonable–Directors remuneration allowed which was based on board resolution.

Where payments were made by assessee-company to its directors was supported by a Board resolution which authorised payment being in appreciation of directors' services and encouraging operational results of company, deduction should be allowed to assessee. Appeal of revenue was dismissed. (A.Y.2001-02)

ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32(URO) (JP) (Trib.)

S.40A(2): Expenses or payments not deductible-Excess or unreasonable-Commission-Disallowance made by the Assessing Officer was deleted.

Assessee is carrying on business of job work and sale of ceramic catalyst items. It paid sales commission to a partnership firm 'R' in which assessee was also a partner. According to assessee, marketing services rendered by 'R' included obtaining orders, visiting parties, collection of payment etc. Assessing Officer took a view that receipt of job work by assessee was a repetitive process and, in such a case, third party services were not required. He thus disallowed payment of sales commission by invoking provision of section 40A(2) (b). Tribunal held that, It was undisputed that sales promotion commission paid to 'R' was allowed in earlier years. Moreover, revenue failed to bring on record evidence showing that expenses incurred were excessive or unreasonable ,in view of above, impugned disallowance made under section 40A(2) (b) was to be deleted. In favour of assessee. (A. Y. 2006-07)

Dy. CIT v. Ravi Ceramics. (2013) 55 SOT 160 (Ahd.) (Trib.)

S.40A(3): Expenses or payments not deductible-Cash payments exceeding prescribed limits – Salary-Exceedingprescribed limit- Disallowancewas held to be justified. (S.147)

Return of assessee-company was processed under section 143(1) - Subsequently, Assessing Officer having found that assessee had paid salary to its managing director in cash exceeding Rs. 20,000 and also claimed non-business expenses initiated reassessment proceedings and thereafter disallowed said expenses. Tribunal upheld finding of Assessing Officer. Court held that no substantial question of law arose out of order of Tribunal. In favour of revenue. (A.Y.2002-03)

Rajasthan Telematics Ltd. v. ACIT (2013) 213 Taxman 44(Mag.) (Raj) (High Court)

S.40A(3): Expenses or payments not deductible- Cash payments exceeding prescribed limits-Assessee purchasing goods and depositing amount in bank account of seller--No disallowance in hands of assessee. (Income-tax Rules, 1962, R. 6DD.)

The Assessing Officer made an addition of Rs. 60,19,000 ,on the ground that the assessee had violated the provisions of section 40A(3) of the Income-tax Act, 1961. The Tribunal partly allowed the appeal by the assessee. On appealby revenue high Court, dismissing the appeal, heldthat the Tribunal categorically held that the amount in question was directly deposited in the bank account of the seller. The Tribunal had considered the factor that the assessee was only an agent of the seller and held that no disallowance could be made in the hands of the assessee. The findings had not been shown to be perverse. Therefore, the addition was not justified. (A. Y. 2008-2009)

CIT v.Shelly Passi (Smt)[2013] 350 ITR 227(P & H) (High Court)

S.40A(3):Expenses or payments not deductible-Cash payments exceeding prescribed limits -Best judgment-No disallowance under section 40(A) (3). (S.144)

The assessee derived income from newspaper agency sales and purchases of commission. He filed his return on March 31, 2010. The Assessing Officer observed that the assessee made sales in cash and while making the best judgment assessment accepted the sales showed by the assessee but applied a higher gross profit rate and made addition in respect of income from newspaper business. He also made trading addition under section 40A(3) of theAct, on the ground that the assessee made cash payments to the newspaper company. The Commissioner (Appeals) deleted the addition on the ground that when income was assessed by estimating the profit after rejection of the books of account no disallowance could be made separately under section 40A(3) of the Act. On appeal by the Department the Tribunal held, that the Commissioner (Appeals) rightly deleted the separate addition made by the Assessing Officer under section 40A(3) of the Act. (A.Y. 2009-2010)

ITO v.Nardev Kumar Gupta(2013) 22 ITR 273 (Jaipur) (Trib.)

S.40A(3):Expenses or payments not deductible- Cash payments exceeding prescribed limits- Cash payments-Held proper.

The tribunal held that the assessee has not produced any material to controvert finding of Assessing Officer that no cash payment was made above over and above Rs 20000by way of a single paymentor aggregate of payments in a single day.As no evidence to establish claim that no single payment in cash madewas blowofRs. 20,000 disallowance was held to beproper. (A.Y. 2008-09)

Manjit Mann (Mrs.) v. Dy.CIT (2013) 21 ITR 57 (Chandigarh) (Trib.)

S.40A(3): Expenses or payments not deductible- Cash payments exceeding prescribed limits- Cash payment-Disallowance justified.

Tribunal held that there is no evidence of exceptional circumstances, hence disallowance is held to be justified. (A. Y.2006-2007, 2007-2008)

ITO v. Nam Estates P. Ltd (2013)141 ITD 659/ 21 ITR 109(Bang.) (Trib.)

S.40A(8): Expenses or payments not deductible-Interest on deposits-Fixed deposits-Interest cannot be disallowed under section 40(A) (8).

Fixed deposits secured by a floating charge on specific assets of company amounts to secured fixed deposits and, therefore, interest paid on them cannot be disallowed under section 40A(8).In favour of assessee. (A.Y.1985-86)

CIT v. Dalmia Cement (Bharat) Ltd. (2013) 212 Taxman 126(Mag.) (Delhi) (High Court)

S.41 (1): Profits chargeable tax-Remission or cessation of trading liability-Since there was no declaration by assessee that it did not intend to honour its liabilities nor was there any discharge of debt, provisions of section 41 (1) could not be invoked.

Assessing Officer finding that assessee had not paid money to many of creditors for years together added same as income under provisions of section 41 (1).Court held that since there was no declaration by assessee that it did not intend to honour its liabilities nor was there any discharge of debt, provisions of section 41 (1) could not be invoked. Cessation of liability has to be either by reason of operation of law, i.e., on liability becoming unenforceable at law by creditor and debtor declaring unequivocally his intention not to honour his liability when payment is demanded by creditor, or a contract between parties, or by discharge of debt. In favour of assessee. (A.Y.2006-07)

CIT v. G.K. Patel & Co. (2013) 212 Taxman 384(Guj.) (High Court)

S.41 (1): Profits chargeable tax-Remission or cessation of trading liability-Adjustment of liabilities-Addition was deleted.

Assessee imported goods from IMC, a US company on credit. Assessee also rendered some services to IMC for commission. However, IMC withheld said commission payable. Assessing Officer found that no confirmation regarding credit was given by IMC and concluded that assessee had adjusted amount payable by it towards goods against commission receivable and made addition under section 41 (1).Tribunal held thatno confirmation was filed from IMC could not lead to conclusion that there was a cessation or remission of liability of assessee to IMC warranting invocation of provisions of section 41 (1).Since no evidence was forthcoming to show that any such adjustment was made by assessee, addition made by Assessing Officerwas deleted. In favour of assessee. (A.Y. 2008-09)
Victoria Roberts (Smt.) v. ACIT (2013) 55 SOT 130 (Bang.) (Trib.)

S.41 (1):Profits chargeable tax - Remission or cessation of trading liability -Unclaimed liability-Entire credit cannot bebrought ton tax.
Assessee consistently followed a method of accounting whereby it is maintaining provision for unclaimed liabilities and offering the unclaimed amounts to tax after the end of the three year limitation period, entire credit in the said account cannot be brought to tax as income of the relevant year. (A.Y. 2002-03)
Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263(Mum.) (Trib.)
S.43(1): Actual Cost-Customs duty-Depreciation-Custom duty paid to be considered as part of actual cost for the purpose of allowing depreciation. (S.32)
Asssesee purchased machinery from a company located in USA. It claimed depreciation at rate of 25 per cent on actual cost of machinery worth Rs. one crore. Assessing Officer pointed out that written down value of machinery in books of account of assessee was Rs. 75.73 lakhs, which was to be taken as actual cost for purpose of granting depreciation. Tribunal upheld order of Assessing Officer. On appeal, assessee furnished copies of invoices and pointed out that Assessing Officer had omitted to take note of payment of ad valorem custom duty which was to be included in actual cost of machinery for purpose of allowing depreciation. On facts, total cost claimed by assessee as Rs. one crore stood explained and, therefore, assessee's claim was to be allowed. In favour of assessee. (A.Y.1996-97)
Dy.CIT v. First Leasing Co. of India Ltd. (2013) 212 Taxman 417(Mad.) (High Court)

S.43(5):Speculative transaction - Speculative loss – Losses from share trading activity and future and options transactions. (S.28(i))
Assessee filed all the evidence for claiming loss from share trading activity including copy of the time stamped contract notes issued by the brokers containing the unique client code and PAN of the assessee, the claim of loss cannot be disallowed merely on the ground that it is directly taken to the capital account without routing it through the P&L a/c nor it can be treated as a speculation loss; matter is restored to the AO for the limited purpose of verifying whether delivery of shares has been taken or not. (A.Y. 2008-09)
A CIT v. Naishad I. Parikh (2013) 83 DTR 227(Ahd.) (Trib.)
S.43B:Deductions on actual payment – Payment of sales tax made beyond time provided under the proviso to section 43 B of the Act– Assessee not entitle to the benefit provided by proviso. (S.139(1))
Where the assessee does not make the payment of sales tax dues before filing its return of income under section 139 (1) of the Act,the amount is liable to be disallowed under section 43 B of the Act. (A.Y. 1993 – 94)
CIT v. Forbas Ewart (P) Ltd. (2013) 81 DTR 436 (Ker.) (High Court)

S.43B: Deductions on actual payment-Disallowance cannot be made on the ground that the payment was not in respect of manufactured goods.
The assessee, a car manufacturer, had to comply with the requirements of the Excise Act, in order to clear the goods, by paying duty. The duties are collected in the form of a regular payment into the "Personal Ledger Account (PLA)" in terms of Rule 173-G of the Central Excise Rules. The AO took the position that the amounts paid into, and remaining outstanding, at the end of the financial year, was to be disallowed by reason of section 43B. However, the Tribunal accepted the assessee's contentions. On appeal the court held thatwhere assessee maintained "sufficient" amounts in Excise PLA, as per Rule 173G of Excise Rules to cover the removals, such amounts related to assessee's duty liability, falling within the description under section 43B; thus, revenue's contention that amounts in credit also related to goods not manufactured, and therefore, not relatable to any "liability incurred" had no basis. Thus, the Tribunal rightly held that the amounts deposited by the assessee in the Excise PLA could not be disallowed under section 43B. (A.Y.1994-95).
CIT v. Maruti Suzuki India Ltd. (2013) 212 Taxman 603/81 DTR 152 (Delhi) (High Court)

S.43B: Deduction on actual payment- Interest- Schedule bank-Co-operative bank- Interest payable to SMM Co-operative Bank Ltd could not be disallowed under section 43B.
The assessee claimed in respect of interest payable to Shree Mahalaxmi Mercantile Co-operative Bank ltd. The Assessing Officer disallowed the interest under section 43B on the ground that the interest was not paid up to the date of filing of

the return. On appeal the Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal the Tribunal held that section 43B would not apply in case of payment of interest to a co-operative bank for the reasons that section is applicable only in respect of interest payable to on a loan taken froma schedule bank.Under terms of Explanation 4(aa) to section 43B of the Act,a schedule Bank would have a meaning assigned to it in the Explanation to cl. (iii) of sub.s. (5) of section 11 of the Act.The Tribunal held that ShreeMahalaxmi Mercantile Co-operative bank is not covered with in the definition of scheduled bank under section 43B,therefore the appeal of assessee was allowed. On appeal to High Court the High Court confirmed the view of Tribunal and the appeal of revenue was dismissed. (A.Y. 200-05)

CIT v. UpendraT. Kapadia (2013) 81 DTR 279/ 256 CTR 201 (Bom.) (High Court)

S.43B: Deductionson actual payment-Service tax-Amount paid before due date for filing return-Section 43B is not applicable.

The assessee showed liabilities which included service tax payable in respect of which no documentary evidence for payment was filed. The Assessing Officer presumed that such service tax had not been paid and disallowed the service tax payable under section 43B of the Act. The Commissioner (Appeals) deleting part of the disallowance on the ground that the amount was paid before the due date of filing of return, observed in respect of the balance that service tax had not become payable and deleted the disallowance. Tribunal held that order of the Commissioner (Appeals) was justified. (A.Y. 2007-2008)

Dy. CIT v. Ovira Logistics P. Ltd (2013) 21 ITR 436(Mum.) (Trib.)

S.43B: Deduction on actual payment- Employees State Insurance-Contribution made to provident fund and Employees' State insurance, the amount deposited within grace period is allowable.

The Tribunal held that the disallowance under section 43B is not required when the amounts are paid within the grace period allowed ; this is so not only on legal principles but also on the fact that the entire amount was paid before the closure of the financial year or within the due date for filing the return as provided. (A. Y. 2004-2005)

ACIT v. UPS Jetair Express P. Ltd. (2013) 21 ITR 82 (Mum.) (Trib.)

S.43D: Public Financial institution-Interest-Crediting to reserve account-Provision-Interest on bad or doubtful debts could be claimed as deduction under section 43D.

Mere crediting of interest to a reserve cannot be said to be an incidence by which said interest could be charged to tax. Where interest on loans granted by assessee-bank remained unpaid which were classified as non-accrual loans and were reversed to an account called Reserve for Doubtful Interest account, assessee would be entitled to claim deduction under section 43D in respect of said interest and simply on ground that interest had been credited on such type of debts in reserve account, deduction could not be taken away. Appeal of assessee was allowed. (A. Y.1998-99)

American Express Bank Ltd. v. Add. CIT (2013) 55 SOT 136(Mum.) (Trib.)

S.44:Insurance business-Provision for tax and deduction of tax at source. (Sch. I, r. 5)

Provision for tax and TDS could not be added to the balance of profits disclosed by the annual accounts of assessee insurance company. CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC) followed. (A.Y. 1980-81,1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 83 DTR185 (Delhi) (High Court)

S.44: Insurance business – Actuarial Valuation –Income to be assessed as work out as per provisions of Insurance Act and not IRDA Act.

Assessee declared surplus deficit from life insurance businessunder Form –Ias prescribed under the Insurance Act after adjusting share holder and policy holder account thereby neutralizing transfer of funds from shareholder's account to policy holders account.Assessing Officer gave credence to new Form-I, prescribed under IRDA Regulationand took 'total surplus' as surplus of Life Insurance business ignoring transfer from shareholder's accountand accordingly brought to tax the surplus or deficit under the said Regulation. On appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to Tribunal it was held that, the Assessee engaged in insurance business should workout actuarial surplus/deficit in accordance with provisions of Insurance Act, and not as per IRDA Act or it's regulations. Accordingly the appeal of assessee was allowed. (A.Y. 2005-06 to 2008-09)

ICICI Prudential Insurance Co. Ltd. v. ACIT (2013) 140 ITD 41 (Mum.) (Trib.)

S.44BB: Mineral oils-Computation- Non-Resident –providing geophysical survey services to oil and gas exploration industry, provisions of section 44BB is applicable and not section 44DA. (S.44DA).

Assessee, a non-resident, which is engaged in providing geophysical survey services to oil and gas exploration industry by way of electromagnetic survey, processing and interpretation of data. The court held that, assessee is engaged in activities

mentioned in specific provisions of section 44BB and, hence its profits will be computed as per section 44BB and not section 44DA. In favour of assessee.
DTIv. OHM Ltd. (2013) 212 Taxman 440/84 DTR 142(Delhi) (High Court)

S.44BB: Mineral oil- Permanent establishment-Remuneration received is not taxable.DTAA-India- USA. (Art.7)
Assessee, a US enterprise not having permanent establishment in India, would not come within purview of section 44BB even in respect of remuneration received by it in connection with any matter provided in section 44BB. In favour of assessee.
CIT v. Enron Oil & Gas Expat Services Inc. Dehradun (2013) 213 Taxman 44 (Uttarakhand) (High Court)

S.44BB: Mineral oils –Income deemed to accrue or arise in India - Business profits –Remuneration has been received outside India hence will not come with in section 5(2) read with section 9(1) (i)., accordingly is not taxable in India.(S.5, 9(1) (i))
Assessee is a non-resident company. It entered into agreement with 'E' Ltd. an Indian company, operating in field of oil and gas. In terms of said agreement, assessee agreed to provide administrative and personnel support outside India. During relevant year, assessee received certain amount in respect of said contract. Assessing Officer included said receipt as taxable income and determine tax payable thereon by taking recourse to section 44BB.Tribunal took a view that since there was nothing on record indicating that agreement in question had any nexus with projects carried out by 'E' Ltd. in India income derived from said agreement could not be brought to tax in India. Court held on facts, that the impugned order passed by Tribunal did not require any interference. In favour of assessee.
CIT v J. Ray Mc. Dermott Middle East Inc. (2013) 212 Taxman 582 (Uttaranchal) (High Court)

S.44C:Non-residents - Head office expenditure – DTAA-INDIA-Oman-Revised return. (Art.7, 40(a) (ia)).
Where assessee had filed revised return and claimed deduction under section 44C at higher level than that claimed in original return, Assessing Officer was duty bound to consider higher claim. Therefore, matter was to be remanded back to Assessing Officer to consider claim as per revised return filed by assessee. It was alsoheld that transaction charges on NOSTRO account with bank outside India are allowable under section 40(a) (i).(A.Ys.2000-01, 2001-02)
ACIT (IT) v. Oman International Bank S.A.O.G (2013) 55 SOT 32 (Mum.) (Trib.)

S.44C: Non-residents - Head office expenditure - Application of provision.
The assessee claimed deduction for head office expenses at Rs. 1.06 crore on the ground that it was directly attributable to the Indian branch. Assessee claimed that the ceiling provided under section 44C would not apply. The Assessing Officer, however, observed from the invoices submitted by the assessee that the expenses in question were 'allocated' to the assessee by the head office; that in some cases the basis of allocation was not given. The Assessing Officer, therefore, held such amount of Rs. 1.06 crore to be covered within the ceiling prescribed under section 44C. On appeal by the assessee, the Commissioner (Appeals) directed Assessing Officer to allow independent deduction distinct from section 44C. Being aggrieved against order of the Commissioner (Appeals), the revenue raised instant ground of appeal. Tribunal heldthat sincethe assessee could not produce any evidence to prove that head office expenses to tune of Rs. 1.06 crore were directly attributable to Indian branch, such expenses could only be allowed within ceiling prescribed under section 44C Decided in favour of revenue (A.Y. 1994-95 1998-99to 2000-01)
Dy. CITv.Banque Indosuez (Known as Credit Agricole Indosuez) (2013) 55SOT 38 (Mum.) (Trib.)

S.44C: Non-residents- Head office expenditure--Direction to deduction of independent of provisions of section 44C is justified-Rate of tax--Foreign bank--Rate applicable to non-resident companies is justified.
Commissioner (Appeals) directed the Assessing Officer to allow the assessee deduction of Rs. 48,60,008 independent of the provisions of section 44C of the ActTribunal held that the order of the Commissioner (Appeals) was justified. The assessee's income was taxed at the higher rate of 55 per cent as applicable to non-resident companies. Held, that the order was justified. (A.Y.1997-1998)
ADIT (Int.) v. Credit Agricole Indosuez (2013) 21 ITR 345 (Mum.) (Trib.)

S.44C:Non-residents- Head office expenditure-- Permanent establishment-Interest and commission received from head office and other overseas branches and paid to other overseas branches and head office-Mutuality between overseas head office and branch in India-Interest received from overseas head office or branches not chargeable-Interest paid by Indian permanent establishment to overseas head office or branches not allowable as deduction. (S.143)

The assessee received interest and commission from its head office and other overseas branches and at the same time also paid interest and commission to other overseas branches and head office. The assessee, in its computation of total income, reduced the interest or commission received and added back the interest or commission paid. The Assessing Officer held that the interest or commission earned by the assessee from its head office or overseas branches should be charged to tax. The Commissioner (Appeals) upheld in principle the assessment order on this issue. On appealthe Tribunal held that(i) that once mutuality is found between overseas head office and branch in India, there can be no interest income by the Indian branch from its overseas head office or branches under the provisions of the Act. No interest or commission received by the Indian branch from the head office can be charged to tax.Sumitomo Mitsui Banking Corporation v. Deputy DIT [2012] 16 ITR (Trib) 116 (Mumbai) [SB] followed.

(ii) That the interest paid by the Indian permanent establishment to its overseas head office or branches should also not be allowed as deduction. (A. Y.1997-1998)
ADIT (Int.) v. Credit Agricole Indosuez (2013) 21 ITR 345(Mum.) (Trib.)

S.45: Capital gains- Transfer- Family settlement- A family settlement does not result in a "transfer" and compensation received to equalize inequalities in family settlement is not taxable as "income". (S. (2(47), 4.)
There was a dispute between two groups of a family. During the pendency of litigation, the parties agreed to divide the assets and businesses of the family into two lots i.e. lot-1 containing the Jalandhar and Ambala units and lot-2 containing the Delhi and Jaipur units. In terms of such settlement, lot-1 fell to the share of Group 'A' and lot-2 fell to the share of Group 'B' with the condition of payment of Rs.24 crores. A dispute regarding the date of split of the said amount was pending. The AO assessed the said sum in the hands of the assessee. This was reversed by the CIT (A) and Tribunal on the ground that the distribution of assets including the sum of Rs.24 crores was not complete as the matter was sub-judice and the amount did not accrue to the income of the group 'A". On appeal by the department to the High Court, the Court had to consider whether the compensation paid to the assessee to settle inequalities in partition, being a provision of "owelty" i.e. compensation deposited to equalize partition represents immovable property and is not an income exigible to tax. On appeal by the revenue, High Court dismissing the appeal held that a family partition which results in an adjustment of shares and of the respective rights in the family properties is not a "transfer" in the eyes of law. When there is no transfer of asset, there is no capital gain and consequently there is no liability to pay tax on capital gains. In a family partition, a situation arises where an item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth. In such a case, with a view to ensure an equitable partition, the item is allotted to one party and he is asked to pay compensation in money value to the other party. This amount is called "owelty". As the amount of compensation is only to equalize the inequalities in the partition it is nothing but a share in the immovable property itself (though paid in cash) and cannot be treated as income liable to capital gain. If such amount is to be treated as income liable to tax, inequalities would set in as the share of the recipient will diminish to the extent of tax. On facts, the payment of Rs.24 crores to Group A is to equalize the inequalities in partition of assets. The amount so paid is immovable property and is not income liable to tax (T.S. Swaminatha Odayar vs. Official Receiver AIR 1957 SC 577, CIT vs. A. L. Ramanathan (2000) 245 ITR 494 (Mad), CIT vs. Kay Arr Enterprises (2008) 299 ITR 348, CIT vs. R. Nagaraja Rao (2012) 207 Taxman 74 (Kar) & Ziauddin Ahmed vs. CGT (1976)102 ITR 253 (Gau), Parvathi Amma Vs. Makki Amma AIR 1962 Kerala 85 reviewed) (A.Y.2007-08)
CIT v. Ashwani Chopra(2013) 85 DTR 40(P&H) (High Court)
CIT v.Arvind Chopra (2013) 85 DTR 40(P&H) (High Court)

S.45: Capital gains-Shares-Foreign company-Non-resident-Indian assets-DTAA-India-France-Gains arising on sale of shares of foreign company by NR to NR not taxable in India under India-France DTAA even if the foreign co only held Indian assets. (S.9(1), 2(47), 90, 195, 201, 245R(2) (iii), Art 14(5))
Two French companies named "Murieux Alliance" ('MA') and "Groupe Industrial Marcel Dassault" ("GIMD") held shares in another French company named "ShanH". MA & GIMD acquired shares in an Indian company named "Shantha Biotechnics Ltd" ("Shantha"). The shares in Shantha were transferred to ShanH. MA and GIMD subsequently sold the shares in ShanH to another French company named "Sanofi Pasteur Holding". The assessee filed an application for advance ruling claiming that as the two French companies had sold the shares of another French company to a third French company, the gains were not chargeable to tax in India. The department opposed the application on the ground that ShanH was formed with no purpose other than to hold the shares of the Indian company and that the transaction was taxable in India. The AAR upheld the department's plea on the ground that the French company's (ShanH) only asset were the shares in the Indian company & so when its shares were sold, what really passes were the underlying assets and the control of the Indian company and so the French company was a facade and a scheme for avoidance of tax. On appeal by the assessee to the High Court, HELD reversing the AAR:

(i) ShanH was incorporated as part of the policy that all off-shore investments must be made through a subsidiary incorporated in France. It is not the case of the Revenue that in 2006 itself ShanH was conceived as a preordained scheme to avoid tax in India. The Revenue's case about when ShanH became a tax avoidance scheme is ambivalent and incoherent. ShanH is an entity of commercial substance and business purpose. Though a subsidiary of MA/GIMD, it is not a mere nominee or alter ego of MA/GIMD and there is nothing to show that they exercised overriding control over it. The creation of subsidiaries for investment is a legitimate practice. ShanH is accordingly the true and beneficial owner of the Indian company's shares. When the shares of ShanH were sold, it was the sale of shares of a French company and it cannot be said that the control, management or underlying assets of the Indian company were sold so as to attract tax on capital gains in India (UOI v. Azadi Bachao Andolan(2003) 263 ITR 706 (SC) & Vodafone International Holding B.V. v. UOI (2012) 341 ITR 1 (SC) followed);

(ii) Article 14(5) of the India-France DTAA which exempts capital gains from shares representing more than 10% holding from tax in India does not permit a see through on whether the alienation of shares by ShanH is an alienation of the control, management or assets of the Indian company. It cannot be said that an actual alienation of the ShanH shares amounts to a deemed alienation of the Indian company's shares. The fact that the value of the shares of ShanH was because of the value of the Indian company's assets is irrelevant;

(iii) The retrospective amendment to s. 9(1) so as to supersede the verdict in Vodafone International and to tax off-shore transfers does not impact the provisions of the India-France DTAA because the DTAA overrides the Act;

(iv) The Revenue's argument that as the term "alienation" is not defined in the DTAA, it should have the meaning of the term "transfer" in s. 2(47) as retrospectively amended is not acceptable because as per Article 31 of the Vienna Convention, a treaty has to be interpreted as per good faith and in accordance with the ordinary meaning. Though Article 3(2) provides that a term not defined in the treaty may be given the meaning in the Act, this is not applicable because the term "alienation" is not defined in the Act. In some DTAA's, the term "alienation" is defined to include the term "transfer" but not in the India-France DTAA;

(v) Even assuming that the controlling rights or assets in India held by the Indian company were transferred on the alienation of the French company's shares, the cost of acquiring those rights and assets in the Indian company and their date of acquisition cannot be determined. It is also not possible to determine the exact or rationally approximate consideration (out of the total consideration for the transaction in issue), apportionable to these assets/rights. As the computation provisions fail, the charging provisions also fail (CIT v. BC Srinivasa Shetty(1981) 128 ITR 294 (SC), PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) & Dana Corporation(2009) 32 DTR 1 (AAR) followed);

(v) The AAR has no power to review its own order. Having admitted the application, the AAR cannot at a later stage invoke clause (iii) of the Proviso to s. 245R(2) (iii) & decline to rule on the application.

Sanofi Pasteur Holding SA v. Dept of Revenue, Ministry of Finance (2013) 257 CTR 401/84 DTR 185 (AP.) (High Court).

S.45: Capital gains-Computation- MOU-Sale consideration-Amount actual received.
The inherited property was sold for Rs 14 crores butas per MOU reached between the assessee and his brother, the assessee received onlyRs 6 Crores as his share, the Court heldthat Assessing Officer was not justified in taking the sale value at Rs 7 Crores in the hands of assessee. Appeal of revenue was dismissed. (A.Y.2006-07)
CIT v. Raman Kumar Suri (2013) 81 DTR 33/255 CTR 257 (Bom.) (High Court)

S.45: Capital gains- Adverse possession-No cost of acquisition –Not liable to capital gain tax.
The Income tax Appellate Tribunal held that when an assessee get the property by adverse possession there is no cost of acquisition. The consideration is not liable to capital gaintax. Revenue challenged the said order before High Court. High court dismissed the appeal stating that no question of law arises.
ITANO 1110 OF 2009 and 1153 of 2009 dt 11-8-2009
CIT v. Star Chemicals(Bom.) Pvt. Ltd. (Bom.) (High Court) (Unreported)
Editorial: Order of Mumbai Tribunal in DCIT v. Star Chemicals (Bom) (P) Ltd. (2007) 110 TTJ 753 (Mum.) is confirmed.

S.45: Capital gains-Firm-Partner-Purchase of property by partner in personal capacity and sale thereof by document executed in personal capacity-Shown in the balance sheet of firm-Long-term capital gains not to be taxed in hands of firm. (S.54F)

One of the partners of the assessee-firm purchased a piece of land with money withdrawn from the Firm. The purchase deed was registered in his personal name. In the books of account of the assessee-firm the purchase of the land was shown as an asset. In the accounts of the assessee-firm, the property was shown as purchased by the firm. Accordingly, the landed property was reflected in the balance-sheet of the assessee-firm. The partner sold this property on June 17, 2005 to a third person by executing the sale document in his personal capacity. The partner purchased another property for claiming deduction under section 54F of the Income-tax Act, 1961 in respect of the capital gains arising out of the sale of the property purchased on June 17, 1999. The assessee-firm did not disclose any capital gains arising in its hands. On the other hand, the partner offered the long-term capital gains in his personal assessment with his claim. The Assessing Officer held that the funds necessary for purchasing the property were withdrawn by one of the partners of the assessee-firm from the partnership fund and on the sale of the property also the funds were brought back to the assessee-firm and during all the relevant period, the property was shown in the balance-sheet of the assessee-firm as its own property and in such circumstances the property was owned by the assessee-firm and accordingly brought the long-term capital gains to taxation in the hands of the assessee-firm. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On further appeal, the Tribunal held that the purchase document was registered in the name of one of the partners of the firm. The document was executed in his personal capacity and in his individual name. There was no recital in the purchase deed that the property was being purchased for and on behalf of the firm. Likewise, the property was sold by a sale deed executed by the partner individually and in his independent capacity as the owner of the property. There was also no mention that the property belonged to the assessee-firm and the firm was actually selling the property. Even though the books of account of the assessee-firm contained entries regarding the purchase and sale of the property and the balance-sheet of the assessee-firm showed the property as its own asset for some time, the accounting entries reflected in the books of account of the assessee-firm could not undo the rule of law or the law of land. In order to bring the property into the ownership of the assessee-firm, it was necessary to have a conveyance deed registered in the name of the assessee-firm. As no such document was available, no such conveyance could be presumed and it was not possible to hold that the property was ever owned by the assessee-firm. Consequently the long-term capital gains could not be assessed in the hands of the assessee-firm. It was one of the partners of the assessee-firm, who was bound to account for the long-term capital gains arising from the transaction and the Assessing Officer as to process the return filed by him in accordance with law. The addition made in the assessment of firm was deleted. (A. Y. 2006-2007)

Raja Fertilizers v. ITO (2013) 21 ITR 658 (Chennai) (Trib.)

S.45: Capital gains-Capital asset-Transferable Development Rights -Transfer of 'transferable development rights' available under Development Control Regulation of Greater Mumbai, 1991, amounts to 'transfer' of a 'capital asset, however, since no cost of acquisition can be ascribed to such a right, computational provisions of section 48 cannot be applied and, therefore, such transfer cannot be subjected to tax under head 'capital gain. (S. 2(14), 48)

In the return of income, assessee showed the above receipts as 'compensation received' on account of grant of permission and towards settlement of disputes between the developer, the society and its members. The Assessing Officer, however, observed that the assessee-society was entitled to utilize the transferable development rights (TDRs) in respect of the land admeasuring 3367 square meters owned by them, in the ratio of 1:1 in accordance with the provisions of Development Control Rights, 1991. As per the Assessing Officer, the assessee had transferred such right (TDRs) to the Ariel View under the terms of consent. The Assessing Officer expressed that land is a bundle of rights and when land admeasuring 3367 square meter was purchased all rights, present and future, embedded in it were also acquired. As per the Assessing Officer, the assessee had transferred its TDR entitlement to the Ariel View under terms of consent which was nothing but an agreement towards transfer of the TDR entitlement of the assessee. The Assessing Officer, therefore, held that the benefit in the form of TDR arising out of the existing land was an immovable property, the transfer of which tantamounted to transfer of long term capital asset and hence liable to be taxed as income under the head 'capital gain'. Thereafter, the Assessing Officer computed the capital gain under section 48 by spreading over the cost of acquisition of land admeasuring 3367 sq. metre over the increased TDR provided by the Development Control Regulation, 1991. Commissioner (Appeals), under appeal from the assessee, confirmed the order of Assessing Officer. Being aggrieved, the assessee preferred instant second appeal. Itwascontended that there was no transfer in the instant case, as just permission was given to use TDR and no part of the land was ever transferred. Computational provisions of section 48 would not be applicable in case of transfer of TDRs as there is no cost of acquisition in such cases. The Tribunal held that,The concept of TDRs originates from the regulation of 'Development Control Regulation of Greater Mumbai' i.e., 'DCR, 1991' wherein it was provided that the owner or a lessee of a plot, which was reserved for public

purpose under the development plan of DCR, would be eligible for award of compensation by way of development right certificate of equivalent Floor Space Index (FSI). In other words, the Govt. decided to grant Transferable Development Rights to the land owners, who agreed to surrender their lands on FSI for public purposes. These TDRs can be transferred to other land owners or building for constructing of the building or additional floors. The plots on which those development rights could be used were termed as 'Receiving Plots' and on these plots in addition to whatever FSI were originally available to the owner or lessor of such plots, additional FSI can be allowed to the owner or lessor on using the transferable development rights contained in DRCs for the purpose of construction of the building. Thus, the TDR is available to the owner/lessee of the land which surrenders to the Govt. and, therefore, the acquisition of such TDRs are to detriment the land surrendered by the owner/lessee, and such TDRs can be utilized on any plot vacant or already developed or by erection of additional storeys subject to the FSI available in the DCR. TDR entitlement is capital asset and transfer thereof is 'transfer'. The contentions and reasoning of the Assessing Officer to the extent that the word 'Property' not only includes tangible asset but also intangible asset and, therefore, additional FSI available to the assessee in view of DCR, 1991, was a right acquired by virtue of being owner of the plot, is correct. Thus, such a right is definitely a 'Capital Asset' held by the assessee and assignment of such a right in favour of the developer amounts to transfer of capital asset. It is held that transfer of TDRs amounts to transfer of a 'Capital Asset'.However, it has to be seen as to whether there was any kind of cost in acquiring these rights. This right was acquired automatically by virtue of DCR, 1991, and what the assessee has transferred is not the plot or the building but a right, parting with which, did not result in parting with land or building. Therefore, such a right cannot be said to be embedded in the land as held by the Assessing Officer and the Commissioner (Appeals), because there was no detriment to cost of land by granting such rights. Even though, there was a transfer of a capital asset, however, there was no cost of acquisition or any cost can be ascribed to such right, because the land and the building continued with the possession of the assessee even when transfer of TDR was made to the developer. The reasoning and the logic given by the Assessing Officer and the Commissioner (Appeals) that these development rights were embedded with the land and, therefore, the sum chargeable to cost has to be ascribed, it is held, is not tenable for the reason that these development rights have been available to the assessee as per the DCR, 1991, and is separate and distinct from the original right in land and, hence, it cannot be held that such a right was embedded in the land. Therefore, the conclusion drawn by the Assessing Officer and the Commissioner (Appeals) on this score gets failed. In such a situation, computational provisions of section 48, also gets failed because no cost of acquisition can be ascribed to a right which has emanated from DCR, 1991. This issue has come up several times and has been dealt and discussed in detail by various decisions of Mumbai Co-ordinate Bench of the Tribunal. Respectfully following the ratio laid down in the such decisions and also as per instant findings and observations given above, it is held that even though the transfer of TDR amounts to transfer of a capital asset, however, the same cannot be subjected to tax under the head 'Capital Gain' for the reason that there is no cost of acquisition in acquiring the right which has been transferred and computational mode given in section 48, thus fails in this case. Therefore, taxing of the receipt from transfer of TDRs under the head 'capital gain' by the Assessing Officer for a sum of Rs. 10,70,46, 274 cannot be sustained. Accordingly, the same is directed to be deleted and order of the Commissioner (Appeals) is thus reversed. (A.Y. 2007-08)
Land Breeze Co. Operative Hosing Society Ltd. v. ITO (2013) 55 SOT 103 / 21 ITR 467(Mum.) (Trib.)

S.45: Capital gains – Transfer – Development Agreement – Irrespective of when physical possession was given, capital gain was assessable in year in which development was entered into. [S. 2(47) (v), Transfer of Property Act. 1882, S. 53A]
Assessee entered into development agreement on 14/2/2002 for construction of multi-storeyed building by developer on assessee's land. Possession was given only on 21/4/2004.Theassesseecontendedthat capital gain was assessable in the year 2005-06 and not in the Assessment year 2003-04.It was held that irrespective of when physical possession was given, capital gain was assessable in year in which development was entered into. (A.Y. 2003-04)
G. Sreenivasan v. Dy. CIT (2013) 140 ITD 235 (Cochin) (Trib.)

S.45: Capital gains-Capital asset-licensee of looms-Transfer of land-Amount paid to assessee for surrender of rights in land. Assessee deemed tenant by virtue of amendment of Rent Control Act. Right of assessee a capital asset within the meaning of section 2(14).Amount received assessable as capital gains and not as income from other sources. (S.2(14), 54EC, 55, 56)
The assessee in the return for the assessment year 2009-10, it declared long-term capital gains on surrender of sub-tenancy rights and claimed exemption under section 54EC, by making investment in NHAI bonds. The Assessing Officer found that possession of a portion of the shed was incidental to the licence granted to it for the use of machinery. Therefore, the Assessing Officer came to the conclusion that the amount received by the assessee was merely gratuitous. He held that the assessee could not be said to have had sub-tenancy rights particularly with regard to land for which the compensation had been received by the assessee and, therefore, the amount received by the assessee was not

assessable under the head "Capital gains". He taxed it under "Other sources". This order was confirmed by the Commissioner (Appeals). On appeal to the Tribunal, the Tribunal held that the assessee had entered into an agreement for licence to use looms and machinery. It was entitled to use the shed in which the looms were situated by way of permissible use on licence basis only as incidental to the use of the looms and machinery. Incidental right to use the premises was provided by the agreement itself. The fact also remained that the assessee had been referred to as a licensee in the agreement. The Bombay Rent Hotel and Lodging and House Rates Control Act, 1947 (Rent Control Act), which was amended by the Amendment Act of 1973, had converted the status of the assessee from "licensee" to "deemed tenant" under section 5(11) (bb). Under section 15A, which was inserted by the Maharashtra Act 17 of 1973, certain licensees in occupation on February 1, 1973 would become tenants. By the provisions of section 55(2) of the Income-tax Act, tenancy rights have been considered to be a capital asset. Moreover, the definition of capital asset under section 2(14) of the Act is wide enough to cover "property of any kind" and the type of right acquired by the assessee in the property used by it could not in any manner be said to be less than "any kind of property" held by the assessee. The assessee in fact was enjoying possession of the property and for peaceful vacation thereof it had received the amount which was described by the parties as amount paid for surrender of tenancy rights. The right of the assessee was undisputed and the nature thereof was "property of any kind" which was held by the assessee and was a capital asset within the meaning of section 2(14). The amount received by the assessee was assessable under the head "Capital gains" and eligible for exemption under section 543EC. (A. Y. 2009-2010)
Kewal Silk Mills v. ACIT [2013] 21 ITR 121 (Mum.) (Trib.)

S.45(4): Capital gains –Admission of partner- Admission of a new partner in partnership firm does not attract provisions of section 45(4).(S. 2(47))
Assessee-firm was engaged in business of builders and developers. It admitted a new partner. Assessing Officer found that assessee owned a plot of land 50 per cent of which was transferred in favour of new partner. He thus, opined that assessee-firm was liable to be taxed under section 45(4). On appeal, it was noted that from very beginning of partnership, plot in question was treated as stock-in-trade and even at end of relevant assessment year it was shown as current asset in balance sheet of firm.In view of above, there was no extinguishment of right as envisaged by section 2(47) in case of assessee-firm.Admission of a new partner in partnership firm does not attract provisions of section 45(4). In the instant case no capital asset was transferred by the assessee during the relevant assessment year. From the very beginning of the partnership the plot of land in question was treated stock-in-trade by the assessee firm. Even on 31-3-2008 it was shown as current asset (i.e. W-I-P) in the balance sheet. The Assessing Officer has nowhere rebutted/ doubted this factual position. Considering the above, the Commissioner (Appeals) rightly held that no capital asset was transferred by the assessee-firm and, hence, provisions of section 45(4) should not have been invoked. In the result, the revenue's appeal has to be dismissed. (A.Y. 2008-09)
ITOv. Fine Developers. (2013) 55 SOT 122(Mum.) (Trib.)

S.47(ii):Capital gains – Transfer – Amount received by partner on dissolution of firm is not liable to capital gain tax. (S. 2(47),45(1),45(4).)
Payment to assessee partner on dissolution of firm towards his capital contribution did not constitute "transfer" so as to attract capital gains tax. (A.Y. 1989-90)
Chalasani Venkateswara Rao v. ITO (2013) 83 DTR 200(AP.) (High Court)

S. 47(ii): Capital gains- Capital asset-Transfer-Association of persons- Distribution of assets on dissolution of Association of persons prior to omission of clause 47(ii) w.e.f 1-4-1988. [S.2(47), 45)]
The question before the High Court was whetheron distribution of capital asset on the dissolution of the firm, body of individuals or association of personsdid not constitute "transfer" of a capital asset for the purpose of attracting the provisions of capital gains.The court held that when the status of an assessee is treated as an association of persons, on the dissolution or distribution of assets as a natural corollary, section 47(ii) would ensure to the benefit of the assessee to exclude the operation of section 45. Section 47(ii) was omitted by the Finance Act, 1987, with effect from April 1, 1988 and sub sections (3) and (4) of section 45 were inserted by the Finance Act, 1987, with effect from April 1, 1988.The Court held that distribution of assets on dissolution ofassociation of personsprior to omission of clause is not transfer. The assessee is entitled to the benefit of section 47(ii) of the Act. (A.Y. 1985-86, 1986-87)
Midland Theaters v. ACIT (2013) 350 ITR 676 (Mad) (High Court)
A.R. Srinivasan (BY LRS) v.ACIT (2013) 350 ITR 676 (Mad) (High Court)

S.48: Capital gains-Computation-Inherited property-Memorandum of understanding (MOU)–Consideration stated in the MOU cannot be ignored as personal arrangement. (S.45)

Assessee and his brother sold an inherited property for Rs.14 crores.A memorandum of understanding (MOU) was entered into by them as per which assessee received only Rs. 6 crores for sale of his rights and he offered same to tax. Sale document also showed that assessee had received Rs. 6 crores as sale consideration. Court held that the Assessing Officer was not justified in assessing sale consideration at Rs. 7 crores treating, said MOU as personal arrangement. In favour of assessee. (A.Y.2006-07)

CIT v. Raman Kumar Suri (2013) 212 Taxman 411 (Bom.) (High Court)

S.48: Capital gains- Computation- Cost of acquisition – Will-Relevant year.

The property was acquired by mother in the year 1974,assessee acquired the propertyin accordance with mother's will dated 11th October, 1987 and sold in 2005, benefit of indexation is to be given from 1st April, 1981 and not from 1987. (A.Y.2006-07)

CIT v. Raman Kumar Suri (2013) 81 DTR 33 (Bom.) (High Court)

S.48:Capital gains- Cost of acquisition- Tenancy rights –Demolishing old property and construction of new property-Cost paid by assessee and not on the basis of valuation report. (S.55(2))

Assessee bought the property of which she was one of the tenantsfor Rs 4.75,000. All the tenants entered into an agreement on 10th June 1999 and formed a co-operative society. The old building was demolished and a new building was constructed thereon. The tenants got possession in A.Y. 2002-03. Assessee sold her property on 17th September 2004. Held that the agreement dated 10th June 1999 itself gave interest and right in the impugned property to the assessee along with other tenants, the transaction clearly involved long-term capital gains. Assessee claimed cost of acquisition at Rs 10.04475 based on approved valuer. The Tribunal held that, cost of acquisition of impugned property would be taken at Rs. 4,75,000/- being payment made by the assessee and not as per the higher value declared by the approved valuer. (A.Y. 2005-06)

Nila V. Shah(Mrs.) v. ITO (2013) 83 DTR218(Mum.) (Trib.)

S. 48:Capital gains – Cost of acquisition -Fair market value as on 1st April 1981 of a leasehold land is also to be determined. (S.55(2) (a).)

Assessee acquired leasehold land for nil value prior to 1st April 1981, and sold the same in 2006. The provisions of s. 48 were held to be applicable and the fair market value of the land as on 1st April 1981 along with the indexed cost of acquisition has to be determined in order to arrive at the long term capital gain. Cost of acquisition of land cannot be taken as nil in accordance with the provisions of s. 55(2) (a) (ii). Approved valuer having estimated the fair market value of the land at Rs. 1, 200 per sq. yd. as on 1st April 1981, disregarding the fact that it was leasehold land, it would be fair and reasonable to value the leasehold rightsof the assessee at Rs. 800 per sq. yd. as on 1st April 1981, and to determine the long-term capital gain. (A.Y. 2007-08)

Natraj v. Dy. CIT (2013) 83 DTR 201 (Ahd.) (Trib.)

S.48:Capital gains –Cost of acquisition – Fair Market value as on 1st April, 1981. (S.2(22B), 2(28)45,55(2) (b) (i))

It was held that average value of land as adopted by the revenue at Rs.27,030 per acre on the basis of registered sale deeds cannot be considered as the fair market value of the land in question as on 1st April, 1981, within the meaning of s. 2(22B) r/w/s 55(2) (b) (i) when the fair market value at Rs.5 lacs per acre adopted by the assessee is supported by the certificate issued by the Patwari and duly endorsed by the Tehsildar and the AO has adopted fair market value of similar land at Rs.1,80,000 per acre in the asst. order for Asst. year 2005-06 passed u/s. 143(3). On the facts of the case, the fair market value of the land in question as on 1st April, 1981 is to be taken at Rs.3.50 lacs per acre for the purpose of computation of capital gains. (A.Y. 2008-09)

Manjit Singh v. Dy. CIT (2013)141 ITD 21/ 151 TTJ 1 (UO) (Chd.) (Trib.))

S.50C: Capital gains-Full value of consideration-Value for stamp purposes-Applies mandatorily when consideration stated by assessee less than guideline value-Appellate authority not bound by valuation by Valuation Officer-Entitled to fix value below that determined by Valuation Officer.

The assessee sold a portion of the land of its factory property for a consideration of Rs.2, 22,64,409. At the time, the guideline value adopted by the registering authority was Rs. 3,95,91,000. In the computation of long-term capital gains the assessee adopted the consideration at Rs. 2, 22,64,409 but, the Assessing Officer held that the guideline value of Rs. 3,95,91,000 must be adopted in computing the long-term capital gains. On the assessee's request the Assessing Officer referred the matter to the Valuation Cell under section 50C of the Income-tax Act, 1961. But since the Assessing Officer had to complete the assessment before the limitation period expired he completed the assessment before the Valuation Report was available adopting the guideline value of Rs.3,95,91,000. The District Valuation Officer finally valued the property at Rs.3,54,73,536. On appeal, the Commissioner (Appeals) held that the valuation report was not binding on the appellate authorities and determined the consideration at Rs. 2.25 crores. On appeal by the Department, the Tribunal held thatthe document consideration was less than the guideline value. The deeming provision of section 50C(1)

operated, howeverit was within the authority of the appellate authority to hear the assessee on the question of value of consideration and grant appropriate relief, depending upon the facts and circumstances of the case. The Commissioner (Appeals) determined the valuation at Rs 2.25 crores. On appeal by revenueThe Tribunal heldthat when all these variables were changing from time to time, from authority to authority, it was not possible to reject the contentions of the assessee as a whole. Nor could the valuation reported by the Valuation Officer be accepted as sacrosanct. Taking into all aspects of the case, the consideration accountable in the hands of the assessee-company for the purpose of section 50C was to be fixed at Rs. 2.5 crores and the long-term capital gains assessable in the hands of the assessee-company was to be accordingly modified. Departmental appeal was partly allowed. (A.Y. 2005-2006)
ACIT v. MIL Industries Ltd. (2013) 21 ITR 627 (Chennai) (Trib.)

S.50C: Capital gains-Full value of consideration-Stamp valuation-Reference to DVO-Reference to valuation is mandatory when assessee objects for valuation.
Tribunal held thatwhere assessee objected to valuation adopted by stamp valuation authority and also filed copy of valuation report by an approved valuer, Assessing Officer was required to make a reference to valuation officer in terms of section 50C(2) to ascertain correct fair market value of property. In favour of assessee. (A.Y. 2005-06)
A.T.E. Enterprises (P.) Ltd. v.Dy. CIT (2013) 55 SOT 175 (Mum.) (Trib.)

S.50C:Capital gains - Full value of consideration - Stamp valuation - Depreciable asset- Assessee had not challenged valuation adopted by stamp valuation authority, impugned addition made by Assessing Officer was to be upheld.
Assessee-company declared short-term capital gains on sale of flats under section 50. Assessing Officer noticed that Stamp Valuation Authority had adopted a higher stamp value for a flat. He thus having invoked provisions of section 50C, made addition on basis of value adopted for stamp duty purposes. Assessee challenged said addition contending that in respect of depreciable asset, i.e., flat, provisions of section 50 were applicable in which event method prescribed under section 50C could not be invoked. Tribunal held thatsections 50 and 50C operate in two different fields and if value adopted by Stamp Valuation Authority is accepted by purchaser/seller, there cannot be any variation for limited purposes of computing consideration received under section 50C. Since, in instant case, assessee had not challenged valuation adopted by stamp valuation authority, impugned addition made by Assessing Officer was to be upheld. In favour of revenue. (A. Y. 2006-07)
Rallis India Ltd. v.Add. CIT.(2013) 55 SOT 288 (Mum.) (Trib.)

S.50C: Capital gains-Full value of consideration- Stamp valuation-Sale of shares- Section 50C does not apply to transfer of immovable property held through company. (S.45)
The assessee held shares in a company called Kamala Mansion Pvt. Ltd. The company owned flats in a building known as Om Vikas Apartments, Walkeshwar Road, Mumbai. The shares were sold by the assessee for Rs. 37.51 lakhs and capital gains were offered on that basis. The AO &CIT (A) held that by the sale of shares in the company, the assessee had effectively transferred the immovable property belonging to the assessee and that it was an indirect way of transferring the immovable properties being the flats in the building. He accordingly 'pierced the corporate veil', invoked s. 50C and computed the capital gains by adopting the stamp duty value of the flats. On appeal by the assessee to the Tribunal, held allowing the appeal:
S.50C applies only to the transfer of a "capital asset, being land or building or both", "assessed" by any authority of a State Government for stamp duty purposes. The expression "transfer" has to be a direct transfer as defined u/s 2(47) which does not include the tax planning adopted by the assessee. S. 50C is a deeming provisions and has to be interpreted strictly in accordance with the spirit of the provision. On facts, the subject matter of transfer is shares in a company and not land or building or both. The assessee did not have full ownership on the flats which are owned by the company. The transfer of shares was never a part of the assessment of the Stamp duty Authorities of the State Government. Also, the company was deriving income which was taxable under the head 'income from property' for more than a decade. Consequently, the action of the AO &CIT (A) to invoke s. 50C to the tax planning adopted by the assessee is not proper and does not have the sanction of the provisions of the Act. (A. Y. 2007-08, 2008-09)
Irfan Abdul Kader Fazlani v. ACIT(2013) 56 SOT 12 (Mum) (Trib.)

S.50C: Capital gains-Full value of consideration- Stamp valuation- FSI-TDR- Section 50Cdoes not apply to transfer of FSI & TDR. (S.45).
The assessee owned a plot of land admeasuring 2244.18 sq. metres of which 2110 sq. metres was acquired by the Municipality for development purposes. The assessee was entitled to receive TDR/ FSI in lieu of the land acquired. The assessee sold the development rights to the said property for Rs. 20 lakhs and computed capital gains on that basis. However, for purposes of stamp duty, the property was valued at Rs. 1.19 crores. The AO held that the value of the

property as adopted by the stamp duty authorities had to be taken as the consideration u/s 50C for purposes of capital gains. This was reversed by the CIT (A). On appeal by the department to the Tribunal,held:

S.50C applies only to the transfer of "land or building" and not to the transfer of all "immovable property". Accordingly, though FSI and TDR is "immovable property" as held in Chedda Housing Development vs. Babijan Shekh Farid 2007 (3) MLJ 402 (Bom), it is not "land or building" and so cannot be the subject matter of s. 50C. The property acquired for development (in lieu of which the FSI/TDR was granted) also cannot be considered even though the property continues to stand in the assessee's name in the property records. The property should be valued by the DVO net of the land transferred to the Developer by the assessee after considering the acquisition made by the Govt& the Municipal Corporation and also excluding the value of TDR or additional FSI included in the consideration shown in the Development Agreement (A. Y. 2006-2007)

ITO v. Prem Rattan Gupta (Mum.) (Trib.)www.itatonline.org

S.51: Capital gains - Advance money received –If transaction is not genuine section 51 is not applicable.

Where transaction is not genuine, provisions of section 51 is not applicable. In favour of revenue. (A.Y. 2002-03)

Ashwani Oberoiv CIT (2013) 212 Taxman 392 (Punj & Har) (High Court)

S.54: Capital gains- Exemption- Investment in two flatswhich is used as one house.

Assessee purchased two flats which were joined together before the purchase, exemption under section 54 was rightly allowed in respect of both the flats treating them as one residential house.The Tribunal decided the issue in favour of assessee following the ratio ofITO v.SushilM.Jhaveri (2007) 292 ITR 1 (SB) (Trib.). On appeal by revenue the High Court affirmed the view of Tribunal. (A.Y. 2006-07)

CIT v. Raman Kumar Suri (2013) 81 DTR 33 (Bom.) (High Court)

S.54: Capital gains-Property used for residence--Exemption-Deemed owner-Tenancy rights-Sale of residential property and investment of gains in acquiring tenancy rights in perpetuity in another residential property, Assessee is not entitled to exemption under section 54. (Bombay Stamp Act 1958)

The assessee sold his bungalow and purchased tenancy rights in two flats in the third floor. The assessee computed the long-term capital gains from sale of residential bungalow which he claimed as exempt because of the investments made in acquisition of the tenancy rights in the new two flats. The Assessing Officer rejected the claim of the assessee of exemption under section 54 of the Income-tax Act, 1961, in respect of tenancy rights acquired in the new flat. Accordingly, the claim under section 54 was disallowed. This was confirmed by the Commissioner (Appeals). On appeal to the Tribunalheld that the exemption under section 54 from capital gains is available to an assessee, who invests the capital gains in a similar asset being a residential house which would obviously mean that acquisition of the house should be as an owner, as the capital gains covered under section 54 are the capital gains arising from transfer of a residential house owned by the assessee. The principle that in case of ambiguity a taxing statute should be construed in favour of the assessee would not apply to the construction of an exception or an exempting provision; these have to be construed strictly. That the person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the provision. In case of doubt or ambiguity, benefit must go to the State. In section 54 there is no ambiguity. The provision refers to purchase or construction of a new residential house and it is quite obvious that the same should be as an owner and not as perpetual tenant. The argument of deemed ownership was relevant only in connection with computation of income from house property and not in relation to exemption under section 54. Similarly, treating the tenancy as conveyance under the Bombay Stamp Act, 1958, was only for the purpose of payment of stamp duty and cannot be considered as conveyance of the title of the property to the assessee as an owner. Taking possession could not be considered as ownership as possession had been taken as a tenant and not as an owner of the flat. The assessee was permitted to sub-let the flat, to bequeath it and to raise loan but such powers were only in relation to tenancy rights of the assessee and not as an owner of the flat. All these facilities to which the assessee was entitled were only against right of the assessee as tenant in the flat and not as owner. Further the agreement provided that the tenant was not entitled to make any structural changes in the flat which showed that the assessee was not the owner because an owner had full right in relation to his property. The assessee was not entitled to exemption under section 54. (A, Y. 2008-2009)

Yogesh Sunderlal Shah v. ACIT [2013] 21 ITR 97 (Mum.) (Trib.)

S.54B:Capital gains - Land used for agricultural purposes-Assessee not establishing land was being used for agricultural purpose for a period of two years prior to date of transfer, exemption wasnot available.

The assessee had a one-fourth share in a property.She sold her share andclaimed exemption under section 54F of the Act. During the course of the assessment proceedings, the assessee contended that she was entitled to exemption under section 54B. The Tribunal affirmed the findings of the authorities that the assessee was not entitled to the benefit of section 54B on the ground that the property which she sold was not used for agricultural purposes for a period of two years prior to the date of the sale as required under section 54B. The Tribunal found that the assessee was entitled only to take Rs. 2 lakhs as the cost of acquisition over and above Rs. 1 lakh allowed as value of superstructure under section 54F. On appeal the Court also held that, the property in the hands of the purchaser was used for putting up an apartment complex, as the document did not establish that the land was being used for agricultural purpose for a period of two years prior to the date of the transfer. Appeal of theassessee was dismissed. (A.Y. 2005-2006)

Asha George(Smt) v.ITO (2013) 351 ITR 123/83 DTR 217(Ker.) (High Court)

S.54EC:Capital gains-Investment in bonds-Full value of consideration - Stamp valuation-Deemed value cannotbe considered for the purpose of section 54EC. (S.50C.)

The actual sale consideration was Rs 160000, the stamp authorities valued the said property at Rs 24, 48,118.The Tribunal held that deeming fiction of s. 50C cannot be imported into s. 54EC and, therefore, the deemed value cannot be considered for the purpose of exemption u/s. 54EC. However for the working of the long term capital gain the sale consideration will be taken up as per the value determined under section 50C. (A.Y. 2005-06)

Nila V. Shah(Mrs.) v. ITO (2013) 83 DTR218(Mum.) (Trib.)

S.54F:Capital gains - Investment in a residential house -Deposit in capital gains account scheme by s. 139(4) due date sufficient. (S.139(1),139(4)

The assessee sold property on 20.06.2006 (AY 2007-08) for a consideration of Rs. 2.24 crores. The said amount was not invested in the capital gains account scheme by the due date of filing the return u/s 139(1) (31.07.2007) and was instead used to purchase a new residential house on 31.3.2008. The assessee claimed exemption u/s 54F which was denied by the AO &CIT (A) on the basis that u/s 54F(4) the amount of the consideration which is not appropriated for purchase of the new asset before the date of furnishing the return of income u/s 139 had to be deposited in the "capital gains account scheme" before the due date for filing the return of income u/s 139(1). On appeal by the assessee, the Tribunal allowed the claim. On appeal by the department to the High Court, HELD dismissing the appeal: Though s. 54F(4) provides that the amount not appropriated towards purchase of the new asset has to be deposited in the capital gains account scheme before the due date for filing the return u/s 139(1), sub-section (4) of s. 139 is in the nature of a proviso to s. 139(1). S. 139(4) provides that a person who has not furnished a return within the time allowed to him under s. 139(1) may furnish the return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. For AY 2007-08, the last date for filing the return u/s 139(4) is 31.3.2009. This extended time limit is available for making deposit in the capital gains account scheme. As the assessee had invested the consideration in purchase of a new house before that date, the exemption has to be allowed (CIT v. Ms. Jagriti Aggarwal (2011) 339 ITR 610 (P&H), CIT v. Rajesh Kumar Jalan (2006) 286 ITR 274 &Fathima Bai (Kar) followed)

CIT v. Jagtar Singh Chawla (P&H) (High Court), www.itatonline.org

S.54F: Capital gains - Investment in a residential house -Deposit in capital gains account scheme by s. 139(4) due date sufficient. (S.139(1), (139(4))

The assessee sold property on 20.06.2006 (AY 2007-08) for a consideration of Rs. 2.24 crores. The said amount was not invested in the capital gains account scheme by the due date of filing the return u/s 139(1) (31.07.2007) and was instead used to purchase a new residential house on 31.3.2008. The assessee claimed exemption u/s 54F which was denied by the AO &CIT (A) on the basis that u/s 54F(4) the amount of the consideration which is not appropriated for purchase of the new asset before the date of furnishing the return of income u/s 139 had to be deposited in the "capital gains account scheme" before the due date for filing the return of income u/s 139(1). On appeal by the assessee, the Tribunal allowed the claim. On appeal by the department to the High Court, HELD dismissing the appeal:

Though s. 54F(4) provides that the amount not appropriated towards purchase of the new asset has to be deposited in the capital gains account scheme before the due date for filing the return u/s 139(1), sub-section (4) of s. 139 is in the nature of a proviso to s. 139(1). S. 139(4) provides that a person who has not furnished a return within the time allowed to him under s. 139(1) may furnish the return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. For AY 2007-08, the last date for filing the return u/s 139(4) is 31.3.2009. This extended time limit is available for making deposit in the capital gains account scheme. As the assessee had invested the consideration in purchase of a new house before that date, the exemption has to be allowed (CIT v. Jagriti Aggarwal (2011) 339 ITR 610 (P&H), CIT v. Rajesh Kumar Jalan (2006) 286 ITR 274 & Fathima Bai v. ITO(2009) 32 DTR 243 (Kar) followed)

CIT. v. Jagtar Singh Chawla (P&H) (High Court) www.itatonline.org

S.54F: Capital gains- Investment in residential house-Exemption- Several independent units can constitute "a residential house"(S.54)
The assessee entered into a development agreement pursuant to which the developer demolished the property and constructed a new building comprising of three floors. In consideration of granting the development rights, the assessee received Rs. 4 crores and two floors of the new building. The AO held that in computing capital gains, the cost of construction of Rs. 3.43 crores incurred by the developer on the development of the property had to be added to the sum of Rs. 4 crores received by the assessee. The assessee claimed that as the said capital gains was invested in the said two floors, she was eligible for exemption u/s 54. The AO rejected the claim on the basis that the units on the said floors were independent & self-contained and not "a residential house" and granted exemption for only one unit. The CIT (A) and Tribunal upheld the assessee's claim by relying on CIT v. D. Ananda Basappa (2009) 309 ITR 329 (Kar.) and CIT v K.G. Rukminiamma (Smt.) (2011) 331 ITR 211 (Kar). On appeal by the department to the High Court HELD dismissing the appeal:

As held in B. Ananda Bassappa (SLP dismissed) & K G Rukminiamma, the Revenue's contention that the phrase "a" residential house would mean "one" residential house is not correct. The expression "a" residential house should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. Also, s. 54/54F uses the expression "a residential house" and not "a residential unit". S. 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans, requirements and compulsions. A person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. The physical structuring of the new residential house, whether it is lateral or vertical, cannot come in the way of considering the building as a residential house. The fact that the residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction u/s 54/54F. It is neither expressly nor by necessary implication prohibited. (A.Y. 2007-08)
CIT v. Gita Duggal(2013) 214 Taxman 51/84 DTR 346/257 CTR 208 (Delhi) (High Court)

S.54F: Capital gains-Investment in residential house-Exemption-Assessee purchasing residential house in name of his wife is entitled to exemption. (S.45)
The assessee, an individual, inherited 50 per cent share in a residential house from his father.In computing the capital gains, the assessee claimed exemption under section 54F of the Acton the ground that the sale proceeds were invested in the acquisition of a vacant plot and purchased a residential house in the name of his wife. The Assessing Officer took the view that under section 54F, the investment in the residential house should be made in the assessee's name and inasmuch as the residential house was purchased by the assessee in the name of his wife, the claim was not allowable. He restricted the exemption and computed the capital gains. The Commissioner (Appeals) allowed the claim. This was confirmed by the Tribunal. On appeal by revenuedismissing the appeal,the court held thatfor the purposes of section 54F, the new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. Moreover, the assessee had not purchased the new house in the name of a stranger or somebody who was unconnected with him. He had purchased it only in the name of his wife. There was also no dispute that the entire investment had come out of the sale proceeds and that there was no contribution from the assessee's wife. Therefore, the Tribunal was right in law in allowing the claim of the assessee under section 54F.(A.Y. 2008-2009)
CIT v. Kamal Wahal (2013) 351 ITR 4/214 Taxman 287(Delhi) (High Court)

S.54F: Capital gains-Investment in a residential house-Duplex flat-Two flats purchased as one unit exemption is available as one house.
Assessee purchased a flat and claimed exemption under section 54F. Assessing Officer found that it was not one flat but two flats which had been joined into one flat and restricted exemption to half of investment. Court held that two flats were joined before assessee became owner of said property and certificate from society also established fact that these two flats were considered as one residential house property, therefore, exemption was fully allowable. In favour of assessee. (A.Y.2006-07)
CIT v. Raman Kumar Suri (2013) 212 Taxman 411 (Bom.) (High Court)

S.54F: Capital gains-Investment in residential house–Failure to Construct newhouse property within specified period is not entitled to not entitled to deduction claimed under section 54F,taxable in the year of 2008-09 and not in the year 2011-12.
The assessee had sold a property during the year and capital gain was worked out. The assessee invested that sum in purchasing a plot on which residential house was to be constructed. The assessee claimed proportionate deduction under section 54F. However, the house could not be constructed. The Assessing Officer disallowed the deduction claimed under section 54F by the assessee as no construction had taken place within specified time. On appeal, the Commissioner (Appeals) upheld order of the Assessing Officer observing that the assessee had not started the work of construction on the said plot, therefore, the claim of deduction under section 54F was not acceptable. Assessee only after a period of three years and, therefore, if the construction could not be completed, the said capital gain could be taxed only after a lapse of period of three years. Since the assessee had filed return declaring capital gain in assessment year 2011-12, the same could not be taxed again in assessment year 2008-09.Tribunal held that Plain reading of section 54F clearly shows that deduction under this section is allowable only in case where the assessee within a period of one year before or two years after the date on which the transfer took place purchases, or has within a period of three years after that date constructed the residential house. Therefore, if the assessee has not purchased or constructed the house within the specified period the deduction is not available. No doubt the proviso to sub-section provides that in case the amount of capital gain has been deposited in the specified account as provided in sub-section (4) and the same could not be used for construction then such capital gain would be charged in the previous year in which the period of three years expires from the date of transfer of original asset. It is a settled position of law that proviso provide exception to the rule. In the instant case, the proviso carves out an exception only in those cases where the amount had been deposited in the specified account and could not be used for the purpose of construction. This exception cannot be made part of the rule where the assessee fails to purchase or construct within specified period. In the instant case, admittedly no plans were made, therefore, there is no question of getting the same approved. Apart from this, assessee admitted that assessee has no evidence to prove that assessee wanted to start construction. If the tax is allowed to be postponed merely on the basis of purchase of plot then no assessee would pay correct taxes during the year and postpone the payment of taxes by merely purchasing the plot and that cannot be intention of the provisions of section 54F. Therefore, the Commissioner (Appeals) is right in denying the deduction under section 54F to the assessee and accordingly his order is to be upheld.The assessee has voluntarily filed return declaring capital gain in assessment year 2011-12, therefore, the tax paid in that year would amount to double taxation if the capital gain is also taxed in assessment year 2008-09. The taxes paid in 2011-12 needs to be adjusted against the capital gain liability during assessment year 2008-09. Accordingly, the Assessing Officer is directed to adjust the taxes already paid by the assessee in assessment year 2011-12 regarding the same capital gain after verification during the current year against the capital gain liability. In the result, appeal of the assessee is to be partly allowed. (A.Y. 2008-09)
Anu Agarwal (Smt.) v. ITO(2013) 55 SOT 294(Chd.) (Trib.)

S.54F:Capital gains-Investment in a residential house Construction of additional floors would be part of existing house-Deeming fiction under section 50C. (S.45, 48, 50C)
The assessee sold a plot of land and computed capital gains. In computing capital gain, the assessee claimed deduction u/s 54F on the ground that the sale consideration (FVC) was utilized for construction of residential house. The Ld. AO, while invoking section 50C disallowed the deduction on the ground that the requirements of section 54F were not met. The actual amount utilized for the new house was more than the FVC even as per section 50C. In appeal, the CIT (A) upheld the application of section 50C but also held that the assessee was entitled forthe deduction u/s 54F. However, the CIT (A) restricted the same to the figure computed by the assessee. According to the CIT (A) the 'full value of consideration' was to be adopted as per section 50C but benefit of section 54F was to be restricted to the amount declared by the assessee. In other words,the difference between 'full value of consideration' as per section 50C and the actual amount declared by the assessee was to be taxed as 'capital gain'; the benefit of section 54F being restricted to the amount declared (which was also to be presumed to be 'investment'/ utilization for s.54F) claimed by the assessee. The Hon'ble tribunal held that since the actual investment was more than eventhe FVC as per section 50C, there was no

taxable capital gain. In the present case, the asssessee's house includes ground plus 4 floors, where the ground floor is a big living room, 1st floor has a kitchen plus 2 bed rooms, 2nd floor has three bedrooms, 3rd floor has three bedrooms and fourth floor has 3 bed rooms.Thus, the said details suggest that functionally. The Commissioner (Appeals) restricting the exemption of capital gains to Rs 5,84, 837/ is not proper. (A.Y. 2008-09)

Raj Babbar v.ITO(2013) 56 SOT 1 (Mum.) (Trib.)

S.55: Capital gains -Cost of improvement - Cost of acquisition -Registered value report- Valuation report will have precedence over Guide house tax.

The court held that valuation done by a registered valuer is with regard to specific property and takes in to account its various advantages and disadvantages all of which influence valuation of property, where as any Guide to House tax is generalized guide and does not take in to account peculiar features of property being valued and therefore, valuation done by an empanelled registered value of Income-tax Department would certainly takes precedence over any Gide to House Tax. In favour of assessee. (A.Y.2006-07)

CIT v Raman Kumar Suri (2013) 212 Taxman 411/81 DTR 33 (Bom.) (High Court)

S.55:Capital gains- Cost of Acquisition-Leasehold land for 99 years.—Indexation-Fair market value as on 1-4-1981 is to determined. (S.48)

The assessee had acquired land on lease for 98 years in the year 1966. Under the agreement to lease, the assesseewas obliged to construct a Cinema Hall on or before 31st December, 1966 at minimum cost of Rs.4 lakhs. The assessee claimedthis amount of four lakhs as 'cost of acquisition'. The Department took the cost of acquisition as 'NIL' by invoking the provisions of Section 48 r.w.s. 55(2) (a) (ii).The Hon'ble Tribunal held that"land" does not find any mention in Section 55(2(a), and hence section 55(2) (a) (ii) will not be applicable while valuing the "cost of acquisition" of the land. And hence, the 'cost of acquisition' of the lease-hold rights in the land in the hands of the assessee, has to be determined as per section 48 and accordingly such 'cost' would be the "fair market value" of the land as on 1.4.1981. It was held that the 'cost' was Rs.4 Lakhs and indexation had to be permitted accordingly. (A.Y.2007-08)

Natraj(2013) 56 SOT 23 (Ahd.) (Trib.)

S.56: Income from other sources -Composite or inseparable letting –Income from house property (S.22, 24)

The assessee claimed deduction in respect of its rental income under the head 'Income from house property. The Assessing Officer perused rent agreements and found that premises were let out on condition that the assessee would provide certain facilities like furniture and fixtures, plant and machinery, etc. He held that the letting out of the machinery, plant and furniture and the letting out of buildings being inseparable, the rental income be taxed under the head 'Income from other sources', which resulted in disallowance under section 24.Commissioner (Appeals) confirmed said order The Tribunal held that the letting out of the plant, machinery or furniture and the premises constituted a single, composite and inseparable letting rental income be assessable as 'income from other sources'. On appeal High Court also held that letting of building and letting of fixture, furniture, etc., was inseparable and, therefore, rental income was assessable as income from other sources. Appeal of assessee was dismissed. (A.Y. 2007-08)

Garg Dyeing & Processing Industries v. ACIT [2013] 212 Taxman 160 (Delhi) (High Court)

S.56(2):Income from other sources - Gift of residential flats through transfer of shares by foreign company to Indian company

The Assessee had received by way of gift, three residential flats in Hill Park from its sister concern viz., BISNCL, a UK based company. BISNCL was holding shares of Hill Park Ltd which entitled it for use and occupation of the said three flats and the gift was effected by transfer of the said shares. Both, the assessee and BISNCL, were 100% subsidiary of a U.K.based entity which in its turn was 100% subsidy of a Dubai based entity.

According to the tribunal, such a transfer may trigger capital gains ramifications in India, since the shares of an Indian company were situated in India and when the transferor is a non resident, the deeming provisions of sec. 9(1) (i) of the I.T. Act. 1961 came into play However, referring to sec. 47(ii), the tribunal noted that the transfer of a capital asset, amongst others, under a gift is not treated as transfers for the purposes of sec. 45 of the Act. Referring to the provisions of sec. 5 andsection 122 of the Transfer of Property Act (TPA), the tribunal noted that there was no requirement in the TPA that a `gift' can be made only between two natural love and affection which means that as long as a donor company is permitted by its Articles of Association to make a `gift', it can do so. In case where donor is a foreign company, the tribunal noted that the relevant corporate/commercial law of the jurisdiction where the donor is based needs to be considered. Referring to the Certificate and Attestation by the Notary Public of the City of London, England, wherein the authority has inter alia certified and attested that the Deed of Gift was binding on BISNCL in accordance with the relevant provisions of English law, the tribunal concluded that BISNCL was regally authorised to give gift of shares. Therefore, it held that the gift of shares of an Indian company by a foreign company without consideration has to be treated as gift within the meaning of sec 47(iii) of the Act.

Simply because both the donor and the done happened to belong to the same group cannot ipso facto establish that they have any business dealings to attract the provisions of section 28(iv).

The Tribunal noted that a plain reading of the provisions of sec. 56(2) show that no every receipt is taxable under the head `income from other sources' but only those which can be shown as `Income' can be brought to tax under this head, if it does not fall directly under other heads of income specified in section 14 of the Act. According to it, the issue involved under the present appeal got covered under the clause (viia) of sec. 56(2). However, the said clause was introduced with effect from 1st day of June, 2010, hence, not applicable to the case of the assessee. (A.Y.2008-09) 'D', ITA No. 3627/M/12, dated 12-10-12.)

DP World P. Ltd. v. D CIT (2013) BCAJ Pg. 22, Vol. 44-B Part 4, January2013(Mum.) (Trib.)

S.57: Income from other sources-Deductions-Interest-When nexus isestablished the principle of netting must be applied.

Assessee received interest from 'S' Ltd. against which it claimed deduction of certain amount being interest paid to same entity and declared net interest as his income. According to assessee, he had received interest from 'S' Ltd. in respect of land sold to them against which sales proceeds were received late and, on other hand, he had also paid interest on loan obtained from 'S' Ltd. earlier for purchase of said land. Court held thatsince right to receive interest and liability to pay interest arose in respect of same period and out of same event, i.e., non-payment of sale proceeds in time, it afforded sufficient nexus between two so as to justify applicability of principle of netting, therefore, claim raised by assessee was to be allowed. In favour of assessee. (A.Y.2000-01)

CIT v UK Bose (2013) 212 Taxman 399(Delhi) (High Court)

S.57: Income from other sources-Deductions – Interest-Director - Order of Tribunalisset aside and matter was to be remanded back for disposal afresh.

Assessee was a director in various companies belonging to 'S' groupIn course of assessment proceedings, Assessing Officer noticed that assessee had declared certain loss under head 'income from other source'. He further noted that loss represented amount of interest on loans borrowed from one company belonging to 'S' group for purchase of shares in several other companies belonging to same Group. According to Assessing Officer, method adopted by assessee amounted to a colourable device for transferring funds of some concerns of 'S' Group to other concerns of same Group, himself acting as a conduit. He thus disallowed assessee's claim for deduction of interest on borrowed funds. Tribunal, however, allowed assessee's claim. The Court held that on facts, it was worth examining why companies belonging to same group could not have helped each other directly and why assessee was introduced as a conduit. therefore, impugned order of Tribunal was to be set aside and, matter was to be remanded back for disposal afresh. Matter remanded. (A.Y.1994-95)

CITv. J.B. Roy (2013) 212 Taxman 591 (Delhi) (High Court)

S. 68 : Cash credits – share application money – Where most of the share applicants had deposited money a few days before the issue of shares and also not responded to the summons – Addition under section 68 held to be justified. (S.131)

Where most of the investors deposited monies in the accounts a few days before the issue of shares and they also did not respond to the summons issued by the assessing officer under section 131 of the Act, the assessing officer was held justified in making the additions under section 68 of the Act. (A.Y. 2006 – 07)

CIT v. Neelkanth Ispat Udyog (P) Ltd. (2013) 81 DTR 214 (Delhi) (High Court)

S. 68 :Cash credits –Shares-Demat account- Shares held in Demat account and consideration received through demand draft,transaction genuine and addition under section 68 is not called for.

Where the shares were held by the assessee in a demat account and sale consideration of the same was also received through bank draft transaction held to be genuine, addition under section 68 held to be not justified. (A.Y 2004 – 05)

CIT v. Udit Narain Agrawal (2013) 81 DTR 63 (All) (High Court)

S.68: Cash credits-Sale proceeds-No addition u/s. 68 can be made in respect of sale proceeds already offered as income.

Once the sale proceeds have been offered as income by the assessee and the same has been accepted by AO, no addition in respect of the same can be justified u/s.68 or else. It shall tantamount to double taxation of the same income. (T.A.No.2471/ 2475/2475 & 2476of 2009 dt 03/07/12.)

Vishal Exports Overseas Ltd. (2012) BCAJ -November-P. 400 (Guj.) (High Court)

S.68: Cash credits-Share application money-Onus- Pvt. Company-Burden is on assessee-On facts the addition was confirmed. Reassessment was held to be valid. (S.131, 143(1), 147)

TheAssessing Officer on thebasis of report of investigation Wing of the department the assessment was reopenedunder section 147 ,which was completed under section 143(1) of the Act on the ground that the alleged share application money was mere accommodation entriesAll the notices were come back. It was contended that the registered offices of the company could be found in the website www.mca.gov.inand the assessing officer may visit the site for further verification. The Assessing Officer has not accepted the submission and made addition under section 68 and also commission of 2.5% on the said amount. In appeal Commissioner (Appeals) following the ruling of Supreme Court in CIT v. Lovely Exports (P) Ltd (2008) 216 CTR 195, (2009) 319 ITR (St.) 5 (SC) held that the addition was not justified.Revenue appeal was dismissedby the Tribunal. On appeal to High Court the Court held that there is no onus on the Assessing Officer to visit website for address of share application for verification, onus on assessee to provengenuineness. Mere furnishingofbank statements of share applications is not sufficient to prove the creditworthiness. Failure to furnish report of investigation wing does not affect validity of addition. On facts and on reassessmentthe appeal of revenue was allowed and the addition made by the assessing Officer was confirmed. (A.Y. 2004-05)

CIT v. Nipun Builders and Developers Pvt. Ltd. (2013) 350 ITR 407/82 DTR 145 (Delhi) (High Court)

S.68: Cash credits-Advances-Forfeiture-On facts it was held that the assessee routed undisclosed income in his capital account as forfeited amount.

The assessee had shown advance of a sum against land in his capital account. He claimed that this amount was on account of forfeiture of earnest money from 'L' for sale of his plot. The Assessing Officer held an enquiry into the matter and found that said amount came from the account of one 'D' whose account with the Bank was found to be shady. Accordingly, the Assessing Officer treated said amount as undisclosed income. The Commissioner (Appeals) as well as the Tribunal upheld the order of the Assessing Officer holding that theassessee routed his undisclosed income to his capital account. TheCourt up held the order of Tribunal. In favour of revenue. (A.Y. 2002-03)

Ashwani Oberoi v. CIT (2013) 212 Taxman 392 (Punj & Har) (High Court)

S.68: Cash credits-Firm-Capital-Partner-First year of business- Contribution of capital by partner cannot be added in hands of firm.

One of the partners, who was a minor, introduced Rs. 2,62,000 as his capital. The Assessing Officer disputed the capital contribution made by the minor. The explanation offered was not found satisfactory and the Assessing Officer added the sum in the hands of the assessee. This was confirmed by the Tribunal. On appeal the Court held that (1) the authorities below had failed to take into account that this was the first year of business of the assessee. The Tribunal was not justified in holding that the unexplained cash credit recorded in the assessee's books be added in the hands of the assessee. There was no material before the Tribunal to hold that the capital introduced by the minor partner at the time of starting of the business, was income of the assessee-firm. The Tribunal erroneously came to the conclusion that the deposits represented undisclosed income of the assessee-firm. Accordingly the appeal of assessee was allowed. (A. Y.1991-1992)

Abhyudaya Pharmaceuticals v. CIT (2013) 350 ITR 358 (All) (High Court)

S.68: Cash credits –Identity proved-Creditworthiness not proved hence addition was held to be justified.

Assessee HUF claimed to have received a loan of Rs. 2.15 lakhs in cash from karta's wife, who was a State Government employee. She claimed to have received gifts of Rs. 2 lakh from her parents who had supposedly earned amount by leasing agricultural land.However, no evidence about such source was submitted. Further, no evidence was filed taking State Government's permission as required before accepting gifts of such an amount by a government servant. Creditworthiness of creditor and genuineness of transaction was not proved in instant case, even though identity of creditor was established. Therefore, the addition of impugned amount was appropriate. Appeal of assessee was dismissed. (A.Y.2002-03)

D. Siva Sankara Rao (Dr.) v.ITO (2013) 212 Taxman 151 (AP) (High Court)

S.68: Cash credits-Share application money-Assessee producing tax returns and also producing confirmation of shareholders - Burden of proving source of share application money discharged addition wasdeleted.

Assessee produced the names, addresses and permanent account numbers of the shareholders the onus on the assessee to prove the source of share application money stands discharged. If the assessing authority is not satisfied with the creditworthiness of the shareholders, it is open to the assessing authority to verify the same in the hands of the shareholders concerned. The Tribunal recorded the findings that the assessee had produced the returns filed by the shareholders who had paid share application money. The assessee had also produced confirmations from the shareholders indicating the details of their addresses, permanent account numbers and particulars of cheques through

which the amounts were paid towards the share application money. The Tribunal treated the deposits of share application money as genuine. On appealhigh Court also confirmed the order of Tribunal.
CIT v. Jay Dee Securities and Finance Ltd. (2013) 350 ITR 220/214 Taxman 62(Mag.) (All.) (High Court)

S.68.Cash credits: Identity- Capacity is proved – Additions deleted.
Tribunal held thatduring the course of appellate proceedings, the assessee produced documents and the details of repayment made through cheque and bank confirmations showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished the identity of persons with complete details of addresses and the fixed deposit applications showing details. After satisfying himself with the documents, the Commissioner (Appeals) had allowed the ground of appeal of the assessee. No interference was warranted. Appeal of revenue was dismissed. (A. Ys. 2005-2006, 2008-2009)
ABT Ltd. v. ACIT (2013) 21 ITR 534/83 DTR 178/56 SOT 42 (Chennai) (Trib.)

S.68: Cash credits- Gifts- Search and seizure-Block assessment-Failing to prove genuineness of gifts, additionis held to be proper. (S.158BC)
Pursuant to a search conducted at the residential premises of the assessees who were father and son, it was found that the assessees received gifts from certain parties. The Assessing Officer noted that most of the donors were friends and not relatives, as claimed, and the gifts were not received on any special or ceremonial occasion. He added the amounts as undisclosed income under section 68 of the Income-tax Act, 1961. The first appellate authority deleted on the basis that, firstly, they could not be said to be undisclosed and, secondly, no material to doubt the genuineness of the credits or gifts was found during the search. On appeal by the Department, it was held that there was no mention of the credits in the returns of income furnished by the assessee from year to year. It was only as a result of search that the credit transactions were found, and which the assessee was unable to satisfactorily explain to the Assessing Officer. No gifts had been given by the assessees to any of their close friends and relatives, including those from whom gifts were being regularly received over the years. Further, none of the donors were produced for examination before the Assessing Officer. No evidence in support of their financial capacity was submitted. The receipt of the credit through the banking channel, or confirmation by the creditor or donor, was itself not sufficient to prove the gifts in terms of section 68. There was nothing to explain to why the gifts should be made by the assessee's father's friends and ex-employees. There were materials and information found as a result of search to discredit the gifts as not genuine. The additions made by the Assessing Officer were to be upheld. (Block period 1-4-1990 to 12-10-2010)
ACIT v. Dwaraka Prasad Malpani (2013) 21 ITR 719 (Cochin) (Trib.)

S.68: Cash credits – Sale of property-Long term capital gains-Addition was deleted as un explainedcash credits.
In course of assessment, assessee declared certain amount as long-term capital gain arising on sale of flat. Assessing Officer treated said amount, as deemed income under section 68, which was credited in books of account on ground that assessee had failed to bring any evidence on record that it was on account of sale of said property. Tribunal noted that assessee had filed a copy of sale agreements in respect of sale of flat wherein it had been mentioned that said property had been sold for a total sale consideration of Rs. 13.80 lakhs. Tribunal held thatsince money had been received by way of sale of a property duly mentioned in sale agreement, same could not be treated as unexplained, consequently, impugned addition made by Assessing Officer was to be deleted. In favour of assessee(2005-06)
A.T.E. Enterprises (P.) Ltd. v.Dy. CIT (2013) 55 SOT 175 (Mum.) (Trib.)

S.68: Cash Credits –Withdrawal from bank-Sourceexplained addition cannot be made.
During previous year, assessee had deposited a sum of Rs. 13 lakhs in his bank account by way of cash. It was submitted that all deposits had been made out of cash withdrawn from cash book. Tribunal held that since sources of amount deposited in bank account were clearly explained, no addition could be made under section 68. In favour of assessee. (A.Y.2005-06)
Deora Trading Co. v. ITO. (2013) 55 SOT 349 (Mum.) (Trib.)

S.68: Cash Credits - Where Assessing Officer failed to bring on record cogent and corroborative material to support his conclusion,addition is deleted.
Tribunal held that the assessee has discharged onus within the meaning of section 68 of the Act and also in consonance with the general principles of law. In the present case the assessee filed evidences before the Assessing Officer and the CIT (A) showing identity of the shareholders, creditworthiness of such parties and the genuineness of the transactions. In view of this the onus stands shifted to revenue to bring credible material on record to show the non existence of such

shareholders and non-genuineness of such transactions. The Tribunal confirmed the order of CIT (A) and the addition made under section 68 by Assessing Officer was deleted. (A. Y. 2006-07)

ACIT v. Kisco Casting P. Ltd. (2013) 152 TTJ 629 (Chd.) (Trib.)

S.68:Cash Credits – Income from undisclosed sources – Liability towards outstanding sale consideration for acquisition of cinema hall, additions cannot be made either under section 68 or 69,unless liability is held to be bogus. (S.69)

The assessee had purchased the cinema hall lock, stock and a barrel which was registered and registration was granted for the assessee to enjoy possession. The seller has acknowledged parphent as mentioned in the sale deed duly registered in 2007 of having received the amount in cheque in 2012. The Assessing Officer made the addition of the amount on account of unexplained sundry creditors. The Tribunal set aside the CIT (A) order and directed the Assessing Officer to delete the addition and held that addition cannot be made either under section 68 or under section 69 unless the assessing authority comes to the finding that an asset has been created on account of bogus liability or the bogus liability exists which has been adjusted in cash. (A. Y. 2009-10)

Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25(UO) (Ctk.) (Trib.)

S.69: Unexplained investments-Creditworthiness of donors was not proved addition was held to be justified.

Assessee advanced Rs. 78 lakhs to partnership firm and claimed that said amount was sent from Singapore by her non-resident mother, brother and sister-in-laws.On enquiry, from Singapore Revenue Authorities, it was found that donors did not have sufficient income to makes gift of Rs. 13 lakhs each. Assessee also could not place proof to show source of funds.Since creditworthiness of donors was not proved, whole amount was to be added to income of assessee as her income from undisclosed income In favour of revenue. (B.P. 1986-87 to 1996-97)

Kumari Kanagam (Mrs) v. CIT (2013) 213 Taxman 154 (Mad.) (High Court)

69:Unexplained investments-Search and seizure-Valuation of property-Reference to District Valuation Officer-Tribunal finding valuation based on incomparable sales hence addition as unexplained investment is held to be not valid. (S.132, 153C)

The Assessing Officer referred the question of valuation of the properties purchased by the assessee to the District Valuation Officer. The difference in the values of the two properties, as between that declared by the assessee and as opined by the District Valuation Officer, was added by the Assessing Officer under section 69. However, the Commissioner (Appeals) and the Tribunal concluded, on facts, that there was no material found during the search to justify the reference to the District Valuation Officer for valuation of the properties. The Tribunal held that there must be some material to show that the investment made by the assessee was outside the books and in any event the District Valuation Officer's report was based on incomparable sales and, therefore, could not be relied upon. The Tribunal also held that the burden was on the Revenue to show that the real investment in the properties was greater than the apparent investment, as disclosed by the assessee and the burden had not been discharged by the Revenue. On appealby revenuedismissing the appeal, the Court held that there was no material found in the search and seizure operations, which would justify the Assessing Officer's action in referring the matter to the District Valuation Officer for his opinion on valuation of the properties. Therefore, the valuation arrived at by the District Valuation Officer would be of no consequence. In any event, the Tribunal had also, on facts, held that the District Valuation Officer's valuation was based on incomparable sales, which is not permissible in law. Appeal of revenue was dismissed (A.Y. 2006-2007)

CIT v. Abhinav Kumar Mittal (2013) 351 ITR 20(Delhi) (High Court)

S.69: Unexplained investments-Share application money - Assessee producing relevant evidence and establishing that all share applicants not fictitious personsdeletionof addition held to be justified.

The assessee is engaged in the business of running a cold storage. For the assessment year 1988-89, the Assessing Officer madeadditions on account of unexplained share capital, unexplained share application money, unexplained sundry creditors, difference in the cost of construction being unexplained investment, fixed deposit receipts purchased by the assessee and loading and unloading expenses. The Commissioner (Appeals) deleted the addition of Rs.15,07,920 made against the unexplained share capital, Rs. 3,13,500 out of the addition made against the unexplained share application money of Rs.4,68,100, and Rs. 46,500 out of the addition made against the difference in the cost of construction of Rs. 2,47,994, and confirmed the other additions made by the Assessing Officer. The Commissioner (Appeals) rectified his order allowing further relief of Rs. 54,800 and Rs. 20,848 out of the total addition of Rs. 3,05,493 made on account of unexplained sundry creditors for goods and expenses. The appeals filed by the Department and the assessee were partly allowed by the Tribunal. On further appeal by the Departmentthe High Court also confirmed the order of Tribunal and held that additions was rightly deleted. (A.Y. 1988-89)

CIT v. Misra Preservers (P.) Ltd (2013) 350 ITR 222 (All) (High Court)

S.69: Unexplained investments-Source of investment-Tribunal ought to have returned a specific finding whether explanation offered by assessee satisfactory-Matter remanded.

Section 69 of the Income-tax Act, 1961, envisages two situations when an addition can be made on account of unexplained investments. The first situation is where the assessee does not offer any explanation about the nature and source of the investment. The second situation is where the explanation offered by him is, in the opinion of the Assessing Officer, not satisfactory. The Court allowing the appeal held that the assessee had offered an explanation but there was no express finding of the Commissioner (Appeals) or of the Tribunal as to whether the explanation offered by the assessee was satisfactory. Although an inference could possibly be gathered that the Commissioner (Appeals) had found the explanation to be satisfactory the matter could not be decided on inferences. The Tribunal is the final fact finding authority and, therefore, it is incumbent on the Tribunal to return a finding in clear and express terms. This is so, because it is only when the finding is clear that a question of law based on those findings can be examined by the court. Therefore, the matter was remitted to the Tribunal to return a clear finding as to whether or not the explanation offered by the assessee was satisfactory. (A. Y. 2008-2009)

CIT v. AjaiShukla (2013) 350 ITR 594(Delhi) (High Court)

S.69: Unexplained investments-Search and seizure-Affidavit-Gold and gold ornaments-Assessee filing affidavits containing details of gifted jeweler-addition to be deleted. (S.132)

The Assessing Officer made addition of the value of gold jewellery, and gold ornaments found in the locker owned jointly by the assessee and his wife. They were explained to belong to the assessee`s wife, giving the break-up thereof. The Assessing Officer did not accept this as the assessee`s wife was a wealth tax payer for the relevant year, i.e., in which the gift was received, and also for the subsequent years, while this gift was not verifiable with reference to her total wealth. The Commissioner (Appeals) deleted the addition holding that the affidavits contained full details of the gifted jewellery, the genuineness of which had not been doubted by the Assessing Officer. On appeal by the Department :

Held, (i) that once the assessee had furnished the affidavits, it was incumbent on the Assessing Officer to cross-examine the deponents. The quantity claimed to be received in gift was not high in relation to the status of the assessee's family or of the donors. Also, a reference to the wealth-tax returns of the assessee`s wife was not relevant in view of a change in the wealth-tax law with effect from assessment year 1995-96. The order of the Commissioner (Appeals) was to be upheld in the case of the assessee.

ACIT v. Dwaraka Prasad Malpani (2013) 21 ITR 719 (Cochin) (Trib.)

S.69B:Amounts of investments not fully disclosed in books of account-Investment in property –Documents seized from assessees premises-Addition as undisclosed investment was held to be justified. (S.132).

Documents pertaining to a property were found and seized from assessee's premises. Assessee submitted that said property papers were given by a property dealer for verification. Name of purchaser of property was not mentioned in documents. Further no one came forward to claim these documents. Even summons served on owner of property came back being unserved. In view of aforesaid, addition under section 69B was justified. In favour of revenue.

CITv.Jai Pal Aggarwal (2013) 212 Taxman 1 (Delhi) (High Court)

S.69B:Amounts of investments not fully disclosed in books of account – Deposits-Dumb documents-Addition as undisclosed investment was held to be not justified. (S.132)

A document had been seized which showed that some FDRs were made. Assessing Officer found that interest on said FDRs had not been shown in return. Accordingly, he made addition under section 69B. However, figures in seized documents did not correlate with any date or details nor was document signed and, thus, it was a dumb document, therefore, addition under section 69B was not justified.In favour of assessee.

CITv.Jai Pal Aggarwal (2013) 212 Taxman 1(Delhi) (High Court)

S.69B: Amounts of investments not fully disclosed in books of account - Investment in companies–Documents seized–Addition as undisclosed investment was held to be justified. (S.132)

Certain documents seized showed that assessee had made investments in a company from 26-11-1993 to 10-2-1994. Seized papers contained date-wise receipts of amount from assessee. Assessee took a plea that said company belonged to his son. However, it was found that assessee's son had not started any business before 26-12-1994. There was no reason for assessee to make investment before 26-12-1994. Therefore, addition under section 69B to assessee's income was justified. In favour of revenue.

CITv.Jai Pal Aggarwal (2013) 212 Taxman 1 (Delhi) (High Court)

S.69B: Amounts of investments not fully disclosed in books of account - Undisclosed investments - Investment in property - Seized from the premises of assessee-Addition held to be justified. (S.132)

Documents pertaining to a property were found and seized from assessee's premises. Assessee submitted that said property papers were given by a property dealer for verification. Name of purchaser of property was not mentioned in documents,further no one came forward to claim these documents.Even summons served on owner of property came back being un served. In view of aforesaid, addition under section 69B was justified.
CIT v.Jai Pal Aggarwal[2013] 212 Taxman 1 (Delhi) (High Court)

S.69B: Amounts of investments not fully disclosed in books of account - Undisclosed investments - Deposits – Dumb documents- Addition was not justified.
Assessing Officer found that interest on said FDRs had not been shown in return. Accordingly, he made addition under section 69B. However, figures in seized documents did not correlate with any date or details nor was document signed and, thus, it was a dumb document, therefore, addition under section 69B was not justified.
CIT v.Jai Pal Aggarwal[2013] 212 Taxman 1 (Delhi) (High Court)

S.69B: Amounts of investments not fully disclosed in books of account - Undisclosed investments - Investment in companies –Addition was held to be justified. (S.132).
Certain documents seized showed that assessee had made investments in a company from 26-11-1993 to 10-2-1994.Seized papers contained date-wise receipts of amount from assessee - Assessee took a plea that said company belonged to his son. However, it was found that assessee's son had not started any business before 26-12-1994,there was no reason for assessee to make investment before 26-12-1994,therefore, addition under section 69B to assessee's income was justified.
CIT v.Jai Pal Aggarwal [2013] 212 Taxman 1 (Delhi) (High Court)

S.69B:Income from undisclosed sources – Noting on seized paper-Cost of land-Addition made without giving an opportunity of cross examination was held to be bad in law.
In the absence of any positive material on record to prove that the bald figure found noted on a seized paper actually represents the cost/purchase price of the land, addition u/s. 69B cannot be made simply by rejecting assessee’s explanation; supporting evidence, i.e., statements of original landowners admitting additional consideration which was neither taken into consideration by the AO nor filed by the department before the CIT (A) cannot be accepted by the Tribunal, same being totally new evidence, more so when these statements were neither confronted to the assessee nor any cross-examination was allowed. (A.Y. 2007-08)
Dy. CIT v. Countrywide Buildestate (P) Ltd. (2013) 83 DTR 346(JP) (Trib.)
S.69C: Unexplained expenditure-Cash payments-Diesel expenses on the basis of confirmation letter by officer in charge held to be allowable.
Assessing Officer made addition on account of diesel expenses paid in cash to BP, Sanchor, a company pump of BPCL. Tribunal on basis of confirmatory letter given by Officer-in-charge of BP, Sanchor wherein it was stated that diesel was supplied by it to assessee deleted additions. Letter clearly mentioned that bills issued to assessee had also been verified before issuance of certificate - Whether since conclusion arrived at by Tribunal was based upon concurrent findings of fact and there was no material to contrary so as to dislodge findings of Tribunal, same was to be upheld. In favour of assessee. (A.Y.2006-07)
CIT v G.K. Patel & Co. (2013) 212 Taxman 384(Guj.) (High Court)

S.70: Set off loss-One source against income from another source-Same head of income-Survey- Income surrendered during survey is not allowable for setoff. (S.71, 133A)
During the course of survey assessee surrendered an additional income. The Assessing Officer held that since income surrendered during survey was not recorded in the books of account therefore no deduction of set off loss on depreciation couldbeallowed.Accordingly the Income surrendered during the course of surveywas assessed separately. On appealCommissioner (Appeals) also confirmed the order of Assessing Officer. On appeal the Tribunal relying on the judgement of Punjab and Haryana High Court in Kim Pharma (P) Ltd. (IT Appeal no 106 of 2011 (O&M) the Tribunal held thatbrought forward loss cannot be set off against surrendered income undersection 70 & 71.Appeal of assessee was dismissed. (AY 2005-06)
Liberty Plywood (P.) Ltd. v. ACIT (2013) 140 ITD 490 (Chd.) (Trib.)

S.72A: **Carry forward and set off-Accumulated loss-Unabsorbed depreciation-Amalgamation:**
Two separate companies, BTPU and another company, got amalgamated with the assessee-company in the previous year relevant to the assessment year 2004-05. The Assessing Officer denied set off of the brought forward loss of BTPU on the grounds that (i) 43.79 per cent. of assets of the amalgamating company had been disposed of by the assessee in the very first year of the amalgamation; (ii) the assessee-company was not able to substantiate that the scheme of

amalgamation was with a view to revive the business of the amalgamating company and amalgamation was for a genuine business purposes; (iii) the assessee-company did not achieve the level of production of at least 50 per cent. of the installed capacity of the amalgamating company before the end of four years from the date of amalgamation and that it further failed to demonstrate that it continued to maintain the said minimum level of production till the end of five years from the date of amalgamation ; (iv) the assessee-company failed to furnish a certificate in the prescribed Form 62 duly verified by an accountant showing particulars of production, which was one of the pre-requisite conditions for availing of the allowance under section 72A, as laid down in rule 9C(b). The Commissioner (Appeals) affirmed this. On appeal :

Held, (i) that two companies, BTPU and BSPPL amalgamated with the assessee-company in the relevant previous year. The assessee claimed set off of brought forward loss of BTPU alone. In order to claim such benefit, it was incumbent upon the assessee not to dispose of more than 25 per cent. of the assets of BTPU alone. The disposal of assets by the assessee in all the three years combined was around 10 per cent. of the book value of total assets of BTPU. The Assessing Officer, while calculating the percentage of 43.79 per cent., erred in including the disposal of assets of BSPPL with the disposal of assets of BTPU. The objection of the Assessing Officer for not granting set off and carry forward of accumulated loss and unabsorbed depreciation of BTPU that the assessee disposed more than 25 per cent. of the assets of BTPU was, therefore not, sustainable.

(ii) That the amalgamation took place on April 1, 2003. The period of four years had not expired at the time of completion of the assessment. The Assessing Officer was required to restrict himself to the year before him for considering as to whether there was any violation of section 72A(2). As the previous year relevant to the assessment year under consideration was not the fourth year from the date of amalgamation, the Assessing Officer was not required to examine this aspect at that stage.

(iii) That it was pre-mature to require the material for demonstrating efforts taken by the amalgamated company for reviving the business of amalgamating company.

(iv) That as the assessee admittedly did not achieve the production at the desired level of the installed capacity and it was not the fourth year from the date of amalgamation, the requirement of furnishing certificate in Form 62 was premature.

(v) That, therefore, there was no failure on the part of the assessee to fulfill the requisite conditions for claiming set off of brought forward business losses and unabsorbed depreciation of BTPU in year under consideration. (A. Y.2003-2004, 2004-2005)

Bayer Material Science P. Ltd. v. ACIT (2013)142 ITD 22/ 22 ITR 287 (Mum.) (Trib.)

S. 73:Losses- Speculation business -Explanation to section 73 – Major portion of gross total income of assessee did not consist of income from granting of loans and advances, but of purchase and sale of shares of other companies.Share trading loss to be treated as speculative loss.

Where the assessee claimed its principal business was of granting loans and advances, as at year end, 62 per cent of its funds were invested in that business However, the assessing officer observed that for more than 10 months of whole year, less than 50 per cent of available funds were utilized in business of granting loans and advances He accordingly, treated share trading loss as speculative loss invoking the provisions of Explanation to section 73.The finding of the fact was confirmed by appellate authorities Therefore, the High Court did not interfere with the consistent finding of fact of the lower authorities and dismissed the Appeal. (A.Y. 2000 – 01)

Alfa Tie up (P) Ltd. v. CIT (2013) 81 DTR 336 (Cal) (High Court)

S.73: Losses - Speculation business - Dealing in shares –Sham transaction - Justified in disallowing thee loss. [S.43(5)]

Assessee was engaged in business of sale and purchase of shares and government securities. It sold shares of JP and HFCL at loss and set off loss against profit from sale of shares. Sale and purchase were made through a sister concern. There was no physical delivery of shares and shares were sold on dates when prices were lowest. The court held that theAssessing Officer was justified in disallowing loss on sale of shares of JP on ground that it was a sham transaction. And also the Assessing Officer was right in treating loss in sale of shares of HFCL as speculation loss. Appeal of revenue was allowed. (A.Y. 2001-02)

CITv.Vachanband Investment Ltd. (2013) 212 Taxman 131 (Delhi) (High Court)

S.79:Carry forward and set off losses - Change in share holdings - Companies which public are not substantially interested-Beneficial owner-Loss is allowed to be carried forward.

In the absence of any material to hold that Tribunal accepted the assessee's contentions and that PM and Mrs. DR were in fact holding the shares on behalf of foreign investors and the foreign investors fell within the description of "beneficial owner" u/s. 79, Tribunal was not justified in allowing carry forward and set off of loss. Matter was remanded for reconsideration. (A.Y. 2002-03, 2003-04.)

CIT v. S Net Freight India (P) Ltd. (2013) 83 DTR 243 (Delhi) (High Court)

S. 80G:Donation- Recognition of Institution etc. u/s. 80G(5) Trust created exclusively for a particular religion:

Assessee trust was created for the construction of a temple of a deity and worship of the said deity under a trust deed which provided that the income of the trust shall be applied in the maintenance and repair of the temple properties and spent on the daily worship of the said deity and on defraying the usual expenses of holding festivals of the said deity and the aforesaid objects were still intact even after the unauthorized amendment of the trust deed by the founders and trustees, it was held that it is atrust expressed to be for the benefit of a particular community i.e. Hindu religious community, which contravenes the provisions of s. 80G(5) (iii) r/w Expln. 3 to S. 80G and, therefore, assessee trust was not entitled to renewal of approval u/s. 80G(5).

Ramanujam Spiritual Public Charitable Trust v. CIT,(2013) 151 TTJ 682(TM) (Asr.)(Trib.)

S.80HH:Newly established industrial undertakings - Backward areas-Infrastructure development-Computation – Loss in non-eligible unit(S.80A(2),80AB,80B(5),80IA.)

While calculating the deduction u/ss. 80HH and 80-IA, the profits of each unit have to be calculated separately. loss of an eligible unit has to be taken into account while calculating the deduction but not the loss of non-eligible unit.

CIT v. Him Teknoforge Ltd (2013) 83 DTR 117/256 CTR 393(HP) (High Court)

S. 80HHC:Export business-Loss in one unit to be adjusted against profits of another.

Different units of the assessee company were engaged in the manufacturing of different goods. This does not make separate units of the assessee company as separate and different assessable units for the purposes of the Income –tax Act, 1961 or for that matter for the purposes of s. 80HHC. Deduction u/s. 80HHC could be allowed to the assess company only after adjustment of loss in unit III against profits of unit I. (A.Y. 2003-04)

Madhav Marbles & Granites Ltd. v. ACIT (2013) 83 DTR 17(Raj.) (High Court)

S.80HHC:Export business- Survey-Surrender of excess stock-Surrender of income during the survey is entitled to deduction under section 80HHC. (S.133A.)

On account of surrender of the income by the assessee, the profit of the assessee during the assessment year was increased. This was due to the assumptive valuation of the closing stock by the authority concerned.During the course of survey,no actual excess closing stock upon physical verification was found. Therefore, it could not be said that the assessee had not fulfilled or satisfied the conditions for grant of deduction u/s. 80HHC. Held that the assessee was entitled to deductions u/s. 80 HHC on excess stock of Rs. 9,39,170/- found during the course of survey and surrendered as business income. (A.Y. 2002-03)

CIT v. Haswani Arts (2013) 83 DTR 81 (Raj.) (High Court)

S.80HHC:Export business- Receipt of export incentives pertaining to earlier years.

Assessee was following cash system of accounting in respect of export incentives. It received such incentives pertaining to earlier years in the relevant financial year. Held that it was entitled to deduction under section 80HHC by taking the export turnover and the total turnover of the year in relation to which the export incentive has been received. (A.Y. 1992-93)

Barcleys International v. CIT (2013) 83 DTR 159/257 CTR 166 (P&H) (High Court)

S. 80HHC:Export business- Filing of audit report – Mandatory –Audit report can be filed before completion of assessment.

Requirement of filing of the audit report u/s. 80HHC(4) is mandatory, but the time of filing is directory and the same could be filed at any time before completion of the assessment. (A.Y. 2003-04)

CIT v. Godha Chemicals (P) Ltd. (20130 83 DTR190 (Raj.) (High Court)

S.80HHC:Export business-Third and fourth provisos – Constitutionality. (Constitution of India.Art 226)

Amendment of s. 80HHC(3) by insertion of certain conditions in the third and fourth provisos thereto with retrospective effect by Taxation Laws (Second Amendment) Act, 2005, violates Art. 14 of the Constitution as it denies the benefit of deduction u/s. 80HHC to the class of assessees having export turnover of more than Rs. 10 crores whose assessment were still pending, while allowing such benefit to the same class of assessees whose assessments have already been concluded. It is also invalid for the reason that its retrospective operation takes away the benefit from one class of assessees. Impugned assessment is quashed to the extent that the operation of section could be given effect from the date of amendment and not in respect of earlier assessment years in the case of assessees whose export turnover is more than Rs. 10 crores.

Vijaya Silk House (Bangalore) Ltd. UoI & Ors. (2013) 83 DTR 241 (Bom.) (High Court)

S.80HHC:Export business-Profits of the business – DEPB credit not transferred – Provisions of section 28(iiid) is not attracted.

The assessee itself had utilised the DEPB credit for its business and had not transferred/sold the same to any third party, then the provisions of section 28(iiid) would not be attracted, and therefore the second, third, fourth provisos of 80HHC(3) are not attracted to the assessee's case. Since AO was directed to recompute the deductions under section 80HHC, in accordance with the law as held by the Supreme Court inTopman Exports v. CIT (2012) 342 ITR 49(SC)

CIT v. K.R.B.L. LTD. (2013) 82 DTR241 (Delhi) (High Court)

S.80HHC:Export business-Computation-Profits of the business-Interest from money lending is not excludible for purpose of applying formula for computing export profits for earlier year- law is amended with effect from Assessment year 1992-93. (S.80AB)

The assesseeis an individual engaged in export business. For the assessment year 1991-92, he claimed deduction of Rs. 33,63,149 under section 80HHC of the Income-tax Act, 1961. The income-tax authorities objected that the interest income, even if it was assessed as business income on the footing that the assessee was carrying on moneylending business, represented domestic profits and not export profits and, therefore, a mechanism should be devised by which the domestic profits were excluded from the profits of the business for the purpose of applying the formula prescribed by section 80HHC. The Tribunal held that the domestic business need not have any nexus with the export business for the purpose of deduction under section 80HHC and hence interest income could not be excluded from the profits of the business. On appeal the Court held that the amendment made to clause (baa) of the Explanation below section 80HHC defined "profits of the business" in such a manner as to exclude receipts like interest, commission, etc., which did not have an element of turnover, was introduced prospectively by the Finance (No. 2) Act, 1991, with effect from the assessment year 1992-93 and the amendment did not operate retrospectively. Therefore, for the assessment years prior to the assessment year 1992-93, it would not be permissible to exclude interest receipts even if the business from which interest arose did not have an element of turnover. Appeal ofrevenue was dismissed. (A.Y.1991-92)

CIT v. Anil Chanana (2013) 350 ITR 247(Delhi) (High Court)

S.80HHC: Export business - Net interest –90 percent thereof.

Tribunal held that when there is a nexus between interest receipts and interest payment interest receipt should be set off against interest payment before excluding 90 per cent thereof in terms of Explanation (baa) to section 80HHC, it is 90 per cent of net interest and not gross interest which has to be deducted under clause (i) of Explanation (baa) to section 80HHC for determining profits of business in order to compute deduction under section 80HHC. In favour of assessee(A.Y.2004-05)

ACITv.Avon Organics Ltd. (2013) 55 SOT260(Hyd.) (Trib.)

S:80HHC: Export business- Block assessment (S.158BC,158BH)

In course of appellate proceedings, assessee raised an objection that revenue authorities were not justified in denying deduction claimed under section 80HHC. Tribunal held thatsince book results were neither altered nor rejected by revenue authorities which showed export proceeds being received by assessee, deduction claimed under section 80HHC was to be allowed within premise of section 158BH. In favour of assessee. (.Block period 1-4-1987 to 23-10-1997)

Hindustan Polyamides & Fibres Ltd. v. Dy. CIT (2013)55 SOT 52(URO) (Mum.) (Trib.)

S.80HHE:Export business-Computer software – Transmission of customized electronic data is eligible deduction.

CIT (A) as well as the Tribunal had arrived at the finding that the assessee was engaged in customizing the data collected by it from various sources to meet specific requirements of its clients and transmitting the same through internet to its clients abroad. CBDT had notified data entry processing as computer software services vide notification dated 26th September 2000. Held that the assessee was entitled to deduction u/s. 80 HHE. (A.Y. 2003-04)

CIT v. Malhar Information Services (2013) 83 DTR 44(Bom.) (High Court)

S.80HHE: Export business-Computer software-Data entry-Export of customized electronic data is eligible for deduction.

The assesseeis engaged in the business of information vending.The activities undertaken by the assessee is transmission of customized data through internet to its clients abroad and that of data entry processing. The assessee claimed the deduction under section 80HHE. The Assessing Officer disallowed the claim on the ground that department has not accepted theorder of Tribunalwhich has allowed the claim of assessee for the assessment year 2000-01.On appeal the Commissioner (Appeals) and Tribunal allowed the claim of assessee. On appeal by revenue the Court held that the job data entryhas been notified as computer software service, vide notification dt 26th Sept, 2000by the CBDT the assessee is eligible to deduction under section 80HHE. Accordingly the appeal of revenue was dismissed. (A.Y. 2003-04)

CIT v. Malhar Information Services (2013) 351 ITR 119/ 83DTR 44/257 CTR 69/213 Taxman 45(Mag.) (Bom.) (High Court)
Editorial: Refer ACIT v. Malhar Information Services (2008) 119 TTJ 346 (Mum.) (Trib.)

S. 80-I : New industrial undertakings – Amalgamation of one company with another – Not a transfer as defined in section 2 (47) of the Act – Disallowance of deduction u/s. 80 I of the Act not called for.
When a company is amalgamated into a company it does not amount to transfer within the meaning of section 2 (47) of the Act.Therefore deduction under section 80 I of the Act cannot be denied on the ground that it was a case of transfer of machinery to a new business. (A.Y. 1995 – 96)
CITv. Bhuwalka Steel Industries Ltd. (2013) 81 DTR 348 (Karn) (High Court)

S. 80-I :New industrial undertakings –While computing deduction under section 80 I of the Act, deduction granted under section 80 HH of the cannot be deducted from the gross total income.
While computing deduction under section 80 I of the Act, deduction granted under section 80 HH of the Act cannot be reduced from the gross total income.
CIT v. Hindustan Pipe Udyog Ltd. (2013) 81 DTR 175 (All) (High Court)

S.80-IA:Industrial undertakings –Manufacture –Production- Activity undertaken by a diagnostic centre does not result in manufacture or production,therefore diagnostic centre is not eligible for deduction under section 80 IA.
Facilities provided by a diagnostic centre viz, X – rays, MIR, CT scan, NMI etc. do not result in manufacture or production of article or thing therefore, a diagnostic centre is not entitle an industrial undertaking eligible for deduction under section 80 IA of the Act. (A.Y. 1995 – 96, 98 – 99 & 99 – 00)
CIT v. Dewan Chand Satyapal (2013) 81 DTR 382 (Delhi) (High Court)

S.80IA:Industrial undertakings - Infrastructure development - Process of converting semi-finished bags into laminated HDPE bags amounts to manufacture and hence, deduction can be availed u/s. 80IA.
The process of converting "semi-finished bags" into "Laminated HDPE bags" amounts of "Manufacture" since both the product are entirely distinct, have different identity, have different utilities and both fetch different prices in the market. The assessee's unit being engaged in an activity of manufacture, fall within the ambit of "Industrial Undertaking as defined u/s. 80IA(12) (b) and is therefore eligible for deduction u/s. 80IB of the Act(T.A. No.96of 2000, dt 19/06/2012 / T.A. No. 98 of 2000, dt 19/06/12)].
Jhaveri Coaters(P) Ltd. (2012) BCAJ -November-P. 401 (Guj.) (High Court)

S.80-IA: Industrialundertakings-infrastructuredevelopment-Works contract- Explanation that s. 80IA(4) does not apply to "works contracts" is clarificatory and its retrospective operation is valid.
By the Finance Act No.2 of 2009 an Explanation was added to s. 80IA(4) with retrospective effect from 1.4.2000 to provide that s. 80IA(4) would apply to a business which is in the nature of a works contract awarded by any person and executed by an undertaking or enterprise. The said retrospective amendment was challenged on the ground that (i) it was a fresh levy of tax, (ii) no reasons were given to support the retrospective levy, (iii) the period of retrospective operation was long and so it violated Article 19(1) (g) of the Constitution. HELD by the High Court dismissing the challenge:

(i) An enactment can be questioned only on the ground of lack of competence or on the ground that the statute violates the fundamental rights or any other constitutional provisions. An enactment cannot be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. As all taxes are raised for public good, there is considerable latitude to Parliament in framing a taxing statute. There is always a presumption of constitutionality and the burden is on the Petitioner bringing such a challenge;

(ii) On merits, the argument that the Explanation below s. 80-IA (13) provides for a levy of tax which was hitherto unknown is not acceptable. It cannot be said that the Legislature in introducing the explanation materially changed the exemption which existed till such explanation was introduced. The explanation was introduced for the "removal of doubts" and is declaratory in nature. By the Explanation, the Legislature has distinguished between cases of developing/ operating etc. from a works contract. It cannot be disputed that there is an intrinsic difference between developing an infrastructure facility and executing a works contract. The Explanation merely aims to clarify that deduction u/s 80IA(4) is not available in case of execution of works contract. Such an interpretation is possible even on the basis of the existing provisions of s. 80IA (4).
Katira Construction Ltd v. UOI (Gujarat High Court),www.itatonline.org

S.80-IA: Industrial undertakings-Infrastructure development-Telecommunication services- VSAT services-Matter remanded.

Assessee, a public limited company, was providing satellite based telecommunication solutions including VSAT services, and broadband service through satellite. It claimed deduction under section 80-IA in respect of income derived from providing broadband/internet services. Assessing Officer rejected assessee's claim on ground that satellite was not a domestic satellite because it was owned by Department of space, Government of India, which was not an Indian company and, moreover, it was being operated by 'B' Ltd. i.e. a foreign company. Court held thatas long as assessee was providing stipulated services and had received payments for specified services, income earned would qualify for deduction under section 80-IA(4) (ii);however, in absence of any details regarding nature and character of service rendered by assessee through satellite, matter was to be remanded back for disposal afresh. Matter remanded. (A.Y 2005-06)

Essel Shyam Communication Ltd. v. CIT (2013) 212 Taxman 328 (Delhi) (High Court)

S.80-IA: Industrial undertakings-Infrastructure development -Telecommunication services-VSAT services-Income derived-Sales of various items such as antenna, RFT, computer printer, video conferencing systems etc.Matter remanded.

In course of assessment, Assessing Officer noted that assessee's claim for deduction under section 80-IA included amount received from sales of various items such as antenna, RFT, computer printer, video conferencing systems etc. Assessing Officerrejected assessee's claim holding that it was not income derived from specified services. Courtheld thatassessee's claim for deduction could be allowed only if sale of goods was inextricably connected with primary purpose of providing telecommunication services, therefore, matter was to be remanded back for determining true nature of sale of goods. Matter remanded.

Essel Shyam Communication Ltd. v. CIT (2013) 212 Taxman 328 (Delhi) (High Court)

S.80-IA:Industrial undertakings - Infrastructure development - Tax component of sales price-Deduction is available.

The assessee NLC was engaged in the business of mining and production of lignite and using them in the generation of electricity. Under Bulk Power Supply Agreement entered into between the assessee and State electricity board, the assessee agreed to sell the electricity generated by it. The tariff that was arrived at between the parties consisted of various components including tax liability on the income streams from the core activity of NLC. A reading of the agreement made it clear that in strict sense, there was no reimbursement of the tax liability by the recipient, but was treated as part of the tariff and whatever was done on the receipt of the statement of the tax payable by the assessee was that the tariff price payable on the electricity sold was finally reckoned with reference to the above said tax payment. In the proceedings under section 263, the Commissioner pointed out that the income tax liability of the assessee had been paid by the electricity boards and the amount received by the assessee was shown as receipt of the income and included for claiming deduction under section 80-IA. The Commissioner viewed that the receipt of the income tax by way of reimbursement was not an income from the manufacturing or production activity. Consequently, no deduction under section 80-IA.Tribunal confirmed the view of Commissioner under section 263. . On appeal to the High Court, held that under a bulk power supply agreement between assessee-electricity generating company and State Electricity Board, various components of tariff was to be charged for sale of electricity. Said agreement as well as relevant notification by Ministry of Power clarified that tax liability would be part of the tariff charged for sale of electricity from Thermal Power Generating Stations and it would not stand independent of the tariff charge. Further, there was no reimbursement from State Electricity Board of tax paid by assessee. tariff could not be dissected to conclude that tax component specified as part of tariff was reimbursement of liability of assessee and, hence, it would not form part of income. relief to be granted under section 80-IA, would not call for exclusion of tax component in sale price of electricity. In favour of assessee. (A.Y.2001-02).

Neyveli Lignite Corpn. Ltd. v ACIT (2013) 212 Taxman 318(Mad.) (High Court)

S.80-IA: Industrial undertakings-Infrastructure development-diagnostic centre-Manufacture-Processing-Diagnostic centre is not entitled to deduction under section 80IA. (S.33B)

Assessee is engaged in running a diagnostic centre providing services of X-ray, MRI and CT scan. It claimed deduction under section 80-IA on MRI and CT scan machines. Court held that diagnostic centre was not an industrial undertaking within meaning of section 80-IA, therefore, assessee is not entitled to deduction under section 80IA. (A.Y. 1995-96, 1998-99,1999-2000)

CIT v Dewan Chand Satyapal (2013) 212 Taxman 370 (Delhi) (High Court)

S.80-IA: Industrial undertakings - Infrastructure development –Civil contractor-Developing, maintaining and operating the facility-The assessee is eligible for benefit u/s. 80-1A even if only part of the Infrastructural Project work is executed by it. Larger Bench verdict in B. T. Patil v. ACIT(2009) 32 DTR 1 is not good law.

The assessee, a civil contractor, claimed deduction u/s 80-IA (4) in respect of the profits from infrastructure projects executed by it. The lower authorities rejected the claim on the ground that the assessee was a mere contractor and not a developer. Before the Tribunal, the Members of the Division Bench dissented and so the issue was first referred to a Third Member and then to a Larger Bench of three Members. The Larger Bench (32 DTR 1) rejected the assessee's claim on the ground that in order to be eligible u/s 80IA (4), the assessee had to be directly engaged in developing, maintaining and operating the facility and that there had to be a complete development of the facility and not just a part of it. When the matter came before the Division Bench for giving effect to the Larger Bench's verdict u/s 255(4), the assessee did not appear and hence, the Bench dismissed the appeal in limine for non-appearance. The assessee filed a MA before the Tribunal to recall the said order and also filed an appeal before the High Court. The Tribunal recalled its order dismissing the appeals and re-fixed the matter for hearing. Consequently, the assessee withdrew the appeal filed in the High Court. In the order permitting the withdrawal, the High Court directed the Tribunal to consider the judgement in CIT v. ABG Heavy Industries Ltd. & ors. (2010) 322 ITR 323 (Bom). HELD by the Tribunal:

The view of the Larger Bench that the assessee had to be directly engaged in developing, maintaining and operating the facility and that there had to be a complete development of the facility and not just a part of it is contrary to the law laid down in CIT v. ABG Heavy Industries Ltd. & ors. (2010) 322 ITR 323 (Bom). The High Court held that the effect of the amendment by the Finance Act of 1999 is that the benefit of s. 80IA(4) is available to any enterprise carrying on the business of (i) developing, (ii) maintaining & operating, or (iii) developing, maintaining and operating an infrastructure facility. It was also held that the assessee did not have to develop the entire project in order to qualify for deduction u/s 80-IA and that Parliament did not legislate a condition impossible of compliance. The Explanation below 80-IA (13) inserted by FA 2007 & 2009 w.r.e.f 1.4.2000 which provides that s. 80-IA(4) shall not apply to a person executing a "works contract" does not apply to a case where the assessee executes the work by shouldering Investment & technical risk by employing team of technically & administratively qualified persons and it is liable for liquidated damages if failed to fulfill the obligation laid down in the agreement and also securing by Bank guarantee. On facts, the assessee had shouldered the investment & technical risk in respect of the work executed and it was liable for liquidated damages if failed to fulfill the obligation laid down in the agreement. The liabilities which had been assumed by the assessee were obligations involving the development of an infrastructure facility. Consequently, it is not correct to say that the assessee is merely a contractor & not a developer. The assessee is eligible for benefit u/s 80-1A even if only part of the Infrastructural Project work is executed by it. (A. Y. 2000-01 & 2001-02)

B.T. Patil & Sons Belgaum Constructions Pvt. Ltd. v. ACIT (Pune) (Trib.) www.itatonline.org.

S.80-IA:Industrial undertakings - Infrastructure development –Manufacture-Activity of repairing the Oldgas cylinder fit to use is not manufacture.

Rendering a particular thing fit for being used for which it stand already produced or manufactured, i.e., restoring it to good and workable condition once again is essentially a repair and not manufacture. Activity of rendering old gas cylinders fit for use as per safety standards and also fitting peripherals parts as required, would be repair and not manufacture for purpose of allowing deduction under section 80-IA. Appeal of revenue was allowed. **(**A.Y.2001-02)

ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32(URO) (JP) (Trib.)

S.80IA:Industrial undertakings-Computation-Provisions of section 80A(2) and 80AB shall apply.

The assessee owned a hotel which was eligible for deduction u/s 80IA. Since sub-sec. (7) of S. 80IA provide for determination of amount of deduction whereas section 80AB and S. 80A(2) provide for amount actually allowable while computing total income, assessee's contention that provisions of S. 80A(2) and 80AB shall not be applicable, cannot be accepted. Matter remanded. (A.Ys.1999-2000 to 2005-06)

Hotel & Allied Trades P. Ltd. v. Dy.CIT (2013) 140 ITD 309 (Cochin) (Trib.)

S.80IA: Industrial undertakings - Infrastructure--Development of projects-Developer-Works contract-Deduction was allowed. (S 132, 153A)

S. 80IA(4) allows deduction to "any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility". The Explanation provides that it shall not apply to "business which is in the nature of a works contract". Whether an assessee is a developer or works contractor depends on the nature of the work undertaken by the assessee. The word 'contractor' is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer is a contractor. Contracts involving design, development, operating and maintenance, financial involvement, and defect correction and liability period cannot be called as simple works contract. A case where in an undeveloped area, infrastructure is developed and handed over to the Government cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. If the contract is composite, it will have to be segregated so as to allow deduction on the parts that involve design, development, operating and maintenance, financial involvement etc. and to deny on those which are pure works contracts. On facts, the assessee had made substantial investments in fixed assets and was exposed to various kinds of risks. It was not a mere contractor. It is enough if the assessee is a developer. It need not also maintain & operate the infrastructure facility (Patel Engineering Ltd v. Dy. CIT (2004) 94 ITD 411 (Mum) &GVPR Engineers Ltd (included in file) followed).Deduction under section 80IA was allowed. (A. Y. 2000 – 01 to 2005-06)

ACIT v. Pratibha Industries Ltd (2013) 141 ITD 151 (Mum.) (Trib.)

S. 80-IA: Industrial undertakings - Infrastructure development –Initial assessment year- Absorbed losses-Wind mill-Absorbed losses pre "initial assessment year" need not be set off.

The assessee set up a Wind Mill and commenced operations on 29.09.2006 (AY 2007-08). In that year the assessee suffered a loss of Rs. 3.5 crores on account of depreciation and interest which was set-off against the other income. In AY 2008-09, the assessee earned profit of Rs. 7 lakhs from the Wind Mill and claimed 100% deduction u/s 80-IA by treating AY 2008-09 as the "initial assessment year". The AO allowed the claim. However the CIT, relying on ACIT v. Goldmine Shares and Finance P. Ltd. (2008)302 ITR (AT) 208 (SB) (Ahd) & Hyderabad Chemical Supplies Ltd. v. ACIT (2011) 137 TTJ 732 (Hyd), revised the order u/s 263 on the ground that as u/s 80-IA(5), the eligible unit was deemed to be the "only source of income", the earlier years' losses of the unit had to be set-off against the profits before allowing s. 80-IA deduction. On appeal by the assessee, HELD reversing the CIT:

The fiction created by s. 80-IA(5) is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the "initial assessment year". Prior to 1.4.2000, s. 80-IA(12) defined the "initial assessment year" for various types of eligible assessees. However, after the amendment by the Finance Act, 1999, the definition of "initial assessment year" has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in s. 80-IA(2) from which it chooses its' 10 years of deduction out of 15 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in s. 80IA(5). The loss prior to the initial assessment year which has already been set-off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. It is only when the loss have been incurred from the initial assessment year, then the assessee has to adjust loss in the subsequent assessment years and it has to be computed as if the eligible business is the only source of income and then only deduction u/s 80-IA can be determined. This is the true import of s. 80-IA(5) (Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (2012) 340 ITR 477 (Mad), CIT v. Emerala Jewel Industry (P) Ltd. (2011) 53 DTR 262 (Mad) followed, ACIT v. Goldmine Shares and Finance P. Ltd. (2008) 302 ITR (AT) 208 (SB) (Ahd), Hyderabad Chemical Supplies Ltd.v. ACIT (2011) 137 TTJ 732 (Hyd) &Pidilite Industries Ltd.v.DCIT (2011) 46 SOT 263 (Mum) distinguished) (A. Y. 2008-09)

Shevie Exports v. JCIT (Mum.) (Trib.), www.itatonline.org

S. 80-IA: Industrial undertakings - Infrastructure development –Loss of eligible unit- Loss of eligible unit, even if set-off against non-eligible profits, has to be aggregated & carried forward for set-off against future eligible profits.

The assessee set up two windmills, the income from which was eligible for deduction u/s 80IA. The assessee suffered a loss in the said Wind Mills and claimed a set-off of the same against its other income. The AO and the CIT (A) rejected the claim by relying on ACIT v GoldMine Shares and Finance (P) Ltd. (2008) 113 ITD 209 (SB) (Ahd) where it was held that in view of s. 80-IA(5), the loss suffered by the eligible unit cannot be set off against the profits of other units / other business in the initial year of assessment or subsequent years of eligible years of assessments. The Tribunal had to consider the following legal issues: (i) what is the "initial assessment year"?, (ii) whether the loss/ depreciation from the eligible unit is entitled to be set-off against the other income?, (iii) whether the said loss/

depreciation of the eligible unit is, after set-off against the other income, still required to be notionally carried forward for set-off against the future profits of the eligible unit? HELD by the Tribunal:
(i) The "initial assessment year" is the year in which the eligible unit commences operations. It is not the year in which the assessee chooses to claim deduction. The requirement of s. 80-IA(5) is that the loss and unabsorbed depreciation of the eligible unit should begin to be aggregated from the "initial assessment year" to the last allowable year. The aggregation has to continue for every year irrespective of whether s. 80-IA (1) deduction for that year is exigible or not;
(ii) If the eligible unit has no profit, the loss & depreciation of the eligible unit is entitled to be set-off against the other income. However, despite such set-off, the loss and depreciation has to be aggregated and notionally carried forward for set-off against the future profits of the eligible unit. (A. Y. 2005-06 to 2008-09)
Hercules Hoists Limited v. ACIT (Mum) (Trib.) www.itatonline.org

S.80IA:Industrial undertakings–Infrastructure development - **Infrastructure development activity of 'processing' was not included in section 80IA. Assess is not entitled for deduction under section 80IA.**
Section 80IA mandates that the industrial undertaking should manufacture or produce any article or thing. The activity of the assessee is blending of tea amounts to processing only and does not amount to manufacture or production. Tribunal held that activity of processing was not included in section 80IA as it stood in Asst. Year 1999-2000, therefore assessee is not entitled for deduction under section 80IA. (A. Y. 1999-2000,2000-01)
Dy. CIT v. Sunrise Tea Processing (P) Ltd. (2013) 152 TTJ 661/84 DTR 333 (Pune) (Trib.)
S.80IB: Industrial undertakings - Additionalground - Claimnot made in return - Claim cannot be entertained in view of specific provision of section 80A(5) which was inserted by Finance Act, 2009which is applicable retrospectively from the Assessment year 2003-04. (S.80IB (5))
Assessee did not make a claim of deduction in AY 2003-04 and 2004-05, rather made the claim for the first time before CIT (A) by filing an additional ground. It was held that the provisions of S. 80IB(5) inserted by Finance Act, 2009 which are applicable retrospectively from AY 2003-04, clearly provides that in case assessee fails to make a claim in the return of income, the claim could not be allowed. The provision was applicable for AY 2003-04 and 2004-05. Therefore, in the view of these provisions which are quiet unambiguous and clear, claim of assessee cannot be allowed. (A.Ys. 2003-04, 2004-05)
Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277/151 TTJ 421 (Mum) (Trib.)

S.80-IB(10): Undertaking - Developing and building - Housing project – Commercial units- Proportionate deduction to extent of compliance, would be allowed. (S.80HHBA, 133A).
The assessee, engaged in business of developing and constructing housing projects, claimed deduction under section 80-IB(10) in respect of two projects. Survey under section 133A revealed that built up commercial area was 9.31 per cent. Therefore, the Assessing Officer disallowed deduction since provisions under section 80-IB(10) were not satisfied in his opinion. The assessee, on appeal, before Commissioner (Appeals), submitted that disallowance made by Assessing Officer, at best, could be restricted to the area exceeding limit prescribed under section 80-IB(10) (c) and relief on *pro rata* basis should be granted. The Commissioner (Appeals) rejected the appeal on grounds that section 80-IB did not contemplate any flexibility till 2004-05 for partly residential and partly commercial projects. There could be no liberal construction of deduction provision even on *pro rata* basis. The Tribunal allowed the assessee's appeal and allowed deduction on residential units on a *pro rata* basis. Deduction was disallowed for the commercial area, being 9.31 per cent, as the residential units had been converted into commercial units by the Managing Director and his relatives. Onappeal by revenue the Court held that, in the face of the clear provisions and going by the strict construction, one cannot read any limitation into the expression "housing project" to mean residential project alone and that if and when the projects have mixed built-up area of commercial and residential, the question of disallowance will arise only if and when the residential flats are beyond the limit as provided under sub-clause (c) of section 80-IB(10) and not otherwise. Even herein, the disallowance could be only proportionate to the extent of units in violation of the area prescribed under clause (c). In a pure commercial housing project, the question of applicability of sub-clause (c) does not arise at all. Going by the background of the expression 'housing project' and various clauses contained in section 80-IB of the Act, read in the context of subsequent insertion of clause (d), inserted prospectively under the Finance Act, 2005, the term 'housing project' has to be understood as a building project and need not be restricted to residential project alone, meaning thereby, user of the unit is not of relevance in the matter of grant of relief. The project may be either out and out residential project or commercial project or mix up of both for, a housing project, purely of commercial nature, approved by the Local Authority, is also a housing project, entitled to 100% deduction. So too, in projects containing residential units alone, where there is a partial compliance, proportionate to the compliance, the assessee would be entitled to have the deduction. In the case of mixed projects, the assessee's claim has to be allowed in full, if all the

residential units satisfied clause (c); otherwise, to the extent of compliance, the relief has to be worked out. A housing project of commercial premises is entitled to 100% deduction, there being no necessity of looking at clause (c) for compliance. Thus, the assessee would be entitled to the benefit of deduction on satisfaction of clauses (a), (b) and (c) of section 80-IB(10) and that the requirement as regards clause (c) would arise, wherein, in a given building, where there is a residential unit, the same has to satisfy the maximum built-up area specified under sub- clause (c) of section 80-IB(10). Even though the provisions under sub-clauses (d), (e) and (f) of section 80-IB(10) are prospective in nature, yet, for the purpose of understanding the scope of deduction under the provisions of the Act, there is no hesitation in drawing assistance from these provisions to decide on the scope of section 80-IB, as it stood at the material point of time. In the circumstances, the Revenue's appeal is to be rejected and the order of the Tribunal is to be confirmed. (A.Y. 2004-05)
CIT v Arun Excello Foundations (P.) Ltd. (2013) 212 Taxman 342 (Mad) (High Court)

S. 80IB(10) : Undertaking - Developing and building – Housing project –Each block- In respect of each block, the assessee is entitled to have benefit of deduction in respect of units satisfying the requirements of section 80 IB (10) of the Act.
Within a composite housing project, where there are eligible and ineligible units, the assessee can claim deduction in respect of eligible units in the project and even within the block, the assessee is entitle to claim proportionate relief in the units satisfying the extent of the built – up area. (A.Y. 2004 – 05 to 2008 – 09)
Viswas Promoters (P) Ltd. v. A CIT (2013) 81 DTR 68 (Mad.) (High Court)

S.80IB(10): Undertaking - Developing and building - Housing project -Filing of completion certificate – Amendment came into effect fromA.Y. 2005-06.No such requirement to file completion certificate for earlier assessment years.
The Assessee was engaged in the building and developing housing society, for A.Y. 2004-05.The department disallowed the claim of the Assessee on the ground that the Completion certificate was not filed. The High Court held that, prior to amendment of S.80IB(10), w.e.f. 1-4-2005, there was no obligation on the part of the assessee to file completion certificate. Appeal of revenuewas dismissed. (A.Y. 2004-05)
CIT v. Jain Housing & Construction Ltd. (2013) 82 DTR 135(Mad.) (High Court)
S.80IB(10): Deduction-Undertaking-Development and construction-Housing project- Open terrace-Certificate of completion- Deduction allowed.
Assessee has undertaken the development and construction of housing project hence eligible deduction. Assessee completed the construction on 6th march 2006, corporation certified the completion on 28th Dec. 2007, one of the authorities namely CMDA had issued a letter on 13th June, 2008 cannot be ground to reject the claim of assessee. The Court also held that open terrace could not be the subject – matter of inclusion as a built uparea to deny the benefit under section 80IB (10). Appeal of revenue was dismissed. (A.Y. 2005-06, 2006-07)
CIT v. Sanghvi&Doshi Enterprises (2013) 81 DTR 75/255 CTR 156 (Mad.) (High Court)
Editorial: Sanghvi & Doshi Enterprise v.ITO(2011) 141 TTJ 1 (TM) (Chennai) (Trib.) affirmed.

S.80IB(10):Deduction- Undertaking-Developing and building-Housing project-Revisedcomputation in the course of assessment proceedings-Proportionate deduction-Five projects-All projects to be considered as a single unit.
Assessee was engaged in the business of property development. In the ROI it claimed deduction u/s 80IB (10) on its five housing projects. In revised computation it claimed deduction for those dwelling units which were having built-up area less than 1500 Sq. feet on a proportionate basis. It was held that deduction originally claimed in the return of income filed could be revised in course of assessment proceedings. Even though some of the dwelling units of assessee had built up areaexceeding 1500 sq. ft. it was entitled for deduction u/s 80IB(10) in respect of those flats having built-up area not exceeding 1500 sq. ft. It was further held that since there was nothing on record to show that each of the project of assessee was independent, all these five projects together had to be considered as a single unit for purpose of working out deduction u/s 80IB(10). (AY 2005-06)
Dy.CIT v. Macro Marvel Projects Ltd. (2013) 140 ITD 472 (Chennai) (Trib.)

S.80IB(10):Deduction-Undertaking-Developing and building-Housing project- Amount not deductible- Amount disallowed cannot be taken in to account to determine profit of business for the purpose of computation. [S.40(a) (ia)]
The assessee deducted tax at source but deposited the same in to Government after due date. The Assessing Officer disallowed the said payment under section 40(a) (ia). The assessee in appeal contended that the addition on account of disallowance of expenditure would result in increased business which would be eligible for deduction under section 80IB(10). Commissioner (Appeals) has accepted the contention of assessee and allowed the deduction. On appeal by

revenue the tribunal held that legal fiction created by virtue of section 40(a) (ia) cannot be extended to determine the profit of the business for the purpose of computing deduction under section 80IB (10).Accordingly the amount disallowed u/s 40(a) (ia) cannot be taken into account to determine profit of business for purpose of computing deduction u/s.80 IB. (A.Y. 2006-07)

Dy.CIT v. Rameshbhai C. Prajapati (2013) 140 ITD 486 (Ahd.) (Trib.)

S.80IB(10): Deduction-Undertaking-Development and construction-Housing project-Matter remanded to determine accrual of income.

Assessee company is engaged in the business of civil construction. It entered into contract with land owners for development of residential cum commercial complex on land. The assessee claimed deduction u/s 80IB(10). It was noted from the records that neither aggregate amount of sale agreement entered into nor advance received there against had been mentioned. It was held that reasonable certainty as to the realization of sale proceeds were crucial to income recognition, and both sale agreement as well as advance received in pursuance thereof were vital thereto. Matter was thus, remanded back to AO. (A.Y. 2008-09)

Dy. CIT v. Vertex Homes P. Ltd. (2013) 140 ITD 300 (Hyd.) (Trib.)

S. 80IC:Special category states - Manufacture or production – production of advanced microprocessor based on fast bus transfer scheme panel – Expert opinion not sought or on record ,matter remanded.

The assessee was engaged in the activity of manufacturing advanced microprocessor based on fast bus transfer scheme panel, on which the assessee had claimed deduction u/s80IC. There was a dispute as to the activity of the assessee amounted to manufacture or assembly. The Hon'ble high court held that, due to the complexity in the production, the assessee or the department ought to have taken an expert's opinion on the issue involved.In view of the same the issue is remanded to the file of the AO for fresh adjudication with a direction to give an opportunity to the assessee. (A.Y.2006-07)

Aartech Solonics Ltd. v. CIT (2013) 82 DTR 9(MP) (High Court)

S.80-IC:Special category states –Set off of losses-Eligible to claim set off losses in its 80IC undertaking against its other taxable income. [S. 70, 80(IA(5)]

The Tribunal held that provisions of section 80-IA(5) only prescribes method by which quantum of a deduction has to be arrived at and it does not bar an assessee to claim set-off of losses of eligible business against undertaking which is not entitled to claim a deduction. Therefore, assessee is eligible to claim set-off of loss incurred in its section 80-IC eligible industrial undertaking against its other taxable business income. In favour of assessee. (A. Y. 2006-07)

Wipro Ltd. v. Add. CIT (2013) 55 SOT 3(URO) (Bang.) (Trib.)

S.80JJA: Deduction-Bio-degraded waste-Fuel briquettes from bagasse-Derived from-Eligible deduction.

The Assessee is engaged in the business of fuel briquettes from bagasse.The assessee claimed the deduction under section 8OJJAA.The Assessing Officer disallowed the claim on the ground that (1) bagase is not waste; (2) it is not generated in municipal /urban limitsi.e., by local authorities;(3) it is not collected but it is purchased; and (4) the process does not involve any treatment or recycling of a biodegradable waste. In appeal the Commissioner (Appeals) allowed the appeal of assessee. The Tribunal also confirmedthe order of Commissioner (Appeals). On appeal by the revenue, theCourt held that bagasse is a biodegradable waste of sugar factory and therefore, deduction under section 80J is allowable on the profits derived from the business of manufacturingfuel briquettes from bagasse; requirement of collecting biodegradable wasteas provided under section 80JJA is satisfiedwhether such waste is collected on payment of consideration or without consideration. Accordingly the appeal ofrevenue was dismissed. (A.Y. 2003-04, 2004-05)

CIT v. Padma S. Bora (Smt) (2013) 81 DTR 99/255 CTR 1 (Bom.) (High Court)

Editorial: Judgment ofPune Tribunal in CIT v. Padma S.Bora(2010) 133 TTJ 108(Pune) (Trib.) is affirmed.

S. 80P : Co-operative societies – Interest earned on deposits of non - SLR fund – Eligible for deduction under section 80P of the Act.

Interest earned by the co – operative society on the deposits of its non – SLR funds is income from banking business and eligible for deduction under section 80 P (2) (a) (i) of the Act.

CIT v. Muzaffarnagar Kshetriya Gramin Bank Ltd. (2013) 81 DTR 145 (All) (High Court)

S.80VV: Expenses Incurred in Connection with Income-Tax Proceedings – Retainership fee –Disallowance cannot be made.

Where assessee paid retainership fee to an advocate which was not in connection with income tax proceedings but for general advice relating to other laws, provisions of section 80VV were not attracted „ therefore, disallowance of retainership fee made by authorities below was to be deleted. In favour of assessee. (A.Y.1985-86)

CIT v. Dalmia Cement (Bharat) Ltd. (2013) 212 Taxman 126(Mag.) (Delhi) (High Court)

S.90: Double taxation relief **–Paying trade tax- DTAA-India-Germany (Arts. 2(3), 3(d), 4 & 12(2))**

Assessee, a limited liability partnership, was paying trade tax in Germany. Assessee was issued a tax resident certificate by German authorities and considered a taxable unit. Held that DTAA applicable to the assessee and benefit of art. 12(2) cannot be denied. (A.Y. 2002-03)

DIT (IT) v. Chiron Bearing Gmbh Co. (2013) 83 DTR1 (Bom.) (High Court)

S.90: Double taxationrelief-Limited partnership-Royalty-Fees for technical services-DTAA- India-Germany - Benefit of DTAA is available to a person who is liable to pay tax in Germany. [S.234B, Art.2(3), 3(d), 4, 12(2)]

The Assessee is a non-resident (Foreign company).In the return of income, it claimed the benefit of Article 12 (2) in respect of royalties and technical fees received by it. The Assessing Officer denied the benefit of DTAA on the ground that the assessee being a limited partnership which is not liable to tax at Germany. In appeal the Commissioner (Appeal) allowed the appeal of assessee. Appeal of revenue was dismissed by Tribunal. On appeal to High Court, the Court held that the Assessee, a limited partnership, paying tax in Germany is considered as taxable unit under the taxation laws ofGermanyas evident from the tax residence certificate issued by the German Authorities and the trade tax being one of the taxes to which Indo-German DTAAapplies, in terms of article 2(3), thereofis applicable to the assessee and therefore, benefit of Article 12(2) thereof cannot be denied. The Court held that the Tribunal was correct in holding that no interest was chargeable under section 234B. Appeal of revenue was dismissed. (A.Y. 2002-03)

DIT(IT) v. Chiron Bearing Gmbh & Co. (2013) 351 ITR 115 / 256 CTR 342 / 83 DTR 1 / 213 Taxman 174 (Bom.) (High Court)

Editorial: Asst DIT(IT) v. Chiron Behring Gmbh & Co. (2009) 120 TTJ 329 (Mum.) (Trib.) is affirmed.

S.91: Double taxation relief - Where no double taxation agreement exists-Kuwait-Credit for taxes was given.

During previous year 1996-97, assessee paid taxes in Kuwait on income earned there and sought benefit of deduction from tax payable in India under section 91 (1). Assessing Officer denied benefit of section 91 (1) on ground that payment of taxes in Kuwait was not made in previous year 1996-97.Court held that since payment of taxes on income earned in Kuwait during previous year had been found to be correct by Commissioner (Appeals), assessee was entitled to benefit of section 91 (1). Object of section 91 (1) is to give relief from taxation in India to extent taxes have been paid abroad for relevant previous year and this relief is not dependent upon payment also being made in previous year. In favour of assessee. (A.Y.1997-98)

CIT v. Petroleum India International (2013) 213 Taxman 41 (Bom.) (High Court)

S.92C: Avoidance of tax-Transfer pricing: If more than one price is determined by the most appropriate method, the ALP has to be the arithmetical mean of such prices.

The assessee was engaged in providing "software development support services" by which it developed software upon the instructions of its parent associated enterprise (IKOS Systems Inc). The entire software developed by the assessee was used by the parent AE captively for integrating the same with other software components developed by it. The assessee adopted the TNMM and claimed that its transactions were at ALP. The TPO rejected the assessee's comparables on general grounds and selected his own comparables and used figures for a subsequent year. He determined the ALP at a much higher figure and made an adjustment. On appeal by the assessee, the Tribunal [ACIT v. Adani Export Ltd. (2007)109 ITD 101] held that the criteria adopted by the TPO for searching comparables was not correct. It held that the TPO was wrong in selecting his own comparables without first rejecting the assessee's comparables. It also held that where one of the prices determined by the most appropriate method is less than the price as indicated by the assessee, that may be selected and there would be no need to adopt the process of taking the arithmetical mean of all the prices arrived at through the employment of the most appropriate method. On appeal by the department to the High Court, HELD:

The Tribunal was wrong in holding that if one profit level indicator of a comparable, out of a set of comparables, is lower than the profit level indicator of the taxpayer, then the transaction reported by the taxpayer is at an arm's length price and there is no need to take the arithmetical mean. The proviso to s. 92C(2) is explicit that where more than one price is determined by most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices. The Tribunal was also wrong in the finding that unless and until the comparables drawn by the taxpayer were rejected, a fresh search by the TPO could not be conducted because s. 92C (3) which stipulates four situations where under the

AO/ TPO may proceed to determine the ALP in relation to an international transaction. If any one of those four conditions is satisfied, it would be open to the AO/ TPO to proceed to determine the ALP price. Also, the question of applying OECD guidelines does not arise at all because there are specific provisions of Rule 10B (2) & (3) and the first proviso to s. 92C(2) which apply. The Tribunal was also not right in reducing the list of comparables to merely four. Having held that the comparables given by the assessee were to be accepted and those searched by the TPO were to be rejected, the only option then left to the Tribunal was to derive the arithmetical mean of the profit level indicators of the comparables which were accepted by it. It erred in selecting only one profit level indicator out of a set of profit level indicators. However, on facts, this makes no difference because even if the arithmetical mean of the comparables as accepted by the Tribunal are taken into account, the profit level indicator would be less than 6.99 % which is the profit level indicator of the assessee.
CIT v. Mentor Graphics (Noida) Pvt. Ltd (Delhi) (HighCourt).www.itatonline.org

S.92C: Avoidance of tax- Transfer pricing- RBI approval- FDI policy - RBI approval has no relevance on issue of Arm's length price - CUP Method- TNM Method - Matter set aside and Assessing Officer to decide the matter by adopting CUP method.
The assessee was engaged in the manufacturing and marketing of beer using technical know-how provided by SAB Miller. The assessee paid royalty for the technical know-how and the question arose whether the same was at arms' length. One of the arguments advanced by the assessee was that as under Press Note no. 9 of 2000 issued by the Ministry of Commerce and Industry in relation to FDI policy, remittance of royalty not exceed 5% of domestic sales and 8% of export sales was permitted, the royalty paid by it which was within those limits should be considered as being at arms' length for transfer pricing purposes. HELD by the Tribunal rejecting the plea:

Press Note no.9 of 2000 issued by the Ministry of Commerce and Industry in respect of FDI policy and prescribing the percentage of royalty to the sales allowed under automatic route cannot substitute as ALP to be determined under the provisions of the Act and Rules. FDI policy permitting certain percentage of payment of royalty is only for remittance of the amount in foreign exchange and therefore, such permission given in an entirely different context and purpose cannot be considered as relevant for determination of the ALP under I. T. Act. The RBI is only concerned with the foreign exchange and, therefore, would look into the matter from that point of view. The RBI, at the time of giving such permission would not keep in mind the provisions of the I T Act, which is the function of the income tax authorities and, hence, cannot validly go into such an issue. When a proper mechanism is provided under the provisions of the I. T. Act and Rules for determination of the ALP, then the approval by other than the I. T. Authorities, for the purpose of remittance/outflow of the foreign exchange, does not ipso facto, partake the character of ALP, which has to be determined as per TP regulations (CIT v. Nestle India Ltd (2011) 337 ITR 103 (Del) followed). (A.Y. 2007-08)
SKOL Breweries Ltd v. A CIT (2013)142 ITD 49/ 84 DTR 271/153 TTJ 257 (Mum.) (Trib.)

S.92C: Avoidance tax-Transfer Pricing- Automatic RBI approval means transaction is at Arm's Length Price.
The ITAT had two consider two legal issues in the context of transfer pricing (i) whether if a royalty agreement falls within the 'automatic approval scheme' and is approved/ deemed to be approved by the RBI, the royalty can be treated to be at arms' length just because it is approved/ deemed approved and (ii) what are the parameters to be applied while applying "Internal TNMM". HELD by the Tribunal:

(i) The assessee's collaboration agreement with its AE for payment of 2% of contract value for manufacturing, drawing and engineering services and 5% of the selling price as royalty falls under the "automatic approval scheme" of the RBI. When the rate of royalty payment and fee for drawings etc. has been approved or deemed to have been approved by the RBI, then such payment has to be considered at ALP;

(ii) Rule 10B(1) (e) (i) requires the profit margin realised by the enterprise from an international transaction entered into with an AE to be ascertained for determining as to whether or not it is at arm's length. The margin with which such margin earned by the assessee is compared with for determining the ALP, can be internally available from comparable transaction(s) or from externally available cases. If the enterprise has entered into similar transactions with third parties as are under consideration with the AE, then the profit realized from such transactions with third parties is a good measure to benchmark the margin from international transaction. Thus, on one hand we need to have profit margin which is to be compared from transactions with the AEs and on the other hand, we need to find out the profit margin from similar transactions with non-AEs with which comparison is to be made. Both these figures should come from separate watertight compartments. No overlapping is permissible in the composition of such compartments. In other words, neither the first compartment of profit margin from AE transactions should include profit margin from the

transactions with non-AEs, nor the second compartment should have profit margin from the transactions with the AEs. If such an overlapping takes place, then the entire working is vitiated, thereby obliterating the finer line of distinction of the profit margin to be compared and the profit margin to be compared with. On facts, as the assessee had not maintained segment-wise accounts and as the figures of AE and Non-AE transactions were segregated from the common pool of figures, the margins derived therefrom were not reliable and the claim of internal TNMM was not acceptable. (A.Y. 2008-09)
ThyssenKrupp Industries India Pvt. Ltd v. ACIT.(Mum.)(Trib.)www.itatonline.org.

S.92C: Avoidance of tax- Transfer Pricing- ALP should be determined on segment-wise profits & not at an entity level. Adjustment cannot be made to the entire entity turnover/ profits.
The assessee entered into several international transactions with its AE and claimed that there were at arm's length on the basis of a segment-wise TNMM analysis for each of them. The TPO rejected the claim on the ground that the segment-wise accounts were not audited. He adopted an entity method approach for purposes of determining the ALP. However, while rejecting the segmental analysis undertaken by the assessee, the TPO accepted 4 segments of the assessee's operations and identified comparables. He arrived at different arithmetical means of appropriate profit level indicators by taking operating profit by cost of various identified comparables in each segment. He thereafter gave weighted average to the assessee's percentage of turnover out of the total turnover and determined the weighted average of the arithmetic mean in each segments and arrived at the operating profit at 18.09% at entity level. This was taken as the arm's length profit margin and as the assessee's operating margin of 4.78% operating cost was less than the ALP so determined, an adjustment of Rs. 82 crore was made to the assessee's income. Before the DRP, the assessee furnished audited segmental accounts though these were ignored by it. On appeal by the assessee to the Tribunal, HELD:
As the assessee's operates in four different & independent segments and it submitted segmental accounts for each of its operation, the correct approach under TNMM should be to determine the ALP of each of the segments by comparing with the corresponding comparables involved in similar lines of functioning after proper FAR analysis. As the TPO had details of each segment-wise profit margin of the comparables, he ought to have compared the relevant profit margins with that of the assessee's profit margins in each segment. His approach of taking the weighted average method of arriving at entity based profit margin is not correct. Also, his approach of making the adjustment on the entire turnover of the assessee including transactions with non-AEs instead of restricting it to the AEs' transactions is not supported by the transfer pricing provisions. Further, in arriving at the segment-wise profit margin, the TPO should carry out an analysis of each company's business activity, why they are selected as comparable and what are the functions of the company, operating margins, etc. He should adopt proper parameters/filters in respect of each segment. If the assessee opposes the selection of comparables by the TPO, it is the responsibility of the TPO to furnish necessary details. The onus cannot be shifted to the assessee when it is contending that proper data is not available in public domain in this regard. (A. Y. 2008-09)
Sandoz Private Limited. v. DCIT (Mum.) (Trib.) www.itatonline.org.

S.92C: Avoidance of tax-Transfer Pricing- ALP of loan transaction has to be determined as per CUP & LIBOR.
The assessee, an Indian company, gave a loan of $ 10,50,000 to its USA based Associated Enterprise (AE) at 4% rate of interest. The TPO adopted the Indian company as the tested party and held that the comparable rates for benchmarking the interest had to be selected from the Indian domain and the rate that the assessee would have earned by giving loans in the Indian market had to be taken as the ALP. It was also held that an addition to the interest rate had to be made for the risk factor. The interest rate was determined at 17.25%. On objection by the assessee, the DRP held that the ALP had to be taken at the PLR of RBI being 13.25%. On appeal by the assessee to the Tribunal, HELD reversing the TPO & DRP:
(i) CUP is the most appropriate method for ascertaining the arm's length price of an international transaction of lending money. Where the transaction is of lending money in foreign currency to its foreign subsidiaries, the comparable transactions have to be of foreign currency lent by unrelated parties. The financial position and credit rating of the subsidiaries will be broadly the same as the holding company. In such a situation, domestic prime lending rate would have no applicability and the international rate fixed being LIBOR should be taken as the benchmark rate for international transactions. On facts, the assessee had an arrangement for loan with CitiBank for less than 4% and on the loan provided to its AE's it had charged 4% interest. Hence, the adjustment made by the TPO was not warranted (Siva Industries & Holding Ltd. (2011) 59 DTR 182 (Che), Four Soft Ltd. v. Dy. CIT (2011) 62 DTR 308 (Hyd), Dy. CIT v. Tech Mahindra Ltd. (2011) 46 SOT 141 (Mum) & Tata Autocomp Systems ltd. v. ACIT (2012) 73 DTR 220 (Mum) followed);

(ii) Further, the assessee's profits are exempt u/s 10B and so there was not a case where the assessee would benefit by shifting profits outside India (Philips Software Centre (P) Ltd. v. Asst. CIT (2008) 26 SOT 226 (Bang) & Ito v. Zydus Altana Health Care(P) Ltd. (2011) 44 SOT 132 (Mum) followed). (A. Y. 2008-09)
Cotton Naturals (I) Pvt. Ltd. v. D CIT (2013) 22 ITR 438(Delhi) (Trib.)

S.92C: Avoidance of tax-Transfer Pricing: No notional interest addition for delayed payments by AE.
The assessee raised invoices on its Associated Enterprise (AE) and gave 30 days credit for payment. As there was delay by the AE in making payment beyond the stipulated credit period, the TPO held that the assessee ought to have charged interest at the rate of 1% per month. A notional addition towards the said interest was made. This was upheld by the DRP. On appeal by the assessee to the Tribunal, HELD reversing the AO & DRP:

The assessee has no borrowings and so there is no interest liability. Even if the payments have been made by the AE beyond the normal credit period, there is no interest cost to the assessee. Moreover, there is no such agreement whereby interest is to be charged on such a delayed payment. The assessee does the billing on a quarterly basis and accordingly, the payment is being received. Therefore, the delay is not wholly on account of late payment by the AEs only. Moreover, the T.P. adjustment cannot be made on hypothetical and notional basis until and unless there is some material on record that there has been under charging of real income. Consequently, an addition an account of notional interest relating to alleged delayed payment in collection of receivables from the A.Es is uncalled for. (A. Y. 2007-08)
Evonik Degussa India P. Ltd. v. ACIT2013) 55 SOT 566 (Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing-Arm's length price -Matter remanded.
Arm's length price not to be determined without proper comparables. Failure by assessee to file transfer pricing report on ground no public domain comparable in assessee's line of business.-Matter remanded for fresh transfer pricing study for determination of fair arm's length price. (A. Y. 2005-2006 to 2007-2008)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S.92C: Avoidance of tax-Transfer pricing - Arm's length price - Discount granted to AE –Addition was not justified.
Assessee-company had granted 10 per cent discount on sales made to its associated enterprise. In course of assessment, Assessing Officer held that price charged by assessee to its AE was not at arm's length and TP adjustment to extent of discount granted was made by him on basis of report obtained from TPO. Commissioner (Appeals) set aside TP adjustment holding that TPO and Assessing Officer had arrived at price difference not on basis of any established method of determining arm's length price but simply on basis of 10 per cent discount granted by assessee-company to its associate enterprise. Tribunalfollowing order passed by co-ordinate Bench of Tribunal in assessee's own case relating to assessment year 2006-07, impugned order passed by Commissioner (Appeals) deleting addition made by way of TP adjustment was to be upheld. Infavour of assessee(A.Y. 2004-05)
Dresser Rand India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 167 (Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing -Arm's length price-TNMM –Method cannot be discarded in preference over transactional profit methods, without any valid reasons.
Assessee-company determined ALP of its international transactions with AE on basis of Cost Plus Method (CPM).TPO, however, made adjustment to ALP determined by assessee relying on Transactional Net Margin Method (TNMM).It was noted that TPO had not assigned any valid reason for rejecting method adopted by assessee for determination of ALP. Further, if four companies earning super normal profits were excluded from list of comparables selected by TPO, average OPM would come to 18.91 per cent whereas net profit margin of assessee was 18.11 per cent, in view of above, impugned adjustment made to ALP determined by assessee was to be set aside. Tribunal held thatwhere an assessee has followed one of standard methods of determining ALP, such a method cannot be discarded in preference over transactional profit methods, unless revenue authorities are able to demonstrate fallacies in application of standard methods. In favour of assessee. (A.Y.2005-06)
CIT v. Sonata Software Ltd. (2013) 55 SOT 533 (Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing-Arm's length price –Matter remanded.
Assessee belonged to a multinational group of companies which undertook IT project named Common Operating Environment System (COE3). It received IT support from its Associated Enterprises (AEs).Costs incurred in respect of said project were allocated to group companies. Assessee shared related cost and reimbursed cost to its AEs.TPO observed that relevant details regarding allocation of costs were not furnished by assessee. He determined arm's length price at nil and disallowed entire cost borne by assessee. Significant costs were incurred in respect of said project.

Assessee had also furnished relevant invoices raised in this regard. Tribunal held that TPO was not justified in ignoring these details and computing ALP at nil and, therefore, matter be remanded to TPO to workout ALP of relevant transaction. Matter remanded. (A.Y.2002-03)
Castrol India Ltd v. ACIT (2013) 55 SOT 521 (Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing-Arm's length price - Comparables - While carrying out comparability analysis for determining ALP, one has to examine functional profile of company and attributes of products and services provided.
Assessee in course of international transactions provided testing and analytical support services in connection with research and development to its associate enterprise. In transfer pricing study report for comparability analysis, assessee had identified 12 comparable companies. Dispute resolution panel for determining arm's length price selected six companies for comparability analysis.These six comparable companies were arrived after rejecting three diagnostic companies, which were selected by assessee, and two new comparable companies were added. Tribunal held that since functional profile of two new comparable companies was different with that of assessee, inclusion of said companies in set of comparables was not justified, since functional profile of three diagnostic companies was not only different but characteristic of services rendered was also different, these three companies had rightly been rejected from set of comparables. Therefore, only four set of companies should be included for purposes of comparability analysis and arithmetic mean of these companies should be taken for purpose of determining ALP. Partly in favour of assessee. Tribunal held that while carrying out comparability analysis for determining ALP, one has to examine functional profile of company and attributes of products and services provided.(A.Y. 2007-08)
Evonik Degussa India (P) Ltd v. ACIT (2013) 55 SOT 566 (Mum.) (Trib.)

S.92C: Avoidance of tax- Transfer pricing - Arm's length price - Notional interest -Addition was deleted.
Assessee had international transactions with its AE. It had given credit of thirty days in invoices raised against AE. AE made payments to assessee beyond stipulated credit period. Assessee had not charged any interest on delayed payment. TPO worked out notional interest at rate of one per cent per month for period of delay beyond thirty days and added same to income of assessee - Whether since there was no agreement between assessee and AE to charge interest on delayed payment, impugned addition was not justified. In favour of assessee. (A.Y. 2007-08)
Evonik Degussa India (P) Ltd v. ACIT (2013) 55 SOT 566 (Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing-Arm’s length price-Comparable by TPO was not proper hence adjustment was deleted.
Assessee-company engaged in business of software development services and information technology enabled services (ITES) entered into an international transactions with its associated enterprise.TPO made transfer pricing adjustment by selecting certain comparable companies. Since comparables selected by TPO were super profit making companies and functionally different as they were not in same line of business as that of assessee, and, there were many other significant differences in companies selected by TPO, same were to be excluded from list of comparables for purpose of making transfer pricing adjustment. In favour of assessee. (A.Y.2006-07)
Google India (P.) Ltd. v. Dy.CIT (2013) 55 SOT 489 (Bang.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing - Arm’s length price – Comparables-Adjustments cannot be made without giving an opportunity. (S. 133(6)).
Tribunal held that where Assessing Officer in exercise of power under section 133(6) obtained information from comparables and on basis of said information made adjustment to assessee's ALP without obtaining objections from assessee, said adjustment was to be set aside and, matter was to be remanded back for disposal afresh. (A.Y. 2007-08)
Headstrong Services India (P.) Ltd. v ACIT (2013)55 SOT 481 (Delhi) (Trib.)

S.92C: Avoidance of tax-Transfer pricing - Arm’s length price –Matter set aside.
Assessee is required to support its claim for any adjustment with robust data and full details and evidences and burden of proof is on it whenever it makes such a claim. Assessee-company was a 100 per cent subsidiary of a US based company. It was registered under Software Technology Park Scheme of Government of India and was primarily engaged in software development for its parent company. It entered into international transactions with its associate enterprise - It also entered into direct contracts with domestic customers. For purpose of computing arm's length price, it adopted transactional net margin method and relied upon internal comparables.TPO rejected internal comparables on ground that internal uncontrolled transactions were just 1.4 per cent of total revenue earned by assessee and hence comparison with such transactions would not provide meaningful benchmarking.He also rejected some other claims of assessee and computed arm's length price at a margin of 16.3 per cent being arithmetic mean of final set of four comparables. since

assessee had uncontrolled comparables transactions with third parties in export segment to tune of 15 per cent of total turnover and had uncontrolled transactions with third parties in domestic sector to tune of 10 per cent of total turnover, domestic uncontrolled transactions were significant part of total turnover of assessee. In case domestic uncontrolled transactions were functionally comparable, same could be used for benchmarking.therefore, matter required to be sent back to TPO to consider internal comparables given by assessee and arrive at fresh decision. Matter remanded. Tribunal held that It cannot be laid down as a proposition that transfer pricing adjustment could not exceed total profits earned by group. Assessee as well as revenue authorities are bound to determine ALP by applying law and rules laid down and cannot be guided by extraneous parameters, any claim for adjustment on basis of risk or any other factors has to be based on proper data and sound calculation and ad hoc adjustments should not be granted. Where material available with TPO in current year is vastly different to material available with TPO in earlier year, principle of consistency does not hold water(A.Y.2006-07, 2007-08)

Interra Information Technologies (India) (P.) Ltd. v Dy.CIT (2013) 55 SOT 585 (Delhi) (Trib.)

S.92C: Avoidance of tax-Transfer pricing - Arm's length price - TNM Method –Matter remanded.

Assessee had provided software development services to its overseas enterprise.It had applied TNMM and in comparison with profits earned by comparables, assessee had benchmarked itself. As it had lost a major contract during year it claimed idle capacity cost so as to justify profits earned by it. TPO disallowed said claim and on basis of operating profit margin of comparables, fixed arm's length margin at 11.96 per cent. However, Commissioner (Appeals) shifted method to profit split method and changed tested party and considered profit margin of 6 per cent as appropriate - No reason for adopting arm's length margin at 11.96 per cent was assigned by TPO. Further even Commissioner (Appeals) had accepted only profit making AEs, and arbitrarily fixed margin at 6 per cent. Neither TPO's order could be considered as appropriate nor order of Commissioner (Appeals), and, therefore, issue was to be restored for reconsideration. Matter remanded. (A.Y. 2004-05)

SITEL India (P.) Ltd. v. ACIT (2013) 55 SOT 541 (Mum.) (Trib.)

S.92C:Avoidance of tax-Transfer pricing-Arm's length price-Resale Price Method –Adjustment held to be not justified.

Assessee-company is engaged in business of distribution of telecom equipment, logic analysers and other test and measurement equipment on behalf of its Associated Enterprise (AE).Besides, if any customer in India wanted to purchase equipment directly from AE, assessee acted as intermediary and derived commission income for services rendered. In transfer pricing proceedings, TPO asked for segmental data of trading activity and commission agency activity separately and thereafter worked out margin in both activities and arrived at adjustment. It was noted that by applying resale price method (RPM), GP as percentage of sales in case of comparables selected by TPO was 12.90 per cent whereas GP as percentage of sales in case of assessee was much higher at 35.60 per cent. Tribunal held that in view of above, impugned adjustment made to ALP determined by assessee was not sustainable. In favour of assessee. (A.Y.2006-07)

Textronix India (P.) Ltd. v Dy. CIT (2013) 55 SOT 512(Bang.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing -Arm's length price - Comparables and adjustments –Value of International transaction and not entire turnover.

Tribunal held that whatever be method followed or adopted for arriving at ALP, ALP can only be determined on value of international transactions alone and not on entire turnover of assessee at entity level. In favour of assessee. (A.Y.2007-08)

Thyssen Krupp Industries India (P.) Ltd. v ACIT (2013) 55 SOT 497(Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing -Arm's length price - Comparables and adjustments –

Tribunal held that so long as expenditure or payment has been demonstrated to have incurred or laid out for purpose of business, it is no concern of TPO to disallow same on any extraneous reasoning - Held, yes - Whether TPO cannot determine ALP at nil as jurisdiction provided to him is to determine ALP of transactions under methods provided under the Act. In favour of assessee. (A.Y.2007-08)

Thyssen Krupp Industries India (P.) Ltd. v ACIT (2013) 55 SOT 497(Mum.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing - Arm's length price - Comparables and adjustments – liquidated damages-

Assessee made payment to its AE on account of liquidated damages paid by AE to a third party. TPO determined arm's length price at nil and made adjustment. Question as to whether liquidated damages were to be paid by assessee or not was outside purview of TP provisions as that was a business decision taken by assessee, as far as TP provisions were concerned, since assessee reimbursed exact amount which was recovered by third party, no adjustment could be made. In favour of assessee(A.Y.2007-08)

Thyssen Krupp Industries India (P.) Ltd. v ACIT (2013) 55 SOT 497(Mum.) (Trib.)

S.92C: Avoidance of tax - Transfer Pricing - The "Bright Line test" can be applied to determine whether AMP expenses incurred by assessee are excessive andfor the benefit of the brand owner- Adjustment in relation to advertisement, marketing, and sale promotion expenses incurred by assessee for creating or improving, marketing intangible for and on behalf offoreign AE is permissible. Expenses in connection with sales which do not lead to brand promotion cannot be brought within ambit of 'advertisement, marketing and promotion expenses'. Correct approach under TNMM is to consider operating profit from each international transaction in relation to total cost or sales or capital employed etc. of such international transactionand not net profit, total costs sales, capital employed of assessee as a whole on entity level.(S. 92B, Rule10A, 10B)

L.G. Electronics Inc, a Korean company, set up a wholly owned subsidiary in India (the assessee) to which it provided technical assistance. The assessee agreed to pay royalty at the rate of 1% as consideration for the use of technical know-how etc. The Korean company also permitted the assessee to use its brand name and trade marks to products manufactured in India on a royalty-free basis. The AO, TPO & DRP held that as the Advertising, Marketing and Promotion ("AMP expenses") expenses incurred by the assessee were 3.85% of its sales and such percentage was higher than the expenses incurred by comparable companies (Videocon & Whirlpool), the assessee was promoting the LG brand owned by its foreign AE and hence should have been adequately compensated by the foreign AE. Applying the Bright Line Test, it was held that the expenses up to 1.39% of the sales should be considered as having been incurred for the assessee's own business and the remaining part which is in excess of such percentage on brand promotion of the foreign AE. The excess, after adding a markup of 13%, was computed at Rs. 182 crores. On appeal by the assessee, the Special Bench had to consider the following issues: (i) whether the TPO had jurisdiction to process an international transaction in the absence of any reference made to him by the AO? (ii) whether in the absence of any verbal or written agreement between the assessee and the AE for promoting the brand, there can be said to be a "transaction"? (iii) whether a distinction can be made between the "economic ownership" and "legal ownership" of a brand and the expenses for the former cannot be treated as being for the benefit of the owner? (iv) whether such a "transaction", if any, can be treated as an "international transaction"? (v) whether the "Bright Line Test" which is a part of U. S. legislation can be applied for making the transfer pricing adjustment? (vi) whether as the entire AMP expenses were deductible u/s 37(1) despite benefit to the brand owner, a transfer pricing adjustment so as to disallow the said expenditure could be made? (vii) what are the factors to be considered while choosing the comparable cases & determining the cost/value of the international transaction of AMP expenses? (viii) whether, if as per TNMM, the assessee's profit is found to be as good as the comparables, a separate adjustment for AMP expenses can still be made? (ix) whether the verdict in Maruti Suzuki India Ltd. v Add. CIT/Transfer Pricing Officer(2010) 328 ITR 210 (Del) has been over-ruled/ merged into the order of the Supreme Court so as to cease to have binding effect?

By the Majority (Hari Om Marathe, JM, dissenting)

(i) Though s. 92CA (2A), inserted w.e.f. 1.6.2011, which permits the AO to consider international transactions not specifically referred to him does not apply as the TPO's order was passed before that date, sub-sec (2B) to s. 92CA inserted by the Finance Act 2012 w.r.e.f. 1.6.2002 (which provides that the TPO can consider an international transaction if the assessee has not furnished the s. 92E report) cures the defect in the otherwise invalid jurisdiction at the time of its original exercise. The assessee's argument that jurisdiction has to be tested on the basis of the law existing at the time of assuming jurisdiction and that s. 92CA (2B) cannot regularize the otherwise invalid action of the TPO is farfetched and not acceptable because it will render s. 92CA(2B) redundant. The argument that s. 92CA(2B) should be confined only to such transactions which the assessee perceives as international transactions but fails to report is also not acceptable;

(ii) The assessee's contention that in the absence of any mutual agreement between the assessee and its foreign AE, there is no "transaction" is not acceptable in view of the definition of that term in s. 92F(v) which includes an "arrangement or understanding". An informal or oral agreement, which is latent, can be inferred from the attending facts and circumstances and the conduct of the parties. As long as there exists some sort of understanding between two AEs on a particular point, the same shall have to be considered as a "transaction", whether or not it has been reduced to writing. However, the department's contention that the mere fact that the assessee spent proportionately higher amount on advertisement in comparison with other entities shows an understanding is also not acceptable. On facts, as it was seen that the assessee not only promoted its name and products through advertisements, but also the foreign brand simultaneously, and the fact that the assessee's AMP expenses were proportionately much higher than those incurred by other comparable cases, lent due credence to the inference of the transaction between the assessee and the foreign AE for creating marketing intangible on behalf of the latter;

(iii) The assessee's contention that a distinction should be made between the "economic ownership" of a brand and its "legal ownership" and that AMP expenses towards the "economic ownership" of the brand, which are routine in nature, cannot be allocated as being for the benefit of the brand owner is not acceptable as it will lead to incongruous results. While the concept of economic ownership of a brand is relevant in a commercial sense, it is not recognized for the purposes of the Act;

(iv) The assessee's argument that there is no "international transaction" is not acceptable because the definition of that term in s. 92B(1) is inclusive. Under clause (i) of the Explanation to s. 92B, a transaction of brand building is in the nature of "provision of service" by the assessee to the AE. Clause (ii) of the Explanation defines "intangible property" to include "marketing related intangible assets, such as, trademarks, trade names, brand names, logos". Consequently, brand building is a "provision of service". The fact that no consideration is paid by the foreign AE is irrelevant;

(v) While a provision from a foreign legislation cannot be imported into the Indian legislation, there is an inherent fallacy in the assessee's argument that the bright line test cannot be adopted to determine the ALP of the international transaction as it is not one of the recognized methods u/s 92C. The bright line test is a way of finding out the cost/value of the international transaction, which is the first variable under the TP provisions and not the second variable, being the ALP of the international transaction. Bright line is a line drawn within the overall amount of AMP expense. The amount on one side of the bright line is the amount of AMP expense incurred for normal business of the assessee and the remaining amount on the other side is the cost/value of the international transaction representing the amount of AMP expense incurred for and on behalf of the foreign AE towards creating or maintaining its marketing intangible. If the assessee fails to give any basis for drawing this line by not supplying the cost/value of the international transaction, and further by not showing any other more cogent way of determining the cost/value of such international transaction, then the onus comes upon the TPO to find out the cost/value of such international transaction in some rational manner. On facts, the cost/value of the international transaction was determined at Rs. 161.21 crore while its ALP (after the 13% markup) was Rs. 182.71 crore. The assessee was not entitled to claim a deduction for Rs. 161.21 crore and it was liable to be taxed on the markup of Rs. 21.50 crore;

(vi) The assessee's contention that once the entire AMP expense is found to be deductible u/s 37(1), then, no part of it can be attributed to the brand building for the foreign AE notwithstanding the fact that the foreign AE also got benefited out of such expense is not acceptable because the whole purpose of transfer pricing is to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India in the case of multinational enterprises. The TP provisions prevail over the general provisions. The exercise of separating the amount spent by the assessee in relation to international transaction of building brand for its foreign AE for separately processing as per s. 92 cannot be considered as a case of disallowance of AMP expenses u/s 37(1)/ 40A(2). s. 37(1)/40A(2) & s. 92 operate in different fields;

(vii) In principle, it is necessary that properly comparable cases should be chosen before making comparison of the AMP expenses incurred by them. However, the argument that only such comparable cases should be chosen as are using the foreign brand is not acceptable. The correct way to make a meaningful comparison is to choose comparable domestic cases not using any foreign brand. Also, several factors have to be considered for determining the cost/value of the international transaction of brand/logo promotion through AMP expenses (14 illustrative issues set out). On facts, the TPO restricted the comparable cases to only two without discussing as to how other cases cited by the assessee were not comparable. Also, a bald comparison with the ratio of AMP expenses to sales of the comparable cases without giving effect to the relevant factors cannot produce correct result (matter remanded);

(viii) There is a basic fallacy in the assessee's contention that if the TNMM is adopted and the net profit is at ALP, there is no scope for making an adjustment for AMP expenses. TNMM is applied only on a transactional level and not on entity level though it can be correctly applied on entity level if all the international transactions are of sale by the assessee to its foreign AE and there is no other transaction of sale to any outsider and also there is no other international transaction. Where there are unrelated international transactions, it is wrong to apply TNMM at an entity level. Further, even assuming that in applying the TNMM on entity level for the transaction of import of raw material the overall net profit is better than other comparables, an adjustment can still be made by subjecting the AMP expenses to the TP provisions. There is no bar on the power of the TPO in processing all international transactions under the TP provisions even when the overall net profit earned by the assessee is better than others. Earning an overall higher profit rate in comparison with other comparable cases cannot be considered as a licence to the assessee to record other expenses in international transactions without considering the benefit, service or facility out of such expenses at arm's length. All the transactions are to be separately viewed. Also, the contention fails if any of the other methods (CUP etc.) are adopted instead of TNMM;

(ix) Maruti Suzuki 328 ITR 210 (Del) lays down the law that (a) brand promotion expenses are an "international transaction", (b) AMP expenses incurred by a domestic entity which is an AE of a foreign entity are required to be compensated by the foreign entity in respect of the brand building advantage obtained by it & (c) the factors required to be considered by the TPO. This verdict has not be overruled by the Supreme Court except to the extent those directions were given to the TPO to proceed in a particular manner. The verdict has also not merged into that of the Supreme Court because the principles of law laid down by the High Court have not at all been considered and decided by the Supreme Court. Consequently, the law laid down therein continues to have binding force.

Per Hari Om Maratha, JM (dissenting):

(i) Before making any transfer pricing adjustments, it is a pre-condition that there must exist an 'international transaction' between the assessee and its foreign AE. The Department has proceeded on a presumption that because the AMP expenses are supposedly higher than that incurred by other entities, there is an 'international transaction' discernible and a part of these expenses have to be treated towards building of the LG Brand owned by the foreign AE. It is not permissible to proceed on such presumption in the absence of a written agreement or evidence to suggest any oral agreement between the parties;

(ii) Further, the assessee had not paid any 'brand-royalty' to the foreign AE though it got the benefit of the brand and earned revenue there from which has been taxed. The AMP expenses have been paid to an unrelated entity in India which has in turn paid tax thereon. As there is no shifting of income to a different jurisdiction, neither Chapter X nor the bright line method has any application;

(iii) Also, the concept of commercial ownership of a brand is a reality in modern global business realm and it is as good as a legal ownership in so far as its effects on sale of products in India are concerned. Any advertisement which is product-centric and even entirely brand-centric will only enhance the sales of the products of that brand in India. In no way is the brand owner benefited. Consequently, the AMP expenses are not a case of brand-building/ promotion and no 'covert transaction' between the Indian entity and its foreign AE can be presumed or inferred. The Revenue has no power to re-characterize the AMP expenditure as routine and non-routine expenditure;

(iv) MarutiSuziki India Ltd v. Add. CIT /Transfer Pricing Officer (2010) 328 ITR 210 (Del) cannot be regarded as a binding precedent after the verdict of the Supreme Court in Maruti Suzuki India Ltd. v Add. CIT (2011) 335 ITR 121 (SC). The fact that a reference was made to the Special Bench itself shows that because a covered issue cannot be referred to a Special Bench. (A. Y. 2007-2008)

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

S.92C: Avoidance of tax- Transfer pricing –Computation of Arm's Length Price – Sale Price realized from AE much higher than ALP fixed by TPO – No recommendation by TPO for adjustment – AOis not required to make any adjustment. (S.10B(7), 80IA (10)

The Assessee is engaged in sale and export of pasteurized crab meat. The Assessee enteredin tointernational transactions with its associated enterpriseand showed sale price at Rs 24 Crores. TPOon reference made by the Assessing Officer, fixed arm's length price of goods at Rs 18 Crores. Assessing Officer opined that receipts of the assessee from sales to AE were in excess of arm's length price and such excess was nothing but income from other sources.TheAssessing Officer relying on provisions of section 10B(7) read withsection 80IA (8) and 80(IA) (10) added excessive receipts to income of assessee. Onappeal Commissioner (Appeals) deleted the addition. On appeal by revenue, the Tribunal held that, where sale price realised from AE was much higher than ALP fixed by TPO and there was no recommendation by TPO for making any adjustment, Assessing Officer was not at all required to make any adjustment in ALP. Accordingly the appeal of revenuewasdismissed. (A.Y. 2007-08)

ACIT v. Handy Waterbase India (P.) Ltd. (2013) 140 ITD 112 (Chennai) (Trib.)

S.92C: Avoidance of tax- Transfer pricing- Computation of ALP – Assessing officer deducted from operating cost, only material cost relatable to purchases from AEs – Not from Non AE's – Computation of ALP of purchases from non-AEs erroneous - Matter remanded back

Assessee, engaged in auto components manufacturing and sale, had international transactions with four Associated Enterprises (AEs). International transactions comprised of import of raw materials, import of machinery and payment for royalty and technical assistance. The Assessing officer divided total operating cost betweenmaterial cost relatable to AEs and cost relatable to non-AEs, which included both material cost as well as other costs. Thus, Assessing officer deducted from operating cost, only material cost relatable to purchases from AEs and not operating cost attributable to such material cost. It was held that if along withmaterial cost paid to AEs, operational cost attributable to such cost was also considered, then amount considered by TPO as ALP of AE purchases, would have gone up significantly, and hence work out of ALP of purchases from non-AEs had been erroneously done. Matter remanded back (A.Y. 2007-08)

SL Lumax Ltd. v. ACIT (2013) 140 ITD 158 (Chennai) (Trib.)

S.92C:Avoidance of tax- Transfer pricing – Computation of ALP – Similar transactions with AE for subsequent years accepted by TPO without any ALP adjustment – TP analysis be considered as ALP.

Where similar transactions with associated enterprises for subsequent years have been accepted by TPO without any ALP adjustment, he should adopt TP analysis conducted by assessee for relevant assessment year also to be at ALP. Revenue could not be permitted to take a different approachin the relevant assessment year. Matter Remanded back. (A.Y. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.) (Trib.)

S.92C: Avoidance of tax- Transfer pricing--Arm's length price—Secret information not be used against the assessee without giving an opportunity.-Matter remanded. (S.133(6))

Information relied upon by Transfer Pricing Officerisnot available in public domain. Secret information not to be used against the assessee. No uniformity in rejection of assessee's comparables and selection of comparables by Transfer Pricing Officer. Proper and appropriate functions, assets and risk analysis required to be done. Transfer Pricing Officer and Dispute Resolution Panel to deal with assessee's objections and discuss them in order. Matter remanded. (A. Y.2006-2007)

Wills Processing Services (India) P. Ltd. v. Dy. CIT [2013] 21 ITR 1/151 TTJ 555(Mum.) (Trib.)

S.92C:Avoidance of tax- Transfer pricing: Turnover filter must be applied to exclude giant companies from comparison.

The assessee, a provider of software development services, claimed that in determining the ALP under TNMM, Infosys Technologies & Wipro were not comparable entities given their extreme large turnover in comparison to that of the assessee. To oppose this, the Department relied on Capgemini India (ITAT Mum) where it was held that the concept of economy of scale was not applicable to service oriented companies and that the turnover filter could not be applied to exclude companies with an extremely large turnover. HELD by the Tribunal:

Though in Capgemini it was held that the concept of economy of scale is relevant only for manufacturing concerns, which have high fixed assets, and not for service concerns and that the turnover filter cannot be applied to exclude companies with an extremely large turnover from comparison, a contrary view has been taken in Dy. CIT v. Deloitte Consulting India (P) Ltd. (2012) 145 TTJ 589 (Hyd) that "giant" companies like Wipro are not at all comparable with smaller "pygmy" companies. Consequently, giant companies line Wipro and Infosys cannot be taken as comparables as their turnover is multiple numbers of times higher compared to that of the assessee and the TPO erred in considering their PLI to arrive at the arithmetic mean. (A. Y. 2008-2009)

Patni Telecom Solutions Pvt. Ltd. v.CIT(Hyd) (Trib.).itatonline.org

S.92C:Avoidance of tax-Transfer pricing-Business advances- Even business advances have to be benchmarked on Libor ALP.

The assessee, an Indian company, gave loans of Rs. 15.65 crores to its AEs in USA, Singapore and Bahrain. It claimed that the said loans were "working capital advances" given for commercial consideration to secure business and that no interest was recoverable on it. The TPO applied the CUP method and determined the ALP of the advances at LIBOR plus 3% mark up. The DRP held that only inbound loans (ECBs) taken by the Indian entities from outside India could be benchmarked with LIBOR and that outbound loans had to be benchmarked on the interest rate prevailing in India on corporate bonds. It treated the advance as an unrated bond having very high risk and enhanced the assessment by directing the TPO to adopt 14% as the ALP rate. On appeal by the assessee, HELD reversing the DRP:

The assessee's argument that the non-charging of interest on the working capital advances to AEs from whom the assessee was getting good business was justified by commercial considerations and that no transfer pricing adjustment is warranted is not acceptable because the existence or non-existence of commercial consideration between the assessee and the AEs is not a required condition for applicability of the TP regulations Further, the advance was not the credit period extended to the AEs in respect of business transactions but was a transaction of advancing loans to the AEs which falls under the ambit of "international transaction" u/s 92B. In principle, the DRP is justified in its view that the ALP should be determined on the basis of the interest rate that would have been earned by the assessee by advancing loans to an unrelated third party (in India) such as a Fixed Deposit with the Bank. However, since LIBOR has been accepted by the Tribunal in other cases, the ALP should be determined on the basis of LIBOR + 2% (Siva Industries & Holding Ltd.v. ACIT (2011) 59 DTR 182 (Che), Dy. CIT Tech Mahindra Ltd. (2011) 46 SOT 141 (Mum) &Tata Autocomp Systems 73 DTR 220 (Mum) referred). (A. Y. 2007-08)

Aurionpro Solutions Ltd v. ACIT (Mum). (Trib.) www.itatonline.org
S.92C:Avoidance of tax-Transfer pricing: Scope of +/- 5% tolerance adjustment to ALP explained.

The Special Bench was constituted to consider whether prior to the insertion of the second proviso to s. 92C(2), the benefit of 5% tolerance margin as prescribed under proviso to s. 92C(2) for the purposes of determining the arm's length price of an international transaction is allowable as a standard deduction in all cases, or is allowable only if the difference is less than 5%. In the meanwhile the second proviso to s. 92C(2) was amended by the Finance Act, 2012 with retrospective effect from 1.4.2002. The assessee claimed, relying on Piagio Vehicle P. Ltd. vs. DCIT that even after the retrospective amendment by the Finance Act, 2012, it was entitled to the benefit of adjustment of +/- 5% variation while computing the ALP. It was also argued that the amendment was unconstitutional. HELD by the Special Bench:
There was a controversy on whether +/- 5% tolerance adjustment was a standard deduction or not. After the retrospective amendment to the second proviso to s. 92C by the Finance Act, 2012 with retrospective effect from 1.4.2002, it is evident that if the variation between the arm's length price and the price at which international transaction was actually undertaken does not exceed the specified percentage, then only the price at which the international transaction has actually been undertaken shall be deemed to be arm's length price. Thus, the benefit of tolerance margin would be available only if the variation is within the tolerance margin. Once the variation exceeded the tolerance margin, then there would be no benefit even up to tolerance margin. Then, the ALP as worked out under s. 92C(1) shall be taken as ALP without any benefit of tolerance margin. The view taken in Piagio Vehicle was without considering the amendment and is per incuriam and not good law. The challenge to the constitutional validity of the retrospective amendment cannot be made before the Tribunal as it is a creation of the Act and not a constitutional authority. (A. Y. 2006-07)

IHGITServices(India)Pvt.Ltd.v.ITO(SB) (Delhi(Delhi) (Trib.)itatonline.org
S.92C:Avoidance of tax-Transfer pricing: Foreign AE cannot be the tested party. TP additions can exceed overall group profits.

The Tribunal had to consider the following important transfer pricing issues: (i) whether the foreign AE can be taken as the tested party & if the sale price received by the foreign AEs from the services ultimately sold to customers is equal to that charged by the assessee from its AEs, it would show that the international transaction between the assessee and the AEs is at ALP? (ii) whether the transfer pricing additions can result in the overall profit of the group of AEs being breached? & (iii) whether if the assessee has consistently followed a method for determination of the ALP and the same has been accepted by the TPO in the past, he cannot reject that method for the current year? HELD by the Tribunal:

(i) The argument that the foreign AE should be selected as the tested party and the profit earned by the foreign AE from outside comparables should be compared with the price charged by the assessee from the AE to determine whether they are at ALP is not acceptable because under the scheme of s. 92C, the profit actually realized by the Indian assessee from the transaction with its foreign AE has to be compared with that of the comparables. There is no question of substituting the profit realized by the Indian enterprise from its foreign AE with the profit realized by the foreign AE from the ultimate customers for the purposes of determining the ALP of the international transaction of the Indian enterprise with its foreign AE. The scope of TP adjustment under the Indian taxation law is limited to transaction between the assessee and its foreign AE. The contention that the profit earned by the foreign AE should be substituted for the profit of the comparables is patently unacceptable. The fact that this may be permissible under the US and UK transfer pricing regulations is irrelevant;
(ii) The contention of the assessee that the authorities cannot go beyond the overall profit of the group of AEs in determining the ALP of the international transaction is also not acceptable because it will constitute a new method/ yardstick for determining the ALP. The transfer pricing adjustments made in India may result in the overall profit earned by all the AEs taken as one unit being breached;
(iii) The contention that as the assessee consistently followed the same method for determination of the ALP and it was accepted by the TPO in the past, he cannot take a different view is not acceptable. A delicate balance needs to be maintained between the principle of consistency and the rule of res judicata. There is no estoppel against the provisions of the Act. As the method employed by the assessee for determining the ALP is contrary to the statutory provisions, the inadvertent acceptance of the wrong method by the TPO in an earlier year does not grant a license to the assessee to continue calculating the

ALP in the grossly erroneous manner in perpetuity. It needs to be discontinued forthwith. (A. Y. 2006-07)

Onward Technologies Ltd v.Dy.CIT (Mum.)(Trib.).www.itatonline.org

S.92C:Avoidance of tax-Transfer Pricing: Important principles on "turnover filter" & comparison explained.

The Tribunal had to consider the following important transfer pricing issues: (i) whether a one-time and extraordinary item of expenditure (ESOP cost) debited to the assessee's P&L A/c has to be excluded while comparing the margins, (ii) whether for the purpose of comparison of margins, the consolidated results of comparables having profit from different overseas markets can be considered? (iii) whether extreme profit and loss cases should be excluded or in case extreme profit cases are included, the case of losses should also be included? (iv) whether a turnover filter can be adopted to exclude companies with extremely high turnover? (v) whether the assessee can seek to exclude its own comparables? (vi) whether an adjustment for working capital is permissible? (vii) whether if the assessee can show that because the AE is in a high tax jurisdiction and that there is no transfer of profit to a low tax jurisdiction, a transfer pricing adjustment need not be made? HELD by the Tribunal:

(i) A comparison of margin between the assessee and the comparables has to be made under identical conditions. As the comparables had not claimed any extraordinary item of expenditure on account of ESOP cost, for the purpose of making proper comparison of the margin, onetime ESOP cost incurred by the assessee has to be excluded. There is nothing in the Rules that prohibits adjustment in the margin of the assessee to remove impact of any extraordinary factors (Skoda Auto India(P) Ltd. v. ACIT (2009) 30 SOT 319 (Pune), Demag Cranes & Components (India) (P) Ltd. (2012) 49 SOT 610 (Pune), Transwitch, Toyota Kirloskar Motors followed);

(ii) Under Rule 10B(2) (d), the comparability of transactions has to be considered after taking into account the prevailing market conditions including geographical locations, size of market and cost of capital and labour etc. Therefore, consolidated results which include profit from different overseas jurisdictions having different geographical and marketing conditions will not be comparable. Only standalone results should be adopted for the purpose of comparison of margins (American Express followed);

(iii) Comparable cases cannot be rejected only on the ground of extremely high profit or loss. In case the companies satisfy the comparability criteria, and do not involve any abnormal business conditions, the same cannot be rejected only on the ground of loss or high profit. The OECD guidelines also provide that loss making uncontrolled transactions should be further investigated and it should be rejected only when the loss does not reflect the normal business conditions;

(iva) In certain Tribunal decisions, various reasons have been given for applying the turnover filter for comparison of margins such as economy of scale, greater bargaining power, more skilled employees and higher risk taking capabilities in cases of high turnover companies, which increase the margins with rise in turnover. However, in these decisions, no detailed examination has been made as to how these factors increase the profitability with rising turnover. The concept of economy of scale is relevant to manufacturing concerns, which have high fixed assets and, therefore, with the rise in volume, cost per unit of the product decreases, which is the reason of increase in margin as scale of operations goes up because with the same fixed cost there is more output when the turnover is high. The same is not true in case of service companies, which do not require high fixed assets. In these cases employees are the main assets, who in the case of the assessee are software engineers, who are recruited from project to project depending upon the requirement. The revenue in these cases is directly related to manpower utilized. With rise in volume cost goes up proportionately. Therefore, the concept of economy of scale cannot be applied to service oriented companies. On facts, it is shown by the department that in the case of the comparables selected by the assessee, there is no linear relationship between margin and turnover and that that the margin has come down with the rise in turnover in some cases. Such detailed study was not available before the various Benches of the Tribunal which have applied the turnover filter and consequently those decisions cannot be followed;

(ivb) Under Rule 10B(2), comparability of international transactions with uncontrolled transactions has to be judged with reference to functions performed, asset employed and risk assumed. The functions performed by all comparable companies are same as it is because of same functions they have been selected by the assessee as comparables. The asset employed has two dimensions i.e. quantity and quality. More employees would mean more turnover, but there is no linear relationship between margin and turnover. As regards quality of employees, this will depend upon the nature of projects and since the comparables are operating in the same field having similar nature of work, and employee cost being more in case of more skilled manpower, it will not have much impact on the margins. As for the bargaining power, the assessee is part of a multinational group and well established in the field and, therefore, it cannot be accepted that it has less bargaining power than any of the Indian Companies, however big it may be. Therefore, it would not be appropriate to apply turnover filter for the purpose of comparison of margins. However, for the purpose of comparison, the turnover would be relevant only from the limited purpose to ensure that the comparable selected is an established player capable of executing all types of work relating to software development as the assessee is also an established company in the field (Genesis Integrating Systemnot followed);

(v) The assessee had selected Infosys and Wipro as comparables on the basis of its own transfer pricing study after being fully aware of its work profile. The assessee raised no plea either before the TPO or DRP for excluding these comparables though it had added some more comparables. The assessee, therefore, cannot raise any grievance before the Tribunal to exclude these comparables, without giving any cogent and convincing reason. The reasons given by the assessee (turnover filter) are not found convincing and so it cannot be permitted to exclude Infosys and Wipro (Kansai Nerolac Paint followed)

(vi) Working capital adjustments are required to be made because these do impact the profitability of the company. Rule 10B(2) (d) also provides that the comparability has to be judged with respect to various factors including the market conditions, geographical conditions, cost of labour and capital in the market. Accounts receivable/payable effect the cost of working capital. A company which has a substantial amount blocked with the debtors for a long period cannot be fully comparable to the case which is able to recover the debt promptly. The average of opening and closing balance in the account receivable/payable for the relevant year may be adopted which may broadly give the representative level of working capital over the year. Even if there is some difference with respect to the representative level, it will not affect the comparability as the same method will be applied to all cases. Working capital adjustment cannot be denied to the assessee only on the ground that the assessee had not made any claim in the TP study if it is possible to make such adjustment. Working capital adjustment will improve the comparability.

(vii) The argument that no adjustment need be made because the parent company is situated in US where tax rate is high and that there was no reason for the assessee to transfer profit to the parent company is not acceptable. The arm's length price of an international transaction has to be calculated with respect to similar transaction with an unrelated party as per the method prescribed and the revenue is not required to prove tax avoidance due to transfer of profit to lower tax jurisdiction. Arguments such as that the parent company was incurring loss or had shown lower margin are not relevant (Aztek Software & Technology Service Ltd. v. A CIT (2007)107 ITD 141 (SB) &24/7 Customers.com followed) (A. Y. 2007-08)

Capgemini India Private Limited v. ACIT (Mum) (Trib), www.itatonline.org

S.92C:Avoidance of tax-Transfer pricing –Arm's length – Adjustment for export-Cost of goods sold – Deduction of rebate/discount received.

Export incentives cannot be deducted from cost of goods sold in the transfer pricing analysis. Assessee entitled to deduct rebate received upon purchase of goods from the value of goods sold in transfer pricing analysis; issue of verification of netting off of rebate from cost of purchase was remitted to the AO. (A.Y. 2006-07)

Goodyear India Ltd. v. Dy. CIT (2013) 152 TTJ 458/ 83 DTR 233 (Delhi) (Trib.)

S. 92C : Avoidance of tax – Transfer pricing – Arm's length price – Export incentive cannot be deducted from cost of goods sold in the transfer pricing analysis

Tribunal held that while determining the gross profits from sale of goods incentives cannot be adjusted to determine the cost of goods sold and TPO has rightly held that export incentive cannot be deducted from cost of goods sold. (A. Y. 2006-07)

Goodyear India Ltd. vs. Dy. CIT (2013) 152 TTJ 458/83 DTR 233 (Delhi) (Trib.)

S.92C:Avoidance of tax – Transfer pricing – Arm's length price-Rebate on purchase of goods.

Assessee is entitled for deduction of rebate received upon purchase of goods from the value of goods sold in transfer pricing analysis. Tribunal held that in subsequent Asst. Years (2007-08 & 2008-09) the TPO has accepted that the rebate received upon purchase of goods is deductible form the value of cost of goods sold. Hence, assessee is entitled for deduction of rebate received upon purchase of goods from the value of goods sold. Matter remanded back to the file of Assessing Officer for factual verification. (A. Y. 2006-07)

Goodyear India Ltd. v. Dy. CIT (2013) 152 TTJ 458/83 DTR 233 (Delhi) (Trib.)

S.92C:Avoidance of tax-Transfer pricing – Arm's length price – Selection of comparables.

Assessee cannot be said to have charged any commission from 'E', a client, as it had entered into fixed fees arrangement with that company and, therefore, 'E' could not be considered as comparable, more so it was earning commission at 7% whereas, as per the industry policy media agencies earned commission of 2.5%. (A.Y. 2002-03)
Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 (Mum. (Trib.)

S.92C:Avoidancve of tax-Transfer pricing – Arm's length price – Adjustment for interest on credit period allowed to foreign company.
Since assessee did not charge any interest from any client, Indian or foreign, for the delay in payments for the services rendered, debit notes provided, no interest is to be charged for the credit period made available to the AE in the computation of the ALP. (A.Y. 2002-03)
Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263(Mum. (Trib.)
S.92C:Avoidance of tax-Transfer pricing –Arm's length price – CUP-. TNMM. (Rule. 10B(1) (a), 10B(1) (e) & 10B(2) (d))
In the absence of availability of exact data to compare the process of similar products supplied to AEs and non-AEs, CUP method cannot be applied as the most appropriate method for transfer pricing exercise; assessee having manufactured and exported wide variety of bathrobes to its AEs as well as non-AEs cannot be taken as CUP and, therefore, AO was justified in applying TNMM for benchmarking and not CUP method. (A.Y. 2005-06)
Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293/23 ITR 53 /56 SOT 444/153 TTJ 153(Mum. (Trib.)
S.92C:Avoidance of tax-Transfer pricing – Computation of arm's length price – Inclusion of DEPB benefit for computation of profit margin(Rule.10B(1) (e))
Once the DEPB benefit is taken into account in the comparable cases while working out their profit margin DEPB benefit received by the assessee during the year under consideration should also be considered as part of the turnover of the assessee for working out the profit margin to make the comparison of like to like and similar to similar. (A.Y. 2005-06)
Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293/23 ITR 53/56 SOT 444/153 TTJ 153(Mum.) (Trib.)
S.92CA: Avoidance of tax-Transfer pricing-Arm's length price-Powers-Reference to Transfer Pricing Officer valid-Assessing Officer need not consider objections of assessee-The Transfer Pricing Officeris not called upon to and is not competent to decide the issue which is sole jurisdiction of the Assessing Officer. (S.144C)
The assessee is engaged in the business of purchasing rough diamonds, manufacturing of polished diamonds and sale/export of such polished diamonds. During the assessment proceedings for the assessment year 2008-09, the Assessing Officer issued a notice under section 142 stating that on a perusal of the assessment records for the assessment year 2007-08, it was observed that the assessee had filed an audit report in the prescribed form as required under section 92E of the Act as there were international transactions with an associated concern, BG. The assessment proceedings for the assessment year 2007-08 were in progress. The audit report showed that during the previous year relevant to the assessment year 2008-09, the assessee had international transactions with the associated concern amounting to Rs. 78.63 crores. However, the record did not show that the assessee had filed the audit report under section 92E of the Act in the prescribed form. There was correspondence between the assessee and the Assessing Officer. The Assessing Officer referred the matter to the Transfer Pricing Officer. On a writ petition challenging the reference to the Transfer Pricing Officer and also the notice from the Transfer Pricing Officer,the Court dismissing the petition, held that,admittedly, between the assessee and the associated enterprise there was an international transaction in the preceding year and the assessee had admittedly filed a report under section 92E of the Act. In the current year also the assessee had entered into transactions worth Rs. 78.63 crores. In the affidavit-in-reply it was further stated that the assessee had made substantial purchases from the associated enterprise. The partners of the assessee were three brothers and their wives/sons together holding the entire partnership stake. The fourth brother along with his wife and his son controlled the entire shareholding of the associated enterprise, the fourth brother and his son being directors of the assessee. It was clear that both the entities were being controlled by the same family of four brothers and their close relatives. It was clear that the associated concern was closely related with the assessee and fell within the parameters of section 92A(2) (j), (k) and (m). Therefore, it was not necessary or appropriate to judge, in the present petition, whether there was any international transaction between the assessee and the associated enterprise during the previous year relevant to the assessment year 2008-09 and such issue must be left to be judged by the competent authority while framing the final assessment. (A.Y. 2008-2009)
Veer Gems v. ACIT (2013) 351 ITR 35(Guj.) (High Court)

S.92CA: Avoidance of tax- Transfer Pricing-Powers-No power to determine arm's length of transaction not referred to him-Provision empowering Transfer Pricing Officer to determine arm's length price of any international transaction other than that referred to him is prospective in operation.

The activity of the assessee is to provide connectivity to the host system by its computer programmes online. The assessee entered into international transactions with associated enterprises. The Assessing Officer referred only the international transactions mentioned in Form 3CEB but not the issue of advertisement, marketing and promotion expenses to the Transfer Pricing Officer. The Transfer Pricing Officer took upon himself the consideration of the question as to whether the advertisement, marketing and promotion expenditure was in the nature of an international transaction. Having concluded that it was an international transaction, he adjusted an amount of Rs. 32,92,83,589 attributable to the difference. On a question whether the Transfer Pricing Officer could have determined the arm's length price in respect of an international transaction which was not specifically referred to him by the Assessing Officer, the Tribunal took the view that the Transfer Pricing Officer could not have done so. On appeal by revenue the Court dismissing the appeal, held that(i) that it was not within the domain of the Transfer Pricing Officer to determine whether a particular transaction, which had come to his notice, but which had not been referred to him, was or was not an international transaction and then to go on and determine the arm's length price thereof.

(ii) That there is nothing in the statute to indicate that sub-section (2A) was introduced in section 92CA in a manner so as to operate with retrospective effect. Sub-section (2A) expands the jurisdiction of the Transfer Pricing Officer by empowering him to determine the arm's length price of any international transaction other than an international transaction referred to him by the Assessing Officer under sub-section (1) of section 92CA. This is clearly an expansion of the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) can only have prospective effect from June 1, 2011, and would have no application to the assessee's case which was in respect of the assessment year 2006-07.Order of Tribunal is affirmed. (A. Y.2006-2007)
CIT v. Amadeus India Pvt. Ltd. (2013) 351 ITR 92(Delhi) (High Court)

S.92CA: Avoidance of tax-Transfer pricing-Arm's length price-List of comparable companies relied on by assessee rejected by Transfer Pricing Officer without stating any reason. Factual matrix exactly the same in all years heldArm's length price adjustment is not justified.
The assessee-company provided computer system consultancy services to private sector, public sector, Government and other organisations, undertaking studies on matters relating to feasibility of computerisation, evaluating and selecting appropriate hardware and software, installing and assisting in using mainframe, mini and microcomputers, etc. For the assessment years 2003-04 and 2004-05, the question of determining the arm's length price of its international transactions with its associated enterprise was referred to the Transfer Pricing Officer under section 92CA(1) of the Act, The assessee filed a detailed transfer pricing study report in which it had adopted the transactional net margin method as the most appropriate method to arrive at the arm's length price. It had selected a list of 6 comparable companies and had determined arm's length price on the basis of the ratio of operating profit to total cost of the assessee-company worked out at 18.04 per cent., the average profit level indicator of the six companies. The Transfer Pricing Officer approved the transactional net margin method adopted by the assessee-company and agreed with the assessee-company's adoption of the ratio of operating profit to total cost as the profit level indicator. The Transfer Pricing Officer, however, made his list of comparable companies and worked out the ratio of operating profit to total cost at 27.52 per cent. This revised profit level indicator worked out by the Transfer Pricing Officer brought out an operating profit of Rs. 8.73 crores. But the operating profit returned by the assessee was Rs. 4.15 crores. The Assessing Officer made an addition of Rs.4.58 crores, the differential amount, to the income of the assessee towards arm's length price adjustment. On appeal, the Commissioner (Appeals) deleted the said arm's length price addition of Rs. 4.58 crores and directed the Assessing Officer to allow exemption under section 10A of the Act. The Commissioner (Appeals) also confirmed the disallowance of dividend tax delay charges, interest for delay in remitting tax deducted at source, expenses incurred for delay in UTI dividend payments, and directed the Assessing Officer to allow the claim of expenses towards development of software as allowable business expenditure. On appeals by the Department and cross-objections by the assessee ,the Tribunal held that (i) that the list of comparable companies relied upon by the assessee-company had been rejected by the Transfer Pricing Officer without stating any reason, even though the Transfer Pricing Officer had, by and large, agreed with the general premises on which the assessee had computed its arm's length price. The Transfer Pricing Officer had not made any finding that the price charged or paid in the transactions entered into with the associated enterprise was not in accordance with rules. The Transfer Pricing Officer had no case that the assessee-company had not maintained proper information and documentation relating to the international transactions. There was also no dispute on the information and data used in the computation of arm's length price, which related to the financial year 2002-03. The arbitrary selection of comparables had in fact inflated the operating profit in the computation made by the Transfer Pricing Officer. There was no factual basis for the addition of the differential amount of Rs. 4.58 crores worked out by the Transfer Pricing Officer and adopted by the Assessing Officer. Moreover, for the immediately succeeding assessment year 2004-05, the Commissioner (Appeals) had held in the assessee's own case that the Transfer Pricing Officer should not have rejected the arm's length price disclosed by the assessee and in the subsequent assessment year 2005-06, the

Transfer Pricing Officer himself had accepted the arm's length price returned by the assessee-company. For all these assessment years, the factual matrix of the case remained exactly the same. Therefore, the Commissioner (Appeals) was justified in deleting the arm's length price addition of Rs. 4.58 crores. (A.Y.:2003-2004, 2004-2005)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205(Chennai) (Trib.)

S.92CA: Avoidance of tax- Transfer pricing -Arm's length price-TNMM-CUP method-Matter sent back for getting comparable.
Assessee, shipping agent of French holding company and Singapore AE, received commission container control fees, detention collection fees, intermodal container handling fees. It also recovered communication expenses and insurance premium paid in course of service.TPO applied CUP method.TPO merely compared data with that of a third party agent of holding company which worked for it earlier and made adjustment in respect of so called undercharged container control fees and recovery of communication expenses. TPO had neither examined comparables nor TNMM for benchmarking ALP in relation to international transactions.In appeal Commissioner (Appeals) had not called for comment upon comparable short listed by assessee. Tribunal held thatCUP method and data of erstwhile third party could not be applied.However ,since there was no occasion to examine comparables and applicability of TNMM, matter was to be restored back to file of TPO, who would require assessee to furnish comparables into similar line of business and activities and examine same for benchmarking ALP. Matter partly in favour of assessee. (A. Y. 2005-06)
Dy. CITv.CMA CGM Global India (P.) Ltd. (2013) 55 SOT 20(Mum.) (Trib.)

S.92CA: Avoidance of tax-Transfer pricing-Arm's length price-CUP method-Matter remanded.
Assessee had procured green coffee beans from coffee planters and traders and sold same to one of its associated enterprises. It selected CUP method for determining arm's length price and relied on monthly prices quoted by Coffee Board. TPO found that transfer pricing documents did not contain details as to how CUP method was applied and price charged to AE was less than price charged by Coffee Board. Accordingly, he worked out ALP and made addition.The Tribunal held thatsince for earlier assessment year, Tribunal, on identical facts, had restored issue to TPO for fresh consideration, it would be appropriate to remand matter to TPO. Matter remanded. (A. Y. 2007-08)
Ecom Gill Cofee Trading (P.) Ltd.v.Dy. CIT. (2013) 55 SOT 23(URO) (Bang.) (Trib.)

S.92CA: Avoidance of tax- Transfer pricing -Arm's length price –Advance to AEs-Interest-Matter remanded.
Assessee gave advances to its AEs which were its wholly owned subsidiaries but charged no interest.Such issue was also raised in earlier years where assessee took plea of commercial expediency for not charging interest and while TPO sought to make TP adjustment at 14 per cent rate of interest based on LIBOR as reasonable rate under CUP method, Tribunal held that TP adjustment is possible only in cases where comparable uncontrolled transactions entered into between two enterprises are established. Tribunaldirected theAssessing Officer to followearlier years. Matter remanded. (A.Y.2006-07)
Wipro Ltd. v.Add. CIT v(2013) 55 SOT 3(URO) (Bang.) (Trib.)

S.92CA: Avoidance of tax –Transfer pricing-Arm's length price--Comparables--Reference to Transfer Pricing Officer-Commissioner (Appeals) deleting addition after considering revised Transfer Pricing Officer's remand proceedings- held to be Justified-
The assessee-companyis engaged in the business of international transportation and domestic pickup and delivery services.During the assessment year, the assessee entered into international transactions with its associated enterprises.The transactions were reported by the assessee in Form 3CEB which was filed along with the return. The Assessing Officer referred the case to the Transfer Pricing Officer for determining the arm's length price in respect of the international transactions entered into by the assessee. The Transfer Pricing Officer rejected the comparable uncontrolled price method adopted by the assessee. He held that the transactional net margin method was the appropriate method. Therefore, he made an upward adjustment of Rs. 9.35 crores of the international transactions of the assessee. The Commissioner (Appeals) considered that the Transfer Pricing Officer wrongly considered the entity-wise margin of one of the comparable companies for the purpose of benchmarking the assessee's margin under the transactional net margin method. The matter was referred to the Commissioner (TPO-II). He agreed with the assessee's contention and concluded that consistency needed to be followed while calculating the margins of comparables of the assessee. Considering this, the Commissioner (Appeals) deleted addition made by the Assessing Officer. On appealthe Tribunal held that(i) that once the Transfer Pricing Officer accepted and adjusted the computations on the basis of which the Commissioner (Appeals) deleted the addition there was no ground to interfere with the order of the Commissioner (Appeals), which was to be upheld. (A. Y. 2004-2005)
ACIT v. UPS Jetair Express P. Ltd. (2013) 21 ITR 82 (Mum.) (Trib.)

S.94(7):Avoidance of tax –Adventure in the nature of trade-Loss on units-Purchase of units of mutual funds and sale thereof after realization of dividend at aloss- Matter remanded to give finding in the course of business. (2(13))

The court held that ultimately the intention and the circumstances alone have to have a bearing on the question as to whether the transaction is only of investment or in the nature of trade. Disallowance of a claim on the ground that the transactions were for tax avoidance or evasion, could be considered only after the in-depth investigation and proper recording and marshaling of all relevant facts, so as to establish the motive of tax avoidance. Matter remanded for reconsideration. (A. Y. 2001-2002)

CIT v. Allu Arvind Babu (2013) 350 ITR 387/ 212 Taxman 260(Mad) (High Court)

S.94(7): Avoidance of tax – Transaction in securities –Loss on sale of mutual funds- Units purchased within a period of three months prior to record date - Sale made within a period of nine months from record date - Conditions in section 94(7) were cumulatively satisfied – Disallowance of short-term capital loss suffered by assessee justified.

Assessee purchased mutual fund units on 20-10-2005. The Record date in respect of mutual fund units was 20-1-2006.The assessee sold said mutual fund units at a loss on 6-2-2006. It was held that since units had been purchased within a period of three months prior to record date and, thereupon, their sale was made within a period of nine months from record date, relevant conditions mentioned in section 94(7) were cumulatively satisfied and, thus, revenue authorities were justified in disallowing short-term capital loss suffered by assessee. Matter decided in against the assessee. (A.Y. 2006-07)

Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.) (Trib.)

S.113:Tax – Block assessment - Search cases-Surcharge.

Surcharge, held, leviable at the rate of 15% on the block assessment made in respect of the search conducted on 29th August 1996 (A.Y. 1997-98), notwithstanding the fact that proviso to s. 113 was not in the existence at the time of search.

CIT v. D.D. Gears Ltd. (2013) 83 DTR88 (Delhi) (High Court)

S.113: Tax- Block assessment-Search and seizure-Surcharge-Rate of tax.

The amendment to section 113 came into effect from June 1, 2002. Although the search was on 12th and 13th October, 2000 the levy of surcharge on the tax quantified on the assessee`s undisclosed income was to be upheld.

ACIT v. Dwaraka Prasad Malpani (2013) 21 ITR 719 (Cochin) (Trib.)

S.115J:Company - Book profit – Change in method of charging depreciation – Book profit to be computed by allowing depreciation as per the changed method. (S.32)

Where the assessee had changed the method of accounting from Straight Line Method (SLM) to Written Down Value (WDV) method, book profit has to be computed by allowing depreciation as be the changed method.

CIT v. Hindustan Pipe Udyog Ltd. (2013) 81 DTR 175 (All.) (High Court)

S.115J:Company - Book profit –Revalued assets- Assessing officer not justified in disallowing depreciation on revalued figure while computing book profit under section 115 J of the Act.

The assessing officer was held not justified in disallowing depreciation on revalued figure while computing book profit under section 115 J of the Act. (A.Y. 1990 – 91)

CIT v. Rampur Distillery & Chemical Co. Ltd. (2013) 81 DTR 181 (All) (High Court)

S.115JB: Company-Book profit-Bank-Provision-Actuarial valuation-Cannot be added.

The Court held that provision is made on the basis of actuarial valuation it cannot besaid that the provision for gratuity is not ascertained liability hence cannot be added back while computing book profit under section 115JB.

DCIT v. Inox Leisure Ltd. (2013) 213 Taxman 260 (Guj.) (High court)

S.115JB: Company-Book profit-Bank-Profit and loss account-Not to be altered -Net interest earned by assessee from placement of funds with head office or other overseas branches is not covered by any of clauses (i) to (ix) of Explanation to section 115JA hence Includible in computing "book profit". Foreign bank whether governed by section 115JB-Contention raised for first time-Matter remanded. (S.115A)

For the purposes of section 115JA, the amount of net profit according to the profit and loss account is immune from alteration irrespective of whether the alteration is ventured by the Assessing Officer or the assessee. Just as the Assessing Officer has no authority to go beyond the profit and loss account prepared by the assessee and tinker with the figure of profit so disclosed, this is equally true for the assessee as well. Once an amount as shown to the credit side of the profit and loss account of the assessee and it is not covered by any of the clauses (i) to (ix) of the Explanation to section 115JA, it cannot be reduced.

Accordingly the Tribunal held that that the interest earned by the assessee from its head office or overseas branches was part and parcel of the credit side of the profit and loss account of the assessee. This amount was not covered by any of the clauses from (i) to (ix) of the Explanation. The net interest earned by the assessee from placement of funds with the head office or other overseas branches amounting was includible in computing the "book profit" for the purposes of section 115JA of the Act. Appeal of assessee was dismissed. Before the Tribunal for the first timeon the basis of Judgment of Tribunal in Krung Thai Bank PCL (2012) 49 SOT 70 (Mum) (URO) the assessee has raised the issuestating that the assessee being foreign bank is it is not required to draw its profit and loss account as per Companies Actvery applicability of provision of section 115JAis not valid. As the issue was raised for the first time the matter was directed to the Assessing Officer to decide accordance with law. **(**A.Y. 2000-2001) (1998-1999 to 2003-2004)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606(Mum.) (Trib.)

S.115JB:Company-Book profit-Computation-Provision for doubtful debts-is to be added in computation of book profits.

The assessee made provision for bad and doubtful debts which was not added to the profit and loss account for computing the book profits for the purpose of section 115JB of the Act. The Assessing Officer` held that provision for an unascertained liability as litigation was going on between the assessee and CCL over the power tariff and that provision for doubtful debts was covered by clause (i) of Explanation 1 to section 115JB which had been made effective by the Finance (No. 2) Act, 2009 retrospectively from April 1, 2001. The Commissioner (Appeals) also confirmed. On appeal to Tribunal the Tribunal held that in view of the insertion of clause (i) to Explanation 1 to section 115JBthe Assessing Officer had no choice to make additions to arrive at the book profits. Now where the assessee stated that it was a provision for unaccruedincome, appeals of the assessee was dismissed.(A. Y. 2005-2006 to 2007-2008)

Eastern India Powertech Ltd. v. Add. CIT (2013) 21 ITR 542 (Delhi) (Trib.)

S. 115JB: Company-Book profit – MAT – Unabsorbed depreciation – No carry forward loss - Not eligible to claim deduction of brought forward depreciation while computing book profit under section 115JB

It was held that in terms of clause (iii) of Explanation 1 to S. 115JB, while computing book profit, assessee is entitled to deduct amount of loss brought forward or unabsorbed depreciation whichever is less asper books of accounts. It was therefore held that where there was no carry forward loss as per books of account, assessee was not eligible to claim deduction of brought forward depreciation while computing book profit under section 115JB. (A.Y.2003-04)

Hotel Allied Trades (P.) Ltd. v. Dy.CIT (2013) 140 ITR 309 (Cochin) (Trib.)

S. 115JB: Company – Book Profit – Adjustments u/s. 115JB(2) explanation.

Assessing Officer cannot tinker with the accounts prepared under Companies Act and have been certified by the authorities except making adjustment as provided in explanation to section 115JB(2). (A. Y. 2004-05)

Forever Diamonds (P) Ltd. v. Dy. CIT (2013) 152 TTJ 682 (Mum.) (Trib.)

S115JB: Company-Book profit-Non-resident companies-Liable to book profit.

Provisions of section 115JB is not confined to a domestic company but it applies to both resident company and a non-resident company. In favour of revenue. (AAR no 1098 of 2011 dt 8-6-2012)

ZD, In re(2013) 212 Taxman 246 (AAR)

S.115VA: Shipping companies - Qualifying ships – Computation- Slot charter -Assessee is required to produce 'valid certificate in respect of such ships.

The assessee-shipping company was operating its own ships and had also chartered in ships under 'slot charter' (part of ship) agreement. In order to avail benefit of Chapter XII-G, the assessee submitted the 'valid certificate' only for its own ships and not in respect of chartered ships, as according to it 'valid certificate' was required only for own ship and ships chartered in fully and there was no requirement to submit the 'valid certificate' in respect of ships chartered under 'slot charter' agreement, since income for full chartered ships was computed on basis of 'net tonnage' shown in valid certificate and income from ships chartered under 'slot charter' was computed on deemed tonnage. The Assessing Officer did not accept said submission and denied the benefit of Chapter XII-G to slot charter income. On appeal, the Commissioner (Appeals) upheld the denial. On second appeal the Tribunal held that The benefit of provisions of Chapter XII-G can be availed only by a 'tonnage tax company' (shipping company) in respect of the business of operating 'Qualifying ships'. 'Operation of Qualifying ships' is a mandatory condition for availing the benefit of Chapter XII-G. Undoubtedly, the assessee opting to avail the benefit of Chapter XII-G has to necessarily show that it has generated income from the business of operation of 'Qualifying ships'. It is necessary to show that the ships chartered in under 'Slot Charter' arrangement are also 'Qualifying ships' by producing the 'Valid certificate'. The assessee heavily placed reliance on the provisions of section 115VG,'Deemed tonnage' defined in section 115VA and 'Specific shipping trades' defined in section 115VI and also on clause 10 of Form No. 66 to contend that there is no necessity to furnish the 'Valid certificate' in respect of ships chartered in under 'slot charter' arrangement. The net result of the said contention is that the ship chartered in under 'slot charter' arrangement need not be a 'Qualifying ship'. (A. Y. 2005-06 & 2008-09)

Trans Asian Shipping Services (P.) Ltd. v. Dy. CIT (2013) 55 SOT 1 (Cochin) (Trib.)

S.119: Instructions–CBDT–Circular-Circular passed by CBDT as per S.119 beyond its authority is not considered to be effective. (S.194A(3) (v))

As per the provision of Section 194A(3) (v) a co-operative society is not supposed to complywith the requirements of TDS as prescribed u/s. 194A at the time of paying interest to its members or toany other co-operative society. The said section makes no distinction between different classes of members. However, CBDT issued a circular date 11/09/02 making certain distinction between different classes of members and narrowed down the scope of members in respect of whom the said exemption was available. On challenging the said validity of the said circular, the Hon'ble high court held that CBDT had crossed its authority under the garb of section 119 of the Act. And hence, the said circular is not effective. SCA 11209 of 2000 / 1465 of 2003 dt12/06/2012]

Gujarat Urban Co-operative Bank Federation. (2012) BCAJ -November-P. 401) (Guj.) (High Court)

S.119: Instructions-CBDT-Binding nature-Bad debts-Bank-Provision for bad debt-Instruction is binding onrevenue. (S.36(1) (vii), 36(1) (viia)).

The Instruction No. 17/2008, dated 26-11-2008 issued under section 119 clarifies the position in respect of working out the deduction under section 36(1) (vii) ,It is well settled that such instructions issued by the Board in exercise of its statutory powers under section 119(2) may have the effect of relaxing the rigours of a statutory provision. Hence, there is no reason to entertain the appeal of the revenue. Therefore, the appeal of the revenue was dismissed. In favour of assessee. (A.Y.1998-99)

CIT v UTI Bank Ltd. (2013) 212 Taxman 296/82 DTR 168 (Guj.) (High Court)

S.124: Jurisdiction of Assessing Officer –Assessee participated in proceedings and filed return voluntarily at Delhi, assessment order passed at Agra was held to be valid.

The petitioner, a share broker, was incorporated in U.P. After shifting its corporate office to Delhi, the petitioner, as per CLB order of 24-1-2003, also shifted its registered office. It was alleged that up to AY 2000-01, filing of income tax returns and assessment thereof were made at Agra. For the year 2002-03, the return was filed at Delhi. Through the instant writ petition, the petitioner prayed for quashing of the assessment order dated 28-3-2005 passed at Agra for AY 2002-03 and for issuing of directions to the respondents to restrain to proceed with penalty proceedings. The petitioner submitted that the writ was maintainable in as much as entire proceedings of assessment by the AO at Agra were without jurisdiction. On the facts, the petitioner could not have changed the place of his assessment and proceeded to file the return unilaterally at Delhi. He participated in the assessment proceedings and acquiesced to the jurisdiction of the Assessing Authority, Agra but it was only when the assessment order was made on protective basis against the company and on substantive basis against its director, who was found to have indulged in large scale fictitious and bogus transactions, that the petitioner filed writ petitions. The Court held that, section 124 provides for jurisdiction of AO. Sub-section (1) and (5) of section 124, when read together provide that where two or more AOs have territorial jurisdiction in respect of same income, they exercise concurrent jurisdiction in the matter of issuing notice to the assessee and where notices have been issued by any one office, it is unnecessary for the other office to issue the same notice again. In respect of petitioner, a survey was conducted under section 133A on 24-4-2001 in which a large number of incriminating documents were found. After enquiries, the AO found that there were serious defects in the books of account. The director had created large number of fictitious concerns, which were not doing any business and therefore, the AO completed the assessment on protective basis. The director appeared and filed reply to the notice and clearly stated before the AO that his company was assessed to tax with Company Circle-1 (2) at Agra. The petitioner thus acquiesced to the jurisdiction, which the AO at Agra already possessed, and allowed him to complete the assessment proceedings for the assessment year 2001-02.In the circumstances, there was no error in exercise of jurisdiction by the ACIT, Circle-IV(1) Agra. The writ petition was accordingly, dismissed. (A.Y. 2002-03)

Aayushi Stock Brokers (P.) Ltd. v. ACIT (2013) 213 Taxman 192(All) (High Court)

S.132:Search and seizure-Warrant of authorization-Satisfaction-Authority entertaining belief that assessee secreted certain documents relevant for purpose of investigation of matter relating to evasion of tax-Assessee

cannot stall proceedings on ground of lack of jurisdiction to issue warrant-Assessee to raise all grounds available in his defense during enquiry and subsequent proceedings. (Constitution of India, art. 226.)
The assessee challenged the action under section 132 of the Act by way of writ before the High Court.The Court dismissed the petition by observing that there were materials available before the authority concerned, for the formation of his belief to issue such a warrant. Further, the authority had also reason to believe that such documents and things would not be produced by the persons concerned, in the normal course, to enable the Department to conduct necessary inquiries in the matter. Therefore, it was premature on the part of the assessees to stall further proceedings relating to the allegations of evasion of payment of tax by the assessees, by raising the issues relating to the jurisdiction of the Department to issue the search warrants. Of course, it would be open to the assessees to defend themselves by showing, at the appropriate stage of the proceedings, that they were not liable to pay the tax, as assessed by the authorities of the Department. The belief of the authorities that the assessees had secreted certain documents relevant for the purpose of investigation of the matter relating to the evasion of tax by the assessees, was based on materials available before the authorities. When serious allegations of tax evasion by the assessees, to the tune of several lakhs of rupees, have been made, it would not be appropriate for the court to scuttle the process by placing undue emphasis on the hyper technical pleas put forth on behalf of the assessees, with regard to the procedural formalities in the issuance of the search warrants. (Block period 1-4-1996 to 12-9-2002)
P.G. Viswanathan (Dr.)v. DIT(Inv. (2013) 351 ITR 217(Mad.) (High Court)
V.Muthulakshmiv.DIT (Inv.) (2013) 351 ITR 217(Mad.) (High Court)
K.Viaswanthan alias Kumar v.DIT (Inv.) (2013) 351 ITR 217(Mad.) (High Court)
Aruna Viswanthan(Dr.)v.DIT (Inv.) (2013) 351 ITR 217(Mad.) (High Court)
Anjana Viswanthan (Dr.)v.DIT (Inv.) (2013) 351 ITR 217(Mad.) (High Court)
Vikram Viswanathn(Dr.) v.DIT (Inv.) (2013) 351 ITR 217(Mad.) (High Court)

S.132. Search and seizure--Warrant of authorization—Reason to believe-Existence of tangible material a pre-requisite-Mere reason to suspect not sufficient, articles seized to be released to assessee,
The assessee challenged the search action. Allowing the petition the court held that the so-called information was undisclosed and what exactly that information was, was also not known. At one place in the affidavit of the Deputy Director of Income-tax, it had been mentioned that he got information that there was a "likelihood" of the documents belonging to the DS group being found at the residence of the assessee. That by itself would amount only to a surmise and conjecture and not to solid information and since the search on the premises of the assessee was founded on this so-called information, the search would have to be held to be arbitrary. When the search was conducted on January 21, 2011, no documents belonging to the DS group were, in fact, found at the premises of the assessee. The warrant of authorization was not in the name of the DS group but was in the name of the assessee. In other words, the warrant of authorization under section 132(1) had been issued in the name of the assessee and, therefore, the information and the reason to believe were to be formed in connection with the assessee and not the DS group. None of clause (a), (b) or (c) mentioned in section 132(1) stood satisfied in the assessee's case and, therefore, the warrant of authorization was without any authority of law. Had the warrant of authorization been issued in the name of the DS group and in the course of the searches conducted by the authorized officer, the premises of the assessee had also been searched, the position might have been different. But that had not happened in the case of the assessee. The warrant of authorization was in the name of the assessee and, therefore, it was absolutely necessary that the pre-conditions set out in section 132(1) ought to have been fulfilled. Since those pre-conditions had not been satisfied, the warrant of authorisation would have to be quashed. Once that was the position, the consequence would be that all proceedings pursuant to the search conducted at the premises of the assessee would be illegal and, therefore, the prohibitory orders would also be liable to be quashed. The jewellery/other articles/documents were to be unconditionally released to the assessee.
Madhu Gupta v. DIT(Inv (2013) 350 ITR 598/256 CTR 21/82 DTR 116/214 Taxman 246(Delhi) (High Court)

S.132(4): Search and seizure-Statement on oath-Retraction-No evidence to establish that admission was incorrect in any way ,hence addition made on basis of statementwas held to be justified.
During the course of search the assessee surrendered a sum of Rs. 1 crore in respect of the financial year 2005-06 for buying peace of mind and to avoid litigation. He also requested the Income-tax Department not to initiate any penalty proceedings against him. After ten days, during the further search conducted by the Income-tax Department, the assessee made another statement on November 21, 2005, wherein he surrendered an additional sum of Rs. 75 lakhs on behalf of himself and all family members, family firms and the companies. The request for no penal measures was reiterated. In the statement, however, he indicated that after receiving all the seized documents from the Income-tax Department he would provide the break up of the voluntary disclosure of Rs.1.75 crores in various hands. He also promised to pay the due tax as soon as possible. The sum of Rs. 1.75 crores which was surrendered by the assessee was bifurcated by him into sums of Rs. 1.5 crores and Rs. 25 lakhs. The former sum was, according to him, to be treated as

undisclosed business income in his hands whereas the latter sum of Rs. 25 lakhs was to be considered in the hands of different family members or business concerns of the assessee's group. The Tribunal reversed the decision of the Commissioner (Appeals) and sustained the decision of the Assessing Officer in making an addition of Rs. 1.75 crores on the basis of the statements made by the assessee under section 132(4). On appeal by the assessee the Court dismissing the appeal, held that it was incumbent upon him to show that he had made a mistake in making that admission and that the admission was incorrect. He had access to all the documents which had been seized inasmuch as copies had been supplied to him. However, he did not produce anything to establish that the admission was incorrect in any way. Thus, the assessee could not reconcile from his statements made on November 10,11, 2005, and November 21, 2005. The statements recorded under section 132(4) were clearly relevant and admissible and they could be used as evidence. In fact, once there was a clear admission, voluntarily made, on the part of the assessee, that would constitute a good piece of evidence for the Revenue. Appeal of assesse was dismissed.(A.Y.2006-2007)

Bhagirath Aggarwal v. CIT (2013) 351 ITR 143(Delhi) (High Court)

S.132(4):Search and seizure-Statement on oath-- Retractions-No addition can be made merely on thebasis of statement. (S. 132,143 (3)

The Tribunal held thatin the absence of any discrepancy in inventory, no addition could be made. As the figures of discrepancy were not available with the Department and the director of the assessee-company had retracted the surrender made by him on account of stock difference, no addition could be made on the basis of a statement recorded under section 132(4) of the Act. If the Assessing Officer wanted to add the amount of Rs. 11 crores on account of stock inventory, he should have brought material on record. (A. Y. 2005-2006 to 2007-2008)

Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S. 132(8): Search and seizure – Retention of seized documents beyond 30 days – Non-communication of CIT's approval to assessee.

Books of account, seized under s.132(1), were retained by the officer for a period exceeding 30 days from the date of order of assessment passed u/s. 153A without communicating to the assessee reasons recorded for the same and approval obtained from the CCIT, Director General, or Director, as the case may be, for such retention. Held that the requirements of s. 132(8) were not satisfied and therefore, the retention of documents beyond 30 days after completion of assessment was illegal.

Joshi P. Mathew v. Dy. CIT (2013) 83 DTR 5(Ker.) (High Court)

S. 132A : Powers - Requisition of books of account – Cash seized from petitioner recorded in books – Order under section 132 A liable to be quashed.

Where the cash seized from the Petitioner was satisfactorily explained and all transactions were recorded in the books, order under section 132A liable to be quashed.

Prakash Jaichand Shah v. DIT (Inv.) (2013 81 DTR 396 (Guj.) (High Court)

S.132A:Powers -Requisition of books of account -Cash seized by police authorities, reasonable explanation regarding cash, no evidence that amount would not be disclosed to income-tax authorities, Order of requisition held to be not valid.

The assessee, a cotton broker, carried with him cash of Rs. 11 lakhs collected from A in respect of the sale of cotton through him. The cash was seized by the police authorities. The assessee furnished an explanation but the police authorities did not accept the explanation and seized the cash. An order was passed under section 132A and the amount was requisitioned by the income-tax authorities. The income-tax officials recorded the statement of the assessee wherein he stated that the amount had been arranged by RS through a shroff of Kalupur against purchase of cotton. The income-tax officials surveyed the business premises of RS and examined his books of account. RS corroborated the statement of the assessee. RS's accounts showed issuance of five cheques in favour of STC. The accounts of the shroff showed that the five cheques issued by RS had been deposited with them for discounting against which Rs. 11 lakhs in cash had been handed over to the assessee. The assessee requested for release of the cash but this was refused. On a writ petition :

Held, allowing the petition, that in view of the factual background, no reasonable person could have come to the conclusion that the amount of Rs. 11 lakhs belonged to the assessee or that he would not disclose the amount to the income-tax authorities under the provisions of the Act. In the circumstances, on the basis of the material before him, the Director of Income-tax could not have formed the requisite opinion as required under section 132A of the Act. The warrant of authorisation issued by him, therefore, was vitiated as having been issued without the condition precedent for exercise of powers under section 132A being satisfied. The warrant of authorisation as well as the order under section 132A was liable to be quashed. The assessee was entitled to the seized amount along with interest.

Prakash Jaichand Shah v.DIT (Investigations) (2013) 350 ITR 336/255 CTR 403 (Guj) (High Court)

S. 132B(4): Search and seizure – Delayed Refund – Assessee entitled to interest under section 132 B (4). (S.132)
Where the assessment of the assessee was concluded resulting in a refund to the assessee which was not given to the assessee for a long time assessee was entitled to interest on refund under section 132 B (4) of the Act.
Om Prakash Agrawal v. UOI (2013) 81 DTR 341 (MP) (High Court)
S.139:Return of income-E-return-Errors-Not ignorance of law but ignorance of usage of latest technology, direction to Assessing Officer to examine interest paid and if satisfied, positive interest to be added to taxable income. (S.143 (1)

The assessees filed e-returns showing interest income earned as well as interest paid under the head "Income from other sources". The assessees did not realise that the server would not accept a negative figure and therefore the interest paid was rejected by the server while processing the returns. The Commissioner (Appeals) observed that it was an incorrect claim on account of the assessees failing to reflect the correct details in the returns, under the computerised processing programme. The Assessing Officer made adjustments for this incorrect claim for deduction and held that there was no mistake in the processing of returns and further concluded that no appeals would lie against such processing where adjustments had been correctly made during processing under section 143(1) (a) (ii) of the Income-tax Act, 1961. On appeal the Tribunal held thatno one cared to educate the taxpayers about the nuances of preparing an e-return compared with filing details in the return forms. This had resulted in many clerical errors because of the ignorance of the taxpayers in acclimatising themselves with the latest technology. This was not ignorance of law but ignorance of the usage of the latest technology. Therefore, the Assessing Officer was to examine the assessee's claim of the interest paid and if satisfied with the claim, he was to deduct it from the positive interest figure to be added to the taxable income. (A.Y 2009-2010)
Sumanchandra G. Mehta v.ITO(2013) 22 ITR 270 (Mum.) (Trib.)
Tarulata S.Mehata v.ITO(2013) 22 ITR 270 (Mum.) (Trib.)
S.142:Enquiry before assessment -Notice- Person-Validity of notice to co-operative bank. (S.2(31),133(6))
S. 142(1) read with s. 2(31) leads to the only conclusion that co-operative societies are also "person" as defined in the I-t Act. Therefore, the impugned notice u/s. 142(1) cannot be held issued without jurisdiction.
Mangalam Service Co-operative Bank Ltd. & Anr. V. ITO & Ors. (2013) 83 DTR 198 (Ker.) (High Court)
S.142: Inquiry before assessment - Special audit –Approval without application of mindon same dayheld to be nullity. (S.142(2A)
Assessing Officer issued notice for assessee to show cause why special audit should not be ordered. Assessee filed replies and Assessing Officer wrote to Commissioner saying that assessee had answered queries regarding complexities in accounts. However next day changing his mind he wrote a letter to CCIT seeking approval for grant of special audit who granted such approval on same day. Court held that there was no application of mind by CCIT to proposal of special audit sent by Assessing Officer, further in absence to any further development and another notice to assessee under section 142(2A) after Assessing Officer changed his mind, order of special audit was nullity. In favour of assessee. (A.Y.2009-10)
DLF Commercial Projects Corpn. v.ACIT (2013) 212 Taxman 43/257 CTR 298 (Delhi) (High Court)

S.142: Enquiry before assessment-Special audit-Natural justice-Complexity of accounts and safeguarding interests of revenue is conditions cumulative, notice on basis of notes of accounts is not valid.
In order to direct special audit under section 142(2A) of the Income-tax Act, 1961, the Assessing Officer must form an opinion with regard to twin conditions, viz., nature and complexity of accounts and the interests of the revenue. Additionally, special audit requires approval of the Chief Commissioner or the Commissioner. Further, the power under section 142(2A) is not to be lightly exercised, and it is to be based on the foundation of available material. A genuine and honest attempt must be made to understand the accounts since an order under the provisions not only entails a heavy monetary burden but it also causes a lot of inconvenience to the assessee. Section 142(2A) is not a provision by which the Assessing Officer delegates his powers and functions, which he can perform, to the special auditor. The provision has been enacted to enable the Assessing Officer to take the help of a specialist, who understands accounts and accounting practices to examine the accounts when they are complex and the Assessing Officer feels that he cannot understand them and comprehend them fully, till he has help and assistance of a special auditor. Interest of the revenue is the other consideration. An order under section 142(2A) directing special audit, entails civil consequences.And therefore, the principles of natural justice in the form of hearing have to be complied with. However, this does not require an elaborate hearing. The notice under the section may contain briefly the issues that the Assessing Officer thinks to be necessary and need not be detailed ones. An order of approval by the Commissioner/Director should not be granted or passed mechanically but should be done having regard to materials on record. Questions should be raised with regard to accounts and entries and only when the explanation offered is not satisfactory, or verification is not

possible without the help and assistance of a special auditor, action under section 142(2A) is required. For the assessment year 2005-06, the recommendation for special audit was made on October 17, 2007, within two days after the books of account were produced on October 15, 2007. The Assessing Officer had not obtained comments/findings on the Comptroller and Auditor-General's report but he had directed the special auditor to obtain it and then give his opinion. Consideringthe facts of the casethe notices under section 142(2A) relating to the assessment years 2003-04 to 2009-10 were not valid and were liable to be quashed. (A. Y. 2003-2004 to 2009-2010)
Delhi Development Authority v. UOI (2013) 350 ITR 432/214 Taxman 130 (Delhi) (High Court)

S.142: Enquiry before assessment-Special audit--Limitation--Failure to record reasons, High Court giving liberty to Department to pass a fresh order-Fresh order cannot be challenged on ground of limitation-Reference to special audit isheld to be justified. (S.153A, 153B)
The Assessing Officer is required to find out the income to be brought to tax. He has to apply the accepted methods of accounting and if there are any inaccuracies, he may direct the assessee to assist him by explaining and to reconcile such accounts. He is not a specialist accountant or an auditor to find out the methods adopted by the assessee for assessing the income to be taxed. He is not required to act as an investigator or a specialist auditor nor does he have a team of assistants to enter into the web to decipher the codes and to demystify the procedures adopted in the accounting methods to find out and arrive at the aggregate income to be assessed to tax. The assessees challenged the directions under section 142(2A) of the Income-tax Act, 1961, for special audit on the ground that no reasons were given in the order. The assessee relied on the principles of natural justice to challenge the order. Held, dismissing the petitions, (i) that the assessees not having challenged the observations of the High Court, giving liberty to the Department to proceed with a fresh order in accordance with law they could not be permitted now on the principles of equity to challenge the fresh order on the ground of limitation. Any advantage gained in such circumstances must be neutralised. The prescription of limitation by itself should not be permitted to confer an advantage on the assessees for such delay. The defect complained of in the notice was at best a lapse, which could be corrected by serving a proper notice and recording of reasons. The court did not hold that the reasons were not sufficient. It held that the reasons were not recorded. It observed that reasons must be recorded in the order to show application of mind on the part of the officer concerned on the basis of the material available on record. The submission that after the earlier notice was set aside, a fresh notice could not be issued, was thus devoid of any substance and must be rejected. On facts reference to specialauditheld to be justified. (A. Y. 2002-2003, to 2008-2009)
ATS Infrastructure Ltd. v. ACIT (2013) 350 ITR 563/256 CTR 46/81 DTR 249 (All.) (High Court)
Prateek Resorts &Builders (P) Ltd. v. ACIT (2013)350 ITR 563/256 CTR 46/81 DTR 249(All.) (High Court)

S.142A:Estimate by Valuation Officer – DVO – AO did not reject books of account maintained by assessee - Made reference to DVO – Reference without jurisdiction (S.145)
Assessing Officer without rejecting books of account maintained by assessee made reference under section 142A to DVO, for valuation of factory building of assessee. Assessing Officer made addition on basis of cost of construction estimated byDVO.Commissioner (Appeals) confirmed the addition and reduced some addition. On appeal to Tribunal the held that Commissioner (Appeals) for estimation of construction cost on basis of DVO' s report could not be approved particularly when Assessing Officer made reference to DVO without rejecting books of account. Assessee's appeal was allowed. (A.Y. 2004-05)
Prahalad Kumar Jindal v. ACIT (2013) 140 ITD 147 (Agra.) (Trib.)
S.143(3):Assessment- Scrutiny guide lines-CBDT-Income-tax department must make return scrutiny guidelines public
The Petitioner, an advocate, filed an application with the CBDT under s. 6 of the Right to Information Act, 2005 seeking information pertaining to cases excluded from scrutiny, where the disclosure was made during survey. He also sought information qua the scrutiny guidelines for the financial year 2009-10. The Department opposed the disclosure of the scrutiny guidelines on the ground that it would prejudice the "economic interest" of the Country and enable assessees to "configure" their return to avoid scrutiny. The refusal to supply the information was upheld by the CIC. The Petitioner filed a Writ Petition to challenge the order of the CIC. HELD by the High Court reversing the CIC:
The Income-tax department has issued instructions with regard to procedure for selection of cases for scrutiny from time to time both qua corporate assessees as well as non-corporate assessees. These instructions give detailed procedure on the basis on which the concerned officers are required to make a random selection of assessees whose cases are taken up for scrutiny. These instructions are in public domain even prior to the enactment of the RTI Act. Most of these instructions have been issued in the middle of the financial year and not in the beginning and they are applied to pending returns as well. Therefore, the argument, that assessees would configure their returns in the manner, which would

impact the economic interest of the country, cannot be accepted. The expression “economic interest” takes within its sweep, matters which operate at a macro level and not at an individual, i.e., micro level. By no stretch of imagination can scrutiny guidelines impact the economic interest of the country. These guidelines are issued to prevent harassment to assessees generally. It is not as if, de hors the scrutiny guidelines, the I.T. Department cannot take up a case for scrutiny, if otherwise, invested with jurisdiction, in that behalf. This is information which has always been in public realm, and therefore, there is no reason why the department should keep it away from the public at large. The department shall supply the relevant scrutiny guidelines to the petitioner for the financial year 2009-10 and hereafter upload the guidelines with regard to scrutiny on their website.
Joginder Pal Gulati v.OSD – CPIO (Delhi) (High Court), www.itatonline.org

S.143(3):Assessment-Undisclosed income –Gross receipt-Only “Profit element” embedded in gross receipts added as “ undisclosed income should be charged to tax if the same are in respect of business transaction.
AO made addition of the gross receipts as “Undisclosed Income “ The Hon’ble ITAT held that only “Profit element” embedded in such gross receipts should be charged to tax since the said receiptswere in respect of business transactions. Hon’ble High Court dismissed the tax appeal preferred by the revenue since it didn’t give rise to any substantial question of law. (T. A. No 2280 of 2009, dt, 17/07/12) (2012)/ (T.A. No. 323 / 325 Of 2000, dt,16/06/12)
Jinendra S. Jain (2012)BCAJ-November-P. 399) (Guj.) (High Court)
Panna Corporation.(2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.143(3): Assessment-Cross examination-Opportunity must be given.
Ifthe accountant of ST stated that he was accepting sums of money without recording them in the books of account, addition could be made in the hands of ST and not in the hands of the assessee. No material had been brought on record to suggest that the amount of Rs. 73,000 was paid by the assessee to ST without recording it in the books of account. It is a settled law that third party evidence cannot be the base of addition unless cross-examination is allowed. The assessee could not be condemned without a hearing. In the absence of any such evidence/cross-examination, no addition could be made. (A. Y. 2005-2006 to 2007-2008)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S. 143(3):Assessment-Search and seizure---Undisclosed income—Entries in papers.
Entries in papers seized from person making purchases for assessee. No material to show difference between sales recorded there and according to books of account, no additionis warranted. (A. Y. 2005-2006 to 2007-2008)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S. 143(3):Assessment - Addition to income – Matter remanded.
Where there is categorical findings by assessing authority in respect profit rate for preceding year which differed from what assessee claimed, Commissioner (Appeals) should have called for assessee's assessment records for preceding year as well as current year, and issued definite findings after hearing both parties,matter remanded. (A.Y.2001002)
ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32(URO) (JP) (Trib.)

S. 143(3): Assessment - Additions to income –Charging of differential interest was not justified.

Assessee kept certain deposits received from clients abroad in NOSTRO account by way of Foreign Currency Non-Resident (Bank) Deposit. Such account was maintained by head office of assessee which was used by head office for its global operations. Assessing Officer noted that interest paid by assessee for above deposits was higher than interest earned by assessee from its domestic deposits held with head office.Assessing Officer held such differential interest to be not deductible and charged same to tax. Tribunal held that since decision as to when above foreign deposits were to be brought into India was with assessee on consideration of factors like foreign exchange rate prevailing at time of receipt of deposits, and further since such deposits were not with head office but were in NOSTRO account, action of Assessing Officer charging differential interest to tax could not be sustained. In favour of assessee. (A.Y.1998-99)
Dy. CITv.Banque Indosuez (Known as Credit Agricole Indosuez) (2013) 55 SOT 38 (Mum.) (Trib.)

S.143(3):Assessment – Addition- Understatement ofincome addition was deleted.
It was noted from audit of CAG that assessee, State Electricity Distribution Company did not recognize unbilled revenue, i.e., revenue from energy supplied but bills not issued till March in respective years. Tribunal held that findings that assessee had been following specified method of accounting consistently which was in agreement with changed

accounting policies and principles under ESSAR, 1985, were to be upheld, hence no addition could be made on account of understatement of Income. In favour of assessee. (A.Y. A.Y.2007-08, 2008-09)
Maharashtra State Electricity Distribution Co. Ltd.v. ACIT. (2013) 55 SOT 84(URO) (Mum.) (Trib.)

S.143(3): Assessment – Loose papers-Addition to total income of certain amounts as sale consideration – No direct evidence of receiving money – Loose papers merely in nature of an offer which was made to assessee – Addition not sustainable.
Assessee sold certain land at a consideration of Rs. 10.62 crores. In course of search, Assessing Officer recovered certain documents which showed two figures of Rs. 22.61 crores and Rs. 14.75 crores. Assessing Officer opined that those figures related to sale of land. Therefore, in absence of any direct evidence about receiving on money, it was to be concluded that such loose papers were merely in nature of an offer which was made to assessee. Hence, addition made by Assessing Officer on basis of those loose papers was not sustainable. (AY2006-07 to 2009-10)
Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.) (Trib.)

S.143(3): Assessment-Income-Computation-Interest-Broken period-
Interest paid in respect of broken period to be set off against interest received in respect of broken period. (A. Y.1997-1998)
ADIT (IT)v. Credit Agricole Indosuez [2013] 21 ITR 345(Mum.) (Trib.)

S.144: Best judgment assessment – Opportunity of being heard-Not raised before lower authorities cannot be raised first time before the Court. (S. 143(2))
Assessee did not contended before the authorities that notices u/s. 143(2) and under proviso to s. 144(1) were not issued before making assessment u/s. 144 and which the authority had no occasion to deal with. Such contention cannot be allowed to be raised for first time before the Court. Further, assessee was informed and required to attend the office of the AO and was also informed about hearing on a certain date. Held, the letters could be deemed to be notices u/s. 143(2) and proviso to s. 144(1). Assessment order could not, therefore, be set aside or quashed. (A.Y. 1995-96)
P.P. Abdul Khader & Co. v. CIT (2013) 83 DTR 41 (Ker.) (High Court)

S.144:-Best judgment assessment--Rectification of mistake--Disallowance of interest paid on capital account and remuneration to partners--Opportunity of hearing--Contentions not raised before appellate authority cannot be raised for first time before High Court. (S.154--Constitution of India, art. 226.)
The assessee-firm consisted of four partners engaged in civil and electrical contract works. On a writ petition contending that for the assessment year 1995-96 its taxable income was determined at Rs. 35,930 and the assessment order was rectified under section 154 of theAct, and dis-allowances were made in respect of interest paid by them on capital deposit and remuneration paid to the partners and subsequently without any notice the assessment was completed under section 144 determining the taxable income at Rs. 1,36,500.Held, dismissing the petition, that in so far as the absence of notices under section 143(2) and the proviso to section 144(1) were concerned, a reading of the order passed by the revisional authority showed that such a contention was never urged by the assessee before the revisional authority. Similarly the inapplicability of section 144 for want of the circumstances specified in section 144(1) (a) to (c) was also not urged before the revisional authority. A contention which was not urged before the statutory authorities and which the authority had no occasion to deal with, cannot be allowed to be raised for the first time before the High Court. Therefore, these contentions could not be urged before the court for the first time. (A. Y.1995-1996)
P.P.Abdul Khader and Co v.CIT (2013) 351 ITR 17 (Ker.) (High Court)

S.144C: Reference to dispute resolution panel –Draft assessment order-Denial of deduction under section 80IA-Writ petition-Alternative remedy-Matter remanded. (Art 226, 80IA)

The assessee claimed deduction under section 80-IA. In scrutiny assessment, though the assessee submitted that there was no inter-unit transfer, but it was found that machinery was transferred to one of its units. Draft assessment order was passed making some additions. Thereafter, final assessment order was passed which completely denied benefit of deduction though it was allowed in principal in draft assessment order. The assessee in a writ petition contendedthat once a draft order was made and served upon the assessee, the Assessing Officer had no jurisdiction to make any additions thereto and that by passing the impugned assessment order, the assessee had been denied an opportunity of availing the provisions of section 144C with respect to the additions that were not made in the draft order. The Court held thatalthough this writ petition is maintainable, but it is viewed that the petitioner ought to pursue its alternate remedy which it had already availed of by filing an appeal before the Commissioner (Appeals), albeit without prejudice to this petition. Therefore, no opinion was expressed on the merits of the matter. By not entertaining this writ petition, it

is not suggested that assessee's submissions are without substance. These indeed are important issues which will undoubtedly require a decision of the Court at some stage in a given matter or even in the present case at another stage in appropriate proceedings. They certainly are points and aspects that require serious consideration by the authorities and this Court. The Court held that despite the same, jurisdiction under article 226 is not exercised for this matter involves several points, some of which require a detailed consideration on disputed questions of fact including as to whether the petitioner had made false statements as indicated earlier. It would serve no purpose and would indeed be cumbersome to have these issues decided in different proceedings. In the circumstances, the writ petition is dismissed only on the ground that this is not a fit case to exercise jurisdiction under article 226. Needless to add that the rights and contentions of the parties are kept open in any proceedings that have been adopted and that may be adopted hereafter. Matter remanded.
Piramal Healthcare Ltdv. Addl. CIT (2013) 213 Taxman27(Mag.) (Bom.) (High Court)

S. 144C:Reference to dispute resolution panel - Consequential order of Assessing Officer-Directed to pass consequential order.

The draft order was passed by the Assessing Officer. The assessee filed objection against the draft order before the DRP. Subsequently, on basis of circular dated 20-1-2010, the assessee sought to withdraw objection filed so as to file an appeal before the Commissioner (Appeals). The Assessee also informed the Assessing Officer about that withdrawal of objection. The Assessing Officer passed assessment order under section 144C(3). On the other hand, the DRP sent letter to the assessee fixing hearing. The assessee informed DRP about the Assessing Officer's order In view of the DRP's direction for hearing, the Commissioner (Appeals) dismissed the appeal filed against order by the Assessing Officer. The DRP ultimately passed order accepting the request of the assessee. Subsequently, the Assessing Officer passed order under section 144C(13) which was identical to his earlier order under section 144C(3) which the assessee challenged. On appeal Tribunal held that, Where DRP after taking note of fact that assessee desired to exercise option to file appeal before Commissioner (Appeals) against assessment order, accepted request of assessee for withdrawal of objection raised, no direction per se could be said to have been passed by DRP on merit of dispute so as to enable Assessing Officer to pass an assessment order on basis of DRP'S order. Appeal of assessee was allowed. ((A. Y. 2006-07)
Bank of America NAv.ADIT(2013)55 SOT 30 (URO) (Mum.) (Trib.)

S.144C: Reference to dispute resolution panel –Transfer pricing- Non Speaking Order – Order violation of provisions –Set aside
Where DRP confirmed addition made by Assessing Officer without passing a speaking order, said order being in violation of provisions of section 144C, was to be set aside. Matter was remanded back to decide both on TP and non TP issues. (A.Y. 2006-07)
Ford India (P.) Ltd. v. Dy. CIT (2013) 140 ITD 171 (Chennai) (Trib.)
S.144C:Reference to dispute resolution panel –Power-DRP is entitled to enhance by questioning the very existence of transaction.
The assessee entered into international transactions with its AE by way of payment of management fees, reimbursement of tender cost and payment of R&D expenses and claimed that the transactions were at ALP. The TPO & AO did not dispute that the transactions had been entered into for business purposes and determined the ALP by making adjustments. The assessee filed objections before the DRP. The DRP held that the assessee had to first show that the services had been rendered by the AE and that some tangible and direct benefit was derived by the assessee as a result of such payment and called upon the assessee to produce proof. As the assessee failed to do so, the DRP held that no tangible and direct benefit was derived by the assessee and directed that a much larger adjustment by way of disallowance of the entire amount be made. The assessee appealed to the Tribunal and claimed that the DRP could not have enhanced the assessment. HELD by the Tribunal:
S. 144C(8) empowers the DRP not only to confirm or reduce the variation proposed in the draft order to the benefit of the assessee but also to enhance it to the prejudice of the assessee. This power of enhancement which is impliedly embedded in the matter of issuing directions, due to the use of expression `as it thinks fit' in s. 144C(5) is expressly set out in s. 144C(8). If the DRP reaches the conclusion that the TPO erred in determining the ALP correctly, warranting further adjustment, the assessee, objecting to the variation in the income due to the order of the TPO, may land in difficulty, and end up with the enhancement of variation. But, for the DRP to exercise its power there has to be some variation proposed in the draft order. The Explanation to s. 144C(8) inserted by the Finance Act, 2012 with retrospective effect from 01.04.2009 has widened the DRP's power of enhancement to all the matters arising out of the assessment proceedings irrespective of whether they were raised or not by the

assessee. With this amplification of the power, even the matters not agitated by the assessee before the DRP can also be considered for the purposes of enhancement. Accordingly, in principle, the DRP was entitled to embark upon the question of enhancement of the TP adjustments. However, on facts as the DRP did not give reasonable opportunity to the assessee, the matter has to be remanded to it for fresh consideration. (A. Y. 2007-08)
Hamon Shriram Cottrell Pvt. Ltd v. ITO (Mum) (Trib.) www.itatonline.org

S.145:Method ofaccounting-Valuation of stock-If liability to pay Excise duty is not incurred excise duty is not to be included inclosing stock:
Under the scheme of excise duty, an assessee incurs liability to pay excise duty only upon both the events taking place, namely manufacture ofexcisable goods and removal of excisable goods. Accordingly, if such a liability in not incurred, excise duty is not to be included in the valuation of closing stock. (T.A. No. 436/ 437 of 2011, dt 13/06/2012)]

Bell Granito Cermica Ltd(2012) BCAJ -November-P. 402) (Guj.) (High Court)

S.145:Method of accounting- Hire-purchase- Leasing operation-Indexingsystem.
The assessee credited Rs 12, 33, 700 towards finance charges in its books of account. This figure was arrived at by adopting the "indexing" or "sum of digits" (SOD) system of accounting. However, while offering income under this head in its return of income, the assessee followed the mercantile system of accounting and reduced the income on this count to Rs 6,71, 326.The Assessing Officer opined that the assessee could not maintain one system of accounting for the purpose of carrying on its business and another system for tax purposes. As the assessee had itself maintained its books of account on indexing system of accounting, the Assessing Officer held that it was bound to adopt the same for the purpose of the assessment proceedings also. On appeal the Commissioner (Appeals) held that income on account of finance charges should be assessed as returned by the assessee and not as per its books of account. In second appeal the Tribunal followingthe special bench judgment in CIT v. Nagarjuna Investment Trust Ltd (1998) 65 ITD 17 (Hyd) (Trib) (SB) held that finance charges /interest in relation to hire- purchase agreements recognized by the assessee on the basis of the method of accounting employed by it and reflected in its books of account has to be considered as the real income which accrued and which was liable for assessment. In consequence, the Tribunal accepted the Revenue's stand.On appeal the court held that accrual would depend on the terms and conditions of the contract between the parties, but not at the whims of either party. On the facts the court held that law laid down by the special Bench in Nagarjuna Investment Trust Ltd (1998) 65 ITD 17 (Hyd.) (SB.) was correct, and revenue's computation was accepted and the appeal of assessee was dismissed. (A.Y. 1987-88)
Chakra Financial Services Ltdv. CIT (2013) 350 ITR 396/214 Taxman 15(Mag.) (AP) (High Court)

S.145: Method of accounting – Hire – purchase - Indexing system followed by assessee there cannot be Mercantile systemfor purposes of assessment, appeal dismissed.
The assessee which is engaged in the business of leasing, hire-purchase and finance. Finance charges represented the interest component of the hire-purchase monthly instalments paid by hirers to the assessee. The assessee had itself credited Rs. 12,33,700 under this head in its profit and loss account for the assessment year 1987-88. However, in its return of income the finance charges were reduced to Rs. 6,71,326 on the ground that the amount of Rs. 5,62,374 did not accrue as income though credited as such in the profit and loss account during the assessment year. The Assessing Officer did not accept this deduction and took into account the credited amount of Rs. 12,33,700 while computing the income under this head. The assessee credited Rs. 12,33,700 towards finance charges in its books of account and this figure was arrived at by adopting the "indexing" or "sum of digits" system of accounting. The Assessing Officer's order was upheld by the Tribunal. On appeal to the High Court :Held, dismissing the appeal, that there was no indication of the assessee's hire-purchase agreements reflecting bifurcation of the equated monthly installments into principal and interest components. In the absence thereof, the common and accepted usage of the indexing system of accounting in the hire-purchase trade must be held to be valid as otherwise the rate of interest under the mercantile system in so far as the later equated monthly installments are concerned would be far higher and contrary to the rate prescribed in the assessee's agreements. Further, as the assessee had itself employed this system of accounting in its books of account, applying the law laid down in Sanjeev Woolen Mills case [2005] 279 ITR 434,the Department was bound to accept the same for the assessment proceedings. Appeal of assessee was dismissed. (A. Y.1987-1988)
Chakra Financial Services Ltd. v. CIT (2013) 350 ITR 396/214 Taxman 15 (Mag.) (AP) (High Court)

S.145: Method of accounting - Valuation of stock - Valuation of securities purchased at premium-Write off ofpremiumwas not allowed.

Assessee purchased securities from market at a premium. It wrote off premium so paid which was amortised over life of investment. Commissioner (Appeals), however, rejected amortization on ground that when securities were purchased as stock from market at market value, there could be no question of carrying stock at a lower price by writing off premium paid. Tribunalup held the order of Commissioner (Appeals), but with a rider that securities could be sold or mature over a period and once amortization was not allowed, purchase price was to be taken as such irrespective of fact as to whether securities were sold or got matured. In favour of revenue (A.Y. 1999-2000)

Dy. CITv.Banque Indosuez (Known as Credit Agricole Indosuez) (2013) 55 SOT 38 (Mum.) (Trib.)

S.145A: Method of accounting -Valuation of closing stock –Purchase tax hasto be taken in to for valuation.

Tribunal held thatvalue of purchase tax has to be taken into account while valuing closing stock; however, in such a case, opening stock valuation has to be correspondingly adjusted.Matter remanded(A. Y. 2006-07)

Rallis India Ltd. v.Add. CIT.(2013) 55 SOT 288 (Mum.) (Trib.)

S. 147:Reassessment-Quaantum of escaped tax- Reopening invalid if reasons silent on quantum of escaped tax. (S.148,149,151)

In AY 2000-2001 the assessee sold a plot of land after converting leasehold land into freehold. The capital gains arrived at was offered as LTCG and the same was accepted by the AO. After the expiry of 4 years, the AO issued a notice u/s 148 for reopening the assessment on the ground that as the property was sold within three years of conversion into freehold, the gains were assessable as STCG. The approval of the Joint/ Addl. CIT was obtained. However, in the recorded reasons, it was not stated whether the amount of income escaping assessment exceeded Rs. 1 lakh. The assessee challenged the reopening on the ground that as the recorded reasons did not state that the income escaping assessment is Rs. 1 lakh or more, the reopening was invalid. HELD by the High Court upholding the plea:

S. 149 (1) (b) provides that no notice u/s 148 shall be issued after the expiry of 4 years from the end of the relevant AY unless the income chargeable to tax which has escaped assessment amounts to Rs. 1 lakh or more. Under the proviso to s. 151 (1), no notice u/s 148 can be issued after the expiry of four years from the end of the relevant AY unless the CCIT/ CIT is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice. Accordingly, it is imperative that the AO should state in the recorded reasons that the escaped income is likely to be Rs.1 Lakh or more so that the sanctioning authority is aware that it has exercised power of extended period of limitation u/s 149 (1) (b) and applies its mind accordingly. A sanction given without being aware of this fact is not valid. On facts, as there is nothing in the recorded reasons to suggest that the income chargeable to tax which has escaped the assessment is Rs. one lakh or more, the reopening is not valid. (A.Y.2000-2001)

Mahesh Kumar Gupta v. CIT (All) (High Court), www.itatonline.org

S.147:Reassessment – Reason to believe – Reopening has to be on the basis of some tangible material available to the AO (S.80IA(4)

Exercise of reopening has to on the basis of some tangible material becoming available with the AO. There has to be a rational connection and a live link between the material discovered and the formation of belief by the AO. Once the AO had applied his mind and allowed deduction u/s. 80-IA(4) to the assessee on the basis of material before him, it was not permissible for him to reopen the assessment u/s. 147 on the same material on the ground that certain aspects were not considered or that they were overlooked; a change of opinion is no ground for exercise of powers u/s. 147. (A.Y. 2007-08)

Agrawal JV v. ITO (2013) 83 DTR 101/247 CTR 112 (Guj.) (High Court)

S.147:Reassessment-Proviso- Full and true disclosure – Notice after expiry of four years-. (S.80M, 148.)

Assessee had claimed deduction u/s. 80M which the AO granted without discussing the issue in the order and without looking into the provisions of the Act. The AO had erred while framing the original assessment. Therefore, merely by adding a line in the reasons recorded that the assessee had failed to disclose fully and truly all material facts, the requirements of the proviso to s. 147 would not be satisfied. Reassessment was held to be invalid.(A.Y. 1995-96)

Himson Textile Engineering Industries Ltd. v. N.N. Krishnan or His Successor to Office (2013) 83 DTR 132(Guj.) (High Court)

S. 147: Reassessment –Change of opinion-Reassessment on same set of facts was held to be bad in law. (S.148)

A different view taken on the same set of facts amounts to change of opinion – Reopening on change of opinion is bad-in-law. (A Y. 2006-07)

Praveen P. Bharcuhua(Mrs) v. Dy.CIT (2013) 256 CTR346(Bom) (High Court*)*

S.147:Reassessment-The expression 'reason to believe' cannot be restrictively construed - The formation of belief by the assessing officer must always be tentative and not a firm or final conclusion-Reassessment was held to be valid.

Once there are reasons for the assessing officer to believe, whether such reasons originate out of the record already scrutinized or otherwise, he shall be within his competence to initiate the re-assessment proceedings. The formation of belief by the assessing officer must always be tentative and not a firm or final conclusion as the latter will negate the very object of giving an opportunity of hearing to the assessee. Reassessment based on agreement to sale which was signed by both parties is held to be valid. (A.Y. 2001 – 02)

Arun Kumar Goyal v. CIT (2013) 81 DTR 123 (P&H) (High Court)

S. 147 : Reassessment – Full and true Disclosure – Notice after Expiry of four (4) years – During the assessment proceeding, assessing officer examined and was aware of the documents when he passed the order -reopening held to be bad.

When during the original assessment proceedings the assessing officer examined the agreements and was aware of the same reopening of assessment was held to be bad in law.But, for the years where the agreements were not on record and the facts were concealed by the assessee the assessing officer was held to be justified in reopening the assessment. (A.Y. 2002 – 03 to 2005 – 06)

Meinhardt Singapore Pte Ltd. v. ACIT (IT) (2013) 81 DTR 283 (Delhi) (High Court)

S. 147 : Reassessment – Full and true Disclosure – Notice after Expiry of four (4) years – Original assessment passed considering the claim of deduction under section 10 A / 10 B of the Act – Reassessment proceedings not valid as there was no failure on the part of the assessee to disclose fully and truly all material fact. (S.10A,10B)

Where the original assessment order was passed by the assessing officer specifically allowing the assessee's claim of deduction under section 10 A / B of the Act, there was no new information received by the assessing officer to initiate reassessment proceedings and there was no failure on the part of the assessee to disclose fully and truly all material facts. Reopening beyond the period of four (4) years after the end of the relevant assessment year was held to be bad. (A.Y. 2004 – 05)

Moser BareIndia ltd. v. Dy. CIT (2013) 81 DTR 10 (Delhi) (High Court)

S.147 : Reassessment – Notice beyond four years – At the time of original assessment no failure to disclose – Reopening not sustainable.

Where the assessee had furnished full and true particulars at the time of original assessment under section 143 (3) and there was no failure on his part to disclose.The reopening of assessment made after four years from the end of the relevant previous year was held to be invalid. (A.Y. 2003 – 04)

CIT v. Convertech Equipment P. Ltd. (2013) 81 DTR 409 (Delhi) (High Court)

S.147:Reassessment- Fully and true disclosure-Notice after expiry of four years –Notice with in four years- Change of opinion- Remuneration to directors-No tangible material - Hemce, reopening is bad in law. (S. 36(1) (ii), 148)

Assessee company in the course of original assessment proceedings, has explained the nature of the paymentbasis of computationand rationale for computing the remuneration paid to the directors partly with reference to fixed amount and partly as a proportion of the net profit, which was accepted under section 143 (3).The Assessing Officer reopened the said assessment on the ground that the payment made to a director who is a shareholder is not covered by section 36((1) (ii) to be eligible for deduction. The Assessee challenged the said notice by writ petition, the Courtquashing the notice held that the reassessment was based on a pure change of opinion and not on tangible material and hence it is impermissible in law. In respect of notice issued after four years the notice was quashed on the ground that in the absence of any allegation in the notice that there was failure on the part of the assessee to disclosure fully and truly materialfacts for the assessment, reopening of assessment does not fulfill the requirement set out in the proviso to section 147, therefore the notice was quashed. (A.Y.2005-06, 2006-07, 2007-08, 2008-09))

OHM Stock Brokers (P) Ltd v.CIT(2013) 258 CTR 90/85DTR 111 (Bom.) (High Court)

S. 147: Reassessment- Deduction at source-194C is not applicable in the first year of operation Consequently, notice issued u/s 148 to disallow expenditure for non- compliance of s. 194C is liable to be quashed. (S.143(3), 194C)

A notice u/s 148 was issued within a period of four years form the end of relevant Asst. Year so as to disallow an amount of Rs. 3,07,59,872/- in respect of labour charge on the pretext that the assessee failed to deduct tax at source u/s. 194C at the time of making the said payment. Assessmentwas framed earlier u/s. 143(3) without making disallowance in respectof the same. According to *Proviso t*o Section 194C(2) an individual or HUF is supposed to deduct tax at source only if its total sales, gross receipts or turnover from its business or profession exceeds monetary limits specified under clauses (a) or (b) of Section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid. This being the first year of operation, the said condition is notfulfilled and hence the assessee is notsupposed to deduct tax u/s. 194C Hence AO's reason to believe that income chargeable to tax in case of assessee has escaped assessment is without foundation andlacks validity. Accordingly, the impugned notice issued u/s. 148 is quashed. (SCA12243 of 2009,dt,16/07/2012)](2012)

Harshadbhai Naranbhai Bagadia. (2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.147: Reassessment-Once Department accepts the tax paid under returns of income filed by an assessee without ever questioning that suchreturns were filed before a wrong officer, it cannot later contend that such officer had no jurisdiction to accept the same. (S.143(1), 143(3)

Assessee had filed its return of income before his normal Assessing Officer which were accepted by such officer u/s.143(1) whereas he was actually supposed to file the same before the special Assessing officer designated as such consequent to search action at the assessee's premises in the past Hence, the assessment was sought to be reopenedon the sole ground that assessee had filed return of income with other wards with mala fide intentions. It was held by the Hon'ble High Court that the assessee had discharged his liabilities by filling returns of income and the same being accepted vide intimation u/s.143(1)Since the Department has accepted the tax paid under such returns without ever questioning filling of such returnbefore a wrong officer, it cannot now be allowed to contend that such returns were filed before wrong officers who had no jurisdiction to accept the same. Since the sole found for such re-opening of the assessment was not sustainable notice u/s.148 were quashed. (SCA 6557 to 6560 of 2001.dt13/08/2012)]

Bipinkumar P.Khandheria (2012) BCAJ -November-P. 402) (Guj.) (High Court)

S.147:Reassessment-Advance Ruling-Binding Precedent- Reassessment based on some other case the decision was overruled cannot be the ground for reassessment. (S. 245S).

The assessee, a foreign company having residential status of non-resident, had approached the Authority for Advance Rulings, whereby it was held that profits arising to it from realization of portfolio investments in India will be treated as business profits. The loss on sale of shares claimed by the assessee under the head 'profits and gains from business or profession' was accepted by the Assessing Officer under section 143(3).A notice to reopen assessment under section 147 was issued on grounds that the Advance Ruling in assessee's own case was overruled by a subsequent Advance Ruling in another case, which held that earnings on purchase and sale of shares would be taxable under the head 'capital gains' and not 'profits and gain from business or profession'. Consequently, a reassessment order was passed. The Tribunal set aside the order of the Assessing Officer on grounds that for two other assessment years, the Director of Income-tax had initiated proceedings under section 263 on identical grounds which had been set aside in a writ petition, the Court held thatAdvance Ruling in assessee's own case cannot be overruled by a subsequent Advance Ruling in case of another assessee ,accordinglyreopening of assessment under section 147 on above ground was not valid, particularly when there was no failure on part of assessee to make full and true disclosure. In favour of assessee. (A.Y. 2003-04)

DIT. v. Prudential Assurance Co. Ltd. (2013)352 ITR 66/ 213 Taxman 111 (Bom.) (High Court)

S.147: Reassessment- Exchange of information- DTAA-India- Japan.-Reassessment proceedings initiated on basis of information received from Government were held to be valid. (S.90,148,Art. 26)

For the assessment year 2006-07, the assessee's return was processed under section 143(1). Subsequently, the Assessing Officer received information from the Government of India that the assessee had received certain amount from a Japanese-company. Since said amount was not shown in books of account by the assessee, a notice was issued under section 148.The assessee challenged the impugned notice in instant writ petition. Revenue contended that the information was received from the foreign tax authorities under the aegis of the OECD on which the respondent had no control and hence, the credibility of the information could not be questioned. Assessee contended that the Japanese authorities had no authority to verify the accounts of the assessee to find out whether the amount in question had been accounted for in its books and, therefore, the Assessing Officer was not right in stating that the information received from the Japanese authorities related only to the amount not disclosed in the books of account of the assessee. The material in the possession of the Assessing Officer could not in any case constitute 'reason to believe' so as to clothe him with jurisdiction to reopen the assessment.The court held that the very fact that this information was received from a Government agency under article 26 of DTAA, same would constitute live link or nexus between material and formation of belief that income to that extent had escaped assessment. In favour of revenue(A.Y. 2006-07)

Mitsui & Company India (P.) Ltd.v. ITO (2013) 213 Taxman 32 (Delhi) (High Court)

S 147: Reassessment--Notice--Share application money--Information from Investigation Wing that assessee one of beneficiaries of accommodation entries---Share applicants confirming factum of application for shares and of funds for such shares in response to notice under section 133(6) at time of original assessment--Reassessment on ground information neither available with Department nor did assessee disclose information at time of assessment proceedings, noticewasheld to be not valid. (S.143(3),148)

In the course of the assessment proceedings under section 143(3) of the Act, the Assessing Officer issued a questionnaire to furnish the details of the share capital introduced and the share application money received but there was no response from the assessee to the questionnaire till December, 2009. On August 24, 2009, the Additional Commissioner circulated a letter to all Assessing Officers including the Assessing Officer of the assessee. The letter was on the subject of a list of beneficiaries of accommodation entries. Thereafter, on November 9, 2009, the assessee furnished a reply to the questionnaire and gave details of the share capital raised by it and furnished confirmations from the parties. The Assessing Officer, in order to further verify and confirm the facts, issued notices under section 133(6) to the share applicant companies directly and all the five companies responded to those notices and reaffirmed their respective confirmations. Thereafter, assessment was framed on December 30, 2012. The assessment was reopened and the main reason for reopening the assessment of the assessee was that there were bogus accommodation entries and the assessee was one of the beneficiaries of the accommodation entries to the extent of Rs. 1, 35,00, 000. The reasons also indicated that the information that the entries were accommodation entries and were provided by bogus companies were not available with the Assessing Officer at the time the assessment was done under section 143(3). On a writ petition : Held, allowing the petition, that the plea taken in the reasons that the information was "neither available with the Department nor did the assessee disclose the information at the time of assessment proceedings" was factually not correct. The information was available with the Department and it had been circulated to all the Assessing Officers. There was nothing to show that the Assessing Officer did not receive the information. There was also nothing to show that the Assessing Officer had not applied his mind to the information received by him. On the contrary, it was apparently because he was mindful of the information that he issued notices under section 133(6) directly to the parties to confirm the factum of application of shares and the source of funds of such shares. Therefore, the very foundation of the notice under section 148 was not established even ex facie. Consequently, it could not be said that the Assessing Officer had the requisite belief under section 147 and, as a consequence, the notice and the order rejecting the objections were liable to be quashed. (A. Y. 2007-2008)
Pardesi Developers and InfrastructurePvt.Ltdv.CIT(2013) 351 ITR 8 (Delhi) (High Court)

S.147.: Reassessment—Notice- After four years--Incorrect allowance of deduction --Assessing Officer raising specific queries and considering material before him, reassessmentheldto be invalid. (S.148)

The assessee is engaged in the business of manufacturing and sale of various types of pharmaceutical products. Notice under section 148 of the Act, was issued to the assessee after the expiry of four years from the end of the assessment year 2003-04 for the reasons that incorrect allowance of deduction had been granted (i) in respect of royalty received from foreign enterprise ; (ii) in respect of export profits ; (iii) in respect of profits and gains from newly established undertakings ; and (iv) of non-business expenditure. Detailed objections were given by the assessee explaining each of the reasons. However, the Assessing Officer did not accept the objections and rejected them. On a writ petition :

Held, allowing the petition, that in so far as all the reasons other than the reason pertaining to club expenses were concerned, specific queries had been raised and the Assessing Officer had considered the material placed by the assessee before him in the course of the original assessment. As regards the club expenses, it was stated that since no specific query had been raised, Explanation 1 would get attracted. This could not be accepted because the club expenses were specifically mentioned in the tax audit report in Form 3CD which was annexed along with the return. This was a clear statutory disclosure on the part of the assessee with regard to the claim of club expenditure. It was not a piece of evidence which was hidden in some books of account and which the Assessing Officer could have possibly, with due diligence, discovered. On the contrary, this was material which was placed before the Assessing Officer along with the return which the Assessing Officer was duty bound to go through before completing the assessment. Therefore, the case could not fall in the category of material which was referred to in Explanation 1 to section 147. (A. Y. 2003-2004)
Ranbaxy Laboratories Ltd. v. Dy. CIT (2013) 351 ITR 23(Delhi) (High Court)

S. 147:-Reassessment--Notice—Duty to disclose primary facts-Licence fee for use of goodwill--Claim based on terms and conditions of licence agreement--Failure on part of assessee to furnish primary facts fully and truly at time of original assessment- notice is heldto be valid-Notice need not contain list of documents required to be furnished, but not actually furnished, by the assessee. (S.143(1),148.)

For the assessment years 2002-03 to 2006-07, amounts paid by the assessee under a licence agreement for use of goodwill were claimed and allowed as deduction. In the course of the assessment proceedings for the assessment years 2003-04, 2004-05, 2005-06 and 2006-07 the assessee did not furnish the licence agreement before the Assessing Officer. In the course of the assessment proceedings for the year 2007-08 the licence agreement was examined but the claim for deduction of the licence fee payment was found not allowable. Thereafter, notices were issued on the ground that the assessee had not disclosed all material facts correctly and fully and there was failure on its part to disclose fully and truly all material facts necessary for its assessment in terms of the proviso to section 147 of the Income-tax Act, 1961, by reason of which there was escapement of income chargeable to tax. On a writ petition contending that (i) the reasons

recorded for reopening the assessment did not allege that the assessee failed to file the licence agreement nor was there anything in the counter-affidavit to that effect and, therefore, it was not open to the Revenue to take up that point for the first time before the court ; and (ii)the partnership deed which was filed in the course of the original assessment proceedings narrated the history of the firm in the preamble wherein there was a reference to the payment of the licence fee as also to the agreement, which would amount to sufficient disclosure.
Held, dismissing the petitions, (i) that it was not necessary for the Assessing Officer to list the documents that were required to be furnished, but not actually furnished, by the assessee in the course of the original assessment proceedings. The primary condition for reopening assessment is that there should be reason to believe that income chargeable to tax had escaped assessment. The claim for deduction of the licence fee payment undeniably was based on the terms and conditions of the licence agreement. Neither the partnership deed nor the letter in question could be considered to be primary facts on the basis of which an inference as to the allowability of the licence fee payment could be properly drawn by the Assessing Officer. The profit and loss account, the tax audit report and its annexures and the replies to the questionnaire issued by the Assessing Officer in the course of the original assessment proceedings did not contain anything with regard to the licence fee agreement. This disclosure was only for the purpose of section 40A(2) (b) which permits the Assessing Officer to disallow such payments to the extent they were found to be unreasonable having regard to the various factors spelt out in the section. Furnishing of these particulars could in no way be considered as furnishing the primary facts in relation to the allowability of the payment of the licence fees which could be adjudicated upon only if the terms and conditions stipulated in the agreement were made known to the Assessing Officer.

(ii) That it is difficult to attribute any knowledge to the Assessing Officer while he is dealing with a return for a particular year under section 143(1), as to what he had done in the case of the same assessee in the earlier assessment years. Therefore, it would not be correct to say that the Assessing Officer consciously allowed the licence fee payment as a deduction when he accepted the return under section 143(1). There is nothing in section 147 prohibiting the reopening of an assessment completed under section 143(1) on the ground that the assessee failed to furnish the primary facts fully and truly. Therefore, failure to furnish the primary facts would constitute reason to believe authorising the issue of notice under section 148 also in a case where the first assessment was made by a mere processing of the return under section 143(1). (A. Y. 2002-2003 to 2006-2007)
Remfry and Sagarv. CIT (2013) 351 ITR 75/84 DTR 65(Delhi) (High Court)

S.147:Reassessment- Within four years- Tangible material- Change in accounting policy- Non application of mind by the Assessing Officer, reassessment is held to be valid. (S. 143(3),148)
The Assessment was completed under section 143 (3). The assessment was reopened on the ground that due to change in accounting policies an amount of Rs 20 crores, which however remained to be added to the total income. The assessee challenged the reassessment proceedings.Dismissing the petition the court held that there was no query was raisedduring the assessmentand the assessment would ex facie disclose that the Assessing Officer has not applied his mind to any of the points on the basis ofwhich the assessment was reopened. Therefore, there was tangible material for the assessing officer to reopen the assessment. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Somethingwhich is tangible need not be something which is new. An Assessing Officerwho has plainly ignored the relevant material in arriving at anassessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of section147,of the Act will be fulfilled. Accordingly the writ petition was dismissed. (A.Y. 2006-07)
Export Credit Guarantee Corporation of India Ltd v. Addl.CIT (2013) 350 ITR 651 (Bom.) (High Court)

S.147: Reassessment–Change of opinion-Speculative transaction-Hedging Loss–Commodity exchange-Reopening of assessment on the basis that the Exchange was recognized only with effect from 22-5-2009the transaction would not be covered under section 43(5) (d) was held to be not valid due to change of opinion. (S.43(5), 143(3)
Theassessee, engaged in wholesale business of gold and silver, claimed losson hedging of metals in commodity exchange to insure against price fluctuation. The said loss was allowed in the course of assessment proceedings under section 143 (3).The Assessing Officer proposed to reopen the assessment on the ground thatexchange was recognized in a subsequent year. In assessment it was not case of Assessing Officer that impugned hedging transactions did not satisfy condition of section 43(5) (a). Court held thatany post-assessment attempt on part of Assessing Officer to fall back on conditions required to be satisfied for application of sub-clause (a) would amount to change of reasons recorded for reopening; and any such inquiry would be wholly a fishing inquiry, therefore, no reopening was to be allowed. In favour of assessee (A.Y. 2007-08, 2008-09)
Jayesh Raichand Shah v ACIT (2013) 212 Taxman 306 (Guj.) (High Court)

S.147: Reassessment-Income deemed to accrue or arise in IndiaDTAA- India- USA –Failure to file return of income would invite action to reopen assessment on ground of escapement of income. (S.9(1) (i))

Petitioner-US company outsourced its core business to its Indian subsidiary CISPL. CISPL worked exclusively for petitioner. According to revenue default in filing return would per se attract provision of section 147, read with Explanation 2(a).Court observed that apartfrom prima facie existence of a business connection there was also material to entertain belief that Indian subsidiary was a permanent establishment of foreign company in India. There was prima facie material in possession of Assessing Officer to form a tentative belief that section 9(1) (i) was attracted and this reason by itself would constituted a relevant ground to reopen petitioner's assessments, therefore mere failure to file return of income (though assessee is liable to do so) would invite action to reopen assessment on ground of escapement of income and this has been provided in Explanation 2(a) below section 147. In favour of revenue. (A.Y. 2002-03 to 2004-05)

Convergys Customer Management v ADIT (2013) 212 Taxman 613(Delhi) (High Court)

S.147:Reassessment-Non-disclosure of primary facts -Tax royalties under section 44D-Where agreements were on record, reassessment were not justified, however where agreements were not available on record the assessments were justified. (S.44D)

Assessee, a Singapore based company, had a Branch Office (B.O.) in India. It is engaged in providing technical consultancy in area of road construction to NHAI in India. Assessee also entered into a sub-consultancy contract with respect to same NHAI project with one 'Q' - Assessee filed its returns wherein gross receipts from NHAI were offered to tax under section 44D. Assessment was completed under section 143(3). Subsequently Assessing Officer initiated reassessment proceedings holding that payments made to 'Q' a sub-contractor, were to be included in taxable income of assessee. It was noted from records that as regards assessment years 2004-05 and 2005-06 agreement between assessee and NHAI and agreement between assessee and 'Q' were available on records. However, for assessment years 2002-03 and 2003-04, agreement between assessee and 'Q' was not in assessment records and, thus, there was concealment of fact on part of assessee. Court held that on facts, reopening of assessment for assessment years 2004-05 and 2005-06 was not sustainable however, said proceedings were validly initiated for assessment years 2002-03 and 2003-04.Partly in favour of assessee. (A.Y. 2002-03 to 2005-06)

Meinhardt Singapore Pte Ltd. v ADIT (2013) 212 Taxman 637 (Delhi) (High Court)

S.147:Reassessment- Export oriented undertaking-Reason to be live-Setting off loss of one eligible unit against profit of another eligible unit- Reassessmentwas not valid. (S.10B)

In original assessment assessee declared profit in respect of its two units and claimed deduction under section 10A/10B but on account of loss situation it claimed nil deduction in respect of its third unit and had also submitted Forms 56F/56G along with return. Assessing Officer specifically examined said claim in detail and allowed deduction with some modifications. Subsequently on 23-7-2010 i.e. after expiry of four years from end of relevant assessment year, Assessing Officer reopened assessment by invoking proviso to section 147 on ground that assessee acted incorrectly in not setting off losses of one eligible unit against profits of another eligible unit. On challenge to reassessment by way of writ the Court held thatsince 'reason to believe' note was silent as to what tangible materials had persuaded revenue to invoke extraordinary powers under proviso to section 147, reopening was unjustified. In favour of assessee. (A.Y. 2004-05)

Moser Baer India Ltd. v. Dy.CIT (2013) 212 Taxman 139 (Mag.) (Delhi) (High Court)

S.147: Reassessment- DTAA- India-USA-Since all facts relating to royalty income had been placed on record in course of assessment, initiation of reassessment proceedings on basis of change of opinion was not sustainable. (S.9, 44D, 115A, Art.12).

The assessee, a non-resident company, had entered into a master licensing agreement (MLA) with MIPL. In terms of said arrangement the MIPL was granted non-exclusive right to use the assessee's system at agreed locations in India. The terms also required MIPL to pay the assessee initial franchise fee upon the opening of each restaurant and royalty on recorded monthly sales of each restaurant during the period. For the relevant assessment years, scrutiny assessments were completed after the relevant documents and materials were considered. Subsequently, a notice was issued under section 148 proposing to reopen the proceedings. The assessee filed its return and assessment was completed. On said occasion, the Assessing Officer accepted the assessee's submissions that the rate of taxation applicable was 15 per cent as originally held and assessed the royalty receipts in respect of the relevant assessment years. After completion of reassessment proceedings, again in respect of the same assessment years the Assessing Officer sought to initiate proceedings afresh. The reason for reopening the assessment was that article 12(6), read with article 7 of DTAA between India and USA provides that where an assessee was earning income in the nature of Royalty or Fees for Technical Services through a permanent establishment situated in the other State, such income was taxable as business income in

accordance with the domestic provisions of the State of source. Therefore, in such case section 44D, read with section 115A should be applied. The assessee filed its return in response to notice issued under section 147. The income was held to be taxable in terms of section 115A, read with section 44D at the rate of 30 per cent. On appeal, the Commissioner (Appeals) accepted the assessee's contention that since basic facts relevant for royalty income had been disclosed with other material, inference sought to be drawn could hardly be characterized as 'reasons to believe'. He thus set aside the reassessment proceedings. The Tribunal upheld the decision of the Commissioner (Appeals). On appeal by revenue the Court held thatsince all facts relating to royalty income had been placed on record in course of assessment, initiation of reassessment proceedings on basis of change of opinion was not sustainable. In favour of assessee. (A.Ys. 2000-01, 2001-02)
DIT v.Mc Donalds Corporation (2013) 213 Taxman 26 (Delhi) (High Court)

S.147: Reassessment proceedings - Property held for charitable purposes- Accumulation of income- Entire accumulated income shall be deemed to be income of assessee of previous year in which breach of conditions or contingency occurs, reassessment for all assessment years was held to be invalid. (S.11, 13, 35, 47)
Assessee is a scientific research society approved by competent authority under section 35(1) (ii). For relevant assessment years, assessee's income was held as exempt from tax. On 1-4-2000, assessee transferred its properties to its sister concern. Assessing Officer thus taking a view that assessee violated provisions of section 13(2) (g), read with section 13(3) (b), initiated reassessment proceedings. During reassessment proceedings, Assessing Officer having invoked provisions of section 11 (3), brought, balance of accumulated income at end of each relevant year, to tax.The assessee challenged the reassessment proceedings by filing the writ petition. Allowing the writ petition the court held thatin view of provisions of section 11 (3), entire accumulated income shall be deemed to be income of assessee of previous year in which breach of conditions or contingency occurs, therefore, it was impermissible in law for Assessing Officer to entertain a reason to believe that income chargeable to tax for all assessment years in question had escaped assessment, in view of above, impugned addition made in reassessment proceedings was to be deleted. In favour of assessee. (A.Y. 1998-99 to 2000-01)
Escorts Heart Institute & Research Centre.v. CIT (2013) 213 Taxman 11 (Delhi) (High Court)

S.147: Reassessment- Change of opinion-Within period of four years-If there is no fresh tangible materialreassessment is not valid-Reasons cannot be supplemented /improved upon later. (S.148)
When assessee disclosedall relevant facts,even in case of reopening of assessment within period of four years from the end of the relevant assessment year, the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment on the basisof tangible material, there being no fresh tangible material which would warrant taking a view different from one taken during the regular assessment proceedings, reopening was not sustainable. The reasons recorded at the time of issuing noticecannot besupplemented /improved upon later. Writ petition of assessee was allowed and notice was quashed. (A.Y. 2007-08)
NDT Systems v.ITO(2013) 81 DTR 1/255 CTR 113 (Bom.) (High Court)

S.147: Reassessment- Change of opinion- Beyond four years-Third proviso- Merger-There was no failure on part of assessee to disclose full and true particulars, and order of original assessment was merged with order of the appellate Authority, hence thereassessment held to be invalid. (S.80IA (8)).
The assessee is in the business of generation of distribution of electricity. Deduction under section 80IA was allowed under section 143 (3).Reassessmentnotice was issued on the ground that the assessee has claimed excess deduction under section80IA.Reasseswsment order was challengedbefore the Commissioner (Appeals). Commissioner (Appeals) held that there was no failure on the part of assessee hencethe reassessment was not valid. Tribunal also confirmedthe order of Tribunal. On appeal by revenue the court held that order ofMaharashtra Electricity Regulatory Commission was passed by MERCon 1stJuly, 2004 and that order specifically dealt with fixation of tariff rate for consumer and had nothing to do with the actual profits earned by a power generation plant ; The Court held that reopening of assessment was also barred by in view of the third proviso section 147since the quantum of deductionunder section 80IA was subject matter of appeal before the Commissioner (Appeals) and the Tribunaland consequently, the order of original assessment had merged with the order of the appellate authority. Accordingly the appeal of revenue was dismissed. (A.Y. 2001-02)
CIT v. Reliance Energy Ltd (2013) 81 DTR 130 /255 CTR 357(Bom.) (High Court)

S.147: Reassessment-Change of opinion-Third proviso- Merger-Order of original assessment was merged with order of the appellate Authority, hence thereassessment held to be invalid. (S.80IA(8)).
The Court held that reopening of assessment wasbarred by in view of the third proviso section 147since the quantum of deductionunder section 80IA was subject matter of appeal before the Commissioner (Appeals) and the Tribunaland

consequently, the order of original assessment had merged with the order of the appellate authority. Accordingly the appeal of revenue was dismissed. (A.Y. 2003-04)
CIT v. Reliance Energy Ltd (2013) 81 DTR 138/255 CTR 365/214 Taxman 64 (Mag.) (Bom.) (High Court)

S.147: Reassessment-Non-disclosure of primary facts-losses – Facts is different recorded reasons was held to be not valid hencereassessment held to be in valid.
While making assessment for assessment year 1996-97, Assessing Officer held that loss in shares had been fraudulently claimed. Accordingly assessment for relevant year was reopened assigning reasons that position mentioned in assessment year 1996-97 also existed in relevant year. As facts of subsequent year were altogether different from facts of relevant year, reasons recorded by Assessing Officer was not valid. Thus accordingly, reassessment proceedings were to be quashed. (A.Y. 1995-96)
CIT v. Kanodia & Sons (2013) 212 Taxman 55 (Mag.) (All.) (High Court)

S.147: Reassessment-Notice after four years - Change of opinion - Inspection report indicating two different units-Reopening on basis of report to withdraw deduction under section 80-IA is a change of opinion held to benot valid. (S.80IA, 148)
The assessment wascompleted under section 143(3) and deduction under section 80IA was allowed. The assessment was reassessed after four yearson the inspection report indicating different units to withdrawthe deduction under section 80IA. The assesseechallenged the reassessment proceedingsallowing the petition, the Court held that this wasnota case where the assessee has failed to disclosefully and truly all material facts and the pre- conditionsfor triggering the exception in the proviso to section 147 were not satisfied, thus reassessment was set aside. (A. Y. 2000-2001)
NTPC Ltd. v. Dy. CIT (2013) 350 ITR 614(Delhi) (High Court)

S.147: Reassessment - Notice after four years - on the basis of complaint ofDirector of assessee - Held to be valid. (S.148)
The assessee is engaged in the business of running hotels consisting of five independent units. For the assessment year 2003-04, the assessee's case was selected for scrutiny and after issuing notices under sections 143(2) and 142(1) of the Income-tax Act, 1961, and after examining the details furnished by the assessee, an assessment order was passed under section 143(3). Thereafter, notice under section 148 was issued to reopen the assessment. The assessee challenged the reassessment dismissing the writ petition the court held that; Director of assessee complaining before statutory authority that assessee had siphoned off monies as foreign travelling expenses and under agreement no obligation of assessee to incur such expenses. No details furnished at time of original assessment towards travelling expenses. No denial of such a clause in agreement. On facts failure to disclose fully and truly all material facts on the basisof Complaint constituting tangible material hence reassessment held to be valid**. (**A.Y. 2003-04, 2004-05, 2005-06)
Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660/214 Taxman 166/82 ITR 177 (Delhi) (High Court)
Maharaj Jai Singh v.ITO (2013) 350 ITR 660 (Delhi) (High Court)
Maharaj Pritviraj Singh v. ITO (2013) 350 ITR 660 (Delhi) (High Court)

S.147: Reassessment-Notice after four years - Travellingand repair and maintenance- Reassessment held to be invalid. (S.148)
For the assessment year 2004-05, the return declaring loss of the assessee was first processed and accepted under section 143(1) but was later selected for scrutiny and notice was issued under sections 143(2) and 142(1). Questionnaires were also issued calling for details relating to fixed assets, loans and advances, opening and closing inventory, sundry debtors, loss on sale of fixed assets, repairs and maintenance expenses, details of travelling expenses for foreign visits, etc., and these queries were answered by the assessee and the information was submitted. The assessment was completed. The notice under section 148 was issued beyond the period of four years on the ground that the expenditure was debited under the head "repairs and maintenance of building and additions to fixed assets", but the amounts were actually siphoned off by illegal withdrawals. On a writ petition:

Held, allowing the petition, that not only did the assessee furnish all the relevant details relating to the purchase of fixed assets, repairs and maintenance of buildings but also the details relating to the foreign travel expenses. The proceedings relating to the original assessment also showed that the Assessing Officer had raised queries regarding repairs and maintenance of building, plant and furniture which were answered by the assessee. No query would appear to have been raised in relation to the foreign travel expenses in regard to which the assessee had furnished the relevant details. Therefore, it could not be said that there was any failure on the part of the assessee to submit full and true particulars at the time of the original assessment. It was for the Assessing Officer to examine the details and draw the appropriate

inferences. The notice under section 148 issued for the assessment year 2004-05 was, therefore, without jurisdiction. (A.Y.2004-05)
Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660(Delhi) (High Court)
Maharaj Jai Singh v. ITO (2013) 350 ITR 660 (Delhi) (High Court)
Maharaj Pritviraj Singh v. ITO (2013) 350 ITR 660 (Delhi) (High Court)

S.147: Reassessment-Complaint by director –Reassessment held to be valid. (S.143(1), 148)
For the assessment year 2005-06, the return of the assessee declaring nil income was processed under section 143(1) and an intimation was issued on June 6, 2006. On March 30, 2012, notice under section 148 was issued reopening the assessment on the ground that the complaint filed by one of the directors before the Company Law Board regarding irregularities in the accounts of the assessee. On a writ petition:

Held, dismissing the petition, that there was no scrutiny assessment under section 143(3) in the first instance ; the return filed by the assessee was merely processed under section 143(1). The most basic and indispensable requirements for the validity of the notice under section 148 were satisfied. There was a complaint filed by one of the directors before the Company Law Board alleging irregularities such as illegal siphoning off of the company's funds by the other two directors in the guise of fixed assets, repairs and maintenances, travelling expenses, etc. This complaint constituted tangible material on the basis of which action to reopen the assessment could be taken in good faith ; the belief entertained by the Assessing Officer on the basis of the complaint which had been filed with some responsibility by one of the directors of the assessee, could not be said to be a mere pretense nor could the belief be said to be divorced from the material. The complaint constituted relevant material for the belief. Therefore, the notice issued under section 148 was within the jurisdiction. The fact that the assessee submitted all the details to the Assessing Officer along with the return was not relevant where only an intimation under section 143(1) was issued after merely processing the return without any scrutiny. There should, however, be reason to believe that income had escaped assessment and this condition had been satisfied in respect of the (A. Y.2005-06.)
Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660(Delhi) (High Court)

S.147: Reassessment-Within four years-Tangible material-No query was raised in the course of assessment hence as there is no application of mind by Assessing Officer notice held to bevalid. (S.148)
When an assessment is sought to be reopened within a period of four years from the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored the relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of section 147 of the Income-tax Act, 1961, would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within the jurisdiction. The Court held, dismissing the petition that no query was raised during the course of the assessment and the assessment order would ex facie disclose that the Assessing Officer had not applied his mind to any of the points on the basis of which the assessment was reopened. Therefore, there was tangible material for the Assessing Officer to reopen the assessment. Reassessment held to valid on facts. (A.Y. 2006-2007)
Export Credit Guarantee Corporation of India Ltd. v. Add. CIT (2013) 350 ITR 651 (Bom.) (High Court)

S.147: Reassessment--Notice--Single judge permitting assessee to file objections to notice and directing Assessing Officer to take decision after considering objections-Failure to file objections-Assessee to file objections and order to be passed after considering objections. (S.133A, 148)
The assessee was engaged in jewellery business. During the survey conducted under section 133A of the Income-tax Act, 1961, in the assessee's premises on February 1, 2006, the managing partner of the assessee admitted certain irregularities in the books of account and offered Rs. 1.5 crores as additional income for investments made by the partners in the business of the assessee for the assessment year 2006-07. The income already projected for advance tax payment in 2006-07 was Rs.1 crore and the amount of Rs. 1.5 crores was over and above the estimated income for the year 2006-07 so that the total income projected was Rs. 2.5 crores and the assessment was completed. Notice was issued for reassessment. On a writ petition, the single judge found that the proceedings were only at the notice stage and it was for the assessee to submit objections and it was for the officer to take the proceedings to the logical conclusion by passing appropriate orders in accordance with law, after considering the objections. Since the time for submitting objections was over, the single judge granted a further period of one month. On appealheld dismissing the appeal, that this was a case where the assessee had not cared to file any objection to the notice. It was in the exercise of discretionary jurisdiction that the single judge permitted the assessee to file objections. In fact, the stand of the Revenue was that the objections

would certainly be considered. Therefore, the objections which the assessee had filed must necessarily be considered and reasons must be given. In the above circumstances, interference is declined and the writ petition is dismissed. However, since the time for submitting the objections is already over, the petitioner is granted a further period of "one month" to submit the same. The proceedings shall be finalised in accordance with law, as expeditiously as possible, at any rate, within three months thereafter. (A. Y. 2006-2007)
Alappat Jewels v. Asst. CIT (2013) 350 ITR 471/257 CTR 358(Ker) (High Court)

S.147:Reassessment-Audit objection-Royalty-Beyond four years-Change of opinion-Audit objection that royalty payment resulted in capital benefitcannot constitute tangible material hence reassessment held to be not valid. (S.37,148)
Allowing the writ petition of the petitioner the Court held that (i) the assessing authority cannot keep improving his case from time to time and that the reassessment proceedings have to stand or fall on the basis of what was stated in the reasons recorded under section 148(2) of the Income-tax Act, 1961, and nothing more. No failure to furnish full and true particulars relating to the royalty payments, including the failure to file the relevant agreements, had been alleged in the reasons recorded. If anything, the reasons are an admission that it was the Assessing Officer who did not draw the inference that the royalty payments were capital in nature. It was for him to draw the appropriate inference and not for the assessee to tell him what inference of fact or law should be drawn from the primary facts furnished. Therefore, the reassessment notices after four years from the end of the assessment years 2002-03 and 2003-04 were quashed as also the consequent proceedings. The court also held that opinion expressed by audit that payment of royalty resulted in a capital benefit could not constitute a tangible material on the basis of which the assessment could be reopened. (A. Y.2002-2003, to 2004-2005)
Xerox Modicorp Ltd. v.Dy. CIT (2013) 350 ITR 308/81 DTR 321/255 CTR 342/213 Taxman 285 (Delhi) (High Court)
S.147: Reassessment – Notice - Assessing Officer has power to issue notice of reassessment. (S. 143(1), 143(2), 148)
In Asst. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC)the Supreme Court held that so long as the ingredients of section 147 of the Income-tax Act, 1961, are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued. (A. Y. 2000-2001)
D.T.T.D.C. Ltd. v. Dy. CIT (2013) 350 ITR 216 (Delhi) (High Court)

S.147: Reassessment - Export business-Original reason dropped - AssessingOfficercannot assess other escaped income if original reason dropped. (S.80HHC, 148)
The AO issued a notice u/s 148 to reopen the assessment for AY 2003-04 on the ground that the assessee had wrongly computed s. 80HHC deduction. However, in the reassessment order, the AO did not make any addition for the s. 80HHC claim and made additions in respect of other unconnected issues. The Tribunal held that as the AO had made no addition in respect of the issue for which the s. 148 notice was issued, he had no jurisdiction to assess any other income. On appeal by the department to the High Court, HELD dismissing the appeal:
S.147 empowers the AO to reopen an assessment if he has reason to believe that income has escaped assessment. If the requirements of giving jurisdiction to the AO to reopen the assessment are satisfied, he may also assess any other escaped income which comes to his notice subsequently in the course of the proceedings. Prior to the insertion of Explanation 3 to s. 147 by the Finance Act 2009 w.e.f. 1.4.1989, it was clear that if the reason for which the assessment is reopened fails, the AO could not proceed to assess other income which had escaped assessment. For assuming jurisdiction to frame an assessment u/s 147 what is essential is a valid reopening. If the very foundation of the reopening is knocked out, any further proceeding in respect to such assessment naturally would not survive. Explanation 3 to s. 147 does not change this position. Explanation 3 to s. 147 was inserted to counter the view taken by some courts (CIT v. Atlas Cycle Industries (1989) 180 ITR 319 (P&H) & Travancore Cements Ltd. v. ACIT (2008) 305 ITR 170 (Ker.) that even if the jurisdiction was validly exercised, the AO could not assess the other escaped income that was not referred to in the reasons. It merely clarifies the existing law and does not expand the powers of the AO u/s 147. If the AO drops the ground for which the notice for reopening was issued, it means he had no "reason to believe" that income had escaped assessment and so he has no jurisdiction to assess the other escaped income (CIT v. Jet Airways(I) Ltd. (2011) 331 ITR 236 (Bom), Ranbaxy Laboratories Ltd. v. CIT (2011) 336 ITR 136 (Del.) &Major Deepak Mehta 344 ITR 641 (Chhattisgarh) followed; Majinder Singh Kang v. CIT (2012) 344 ITR 358 (P & H) not followed) (A.Y.2003-04)
CIT v. Mohmed Junded Dadani(2013) 214 Taxman 38/85 DTR 12(Guj.) (High Court)
S.147:Reassessment-Revenue audit-Reopening of assessment due to revenue audit's compulsion is void. (S.148)

The AO passed a s. 143(3) assessment order in which he allowed the assessee's claim for business expenses. The Revenue Audit raised an objection that as the assessee's business had ceased, the income had to assessed as "other sources" and the expenditure disallowed. The AO replied to the Audit stating that the objection was not correct and that the assessment order was correct. The Revenue Audit thereafter wrote to the CIT that the AO's stand was not correct. Based on this, the AO issued a s. 148 notice (within 4 years from the end of the AY) to reopen the assessment and disallow the expenditure. The assessee challenged the reopening on the basis that the AO was compelled by the audit party to re-open the assessment though he was of the belief that no income had escaped assessment. HELD by the High Court upholding the plea:

If the audit party brings certain aspects to the notice of the AO, he is entitled to reopen the assessment after forming his own belief. However, if the AO acts under compulsion of the audit party and not independently, the action of re-opening would be vitiated. On facts, it is clearly established that the AO was under compulsion from the audit party to issue notice for reopening because after the audit party brought the controversial issue to the notice of the AO, he did not agree to the proposal for re-examination of the issue and wrote a letter and gave elaborate reasons why the assessment order was correct. The s. 148 notice was issued only after the Revenue Audit wrote to the CIT reiterating its stand that income had escaped assessment. Consequently, the s. 148 notice had to be quashed [**Cadila Healthcare**Ltd. ACIT (2012) 65 DTR 385(Guj) followed; CIT v. **P.V.S Beedies Pvt. Ltd. (1999)** 237 ITR 13 (SC) referred].

Vijay Rameshbhai Gupta v.ACIT (Guj.) (High Court).itatonline.org

S. 147:Reassessment-Existence of material and rational belief-Tax deducted at source-No return was filed, reassessment was valid-Limitation-Reasons for reopening were furnished after six years from the end of the relevant assessment year was held to be valid-Sanction by Addl. Director of income tax was held to be valid. Due to typing error sanction cannot be held to be invalid. (S.2. (28C),149, 151)

At the stage of formation of beliefthe final outcome of the proceedings is not relevant and the fact of escapement of income need not be established. The phrase 'reason to believe' cannot be said to mean that the AO shouldhave finally ascertained the fact by legal evidence or conclusion.Once the AO had formed a prima facie belief on the basis of relevant material, any facts which subsequently surface in the course of assessment proceedings which contradict the basis on which the belief was formed cannot vitiate the reassessment proceedings is valid. The contention that since tax was deducted at source for assessment years 2002-03 and 2003-04, the presumption is that there is no escapement of income is not tenable. No such presumption can be there. The fact remains that for the Assessment year 2002-03 and 2003-04 there was income from FTS derived by the assessee which was subject to tax at source and that no return of income was filed.Reassessment was held to be valid. Reassessment proceedings cannot be held to be barred by limitation on the ground that reasons for reopening were furnished after the expiry of six years from the end of the relevant assessment year. Sanction under section 151 given by an Add.Director of ITwho is authorized to exercise the power of an Addl.CIT is a sanction by an appropriate authority. Sanction under section 151 accorded by the Addl.Director cannot be said to have given without application of mind simply because the findings of the Addl.Director are typed. (A.Y. 2001-01 to 2004-05)

Qualcomm Incorporated v. ADIT (2013) 23 ITR 239/85 DTR 156(Delhi) (Trib.)

S.147: Reassessment-Block assessment-Reassessment based on same material requisitioned under section 132A was held to be invalid. (S.132A, 148, 158BC)

The police authorities intercepted a car in which assessee was travelling with two other persons. A sum of Rs. 32.34 lakhs was recovered from them. The police authorities recorded the statement of occupants of the car and the information was passed on to income-tax department. Consequently case was requisitioned by the Department under section 132A. As per the Assessing Officer the assessment proceedings in the name of AOP consisting of three persons including assessee were initiated under the provisions of Chapter XIV-B. In pursuance of those proceedings, the amount recovered was added to taxable income of AOP on ground that same remained unexplained. The Commissioner (Appeals) confirmed said addition. On further appeal, the Tribunal opined that whether the cash was explained or unexplained, the fact remained that action could be taken only in the hands of individuals and not in the hands of AOP'. Accordingly, the addition made in the hands of AOP was deleted. On receipt of the Tribunal's order, the Assessing Officer initiated proceedings under section 148 in case of assessee. The assessee filed an appeal before the Commissioner (Appeals) challenging the validity of reopening on the ground that in case of documents or any asset requisitioned under section 132A, then the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of Chapter XIVB of the Act. The Commissioner (Appeals) having accepted assessee's submission set aside reassessment proceedings taking a view that said proceedings were *void ab initio*. On revenue's

appealthe Tribunal held thatonce Assessing Officer proceeds to make block assessment under section 158BC based on material gathered during search under section 132, he cannot proceed to make reassessment under section 147 on basis of same material, therefore, where material on basis of which Assessing Officer sought to reopen a regular assessment was material pertaining to requisition under section 132A, such material could be subject to only block assessment and it could not form basis for reopening an assessment. In favour of assessee (A. Y. 1999-2000).
ACITv.Vidit Kumar Agarwal (2013) 55 SOT 48(URO) (Agra) (Trib.)

S.147: Reassessment - Issue notmentioned in recorded reasons - Explanation 3 -Reassessment held to be justified. (S.35D, 148)
The assessment was completed under section 143(3).The assessment was reopened on the ground that the assessee had debited Rs.44,90,600 towards 'loss on sale of investment'allowed asbusiness expenditurethough it is a capital in nature. In the reassessment proceedings the Assessing Officer disallowed the preliminary expenses though the said expenses were not referred in the reasons record. On appeal the Tribunal held thatExplanation 3 to section 3 to section 147 inserted by the Finance (No 2) Act, 2009, provides that the Assessing Officer may assessee or reassess the income in respect of any issue, which has escaped assessment, if such issue comes to his notice subsequently in the course of the proceedings under section 147 notwithstandingthat the reasons for such issue have not been included in the reasons recorded under sub section (2) of section 148. Therefore in view of explanation 3 to section 147 inadmissible claim of deduction of miscellaneous expenses under section 35Dcould be disallowed by the Assessing Officer in the course of reassessmenteven though the same did not find in the reasons recorded under section 148(2). Appeal of assessee dismissed. (A.Y. 2005-06)
Instant Holdings Ltdv. Dy.CIT(2013) 81 DTR 35(Mum.) (Trib.)

S.147: Reassessment - Merger - Rectification - Merger of rectification proceeding with reassessment proceedings - validity of proceedings –Reassessment was held to be valid. (S.143(1), 148, 154)
Assessment was completed under section 143(1) of the Act. Thereafter thenotice was issued under section 154/155of the Actfor rectifying certain mistakes. Subsequently the Assessing Officer issued notice under section 147/148.Before Commissioner (Appeals) it was contended that no reopeningcan be made after due date of completing scrutiny assessment under section 143(3) has been allowedto be lapsed by the Assessing Officer. It was also contended that there should not be simultaneousaction undersection 154 and 147. Commissioner (Appeals) held that reassessment was void ab-initio. On appeal by revenue the Tribunal up held the validity of reassessment and directed the Commissioner (Appeals) to decide on merits. The Tribunal held that reassessment proceedings, validity of those proceedings could not be challenged on ground that there could not be a simultaneous action by Assessing Officer u/s 154 and 147. (A.Y. 2002-03)
Hotel Allied Trades (P.) Ltd. v. Dy.CIT (2013) 140 ITR 309 (Cochin) (Trib.)

S.147: Reassessment – Consideration for development agreement spread over in three years – Capital Gain to be taxed only in final year – Reassessment Valid
Assessee entered into development agreement with builder and received consideration in installment, spread over three financial years. Assessing Officer issued a notice for reopening for threeassessment years. It was held that issue of notice for all three years were valid though finally A.O. brought capital gains to tax only in AY 2003-04. Thus, the reopening of assessmentheld to be valid. (A.Y. 2003-04)
G. Sreenivasan v. Dy. CIT (2013) 140 ITD 235 (Cochin) (Trib.)

S. 147 : Reassessment – Information from investigation wing-Reassessment held to be valid. (S. 148)
Where the information is factual and not false one and the same has merely been communicated to the Assessing Officer, he would be within his statutory right to invoke the provisions of section 147 r.w.s. 148.The Tribunal held that information from the investigation wing being factually correct and the assessee failed to refuse the same in any proceedings under the Act, then the Assessing Officer has jurisdiction under section 147 r.w.s. 148 of the Act and there is no infirmity and illegality in issuance of notice under section 148 of the Act by Assessing Officer. (A. Y. 2006-07)
ACIT v. Kisco Casting P. Ltd. (2013) 152 TTJ 629 (Chd.) (Trib.)

S.148:Reassessment – Notice- For failure to issue notice, reassessment held to benot valid, section 292BB does not have retrospective effect. (S.143(2), 292BB)
The A.O. issued a notice u/s 148 to make a reassessment. However, as a notice u/s 143(2) was not issued, the Tribunal quashed the reassessment. The Department filed an appeal before the High Court where it relied on s. 292BB (which provides that the failure to issue notice cannot be objected to if the assessee has appeared in the proceeding), inserted by

the Finance Act 2008 w.e.f. 1.4.2008 and argued that the said provision was retrospective in operation and the reassessment was valid. Held by the High Court dismissing the appeal:
The issue of a notice u/s.143(2) is mandatory. The failure to do so renders the reassessment void (CWT v. HUF ofH. H. Late Shri. J.M. Scindia (2008) 300 ITR 193 (Bom.) followed). S.292BB was inserted w.e.f. 1.4.2008 and came into operation prospectively for AY 2008 - 2009 and onwards.
CIT v Salman Khan (Bom.) (High Court) www.itatonline.org.

S.153:Assessment–Reassessment – Limitation -In case where ITAT remands a matter to the file of AO, if AO doesn't pass Asst. Order within one year from the end of financial year in which such order is received by CCIT or CIT, such asst. Proceedings become time barred:
Whenever Hon'ble ITAT remands a matter to the file of AO with certain specific directions, AO must pass an Asst. Order within a period of two years from the end of financial year("One Year" instead of "two years" w.e.f.01/06/2001) in which such order passed by Hon'ble ITAT is received by the Chief Commissioner or Commissioner as prescribed u/s. 153(2A) of the Act. If AO doesn't pass an Asst. Order within the prescribed time limit such proceeding become time- barred and the assessment placed before AO by Hon'ble ITATs order must be treated as having abated. Any excess tax paid by the assessee under original assessment framed by the AO must be refunded with consequential effect [SCA 10330 of 2003, dt18/06/2012)]
Instruments and Control Company. (2012) BCAJ -November-P. 401) (Guj.) (High Court)

S.153A: Assessment-Search or requisition-Assessment is mandatory even if no incriminating material is found. Distinction between "developer" and "works contractor" in s. 80-IA(4) explained. (S. 80IA (4))
A search and seizure action u/s.132 was conducted on the premises of the assessee. No incriminating material or evidence was found to indicate that there was any undisclosed income. The AO passed an order u/s. 153A for AY 2000-01 to 2005-06 in which he took the view that the assessee was not entitled to claim deduction u/s 80IA(4) on the ground that it was a contractor and not a developer of infrastructure projects. The Tribunal had to consider two issues: (a) whether if the assessments for the concerned years have attained finality and no incriminating material is found in the course of the search, the AO has jurisdiction to proceed u/s 153A and (b) how to distinguish between a "developer" and a "works contractor" for purposes of s. 80-IA(4). HELD by the Tribunal:

(i) Three possible circumstances emerge on the date of initiation of search u/s 132(1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material is found in the course of search, indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. Circumstance (a) is answered by the Act itself, that is, since the proceedings are still pending, all those pending proceedings are abated and the AO gets a free hand to make the assessment. Circumstance (b) has been answered in Anil Bhatia to hold that while there is no question of any abatement since no proceedings are pending, the AO is entitled to reopen the assessment (without having to comply with the strict conditions of s. 147, 148 and 151) and bring the undisclosed income to tax. Also, in All Cargo Global Logistics Ltd v. Dy. CIT (2012) 137 ITD 287 (Mum) (SB) it was held that in the case of a non-abated assessment, an assessment u/s 153A has to be made on the basis of incriminating material. Circumstance (c) has been kept open and left unanswered. Circumstance (c) has to be answered to say that even where there is/are no pending proceedings and no incriminating material has to be found, the AO is still required to pass an order u/s 153A though the assessed income will have to be the same as the originally assessed income as there was no incriminating material. Accordingly, the assessee's argument that when there is no incriminating material or assets, then there is no jurisdiction to proceed u/s 153A is not acceptable. S. 153A contains a non-obstante clause and is triggered automatically whenever a search is undertaken. The fact that no incriminating material was found has no bearing on the applicability of s. 153A;

(ii) S. 80IA(4) allows deduction to "any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility". The Explanation provides that it shall not apply to "business which is in the nature of a works contract". Whether an assessee is a developer or works contractor depends on the nature of the work undertaken by the assessee. The word 'contractor' is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer is a contractor. Contracts involving design, development, operating and maintenance, financial involvement, and defect correction and liability period cannot be called as simple works contract. A case where in an undeveloped area, infrastructure is developed and handed over to the Government cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. If the contract is composite, it will have to be segregated so as to allow deduction on the parts that involve design, development, operating and maintenance, financial involvement etc. and to deny on those which are pure works contracts. On facts, the assessee had made substantial investments in fixed assets and was exposed to various kinds of risks. It was not a mere contractor. It is enough if the assessee is a developer. It need not also maintain & operate the infrastructure facility (Patel Engineering Ltd v. Dy. CIT (2004) 94 ITD 411 (Mum) &GVPR Engineers Ltd (included in file) followed) (A. Y. 2000 – 01 to 2005-06)

ACIT v. Pratibha Industries Ltd (2013) 141 ITD 151 (Mum.) (Trib.)

S.153C: Assessment-Income of any other person- Search and seizure-Approval-Failure to Obtain JCIT's Approval Renders s. 153C Assessment Order Void. (S.132, 144, 153D)

Pursuant to search & seizure action u/s 132 on the premises of a third party, certain documents belonging to the assessee were found and seized pursuant to which a notice u/s 153C was issued to the assessee and assessment u/s 153C r.w.s. 144 were framed. In passing the assessment orders, the A.O. (ITO) omitted to obtain the consent of the JCIT as mandated by S.153D. Before the Tribunal, the assessee argued that the failure to obtain the JCIT's consent rendered the assessment a nullity. The Tribunal {Akil Gulamali Somki v. ITO (2012) 137 ITD 94 (Pune)} upheld the plea on the basis that as the heading to s. 153D refers to a "prior approval" and uses negative wording and the word "shall", compliance of s. 153D is mandatory and cannot be waived by the assessee. Reliance was also placed on Clause 9 of the Manual of Office Procedure which makes it clear that an assessment order under Chapter XIV-B can be passed only with the previous approval of the JCIT and that the approval must be in writing and stated to have been obtained in the body of the assessment order. On appeal by the Department to the High Court, held dismissing the appeal:

Though the question raised proceeds on the basis that approval of the JCIT was given as he had corrected the draft assessment order and the changes were incorporated by the AO in the final assessment order, the finding of fact was recorded by the Tribunal is that no prior approval of the Joint Commissioner was taken before the ITO passed the order. In view of the above, there is no reason to entertain the proposed question and the appeal is dismissed.

CIT v. Akil Gulamali Somji (Bom) (High Court) www.itatonline.org.

S.154: Rectification of mistake –Debenture redemption reserve-Book profit-Adjustment cannot be made under section 154. (S.115JB, 143(1))

Return of assessee was processed under section 143(1).Thereafter, an order under section 154 was passed on ground that assessee did not include debenture redemption reserve and short provision for expenses for earlier years while determining book profits under section 115JB.Tribunal held that thedisputed issues as to whether or not debenture redemption reserve is for ascertained liability and whether or not such reserve is deductible while determining book profits under section 115JB and also as to whether or not liability for prior period expenses crystallized in year under consideration cannot be adjudicated in proceedings under section 154. In favour of assessee. (A.Y. 2008-09)

ACITv.Uflex Ltd.(2013)55 SOT43 (URO) (Delhi) (Trib.)

S.154: Rectification of mistake–Commissioner(Appeals)-Powers-Exempt income- Rectification application denial of exemption under section 10Awas held to be not justified. (S.10A, 251)

Assessee-company claimed deduction under section 10A. Assessing Officer allowed same after reducing 'internet expenses' from export turnover. The assessee went in appeal against said order. The Commissioner (Appeals) dismissed the appeal as infructuous. The Assessee sought rectification in said order, by filing rectification application, under section 154. Disposing the said application, the Commissioner (Appeals) accepted the existence of the assessee-company; however, he entirely disallowed the claim of assessee under section 10A on ground that activity carried out by the assessee was not manufacture. On appeal to Tribunal held thatissue of eligibility for deduction under section 10A required examination of facts, business activity and relevant provisions and, therefore, same could not be considered as mistake apparent from records under section 154. Therefore, the Commissioner (Appeals) was not justified in denying deduction in order pursuant to rectification application under section 154. In favour of assessee. (A. Y. 2007-08)

Nuance Transcription Services India (P.) Ltd. v. Dy. CIT. (2013) 55 SOT 39(URO) (Bang.) (Trib.)

S.154: Rectification of mistake - Tax on STCG - Clerical error - Assessee did not showed STCG under Schedule CG of e-return - Depicted same under Schedule SI - Gain taxable at special rate 10%appeal of assessee was allowed. (S. 111A, 143(1))

The assessee filed e. return. The Assessing Officer received the intimation under section 143(1). The Assessing Officer computed the tax payable on short term capital gain at 30 percent as against at the rate of 10 percent under section 111A. The assessee moved application under section 154. The Assessing Officer held that short term capital gains had not been shown under section 111Aat Schedule CG of e. return. Commissioner (Appeals) up held the order of Assessing Officer. On appeal the Tribunal held that where due to clerical error, assessee did not showed STCG under

Schedule CG of e-return, but depicted same under Schedule SI. It was held that Income chargeable at special rates, gains would be taxable at special rate of 10 per cent. (A.Y. 2008-09)
Shrikant Real Estates (P.)Ltd. v. ITO (2013) 140 ITD 155/152 TTJ 30/22 ITR 266 (Mum.) (Trib.)

S.154:Rectification of mistake- Free trade zone – Depreciation and brought forward losses –Held benefit of tax holiday availed from AY 1999-2000, its exemption period was continuing hence, S. 10A(6) not applicable, hence rectification was not justified. (S.10A)
Assessee, a S.10A unit claimed deduction for depreciation and brought forward losses which were allowed.Assessing Officer found that claim for depreciation and brought forward business loss for AY had been wrongly allowed as assessee, a section 10A unit, had violated S.10A(6). Assessing Officer passed the order under section 154 and rejected the claim. In appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that since assessee chose to avail benefit of tax holiday from AY 1999-2000, its exemption period was continuing and therefore S. 10A(6) would not apply. Accordingly the rectification order was quashed and appeal of assessee was allowed.(A.Y. 2003-04 & 2004-05)
Tata Consultancy Services Ltd. v. ACIT (2013) 140 ITD 325 (Chennai) (Trib.)

S.158BB:Block assessment – Computation of undisclosed income – Unexplained investment in stock – Cash receipts and expenses noted on seized material.
Tribunal deleted the additions made by the AO towards the alleged discrepancy in stocks on the ground that the entire process of inventorisation followed by the I-t authorities was inaccurate as it was humanly impossible to complete the entire exercise in a single day and that the AO has not examined the reconciliation of stock filed by the assessee and ignored the value addition made to the semi-finished goods and the discount and profit element in arriving at the value of stocks coupled with the fact that there was no evidence of sale of stocks outside the books.Findings of the Tribunal are findings of facts and, therefore, no substantial question of law arises out of the findings of the Tribunal.AO having made addition of unaccounted receipts noted on seized handwritten slips without allowing deduction for the unaccounted expenses recorded in the same material, and the Tribunal having deleted the addition on the ground that the seized material should be followed in its entirety and that the said expense were incurred by the assessee for the purposes of the business.Findings of the Tribunal, both of facts and law, do not suffer from any perversity and, therefore, no substantial question of law arises.
CIT v. D.D. Gears Ltd. (2013) 83 DTR88 (Delhi) (High Court)
S.158BB:Block assessment-Undisclosed income-Absence of any material addition deleted by the Tribunal was held to be justified. (S. 158B(b))
Documents on record having indicated that the assessee has in fact, not received any royalty w.e.f. October 1999, for the user of his trademark from the company. Once the trademark stood assigned to the company by virtue of the shareholders agreement entered into by the assessee with another company which is not shown to be sham and bogus, the finding of the Tribunal that no royalty income was assessable under Chapter XIV-B does not raise a substantial question of law.
In the absence of any material to show that the assessee had actually received the reimbursement of marketing expenses from the company using his trademark which he was entitled to receive only "on demand" but was not demanded by him, the question of undisclosed income does not arise and no substantial question of law arises. (Block period 1.4.1999 to 1.11.2000)
CIT v. M.P. Ramchandran (2013) 83 DTR 143 (Bom.) (High Court)

S.158BB: Block assessment – Computation - Undisclosed income – Money requisitioned under section 132 A of the Act from police beyond the block period cannot treated as undisclosed income. (S.132A.)
Money requisitioned under section 132 A of the Act from Police which was received beyond the block period cannot be included while computing undisclosed income in block assessment. (Block Period: 25.08.84 to 26.10.95 & 01.04.85 to 14.11.95)
CIT v. Nirankar Nath Mittal (2013) 81 DTR 233 (All) (High Court)

S.158BB:Block assessment – Undisclosed income – Assessee following cash system of accounting – interest on Indira Vikas Patra accrued on year to year basis cannot be assessed as undisclosed income.
Where the assessee is following cash system of accounting it cannot be said that interest on IndiraVikas Patra accrued to the assessee on year to year basis so as to assess the same as undisclosed income of the assessee in block assessment. (Block Period: 01.04.90 to 06.04.2000)
CIT v. Roshan Singh (2013) 81 DTR 58 (P&H) (High Court)

S.158BB: Block assessment-Computation-Undisclosed income-Salary-TDS-Income from salary which has been subjected to TDS can't be categorized as undisclosed income. (S.192)

Income from salary which has been subjected to deduction of tax at source cannot be categorized as "Undisclosed Income" as defined u/s 158B(b) Such an income cannot be taxed as income during the block period by virtue of computation provisions of section 158BB in Search cases. (T.A.No. 63 of 200,dt, 16/07/12)

Harishkumar J. Gupta (2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.158BB: Block assessment- Computation-Undisclosed income-Cash credits-Gifts-Value ofproperty- Gifts held to be genuine- Documents found explained addition was not justified. (S.68, 69)

The assessee has receivedgifts amounting to Rs 22.75 lacs.In the assessment proceedings the assessee had filed thedetails of capacity of donors, Income tax details, PAN no, copies of pass book. Commissioner (Appeals) and Tribunalhave gave the finding that gifts are genuine. On appeal by revenuethe High Court also confirmed the view of Tribunal byholding that the orderis not perverse. Accordingly the appeal of revenue was dismissed. A document was foundat the premises of assessee in the course of search. The assessee explainedthat the said document was in the hand writing of the assessee's father which contained the resale value of property for the purpose of distribution of property within family. The Commissioner (Appeals), and Tribunalhasaccepted the explanation of assessee that no cash consideration in excess of Rs 71.35 lacs was paid for the purchase of the property. On appeal by revenue the High Court also confirmedthe order ofTribunal Hence no addition is called for. (Block period 1st April, 1997 to 29th Jan, 2003)

CIT v. Sunita Makhija (2013) 256 CTR 197/82 DTR 140 /214 Taxman 50(Mag.) (Bom.) (High Court)

S.158BB: Block assessment–Computation-Undisclosed income-Deduction under Chapter VI-Ais available amount disclosed in regular assessment cannot be assessed as undisclosed. (S.158B)

Assessing Officer disallowed deduction under Chapter VI-A while computing undisclosed income of assessee for relevant block period. The court held thatdeduction under Chapter VI-A has to be given while computing total income or loss. The court also held that the amount in question had been taken into consideration in regular assessment order under section 143(3), said amount could not be included under sub-clause (b) of section 158B In favour of assessee(B.P. 1-4-1985 to 14-11-1995)

CIT v. Anil Sarin (2013) 212 Taxman 108 (Mag.) (All) (High Court)

S 158BC:- Block Assessment – Undisclosed income –

Amount received from policy which was in fact received by the Assessee beyond block period could not possibly be included in the computation of undisclosed income in the Block Assessment. (Block Period 1984 to 1995)

CIT v. Nirankar Nath Mithun (2013) 255 CTR 488 (All) (High Court)

S.158BC: Block assessment-Undisclosed income-Donation to political parties- Statement on oath- No addition can be made merely on the basis of sworn statement of third party without given an opportunity of cross examination. [S.132, 132(4)]

The Assessing Officer made addition in respect ofadvanceby assessee as donation to political party.The Tribunal deleted the additionby observing that the assessee established the source of collectionand given to the Political party. Asregards the noting in thediary the assessee stated that the entries were not written by him.Theaddition was made consequence to swornstatement of one Mr. J.A. Richrdswhich was taken fromthe personal assistant of the assesse. The assessee asked for cross examinationand opportunity was not given.The Tribunal held that his statement cannot be used as evidence against the assessee. Accordingly, the Tribunaldeleted the addition. On appeal by revenue the Court also affirmed the order of Tribunal. (Block period 1987-88 to 1997-98)

CIT v. M. Chinnasamy (2013) 350 ITR 694 (Mad.) (High Court)

S.158BC: Block assessment-Undisclosed income-Revenue accepting Commissioner (Appeals) finding in case of assessee's wife from assessment year 1997-98 that she was owner of business and on that basis filed her return-No addition as undisclosed income in hands of assessee on ground business belonged to him.

Pursuant to a search of the assessee's business and residential premises, the Assessing Officer made an addition for the assessment years 1995-96 to 1997-98 on the basis that the business in question belonged to the assessee rejecting the assessee's claim that the business had been transferred to his wife after 1994 and, thereafter, was run by her and, that therefore, the entire income from that business should be assessed in her hands. In support of the claim the assessee had filed an affidavit from the assessee's wife before the Assessing Officer. The affidavit was, however, rejected and it was noted that the statement given by the assessee's wife on oath earlier before the income-tax authorities should be given more weight. The assessee also claimed before the Assessing Officer that the income from the business was declared in the returns filed in the name of his wife. This claim was also rejected by the Assessing Officer as irrelevant. The Commissioner (Appeals) deleted the addition following his predecessor's order. His predecessor had deleted the

additions on the ground that the income from the business had been disclosed in the returns filed by the assessee's wife. The Tribunal confirmed the decision of the Commissioner (Appeals). On appealby revenue dismissing the appeal,the Court heldthat the finding as to the ownership of a particular business is a finding of fact. The Commissioner (Appeals) found as a fact that from the assessment year 1997-98 it was the assessee's wife, who was the owner of the concern. It was on that basis that she had filed her return and the finding of the Commissioner (Appeals) was accepted by the Revenue. The finding of fact had not been challenged as perverse. The Revenue, having accepted the finding in the assessee's wife case, could not take a different view in the assessment of the husband. That would amount to taking contradictory or inconsistent stands without any just cause. Therefore, the additions were rightly deleted by the Tribunal. (A.Y.1998-1999)
CIT v.Kuldeep Sood (2013) 351 ITR 166 (Delhi) (High Court)

S.158BC: Block assessment - Procedure-Undisclosed income-Fixed deposits.
FDRs in names of employees found to be bogus, addition to incomeis held to be justified. Deletion of amounts representing FDRs in names of friends and relatives of managing director as there was no evidence regarding genuineness of FDRs--Matter remanded. (Block period 1-4-1986 to 28-11-1996)
Hastalloy India Ltd. v. Dy. CIT (2013) 350 ITR 52 (AP) (High Court)

S.158BC: Block assessment- Non recording of transaction –Valuation –No variation in overall stock –Addition was deleted.
A search and seizure operation was undertaken by department in assessee's case wherein department disputed valuation and quantities of raw materials, work in progress and finished products, within factory premises. Assessee filed its return showing nil undisclosed income. Assessing Officer completed block assessment making addition on account of discrepancies in stock quantities. Tribunal held that there was no variance in overall stocks. Further, revenue failed to prove that assessee had indulged in either investments made from outside books or any sales had been made outside books, which could lead to an element of income having been generated, and which could come under purview of Chapter XIV-B, in view of above, impugned addition made by Assessing Officer was to be set aside. In favour of assessee. (Block period 1-4-1987 to 23-10-1997)
Hindustan Polyamides & Fibres Ltd. v. Dy. CIT (2013)55 SOT 52(URO) (Mum.) (Trib.)

S. 158BD : Block assessment - Undisclosed income of any other person – Recording of satisfaction – It is mandatory for the assessing officer of the searched person to record satisfaction for assessee's officer to assume jurisdiction under section 158 BD of the Act. (S.158BC)
Where in the communication received from the assessing officer of the searched person to the assessing officer of the assessee, there is no recording of satisfaction that any undisclosed income belongs to the assessee entire proceedings under section 158 BD are held to be without jurisdiction. (Block Period: 01.04.1986 to 02.11.1996)
CIT v. Intercontinental Trading & Investment Co. Ltd. (2013) 81 DTR 314 (Delhi) (High Court)

S.158BD:Block assessment-Undisclosed income of any other person-Recording of satisfaction-Satisfaction - Block assessment made without such satisfactionis held to beinvalid. (S.158BC)
The Tribunal held that mere forwarding of such books of account by itself was insufficient to conclude that the Assessing Officer, having jurisdiction over the Mody group of cases, was satisfied that any undisclosed income was found or detected, as a result of the search, on the basis of which, proceedings under section 158BD of the Income-tax Act, 1961, could have been initiated against the assessee. On appeal the Court dismissing the appeal held that in the communication from the Assessing Officer of the searched person to the Assessing Officer of the assessee, there was no recording of any satisfaction that any undisclosed income belonged to the assessee. The communication merely indicated that the books of account pertaining to the assessee were seized and were lying in the custody of the Assessing Officer in respect of the Mody group of cases. There was no satisfaction recorded by the Assessing Officer of the Mody group of companies that any undisclosed income belonged to the assessee. The very first mandatory condition precedent for assuming jurisdiction under section 158BD and subsequently under section 158BC had not been satisfied. Thus, the entire proceedings were without jurisdiction. (Block period 1-4-1986 to 2-11-1996)
CIT v.Intercontinental Trading and Investment Co. Ltd. (2013) 350 ITR 316/81 DTR 314 (Delhi) (High Court)
Editorial: Ratio ofManish Maheshwari v. ACIT (2007) 289 ITR 341 (SC) applied.

S.172:Shipping business- Non- residents- Agent-DTAA-India-UAE-Assessment made under section 172(4) was held to be null and void and the assesseewas assessable under section 172(7). (S.172(4), 172(7))
Assessee, an agent of freight beneficiary of its foreign principal, filed its return without paying freight tax. The AO held that principal having occasional shipping business was not entitled to benefit of DTAA and worked out income and tax

payable thereon u/s.172(4). It was thus held that, Principal had filed its return with Director (IT) and thus, it had accepted its liability to be dealt with under the provisions of section 172(7). Thus, the AO was directed to take action u/s. 172(7) to ensure that the income of the assessee from 86 voyages does not escape assessment as per normal provisions of the Act. Appeal of revenue was dismissed. (A.Y. 2010-11)
ITO(IT) v. Albatross Shipping Ltd. (2013) 140 ITD 585 (Rajkot) (Trib.)

S.172: Shipping business-Non-residents-Summary proceedings. (S.139, 44B)
Tribunal held that where French shipping company undertook a huge number of 40 voyages through Indian agent and had exercised its option under section 172(7) by filing return of income under section 139(1), summary proceedings of assessment under section 172(4) could not be applied; regular assessment proceeding was required. In favour of assessee. (A.Y.2010-2011)
ITO (IT) v.CMA CGM Agencies (India) (P.) Ltd.(2013) 55 SOT 61 (URO) (Rajkot) (Trib.)

S.179: Private company-Liability of directors-Corporate veil-Pubic company- Ordinarily, provisions of section 179(1) cannot be applied to a public company-Corporate veil can be lifted and tax due of public company can be recovered from its directors.
The ACIT found the following facts in his order dated 15-4-2002 whereby he sought to lift corporate veil and recover tax dues of public company from its directors:

(*i*) Even after the attachment of the said stock of diamonds of the company, huge demand in excess of Rs.150 crores of tax dues had remained unpaid. The balance sheet of the company shows that such undisclosed income had not been reflected in the accounted balance sheet of the assessee company. There is no immovable property in name of the company where such unaccounted income might have been invested. Thus apparently unaccounted income of the company has been misappropriated by the directors and shareholders of the company.

(*ii*) Memorandum of Understanding of the company shows that there were 7 directors-cum-shareholders all of them being family members and related to M Kantilal family.

(*iii*) The memorandum of understanding shows that main object of the company was to takeover business, and undertaking carried on under the name and style of M/s. M. Kantilal & Company, along with all the belonging, funds, assets, rights, privileges, etc. To carry on in India and elsewhere the business of manufacturing, dealing, buying, selling, importing and exporting of gems, diamonds, pearls, rubies, etc. Thus the company was formed with the main object of taking over the business of the outgoing concern i.e. M/s. M Kantilal & Co. where most of the Directors were partners.

(*iv*) From the inception the company was to run as a family business of M. Kantilal and family.

(*v*) Huge undisclosed income was computed under section 158BC of the Act in the name of the firm for the block period during which takeover of the firm of M/s. Kantilal & Co. Ltd. had taken place.

(*vi*) Directors of the company had created huge assets in their own name in the form of immovable properties. It was therefore, evident that unaccounted income of the company was utilised for acquiring such properties by the directors.

(*vii*) The Assistant Commissioner therefore, concluded that the evidence shows that the company was used as a conduit for generating unaccounted wealth. Shares of the company were not offered to general public for subscription. All shares were held by the directors only.

(*viii*) Petitioner-director of the company filed a revision application to CIT under section 264 which was rejected by the CIT by order dated 9.4.2003. Aggrieved petitioner-director filed instant writ petition in the High Court and sought the quashing of the impugned orders of ACIT & CIT.

The court held that concept of lifting or piercing the corporate veil as sometimes referred to as cracking the corporate shell, is applied by Courts sparingly and cautiously. It is however, recognised that boundaries of such principle have not yet been defined and areas where such principle may have to be applied may expand.

Howsoever cautiously, the concept of piercing of corporate veil is applied by the Courts in various situations.
Two situations where such principle is consistently applied are, one where the statute itself so permits or provides for and second where due to glaring facts established on record it is found that a complex web has been created only with a view to defraud the revenue interest of the State.

If it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individuals who behind the corporate veil are the real operators of the company and beneficiaries of the fraud, the Courts have not hesitated in ignoring the corporate status and striking at the real beneficiaries of such complex design. Section 179 of the Act itself is a statutory creation of piercing of corporate veil.

Ordinarily, directors of a company even that of a private company would not be answerable for the tax dues of the company. Under sub-section (1) of section 179 of the Act, however, subject to satisfaction of certain conditions, the directors can be held jointly and severally liable to pay the dues of the company.

In the present case, however, the Revenue desired to apply the principle of lifting the corporate veil in case of a public company and seeking to resort to provisions contained in section 179 of the Act.
If the factors noted by the Assistant Commissioner are duly established, there is no reason why such double application of lifting the corporate veil one statutorily provided and other due to emergent need of the situation, cannot be applied.

The factors recounted by the Assistant Commissioner in the impugned order are glaring. The Assistant Commissioner therefore, was of the opinion that the company was only a conduit for creation of unaccounted money and appropriating in directors.

If these facts are duly established, principle of lifting the corporate veil should be applied. By application of section 179 of the Act, the recovery of the tax dues of the company can be sought from the directors.

The respondent authorities did establish that it was not possible to recover the tax dues from the company.
The petitioner neither pleaded nor succeeded in establishing that such non recovery was not attributable to any gross neglect, misfeasance or failure in discharging duty on his part in connection with the affairs of the company.

Being a public company, ordinarily, provisions of section 179(1) of the Act cannot be applied. However, if the factors noted by the Assistant Commissioner in his impugned order dated 15-4-2002 are duly established, it would certainly be a fit case where invocation of principle of lifting of corporate veil would be justified.

The Assistant Commissioner proceeded to record such findings without giving sufficient opportunity of hearing to the petitioner and without disclosing the necessary materials for coming to such a conclusion. The impugned orders dated 15.4.2002 and revisional order dated 9-4-2003 are quashed. The proceedings are however, placed back before the Assistant Commissioner for proceeding further in accordance with law after giving a notice to the petitioner indicating his tentative grounds why he desires to invoke the concept of lifting of corporate veil, giving sufficient opportunity to the petitioner to meet with such allegations. After giving opportunity of hearing to the petitioner and following the principles of natural justice it would be open for the Assistant Commissioner to pass fresh orders in accordance with law as may be found appropriate on the basis of material on record.
Pravinbhai M. Kheni. v. ACIT (2013) 213 Taxman 81 (Guj.) (High Court)

S.184:Firm-Assessment-Association of persons-Status-Assessment in the status of Association of persons was held to be valid. [S. 2(31) (v)]
The Assessing Officer held that there was no firm and the status to be held as Association of persons. Commissioner (Appeals) and Tribunal up held the order of Assessing Officer. On appeal to High Court the court held that the question of treating it asunregistered firm would arise only if the assessee was able to prove the existence of a valid partnership deed to constitute a firm. The assessee has not produced any evidence of partnership therefore assessment in the status of Association of persons was held to be valid. (A.Y. 1985-86, 1986-87)
Midland Theaters v. ACIT (2013) 350 ITR 676 (Mad.) (High Court)
A.R. Srinivasan (BY LRS) (2013) 350 ITR 676 (Mad) (High Court)

S.192: Deduction at source-Salary-Seconded employees-Seconded personnel being not employees– Hence, not liable to deduct tax at source. (S.40(a) (iii)).
Assessee, an association of persons consisting of nine public sector oil companies as its members, was engaged in doing business abroad and for that purpose deployed trained man power to foreign companies at contracted rate. Trained man power deployed abroad was drawn by assessee from employees of its member companies. Such deployed man power continued to be employees of its member companies, but were seconded to projects abroad by assessee. Assessee paid certain amount as foreign allowance to seconded personnel and claimed deduction of same. Assessing Officer disallowed claim of deduction on plea that assessee failed to deduct tax at source under section 192 on such payment and, therefore,

payment was hit by section 40(a) (iii). In view of fact that seconded personnel were not employees of assessee, amount paid to seconded personnel was not liable for deduction of tax at source. In favour of assessee. (A.Y.1997-98)
CIT v. Petroleum India International (2013) 213 Taxman 41 (Bom.) (High Court)

S.194A: Deduction at source-Interest other than interest on securities–Mutuality-[S.40(a) (ia)]
The Assessing Officer held that since the assessee-trusts paid interest to the umbrella company without deducting tax at source under section 194A of the Act, section 40(a) (ia) was attracted and payments of interest made by the assessee-trusts to the umbrella company were to be disallowed. The Commissioner (Appeals) came to a finding that the assessees were mutual concerns and not taxable. The Commissioner (Appeals) also held that interest expenses in the hands of the assessee-trusts were deductible under section 28 itself and, therefore, section 40(a) (ia) did not apply and deleted the disallowance under section 40(a) (ia) of the Act. On appeal the Tribunal held that the assessees availed of loans from the umbrella company and passed over the loans to various self-help groups working under them. In fact, the loans were not utilised by the assessee-trusts but by the self-help groups working under the trusts. The self-help groups were mutual concerns and ultimately the interest burden was shared by the individual members of the group. Therefore, the expenditure by way of interest was incurred by the members of the self-help groups and in fact the interest was paid by those members of self-help groups to the umbrella company. These individuals, not being liable for audit under section 44AB, section 194A was not applicable to them. All the assessee-trusts were representative assessees of the members constituting the self-help groups. What was not applicable to the members, would not apply to representative assessees. Therefore, the Commissioner (Appeals) was justified in holding that the assessees were not bound to deduct any tax at source while making the interest payments to the umbrella company. The additions made by the assessing authorities under section 40(a) (ia) of the Income-tax Act, 1961 were liable to be deleted. (A.Ys. 2007-2008, 2008-2009)
ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277(Chennai) (Trib.)

S.194A: Deduction at source - Interest other than interest on securities –Not obtaining the form 15Gand 15Hon or before last day of relevant financial year, disallowance was justified. [S.40(a) (ia)]
Assessee paid interest without deducting tax at source. It was submitted by assessee that persons had filed form No. 15G and 15H on basis of which tax was not deducted on interest payment. Assessing Officer finding that Form Nos. 15G and 15H were filed after end of relevant financial year, disallowed payment of interest under section 40(a) (ia). Tribunal heldthat for allowance of deduction under section 40(a) (ia) assessee should have obtained Form No. 15G/15H on or before last day of relevant financial year. Since assessee failed to do so, impugned disallowance made by Assessing Officer was to be upheld. In favour of revenue. (A.Y.2006-07)
ACITv.Meerut Rubber Factory (2013) 55 SOT 325 (Delhi) (Trib.)

S.194A: Deduction at source-Interest other than interest on securities-Trading liability-Purchase of bills- Not liable to deduct tax at source. [S.2(28A), 40(a) (ia)].
Tribunal held where a payment which has direct link and immediate nexus with trading liability being connected with delayed payments of purchase bills, will not fall within category of interest as defined in section 2(28A) and, therefore, while paying interest on delayed payment of purchase bills, assessee is not liable to deduct tax at source under section 194A. In favour of assessee. (A.Y.2005-06)
Sri Venkatesh Paper Agencies (Hyd.) (P.) Ltd. v. Dy. CIT (2013) 55 SOT 332 (Hyd.) (Trib.)

S.194A: Deduction at source – Interest – Firm – Partner - Interest paid by partner to firm, tax is deductible at source on such interest.
The assessees borrowed money from the firms in which they were partners and paid interest to the firms. The Dy. CIT (TDS) noticed that the assessee did not deduct tax at source under the provisions of section 194Aon the interest so paid to the firms. After hearing the assessees, the Dy. CIT (TDS) levied penalty under section 201 (1) of the Act equivalent to the amount of tax liable to be deducted at source and levied interest under section 201 (1A) of the Act for the period from the closing of the relevant financial year to May 31, 2009 for the assessment years 2005-06 to 2007-08. The Commissioner (Appeals) confirmed the penalties and interest. On appeal to the Tribunal held that t the Income-tax Act recognises a partner and a firm as different "persons", despite the legal relationship between them as prevailing under the Partnership Act. Further section 194A provides exemption from the obligation imposed under that section only in respect of interest paid or credited by a firm to its partner. The Act does not provide such exemption to the interest paid or credited by a partner to his firm. Tax is deductible at source on the interest paid by the partner to the firm. Penalty levied was directed to be deleted after verification of facts. (A.Y.2005-2006 to 2008-2009)
Thomas Muthoot v. Dy. CIT[2013] 21 ITR 133/55SOT 390(Cochin.) (Trib.)

S.194C: Deduction at source-Lorry booking business-Not liable to deduct tax at source.

Assessee collecting freight charges from clients who intended to transport their goods through separate transporters andpaying to transporters entire amount collected from clients after deducting his commission. There isnoprivity of contract of carriage of goods between assessee and his clients, assesseeis not a person responsible butonly a facilitator hence not liable to deduct tax at source. Appeal of revenue was dismissed. (A. Y.2007-2008)
CIT v. Hardarshan Singh (2013) 350 ITR 427(Delhi) (High Court)

S.194C: Deduction at source-Contractor-sub-contractor - Companies agreed to depute their employees, would not mean that it was a works contract, hence thedisallowance was deleted.
Assessee company was promoted as Joint Venture Company by HPCL and GAIL. It was engaged in business of distributing and marketing of CNG, LPG and Natural Gas. Assessee paid GAIL and HPCL certain amounts towards reimbursement of cost of salaries of employees who were on deputation, toassessee company without deducting tax at source. It was noted that deputed employees worked under the control and management of assessee and, their salaries were charged on assessee's profit. Thus, in aforesaid circumstances merely because companies had agreed to depute their employees it would not mean that it was a works contract covered u/s.194C. Hence, impugned disallowance was deleted. (A.Ys. 2007-08 & 2008-09)
Bhagyanagar Gas Ltd. v. ACIT (2013) 140 ITD 591 (Hyd.) (Trib.)

S.194C: Deduction at source–Contractor-sub-contractor - Companies agreed to depute their employeeswould not mean that it was a works contract, hence thedisallowance was deleted. [S.194I, 40(a) (ia)].
Assessee a transport contractor, hired lorries/ truck from lorry owners and further gave them on hire to L who used same for carriage of goods. Since no work of carriage of goods was entrusted either with assessee or with lorry truck's owners from whom assessee hired lorries/trucks, assessee was not liable to deduct tax at source from payment of hire charges to lorry/truck owners.At the most the hire charges may fall within theprovision of section 194I, however section 194I is not applicable for the relevant year. More over the tax payer hasadmittedly paid hire charges to lorry owners. Following the Special Bench in Merlyn Shipping & Transporters v. ACIT (2012) 136ITD 23 (SB) (Visakha) (Trib.) the provision of section40a(ia) is applicable only in respect of the amount which remains to be paid at the end of the financial year and is not applicable to the amount already paid.(A.Y.2006-07)
Dy. CIT v. Shri Reez Karakkattil Raghavan Friends Transport Co. (2013) 140 ITD 598 (Cochin) (Trib.)

S.194C : Deduction at source – Contractors-Sub-contractors-BIFR-No relief can be given to BIFR company for deduction tax at source.
Tribunal held thatwhere payment has been made by manufacturer of clothes for processing and weaving, liability to deduct TDSarises under section 194C(1).Even where recipient company was under BIFR, no relief could be given in terms of TDS liability. Partly in favour of assessee. (A.Y.2005-06)
Deora Trading Co. v. ITO. (2013) 55 SOT 349 (Mum.) (Trib.)

S.194C: Deduction at source-Contractors-sub-contractors-Violation of provident fund act cannot be the ground to disallow payment to civil contractor. [S.40(a) (ia)]
Assessee, a civil contractor made labour payments to various persons but failed to deduct TDS. Assessing Officer invoking provisions of section 40(a) (ia), disallowed said charges. On appeal, assessee produced some registers, namely, labour register, wage register, etc., which were accepted by Commissioner (Appeals) and additions were deleted. Revenue raised an objection that labour registers were not maintained properly and, moreover, there was no deduction of provident fund; hence, there was no direct payment to labourers, but to sub-contractor who made labour payments. Thus, TDS liability under section 194C was violated. Tribunal held that whether violation of provisions of Provident Fund Act and labour laws had nothing to do with proceedings under Income-tax Act, therefore, revenue's objection was to be set aside and impugned order passed by Commissioner (Appeals) was to be upheld. In favour of assessee (A.Y. 2006-07)
Dy. CITv. Arjun Bhowmick (2013) 55 SOT 82(URO) (Kol.) (Trib.)

S.194C: Deduction at source – Contractors-Sub-contractors-Agents of truck owners-Did not have obligation to deduct tax at source. (S.40(a) (ia))
Assessee is engaged in business of transportation of goods. During course of business, assessee had to take several trucks on hire. Assessee did not deduct tax at source under section 194C, while making payments to agents of truck-owners, which inter alia, resulted in disallowance under section 40(a) (ia). Tribunal held that since assessee made payments for hiring of trucks simplicitor and not for transporting goods which he received from other parties, it was not a case of sub-contracting work and, thus, assessee did not have any obligation to deduct tax at source while making said payments, therefore, impugned disallowance was to be deleted. In favour of assessee. (A.Y. 2006-07)

Lokesh Duggalv.ITO. (2013) 55 SOT 78(URO) (Kol.) (Trib.)

S.194C: Deductionat source-Contractors-Sub-contractors-Printing material on paper-Works contract-Sale-Contract for sale the assessee is not liable to deduct tax at source. [S.201, 201 (IA)]

Tribunal held that if a person has given specifications for printing and has supplied his own paper or ink and printer is only printing such material on paper, then it would constitute a works contract and provisions of section 194C would be attracted. However, if a person has only given specifications for printing and such material is delivered to such person after specified printing, it would be a contract of sale. Assessee had specified printing material for printing to 'F' - 'F' had rendered services as specified by assessee and in many cases had charged even VAT/CST. It was not alleged or proved that assessee had supplied paper or ink to printer, it was contract for sale or purchase and provisions of section 194C were not attracted and, thus, assessee was not in default under section 201 (1). In favour of assessee. (A.Y. 2006-07 to 2009-10)

Punjab Tractors Ltd. v. ITO(2013) 55 SOT 75 (URO) (Chd.) (Trib.)

S.194C: Deduction at source–Contractors-Sub-contractors-Supervising-Matter remanded. (S.194J)

Tribunal held that,where contractor merely provided service simpliciter for supervising construction work of assessee, tax was not to be deducted under section 194C.In respect of applicability of section 194J to such payment Commissioner (Appeals) had to specify in appellate order as to which of clauses of section 194J would apply in case of assessee and he had to give reasons for same in appellate order, merely because assessee originally mentioned section 194J in TDS return, that by itself was not sufficient to put assessee in default for short deduction and late payments of taxes with interest, in case payee had paid tax on same payment to revenue department, tax could not be recovered once again from assessee, although charging of interest was mandatory in nature for delay. Matter remanded. (A.Y. 2008-09)

Radheyshyam Bhakar & Co. v. ITO (2013) 55 SOT 80(URO) (Agra) (Trib.)

S:194H: Deduction at source-Commission-Brokerage-Principal –Agent relationship-Distributors-Matter remanded.

The assessee has contended that discount given to the distributors is not subjected to the provisions of section 194H on the ground that the relationship between the assessee and the distributor is on principal to principal and notprincipal to agent. The Tribunal held that section 194H does not talk about the relationshipbetween the payer and payee necessarily be the of a principal and agent, the provisions do not require any formal contract of agency. On facts, the Tribunal held that the assessee has failed toproduce any material such as scheme under whichthe benefit had been given to the distributors. Accordinglythe matter was set aideto decide accordance with law.
(A.Y. 2007-08)

SKOL Breweries Ltd v. A CIT (2013)142 ITD 49/ 84 DTR 271/153 TTJ 257 (Mum.) (Trib.)

S:194H: Deductionat source-Commission- SIM cards-Recharge coupons - wholesale dealers–discount-Commission-Discountallowed on sale of recharge coupons is not discount but commission, taxis deductible at source on such amount. (S.201)

The assessee-company was selling SIM cards and recharge coupons of the Chennai Telephones to wholesale dealers and paying commission to them up to the financial year 2007-08. From the financial year 2008-09 onwards the assessee-company distinguished the sale of SIM cards and recharge coupons. It treated the commission paid to dealers on sale of recharge coupons as discount and did not deduct tax at source under section 194H of the Income-tax Act, 1961 thereon. The Assessing Officer treated the company as an assessee-in-default under section 201. This was confirmed by the Commissioner (Appeals). On appeal to the Tribunal heldthat the payment amounted to commission and tax was deductible at source on such amount. (CIT v. Idea Cellular Ltd. [2010] 325 ITR 148 (Delhi) followed.) Appeal of assessee was dismissed. (A.Y. 2009-10, 2010-2011).

Cellular Mobile Telecom Services v.ITO (2013) 21 ITR 456 (Bang.) (Trib.)

S.194H: Deduction source-Commission – Travel agent-Distribution of amount, the assessee is not liable to deduct tax at source.(S.40(a) (ia)

Assessee is engaged in business of travel agents. It entered into a consortium agreement with 12 other members who were travel agents for booking air tickets through platform provided by 'A' Ltd. In terms of said agreement all members travel agents except assessee, rendered services of booking airline tickets and utilized computerized electronic reservation system platform provided by 'A', who offered preferential rates subject to bulk business being offered by all travel agents as one entity. Consortium members agreed that assessee would act as a lead member and authorized it to enter into contracts with 'A' to make collections and distribute monies to each of consortium travel agents in proportion to segment bookings effected by each of travel agents. Lead member, i.e., assessee collected commission for services rendered by other members and distributed said commission amongst members on priority basis. Though TDS

certificate issued by 'A' reflected commission of Rs. 65,71,690, assessee distributed amount of Rs. 52, 22,326 amongst members for services rendered by them in booking tickets etc. Since assessee did not deduct tax at source while making payment of commission to travel agents, referring to provisions of section 40(a) (ia), Assessing Officer disallowed amount of Rs. 52, 22,326. Tribunal held that since assessee only distributed monies amongst members in terms of agreement for services rendered by them in booking ticket etc., and had not claimed said amount as expenditure in its account, it could not be treated as income of assessee so as to attract provisions of sections 194H and 40(a) (ia). In favour of assessee. (A. Y.2006-07)
ITOv. Interserve Travels (P.) Ltd. (2013) 55 SOT 356 (Delhi) (Trib.)

S.194H: Deductionat source-Commission-Trade discount-Assessee is not liable to deduct tax at source. (S.40(a) (ia))
Assessee is a franchisee of BSNL.It received commission on gross value of purchase and on said commission BSNL had deducted tax at source under section 194H. It had also appointed sub-franchisees for selling products of BSNL. It out of its own commission allowed trade discount to sub-franchisees. Assessing Officer treated trade discount as commission and disallowed same by applying section 40(a) (ia) on plea that assessee had not deducted tax at source under section 194H on trade discount. Tribunal held thattrade discount made available to sub-franchisees was a compensation by foregoing part of commission already subjected to tax at source by BSNL and it could not have suffered taxation under section 194H. Therefore, the disallowance under section 40(a) (ia) was unjustified. In favour of assesse. (A.Y. 2008-09)
Pareek Electricals v. ACIT (2013) 55 SOT 338 (Cuttack) (Trib.)

S.194H: Deductionat source – Commission or brokerage – Relation of principal and agent – Discount was treated as commission for provision of S. 194H hence the assessee was held tobe liable to deduct tax at source.
Assessee was engaged in the business of providing telecom services across country. To market its products and services, assessee appointed persons called "channel Partners (CP)". To enable its customer to use its services, assessee gave starter packs as well as recharge vouchers to its CPs. While MRP of the products were fixed at time of raising invoices, product was priced at discounted price agreed to between assessee and CP. It was held that the relationship between the assessee and its distributors was that of principal and agent and thus, difference between MRP of product and price actually charged constituted commission which would fall under realm of provisions of section 194H. The Assessee was held to be liable to deduct tax at source on such payment.Appeal of assessee was dismissed. (A.Y. 2005-06 & 2008-09)
Tata Teleservices Ltd. v. Dy. CIT (2013) 140 ITD 451 (Bang.) (Trib.)

S.194H: Deduction at source – Commission or brokerage – Bank Charges – Payment to bank for utilization of credit card facilities is not in nature of commissionhence section194H isnot applicable.
Assessee had arrangement with several banks whereby customers of assessee, who also held credit card of such banks, could make payment for communication service utilized by them from assessee through credit cards. It was held that the payment to bank for utilization of credit card facilities would be in nature bank charge and not in nature of commission within meaning of section 194H.Assessee is not liable to deduct tax at source on such payments. Appeal of assessee was allowed. (AY 2005-06 & 2008-09)
Tata Teleservices Ltd. v. Dy. CIT (2013) 140 ITD 451 (Bang.) (Trib.)

S.194-I : Deduction at source-Rent-Wagon Investment scheme'-Not liable to deduct tax at source. (S.40(a) (ia))
Assessee is engaged in business of mining and processing of iron ore. For its logistical requirement, it entered into an agreement with Indian Railway where under, it made an investment in 'Wagon Investment scheme' where under it was entitled to get assured supply of particular number of rakes on monthly basis and was charged with regular freight. Such entitlement if remained unused could be seconded to other concerns and vice-versa. Assessee used entitlement rights of two companies, FGCP and RSP and made payments to them as wagon facilitation charges. Assessing Officer formed an opinion that such charges were paid as hire charges under an arrangement entered with said two companies on which tax was to be deducted under section 194-I - As assessee failed to deduct tax, payments were disallowed under section 40(a) (ia). It was noted that wagons procured under scheme were to merge and operate in general pool of wagons of Indian Railways and were to be reverted back to Indian Railways after 10 years. Tribunal held thatrent as defined under section 194-I has to be understood from point of view of ownership and Assessing Officer could not correlate WI Scheme in question and rent. Assessing Officer misdirected himself by holding arrangement with two companies as arrangement under section 194-I. therefore, order of Assessing Officer was to be set aside. In favour of assessee. (A.Y. 2008-09)
Bonai Industrial Co. Ltd. v. Dy. CIT (2013) 55 SOT 363 (Cuttack) (Trib.)

S.194J: Deduction at source-Technical services fee-Royalty-Purchase of computer software hence not liable to deduct tax at source. (S.9(1) (vii), 40(a) (i))
Assessee is a company engaged in business of purchase and sale of computer software. It made a payment for purchase of software from persons who were resident in India. Assessee did not deduct tax at source while making payments towards such purchases. Assessing Officer opined that payment was made for acquiring a right to use software which was in nature of royalty. According to Assessing Officer, since assessee did not deduct tax at source while making payments in question, same were to be disallowed. Commissioner (Appeals), however, took a view that amount paid by assessee towards purchase of computer software as a good could not be treated as payment of royalty and, therefore, disallowance made by Assessing Officer was not sustainable. Tribunal held that on facts, impugned order of Commissioner (Appeals) deleting addition was justified and called for no interference. In favour of assessee (A.Y. 2007-08)
ACITv. Sonata Information Tech. Ltd. (2013) 55 SOT 455 (Mum.) (Trib.)

S.194J : Deduction at source-Fees for professional or technical services-wheeling and transmission charges-Not liable to deduct tax at source. (S.194C.)
Tribunal held that wheeling and transmission charges paid by assessee state electricity distribution company in case of which provisions of Electricity Act, 2003 is applicable are not liable for deduction of tax either under section 194J or section 194C. In favour of assessee. (A.Ys.2007-08, 2008-09)
Maharashtra State Electricity Distribution Co. Ltd.v. ACIT (2013) 55 SOT 84(URO) (Mum.) (Trib.)

S.195: Deduction at source-Non-resident–Foreign agent-Commission-Not liable to deduction of tax at source. (S.40(a) (ia))
Tribunal held that where foreign agents were appointed to act as a selling agents of assessee outside India, commission earned by them for services rendered by them outside India could not be considered as income chargeable to tax in India, therefore, when commission paid to non-residents were not chargeable to tax under provisions of Act, no deduction of tax was required to be made under section 195(1) warranting disallowance under section 40(a) (i). In favour of assessee. (A.Y.1998-99)
ACITv.Priyadarshini Spinning Mills (P.) Ltd. (2013) 55 SOT 432 (Hyd.) (Trib.)

S.195: Deduction at source -Non-resident - Reinsurance premium –Matter remanded. (S.40(ia)).
Assessee-company paid reinsurance premium to non-resident reinsurance companies. Assessing Officer finding that assessee did not deduct tax at source while making said payments, disallowed same. On appeal, assessee relied on order passed by Supreme Court in case of GE India Technology Cent. (P.) Ltd. v. CIT [2010] 193 Taxman 234to contend that reinsurance premium paid to non-resident reinsurance companies was not taxable in their hands and, therefore, question of deducting tax at source did not arise. Assessee also brought on record details of reinsurance premium ceded to non-resident insurance companies, profit margin of assessee-company, explanation on concept of unexpired risk reserve, etc. Tribunal held thatsince aforesaid details were not available before lower authorities, it was appropriate to remit matter back to concerned assessing authority to reframe assessments in light of the new materials and latest judicial pronouncements. Matter remanded. (A.Y.2001-02 to 2010-11)
Royal Sundaram Alliance Insurance Co. Ltd. v. ACIT (2013) 55 SOT 429(Chennai) (Trib.)

S.195: Deduction at source - Non-Resident – NRI purchasing flat, seller is liable to deduct tax at source as the tax was not deducted liable to be held as assessee in default under sectionn201 (1). [S.201 (I)]
NRI assessee purchased a residential flat at Bangalore from one G whose Hong Kong address given in sale deed indicated that she was NRI seller. Assessing Officer opined that assessee had failed to make TDS at prescribed rate on sale consideration as required by section 195 before making payment to NRI seller and therefore, he was assessee-in-default under section 201 (1). Assessee claimed that he was unaware of provisions of section 195 and also thought that seller was resident in India. Tribunal held thatassessee's said claim would not absolve him of duty to make TDS under section 195 when seller's address given in sale deed clearly established that she was NRI and therefore, he ought to have made TDS.therefore, assessee was rightly held as assessee in default in accordance with provisions of section 201 (1). In favour of revenue. (A.Y. 2007-08)
Syed Aslam Hashmi v. ITO (2013) 55 SOT 441 (Bang.) (Trib.)

S.195: Deduction at source -Non-Resident-Sale consideration-Purchase of flat-Capital gain-Liable to deduct tax on entire consideration unless application is made to the Assessing Officer under section 195(2).
NRI assessee contended that Assessing Officer had wrongly quantified TDS under section 195 by applying specified rate on entire sale consideration paid to NRI seller for purchase of residential flat and not on capital gain arising on this

transaction. Assessee also stated that tax on said capital gain was duly paid, However, it was found that assessee did not fulfill requirement of section 195(2) vide which he was required to make application to Assessing Officer to determine amount chargeable if he had considered that whole or part of sale consideration would not be income in hands of NRI seller. Tribunal held that when assessee did not apply for lower or no deduction of tax, he was statutorily duty bound to have deducted tax at specified rate on entire sale consideration before making payment to NRI seller, therefore, quantification of TDS as made by Assessing Officer was to be upheld. In favour of revenue. (A.Y.2007-08)

Syed Aslam Hashmi v. ITO (2013) 55 SOT 441 (Bang.) (Trib.)

S.195:Deduction at source-Non-resident - Other sums -Surcharge-Educational cess-If DTAA is silent, no obligation to deduct surcharge & education cess.

The assessee made a remittance of management fee and interest to a resident of France. The AO held that in deducting TDS thereon u/s 195, the assessee ought to have deducted surcharge and education cess. The assessee claimed that as the India-France DTAA was silent about inclusion of surcharge & education cess, it was under no obligation to do so. HELD by the Tribunal upholding the assessee's plea:

The India-France DTAA does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source. Therefore, there is an apparent conflict between the Income-tax Act and the DTAA between the two sovereign countries with regard to deduction of tax at source on surcharge and education cess. U/s 90(2) if the provisions of the DTAA are more beneficial to the taxpayer, the DTAA prevails over the Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, the taxpayer may take advantage of that provision in the DTAA for deduction of tax. (A. Y. 2003-04 to 2008-09)

ITO v. M. Far Hotels Ltd (Cochin) (Trib.), www.itatonline.org

S.197: Deduction at source-Certificate for lower rate-Short deduction of tax-Certificate for deduction at lower rate issued to principal officer of M unit-Assessee is not in default merely on ground certificate not issued in name of B unit. (S.194C).

The assessee had appointed various persons for executing the works, making it liable to deduct tax at the rate prescribed under section 194C of the Act. The assessee's Mumbai unit had a separate tax deduction account number from its Bahadurgarh unit. The Mumbai unit held a certificate under section 197 permitted deduction of tax at a lower rate. On the ground that the two units were separate entities for the purpose of deduction of tax at source the Assessing Officer recorded a finding of short deduction of tax at source and passed an order under section 194C. The Commissioner (Appeals) held that since the genuineness of the issue of certificates under section 197 had not been doubted by the Assessing Officer, there was no justification to hold that the assessee was in default merely on the ground that the certificate was not issued in the name of the Bahadurgarh unit. This was affirmed by the Tribunal. On appeal by revenue the Court dismissing the appeal, held that the Assessing Officer of the contractors had furnished a certificate under section 197 to the principal officer of the Mumbai unit in terms of clause (iii) of section 204 mandating the persons to whom such certificate was issued to deduct tax at a rate lower than the prescribed rate under section 194C. Merely because the assessee had got separate tax deduction account numbers for the Bahadurgarh unit and for the Mumbai unit, that would not render the certificate issued under section 197(2) redundant. Such certificate was to be issued to the principal officer of the company as the person responsible for deduction of tax and not to any other person or unit of the assessee. Therefore, the order passed by the Commissioner (Appeals) and affirmed by the Tribunal could not be said to suffer from any illegality in any manner.

CIT (TDS) v. Parle Biscuits Pvt. Ltd. (2013) 351 ITR 138(P & H) (High Court)

S.200: Deduction at source - Duty of person deducting tax-Authorised person-Procedural-(S. 201(1))

Tribunal held thatsub-section (3) of section 200 as inserted by Finance (No 2) Act, 2004 with effect from 1-4-2005, mentioning that authorised person to initiate proceedings is DGIT (System)/NSDL, is a procedural section to streamline process of statements in computerised set up; however, this section does not take away powers of Assessing Officer to initiate proceedings under section 201 (1). Matter remanded. (A.Ys. 2010-11to2012-13)

Kingfisher Airlines Ltd. v. ACIT (2013) 55 SOT 370(Bang.) (Trib.)

S.201: Deduction at source-Failure to deduct or pay-Survey-Matter set a side. (S. 133A)

Assessee company is engaged in business and operating as a schedule passenger airline in India - A survey under section 133A was conducted in assessee's premises on 18-3-2011 in order to verify TDS compliance. In course of survey Assessing Officer noted that assessee-company had deducted TDS from employee's salaries but it had not remitted same to Government's account within due dates. Assessing Officer, though issued a show-cause notice, passed order in haste treating assessee to be assessee-in-default without providing assessee reasonable opportunity of being heard. Moreover, it was not clear how liability for default in terms of section 201 (1) and levy of interest under section 201 (1A) had been determined and as to whether remedies available to assessee for making adjustments had been exhausted. Order passed by Assessing Officer was to be set aside and, matter was to be remanded back for disposal afresh. (A.Y. 2010-11to2012-13)

Kingfisher Airlines Ltd. v. ACIT (2013) 55 SOT 370(Bang.) (Trib.)

S.201: Deduction at source - Failure to deduct or pay - Recovery provisions under section 201 (1) can be invoked only when loss to revenue is established, matter remanded.

Assessing Officer treated assessee as assessee-in-default for non-deduction of tax at source on several payments made. Assessee contended that since recipients had paid tax on income embedded in such payments, taxes could not once again be recovered.However, Assessing Officer held that assessee was not able to prove that taxes had been duly been paid by recipients. Further, assessee's request to Assessing Officer to 'use his statutory powers to corroborate from payers whether they had paid tax on their account' was also rejected.Tribunal held thatrecovery provisions under section 201 (1) can be invoked only when loss to revenue is established, once assessee furnishes lawfully maintained information about recipients, Assessing Officer should first ascertain related facts about payment of taxes directly from recipients before invoking section 201 (1). Matter remanded. (A.Ys. 2005-06, 2006-07 & 2008-09)

Ramakrishna Vedanta Mathv. ITO (2013) 55 SOT 417(Kol.) (Trib.)

S.201:Deduction at source - Failure to deduct or pay – Perquisites-Stay order of High Court assessee is not liable under section 201. (S. 192, 200)

Tribunal heldwhere during assessment years, assessee-employer could not deduct TDS under section 192 on account of stay order of High Court for non-deduction of TDS on perquisites granted to employees, assessee could not be held liable under section 201. In favour of assessee. (A.Ys. 200-03 to 2008-09)

State Bank of Indore v. ITO (2013) 55 SOT 422 (Indore) (Trib.)

S.201: Deduction at source - Failure to deduct or pay – Firm – Partner – Penalty - Matter remanded.

The Tribunal held that penalty under section 201 (1) iscompensatory in nature. Failure to deduct tax at source on interest paid by partner to firm. Penalty is not leviable if no tax is payable by firm. Matter remanded. (A.Y. 2005-2006, to 2008-2009)

Thomas Muthoot v. Dy. CIT[2013] 21 ITR 133/55 SOT 390 (Cochin.) (Trib.)

S.201 (IA): Deduction at source-Failure to deduct or pay-Interest-Firm-Partner-Matter remanded.

No tax was deducted at source on interest paid by partner of firm. The Tribunal held thatinterest isnot payable if no tax is payable by firm. Matter remanded. (A.Y. 2005-2006 to 2008-2009)

Thomas Muthoot v. Dy. CIT[2013] 21 ITR 133 / 55 SOT 390(Cochin.) (Trib.)

S.215: Advance tax-Interest payable by assessee-Application of mind is necessary-Order of Tribunal deletionof interest held to be justified. (S.217)

That even if any provision of law is mandatory and provides for charging of tax or interest, such charge by the Assessing Officer should be specific and clear and the assessee must be made to know that the Assessing Officer had applied his mind and had ordered the charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the provision of law under which such interest is charged are two different things. The appeal filed by the department is dismissed. (A.Y.1988-1989)

CIT v. Misra Preservers (P.) Ltd (2013) 350 ITR 222(All) (High Court)

S.220:Collection and recovery-Assessee deemed in default-Stay- -Demand should be stayed if strong prima facie case made out. Demand on covered issues cannot be recovered by adjustment of refunds.

The AO passed an assessment order u/s 143(3) and raised a demand of Rs. 1719 crores. In response to the assessee’s stay application, the AO accepted that demand of Rs. 1370 crores had to be kept in abeyance as they were covered in favour of the assessee by appellate orders for earlier years. However, he still held that the said demand had to be adjusted against refunds of Rs. 560 crores determined for earlier years. He demanded that the balance demand of Rs. 377 crores on the other issues be paid by the assessee. The assessee filed a Writ Petition to challenge the adjustment of refunds against the demand on covered issues and the non-grant of stay on the other issues. HELD by the High Court:

The manner in which and the ground on which an adjustment of the refund was made is arbitrary and contrary to law. The stay order states that the assessee would not be treated as an assessee in default in respect of covered issues. Yet the department has proceeded to adjust the refund due and payable to the

assessee merely on the ground that the department's appeal is pending. The adjustment of a refund is a mode of effecting recovery. Once an issue has been covered in favour of the assessee in respect of another assessment year on the same point, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund. If the adjustment was not made, there can be no manner of doubt that the assessee would have been entitled to a stay on the recovery of the demand. The demand cannot be adjusted by the department in this manner merely because it is in possession of the funds belonging to the assessee to which the assessee is legitimately entitled to and has been granted a refund. The making of an adjustment in these facts is totally arbitrary and contrary to law. As regards the other issues, the assessee has made out a strong prima facie case for a stay of the recovery of the demand. As the action of the department in adjusting the refunds due to the assessee was contrary to law, the interests of justice would be served if the department is permitted to make an adjustment to an extent of Rs.60 crores and refund the balance with interest.
HDFC Bank Limited v. ACIT (Bom) (High Court), www.itatonline.org

S. 220:Collection and recovery -Assessee deemed in default - Garnishee proceedings under 226(3) – AO did not pass a speaking order u/s220(6),order of attachmentwas squashed. (S.226(3))
The assessee was denied claim of deduction U/S 10B, and substantial demand was raised. The assessee had made an application u/s220(6) to the AO stating that the demand should be stayed till disposal of appeal by the CIT (A).The AO rejected the stay without citing any reasons, and the bank accounts and rents were attached of the assessee.The assessee filed a writ with the High Court, and while allowing the writ, held that non-speaking order under section s.220(6) without assigning any reasons needs to be quashed, and therefore the order attaching the accounts and rent of assessee is also liable to quashed. (A.Y. 2009-10)
Lalit Wadhwa v. CIT (2013) 82 DTR 130 (P&H) (High Court)

S.220:Collection and recovery - Assessee deemed in default -Appeal before Commissioner (Appeals) pending-Demand stayed pending disposal of appeal.
The assessee, a joint venture company,claimed deduction of Rs. 103.04 crores towards software development and information technology related services to its associated enterprise. It incurred a sum of Rs. 5.86 crores towards reimbursement of expenses incurred by its associated enterprise. The Assessing Officer made a reference to the Transfer Pricing Officer to investigate into the reasonableness of the international transactions of the assessee with its associated enterprise. The Transfer Pricing Officer came to the conclusion that no services which would benefit the assessee had been rendered by its associated enterprise and that the assessee should not have made the claim for reimbursement. The Transfer Pricing Officer made an addition of Rs. 5.86 crores under section 92CA(3) of the Act,. The Assessing Officer passed an order under section 143(3) (iii) determining a total income of Rs. 6.41 crores after making an adjustment in terms of the findings of the Transfer Pricing Officer, in the amount of Rs. 5.86 crores to the total income returned by the assessee. Notice under section 271 (1) (c) was issued to the assessee and thereafter penalty was imposed in a sum of Rs. 2.05 crores. An appeal was filed before the Commissioner (Appeals) against the order of penalty. On an application made before the Assessing Officer under section 220(6), the application for stay of demand was rejected and the assessee was directed to deposit 50 per cent of the outstanding demand. Thereafter, the assessee moved the Additional Commissioner who similarly rejected the application observing that the quantum addition on the basis of which penalty was imposed, had been confirmed by the Commissioner (Appeals). Upon an application made before the Commissioner the request for stay of demand was rejected. The quantum appeal was in the meantime also dismissed by the Tribunal. Against the order of the Tribunal, the assessee filed an appeal before the court which was pending admission. On a writ petitionthe Court held that the Assessing Officer as well as the Commissioner had failed to exercise their jurisdiction in accordance with law. The Commissioner adverted to the fact that the quantum appeal had been rejected by the Commissioner (Appeals) and the Tribunal. The order for the deposit of the entire penalty was not justified. The assessee was to deposit an amount of Rs. 50 lakhs in two instalments each of Rs. 25 lakhs. Conditional on the payments, recovery of the demand was to be stayed pending disposal of the appeal before the Commissioner (Appeals). If an order adverse to the assessee was passed by the Commissioner (Appeals), no coercive steps for the recovery of the balance demand were to be pursued for a period of two weeks.

By the court : "When the statute confers a discretion on the Assessing Officer, that is a discretion which is wielded in the exercise of a quasi-judicial function. Assessing Officers reject stay applications in a cavalier fashion making a bald statement to the effect that `looking to the facts and circumstances of the case', no case for stay has been made out. This does not amount to a valid or proper exercise of discretion. What is expected of an Assessing Officer is at least a brief statement in the order of the reasons on the basis of which he formed his decision under section 220(6). Otherwise recourse to section 220(6) is a meaningless formality. Assessing Officers when they dispose of applications under section

220(6) are required to act fairly. Fairness as a concept does not undergo a change in the hands of an Assessing Officer. Fairness requires objectivity. Objectivity that is guided by the need to protect the Revenue while at the same time being fair to the assessee whose case has to be tested in a statutory appeal." (A.Y. 2004-2005)
Deloitte Consulting India Pvt. Ltd. v. ACIT (2013) 351 ITR 160/84 DTR 437(Bom.) (High Court)

S.220: Collection and recovery - Waiver of interest – Hardship - Attachment of entire properties - Entire liabilities subsequently satisfied by appropriation of compensation, Authorities to reconsider waiver application.
Theapplication for waiver of interest liability of Rs.8,54,476 under section 220(2A) of the IT Act, 1961, was rejected and subsequently the entire interest liability of the assessee was satisfied by appropriating amounts from out of Rs.18,06,402 remitted by a corporation which was due to the assessee in a land acquisition proceedings. The reasons for rejecting the application were (i) that the assessee did not produce any proof that he had no other business or source of income, and (ii) there had not been any co-operation extended to the Department during the recovery proceedings. On a writ petitionthe Court held that the assesseeprima facie, proved by the fact that the entire properties of the assessee were under attachment and that the entire liabilities were subsequently cleared by making appropriation of the compensation. Therefore, the order rejecting the application could not be sustained. Commissionerdirected to pass the order according to law.
Anto Nitto v. CIT (2013) 350 ITR 305/258 CTR 100/85 DTR 94214 Taxman 37(Mag.) (Ker.) (High Court)

S.220: Collection and recovery-Interest-Waiver-Partial waiver can be given.
In a writ petition filed in the High Court the Court held that section 220(2A) of the Income-tax Act, 1961, is an incentive to defaulter/Assessees to co-operate with the Department and to remit the tax voluntarily at the earliest and, therefore, compliance should be rewarded by taking a liberal view and approach. The Commissioner or the Chief Commissioner need not always waive the amount of interest in full but can grant waiver or reduction partially. What is indicated by the provision is that relief to be granted under section 220(2A) should be proportionate to the extent of satisfaction of the conditions stated therein. In other words, if the conditions are partially satisfied the assessee should be given partial relief, i.e., partial waiver which should be in proportion to the extent of satisfaction of the conditions and Application for stay of recovery proceedings cannot be construed as non-co-operation as entire arrears paid within six months, partial relief under section 220(2A) granted. The Writ petition was allowed. (A. Y.2006-2007)
Arun Sunny v. Chief CIT [2013] 350 ITR 147(Ker.) (High Court)

S.220: Collection and recovery-Interest-Rejection of waiver application forinterest held to be justified.
Assessee partner in two firms and having substantial agricultural income. Assessment was necessitated on account of addition to taxable income of firm of which assessee was a partner. Assessee not satisfying conditions. Payment of interest would not cause genuine hardshipRejection of application for waiver of interest was held to be justified
K. C. Mohanan v. Chief CIT (2013) 350 ITR 461/258 CTR 103/85 DTR 125(Ker) (High Court)

S.226: Collection and recovery-Modes of recovery-Stay-Stay Applications are not a "Meaningless Formality". No recovery during pendency of a stay application. S.226(3) notice must ordinarily be pre-served on assessee. (S.226(3))
The assessee, an age-old charitable trust, amended its objects. Because of this change, the AO passed an order u/s 143(3) denying exemption u/s 11 and raised a demand of Rs. 11 crores. The assessee filed a stay application and requested a hearing. During the pendency of the stay application, the AO issued a notice u/s 226(3) and attached the assessee's bank accounts. The notice specifically stated that the bank should not contact the assessee till payment was made. A copy of the said notice was not served on the assessee. The assessee filed a Writ Petition to challenge the recovery action undertaken by the department. Held by the High Court allowing the Petition:

(i) The action of attaching the assessee's bank account u/s 226(3) during the pendency of a stay application and without giving it notice was arbitrary and high handed. The whole object of serving a notice on the assessee is to enable the assessee to have some recourse. While in a given case, it may not be feasible to serve a prior notice on the assessee if there is an apprehension that the monies would be spirited away, this was not a case of that type. In a situation such as the present where appeals filed by the assessee are pending before the CIT (A) and the assessee had sought an opportunity of being heard and filed applications for stay, there was no justification whatsoever to proceed hastily with the enforcement of the recovery of the demand without disposing of the application for stay;

(ii) Applications for stay cannot be treated by the AOs & appellate authorities as meaningless formalities. Quasi-judicial authorities have to apply their mind in an objective and dispassionate manner to the merits of each application for stay.

While the interests of the Revenue have to be protected, it is necessary for AOs to realize that fairness to the assessee is an intrinsic element of the quasi-judicial function conferred upon them by law. Applications for stay must be disposed of at an early date. Such applications cannot be kept pending to obviate compliance with the need to evaluate the contentions of the assessee until after monies are recovered using the coercive arm of the law. Appellate authorities must set down time schedules for disposal of stay applications with reasonable expedition. The manner in which recourse has been made to the coercive process of law, leaves much to be desired and the action which was pursued was completely high handed and arbitrary. There could have been absolutely no apprehension that the assessee in the present case was likely to spirit out the monies which were invested in Fixed Deposits. A part of the money has to be refunded to the assessee to carry out its day-to-day activities.
Society of the Franciscan (Hospitaller) Sisters v. DDIT (Bom.) (High Court) www. itatonline.org

S.226: Collection and recovery - Modes of recovery –Stay- Stay of demand can be granted even if there is no financial hardship.
The AO raised a demand on the assessee on the same lines as had been done in the preceding AY. Though in the preceding AY, the assessee had obtained a stay from the High Court (see UTI Mutual Fund vs. ITO (2012) 345 ITR 71 (Bom), the AO refused to follow that for the present AY. The assessee filed a Writ Petition to challenge the refusal to grant stay. To oppose the grant of stay, the department relied on CIT vs. IBM India Pvt. Ltd where the Karnataka High Court had held that in matters involving large amounts due to the Revenue, an interim order of stay would be granted only in case of genuine financial hardship of the assessee and not otherwise. The Department argued that as the assessee did not have any financial hardship, the stay should be rejected. HELD by the High Court rejecting the department's plea and granting stay of the demand:
The order of the Karnataka High Court in CIT vs. IBM India Pvt. Ltd cannot be read to mean that consideration of whether an assessee has made out a strong prima facie case for stay of enforcement of a demand is irrelevant. Nor is the law to the effect that absent a case of financial hardship, no stay on the recovery of a demand can be granted even though a strong prima facie case is made out. In considering whether a stay of demand should be granted, the Court is duty bound to consider not merely the issue of financial hardship if any, but also whether a strong prima facie raising a serious triable issue has been raised which would warrant a dispensation of deposit. That is a settled position in the jurisprudence of our revenue legislation. In CEAT Limited v. UOI 2010 (250) ELT 200 (Bom) it was held that "If the party has made out a strong prima facie case, that by itself would be a strong ground in the matter of exercise of discretion as calling on the party to deposit the amount which prima facie is not liable to deposit or which demand has no legs to stand upon, by itself would result in undue hardship of the party is called upon to deposit the amount." Where a strong prima facie case has been made out, calling upon the assessee to deposit would itself occasion undue hardship. Where the issue has raised a strong prima face case which requires serious consideration as in the present case, a requirement of pre-deposit would itself be a matter of hardship. Also the manner in which the Revenue has sought to brush aside a binding decision of the Court in the case of the assessee on the issue of a stay on enforcement for the previous year has to be serious disapproved. The rule of law has an abiding value in our legal regime. No public authority, including the Revenue, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.
UTI Mutual Fund v. ITO (No. 2) (Bom.) (High Court).www. itatonline.org

S. 234A : Interest - Default in furnishing return of income – Waiver or reduction – Delay in filing return attributable to assessee – Chief CIT correct in only partially waiving the interest.
Where there was a delay on the part of the assessee in seeking copies of the impounded documents for filing return, the Chief CIT was correct in only partially waving the interest under section 234 A of the Act for delay in filing return of income. (A.Y. 2001 – 02 & 2002 – 03)
Shebin Jewellery v. Chief CIT (2013) 81 DTR 329 (Ker.) (High Court)

S.234A: Interest-Advance tax-No interest canbe levied u/s.234A if entire amount of tax has been paid on or before due date of filling return of income even if return is filed after due date.
If entire amount of tax on taxable incomes has been paid on or before due date of filling return of income then even if return of income is filed after due date of filling return of income, no interest can be levied u/s.234A.If tax on total income has been paid in part on or before due date of filling return of income then interest u/s.234A can be levied only on differential amount of tax (i.e. on total tax less tax already paid before on or before due date)and not on the entire amount of tax or else, it shall render the provisions of section 234A penal in nature which the statue does not provide for. (SCA 9820 of 2002,dt 18/06/2012)]
Bharatbhai B.Shah(2012) BCAJ -November-P. 400/(2013) 214 Taxman 36(Mag.) (Guj.) (High Court)

S.234A: Interest - Default in furnishing return of income - Waiver of interest - Commissioner waiving one-third of interest - No further waiver of interest (S.234B)

That interest under sections 234A and 234B could be waived by the Chief Commissioner, only if the conditions specified in Notification F. No. 400/29/2002-IT (B), dated June 26, 2006, are satisfied. The first condition requires seizure of documents in search and seizure operations and the second condition was applicable only where interest is charged under section 234C. The third condition was applicable only in cases where the statute has been amended retrospectively and the fourth condition was applicable only where the return is filed voluntarily. None of these grounds were applicable and in spite of this, one-third of the interest had been waived up to the assessment year 1992-93. Since the conditions specified in the notification were not available, the assessee could not seek waiver of interest levied under sections 234A and 234B. Therefore, the order rejecting waiver of interest had to be sustained.

K. C. Mohanan v. Chief CIT (2013) 350 ITR 461 (Ker) (High Court)

S. 234B: Interest –Advance tax- MAT credit – Amendment in section 234 B by Finance Act, 2006 - Retrospective in nature – Therefore, MAT credit to be considered before calculation of interest u/s. 234 B of the Act.

Amendment in section 234 B of the Act w.e.f. 01.04.2007 was held to be clarificatory in nature which is retrospective in nature.Therefore, MAT credit is to be considered before calculating interest under section 234 B of the Act. (A.Y. 1999 – 00)

Chief CIT v. Gujarat Mitra P. Ltd. (2013) 81 DTR 25 (Guj.) (High Court)

S.234B: Interest-Advance tax-No interest u/s. 234B can be levied unless AO give specific direction in the Assessment order.

No interest can be levied through a notice of demand unless there is any specific direction giving reference tothe section charging interest in the Assessment Order. (T.A No. 84 of 200,dt 19/06/2012]

S.K. Patel Family Trust. (2012) BCAJ -November-P. 401) (Guj.) (High Court)

S.234B: Interest-Advance tax-Deduction at source-Entire income is subject to deduction at source.

When entire income is subject to TDS, it was not liable to pay advance tax, therefore no interest could be charged under section 234B. (A.Y.2002-03)

DIT(IT) v. Chiron Bearing Gmbh & Co (2013) 351 ITR 115/256 CTR 342/83 DTR 1 (Bom.) (High Court)

S.234B:Interest-Advance tax -Withouta specific ordercannot be charged. (S.156)

Interest under section 234B cannot be charged in notice of demand issued under section 156 in absence of any specific order demanding interest in assessment, reassessment or rectification order. In favour of assessee. (A.Y.1996-97)

CITv.Ruchira Papers Ltd. (2013) 212 Taxman 9 (HP) (High Court)

S.234B: Interest – Advance tax-Notice of demand - Specific order-Levy of interest was deleted. (S.156)

Interest under section 234B cannot be charged in notice of demand issued under section 156 in absence of any specific order demanding interest in assessment, reassessment or rectification order. (A.Y. 1996-97)

CIT v.Ruchira Papers Ltd. (2013) 212 Taxman 9 (HP) (High Court)

S.234B: Interest-Advance tax-Company-Book profits-Levy of interest is mandatory. (S.115JB)

Charging interest under section 234B of the Actis mandatory. (A. Ys. 2005-2006 to 2007-2008)

Eastern India Powertech Ltd. v. Add. CIT (2013) 21 ITR 542(Delhi) (Trib.)

S.234B: Interest-Advance tax-Deduction at source- Non-resident- Liable to income tax and not advance tax. (S.195, 209(1) (d))

The assessee, a tax resident of USA, supplied telecom equipment to customers in India. The customers while making payment to non-resident-assessee did not deduct tax at source under section 195. In the course of assessment proceedings, the Assessing Officer opined that in view of failure of payers to deduct tax at source while making payments, assessee being payee in instant case, was in default. Accordingly, the Assessing Officer passed an order levying interest under section 234B from the assessee. On appeal, the Commissioner (Appeals) deleted the interest levied under section 234B. On revenue's appeal the Tribunal held that in this case it is an undisputed fact that the tax on the entire income received by the assessee was required to be deducted at source at the appropriate rates by the respective payers under section 195. The revenue have not placed any material on record controverting these findings of the Commissioner (Appeals) nor pointed out any contrary decision so as to enable the Tribunal to take a different view in the matter. In view of aforesaid, it is to be held that the assessee is not liable to pay any interest under section 234B accordingly.the revenue's appeal wasdismissed. (A.Y. 2004-05 to 008-09)

ADIT (IT) v.Alcatel Lucent USA Inc. (2013) 55 SOT 72(URO) (Delhi) (Trib.)

S.234B: Interest-Advance tax- Deduction at source - Non-resident – No liability to advance tax interest under section 234Bcannot be levied. (S. 195, 208)

The assessee-company registered in U.S.A. belonged to ALU group, a leading manufacturer of telecom equipment in the world ALU group had a substantial presence in India and started its Indian operations in the year 1982 when it entered into an agreement with Indian Telecom Industries Ltd. During the year under consideration, the assessee supplied telecom equipment to various Indian companies. Assessing Officer found that ALU overseas entities including the assessee had a permanent establishment (PE) in India. The Assessing Officer determined net income chargeable to tax as attributable to PE in India at the rate of 2.5 per cent of the sales made by the assessee in India. Accordingly, assessment was framed at an income of Rs. 6,55,033 and also levied the interests under section 234A, 234B and 234C. Before the Commissioner (Appeals) the assessee questioned the levy of interest under section 234B by the Assessing Officer at Rs. 3,46,360. The Commissioner (Appeals) being convinced with the contention of the assessee had deleted the interest levied under section 234B.Tribunal held that combined reading of the provisions of section 209(1) (d) with the provisions of section 234B makes it clear that the liability to pay interest under section 234B would arise only if advance tax is payable after making the necessary adjustment for tax deductible at sources. The amount of (Tax deductible) would obviously mean the tax as was required to be deducted in respect of a particular income and not the tax which has actually being deducted at source. Responsibility of an assessee to pay advance tax arises under the provisions of section 208 read with sections 209 and 210 the mode of computation of advance tax is given in section 209. As long as the assessee has discharged its obligation to pay advance tax as per the provisions of section 208 read with sections 209 and 210 he cannot be held liable for defaulting in payment of advance tax. Section 234B and section 234C only provide a method of computation of interest in case of default by an assessee to pay advance tax as stipulated in sections 208, 209 and 210. The undisputed fact in the present case remained that the tax on the entire income received by the assessee was required to be deducted at appropriate rates by the respective payers under section 195(2). Had the payer made the deduction of tax at the appropriate rate, the net tax payable by the assessee would have been Nil. Thus, there was no liability to pay advance tax by the assessee. Under similar facts, the High Court of Delhi in the case of Jacabs Civil Incorporated/Mitsubishi Corpn. (supra) held that section 195 puts an obligation on the payer i.e. any person responsible for paying any tax at source at the rates in force from such payments and if payer has defaulted in deducting tax at source, the department can take action against the payer under the provisions of section 201. In such a case, the non resident is liable to pay tax but there is no question of payment of advance tax and, therefore, it cannot be held liable to pay interest under section 234B on account of default of the payer in deducting tax at source from the payments made to the non-resident. Appeal of revenue was dismissed. (A.Y.2002-03**)**

Dy. CIT(IT) v.Lucent Technologies International Sales Ltd. (2013) 55 SOT 271(Delhi) (Trib.)

S.234B: Interest- Advance tax-Order giving effect-Deduction at source-Self assessment tax. (S.234A, 234C)

The AO while charging interest u/s. 234B calculated interest @ 2% per month for 19 months on Rs.8,44,797/- (i.e. Rs.5,63,906/- month of tax worked out after giving credit of Rs and self assessment tax (+) Rs.1,09,440 amount of interest charged u/s. 234A(+) Rs.1,70, 230 amount of interest u/s. 234B up to 15.5.1994 and Rs.1221 amount of interest charged u/s. 234C). According to the assessee, the interest u/s. 234B was chargeable only on Rs.5,63,906 which is amount of tax worked out after giving credit of TDS and self assessment tax. Thus, according to the assessee interest u/s. 234B worked out to Rs.2,14, 284 as against Rs.8,44,797 charged by the AO. The assessee filed an application u/s. 154 of the Act objecting that interest charged u/s. 234B is not correctly computed. The AO rejected the claim of the assessee vide order dated 15.4.2010. The Tribunal held that, at the time of passing an order giving effect to order of ITAT, interest u/s. 234B is to be computed on tax on total income finally determined under regular assessment as reduced by the amount of TDS and self assessment tax. Interest u/s 234B cannot be levied on amount of interest chargeable u/s. 234A and 234C. (A.Y.1993-94) (ITA No. 4913/M/11, dated 17-10-2012 'C' Mum.)

Chandrakant S. Shah v. ITO(2013)BCAJ Pg. 20, Vol. 44-B Part 4, January 2013(Mum.) (Trib.)

S.234C: Interest - Deferment of advance tax -Mandatory - Waiver of interest - Assessee not filing application for waiver of interest hence no opinion could be expressed whether assessee's case is covered by circulars.

During the assessment year 2004-05, the assessee contended that its principal informed it by letter dated November 4, 2004, that it was entitled to the additional incentive of Rs. 6,07,44,583. The incentive was paid in view of the sale of Rs. 636 crores in the previous year 2003-04 in which the growth of 9.8 per cent. over the last year was recorded. Prior thereto, the assessee was not aware that the income towards the growth incentive would become payable and could not have presumed that it would be entitled to the substantial payment towards growth incentive before the letter dated November 4, 2004, was received by it. The assessee had paid the advance tax of Rs. 1.25 crores on December 14, 2004. The Tribunal upheld the interest charged by the Assessing Officer under section 234C amounting to Rs. 4,17,074. On

appeal Held, dismissing the appeal, that the Central Board of Direct Taxes had issued circulars in this regard and the Chief Commissioners and the Director General have been given power to reduce the interest payable under sections 234A, 234B and 234C in specified and specific cases. Since the assessee had not filed any application no opinion could be expressed whether the assessee's case was covered under the circulars. If deemed appropriate, the assessee could make an application. (A.Y.2004-2005)
Bill and Peggy Marketing India Pvt. Ltd. v. ACIT (2013) 350 ITR 465(Delhi) (High Court)

S. 234C: Interest-Deferment of advance tax- Assessed income was loss, assessee is not liable for interest under section 234C.
Assessment was subjected to modifications due to findings of appellate authorities regarding earlier assessment years and allowing toset off loss carried forward against income of current assessment year. Accordingly, Assessing Officer determined loss for relevant assessment year and refunded TDS, advance tax and interest paid under section 234B. He, however, refused to refund interest paid under section 234C. Tribunal held thatinterest paid under section 234C is for deferment of advance tax and when income of assessee having finally been arrived at loss advance tax was refunded, there was no logic in making assessee liable for interest under section 234C. In favour of assessee. (A.Y. 1996-97)
Dy. CITv. Mysore Paper Mills Ltd. (2013)55 SOT 56(URO) (Bang.) (Trib.)

S.237:Refunds: Non-grant of refunds-Search and seizure-Refund of seized amount- Strictures passed against Dept for harassing honest taxpayers. (S 132,.245)
A search was conducted at the premises of the assessee during which cash of Rs. 25 lakhs was seized. The assessee succeeded in the block assessments and the said amount of Rs. 25 lakhs became refundable to the assessee. However, the said amount was not refunded to the assessee on the ground that there were demands outstanding against a third party who was also named in the search warrant. The assessee claimed that he had no relation with the third party and the fact that there were demands outstanding there did not mean that the assessee's refund could be blocked. The department refused to pass an order on the assessee's application for refund. HELD by the High Court allowing the plea:
It is but evident that the department has failed to discharge its legal obligation in not refunding the seized amount. The argument of the department that unless a direction is issued, a speaking order shall not be passed on the application for refund of the amount due to him is not appreciated. It shows that the officers of the Income-tax Department are shirking their responsibilities. Speedy and affordable justice is the requirement of the day. But it cannot be achieved until the executive including tax-man discharge their duties faithfully honestly within the four corners of law. The revenue official failed to take any decision right or wrong on the refund application filed by the assessee and passed on the buck on the Court. Time has come for the heads of the departments to keep a strict vigil on such shirkers and to fix their responsibility. While it is no doubt true that collection of revenue is a serious matter for the State -and the bounden duty of the authorities functioning under the Act is to implement the provisions of the Act, there should be safety and assurance to an honest tax-payer. An honest tax-payer should not be subjected to unnecessary harassment and an action not warranted in law, which can be of very serious consequence to the tax-payer if is allowed to remain without correction, such harassment and browbeating of an honest tax-payer will otherwise drive even such honest tax-payers to become cynical and lead to a situation where taxpayers will get a feeling that paying taxes honestly is not a worthwhile exercise; that the tax authorities are a menace to the society rather than simply being representatives of the State for enforcing the tax provisions. The department shall pay costs of Rs. 15,000 to the assessee [**Sandik Asia Ltd. v. CIT (2006)** 280 ITR 643 (SC), CIT v. **Gujrat Flouro Chemicals (2012)** 348 ITR 319(SC) &**Raghavendra Sherrigar** (2005) 142 STC 153) followed]
Vijay Prakash Agrawal v. CIT (All) (High Court).www.itatonline.org

S.237:Refund-Deduction at source-Deposited by mistake-Refund entitled with interest. (S.195, 244A.)
TDS under mistake and deposited with the government was liable to be refunded without reference to any circular; further, the case of the petitioner was covered under cl. (i) (c) of para (1) of Circular No. 769 dt. 6th August 1998 and not under subsequent Circular No. 790 dt. 20th April 2000; refund directed with interest.
Fab Bearings India Ltd. v. CCIT (2013) 83 DTR 136(Guj.) (High Court)
S.237:Refunds –Circular –On the date of application-Refund claim of an assessee must be examined in light of circular in force as of the date of application for such refund.
Petition moved as application for refund arising to it which was appropriate in light of the CBDT circular prevalent at the point of time. Since, the Department did not respond to the said application for a considerable time, another letter remaining about the same was addressed to AO. During the pendency of such application, CBDT came out with

another circular superseding the earlier circular andaccording to provisions of the said circular Petitioner was ineligible for the said refund and the Department denied the said refund on the strength of such subsequent circular. It was held that the Department cannot process application of an assessee after an indefinite periodof timeand apply a rule that may have changed in the meantime by virtue of change in circular. Hence the refund claim of the Petitioner must be examined in light of the circular in force as of the date of application. (SCA 4141 of2001, dt, 23/07/12/(SCA11132 of 2002, dt 23/07/12)

Mardia Chemicals Led.(2012) BCAJ -November-P. 399) (Guj.) (High Court)
FAG Bearing India Ltd. (2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.244: Refunds - Interest on refund -– Intimation – DTAA – India – France [S.143(1)].
Interest assessable in year in which refund granted and not in year in which proceedings under section 143(1) (a) attain finality. If interest reduced on account of assessment under section 143(3) reduced interest to form part of income of that year. Assessing Officer to adopt rate at which interest on income-tax refund charged under Double Taxation Avoidance Agreement between India and France. (A.Y.1997-1998)
ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345(Mum.) (Trib.)

S.244A: Refunds-Interest-Rectification of order-Withdrawal of interest. (S.115JB, 143(3), 154)
After completing original assessment, Assessing Officer passed order under section 154 to give effect to amended clause of section 115JB(2) (h) and recomputed income at higher figure than originally assessed.Assessing Officer also withdrew interest granted to assessee under section 244A.On appeal by assessee the Tribunal held that in view of section 244A(3), Assessing Officer was justified in withdrawing interest already allowed to assessee. In favour of revenue. (A. Y. 2006-07)
Aarti Steels Ltd. v.Dy. CIT (2013) 55 SOT 59 (URO) (Chandigarh) (Trib.)

S.244A: Refunds-Interest-Self assessment tax-Entitle to interest on refund of self assessment tax. (S.140A)
Tribunal held that in terms of section 244A interest is payable where refund of any amount becomes due to assessee under Act and, therefore, assessee is entitled to receive interest under section 244A on refund of self-assessment tax. In favour of assessee. (A.Y.1996-97)
Dy. CITv. Mysore Paper Mills Ltd. (2013)55 SOT 56(URO) (Bang) (Trib.)

S.245: Refunds-Set off of refunds against tax remaining payable-TDS credit-Strict guidelines issued to end Dept's TDS credit & refund adjustment harassment. (S.143(1), 154, 200, 244A, 245)
Anand Parkash, FCA, addressed a letter dated 30.4.2012 to the High Court in which he set out the numerous problems being faced by the assesses across the Country owing to the faulty processing of the Income Tax Returns and non-grant of TDS credit & refunds. He claimed that because of the department's fault, the assessees were being harassed. The High Court took judicial notice of the letter, converted it into a public interest writ petition and directed the CBDT to answer each of the allegations made in the letter and certain other queries that the Court raised. The Court also appointed eminent senior counsel to assist it. The department accepted that tax payers are facing difficulties in receiving credit of TDS & refunds on account of adjustment towards arrears. Thereafter, as an interim measure to provide immediate relief to the assessees, the Court passed an order dated 31.08.2012 by which it gave detailed directions. After further hearing, Held by the Court:

(i) **Re Uploading of wrong or fictitious demand**: The CBDT has accepted that incorrect and wrong demands have been uploaded on the CPC arrears portal. In his letter dated 21.08.2012, the CIT, CPC, has expressed his concern and anguish on account of uploading of incorrect and wrong data in the CPU and the problem faced by them and by the assesses. The CBDT has issued Circular No. 4 of 2012 in which the burden is put on the assessee to approach the AOs to get their records updated and corrected by filing s. 154 applications. While this may be the easiest option available, it should not be a ground for the AO not to suo motu correct his records and upload correct data. Each assessee has a right and can demand that correct and true data relating to the past demands should be uploaded. Asking the assessee to file s. 154 applications entails substantial expenses and defeats the main purpose behind computerisation. Also, the AO's do not adhere to the time limit prescribed for disposal of the s. 154 applications. To ensure transparency (and accountability), a register must be maintained with details and particulars of each application made u/s 154, the date on which it was made, date of disposal and its fate. The s. 154 application has to be disposed of by a speaking order and communicated to the assessee. There must be full compliance of the said requirements;

(ii) **Re Adjustment of refund contrary to s. 245**: S. 245 postulates two stage action; first a prior intimation to the assessee and then, if warranted, the subsequent adjustments of the refund towards arrears. This is not being followed by the CPC because the computer itself adjusts the refund due against the existing demand. To prevent this breach of the law, the department must follow the procedure prescribed u/s 245 and give the assessee an opportunity to file a reply which should be considered by the AO before giving the direction for adjustment. As regards the cases where such (illegal) adjustment has been made in the past, the cases must be transferred to the AOs for issue of notice to the assessee seeking adjustment of refund. The assessees will be entitled to file a reply to the notice and the AO will then pass an order u/s 245 allowing the refund. The CBDT has to fix a time limit and schedule for completing the said process. Though the process involves expenditure and paper work, the situation has arisen due to the lapses on the part of the AOs and the assessees cannot be made to suffer for the wrong uploading of arrears and wrong adjustment of refund. The question of the assessee's entitlement to interest on the SA tax is left open though when the delay is due to the fault of the Revenue, interest should be paid u/s 244A. False uploading of past arrears and failure to follow the mandate of s. 245 is a lapse on the part of the AO;

(iii) **Re non-communication of adjusted s. 143(1) intimations**: The non-communication of s. 143(1) intimations, where adjustments on account of rejection of TDS or tax paid has been made, is a matter of grave concern. When there is failure to dispatch the intimation within a reasonable time to the assessee, the return shall be deemed to have been accepted and the intimation will be treated as non est or invalid for want of service. The onus to show that the order was served on the assessee is on the Revenue and not upon the assessee. If a TDS or tax credit claim has been rejected on a technicality but there is no communication to the assessee of the order/intimation u/s 143(1), the AO cannot enforce the demand created by the said order/intimation;

(iv) **Re non-grant of credit for TDS**: The problem regarding rejection of TDS credit is in two categories. The first is those where the deductors fail to upload the correct particulars of the TDS which has been deducted and paid and the second is where there is a mismatch between the details uploaded by the deductor and the details furnished by the assessee in the ROI. As regards the first, the CBDT had earlier directed that the AOs to accept the TDS claims without verification where the difference between the TDS claimed and the TDS as per AS26 did not exceed rupees one lakh. This figure has now been reduced to a mere Rs.5,000. Ex-facie, there is no justification for the reduction because credit is being given only if the three core fields match. The CBDT must re-examine this aspect and take suitable remedial steps if they feel that unnecessary burden or harassment will be caused to the assessees. As regards cases of mismatch because of different methods of accounting, or offering income in different years, the department must take remedial steps and ensure that in such cases TDS is not rejected on the ground that the amounts do not tally. The department should also fix a time limit within which they shall verify and correct all unmatched challans. An assessee as a deductee should not suffer because of fault made by deductor or inability of the Revenue to ask the deductor to rectify and correct. Once payment has been received by the Revenue, credit should be given to the assessee. The CBDT should issue suitable directions in this regard. The department's response on the action taken against deductors for non-compliance is unfortunate and unsatisfactory and it purports to express complete helplessness on the part of the Revenue to take steps and seeks to absolve them from any responsibility. Denying benefit of TDS to a taxpayer because of the fault of the deductor causes unwarranted harassment and inconvenience. The deductee feels cheated. The Revenue cannot be a silence spectator, wash their hands and pretend helplessness. S. 234E has now been inserted by the Finance Act, 2012 to levy a fee of Rs.200 per day for default of the deductor to file TDS statement within due date. It is unfortunate that the Board did not take immediate steps after even noticing lacuna and waited till FA 2012. The stand of the Revenue that they can only write a letter to the deductor to persuade him to correct the uploaded entries or to upload the details is not acceptable. The AO must use his power and authority to ensure that the deductor complies with the law.
Court On Its Own Motion (Anand Parkash) v. CIT (2013)214 Taxman335/85 DTR 301 (Delhi) (High Court)
All India Federation of tax Practioners v.UOI(2013) 85 DTR 301 (Delhi) (High Court)
Court on its own motion v. CIT(2013) 85 DTR 289 (Delhi) (High Court)

S.245C: Settlement Commission – Application- Maintainability-When there is no pendency of proceedings, application is not maintainable. (S.245A)
The assessee had filed returns in respect of assessment years 2004-05, 2005-06, 2007-08 and 2008-09.On 5-8-2011 the assessee filed an application before Settlement Commission seeking a settlement of its cases. The revenue opposed application contending that application was not maintainable as no case was pending before any Income-tax Forum. The settlement commission overruled objection of revenue and decided to entertain the settlement application. The revenue filed the writ petition and raised the question.
"Whether proceedings are to be deemed to remain 'pending' for the purposes of section 245A(b) when the time-limit for completion of assessment under section 143 or section 144 has expired".

TheCourt held thatsince no proceedings under Income-tax Act were pending at time of filing of application, Settlement Commission was not right in admitting assessee's application. Where by application of section 153, an assessment order can no longer be made, proceeding, for purposes of section 245A, would have to be construed as terminatedIn favour of revenue. (A.Ys. 2004-05, 2005-06, 2007-08, 2008-09)

CIT v Income-tax Settlement Commission (2013) 212 Taxman 511 (Delhi) (High Court)

S.245H: Settlement Commission-Immunity from prosecution/penalty-Remanding the matter to settlement commission for de novo adjudication by a single judge held to be valid. (S.245C, 245D)

Assessee approached Settlement Commission under section 245C(1) for settlement of its cases. Settlement Commission granted immunity to assessee from levy of penalty and initiation of prosecution. Single Judge of High Court quashed order of Settlement Commission and remanded matter to it for reconsideration. Whether as per provisions of section 245D prevalent at relevant assessment years Settlement Commission on receipt of application had to call for a report from Commissioner and on basis of such report granting of immunity from prosecution and penalty ought to have been scrutinized, since Settlement Commission had not done so, order of Single Judge remanding matter to Settlement Commissioner for de novo adjudication did not suffer from any material irregularity or illegality. In favour of revenue. (A.Ys. 1994-95 to 1999-2000)

ING Vysya Bank Ltd. v CIT (2012) 76 DTR 193/ (2013) 213 Taxman 115/255 CTR 311 (Karn.) (High Court)

S.245R: Advance ruling-Procedure-Application-Ruling is transaction related; seeking a ruling only on part of transaction cannot be said to be proper. (S.10(38), 115JB)

The applicant, a company registered under the laws of Panama, holds shares in two Indian companies, both governed by the Companies Act, 1956.The applicant proposes to transfer the shares held by it in the two companies through recognized stock exchanges. As per applicant, shares held by it in the Indian companies are long-term capital assets in terms of section 2(29A), read with section 2(42A) thereof. According to it, the capital gains arising out of the sales through the stock exchanges in India on which securities transaction tax would be paid, would be exempt under section 10(38).At the hearing under section 245R(4), the applicant emphasised that it was not seeking a ruling on the question whether the transaction would be exempt from taxation under section 10(38), but was seeking a ruling only on the applicability of section 115JB to the proposed transaction. According to the applicant, section 115JB had no application to a foreign company which had no presence in India and its application was confined to companies that are resident in India. Authority held that where proposed transaction requires ruling on question of applicability of section 10(38) and also section 115JB but applicant does not seek ruling on applicability of section 10(38), ruling on applicability of section 115JB is to be declined. In favour of revenue.
(AAR no 1098 of 2011 dt 8-6-2012)

ZD, *In re*(2013) 212 Taxman 246 (AAR)

S.246A:Appeal-Commissioner (Appeals)- Appealable orders- (S.144,Rule 45(2))

Aggrieved by the exparte order dated 31-12-2008 passed by the Assessing Officer (AO) u/s. 144 of the Act the assessee filed an appeal to CIT (A). The memorandum of appeal was signed by CA, Shri S.U. Radhakrishnani, as authorised representative. Since the assessee neither submitted any valid power of attorney nor was there any explanation as to why the appeal was not signed by the assessee, CIT (A) vide order dated 11-10-2010 dismissed the appeal as invalid. Thereafter, the assessee filed a fresh appeal on 7-3-2011 along with application for condonation of delay. The CIT (A) in his order dated 22-12-2011 held that the appeal filed by the assessee against the assessment order had already been adjudicated by CIT (A) and dismissed. There was no provision for filing of an appeal when the first appeal had been dismissed. The appeal was also filed beyond the time limit CIT (A) therefore dismissed the appeal inlimine. Once the appeal was treated as invalid, the same became non-est. The assessee had the right to file another appeal which of course has to be considered as delayed appeal and, in case delay is condoned, the appeal has to be decided on merit. The Tribunal held that the view taken by CIT (A) does not represent the correct view and therefore, has to be rejected. Once the appeal filed by the assessee is found to be legally invalid and dismissed as such, the assessee can file another appeal which has to be considered along with condonation application and, if admitted after due consideration of condonation application, it has to be decided on merit. (A.Y. 2006 – 2007) ('G' Bench, ITA No.1133/M/12 and ITA No.5490/M/11, Dated 11-12-2012)

Yusuf Husain v. ITO(2013) BCAJ Pg. 25, Vol. 44-B Part 5, February 2013(Mum.) (Trib.)

S. 251:Appeal-Commissioner (Appeals) – Powers - Remand by CIT (A) for failure by AO to comply with directions of Tribunal.

Even after amendment of s. 251 (1) (a) w.e.f. 1st June 2001, divesting CIT (A) of power to remand, CIT (A) was justified in remitting the matter to the AO in appeal against giving effect to order of the Tribunal, where the AO failed to make

assessment as per directions of the Tribunal. Order barred by limitation. Appeal of revenue was dismissed. (A.Y. 1979-80 to 1981-82)
CIT v. Hindustan Zinc Ltd. (2103) 83 DTR 231 (Raj.) (High Court)

S.251:Appeal-Commissioner (Appeals)-Powers-Power of enhancement-Notice is mandatory before enhancement.
Assessee-company was incorporated on 30-1-1997. Promoters subscribed to equity shares of assessee and also made advances to it towards allotment of additional equity shares. Since allotment of additional equity shares against subscription money could not be completed by 31-3-1997, assessee paid interest to subscribers and claimed deduction of same. Assessing officer accepted assessee's claim for deduction of interest payment. Commissioner (Appeals), on appeal filed by assessee on some other issues, considered payment of interest too and held that assessee was not entitled to deduction for payment of interest.Tribunal upheld order of Commissioner (Appeals) on enhancement of assessment. The Court held that said issue was to be sent back to Commissioner (Appeals) with a direction to issue notice to assessee before considering any such enhancement. Matter remanded. (A.Y.1997-98)
Infrastructure Development Finance Co. Ltd. v. Jt.CIT (2013) 213 Taxman 28 (Mag.) (Mad.) (High Court)

S.251: Appeal - Commissioner (Appeals) – Powers- Enhancement-Income from same source of income-Held to be valid.
Assessee having derived royalty income from licensing of CDMA patents hand sets and equipment cannot be treated as two different source of royalty and therefore, AO having concluded the assessment by taxing only the royalty income from handsets, CIT (A) was competent to exercise his jurisdiction under section 251 to enhance income of the assessee by including royalty income from network equipment. (A.Y. 2001-01 to 2004-05)

Qualcomm Incorporated v. ADIT (2013) 23 ITR 239/85 DTR 156(Delhi) (Trib.)

S.251: Appeal - Commissioner (Appeals) – Powers- Revision - Commissioner under section 264 has no power to pass an order prejudicial to assessee, issues which are not subject matter of revision under section cannot be enhanced by the Commissioner (Appeals) (S.35AB, 264)
The Assessing officer allowed the claim of assessee for deduction under section 35AB in respect of technical know-howfees. The Assessee filed petition under section 264 in respect of claim under section 80IB which the assessee had omitted to make in the original return. Commissioner restored the issue regarding allowability of claim under section 80IB of the Act to the Assessing Officer.Assessing Officer in fresh assessment proceedings disallowed the claim under section 80IB. On appeal the Commissioner (Appeals) suomotu disallowed the claim under section 35AB.In appeal before the Tribunal it was argued that Commissioner (Appeals) could not have consider the deduction under section 35AB which is beyond his jurisdiction. The Tribunal held that the Assessing Officerwas correct in not considering any issue other than the claim of deduction under section 80IBmade by assessee in the applicationunder section 264before Commissioneras he had no such jurisdiction. Nodoubt it is true that Commissioner (Appeals) while deciding an appeal has plenary power and can also consider any issuewhich has been omitted bythe Assessing Officer. On the facts the Commissioner (Appeals) cannot consider any issue which is beyond the jurisdiction of Assessing Officer.In the fresh Assessment proceedings the Assessing Officer had no jurisdiction to consider any issue other than the claim under section 80IBand therefore, it cannot be said that in not considering the claim of deduction under section 35AB, the Assessing Officer had failed to do something which was necessary in the assessment. Commissioner (Appeals) has no power to act on which the Assessing Officer hasno jurisdiction. Accordingly the order of Commissioner (Appeals) was set aside on this issue. (A.Y.2003-04)
Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277/151 TTJ 421 (Mum.) (Trib.)

S. 253 :Appellate Tribunal – Condonation of delay – Delay in filing appeal against the original order of the CIT (A) after the Tribunal allowed the appeal of the Revenue holding that the CIT (A) was not justified in rectifying his original order – technical and had to be condoned.
Pending the assessee’s appeal before the Tribunal the assessee filed a rectification application before the CIT (A) which was allowed by him giving substantial relief to the assessee.Thereafter, the assessee withdrew its appeal before the Tribunal.However, the revenue authorities challenged the order of the CIT (A) in rectification which was allowed by the Tribunal.The Assessee therefore filed an appeal before the Tribunal against the CIT (A)’s original order and also filed an application for condonation of delay.The delay was held to be condonable as the assessee had filed fresh appeal before the Tribunal once the entire reason for challenging the CIT (A)’s order had changed. (A.Y. 1993 – 94)
Umakant Leasing & Finance (P) Ltd. v. Dy. CIT (2013) 81 DTR 197 (Guj.) (High Court)

S.253:Appellate Tribunal-Appeal-Condonation of delay-High Courtcondoned the delay of more than one yeardue to negligent of lawyer.
Assesseerunning a tuition centre, an assessment order was passed. Against said order, assessee filed an appeal before Tribunal with a delay of over one year. Tribunal dismissed appeal being barred by limitation. On appeal, it was noted that on account of negligence of assessee's lawyer, appeal could not be filed within prescribed time. Further, sickness of mother was also a contributing factor as assessee was engaged in attending her. The Court heldonfacts, cause shown by assessee for delay in filing appeal was genuine and bona fide, therefore, impugned order was to be set aside and, matter was to be remanded back for disposal on merits. Matter remanded. (A.Y. 1999-2000 to 2001-02)
Mukesh Jesangbhai Patel. v. ITO (2013) 213 Taxman 37(Mag.) (Guj) (High Court)

S.253 Appellate Tribunal – Appeal- Dismissing the cross objection was seta-side. (Rule 46A)
Assessing Officer made re-assessment and added certain amount to total tax liability of assessee.Assessee, in appeal, objected to said addition which was accepted. On appeal before Tribunal by revenue, assessee did not file any appeal or cross-objections. It was disputed whether notice of appeal was in fact received by assessee. Tribunal passed order and directed remand to Assessing Officer on question of consideration of additional evidence relied upon by assessee. Assessee filed appeal before High Court. High Court did not go into question as to whether notice of appeal was served on assessee. High Court directed Tribunal to adjudicate matter afresh on applicability of rule 46A and whether in obtaining factual matrix, only option was to remand matter to Assessing Officer. Assessee filed its cross-objection before Tribunal under section 253(4). Tribunal dismissed cross objection on assumption that assessee did not choose to file cross-objections despite service of notice. The Court heldthat Tribunal was unjustified in rejecting cross objection when it itself was satisfied that appellant had not, in fact, filed cross objection at time when it could have originally filed it when appeals were filed earlier before Tribunal. The Court also held that Tribunal should have examined whether cross-objections could be entertained in facts and circumstances of case having regard to independent power to entertain them contained under section 253(5), therefore, Tribunal's impugned order dismissing cross-objection was unsustainable and was to be set aside. In favour of assessee.
Ashian Needles (P.) Ltd. v. CIT (2013) 213 Taxman 38(Mag.) (Delhi) (High Court)

S.253:Appellate Tribunal –Appeal- Duty of Tribunal - Duty to examine facts carefully.
That the order of the Tribunal did not disclose the facts considered on the basis of which it arrived at the conclusion in respect of the fixed deposits made by the friends and relatives of the managing director to the tune of Rs. 21,60,000. Admittedly, reasons are the links between the materials on which certain conclusions are based on the actual conclusions. In the absence of reasons based on consideration of facts by the Tribunal in the order to support its conclusion as regards the fixed deposit receipts of Rs. 21,60,000 its order could not be sustained. Matter remanded.
Hastalloy India Ltd. v. Dy. CIT (2013) 350 ITR 52(AP) (High Court)

S.253:Appellate Tribunal-Appeal-Department cannot argue that registration granted by Commissionerunder section 12 AA is not proper. (S.12AA).
Tribunal held that order under section, 12AA, is an order passed by competent authority and if any irregularity has crept in the order, the same can be rectified by the competent authority itself. No appeal has been provided for the revenue against this order before the Tribunal. Therefore, the revenue cannot raise any objection qua the irregularity, if any, crept in the order of the Commissioner while granting registration.Decided in favour of assessee.
Add.CIT v. Chaudhary Raghubir Singh Educational & Charitable Trust (2013)55 SOT 211 (Delhi) (Trib.)

S.253:Appellate Tribunal-Appeal-**Condonation of delay –Cross objection delay of 1529 days was not condoned.**
Assessee filed cross objections after a delay of 1529 days. Assessee explained that it was an oversight which was discovered only in conference with its counsel after expiry of four years. Tribunal heldthat therewas no sufficient cause for delay within meaning of section 253(5) to justify condonation of delay. Decided in favour of revenue. (A.Y. 2001-02)
ACITv.Petroleum India International.(2013) 55 SOT 69(URO) (Mum.) (Trib.)

S.253: Appellate Tribunal-Appeal-Condonation of delay-Delay of 557 in filing appeal before Tribunal by the revenue was not condoned.
Against order of Commissioner (Appeals) revenue department preferred on appeal after a delay of 557 days with condonation of delay application assigning cause as to that due to oversight and pressure of workload appeal could not be filed within prescribed time of 60 days. Tribunal held thatcause shown by department was neither reasonable nor sufficient and, therefore, condonation of delay had to be declined.Tribunalalsoobserved that ithas power to condone delay in filing an appeal only when sufficient cause is shown with a view to advance substantial justice and even after sufficient cause has been shown party is not entitled to condonation of delay as a matter of right, and Tribunal has still

to exercise its discretion after considering bona fides of parties or due diligence exercised by parties.Appeal of revenue was dismissed.In favour of assessee. (A. Y. 2007-08)
ACIT v. Vimal Mehra (2013) 55 SOT 67(URO) (Delhi) (Trib.)

S.253:Appellate Tribunal-Appeal-Tax effect-tax effect in a 'case' means overall tax effect in respect of disputed issues in a particular assessment year. (S.172(7))
During previous year 40 voyages were undertaken by a French shipping company through its Indian agent and 40 returns were filed - Instead of passing 40 orders, a composite assessment order under section 172(4) was passed by Assessing Officer assessing total income at Rs. 2.72 crore. Tribunal held thatsince tax effect under appeal in instant case was more than stipulated tax effect of Rs. 3 lakhs, even though 30 out of 40 appeals had tax effects of less than Rs. 3 lakhs each, all 40 appeals were maintainable before Tribunal. Tax effect in a 'case' means overall tax effect in respect of disputed issues in a particular assessment year. In favour of revenue. Circulars and Notifications: CBDT's Instruction No. 3/2011, dated 9-2-2011. (A. Y. 2010-11)
ITO(IT) v.CMA CGM Agencies (India) (P.) Ltd.(2013) 55 SOT 61 (URO) (Rajkot) (Trib.)

S.253: Appellate Tribunal-Appeal-Condonation of delay-Delay of 902 days not condoned as the assessee had not come with clean hands.
Tribunal held thatwhen assessee had not come with clean hands before Tribunal and had also failed to establish with cogent and proper evidence that there existed sufficient cause for not presenting appeal within stipulated period, delay of 902 days in filing appeal, could not be condoned; appeal would be barred by limitation and, hence, deserved to be rejected. In favour of revenue (A.Y. 2005-06)
Shree Balaji Woollen Mills v. ACIT (2013) 55 SOT 65(URO) (Delhi) (Trib.)

S. 253:Appellate Tribunal -Maintainability – Small tax effect. (S.268A)
Since the tax effect in the case is less than 3 lacs, the appeal filed by the revenue before the Tribunal is not maintainable. The limit is also applicable to pending cases. (A. Y. 2003-04)
ITO v. Saraswati Devi Gehlot(Smt) (2013) 152 TTJ 17 (UO)(Jodh.) (Trib.)
S.253(5):Appeal - Appellate Tribunal-Delay of 890 days was Condoned-Pursuing remedy as per the legal advice.
Assessee filed the appeal belatedly as he was pursuing one remedy or the other as per the legal advice obtained. The delay of 890 days in filing the appeal before the Tribunal was condoned. Appeal was restored to the Tribunal. (A.Y. 2005-06)
Faisal Hameed v. ITAT (2013) 83 DTR 10(J&K) (High Court)
S.254(1): Appellate Tribunal – Orders – Non speaking order – matter remanded for reconsideration. (S.36(1)(vii))
Where the Tribunal allowed deduction under section 36 (1) (vii) of the Act in respect of bad debts written off without reasons and by a non speaking order is remanded back to the Tribunal for reconsideration.
CIT v. Metallurgical Engineering Consultants (India) Ltd. (2013) 81 DTR 22(Jharkhand) (High Court)

S.254(1):Appellate Tribunal – Powers-Power to remand-Direction should be very cautious.
While remanding issues for fresh consideration by Assessing Officer, Tribunal should be very cautious in issuing directions, even if it is only for guidance of Assessing Officer, direction issued by Tribunal should not give rise to a situation where assessing authority is likely to feel disturbed by it. Matter remanded
CIT v. RBG Investment & Finance Ltd. (2013) 213 Taxman 39 (Mag.) (Delhi) (High Court)

S.254(1): Appellate Tribunal-Orders-Power- Additionalevidence-Tribunalcan remit matter to Assessing Officer to consider additional evidence. (Appellate Tribunal) Rules, 1963, 29)

The assessee incurred certain expenses in the form of management expenses paid by it to its group companies. TheAssessing Officer rejected the claim on the ground that the assessee was not able to prove that the group companies had rendered any services to the assessee. Before the Commissioner (Appeals) the assessee had filed copies of certain agreements entered into between the assessee and its group companies to whom the management fee was given. The Commissioner (Appeals) admitted this fresh evidence but came to the conclusion that the assessee was unable to lead any credible evidence to prove that for carrying on the business it had received any inputs from the group companies and the money to them became payable. The assessee preferred an appeal before the Tribunal. Along with the appeal application for leading additional evidence under rule 29 was filed as the assessee wanted to produce some further evidence which he did not produce before the Assessing Officer and even the Commissioner (Appeals). The Tribunal admitted the additional evidence and remitted the case to the Assessing Officer to decide the issue afresh after considering the additional evidence. On appeal by revenue dismissing the appeals, the Court held that the reason which was given by the assessee in support of its plea for admission of additional evidence was that the assessee could not produce these records before the lower authorities due to non-irretrievability of e-mail on the date because of technological difficulties. This reason was specifically mentioned in the application filed. No reply to this application was filed refuting this averment, though the Departmental representative had opposed the admission of the additional evidence. The ground pleaded by the assessee was not confronted. In this backdrop, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It was, thus, clear that the Tribunal found the requirement of the evidence for proper adjudication of the matter and in the interest of substantial cause. Rule 29 categorically permits the Tribunal to allow such documents to be produced for any substantial cause. Once the Tribunal has predicated its decision on that basis, there was no reason to interfere with the same. (A.Y. 2004-2005)

CIT v. Text Hundred India Pvt. Ltd. (2013) 351 ITR 57(Delhi) (High Court)

S.254(1): Appellate Tribunal-Orders- Powers-Under rule 27 the respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him, however set side of entire order is not permitted. (Income-tax (Appellate Tribunal) Rules, 1963Rule 27)

The assessee had made a claim on account of bad debts in the amount of Rs. 28.69 lakhs under section 36(2). The Assessing Officer disallowed the claim. In appeal, the Commissioner (Appeals) confirmed the disallowance made by the Assessing Officer to the extent of Rs. 14.96 lakhs. However, the assessee was granted relief to the extent of Rs. 13.73 lakhs under section 36(2). Both, the revenue and the assessee, filed appeals before the Tribunal. The appeal filed by the assessee was, however, barred by limitation, there being a delay of 551 days. During the course of the hearing before the Tribunal, the assessee withdrew its appeal, but sought to press in aid the provisions of rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963 to contend that the Commissioner (Appeals) erred in partly confirming the disallowance. The Tribunal held that in the absence of relevant details being brought on record by the parties and in the interests of justice it was appropriate to remand the entire matter pertaining to the disallowance of Rs. 28.69 lakhs to the Assessing Officer. Accordingly, the order passed by the Assessing Officer on this account was set aside in its entirety and the Assessing Officer was directed to decide the matter afresh in view of the decision of Mumbai Special Bench in Dy. CIT v. Shreyas S. Morakhia [2010] 40 SOT 432.On appeal to the High Court, the revenue contended that rule 27 of the 1963 Rules would only permit the assessee, as the respondent to the appeal by the revenue, to support the order appealed against on any of the grounds decided in favour of the assessee and, hence, the assessee could have supported the order of the Commissioner (Appeals) to the extent to which the appellate authority had allowed the claim of the assessee in the amount of Rs. 13.73 lakhs and not disallowance of Rs. 14.96 lakhs. Allowing the appeal the Court held that Tribunal erred in setting aside order of Commissioner (Appeals) in its entirety and by restoring proceedings to Assessing Officer in regard to entire disallowance; Tribunal could have restored proceedings to Assessing Officer only as regards amount of disallowance deleted by Commissioner (Appeals). Under rule 27 the respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him, however set side of entire order is not permitted. In favour of revenue (A.Y. 2004-05)

CIT. v. Jamnadas Virji Shares & Stock Brokers (P.) Ltd. (2013) 212 Taxman 120(Mag) (Bom.) (High Court)

S.254(1): Appellate Tribunal-OrdersRectification of mistake-Ex-parte order-Recalling the order and decidingallowing the bad debt was held to be justified.[S.36(1) (vii)].

Assessee had written off an advance of Rs. 65 lakhs as bad debts on ground that despite filing a suit sum was not recoverable. Issue had reached up to Tribunal. Tribunal by an ex-parte order held against assessee. Subsequently, however, assessee applied for recall of such an order. Tribunal thereupon proceeded to decide appeal afresh. In such exercise Tribunal overruled objections of Assessing Officer and allowed claim of assessee by holding that loan written off had become bad debt which was allowable, since assessee was in business of banking or money lending. Revenue contended that Tribunal having previously ruled against assessee could not have changed decision. Court held that since original order of Tribunal was passed in absence of assessee which had shown sufficient ground justifying its absence, and had satisfied necessary conditions of section 36(2) (i), Tribunal was right in deciding appeal afresh and allowing claim of assessee. In favour of assessee.

Dy. CIT v. Hindustan MI Swaco Ltd. (2013) 212 Taxman 293 (Guj.) (High Court)

S.254(1): Appellate Tribunal – Orders - Duty of Tribunal to give its own reason.

The Court observed that there was no discussion in the order of the Tribunal about the respective arguments of the parties. It did not contain the points for determination and its findings thereon. Even an order of affirmation by a higher authority requires that the authority should give its own reasons, may be, in brief for its concurrence with the order

appealed. The Tribunal is under a legal obligation to record its own finding on the submissions of the parties, may be in brief, depending upon the facts and circumstances of the case. But if it does not contain any reason such an order is no order in the eyes of law and cannot be allowed to stand. In the opening portion of the order, the Tribunal noticed the grounds raised by the assessee in the memo of appeal. It had taken trouble to reproduce them but left them undecided. Definitely, the case merited a different treatment at the hands of the Tribunal. (A.Y. 1991-1992)
Abhyudaya Pharmaceuticals v. CIT (2013) 350 ITR 358/214 Taxman 61 (Mag.) (All) (High Court)

S.254(1):Appellate Tribunal- Orders-Powers - Additional evidence - No power to declare retrospective effect of amendment.-Additional evidence after hearing is also permissible. (Appellate Tribunal) Rules 1963 Rule 29)
The Tribunal has no power to declare retrospective effect of amendment unconstitutional The Tribunal suomotu require additional evidence even after conclusion of hearing. (A.Y. 2007-08)
L.G. Electronics India P. Ltd. v. ACIT (2013) 140 ITD 41 / 22 ITR 1/83 DTR 1/152 TTJ 273 (SB) (Delhi) (Trib.)

S.254(2): Appellate Tribunal –Orders-Rectification of mistake apparentfrom the record-- Not considering the decision of Supreme Court can be rectified under section 254(2). [S.11, 13(1) (c) (ii)]
Assessee, a charitable trust, claimed exemption under section 11. Assessing Officer having found that during current year assessee had advanced a sum of Rs. 25 lakh to one P, who was managing trustee of trust, took view that this amounted to violation of section 13(1) (c) (ii). He, therefore, asked assessee to explain as to why exemption claimed under section 11 should not be denied. Assessee explained that in current year no funds were given by trust to P, and that said transaction related to earlier assessment year 2002-03. Assessing Officer did not accept explanation of assessee and denied exemption under section 11. Commissioner (Appeals) having found, that during current year no funds were given by trust to P, granted exemption under section 11 to assessee. Tribunal held that assessee had violated provisions of section 13(1) (c) (ii) and accordingly set aside order passed by Commissioner (Appeals). Thereupon assessee filed a petition under section 254(2) stating that Tribunal while deciding appeal did not consider decision of Supreme Court rendered in case of Aditanar Educational Institution v. Addl. CIT [1997] 224 ITR 310 for adjudicating issue regarding violation of section 13(1) (c) (ii).Tribunal (i) after taking into account fact that advance of Rs. 25 lakh was given to P during period 1-4-2001 to 31-3-2002, and (ii) also taking into account decision of Supreme Court in case of Aditanar Educational Institution (supra), held that there was a mistake apparent on record in earlier order passed by it. It further on basis of above findings held that assessee had not violated provisions of section 13(1) (c) (ii) during relevant assessment year 2003-04 and accordingly rectified order passed by it earlier. On appeal to High Court by revenue the Court held that,on facts and in circumstances of case, Tribunal had rightly exercised powers conferred under section 254(2). Therefore, theimpugned order passed by Tribunal was justified.Section 254(2) has been enacted not only to safeguard interest of revenue but also to enable Tribunal to rectify error apparent on face of record.In favour of assessee. (A.Y. 2003-04)
CIT v. Park Trust (2013) 212 Taxman 115(Mag.) (Mad.) (High Court)

S.254(2): Appellate Tribunal-Rectification of mistake apparent from the record- Rectification of order based on the Subsequentlarger bench decision of supreme Court is proper-Application is made in timeorder can be passed thereafter.
Tribunal following a decision of Supreme Court deleted penalty under section 271 (1) (c). Subsequently, Larger Bench of Supreme Court overruled decision relied upon by Tribunal. On basis of latter decision of Supreme Court, revenue sought to recall Tribunal's decision under section 254(2). Accordingly, Tribunal recalled its earlier decision. On appeal by assessee the Court held thatsubsequent decision of Supreme Court operated retrospectively and, therefore, it had to be regarded as it existed when order was passed by Tribunal and, thus, there was mistake apparent from record which could not be allowed to remain, further only limitation for correcting mistake, that is imposed by provisions of section 254(2), is only with respect to time and since in instant case application for rectification had been made in time, order of Tribunal recalling its earlier order could not be faulted. In favour of revenue. (A.Ys.1993-94, 1996-97, 1997-98)
Lakshmi Sugar Mills Co. Ltd. v. CIT (2013) 212 Taxman 118(Mag.) (Delhi) (High Court)

S.254(2): Appellate Tribunal-Rectification of mistake apparent from the record-Defects were notified on notice board, that itself could be construed as notice to assessee to rectify office objections-Dismissal of miscellaneous applicationwhich was filed after nine years was held to be justified. (Karnataka Agricultural Income-tax Act, 1957 S. 34)
Assessee presented appeal before Tribunal on 3-1-2002. Matter was adjourned for rectification of defects. When matter was listed on 11-4-2002, Tribunal granted time till 30-4-2002 to rectify defects. Matter was re-listed on 30-4-2002. On said date assessee was not present and defects had not been rectified. Notice of defects was duly published and it was

affixed on notice board.Tribunal rejected appeal on ground of non-compliance of office objections. Thereafter assessee received a demand notice on 4-1-2011 on ground that appeal filed by assessee was rejected. After that assessee filed a miscellaneous petition before Tribunal seeking to recall order dated 30-4-2002 and restore appeal to file and hear it on merit. Tribunal found that delay of nine years was not at all explained by assessee inasmuch as assessee was not vigilant after filing of appeal. The Court held thatpetitioner could not be heard to say that Tribunal was obliged to inform petitioner about dismissal of order for non-removal of office objections. Since defects were notified on notice board, that itself could be construed as notice to assessee to rectify office objections. Therefore, order passed by Tribunal rejecting miscellaneous petition on ground of delay was justified and thus, petition of assessee in respect of rejection of miscellaneous petition was to be rejected. In favour of revenue. (A.Y.1998-99)
Baganeheddal 'C' Estate v.Karnataka Appellate Tribunal (2013) 212 Taxman 99(Mag.) (Karn.) (High Court)

S.255: Appellate Tribunal-Binding precedent-Special bench-Suspension by High Court-Deduction at source-Special Bench verdict binding despite suspension by High Court. (S. 40(a) (ia), 194C)
The assessee paid dumper hire charges of Rs. 36.37 lakhs and claimed it as a deduction. The AO disallowed the claim u/s 40(a) (ia) on the ground that the assessee had not deducted TDS thereon u/s 194C. Before the Tribunal, the assessee argued that it was not liable to deduct TDS u/s 194C as there was only no "contractual agreement". In the alternative, it was argued that in accordance with the Special Bench judgement in Merilyn Shipping& Transports v. Add. CIT (2012) 136 ITD 23 (SB), the disallowance u/s 40(a) (ia) had to be confined to the amounts "payable" as at the end of the year and it did not apply to the amounts already paid during the year. The assessee also argued that though the Andhra Pradesh High Court had granted an "interim suspension" against the said judgement of the Special Bench, it was still binding. Held by the Tribunal:

The argument that s. 194C does not apply in the absence of a written contractual agreement is not acceptable. Even a verbal contract is sufficient. As regards the judgement of the Special Bench in Merilyn Shipping& Transports v Add. CIT (2012) 136 ITD 23 (SB) where the view was taken that s. 40(a) (ia) can apply only to the amounts remaining payable as at the end of the year and not to the amounts paid during the year, though the Andhra Pradesh High Court has granted "interim suspension" of the said judgement, the said stay/ suspension applies only to the parties to that proceeding and does not destroy the binding effect of the judgement of the Special Bench. There is a difference between "stay of operation" of an order and "quashing of an order". While, in the case of a "quashing", the order of the lower court ceases to exist, in the case of a "stay", the order of the lower court continues to operate and have binding effect. Accordingly, the judgement of the Special Bench in Merilyn Shipping still holds ground and the TDS provisions will apply, for purposes of invocation of s. 40(a) (ia), only on the amounts remaining payable at the end of the year and not on the amounts paid (Shree Chamund Mopeds Ltd. vs. Church of South India Trust Association AIR 1992 SC 1439, 1444 &Pijush Kanti Chowdhury vs. State of West Bengal 2007 (3) CHN 178 followed). (A. Y. 2007-08)
ITO v. MGB Transport (Kol.) (Trib.) www.itatonline.org

S. 260A: Appeal –High Court-Low Tax Effect Circular-Burden- Dept to show why appeal should not be dismissed.
The department filed an appeal before the Tribunal. The Tribunal dismissed the appeal on the ground that the tax involved in the appeal was less than the monetary limit of Rs. 3 lakhs prescribed in CBDT Instruction No.3/2011 dated 9.2.2011. The Tribunal followed CIT v. **Madhukar Inamdar (HUF)** (2009) 318 ITR 149 (Bom) where it was held that the CBDT Instructions fixing monetary limit for filing an appeal to the Tribunal would apply even to pending cases. The Department then filed a MA before the Tribunal pointing out that in **CIT v. Surya Herbal** the Supreme Court had held that the CBDT Instruction No.3/2011 would not apply ipso facto and would not apply where the matter has cascading effect or raises a common principle involving a large number of matters. The Tribunal dismissed the MA. On appeal by the department to the High Court, HELD dismissing the appeal:
The grievance of the Revenue is that the Tribunal ought to have entertained the appeal by following the decision of the Apex Court in the matter of **Surya Herbal Ltd**. However, the revenue has not been able to point out before us any of circumstance as laid down by the Supreme Court in the matter of **Surya Herbal Ltd** being applicable to this case which would lead to non-application of CBDT instructions No.3/2011. In the above circumstances, we see no reason to entertain the proposed question of law (it was also held following **Chem Amit** v. ACIT (2005) 272 ITR 397 that an appeal u/s 260A cannot be filed to challenge an order dismissing a MA)
CIT v. Sevak Pharma Pvt. Ltd (Bom.) (HighCourt).www.itatonline.org

S.260A:Appeal-High Court- Substantial question of law – Disallowance of depreciation and interest. (S. 32, 36(1) (iii))
Grounds related to the matters of appreciation of evidence for a factual enquiry and rendering of findings on facts about the factory building construction. CIT (A) and Tribunal had deleted disallowance on account of depreciation on building and interest expenses observing that no defects were pointed out in the books. It was not a case where assessee had shown excessive valuation of building. Impugned orders did not suffer from any perversity or wrong application of any principle of law. (A.Y. 2005-06)
CIT v. Bohra Industries Ltd. (2013) 83 DTR 113 (Raj.) (High Court)
S.260A: Appeal-High Court- Monetary limit- Circular: Dept to show why appeal should not be dismissed.
The department filed an appeal before the Tribunal. The Tribunal dismissed the appeal on the ground that the tax involved in the appeal was less than the monetary limit of Rs. 3 lakhs prescribed in CBDT Instruction No.3/2011 dated 9.2.2011. The Tribunal followed CIT v Madhukar Inamdar (HUF) (2009) 318 ITR 149 (Bom) where it was held that the CBDT Instructions fixing monetary limit for filing an appeal to the Tribunal would apply even to pending cases. The Department then filed a MA before the Tribunal pointing out that in CIT v. Surya Herbal the Supreme Court had held that the CBDT Instruction No.3/2011 would not apply ipso facto and would not apply where the matter has cascading effect or raises a common principle involving a large number of matters. The Tribunal dismissed the MA. On appeal by the department to the High Court, HELD dismissing the appeal:

The grievance of the Revenue is that the Tribunal ought to have entertained the appeal by following the decision of the Apex Court in the matter of Surya Herbal Ltd. However, the revenue has not been able to point out before us any of circumstance as laid down by the Supreme Court in the matter of Surya Herbal Ltd being applicable to this case which would lead to non-application of CBDT instructions No.3/2011. In the above circumstances, we see no reason to entertain the proposed question of law (it was also held following Chem Amit v. ACIT (2005) 272 ITR 397(Bom) (High Court) that an appeal u/s 260A cannot be filed to challenge an order dismissing a MA)
CIT v. Sevak Pharma Pvt. Ltd (Bom.) (High Court) www.itatonline.org.

S.260A: Appeal-High Court-Constitutional validity- High Court in appeal cannotdetermine constitutional validity of amendment, it is beyond scope of jurisdiction under section 260A.
Based on retrospective amendment of section 80HHC, assessee's assessment was reopened to disallow deduction in respect of profit on sale of DEPB.Tribunal upheld reopening of assessment. On appeal to High Court, assessee took ground that retrospective amendment of section 80HHC had been struck down by Gujarat High Court ,by following or dissenting from judgment of High Court of Gujarat, The Court held that Tribunal could not consider validity of a retrospective amendment, such question could not arise from its order, thereforeinstant case High Court would be determining constitutional validity of amendment; it would then be stepping out of and beyond scope of jurisdiction under section 260A. High Court in appeal cannot determine constitutional validity of amendment, it is beyond scope of jurisdiction under section 260A.In favour of revenue (A.Y. 2001-02, 2003-04)
M. Abdul Rehuman Kunju v. ACIT (2013) 213 Taxman 11(Mag.) (Ker.) (High Court)

S.260A: Appeal-High Court-Plea which was not raised at any stage,could not be raised for first time before Court. (S.263, 292BB)
Notice had been issued under signature of Income-tax (Technical), whereas in view of provisions of powers under section 263 (1), it was only Commissioner to issue notice.In appeal to High Court, revenue raised new plea that in view of provisions of section 292BB, it was not open for assessee to raise an objection with regard to proceedings initiated under section 263 as he had participated in proceedings and tendered his reply. The Court held that pleas can be raised only out of judgment passed by Tribunal or other authorities, but plea which was not raised at any stage, as in instant case, could not be raised for first time before Court, therefore, appeal against order of Tribunal failed. In favour of assessee (A.Y. 2007-08)
CIT v. Rajesh Kumar Pandey (2013) 213 Taxman 19(Mag.) (All) (High Court)

S.260A:Appeal - High Court – Tax effect-Less than 2 lakhs-Appeal is not maintainable. (S. **268A).**
Tribunal quashed reassessment proceedings to bring gifted amount to tax for want of material. Appeal against order of Tribunal involved tax effect of less than Rs. 2 lakh. Court held that theappeal of revenue isnot maintainable as tax effect was lower than Rs. 2 lakh prescribed under CBDT Instruction No. 1979 [F. No. 279/126/98-IT], dated 27-3-2000. Hencecase also did not fall in exclusionary clause of said Instruction. In favour of assessee. (A.Y.2005-06)
CIT. v. Sanjay Kumar Agrawal (2013) 212 Taxman(Mag.) (All) (High Court)

S.260A:Appeal - High Court - Monetary limits-Less than two lakhs appeal was dismissed.

Against common order of Tribunal, revenue filed an appeal under section 260A before High Court, since in instant case tax effect that was involved was not more than Rs. 2 lakhs, in terms of Board's Instruction No. 2/2005, dated 24-10-2005 said appeal was liable to be dismissed on question of maintainability. In favour of assessee. (A.Y.1999-2000, 2000-01)

CIT v. Golf View Homes Ltd. (2013)81 DTR 46/ 213 Taxman 8(Mag.) (Karn.) (High Court)

S.260A:Appeal- High Court-Appeal-Guidelines for engagement of standing counsels-CBDTgave assurance to do the needful.

Before the Court the CBDT Member stated that, insofar as revamping system and giving better assistance to Court was concerned, all necessary action had been taken; matter of fresh panel was pending before Law Ministry; admitted fee was being paid to standing counsels and arrears of admitted fees would be cleared within next two months and disputed parameters to be sorted by counsels themselves. Member assured court that there would be no laxity in assistance rendered to Court in future.

CIT v. Jackson Engineers Ltd. (2013) 213 Taxman 10(Mag.) (Delhi) (High Court))

S.260A:Appeal - High Court - Memorandum of appeal- The question not relating to appeal cannot be permitted to agitate.

Against orders of Commissioner (Appeals), revenue preferred two appeals before Tribunal. Assessee also preferred an appeal before Tribunal.Tribunal clubbed together all these appeals and disposed of them by a common order. Against order of Tribunal, revenue preferred an appeal before High Court. During pendency of appeal, revenue also filed an application seeking for suitable amendment in memorandum of appeal so that instant appeal could be agitated insofar as it related to order passed by Tribunal in appeal of assessee in common order passed by it. The Court held that allowing application of this nature and also to permit revenue to agitate such question by further alteration of memorandum of appeal, etc., was not feasible course of action at this point of time. As it was barred by limitation.The question not relating to appeal cannot be permitted to agitate.In favour of assessee. (A.Y.1999-2000, 2000-01)

CIT v. Golf View Homes Ltd. (2013) 81 DTR 46/ 213 Taxman 8(Mag.) (Karn.) (High Court)

S.260A: Appeal-High Court-Substantial question of law-Meaning-Principle of consistency in tax matters.

An appeal under section 260A of the Income–tax Act 1961, will lie before the High Court if the appellant is able to satisfy the Court that it involves a substantial question of law. In order to be substantial, a question of law must be debatable, not previously settled under the law of the land or binding precedent, and must have a material bearing on the decision of the case, if answered either way,in so far as the rights of the parties before it are concerned. The High Court in exercise of its second appellate jurisdiction should normally accept all findings of facts recorded by the first appellate court, being form of facts. Adequacy of materials or possibilities of another view on facts, is no ground for High Court to entertain a second appeal. The High Court can on factsinterfere only after it reaches the conclusion that, in view of the materials on record, no person duly instructed in law can reach that conclusion.

Dy. CIT v. Sulabh International Social Service Organisation (2013) 350 ITR 189 (Patna) (High Court)

S. 263:Commissioner-Revision of orders prejudicial to revenue - Export –Without reducing the profits – Revision was held to be valid. (S.80HHC,.80IA.)

The assessee had claimed deduction u/s 80 HHC and also u/s 80IA and the same was allowed by the AO. The CIT while exercising his revisional powers u/s 263 held that assessment is erroneous and prejudicial to the interest of the revenue, as the assessee while computing the deduction u/s 80HHC, had not reduced the claim of deduction u/s 80IA from the profits and gains from the business, therefore revision by the CIT u/s 263 was held to be valid. (A.Y. 2004-05)

CITv. Abhishek Industries Ltd. (2013) 255 CTR 504/82 DTR 1 (P&H) (High Court)

S.263: Commissioner - Revision of orders prejudicial to revenue –Revision to make further enquiry is held to be not valid.

When, during course of framing of assessment, Assessing Officer had access to all records of assessee, and after perusing said records, he framed assessment, said assessment could not be re-opened in exercise of revision power under section 263 for making further inquiries. In favour of assessee

CIT. v. Amit Corpn. (2013) 213 Taxman 19 (Mag.) (Guj.) (High Court)

S.263: Commissioner - Revision of orders prejudicial to revenue –Investment wasmade beyond duedate – Revision of order was not justified.(S.54F, 139(1), 139(4))

Assessee filed her return wherein she raised a claim for deduction under section 54F. Assessing Officer allowed assessee's claim. Commissioner passed a revisional order holding that assessee's claim was wrongly allowed because she made investment in new house beyond due date prescribed under section 139(1).Tribunal set aside revisional order holding that investment was made within time specified under section 139(4) relying on the orderpassed in case of Fatima Bai v. ITO [2009] 32 DTR 243 (Kar.). On appeal by revenue it was contended that order passed in aforesaid case was incorrect and, thus, it could not be accepted. The court held that if order passed in aforesaid case was incorrect, revenue should have filed an appeal against it; however, at any rate that would not be a ground for invoking section 263. The court held that Tribunal was justified in setting aside revisional order. In favour of assessee. (A.Y. 2006-07)

CIT. v. Vrinda P. Issac (Smt) (2013) 212 Taxman 101 (Mag.) (Karn.) (High Court)

S.263: Commissioner-Revision of orders prejudicial to revenue- Period of limitation-On facts the limitation to be computed from the date of original order. (S.68, 80-I)

In original assessment order dated 28-3-1995, an addition under section 68 was made and deduction under section 80-I was granted on total income, inclusive of income under section 68. Grant of such deduction was not questioned by revenue at relevant time. Tribunal remitted issue pertaining to addition under section 68 to Assessing Officer for reconsideration. In remand proceedings, Assessing Officer once again made addition under section 68 and granted deduction under section 80-I. Invoking section 263, Commissioner vide order dated 30-3-2007, set aside assessment order on ground that deduction under section 80-I was wrongly computed. The Tribunal set aside revision order on ground that the proceedings under section 263 was barred by limitation. Onappealby revenue the High Court held thatremand proceeding was limited to addition under section 68 and, therefore, limitation qua issue of deduction under section 80-I would have to be computed from date of original assessment order, i.e., 28-3-1995, therefore, revision order dated 30-3-2007 was time-barred. In favour of assessee. (A.Y. 1992-93)

ACIT. v. Modern Cement Industries Ltd. (2013) 212 Taxman 135(Mag.) (Guj.) (High Court)

S.263: Commissioner - Revision of orders prejudicial to revenue-Alternative remedy-Writ against the orderunder section 263 was held to be notvalid as an alternative remedyis available. (S.43B, 253(1) (c))

Assessee claimed deduction on account of payment of bonus for assessment year 1995-96. Same was allowed under section 43B. Said claim had also been allowed in preceding assessment year 1994-95 - Rectification proceedings were initiated but subsequently dropped Commissioner invoked section 263 and directed Assessing Officer for recomputation. Assessee filed writ petition alleging that there was jurisdictional error in invoking section 263.Single Judge held that order passed by Commissioner was without jurisdiction.On writ appealit was held that single judge was not justified in interfering with the order of the Commissioner passed under section 263, remedy of appeal under section 253(1) (c) was available to it. Therefore, writ petition ought not to be entertained and Single Judge was not justified in interfering with revisional order. In favour of revenue. (A.Y. 1995-96)

CIT v. B & A Plantation and Industries Ltd. (2013) 212 Taxman 137(Mag.) (Gau.) (High Court)

S.263: Commissioner - Revision of orders prejudicial to revenue - Error of Assessing Officer should be "unsustainable"-Disallowance under section 14A, debatable, hence revision held to benot warranted. (S.10(33), 14)

Whether the deduction under section 14A was warranted, was a debatable fact. In any event, even if it were not debatable, the error by the Assessing Officer was not "unsustainable". Possibly he could have taken another view; yet, that he did not do so, would not render his opinion an unsustainable one, warranting exercise of section 263. (A. Y. 2002-2003)

CIT v. DLF Ltd. (2013) 350 ITR 555 (Delhi) (High Court)

S.263: Commissioner-Revision of order prejudicial to revenue-Non-residents - Mineral oil, business for prospecting/exploration, etc. (S.44BB)

Where Assessing Officer did not analyse as to whether payment received by assessee was in respect of services rendered or facilities provided in connection with prospecting for extraction or production of mineral oils or it was received only by way of sale price of goods/materials sold by assessee, may be outside India and, thus, there was failure on part of Assessing Officer to ascertain whether said revenue would or could come under provisions of section 44BB, Commissioner rightly revised said order under section 263.Appeal of assessee was dismissed. (A.Y.2006-07)]

M-I Overseas Ltd. v.DIT (IT) [2013] 212 Taxman 190 (Uttarakhand) (High Court)

S.263: Commissioner - Revision of order prejudicial to revenue - Business expenditure -Capital or revenue - Revision held to be not justified.

Assessee paid certain amount towards regulatory fee and stamp duty and claimed deduction of same as a revenue expenditure. Assessing Officer allowed claim of deduction. Commissioner issued on assessee a notice under section 263 stating that license fee, loan arrangement charges and stamp duty were capital expenditure. Assessing Officer before passing assessment order made an enquiry and directed his mind on all aspects. View adopted by him was clearly one

among two plausible views that could have been taken. Commissioner did not specifically furnish any reasons to say why original assessment order was unsupportable in law.Commissioner could not have validly exercised his revisionary power under section 263 in instant case. (A.Y. 2004-05)
CIT v.Vodafone Essar South Ltd. (2013) 212 Taxman 184 (Delhi) (High Court)

S.263: Commissioner-Revision of order prejudicial to revenue-Business expenditure-Deduction at source-Failure by Assessing Officer to make enquiry in respect of payments liable to tax deduction at source, revision is held to be justified. (S.40(a) (ia), 194J 194H)
The assessee is a telecommunications service provider. The Assessing Officer, inter alia, made two disallowances under section 40(a) (ia) of the Income-tax Act, 1961 on the ground of failure by the assessee to deduct tax at source on the payments: free airtime to distributors in the nature of commission expenses liable to deduction tax at source under section 194H of the Act, and roaming charges paid to other operators in the nature of fees for technical services liable for deduction of tax at source under section 194J of the Act. On the basis that the nature of business of the assessee was the same for the assessment year 2007-08 also and that the assessee had not deducted tax at source on the free airtime allowed to distributors under section 194H of the Act or on the roaming and interconnection charges under section 194J of the Act, the Commissioner issued notice of revision under section 263 to the assessee, set aside the assessment for that year and directed the Assessing Officer to examine the case afresh in respect of these two issues and after giving proper opportunity to the assessee and pass a speaking order. On appeal : Held, dismissing the appeal, (i) that the issue of disallowance of free airtime to distributors under section 40(a) (ia) of the Act had not been examined by the Assessing Officer in the course of assessment proceedings for the assessment year 2007-08. No reference thereto was there in the assessment order. The Assessing Officer had not issued any query in this regard or obtained necessary details. Hence, it could not be said that the Assessing Officer had applied one of the two views possible. (ii) That on the issue of roaming charges paid the fact that certain tax deductible at source had not been so deducted was clearly prejudicial to the Revenue. That something was available in the balance-sheet, profit and loss account or books of accounts could not lead to the conclusion that the Assessing Officer had applied his mind. There was no discussion by the Assessing Officer on these subjects, nor had the Assessing Officer made any enquiry on these subjects. The Assessing Officer had mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. Similarly, no evidence had been placed that the claim made by the assessee was objectively examined or considered by the Assessing Officer either on record or in the assessment order. The Assessing Officer had completely omitted the issue in question from consideration and made the assessment in an arbitrary manner. Hence, it was a fit case for the Commissioner to exercise his revisional jurisdiction under section 263. Appeal of assessee was dismissed. (A. Y. 2007-2008)
Bharti Hexacom Ltd. v. CIT (2013) 21 ITR 648 (Delhi) (Trib.)

S.263: Commissioner-Revision of orders prejudicial to revenue-Transfer pricing-Commissioner has no jurisdiction over TPO administratively and, therefore, Commissioner cannot revise order passed by TPO under section 92CA(3). (S.92CA)
Assessee sold shares to its AE located abroad. In transfer pricing proceedings, TPO determined ALP of share transactions at a higher amount. He thus passed an order under section 92CA(3) proposing certain adjustments. Assessing Officer passed assessment order accepting addition proposed by TPO. Subsequently, TPO made a proposal that order passed by him contained some computation errors and, thus, same be rectified. Commissioner passed an order under section 263 revising assessment order. It was, however, undisputed that there was no error in assessment order because Assessing Officer had proceeded to compute total income under section 92CA(4) in conformity with ALP determined by TPO. Tribunal held that where two views are possible and the TPO has taken one possible view the proceedings under section 263 cannot be invoked. Even otherwise, in this case instead of initiating proposal on TPO order as suggested, the Commissioner initiated the proceedings under Assessing Officer's order which is not erroneous or prejudicial to the interests of the revenue, as Assessing Officer sincerely followed the mandate of provisions of section 92CA in proceeding to compute the total income under sub-section (4) of section 92CA in conformity with the arm's length price so determined by the TPO. As the provisions of section 92CA(4) have been amended with effect from 1-6-2007 which used the word "shall" Assessing Officer is bound to follow the TPO's order determined under sub-section (3). Accordingly, there is no error in the order of Assessing Officer so that it can be considered as erroneous and prejudicial to the interests of the revenue. In view of above, the impugned revisional order passed under section 263 has to be set aside. In favour of assessee. (A.Y. 2005-06)
Essar Steel Ltd. v. Add. CIT (2013) 55 SOT 1 (URO) (Mum.) (Trib.)

S.263: Commissioner-Revision of orders prejudicial to revenue-Commission to various parties-Matter remanded forverification.

Assessee paid commission to different parties to tune of Rs. 4.19 crores. Assessing Officer accepted claim of payment of commission by placing reliance only on confirmation letters issued by payees without gathering any information regarding genuineness of payments and evidence to suggest nature of services rendered by these parties. Commissioner revised the order under section 263. On appeal by revenue the Tribunal held that it was incumbent on part of Assessing Officer to come to independent conclusion that payments were commensurate with nature of services rendered by parties as mere confirmation letters themselves could not prove genuineness of payments and nature of services rendered ; therefore, it would be appropriate to remit entire issue back to file of Assessing Officer to carry further enquiry and examine issue thoroughly. Matter remanded. (A. Y. 2007-08)
Sun Minerals v. Add. CIT (2013) 55 SOT 54(Hyd.) (Trib.)

S.263: Commissioner - Revision of orders prejudicial to revenue - Penalty – Settingaside assessment for de novo considerationwas held to be not valid.(S.271 (1) (C).
Assessee claimed 100 per cent depreciation on centering material. Assessing Officer found that centering material fell under head 'Plant and machinery' on which 15 per cent depreciation was admissible. Accordingly, he disallowed excess depreciation and made addition. In revision, Commissioner found that Assessing Officer had not levied penalty under section 271 (1) (c). He, set aside assessment. Tribunal held that Commissioner has authority to initiate and levy penalty under section 271 (1) (c) and justification of imposition of penalty should be decided by him. Therefore, there was no necessity to set aside assessment for de novo consideration. In favour of assessee. (A.Y.2006-07)
S. Anitha (Smt) v. CIT (2013) 55 SOT 88 (URO) (Bang.) (Trib.)

S.263: Commissioner - Revision of order prejudicial to revenue - Capital gains – Exemption – Investment in bonds – Beyond Prescribed time limit- As no evidence to justify the delay, order under section 263was held to be justified. (S.54EC.)
Assessee sold agricultural landon 10-1-2006 and invested the sale consideration in Rural Electrification Corporation Ltd. bondson 27-1-2007 which is beyond the prescribed time limit. The assessee claimed exemption u/s.54EC. The claim was allowed by the Assessing Officerunder section 143(3). Commissioner under section 263 directed the Assessing Officer to disallow the claim. The Assessee filed an appeal before the Tribunal.The assessee submitted that delay was due to unavailability of applied forms. However, it was held that there was no evidence to show that assessee had applied for bonds but due to their unavailability, failed to invest within time. The Tribunal also held that it could be accepted that the time-limit for investment extended by Notification up to 31-12-2006 canbe stretched up to 27-01-2007by exercising jurisdiction under the Act. Hence, in the view of above stated legal position withdrawal of exemption u/s 54EC by commission was justified. Note: Notification No.S.O. 2146(E) dated 22/12/2006.(A.Y. 2006-07)
Anuradha Venkatesan (Smt) v. ITO (2013) 140 ITD 421 (Chennai) (Trib.)

S.263 Commissioner – Revision of orders prejudicial to revenue – Lack of proper enquiry cannot be the ground for revision. (S.43(5))
The CIT invoked the provision of section 263 on the ground that the Assessing Officer accepted the long term capital gain shown by the assessee without making sufficient enquiries. The Tribunal found that in the Asst. Years 1995-96, 1996-97, 2001-02, 2002-03, 2003-04, 2005-06 and 2006-07, the claimed investment and the capital gain claimed thereon have been accepted by the Assessing Officer or at the appellate stage. Even in the future Asst. Years 2008-09 and 2009-10 the Assessing Officer has accepted the claim of long term capital gain as well as short term capital gain in assessment orders framed under section 143(3) of the Act. The Tribunal followed the decision of Hon'ble Bombay High Court in the case of CIT vs. Gabriel India (1993) 114 CTR 81 (Bom.) and held that the assessment order was not erroneous as the Assessing Officer has accepted the claimed long term capital gain and loss in derivative trading after conducting inquiry thereto and thus the assessment order cannot be held erroneous and thus also prejudicial to the interest of revenue. (A. Y. 2007-08)
HB Stock Holdings Ltd. v. CIT (2013) 152 TTJ 451/83 DTR 210(Delhi) (Trib.)

S. 263: Revision – Erroneous and prejudicial order – Lack of proper enquiry-Matter remanded to Commissioner.
AO did not enquire about the genuineness and reasonableness of the payment of commission and syndication fees. He neither enquired about the guarantee fees paid by the assessee to two companies. The assessment order was erroneous and prejudicial to the interests of the revenue. However, CIT also did not consider the merits of the objections raised by the assessee to the show-cause notice, matter is remanded to CIT for adjudication and to record his findings on the objections of the assessee. (A.Y. 2006-07)
Religare Finvest Ltd. v. CIT (2013) 83 DTR315/152 TTJ 647 (Delhi) (Trib.)

S.263 : Commissioner – Revision of orders prejudicial to interest of revenue – No application of mind by the AO at the time of assessment – An order without application of mind is definitely prejudicial to the interest of revenue. (S.36(1) (viia).)

The assessee claimed provision made for standard assets also as a provision for bad and doubtful debts under section 36(1) (viia). Assessing Officer allowed the deduction under section 36(1) (viia). CIT initiated proceedings under section 263 of the Act. As per CIT, the provision for standard assets could not be considered as provision for bad and doubtful debts which could be allowed under section 36(1) (viia) of the Act. Before the Tribunal the assessee submitted that Assessing Officer has taken a lawful view and therefore, CIT could not substitute his view with that of Assessing Officer. The Tribunal upheld the revisional order passed by the CIT and observed that there was no enquiry made during the course of assessment proceeding. Therefore, the order which was silent on the claim made by assessee, and allowing such claim, without any discussion will definitely render it erroneous and prejudicial to the interest of revenue. Tribunal dismissing the appeal followed the decision of Apex Court in case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) (A. Y. 2007-08).

Bharat Overseas Bank Ltd. v. CIT (2013) 152 TTJ 546 (Chennai) (Trib.)

S.264:Commissioner-Revision of other orders-Condonation of delay-Commissioner (Appeals)-Doctrine of merger-Order rejecting appeal by Commissioner (Appeals),further revision before Commissioner is not maintainable. (S. 264(4) (C))

The assessee filed an application before the Commissioner (Appeals) to condone the delay. He declined to condone the delay and dismissed the appeal. Subsequently, the assessee filed a revision application under section 264 of the Act,, and along with it he also filed an application to condone the delay. The Commissioner rejected the revision application. In the order, he had dealt with the maintainability of the revision, the tenability of the request for condonation of delay and also the merits of the revision itself. On all these grounds, he decided against the assessee. On a writ petitionby assessee, dismissing the petition,the Court held that the order dismissing the appeal filed by the assessee was an order in the appeal filed by the assessee. The assessee had not waived his appellate right to maintain an application for revision under section 264. Thus, the finding of the Commissioner that in view of section 264(4), the revision filed by the assessee was not maintainable, had to be upheld. (A.Y. 2000-2001)

K. H. Traders v. CIT (2013) 351 ITR 1/85 DTR 287/213 Taxman 41 (Mag.) (Ker.) (High Court)

S.264: Commissioner-Revision of other orders-Condonationof delay-Disputes between partners- Delay was condoned.

The assessee-firm is carrying on business in the export of walnuts and walnut Kernels. During the relevant assessment year, it filed its return of income declaring loss of Rs. 3.8 crores. The return was taken up for scrutiny by the Assessing Officer and several notices of hearing were issued to the assessee. In absence of proper response, the Assessing Officer completed the assessment under section 144 on 28-2-2003. A revision petition under section 264 along with an application before the Commissioner was filed for condonation of the delay. The Commissioner held that the assessment order was delivered to the authorized representative of the assessee firm on 9-3-2004 and even allowing for the pendency of litigation between the partners before the High Court for rendition of partnership accounts and for partition of the family business properties, the delay after February, 2005, when the consent decree was passed by the Court, remained to be explained. He accordingly refused to condone the delay and rejected the revision petition *in limine*. On writ the court held that there was litigation between partners of assessee-firm as well as litigations against assessee-firm. Authorised representative of assessee-firm was acting on his own and partners of firm were not aware of passing of best judgment assessment order. Assessing Officer passed best judgment order even though he was aware of fact that assessee's books of account was in custody of Court Commissioner. It was only when services of authorised representative were subsequently terminated, partners of assessee-firm came to know about aforesaid proceedings and, then they filed application seeking condonation of delay immediately. The Court held that, delay had to be viewed having regard to background of litigation between partners of assessee-firm which ultimately resulted in consent decree and in view of above, it could be concluded that there was sufficient cause for condoning delay in filing revision petition before Commissioner. In favour of assessee (A.Y. 2000-01)

Narinder Kumar v. CIT (2013) 212 Taxman 105(Mag.) (Delhi) (High Court)

S.264: Commissioner-Revision of other orders-Reasoned order-Natural justice-Non-speaking order of Commissioner rejecting the application was set aside.

The Commissioner dismissed the petition of the petitioner on the ground that the petitioner has an alternative remedy by filing an appeal. Petitioner filed writ petition against the said order, the court held that it is well settled law that one of the basic principle of natural justice is that the authority concerned must pass a speaking orderso as to enable a party to know the reasons so as to why his applicationis beingaccepted or rejected. This giving of reasons also ensuresdue

application of mind to the facts by the authority concerned. On facts non-speaking order of Commissioner rejecting assessee's application under section 264 was set aside. (A.Y. 2007-08)
Universal Packaging & Ors v. CIT (2013)352 ITR 398/ 84 DTR 101/257 CTR 236 (Bom.) (High Court)

S.264: Commissioner-Revision of other orders-Commissioner cannot dismiss revision application merely on ground that quantum issue has not attained finality.
The assessee for the assessment year 2003-04 by filing the return of income declared loss of Rs. 93,33,000.The Assessing Officer framed a scrutiny assessment under section 143(3) on 18-1-2006 disallowing the reduction of Rs. 1,08,16,965. He also initiated penalty proceedings under section 271 (1) (c). He also passed an order imposing penalty of Rs. 1,19, 25,702. The assessee challenged the said order of penalty before the Commissioner by filing revision application under section 264. After condoning delay caused in filing such revision application, the proceedings were taken up by the Commissioner for hearing. Before the Commissioner the assessee had pointed out the quantum additions on the basis of which the penalty was imposed were deleted. It had also come on record that against such appellate order the department's appeal was also dismissed by the Tribunal. Turning down such contentions of the assessee the Commissioner rejected the revision petition on two grounds, firstly, that the question of quantum additions had not achieved finality. Against the judgment of the Tribunal confirming deletion of such quantum additions, the revenue had preferred further appeal before High Court and such appeal was pending. Second reason why the Commissioner was not inclined to entertain the revision petition was that according to him revision proceedings were contemplated only to mitigate the situation faced by the assessee who is unable to approach the appellate authority for relief. The Commissioner noted that the assessee had already exercised his right of appeal before the appellate authorities. He could not claim relief under section 264. On petition :The court held that (1).Section 264 nowhere provides than an assessee can resort to such proceedings only when he is unable to approach appellate authority,(2) Fact that assessee has preferred appeal against quantum additions will not therefore, take away his right to file revision application. (3) Commissioner while deciding revision petition must take into consideration prevailing order at that time. Therefore Commissioner cannot dismiss revision application merely on ground that quantum issue has not attained finality. In favour of assessee. (A.Y. 2003-04)
Aryaman Spinners (P.) Ltd. v. CIT (2013) 212 Taxman 102(Mag.) (Guj.) (High Court)

S.268A: Appeal –Low tax effect-Assessing the nil income after set off of loss- Dismissal of appeal was not proper the matter remanded to decide the issue on merits. (S.253, 260A)
Assessee filed return declaring nil income. Assessing Officer fixed total income of assessee at Rs.1,76,32, 251. He further allowed set-off of business loss and unabsorbed depreciation to tune of Rs.1,74,96,566 and eventually determined taxable income of assessee at Rs. 1,35,685. Commissioner (Appeals) partly allowed appeal of assessee. Revenue challenged order of Commissioner (Appeals) before Tribunal, which dismissed appeal on ground of low tax effect. Revenue contended before High Court that notional tax effect in instant appeal exceeded monetary limit prescribed by Board. The court held thatin view of judgment of Gujarat High Court delivered in another appeal on identical question of law, Tribunal was wrong in dismissing appeal of revenue on ground of low tax effect. Thereforematter deserved to be remanded back to Tribunal for reconsideration on merits. Matter remanded. (A.Y. 2004-05)
CIT v. Sambhav Media Ltd. (2013) 212 Taxman 129(Mag.) (Guj.) (High Court)

S.268A: Appeal-Application-High court-Monetary limits-Matter referred to larger Bench. (S.260A)
The Revenue filed appeal on 13-10-2010 against Tribunal's judgment when the tax effect involved exceeded Rs. 4 lac i.e. threshold limit as provided in "instructions of 2008". However, as per "instructions of 2011", such limit was revised to "does not exceed Rs. 10 lac".The assessee contended that though at the time of filing of the appeal the limits prescribed by 'instructions of 2008' were applicable but the revised limits contained in the 'instructions of 2011' should be applied when the appeal is taken up for hearing. In view of the conflicting judgments, the High Court was of the view that issue requires consideration by a larger Bench regarding applicability of 'instructions of 2011' prospectively or otherwise to all pending cases filed earlier. Matter referred to larger Bench.
CIT v. Shambhubhai Mahadev Ahir (2013) 213 Taxman 179 (Guj.) (High Court)

S.269SS: Deposits - loans - Mode of repayment - Penalty was deleted. (S.269T, 271D, 271E)
Assessing Officer found that assessee-hostel had accepted and repaid amounts of loans/deposits otherwise than by cross - cheques / drafts in contravention of provisions of sections 269SS and 269T. Assessee contended that some expenditure was incurred by hostel or school students and amount was reimbursed to hostel by managing trustee of school, and it did not become a deposit or loan given or taken by way of cash. It therefore contended that there was no contravention of provisions of sections 269SS and 269T and they were not liable to pay penalty under sections 271D and 271E. Assessing Officer did not accept submission of assessee and imposed penalty under sections 271D and 271E,

respectively. Since there was nothing on record to show that above transactions were attached with certain conditions or stipulation as to period of repayment, rate of interest, manner of payment, etc., so as to treat transactions as loan or deposits, penalty could not be levied upon assessee. Appeal of revenue was dismissed.

ITO v. V S Hostel(2013) 212 Taxman 61 (Mag.) (Guj.) (High Court)

S.271 (1) (c):Penalty- Concealment- Wrong advice by chartered accountant- Levy of concealment is not valid, if wrong claim due to mistake/ wrong advice of CA.

The assessee filed a return of income in which it committed two mistakes (i) Depreciation was claimed at Rs.1.70 crores instead of at Rs. 1.05 crores due to a mistake in calculation, (ii) the assessee sold its garment manufacturing machine and suffered a loss of Rs.21.68 lakhs thereon. Though the loss was on capital account, it was claimed as a revenue deduction. In the course of the assessment proceedings, the assessee realised its mistake and withdrew the claim for excess depreciation and the claim for the loss. The AO levied penalty u/s 271 (1) (c) on both issues which was confirmed by the CIT (A). However, the Tribunal held that both mistakes had occurred due to a mistake/ wrong advice given by the Chartered Accountant and that there was a "bona fide mistake". It was also held that "the bonafide of the assessee is established from the fact that the assessee accepted the mistake and did not prefer any appeal against the order of the AO". On appeal by the department to the High Court, HELD dismissing the appeal:

The grievance of the revenue is that penalty is justified in view of the fact that the assessee had not filed a revised return of income. However, the Tribunal noted that the time to file revised return had expired. In any event, even the revenue does not dispute that it was a bonafide mistake on the part of the assessee. In the above view, imposition of penalty upon the assessee is not warranted.

CIT v. Somany Evergreen Knits Ltd (Bom) (High Court).itatonline.org

S.271 (1) (c):Penalty-Concealment-Revised Return – During the assessment proceedings assessee filed revised return declaring higher profit – A.Onot recoding satisfaction that the assessee has concealed incomePenalty is not leviable.

Where the A.O. had not recorded any satisfaction that the assessee had concealed income or furnished inaccurate particulars of income and the additional income offered in the revised return filed during the assessment proceedings is accepted by the A.O. Penalty under section 271 (1) (c) is notleviable. (A.Y. 1976 – 77)

CIT v. Ashok Kumar Jain (2013) 81 DTR 94 (Jharkhand) (High Court)

S. 271 (1) (c) : Penalty – Concealment – Absence of due care does not mean that the assessee is guilty of furnishing inaccurate particulars of income.

Where Additions were made not in respect of lack of bonafides, penalty levied under section 271 (1) (c) of the Act is not sustainable as absence of due care does not mean that the assessee is guilty of furnishing inaccurate particulars. (A.Y. 1991 – 92)

CIT v. Balaji Distilleries Ltd. (2013) 8 DTR 190 (Mad) (High Court)

S. 271 (1) (c) : Penalty – Concealment – Held to be justifiable when the claim was found not bonafide.

Penalty under section 271 (1) (c) of the Act was held to be justifiable in a case where the assessee had claimed depreciation on the property not used by it for business purpose as the claim lacked bonafides. (A.Y. 2005 – 06)

CIT v. Morgan Finvest (P) Ltd. (2013) 81 DTR 441 (Delhi) (High Court)

S.271 (1) (c): Penalty-Concealment-Wrong advice of Chartered accountant-Mistakes had occurred due to wrong advice given by the Chartered Accountant and that there was a "bona fide mistake". Levy of penalty is not justified.

The assessee filed a return of income in which it committed two mistakes (i) Depreciation was claimed at Rs.1.70 crores instead of at Rs. 1.05 crores due to a mistake in calculation, (ii) the assessee sold its garment manufacturing machine and suffered a loss of Rs.21.68 lakhs thereon. Though the loss was on capital account, it was claimed as a revenue deduction. In the course of the assessment proceedings, the assessee realised its mistake and withdrew the claim for excess depreciation and the claim for the loss. The AO levied penalty u/s 271 (1) (c) on both issues which was confirmed by the CIT (A). However, the Tribunal held that both mistakes had occurred due to a mistake/ wrong advice given by the Chartered Accountant and that there was a "bona fide mistake". It was also held that "the bonafide of the assessee is established from the fact that the assessee accepted the mistake and did not prefer any appeal against the order of the AO". On appeal by the department to the High Court, HELD dismissing the appeal:

The grievance of the revenue is that penalty is justified in view of the fact that the assessee had not filed a revised return of income. However, the Tribunal noted that the time to file revised return had expired. In any event, even the revenue

does not dispute that it was a bonafiide mistake on the part of the assessee. In the above view, imposition of penalty upon the assessee is not warranted.
CIT. v. Somany Evergreen Knits Ltd. (Bom.) (High Court). www.itatonline.org.

S.271 (1) (c): Penalty-Concealment- loss return-Speculation loss-Wrong claim penalty was confirmed.
Assessee filed its return without disclosing speculative profit earned from sale of shares. In response to Assessing Officer's notice, assessee contended that there was no need to disclose speculative profit in profit and loss account because speculative loss had been incurred in earlier years. Assessing Officer having rejected assessee's explanation, added speculation profit to taxable income and also imposed penalty under section 271 (1) (c). The court held thateven if speculation profit was eligible for set off against carried forward speculation loss, same would have effect of diminishing such speculation loss which would be carried forward for future years.Since, it is well settled that in case of loss return also, penalty could be imposed if by virtue of wrong claim, due to which thecomputation of loss is likely to reduce. Accordingly the impugned penalty order was to be confirmed. In favour of revenue. (A.Y. 2006-07)
Subhash S. Shah. v. ITO (2013) 213 Taxman 43(Mag.) (Guj.) (High Court)

S.271 (1) (c): Penalty-Concealment-Explanation-5-Search and seizure-In the return pursuant to search action the amount was not included, the computation was revised in the course of assessment proceedings-Levy of penalty was justified. (S.132(4), 139(1), 153A)
After filing of return under section 139(1), search was conducted. In statement recorded under section 132(4), assessee admitted benami share investment. On being issued with notice under section 153A, assessee did not file any return and by a letter, requested that its return, filed under section 139(1) prior to search and seizure be treated as its return filed in response to notice under section 153A. It was only when assessment proceedings were taken up for consideration, did assessee seek to revise its computation.The court held that it could be said that assessee did not include amount in return pursuant to notice issued, and instead chose to merely reiterate its return originally filed, therefore, 'escape route', provided by clause (2) to Explanation 5 to section 271 (1) (c) in this case, was not available to assessee, and it would be liable to penalty for concealment, as a return filed under section 153A can never be assumed to be covered as one under section 139(1). In favour of revenue. (A.Y. 2006-07)
Shourya Towers (P.) Ltd.v.Dy. CIT (2013) 213 Taxman 20(Mag.) (Delhi) (High Court)

S.271 (1) (c): Penalty-Concealment-Surrender of income-Penalty is leviable.
In the course of assessment proceedings extra liability in respect of sundry creditors was found by Assessing Officer. Assessee simply stated that balance as per his account books were correct and balance shown by third parties incorrect, however, to end prolonged assessment proceedings and buy peace, assessee surrendered income and agreed to addition ,however, no plausible explanation was given regarding discrepancy in books of account. The court held that mere surrender of income by assessee without offering plausible explanation regarding its correctness, would not absolve assessee from charge of penalty for concealment of income. Penalty would be levied on assessee. In favour of revenue. (A.Y.1989-90)
Bajrang Glass Emporium.v. CIT (2013) 213 Taxman 25(Mag.) (All) (High Court)

S.271 (1) (c): Penalty-Commencement-Depreciation was claimed on cost of land, levy of penalty was held to be justified. (S.32)
Assessing Officer disallowed assessee's claim of depreciation in respect of a property on ground that said properly was not used for business purpose and moreover cost of land was included in claim of depreciation though no depreciation is allowable under Act on land. He also levied penalty under section 271 (1) (c) for furnishing inaccurate particulars holding that there was complete lack of any evidence to show that property was used for purpose of assessee's business and attempts made by assessee to show to contrary were indicative of frivolous nature of claim. In appeal Commissioner (Appeals) confirmed the levy of penalty. Tribunal deleted the penalty holding that explanation submitted by assessee was bonafide and for mere disallowance levy of penalty was not justified. On appeal by revenue the Court held that levy of penalty was justified. In favour of revenue(A.Y.2005-06)

CIT v. Morgan Finvest (P.) Ltd. (2013) 213 Taxman 23(Mag.) (Delhi) (High Court)

S.271 (1) (c): Penalty- Concealment-High court admission of quantum appeal- Admission of quantum appeal by High Court shows issue is debatable levy of penalty is not justified.
The assessee’s appeal against the disallowance made u/s 14A was admitted by the High Court. The AO levied penalty u/s 271 (1) (c) in respect of the said disallowance. The CIT (A) and the ITAT set aside the penalty levied u/s 271 (1) (c)

on the ground that the issue of deduction u/s 14A was a debatable issue. On appeal by the Department to the High Court HELD:

Both the CIT (A) as well as the ITAT have set aside the penalty imposed by the AO u/s 271 (1) (c) on the ground that the issue of deduction u/s 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction u/s 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court u/s 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case.

CIT v. Liquid Investment and Trading Co. (Delhi) (High Court) www.itatonline.org

S.271 (1) (c):Penalty-Concealment-Short-term capital gains-Business income-Treating income under some other headis not inaccurate particulars of income levy of penalty is rightly deleted.

The assessee declaredincomefrom short-term capital gains. The Assessing Officerassessed it as income from business. He also levied penalty under section 271 (1) (c) of theAct, on the ground that the assessee had furnished inaccurate particulars of his income. The Commissioner (Appeals) cancelled the penalty. This was confirmed by the Tribunal. On appeal by revenue the Court also confirmed the order of Tribunal.

CIT v. Amit Jain (2013) 351 ITR 74 /258 CTR 88/85 DTR 175(Delhi) (High Court)

S.271 (1) (c): Penalty –Concealment-Inadvertent mistake-Wrong heads -Concealment penaltycannot be if income not offered to tax due to "inadvertent mistake".

The assessee claimed deduction/ exemption of interest on tax-free bonds of Rs.5.60 crores. Assessing Officerasked the assessee to give details of the interest on tax-free bonds, the assessee stated that it had inadvertently treated taxable interest of Rs. 75 lakhs as being tax-free and offered the said sum to tax. The AO levied penalty u/s 271 (1) (c) for concealment of income/ filing inaccurate particulars of income. This was upheld by the CIT (A) though deleted by the Tribunal on the ground that there was an "inadvertent mistake" by which the taxable bonds were classified as tax-free and that there was "no desire" on the part of the assessee to hide or conceal its income so as to avoid payment of tax on interest from the bonds. On appeal by the department,dismissing the appealthe Court held that the decision of the Tribunal is based on finding of fact that there was an inadvertent mistake on the part of the assessee in including the interest received of 6% on the GOI Capital Index Bonds as interest received on tax free bonds. It is not contended by the Revenue that above finding of fact by the Tribunal is perverse. In these circumstances, there is no reason to entertain the proposed question

Note: It was also decided that offering income under the wrong head (capital gains instead of other sources) does not attract s. 271 (1) (c) penalty. (A.Y.)

CIT v. Bennett Coleman & Co. Ltd (Bom.) (High Court) www.itatonline.org

S.271 (1) (c):Penalty-Concealment- Revised return-Search and seizure by Excise Department- Surveyby Tax department-Levy of penalty is not justified when the revised return was filed before issue of notice under section 148. (S.148, 133A).

In course of a search conducted at assessee's premises by Excise Department, assessee admitted suppression of turnover. Thereafter, based on said search, income-tax authorities, conducted survey and consequent thereto assessee filed revised returnsbefore issue of notice under section 148 declaring additional income and suppression of sales and paid taxes as well as interest. The Assessing Officer held that there was concealment of income by way of suppression with intention to evade tax and the assessee even failed to revise the income after the date of search conducted by the Central Excise Department. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On further appeal, the Tribunal held that when once the return was filed before the issue of notice under section 148 and tax due with interest was paid, as the income was not suppressed, the imposition of penalty was not proper. Therefore, the order of imposition of penalty was set aside. On appeal by revenue theCourt held that merely because it was only after survey that a revised return was filed, it was not a ground to hold that there was suppression of income so as to justify levy of penalty. In favour of assessee. (A.Y. 2004-05 to 2006-07)

CIT v Vega Auto Accessories (P.) Ltd. (2013) 212 Taxman 95(Mag.) (Karn.) (High Court)

S.271 (1) (c): Penalty-Concealment- Survey-Surrender of income without explanation attracts penalty. (S.133A)

A survey u/s.133A was conducted on the assessee's premises in the course of which certain documents belonged to certain entities who had applied for shares in the assessee company were found. The AO called upon the assessee to prove the nature and source of the monies received as share capital, the creditworthiness of the applicants and the genuineness of the transactions. The assessee offered Rs. 40.74 lakhs as income from other sources "to avoid litigation and to buy peace". It was made clear that in making the surrender, there was no admission of concealment. The A.O.

completed the assessment by adding the said sum and levied penalty u/s 271 (1) (c) for furnishing inaccurate particulars of income u/s. 271 (1) (c). This was upheld by the CIT (A) though reversed by the Tribunal (included in file) on the ground that there was no material to show any concealment and even in the penalty order it was not specified as to the particular credit in respect of which the penalty was being imposed. It was also emphasized by the Tribunal that the assessee had made it clear while surrendering that there was no admission of concealment and that the offer was made in a spirit of settlement. On appeal by the Department to the High Court, HELD reversing the Tribunal:

When the AO called upon the assessee to produce evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of the transactions the assessee simply folded up and surrendered the sum of Rs. 40.74 lakhs by merely stating that it wanted to "buy peace". In the absence of any explanation in respect of the surrendered income, the first part of clause (A) of Explanation 1 to s. 271 (1) (c) is attracted because the nature and source of the amount surrendered are facts material to the computation of total income. The absence of any explanation regarding the receipt of the money, which is in the exclusive knowledge of the assessee leads to an adverse inference against the assessee and is statutorily considered as amounting to concealment of income under the first part of clause (A) of the Explanation to s. 271 (1) (c) and penalty has to be levied.
CIT v. MAK Data Ltd (Delhi) (High Court)www.itatonline.org.

S.271 (1) (c): Penalty - Concealment -False claims - Levy of penalty was held to be justified.
An amount was Rs 10.81 lakhs was paid to PM (P) Ltd which was assessees sister concern. These payments were made througha debit note raised at the close of the year. Tribunal has given the finding thatno such amounts were paid. This finding ofTribunal was accepted by assessee. On appeal by the assessee against the confirmation of penalty the court held that where Tribunal had reached a finding of fact that appellant had filed inaccurate particulars regarding its income by showing false/exaggerated expenses, it would be concluded that there was a concealment of income on part of appellant, leading to imposition of penalty under section 271 (1) (c) upon appellant.Appeal of assessee was dismissed. (A.Y.1989-90)
Sanghvi Swiss Refills (P.) Ltd. v. ACIT (2013)81 DTR 40/255 CTR 251 212 Taxman 66 (Mag.) (Bom.) (High Court)

S.271 (1) (c): Penalty – Concealment-As there was no clarity on law levy of penalty was held to be not justified. (S.78(2), 170(1))
Assessee succeeded to business of a partnership firm by way of family settlement. He claimed set off of losses of erstwhile firm. Claim of assessee was disallowed by Assessing Officer, Commissioner and Tribunal on ground that section 78(2) did not entitle assessee to set off losses. High Court however, held that such claim was not allowable in view of section 170(1). Meanwhile, penalty was imposed on ground that assessee had made a false claim.High Court, on appeal, noted that there was absolutely no discussion of section 170 in order of Commissioner (Appeals) and Tribunal which was applicable provision as regards succession. Moreover, Assessing Officer as also Commissioner (Appeals) was under misapprehension that assessee was not a successor.There was lack of clarity by income-tax authorities right up to Tribunal itself and, hence, imposition of penalty was not warranted. Appeal of assessee was allowed.
Pramod Mittal v.CIT [2013] 212 Taxman 64 (Mag.) (Delhi) (High Court)

S.271 (1) (c): Penalty –Concealment- AOP- Deletion of penalty held to be justified. (S.167B)
Assessee, an AOP, was constituted for carrying on business of procuring orders on behalf of RIL for supply of purified trephthalic acid. In respect of assessment years in question, assessee filed a return of income at nil. During course of assessment proceeding, assessee was required to explain as to why income should not be charged to tax in hands of AOP by applying provisions of section 167B(2). According to assessee, it had distributed profit amongst its members as per their respective shares which were defined in joint venture agreement and all of them had shown their respective shares as income under provisions of section 167A, and, therefore, section 167B(2) was not applicable. Assessing Officer rejected assessee's explanation and assessed entire income in hands of AOP under section 167B(2).On second appeal, Tribunal referred matter to Special Bench which upheld order passed by Assessing Officer. Thereupon, Assessing Officer taking a view that assessee had deliberately shown income in hands of members of AOP in order to evade taxes, passed a penalty order under section 271 (1) (c).Tribunal, however, set aside penalty order. On revenue's appeal, it was noted that when assessee had filed nil return, there were two views possible inasmuch as Tribunal itself was in doubt as to which of two views were to be preferred and it was for this very reason that Tribunal had passed referral order requiring matter to be considered by a Special Bench. In view of above, it could not be said that assessee could not have had such a doubt in its mind when it had indeed filed its return. Therefore, Tribunal was justified in setting aside penalty order. Appeal of revenue was dismissed. (A.Y.2003-04, 2004-05).
CIT v.Pradeep Agencies Joint Venture(2013) 212 Taxman 72 (Mag.) (Delhi) (High Court)

S.271 (1) (c): Penalty – Concealment - No explanation was filed - Penalty was held to be justified. [S.94(7)].
Assessee-company engaged in business of sale and purchase of shares claimed certain loss on sale of shares. Assessing Officer disallowed amount for not complying with provisions of section 94(7) and assessed it as income of assessee. Assessing Officer, thereafter imposed penalty under section 271 (1) (c).On appeal, Commissioner (Appeals) deleted penalty but on appeal by revenue Tribunal reversed order of Commissioner (Appeals).When assessee-company had been availing services of a chartered accountant and in spite of that no reply was filed by it for non-compliance with provisions of section 94(7) while working out income shown in income-tax return, Explanation 1 to section 271 (1) (c) was directly applicable and penalty was rightly imposed by Assessing Officer. Appeal of assessee was dismissed. (A.Y. 2005-06)
VSB Investment (P.) Ltd. v. CIT (2013) 212 Taxman 59 (Mag.) (P&H) (High Court)

S.271 (1) (c): Penalty – Concealment - Revised return - After detection - Levy of penalty was justified.
Assessee's case was taken up for scrutiny and concealment of income had been detected by Assessing Officer. Assessee filed revised return. An amount was surrendered on ground of buying peace with department. However, it was a specific concealment for a particular month which was detected by Assessing Officer and not a case where addition was made in income on estimate and surmise. Since it was clear case of concealment of income and furnishing of wrong particulars of income, penalty was correctly imposed. Appealof assessee was dismissed. (A.Y.1993-94)
Standard Hind Co. v. CIT (2013) 212 Taxman 74 (Mag.) (All.) (High Court)

S.271 (1) (c): Penalty – Concealment – Income deemed to accrue or arise in India-Furnishing of inaccurate particulars – Exclusion of amount of tax deducted at sourcefrom income not bona fide hencepenalty isleviable. (S. 9(1) (i))
Assessee, a Japanese bank was operating in India through its branch office/ PE. Its branch in India received certain amount as income from a Korea company as guarantor in respect of a loan given by bank to one 'D'. The amount was subject to tax under Korean law and balance after deduction of tax was remitted to India. It was held that whatever tax had been deducted in Korea on behalf of non-resident assessee had to be claimed in its own country i.e. Japan and therefore, entire amount accrued in India. The amount excluded was not an expenditure claim but only tax paid on behalf of principal company and therefore, entire amount was taxable in hands of assessee in India. It was therefore held that mere note given by assessee that tax deducted in Korea did not accrue in India was not sufficient. As the exclusion of amount was not bonafide penalty u/s 271 (1) (C) was leviable. (AY 2001-02)
Dy.DIT v. Sumitomo Mitsui Banking Corpn. (2013) 140 ITD 528/151 TTJ 409 (Mum.) (Trib.)

S.271 (1) (c): Penalty-Concealment-Unrealised export proceeds disclosed in return-Information given in return not found to be incorrect, Levyof penalty held to be not justified. (S.10A)
The assessee filed the return and claimed exemption under section 10A of the Act. The Assessing Officer observed that the assessee could not furnish any reason for treating the unrealised export proceeds, eligible for claim for exemption. He, accordingly, added back Rs. 13,72,927 and initiated penalty under section 271 (1) (c). The Commissioner (Appeals) held that the assessee had not concealed any particulars of income or not suppressed any facts and deleted the penalty. On appeal to the Tribunal, held that the assessee had made adequate disclosure with respect to the unrealised export proceeds at the time of filing its return, and no fault could be found on the conduct of the assessee. Therefore, penalty was not exigible under section 271 (1) (c) of the Income-tax Act, 1961.Appeal of revenue was dismissed. (A. Y.2007-2008)
Dy. CITv. Genesys International Corporation Ltd. (2013) 21 ITR 581/151 TTJ 606 (Mum.) (Trib.)

S.271 (1) (c): Penalty-Concealment-Revised return-Income not fully declared in original return but in return filed pursuant to notice under section 148- liable for penalty in first assessment year instead of all assessment years. (S.148)
The assessee is a qualified anesthetist working in a private hospital. In response to notice under section 148 of the Income-tax Act, 1961, the assessee filed another return substantially enhancing his income and also claiming expenditure which had not been previously admitted. The Assessing Officer disallowed the claim and also initiated penalty under section 271 (1) (c) of the Income-tax Act, 1961. The Commissioner (Appeals) granted part relief to the assessee and held that his claim of expenditure was liable to be accepted at 30 per centof net receipt on estimation basis. On appeal, the Tribunal restricted the expenditure to 15 per cent. Since, penalty proceedings stood revived, the assessee submitted before the Assessing Officer that he had neither concealed his income nor furnished inaccurate particulars. The Assessing Officer held that the revised return submitted by the assessee was only after the initiation of the investigation and therefore he imposed penalty. The Commissioner (Appeals) confirmed this. On appeal, Held, that only when notice

under section 148 was issued to the assessee, he chose to disclose the receipt and raise the claim of expenditure. Despite the fact that the assessment proceedings attained finality, this ipso facto did not absolve the assessee from the necessary conclusion from his conduct that he had nevertheless concealed the income which ultimately led to furnishing inaccurate particulars in the initial return. Therefore, the provisions of section 271 (1) (c) were attracted in the act and conduct of the assessee. It is a settled law that the assessment proceedings and penalty proceedings are altogether different and any disallowance does not result in imposition of penalty. In penalty proceedings, the assessee's conduct during assessment always carries significance. Therefore, it could not be said that he was not guilty of concealment and furnishing of inaccurate particulars of income within the meaning of section 271 (1) (c). Moreover, the assessee had been continuing with the practice of alleged concealment and furnishing inaccurate particulars in the assessment years 2000-01 to 2005-06. However, adopting the "doctrine of continuity" and concurrence, the penalty was liable to be confirmed only in the first assessment year i.e., assessment year 2000-01 instead of all the assessment years. (A. Ys. 2000-2001 to 2005-2006)
Bapuji Cherukuri(Dr) v. Dy. CIT (2013) 21 ITR 714 (Chennai) (Trib.)

S.271 (1) (c): Penalty-Concealment-Explanation 5-Due date expired –Concession given by revenue,penalty was deleted. (S.153A)
Pursuant to search proceedings, assessee filed its returns admitting undisclosed income of various assessment years. Assessing Officer having completed assessments, passed separate penalty orders for each assessment year involved.Assessee was successful in first appeal for some of assessment years on basis of applicability of Explanation 5 to section 271 (1) (c). For relevant assessment years, immunity under Explanation 5 to section 271 (1) (c) was not available mainly for two reasons, firstly, due date for filing return under section 139(1) had already expired as on date of search and, secondly, there was non-satisfaction of condition of payment of tax and interest by due date of filing return of income under section 153A. However, in appellate proceedings revenue itself conceded that assessee's case was squarely covered by Explanation 5 to section 271 (1) (c). Tribunal held that in view of revenue's concession, impugned penalty order passed for assessment years in question was to be set aside. In favour of assessee. (A. Y. 2004-05, 2005-06)
Dy. CITv. Sheo Kumar Kajaria (2013) 55 SOT 91(URO) (Kol.) (Trib.)

S.271 (1) (c): Penalty – Concealment - Transfer pricing - Computation of ALP – Debate at the time of filing return as to whether current year data can be used or multiple year data has to be used – Assessee adopting multiple year data, bona fide exercise levy of penalty held to be not justified. (S.92C)
Assessee, engaged in providing market support services, returned nil income and computed arm's length price of its transactions on basis of multiple year data. TPO being of opinion that current year data was to be used, added some comparables and made transfer pricing adjustment. The Assessing Officer made addition to assessee's income and initiated penalty proceedings. It was held that where at time of filing return, there was a legal debate as to whether current year data can be used or multiple year data has to be used, assessee's adopting multiple year data was a bona fide exercise. The assessee acted in bonafide manner in conducting its transfer pricing study and arriving at arm’s length price. The explanation is bonafide hence levy of penaltyunder section 271 (1) (C) is not warranted.(A.Y. 2006-07)
Verizon Communication India (P.) Ltd. v. Dy. CIT (2013) 140 ITD 122 (Delhi) (Trib.)

S.271 (1) (c): Penalty – Concealment - surrender of income - Levy of penalty held to be valid.
During the course of assessment proceedings, the Assessing Officer after obtaining details of creditors, issued notice under section 133(6) of the Act to N and G. In the light of the details reflected in the copy of account of the assessee received from these parties vis-a-vis the books of account of the assessee, the Assessing Officer noticed differences. The assessee surrendered the amount. Accordingly in terms of the surrender of the amount, the Assessing Officer added the amount and initiated penalty proceedings under section 271 (1) (c). This was upheld by the Commissioner (Appeals). On appeal to the Tribunalheld thatas a result of enquiries made by the Assessing Officer, the assessee did not reconcile the difference in the account of the two parties and instead surrendered the amount as income of the year under consideration. In the course of penalty proceedings, the assessee did not bring any material before the Assessing Officer to rebut the inferences drawn by the Assessing Officer in the course of assessment proceedings. The assessee claimed before the Assessing Officer and the Commissioner (Appeals) that the addition was accepted in order to purchase peace of mind and to bring an end to the issue. But this explanation was tendered only after the Assessing Officer confronted the evidence in the form of copies of account of the assessee in the books of the two parties. Apparently, only when the assessee was cornered, the assessee surrendered the amount. The surrender was not voluntary. The levy of penalty was valid. (A. Y.2007-2008)
Ajay Jain v.ACIT [2013] 21 ITR 41 (Delhi) (Trib.)

S.271 (1) (C):Penalty- Concealment-Levy of penalty was not justified without pointing out any specific fact.

No penalty can be imposed if Assessing Officer has not pointed out any specific fact not disclosed by the assessee or any wrong particulars furnished by the assessee. Based on the primary facts disclosed by the assessee inference drawn by the AO could have been drawn. (A.Y. 04-05)('C'Delhi, ITA No. 3522/Del/12 dated 11-1-2013)

ADIT vGE Energy Control Systems(2013) BCAJ Pg. 24, Vol. 44-B Part 5, February 2013(Delhi) (Trib.)

S. 271 (1) (c):Penalty-Concealment- Consistent losses show mistake/ absence of intention to evade taxes.

The assessee filed a return declaring a loss of Rs. 16 lakhs in which it had made a wrong claim of depreciation. The AO disallowed the claim and levied 100% penalty which was upheld by the CIT (A). Before the Tribunal, the assessee claimed that its' Directors were technical persons not knowing the intricate provisions of the Act but were dependent on the advice of professionals for preparing income tax returns. It claimed that it had committed a bona fide mistake and that there was no intention to evade taxes. HELD by the Tribunal upholding the plea:

A mere mistake in making of a claim in the return of income would not ipso facto reflect concealment or furnishing of inaccurate particulars of income in terms of s. 271 (1) (c). The wrong claim of depreciation cannot be said to be made with an intention to evade taxes in as much as even after the disallowance of depreciation, the resultant income of the assessee remains a loss. The assessee had been incurring losses since the year 2003 due to the market forces. Considering the entirety of circumstances, the claim on account of depreciation was a mistake, and did not invite the provisions of s. 271 (1) (c). (A. Y. 2007-08)

Amruta Organics Pvt. Ltd v. DCIT (Pune) (Trib.) www.itatonline.org

S.271 (1) (c): Penalty- Concealment-Provision for diminution of value certain stocks-Levy of penalty was held to be not justified.

The assessee had made a provision for diminution of value certain stocks but could not provide details of the stocks whose value had decreased. During the course of assessment proceedings the AO made disallowance of write-off of certain obsolete stock on the ground that the write-off was actually a provision for unascertained liability - the AO also held that the loss accrued to assessee was diminution in the value of stock. The view of the AO was affirmed up to the ITAT on the ground that write-off is not allowable as the assessee has failed to file supportive documents and details - The AO levied penalty and the order of the penalty was affirmed by the CIT (A)-In the courseof the penalty proceedings, the assessee produced material which justified write-off and hence contended that it was entitled for the write-off. The Hon'ble Tribunal deleted the penalty on the ground that the quantum proceedings and penal proceedings being separate and independent, the finding in the quantum proceedings cannot be relied upon to justify penalty; the assessee was entitled to lead fresh evidence to establish that the finding in quantum proceedings is not conclusive. (A.Y. 2001-02)

Global Green Co. Ltd. (2013) 56 SOT 30(URO). (Delhi) (Trib.)

S.271 (1) (c):Penalty- Concealment- Expenditure on R& D-Non furnishing of details of fixed assets-Liable topenalty.

The assessee claimed to have incurred expenditure for 'R & D' items. The A.O. asked the assessee to produce documents to establish the claim of expenditure. The assessee failed to produce any documentary evidence and hence the A.O. levied penalty. Before the Tribunal, the assessee contended that the 'Tax Audit' report was furnished which mentioned incurring of the expenditure and this fact was sufficient to establish the claim of the assessee. Rejecting this contention and upholding the penalty, the Hon'ble Tribunal held that a tax audit report cannot take place of the documentary evidence and having failed to produce evidence to establish its claim the assessee had exposed itself to penalty. ([A.Y. 2003-04) **Clariant Chemicals Ltd (2013). 56 SOT 25(URO**) **(Mum.) (Trib.)**.

S.271B: Penalty – Failure to get accountsaudited - Business Income - Tax Audit - Turnover - Online buying and selling of commodities being speculative in nature not liable for penalty. (S.44AB)

Assessee is engaged in online buying and selling commodities through commodity exchange, as a speculative activity, wherein no physical delivery was taken or given, total transaction booked with such commodity exchange could not be considered as 'turnover' for purpose of considering liability of assessee to get accounts audited u/s.44AB. Buying and selling the unitswas aspeculative transaction.No delivery has taken place henceLevy of penalty was deleted. (A.Y.2006-07)

Banwari Sitaram Pasari HUF v. ACIT (2013) 140 ITD 320 (Pune) (Trib.)

S.271B : Penalty- Penalty-Failure to get accountsaudited-Business Income – Tax Audit – Project completion method (S.44AB)

The assessee company was engaged in business of construction. It was following project completion method of accounting. In respect of a SRA project taken up by the assessee, it had received a booking advance of Rs.11.25 crore from M/s. Welspun Gujarat Stahi Robern Ltd. The advance was subsequently returned in 2010 since the property had several encroachments. The assessee did not get its accounts audited as required u/s. 44AB of the Act since it was of the view that the provisions of sec. 44AB would apply only when sales, turnover or gross receipts exceed Rs.40 lakh. Since the assessee had only received an advance which was later refunded and the assessee was following project completion method and the sales would be accounted in the year of completion of the project. The AO levied penalty u/s 271B of the Act. The Tribunal held that, in case of an assessee following project completion method, advance received which is required to be adjusted against future income cannot be considered as gross receipt of business or turnover. Bonafide belief constitutes reasonable cause for non-levy of penalty. (A.Y. 2007-08) (ITA no 307/M/011, dated 21-11-2012)
Pilot Construction Pvt. Ltd. v. ITO (2013) BCAJ Pg. 18, Vol. 44-BPart 4, January 2013(Mum.) (Trib.)

S.271B : Penalty – Failure to get accounts audited – Since assessee is entitled to registration for levy of penalty matter sent back to Assessing Officer. (S.12A)
Assessee trust did not get its accounts audited on the basis that the income is exempt. Therefore, the assessee had a reasonable cause for not getting its accounts audited under section 44AB of the Act. The Tribunal held that the assessee is entitled to registration.So for the levy of penalty, the Tribunal remanded the matter back to the file of Assessing Officer to be decided afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee. (A. Y. 2003-04 to 2007-08)
Urban Improvement Trust Sriganganejor v. CIT (2013) 152 TTJ 507 /83 DTR282 ((Jodh.) (Trib.)
S.271D:Penalty-Accepts any loan or deposit-Reasonable cause – Finding as to the existence of reasonable cause is a finding of fact which cannot give rise to anysubstantial question of law. (S.269SS, 269T, 273B.)
CIT (A) and the Tribunal arrived at concurrent findings that there was reasonable cause within the meaning of s. 273B for the violation of s. 269SS after taking note of the entire facts and circumstances in which the assessee was placed, it cannot be held that the view taken by the Tribunal is either perverse or absolutely irrational, and the findings recorded by the Tribunal being essentially findings of fact, no substantial question of law arises. (A.Y. 1993-94 & 1999-2000 to 2001-02)
CIT v. Sahara India Financial Corporation Ltd. (2013) 83 DTR 162/257 CTR 215 (Delhi) (High Court)
S.271D:Penalty-Accepts any loan or deposit- Reasonable cause. (S.269T, 271E, 273B.)
Tribunal cancelled penalties u/ss. 271D and 271E after appraising several facts and circumstances in accepting the assessee's explanation that there exited reasonable cause within the meaning of s. 273B for the violation of the provisions of ss. 269SS and 269T. The revenue had not brought on record any material to show that the finding of the Tribunal as to the existence of reasonable cause is perverse. No substantial question of law arose. (A.Y. 1992-93, 1993-94, 1996-97, 1999-2000 & 2000-01)
CIT v. Sahara India Mutual Benefit Co. Ltd. (2013) 83 DTR 171/257 CTR 225(Delhi) (High Court)
S.271D:Penalty - Accepts any loan or deposit –Limitation—Barred by limitation. (S.269SS, 275)
Show-cause notice for the alleged contravention of s. 269SS was issued on the assessee by the AO on 27th March 2003. Penalty levied by Jt. CIT on 28th May 2004 was beyond the period of limitation, notwithstanding issue of show-cause notice by Jt. CIT after the matter was referred to him on 22nd March 2004. (A.Y. 2001-02)
CIT v. Jitendra Singh Rathore (2013) 83 DTR227 (Raj.) (High Court)
S.271D: Penalty - Accepts any loan or deposit –Reasonable cause –Penalty deleted. (S. 269SS, 269T, 271E, 273B)
Assessee is a mutual benefit company doing business of mobilization of deposits from members/shareholders. Assessing Officer levied the penalty under section 271D and 271E of the Act. In appeal Commissioner (Appeals) deleted the penalty, which was affirmed by Tribunal. On appeal to High Court by revenue the Court held that Tribunal deleted penalty imposed on assessee under sections 271D and 271E after considering assessee's business realities, difficulties in mobilizing deposits from people of small incomes, agriculturists and rural dwellers. The Revenue could not bring on record any material to show that finding of fact Tribunal as to existence of reasonable cause was perverse.Therefore, thefinding of Tribunal could not be disturbed. In favour of assessee.
CIT v. Sahara India Mutual Benefit Co. Ltd. (2013) 212 Taxman 97(Mag.) (Delhi) (High Court)

S.271D: Penalty-Accepts any loan or deposit-Reasonable cause-No material was placed S.269SS)

Assessing Officer imposed penalty upon assessee for acceptance of cash loans from various persons exceeding specified limit. Assessee submitted that he had to follow village customs and traditions and accept words of elders of village and that some depositors did not have PANs. No material was placed on record as to which elder advice assessee had taken

and why loan was not received through crossed cheque when some depositors were having PAN, therefore, imposition of penalty under section 271D was justified. In favour of revenue. (A.Y. 2005-06)
Addl.CITv.Madireddy Venkat Reddy (2013) 55 SOT 94(URO) (Hyd.) (Trib.)

S.271BA: Penalty-Failure to furnish reports-International transaction-Transfer pricing-Report from accountant to be furnished –Failure to furnish report is liable to penalty. (S.92E, form no 3CEB)
Assessing Officer levied penalty under section 271BA on ground that assessee failed to furnish accountant's report in Form No. 3CEB as required under section 92E by due date. Submission of assessee was that it had filed return of income electronically; therefore annexures were not required to be furnished, and that Form No. 3CEB was filed during penalty proceedings. Through the contention of assessee that return of income in electronic form was not to accompany report in Form 3 CEB was correct. Tribunal held that the Assessee was required to file report under section 92E, read with rule 10E, before specified date i.e., due date for filing of return. therefore, penalty under section 271BA was rightly imposed. In favour of revenue (A Y 2006-07)
Nectar Lifesciences Ltd. v. Dy. CIT (2013) 55 SOT 93(URO) (Delhi) (Trib.)

S.272A: Penalty-E-TDS return-Delay in filing TDS return through NSDL is a technical breach-Levy of penalty is not justified.
The AO imposed penalty u/s 272A(2) (k) for delay in filing the TDS return u/s 200(3). The assessee's argument that the delay was due to a shortage of staff was rejected on the ground that the same was not reasonable cause. The CIT (A) confirmed the penalty. On appeal by the assessee to the Tribunal, HELD allowing the appeal:

The penalty was levied by the department in a mechanical manner. The assessee would have filed the hard-copy of the quarterly statements but this is not accepted by the department. The computer has to generate a number for acknowledging receipt of such statements. The number is not generated till the computer tallies the PAN and the information available on AS-26. The late filing is caused by an administrative glitch. The delay occurs because the assessee deductors are dependent on information of TDS and its deposit from the sub treasury of the Government and the filing of the e-return through the designated service provider of the Income-tax Department. The assessee-deductors have no technical competency to file the return by themselves without external aid. They are also not competent to do so by themselves as per rule 37B and "Filing of Return of Tax deducted at source" scheme 2003, which requires the submission of quarterly statement through NSDL or other approved agencies which are third parties and not under the control of the assessees. Penalty u/s 272(A) (2) cannot be levied in a routine manner. The late filing of TDS return cannot be said to be intentional or willful. It is only a technical or venial breach
Branch Manager, UCO Bankv. A CIT (2013) 23 ITR 209 (Cuttack) (Trib.)

S.272A:Penalty-E-TDS return-Penalty deleted first year of default. (Form No.24Q, 26Q)
Tribunal held thatwhenthere is no provision for issuing separate notice for levy of penalty for late or non-filing of From nos. 24Q and 26Q as in case of failure to file these forms penalty is leviable under section 272A(2). For relevant assessment year, assessee did not file E-TDS returns within specified time - Assessing Officer, thus, levied penalty under section 272A(2).Tribunal held that since requirement of filing Form No. 24Q was new one being first year of filing such return and, moreover, tax had been duly deducted by assessee, in such a case, impugned penalty order was not sustainable. In favour of assessee](2006-07)
The Manager, Union Bank of India v Dy. CIT (2013) 55 SOT 96(URO) (Agra) (Trib.)

S.272B: Penalty - Permanent account number -Failure to mention PANs in form no 16, 16A, is liable to penalty. (S.139A, form no 16, 16A)
During course of inspection, Assessing Officer noticed that assessee had failed to mention PANs on Form Nos. 16 and 16A issued to persons from whom tax has been deducted at source. Assessee neither gave any explanation nor even appeared before ITO (TDS) on date fixed - ITO (TDS), thus, formed an opinion that assessee was not prevented by any reasonable cause and, thus, he passed a penalty order under section 271B. Tribunal held that on facts, assessee had not made any compliance of section 139A(5B) and, thus, impugned penalty order was to be confirmed. In favour of revenue. (A.Y. 2007-08to 2009-10)
General Manager, J&K Project Construction Corpn. Ltd. v. ITO. (2013) 55 SOT 98(URO (Asr.) (Trib.)

S.281B: Provisional attachment-Validity period-After passing of assessment order the provisional attachmentis ceaseto operate.
Court held thatprovisional attachment order passed under section 281B and notices/letters issued to bank and sundry debtors of petitioner for not to make payment to petitioner would cease to operate after passing of assessment order.

Hence, the validity period of six months of provisional attachment order would be extinguished after passing of assessment order. In favour of assessee. (A.Y.2008-09)
Motorola Solutions India (P.) Ltd. v. CIT (2013) 212 Taxman 35 (P & H) (High Court)

S.281B: Provisional attachment-Crown debt-Petitioner as secured creditor had preference over dues of department in respect of secured assets-Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
A company availed loan from petitioner and mortgaged certain property to secure loan advanced to it. Since said company defaulted in making payments of loan, petitioner initiated proceedings under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.Thereupon, petitioner took possession over property and put it on sale. Impugned property had been provisionally attached under section 281B with prior approval of Commissioner and, it was on said basis, revenue claimed preferential right to realize its dues being crown debt. The petitioner challenged the order by way of writ petition allowing the petition the court held that, there is no provision in statute which gives preferential rights to dues of State under Act., therefore, petitioner as secured creditor had preference over dues of department in respect of secured assets, in view of aforesaid, instant writ petition was to be disposed of with a direction to petitioner to remit any excess amount, after adjusting its dues, to revenue being preferential creditor amongst unsecured creditors. In favour of assessee.
Axis Bank Ltd. v. CIT (2013) 212 Taxman 19(Mag.) (P&H) (High Court)

S.281B: Provisional attachment- There is no provision in statute which gives preferential rights to dues of State under Act. - (S.13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.)
A company availed loan from petitioner and mortgaged certain property to secure loan advanced to it.Since said company defaulted in making payments of loan, petitioner initiated proceedings under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.Thereupon, petitioner took possession over property and put it on sale. Impugned property had been provisionally attached under section 281B with prior approval of Commissioner and, it was on said basis, revenue claimed preferential right to realize its dues being crown debt. There is no provision in statute which gives preferential rights to dues of State under Act. Therefore, the petitioner as secured creditor had preference over dues of department in respect of secured assets. In view of aforesaid, instant writ petition was to be disposed of with a direction to petitioner to remit any excess amount, after adjusting its dues, to revenue being preferential creditor amongst unsecured creditors. Writ petition of assessee was allowed.
Axis Bank Ltd. v. CIT (2013) 212 Taxman 19 (Mag.) (P & H) (High Court)

S.281B:Provisional attachment - Validity period - Extinguish after passing of assessment order. (S.144C)
Provisional attachment order passed under section 281B and notices/letters issued to bank and sundry debtors of petitioner for not to make payment to petitioner would cease to operate after passing of assessment order. Validity period of six months of provisional attachment order would be extinguished after passing of assessment order. (A.Y.2008-09)
Motorola Solutions India (P.)Ltd. v. CIT [2013] 212 Taxman 35 (P & H) (High Court)

S.292C: Presumptions as to assets, books of account etc. -Presumption not available in respect of person other than person from whose possession books or assets seized. (S.153A) - During the course of search, papers were seized from the premises of a hospital showing date-wise cash received from the assessee. The assessee explained that the donations were made out of unaccounted income declared by S. The Assessing Officer further noted that the company was maintaining separate cash account. The presumption under section 292C of the Act was that the paper belonged to the assessee and its contents were proved. The Assessing Officer therefore, made the addition. The Dispute Resolution Panel rejected the objections raised by the assessee on the ground that the addition made was based on seized papers. Papers seized from the possession of S from the premises of the hospital showed the expenses incurred on construction of a school building belonging to the M trust. An addition was made in the hands of the assessee. That admittedly, the papers were seized from the premises of the hospital from the possession of S who had owned up to the documents. No evidence was found during the course of search to establish that the donations were made by the assessee out of undisclosed income. S had donated the amount out of undisclosed income declared by him under section 153A of the Act. The source of income out of which the payment had been made existed in the earlier years. The bank statement of M Trust which gave details of Rs. 5 lakhs debited to the account. There was nothing on record to suggest that these amounts had been paid by the assessee. Therefore, no addition could be made in the hands of the assessee-company. According to the provisions of section 292C the presumption was that the documents related to S and not to the assessee. Hence, the Assessing Officer had wrongly applied the provisions of section 292C.The Tribunal held that

the paper in question did not show the name of any person from whose account the money had come for investment in school building. There was no indication on these pages that amount had come from the account of the assessee-company. Therefore, no addition could be made in the hands of the assessee-company. Since the school was owned by M trust the addition could be made if at all, in the hands of the trust and not in the hands of the assessee. (A. Y. 2005-2006 to 2007-2008)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi) (Trib.)

S.292BB: Notice deemed to be valid in certain circumstances - Reassessment-Section 292BB does not have retrospective effect. (S.143(2), 148)
The AO issued a notice u/s 148 to make a reassessment. However, as a notice u/s 143(2) was not issued, the Tribunal quashed the reassessment. The Department filed an appeal before the High Court where it relied on s. 292BB (which provides that the failure to issue notice cannot be objected to if the assessee has appeared in the proceeding), inserted by the Finance Act 2008 w.e.f. 1.4.2008 and argued that the said provision was retrospective in operation and the reassessment was valid. HELD by the High Court dismissing the appeal:

The issue of a notice u/s 143(2) is mandatory. The failure to do so renders the reassessment void (CWT v. HUF ofH. H. Late Shri. J.M.Scindia (2008) 300 ITR 193 (Bom.) followed). S. 292BB was inserted w.e.f. 1.4.2008 and came into operation prospectively for AY 2008 – 2009 and onwards.
CIT v Salman Khan (Bom) (High Court) www.itatonline.org.

S.292C: Presumption as to assets, books of account, etc.- Search and Seizure - Addition on the basis of documents is held to be justified.
Pursuant to a search at assessee's premises, certain documents were found and one of such documents contained working of interest at rate of 3 per cent on total sum of Rs. 3 lakh. Assessee was directed to explain contents of document found during course of search - Assessee explained that contents of said document were rough working and no loan was given out. Assessing Officer rejected assessee's explanation and brought to tax principal amount of Rs. 3 lakh and interest thereon. Commissioner (Appeals) and Tribunal confirmed order of Assessing Officer. On basis of material recovered during search, lower authorities had rightly drawn presumption in terms of section 292C.therefore, impugned addition was to be confirmed. Appeal of assessee wasdismissed. (A.Y.1998-99)
Hiren Vasantlal Shah v. ACIT (2013) 212 Taxman 23 (Mag.) (Guj.) (High Court)

Gift-tax Act, 1958

S.4(1) (c): Deemed gift - Revocable gift of shares - Donor revoking gift but bonus shares continued with donee- Matter remanded. (S.11, 16(1))

The assessee owned 6000 shares of Hero Cycles. On 20.02.1982, he executed a deed of revocable transfer in favour of M/s. Yogesh Chandra. The deed permitted the assessee to, after completion of 74 months from the date of transfer but before the expiry of 82 months from the said date, exercise the power of revoking the gift. In other words, there was a window of 8 months within which the gift could be revoked. The deed of revocable transfer specifically stated that the gift shall not include any bonus shares or right shares received and/or accruing or coming to the transferee from Hero Cycles by virtue of ownership of the said shares. Effectively, therefore, only a gift of 6000 equity shares was made by the assessee to the transferee. On 29.09.1982 & 31.5.1986, the company issued 4000 and 10,000 bonus shares to the transferee. On 15.6.1988, the assessee revoked the gift with the result that the 6000 shares gifted to the transferee came back to the assessee. However, the 14,000 bonus shares allotted to the transferee while it was the holder of the equity shares of the company continued with the transferee. In AY 1982-83, the GTO relied on McDowell and Co. Ltd. v. Commercial Tax Officer (1985)154 ITR 148 (SC) and held that the revocable transfer was only for the purpose of reducing the wealth tax liability and was void. He, however, made a protective gift-tax assessment. The Tribunal and the High Court (CGT vs. Satya Nand Munjal (2002) 256 ITR 516 (P&H)) reversed the AO and held that a revocable transfer was valid even if its object was to avoid wealth-tax. The assessee was held liable to pay gift-tax u/r 11 of the Gift-tax Act. In AY 1989-90 the AO &CIT (A) held that the 14,000 shares belonged to the assessee and as the revocation was only with respect to the 6,000 shares and the 14,000 bonus shares continued with the transferee, there was a chargeable gift to that extent. The Tribunal reversed the AO &CIT (A). On appeal by the department, the High Court reversed the Tribunal and held that the assessee was liable to gift tax on the value of the bonus shares gifted by him to the transferee applying the principles of Escorts Farms (Ramgarh) Ltd. v CIT (1996) 222 ITR 509 (SC). On appeal by the assessee to the Supreme Court, held:

The fundamental question is whether there was in fact a gift of 14,000 bonus shares made by the assessee to the transferee. The answer to this question lies in s. 4(1) (c) of the Gift-tax Act which provides that "where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment to the extent to which it has not been found to the satisfaction of the AO to have been bona fide, shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment". On facts, the assessee had made a valid revocable gift of 6000 equity shares in the company on 20.2.1982 to the transferee. The only event that took place in AY 1989-90 was the revocation of the gift by the assessee on 15.6.1988. The question whether the revocation of the gift of the original shares in AY 1989-90 constitutes a gift of the bonus shares that were allotted to the transferee on 29.09.1982 and 31.05.1986 requires to be answered in the light of s.4(1) (c). The question of applicability of Escorts Farms has to be decided after a finding is reached on the applicability of the first part of s. 4(1) (c) (matter remanded). (A.Y.1989-90)

SatyaNandMunjal v. CGT (2013) 350 ITR 640/256 CTR 121/82 DTR 284(SC)
Om PrakashMunjalv.CGT (2013)350 ITR 640/ 256 CTR 121/82 DTR 284(SC)

S.16B: Revocable gift-Interest-Matter remanded.

The High Court heldinter alia, that since gift-tax was leviable on the revocable transfer of equity shares by the assessee to Y, interest was liable to be paidby the assesseeon the gift -tax levied. On appeal, the Supreme Court set aside the judgment of the High Court and remanded the matters for fresh considerationon the merits of the case. (A.Y. 1989-90)

Satya Nand Munjal v. CGT (2013) 350 ITR 649/256 CTR 127/82 DTR 275/214 Taxman 10(Mag.) (SC)
Om PrakashMunjal v.CGT(2013)350 ITR 649/ 256 CTR 127/82 DTR 275(SC)
Brij Mohan Lal Munjal v.CGT ((2013)350 ITR 649/ 256 CTR 127/82 DTR 275(SC)

Gift tax-Reconstitution of Partnership firm doesn't amount to deemed gift:

Reconstitution of a Partnership firm at the time of admission of new partner resulting into reduction of share in profit of erstwhile partners doesn't amount to deemed gift and shall not give rise to levy of gift tax. (T.A. No. 394/ 395 of 2000,dt16/06/2012/(T.A. No. 346 of 2002,dt 16/16/2012)]

Ratilal P. Patel (2012) BCAJ -November-P. 402) (Guj.) (High Court)
Urmilaben A. Patel (2012) ACAJ -November-P. 402) (Guj.) (High Court)

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Interest –tax Act, 1974.

S.2(5): Interest –Credit institution.-Chargeable interest.
Interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it.
CIT v. Haryana Financial Corpn. (2013) 212 Taxman 25 (Mag.) (P&H) (High Court)

S.2(5): Interest - Non banking financial institution - Financial transaction - Hire purchase –Matter remanded.
Tribunal has remitted the matter to original authority to have a fresh look, in to matter both aspect of relevance of board circular and judgment of Supreme Court in case of Sundaram Finance v. State of Kerala, AIR 1966 SC 1178. Appeal of revenue was dismissed. (A.Y.1998-99)
CIT v. Standard Chartered Finance Ltd (2013) 212 Taxman 24 (Mag.) (Karn.) (High Court)

S.2(5B): Financial Company -Lease charges-Discounting charges.
Where factual aspect as to whether assessee was a financial company and whether interest earned under three heads namely, lease charges, hire purchase charges and bill discounting charges, were chargeable to tax under Interest-tax Act being not clear, matter was to be remanded back to lower authorities for reconsideration -Matter remanded.
CIT v.Motor & General Finance Ltd. (2013) 212 Taxman 76(Mag.) (Delhi) (High Court)

S.2(7): Interest –Finance charges-Separate Accounts.
Assessee-bank received finance charges in case of lease transactions entered into by it with its customers where customers purchased machinery from finances provided by assess. Assessing Officer held that amount received by assessee was liable to interest tax. On appeal, Appellate Authorities held that amount collected by assessee was hire purchase charges and not interest and, therefore, there was no liability to pay tax as such. In view of concurrent finding of fact recorded by Appellate Authorities, no case for interference was made out. Appeal ofrevenue was dismissed. When assessee had maintained a separate account in respect of amounts collected from customers towards interest-tax, amounts so collected by assessee were not 'interest' within meaning of section 2(7) and, hence, could not be treated as chargeable interest. Appeal of revenue was dismissed.
CIT *v.* Karnataka Bank Ltd. (2013)212 Taxman 78 (Mag.) (Karn.) (High Court)

S.5: Chargeable interest - Interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it. (S.2(5), 26C)
The assessee is a credit institution earning interest. It filed its return of chargeable interest. In the course of assessment, Assessing Officer noted that assessee had not included the interest tax collected from its clients in the chargeable interest. The Assessing Officer completed the assessment under section 8(2) adding the said amount to the chargeable interest in view of provisions of section 26C. On second appeal, the Tribunal deleted the addition holding that amount of interest tax recovered from the customers was not chargeable to interest. On revenue's appeal the court held that interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it. In favour of assessee
CIT v. Haryana Financial Corpn. (2013) 212 Taxman 25 (Mag.) (P&H) (High Court)

S5: Chargeable interest-Provision-Interest on bad or doubtful debts
Interest on non-performing assets would be charged to interest-tax only in year in which said interest is credited to profit and loss account or in year of receipt, whichever isearlier. Appeal of assessee was allowed. (A.Y.1998-99)
American Express Bank Ltd. v.Add. CIT (2013) 55 SOT 136 (Trib.) (Mum.)

S.10: Reassessment – Non - disclosure of primary facts-Reassessment held to be valid. (S.8, 10A).
Assessee filed return of chargeable interest voluntarily, which had not been processed / finalized by Assessing Officer. Later on, Assessing Officer issued a notice under section 10 to reopen assessment on ground that certain interest chargeable to tax had escaped assessment on account of non-disclosure by assessee. Assessing Officer passed a reassessment order and brought to tax certain amount of interest. Appellate authorities having found that Assessing Officer had not processed original return filed by assessee within limitation period of two years from end of assessment year under consideration, held that reopening of assessment was barred by time. Situations may develop where Assessing Officer may be inactive, may be indecisive or may be for justifiable reasons or deliberately does not conclude assessment, but to hold or opine that even a re-assessment is not possible in such situations will be virtually amounting to re-writing contents of section 10.Since a reopening is permitted even in a situation where an assessment order is passed, but that has resulted in escapement of some chargeable interest to tax, reopening is also permitted where a return is filed, but no assessment order is passed within time permitted for passing an assessment order under section

10A.Section 10 is a specific enabling provision only to remedy such situations and only criteria is escapement of such chargeable interest to tax for whatever reason may be; while invoking section 10 it can only be within parameters mentioned in section 10 and not with reference to time stipulations provided for concluding an assessment or passing assessment order under section 8.Reopening held to be justified. (A.Y.1997-98).
CIT v. Standard Chartered Finance Ltd.(2013) 212 Taxman 79 (Mag.) (Karn.) (High Court)

Wealth-tax Act, 1957

S. 2(ea):Asset –House property- Transit house for executives does not form partof asset.
Transit house used for the stay of executives on official tour does not form part of asset u/s. 2(ea). (A.Y.1995-96)
Carborandum Universal Ltd. v. Dy. CWT (2013) 83 DTR75 (Mad.) (High Court)

S.2(ea): Asset-Commercial properties-Commercial Properties were not considered as assets in terms of S.2(ea) (i) of the Wealth–tax Act, 1957 prior to 01/04/97 and hence, such properties can't be assessed under the said Act.
Property given on rent, being a productive asset, bears the character of a "Commercial Property" Commercial Properties were not included in the definition of asset as prescribed u/s.2(ea) (i) of the Wealth-tax Act, 1957 as it stood prior to 01/04/1997. Since the year under consideration was Asst. Year 1996-97, it was held by the Hon'ble High Court that the said property cannot be assessed under the Wealth-Tax Act. 1957. (T.A. no 540 of 2006. dt 16/06/2012)]
Narayan T. Baddi (Dr.) (2012) BCAJ -November-P. 402) (Guj.) (High Court)

S.2(ea): Asset –Lease for 99 years-Used for the purpose of business-Landis exempt.
Assessee had been allocated land in question on 99 years lease by State Industrial Corporation. WTO denied exemption under section 2(ea) (i) (3) and subjected land to wealth tax on ground that assessee was not doing any business therefrom for last number of years. In fact it was found that assessee had carried on its business utilizing aforesaid asset for this purpose, and this position was even accepted by department as well. On factsland in question held by assessee was exempt from wealth-tax under section 2(ea) (i) (3). (A.Y.2001-02 to 2004-05)
CIT v. Sohna Forge (P.) Ltd. [2013] 212 Taxman 82 (Mag.) (Delhi) (High Court)

S.2. (m):Net wealth- Asset-Surplus of income-Presumption-Exception-No presumption -Addition of income from undisclosed sources in earlier yearsis nottreated as surplus available in assessee's hands to be treated as wealth for purpose of wealth-tax forlatteryears.
The Income-tax Officer, for the assessment years 1985-86 to 1988-89, found that the total surplus available with the assessee by way of income being Rs. 21,15,164 and the total wealth disclosed by the assessee being Rs.97, 25,000, the increase in the wealth was to the tune of Rs. 76,09,836. That income of Rs. 76,09,836 was taken to be income from undisclosed sources. The total available surplus available with the assessee during the assessment years 1973-74 to 1976-77 was declared to be Rs. 21,15,164 based on the assessed income of the assessee for the three years. The Tribunal upheld the assessment. On appeals :
Held, dismissing the appeals, that the addition of Rs. 23,59,461 made from the assessment years 1963-64 to 1970-71 could not be held to be assets in the hands of the assessee after the period of more than eight years and, therefore, no tax could be imposed on the basis of such addition of Rs. 23,59,461 treating it to be wealth for the purpose of wealth-tax for the years 1985-86 to 1988-89 and onwards. (A. Y. 1985-1986, to 1988-1989)
Gyan Chand Jain v. CWT (2013) 350 ITR 353/84 DTR 170/257 CTR 273 (Jharkhand) (High Court)

S.4: Deemed wealth-Asset-'belonging to'-Allotment of land-Liable to wealth tax.
Assessee was allotted certain land by State Government. It constructed sheds thereon and rented out same to industrialists. Assessing Officer observed that though income from those sheds had been reflected in income of assessee, in return of wealth tax aforesaid shed were not shown as 'assets' of assessee. Assessing Officer, therefore, added value of those sheds towards assets of assessee - On appeal, Tribunal held that property in question could not be treated to be assets of assessee since same had only been allotted to it and was actually transferred in its favour in a later year.Since assessee was deriving rental income from sheds, property should be deemed to be belonging to assessee and was liable to be included in its assets.
CIT v.H. P. Small Industries & Export Corp. (2013) 212 Taxman 84 (Mag.) (HP.) (High Court)

S.5(i): Exemptions - Property held by charitable and religious trust –Exemption is held to be available.

Assessee trust was constituted with object to provide educational facilities in catering.One 'K' transferred movable and immovable properties of hotel 'V' to assessee-trust for providing catering education therein.Said transfer was treated as gift in hands of 'K' but on appeal levy of gift tax was set aside by Tribunal holding that there was no gift and it was only a permission granted for a college to manage same free of rent. In case of assessee, Assessing Officer treated assets of hotel 'V' as assessee's wealth and computed wealth tax liability payable by assessee.when assessee was not liable to pay any income-tax on income derived by it from activity carried on by it and 'K' was held not liable to pay gift-tax for transfer of property in assessee's favour, levy of wealth tax on very same property on ground that activity conducted by assessee in respect of property did not constitute a charitable or religious purpose was unjustified. Appeal of revenue was dismissed. (A.Y. 1986-87)

CIT v.Manipal Hotel & Restaurant Management College Trust[2013] 212 Taxman 86 (Mag.) (Karn.) (High Court)

S.7: Valuation of assets - Immovable property – Let out property - Interest free deposits-Annual rent-Addition was up held:

Assessee let out its property on annual rent of Rs. 4.42 lakhs. It also received interest free deposits of Rs. 31.50 lakhs from tenant - While computing fair market value of property let out, Assessing Officer added interest at rate of 14 per cent on Rs. 31.50 lakhs to figure of annual rent. Commissioner (Appeals) as well as Tribunal held that interest amount could not be added to annual rent to compute fair market value of property. It is undisputed that as per Schedule III, rule 5, where an owner has accepted an amount or deposit, not being an advance payment towards rent for a period of 3 months or less, an amount calculated at rate of 15 per cent per annum on amount of deposit outstanding from month to month shall be added to compute annual rent. In view of aforesaid, computation made by Assessing Officer by adding interest on security deposit to figure of annual rent was to be upheld. Appeal of revenue was up held.(A.Y.1985-86 to 1987-88)

CWT v.M G Builders Co. (2013) 212 Taxman 15 (Mag.) (Delhi) (High Court)

S.7: Valuation of assets - Immovable property - Slums on property has to be considered for the purpose of valuation of property.

Assessee acquired 50 per cent of share in a property. He acquired same under registered sale deed.AAC accepted valuation of assessee where under apart from consideration mentioned in sale deed and market value of the property, impediments like ownerships slums on property were also taken into consideration in coming to fair market value. On appeal, Tribunal declined to interfere with finding recorded by AAC.On facts, valuation accepted by Tribunal was just and proper and represented true market value of property. (A.Y.1996-97 to 2003-04)

CIT v. S.K. Ramprasad(2013) 212 Taxman 15 (Mag.) (Karn.) (High Court)

S.16: Assessment –Notice- Reassessment-Order passed without issuing mandatory notice held to be in valid. (S.16(2), 16(4), 17)

A notice under section 17 was issued to assessee on ground that authority had reason to believe that wealth had escaped assessment - Assessee did not file any return, in response to said notice. Assessing Authority issued a notice under section 16(4) calling upon assessee to produce accounts books and other documents for verification. Instead of producing books as sought for in said notice, assessee filed returns under section 16(4) (i).Thereafter, Assessing Authority passed assessment order.Assessee challenged said order before Appellate Commissioner on ground that notice under section 16(2) was not issued before passing an order of assessment which was mandatory. Appellate Commissioner taking a view that notice issued under section 16(4) would satisfy requirement of law as well as principles of natural justice, dismissed assessee's appeal. On further appeal, Tribunal held that impugned order of assessment passed without complying with requirement of section 16(2) was invalid. On appeal by revenue the Court held that since Assessing Officer had neither given a notice under section 16(2) nor a notice as contemplated in proviso to section 16(5) and passed impugned order, order so passed was violative of principles of natural justice, therefore, Tribunal was justified in setting aside impugned assessment order. (A.Y.1999-2000 to 2003-04)

CWT v. Prameela Krishna (Smt) (2013) 212 Taxman 16 (Mag.) (Karn.) (High Court)

S. 16(1) (a):Assessment-Primafacie adjustment-Debatable-Transit house.

In the proceedings u/s. 16(1) (a), transit house could not be included in the value of net wealth. (A.Y. 1995-96)

Carborandum Universal Ltd. v. Dy. CWT (2013) 83 DTR75 (Mad.) (High Court)

S.18(1 (c):Penalty-Concealment-NO penalty can be levied in respect of addition made on account of adoption different methods of valuation by assessee and Department:

No penalty can be levied u/s.18(1) (c) on addition made in respects of difference in valuation of properties on account of adoption of different methods of valuation by assessee and department further, in case the penalty order does not

clearly spell out as to whether the penalty is levied for concealment of wealth orfor furnishing inaccurate particular of wealth. (T.A. No. 145 / 147 Of 200, dt, 24/07/12)]
Ramanbhai B. Patel HUF (2012) BCAJ -November-P. 399) (Guj.) (High Court)

S.24: Appellate Tribunal –Power- Appeal-Rectification of mistake-No power to review.
Assessee is an individual belonging to royal family of Patiala. In course of wealth-tax proceedings, department had bifurcated residential land bounded by four walls of property into different segments and adopted different rates of land. On appeal, Tribunal considered facts of case and proceeded to hold that value of residential house and land appurtenant to residential house might be valued as per provisions of section 7(4). However, in same order, Tribunal proceeded to hold that classification of land into different categories, area of land and valuation of land, was fair and reasonable. In view of apparent contradictions in Tribunal's order, assessee filed a miscellaneous application.Tribunal thus recalled its order for a limited purpose of determining valuation of land appurtenant to residential house in question. Subsequently, Tribunal concluded that there was no contradiction in findings recorded. On facts, approach adopted by Tribunal in impugned order smacked review of earlier order. Therefore, the impugned order was to be set aside and, matter was to be remanded back with a direction to Tribunal to reconcile figuring in earlier order instead of writing a perfunctory order. Matter remanded (A.Y.1972-73 to 1984-85)
Raja Malwinder Singh v. CWT (2013) 212 Taxman 17 (Mag.) (P & H) (High Court)

Excise and Customs.
Excise and Customs-Stay- Recovery-CBEC Circular that demand should be recovered even if stay application is not disposed of for no fault of assessee is arbitrary, unjustified & unlawful-Digital data records- For better administration and control to safe guard the interest of revenue as well as fairness to assessees, Union of India Ministry of Finance requested to give these suggestions serious and urgent consideration.

The Central Board of Excise and Customs (CBEC) issued Circular No. 967/01/ 2013 – CX dated 01.01.2013 to deal with recovery of demand. The Circular provided that (i) even if a stay application is pending, steps for recovery must be initiated thirty days after the filing of the appeal if no stay is granted, (ii) if the Commissioner (Appeals) has confirmed a demand, recovery has to be initiated immediately despite s. 35F permitting the assessee to move the Tribunal for a dispensation of the requirement of deposit and (iii) if the Tribunal has confirmed the demand, recovery should be initiated immediately despite the statute providing a time period for filing an appeal to the High Court. The Circular was challenged by the assessees on the ground that recovery of the demand even when the assessee is not responsible for the delay in disposal of the stay application/ appeal and during the pendency of the time period for filing an appeal was arbitrary and violative of Article 14 of the Constitution. Held by the High Court upholding the plea:

(i) Though in Krishna Sales (Collector of Customs Bombay v. Krishna Sales (P) Ltd. (1994) 73 ELT 519 (SC) it was held that the mere filing of an appeal does not operate as a stay or suspension of the order appealed against, where the delay in the disposal of an appeal or a stay application arises due to a failure of the Appellate Authority to dispose of the appeal or the stay application and the assessee is not at fault, there is no reason or justification to penalize the assessee by recovering the demand in the meantime. Administrative reasons for non-disposal of the stay application may include lack of adequate infrastructure, unavailability of the officer concerned before whom the stay application has been filed, absence of a Bench before the CESTAT for the decision of an application for stay or the sheer volume of work. In such a situation, where an assessee has done everything within his control by moving an application for stay and which remains pending because of the inability of the Commissioner (Appeals) or the CESTAT to dispose of the application within thirty days, it would be a travesty of justice if recovery proceedings are allowed to be initiated in the meantime. The protection of the revenue has to be necessarily balanced with fairness to the assessee. That was why, even though a specific statutory provision came to be introduced by Parliament in s. 35C(2A) to the effect that an order of stay would stand vacated where the appeal before the Tribunal was not disposed of within 180 days, the Supreme Court held in COC &C.Ex.(Ahd) v. Kumar Cotton Mills Pvt. Ltd. (2005) 180 ELT 434 (SC) that this would not apply to a situation where the appeal had remained pending for reasons not attributable to the assessee.

(ii) Also initiation of recovery proceedings without allowing the assessee, the time which is allowed by the statute for filing an appeal and for applying for a waiver of pre-deposit or for filing an appeal to the High Court is not justified. The circular is in terrorem and its plain effect and consequence is to deprive the assessee of the remedy which is provided under the law of moving, as the case may be, the CESTAT, the High Court or the Supreme Court against an order of adjudication of the competent appellate forum. There is no justification to commence recovery immediately following an order in appeal where the limitation period for challenging the decision of the Appellate Authority has not expired. The Circular is to that extent patently arbitrary and violative of Article 14 of the Constitution. The Department's argument that the field officers who initiate recovery action have no means of verifying the status of the stay application is not justified. The Ministry of Finance should take steps to ensure that proceedings before all the authorities are recorded in the electronic form. This will provide transparency and accountability in the functioning of all authorities. However, if the failure to dispose of the stay application is because of the conduct of the assessee, the revenue would be justified in commencing recovery action.

Larsen & Toubro Limited v. UOI(2013) (288) E.L.T. 481 (Bom.) (High Court).

S.35C: Stay of recovery-Proviso-CBEC Tax Recovery Circular is untenable, misconceived, wholly illegal and arbitrary.

The High Court had to consider two issues: (i) whether the revenue is justified in initiating recovery proceedings on the basis of Circular dated 01.01.2013, even when an application for waiver of pre-deposit is pending before the Appellate Authorities for the reason that on such application for stay or waiver of pre deposit, no orders have been passed? And (ii) whether the second proviso in sub-section (2A) of s. 35C is directory and that the Tribunal in appropriate circumstances can extend the period of stay beyond 180 days? Held, by the High Court:(i) The Circular is purported to be issued in terms of the judgement in Krishna Sales (73) ELT 519 (SC). Though in Krishna Sales it was held that mere filing of an appeal does not operate as stay or suspension of the order appealed against, the Board has overlooked the fact that the assessee is not seeking stay only on account of filing of an appeal, but for the reason that the assessee has sought dispensing with the pre-deposit of duty and penalty and has a right to demand decision on such application, a right which is created by the Statute. Therefore, the very basis of the Circular is untenable, misconceived, wholly illegal and arbitrary. Therefore, the condition of recovery, if no stay is granted within 30 days, is illegal, arbitrary, unjustified and consequently set aside (Larsen & Tuobro (Bom) referred);

(ii) As regards appeals pending before the Tribunal, the assessee has no control over the non-disposal of the appeal on account of non-availability of infrastructure; the members of the Tribunal and the workload. The vacation of stay for the reason that the Tribunal is not able to decide appeal within 180 days is a harsh, onerous and unreasonable condition. It burdens the assessee for no fault of his. Such a condition is onerous and renders the right of appeal as illusory. An order passed by a judicial forum cannot be annulled for no fault of the assessee. Therefore, s. 35C(2A) which provides for automatic vacation of stay on the expiry of 180 days has to be read down to mean that after 180 days the Revenue has a right to bring to the notice of the Tribunal the conduct of the assessee in delay or avoiding the decision of appeal, so as to warrant an order of vacation of stay. If the provision is not read down in the manner mentioned above, it suffers from illegality rendering the right of appeal as redundant.

PML Industries Limited v. UOI (P&H)High Court) ,www. itatonline.org.S. 35L: Appeal-High Court-Grounds not argued before Tribunal is not to be raised.

The Court held that in an appeal under section 35L of the 1944 Act, it is not open to either party to raise a new ground which was never argued before the Tribunal. The court's scrutiny of the arguments advanced has to be limited only to those grounds which were argued by the parties and addressed by the Tribunal in its order.

CCE v. Connaught Plaza Restaurant P. Ltd (2013) 18 GSTR 1 (SC.)

SERVICE- TAX.

S. 65.Service tax –Point of taxation- CBEC Circulars on CA's liability to pay higher service tax rate on services rendered/ invoice raised before 01.04.2012 but payment received thereafter is ultra vires. (Finance Act, 1994.S. 65(105) (s),66b), Point of taxation Rules 2011, rule, 4,7)

Rule 2(e) of the Point of Taxation Rules, 2011 inserted w.e.f. 01.04.2011 defined "point of taxation" as the point in time when a service shall be deemed to have been provided. Consequent to the insertion of s. 66B, the rate of service tax was enhanced from 10% to 12% w.e.f. 01.04.2012. The High Court had to consider what would be the rate of tax where (a) the service is provided by the chartered accountants prior to 01.04.2012 (b) the invoice is issued by the CAs prior to 01.04.2012 but (c) the payment is received after 01.04.2012. On facts, as the services were rendered before 01.04.2012 and even the invoices were raised before that date and it was only that the payment was received after the said date, the Petitioner claimed that Rule 4(a) (ii) of the Point of Taxation Rules, 2011 applies and the point of taxation shall be the date of issuance of the invoice. However, the service tax authorities issued Circular No.154 dated 28.03.2012 and Circular No.158 dated 08.05.2012 that in respect of invoices issued on or before 31st March 2012 the point of taxation shall be the date of payment. The Petitioner filed a Writ Petition to challenge the said Circulars. HELD by the High Court upholding the plea:

Rule 4 of the Point of Taxation Rules, 2011 which has continued even after 01.04.2012 is clearly the answer. It provides for a specific situation namely determination of the point of taxation in case of change in effective rate of tax. As per Rule 4, whenever there is a change in the effective rate of tax in respect of a service, the point of taxation shall be determined in the manner set out in the Rule. Sub-clause (ii) of Clause (a) of Rule 4 provides that where the taxable service has been provided before 01.04.2012 and the invoice was also issued before 01.04.2012, but the payment is received after 01.04.2012, then the date of issuance of invoice shall be deemed to be the date on which the service was

rendered and, consequently, the point of taxation. The result is that where the services of the chartered accountants were actually rendered before 01.04.2012 and the invoices were also issued before that date, but the payment was received after the said date, the rate of tax will be 10% and not 12%. The circulars in question have not taken note of this aspect, and have proceeded on the erroneous assumption that the old Rule 7 continued to govern the case notwithstanding the introduction of the new Rule 7 which does not provide for the contingency that has arisen in the present case. Consequently, the circulars are quashed as being contrary to the Finance Act, 1994 and the Point of Taxation Rules, 2011. A Circular which is contrary to the Act and the Rules cannot be enforced (Ratan Melting & Wire Industries followed)
Delhi Chartered Accountants Society v. UOI (2013) 84 DTR 25/257 CTR 73(Delhi) (High Court)

Allied Laws.
Service matter - Promotion of income-tax Inspectors - Direct recruits – promotes.
where examination and selection process of direct recruits could not be completed within recruitment year itself, modification/amendment in manner of determining inter se seniority between direct recruits and promotees, carried out through Office Memorandum dated 7-2-1986, and compilation of instructions pertaining to seniority in Office Memorandum dated 3-7-1986 leave no room for any doubt that 'rotation of quotas' principle would be fully applicable to direct recruits. Direct recruits will, therefore, have to be interspaced with promotees of same recruitment year. Claim of promotees that direct recruit Income-tax inspectors in such a case should be assigned seniority with reference to date of their actual appointment in Income-tax Department; and not date of original/first examination/selection, was to be declined.
UOI v.N.R. Parmar(2013) 212 Taxman 97 (SC)

Income-tax Appellate Tribunal-Powers of President- Transfer of members-As there is prima facie merit in the allegation regarding improper Collegium & mala fides, interim stay on transfer of ITAT Member cannot be vacated
Hon'bleShri. Sunil Kumar Yadav, Judicial Member, posted at Lucknow, filed a case before the Central Administrative Tribunal (CAT), Lucknow Bench, claiming that his transfer, within a span of one year, from Lucknow to Chennai, which was then modified from Lucknow to Kolkota was "arbitrary and with a malafide intention" and contrary to the guidelines laid down in Ajay Gandhi vs. V. B. Singh (2004) 2 SCC 120. By an interim order dated 19.11.2012, the CAT stayed operation and implementation of the impugned transfer order. The UOI and the President of the Tribunal filed an application seeking vacation of the stay order. HELD by the CAT:

The interim order has been passed on the basis of a prima facie case that the impugned transfer order has not been made by a proper Collegium in accordance with the guidelines laid down in Ajay Gandhi's case and also on the ground of alleged mala fides against the present officiating president of the ITAT. A new point has now been raised by the transferred Member that the ACC (Cabinet Committee of Appointment) has not yet accorded approval on the proposed appointment of Shri Karwa as officiating President of the ITAT on the ground that by such appointment there is a supersession of three persons and as there is no difference between an appointment in a substantive capacity and an officiating capacity, the appointment requires to be considered first by the Selection Committee. This approval may or may not come in due course of time and then only the exact status of the competent authority i.e. the President, ITAT, would be ascertained. For the present, prima facie, this point is in favour of the applicant. As regards the point of proper Collegium, the requirement in Ajay Gandhi is that the President should consult two senior Vice Presidents and not the two Vice Presidents available. It has been alleged that though the two Senior Vice Presidents were available for the Collegium, they were ignored in an arbitrary manner and in utter defiance of the law. Prima facie there appears to be some substance in the submission. A prima facie case has also been made out as regards the allegation of malafides. Consequently, there is no substantial and sufficient ground for vacating the interim order dated 19.11.2012
Sunil Kumar Yadav v. UOI (CAT) www.itatonline.org
Interpretation of taxing statues.
Precedent- Judgment of Foreign Courts- Persuasive value.
The judgment of Foreign Courts have only persuasive value.
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