CONTENTS

303 Case Laws Digested in this issue from 33 journals & www.itatonline.org (April 2014 to June, 2014)

ALL INDIA FEDERATION OF TAX PRACTITIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020. • Tel.: 22006342
Telefax: 22006343 • E-mail: aiftp@vsnl.com • Website: www.aiftponline.org

Membership of AIFTP as on 16-8-2014

		Life Members			
	Associate	*Individual*	*Association*	*Corporate*	*Total*
Central	0	796	23	3	822
Eastern	3	1163	35	3	1204
Northern	0	956	17	0	973
Southern	1	901	13	6	921
Western	4	1715	33	16	1768
Total	**8**	**5531**	**121**	**28**	**5688**

Subscription Rates w.e.f. 1-4-2014

1. Life Membership of the AIFTP ₹ 2,500/-
   Subscription of AIFTP Journal (for 1 year) ₹ 800/-
   Subscription of AIFTP Journal (for 3 years) ₹ 2,100/-
2. For Non-Members
   Subscription of AIFTP Journal (for 1 year) ₹ 1,000/-
   Subscription of AIFTP Journal (for 3 years) ₹ 3,000/-
   Single copy of the AIFTP Journal ₹ 80/-
3. Corporate Membership

Nature of fees	Type I (5 Yrs.) ₹	Type II (10 Yrs.) ₹	Type III (15 Yrs.) ₹	Type IV (20 Yrs.) ₹
Admission	500/-	500/-	500/-	500/-
Subscription	5,000/-	7,500/-	11,500/-	15,000/-
Total	5,500/-	8,000/-	12,000/-	15,500/-

Note: Members may download the membership form from the website of AIFTP., i.e., www.aiftponline.org

ADVERTISEMENT TARIFF FOR AIFTP JOURNAL
(W.e.f. 15th July, 2013)

	Particulars	**Per Insertion**
1.	Quarter page	₹ 1,500/-
2.	Ordinary half page	₹ 2,500/-
3.	Ordinary full page	₹ 5,000/-
4.	Third cover page	₹ 7,500/-
5.	Fourth cover page	₹ 10,000/-

There shall be Discounts on bulk advertisements.

From the Editor-in-Chief

The National Judicial Appointments Commission Bill, 2014 – A strike at the root of judicial independence – Present collegium system of appointing Judges should be continued – However, the system needs to evolve into a more transparent one – One more legal battle of the century to preserve the independence of the Judiciary is awaited

One of the objects of the All India Federation of Tax Practitioners (the Federation) is "To strive and work for independence of Honourable Courts". The Tax Bar has always played a paramount role in warding off threats to the independence of the Judiciary. It was due to the labours of the Tax Bar that the independence of the Income-tax Appellate Tribunal (ITAT) could be preserved *[Ajay Gandhi v. B.Singh (2004) 265 ITR 451(SC); ITAT v. V.K.Agarwal (1999) 235 ITR 175 (SC)].* Similarly, attempts of the Legislature to take away powers of the High Courts and to give them to a Tribunal to decide substantial questions of law has also been challenged *[All India Federation of Tax Practitioners v. UOI (2003) 264 ITR 466/ 133 Taxman 491 Orissa(HC)/ P.C.Joshi v. UOI WP No 45 of 2006 dt 8-2-2006 (Bom.)(HC)].* A constitutional bench of the Apex Court has heard the petitions and a judgment on the issue is awaited.Whatever may be the outcome of the judgment, the Tax Bar has the satisfaction that it has made a sincere attempt to preserve the independence of the Judiciary. Noted jurist Shri Fali S. Nariman has stated that the 121st Constitution Amendment Bill, 2014 and the National Judicial Appointments Commission Bill, 2014 "hit at the root of judicial independence".He also stated that "...the independence of the judiciary is now the cornerstone of the Constitution. And anything that is done which damages it is anathema and the people who decide are the judges of the Supreme Court".

The senior members of the Tax Bar are of the opinion that the present system of the appointment of judges should be continued with albeit increased transparency.

When a collegium of High Court selects a candidate as a Judge, they take utmost care that only persons of integrity are selected.The credentials of the candidate are judged by looking at his or her performance in the court for years, making enquiries with other judges and advocates. However, under the proposed system, it remains to be seen how would the Minister of Law and Justice or any other nominated member be in a position to judge the integrity of the proposed candidate who appears before courts in different parts of the country. Today, when the Government is the biggest litigant in various courts of

the country, would a Judge be in a position to rule without fear or favour in such matters without jeopardising his or her chances of elevation to the Apex Court!

The Federation therefore suggests as under:

1. Steps must be taken to introduce transparency and wider consultations in the present system of Collegium;

2. There could be three categories of selections:

   (i) After looking at the performance of advocates in courts and after enquiring into their credentials, advocates may be selected by the Collegium, and thereafter, he or she may be requested to forward an application in appropriate form;

   (ii) Applications may be invited by the Registry of High Courts from advocates who are eligible to be appointed as Judges.

   (iii) Selection of Judges from the lower courts / judicial authorities such as the Income-tax Appellate Tribunal.

3. Eligible criteria may be prescribed such as

   (i) 20 cases involving important issues appeared in;

   (ii) Details of income declared for last three years for practising lawyers;

   (iii) Recommendation of at least three Senior Advocates or Advocates having more than 30 years of practice in that High Court;

   (iv) Contribution to the development of the profession.

4. After scrutinising the applications, the names of shortlisted candidates may be circulated in the full court of the respective High Court or at least among its senior Judges and thereafter the names of approved candidates be forwarded to the Supreme Court Collegium.

5. In the era of specialisation, persons who are well conversant with certain specialised Areas of law such as taxation, IPR etc. deserve to be appointed.In the Income–tax Appellate Tribunal, for instance, certain Judicial Members deserve to be appointed as High Court judges. As per the transfer procedure, a professional appearing before the Income–tax Appellate Tribunal is not posted as Member in the same State where he was practising. Therefore, the Collegium of the High Court concerned may not have the mechanism to judge the credentials of the prospective candidates from the Income–tax Appellate Tribunal. Thus,the collegium of the High Court may, in consultation with the Income-Tax Appellate Tribunal, devise an appropriate internal mechanism for obtaining feedback about the proposed candidates. This will help attract deserving candidates of the Income–tax Appellate Tribunal to the High Court.

   As regards appointment and elevation to the Apex Court, the present system of Collegium should be continued with greater transparency.

The National Judicial Appointments Commission Bill may not achieve the desired objective. On the contrary it may turn out to be a great threat to the independence of the Judiciary. Possibly, one more legal battle is awaited.

I am of the opinion that Government should not have hurried in to bringing in this Bill; instead, consultations on how to bring in greater transparency in the present Collegium system could have been invited. If this Bill becomes an Act in its present form, the Federation may have to join-in to challenge it, for preserving the independence of the Judiciary. In an interview, the chairman of the Law Commission of India, Justice A.P. Shah, stated that in the 60s and the 70s, the Bar used to be very strong and at times used to take up issues of corruption and stalled judicial appointments. The Tax Bar has also raised such issues from time to time, passed resolutions and brought such issues to the notice to the authorities concerned.

We acknowledge the efforts of the Honourable Prime Minister, Shri Narendra Modi, to eradicate corruption at all levels and on the 68th Independence Day, all Tax professionals must pledge for independence of the Judiciary and zero tolerance towards corruption in judiciary and quasi-judicial authorities.

Members may send their views.

Dr. K. Shivaram
Editor-in-chief

President's Message

My beloved Members,

68th Independence Day greetings and National Scenario

By the time you read present message we would have celebrated our 66th Independence Day with great joy and pride! Simultaneously, on this occasion, we would have committed ourselves for the growth and prosperity of the nation notwithstanding, the huge problems of poverty, inflation and corruption in all walks of life, which await our steely determination for its resolution.

Concerning our democracy and profession, at the moment, serious debate is taking place opened up by former CJI and at present Press Council Chief Justice Mr. Markendey Katju, who, earlier, exposed corruption in judiciary. Also, whether Judicial Bill to amend Article 124 of the Constitution for diluting the 'Role of Collegium System', should be introduced and passed in the Parliament? As per latest news, Government is serious about the passing of the said Bill on top priority. Notwithstanding this fact, CJI Hon'ble Justice Mr. R.S. Lodha stood for defending 'Collegium System'. Mr. K.T.S. Tulsi, Sr. Advocate, Supreme Court and Rajya Sabha MP, recalled Dr. B.R. Ambedkar, the Architect of the Constitution, saying : "to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day." In this context, Justice Singhvi, said : "Collegium System on its Own has worked very well". While Sr. SC Counsel Mr. Shekhar Naphade said : "It is only the Sterling Character of the people who head these institutions which will matter".

Lastly, in the aforesaid matter, Hon'ble Union Law Minister Mr. Ravi Shankar Prasad said: "The Government has no intention whatsoever to interfere in the authority and powers of the SC, favours its independence but at the same time the sanctity and supremacy of Parliament should be maintained."

Now, we are eager to attend and participate in a Two-day National Tax Conference at Nagpur commencing on 23rd August, 2014. The Organizers AIFTP (Western Zone), STPAM, Mumbai, ST Bar Association and Vidharbha Bar Association, Nagpur, have already put in their hard work for the success of the said conference. I therefore offer my best wishes for the grand success of the conference. Members are also requested to spare time and attend one day Conference at Anand, Gujarat on 6th September, 2014, arranged by AIFTP (Western Zone).

Needless to state that I am in good health and would be attending the National Executive Committee Meeting followed by Nagpur Conference.

With best wishes and regards,

(J.D. Nankani)
National President

DIRECT TAXES

Supreme Court
Research Team

5. S.2(24): Income – Transfer of development rights (TDR) – Compensation paid to members – Amount cannot be taxed in the hands of society. [S.2(14), 2(47)]

Assessee was a hosing society consisting of 51 members. It had certain property. Developer has paid certain amount to the society for granting consent to consume TDR purchased by developer from 3rd party. Developer has also paid certain amount of compensation to individual members of society. AO held that compensation received by the society and members of the society also taxable in the hands of society. On appeal Tribunal held that amount of compensation paid by the developer to the members of the society cannot be taxed in the hands of society as individual members have offered the income to tax in their respective assessment. Society has received only ₹ 2.51,000 for granting consent to consume TDR purchased by the developer from third party. The Society continued to be the owner of the land and no change in ownership of the land had taken place. Mere grant of consent would not amount to transfer of land or any rights therein. Tribunal deleted the addition. The Revenue has filed an appeal to High Court which was dismissed by Bombay High Court (ITA NO 2292 of 2011 dt. 27-12-2013. Revenue has filed SLP before Supreme Court, which was also dismissed. (A.Y.1997-98)(S.L.P(C) No. 34415 of 2015 dt. 28-10-2013).

CIT v. Raj Ratan Palace Co-operative Housing Society Ltd (2014) 362 ITR 1(St.)(SC)

Editorial: Refer Raj Ratan Co-operative Housing Society Ltd. (2011)46 SOT 217 (URO) (Mum.)(Trib.)

6. S.2(47): Transfer-Capital gain – Profit on sale of property used for residence – If an agreement to sell is entered into within the prescribed period, there is a transfer of some rights in favour of the vendee. Fact that sale deed could not be executed within the time limit owing to supervening problem is not a bar for s. 54 exemption. [S.45,54]

Consequences of execution of the agreement to sell are very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed. A right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27.12.2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated. As held in *Oxford University Press v. CIT [(2001) 3 SCC 359]* a

purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax and one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act. (A.Y. 2005-06)

Sanjeev Lal ETC. v. CIT(2014) 105 DTR 305(SC)

7. S.9(1)(i): Income deemed to accrue or arise in India – Business connection – Procurement fees – Deduction at source – Substantial question of law – Matter remanded back to High Court to decide the issue by taking in to consideration section 26A. [S.9(1)(vii), 40(a)(ia), 260A]

The Court observed that the High Court merely quoted the decision of the Tribunal in extensor in its judgment without deciding the substantial questions of law raised by the Revenue as to whether the Tribunal erred in holding that the procurement fees received by the assesse is taxable under section 9(1)(i) or 9(1)(vii) and deleting the disallowances under section 40(a)(i). Apex Court set aside the matter to High Court and decide the questions of law keeping in consideration of the provisions of section 260A.

DIT(IT) v. Black & Veatch (I) (P) Ltd. (2014) 101 DTR 289/222 Taxman 1/267 CTR 183 (SC)

Editorial: Judgment of Bombay High Court in ITA no 927 of 2010 dt. 17-01-2011 was set aside.

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

On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes. The fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in color. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. In judging whether a certain purpose is of public benefit or not, the Courts must in general apply the standards of customary law and common opinion amongst the community to which the parties interested belong to. Customary law does not restrict the charitable disposition of the intended activities in the objects. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community. The activity of Nyaz performed by the assessee does not delineate a separate class but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility. Even the establishment of Madrasa or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education u/s. 2(15). The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s 11.

On facts, though the objects of the assessee-trust are based on religious tenets under Quran according to religious faith of Islam, the perusal

of the objects and purposes of the assessee would clearly demonstrate that the activities of the trust are both charitable and religious and are not exclusively meant for a particular religious community. The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of s. 13(1)(b).

CIT v. Dawoodi Bohra Jamat(2014)364 ITR 31/102 DTR 361/222 Taxman 228 (Mag.)(SC)

9. S.40(a)(ia): Amounts not deductible-Deduction at source – Disallowance applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year – SLP of department was dismissed.

In CIT v. Vector Shipping Services (P) Ltd. (2013) 357 ITR 642(All)(HC) held that disallowance u/s. 40(a)(ia) applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year. The majority judgment in *Merilyn Shipping& Transports v. Add. CIT (2012) 136 ITD 23 (SB)* was approved. The department filed a Special Leave Petition (SLP) in the Supreme Court. The said SLP has been dismissed by the Supreme Court in limine.(SLP No. 8068/2014, dt. 02/07/52014)

CIT v. Vector Shipping Service (P) Ltd. (SC),www. itatonline.org

10. S.80HHC: Export – "turnover" – Sale proceeds of scrap is not "turnover" for s. 80HHC – Provision intended to encourage businessmen in order to bring more foreign exchange – Department should encourage such traders

(i) The word "turnover" means only the amount of sale proceeds received in respect of the goods in which an assessee is dealing in. So far as the scrap is concerned, the sale proceeds from the scrap may either be shown separately in the Profit and Loss Account or may be deducted from the amount spent by the manufacturing unit on the raw material. When such scrap is sold the sale proceeds of the scrap cannot be included in the term 'turnover' for the reason that the unit is engaged primarily in the manufacturing and selling of steel utensils and not scrap of steel. Therefore, the proceeds of such scrap would not be included in 'sales' in the Profit and Loss Account of the assessee. (The situation would be different in the case of a person who is primarily dealing in scrap).

(ii) The intention behind enactment of s. 80HHC was to encourage export so as to earn more foreign exchange. For the said purpose the Government wanted to encourage businessmen, traders and manufacturers to increase the export so as to bring more foreign exchange in our country. If the purpose is to bring more foreign exchange and to encourage export, we are of the view that the legislature would surely like to give more benefit to persons who are making an effort to help our nation in the process of bringing more foreign exchange. If a trader or a manufacturer is trying his best to increase his exports, even at the cost of his business in a local market, we are sure that the Government would like to encourage such a person. In our opinion, once the Government decides to give some benefit to someone who is helping the nation in bringing foreign exchange, the Revenue should also make all possible efforts to encourage such traders or manufacturers by giving such business units more benefits as contemplated under the provisions of law.

CIT v. Punjab Stainless Steel Industries (2014) 364 ITR 144/ 103 DTR 49/268 CTR 113 (SC)

CIT v. Punjab Stainless and Steel Industries (2014) 364 ITR 144/ 103 DTR 49 (SC)

CIT v. Dhram Industries (2014)364 ITR 144/ 103 DTR 49 (SC)

11. S.158BD: Block assessment – Undisclosed income of any other person – Satisfaction can be (a) at the time of or along with the initiation of proceedings against the searched person u/s. 158BC of the Act; (b) along with the assessment proceedings u/s 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s. 158BC of the Act of the searched person. [S.158BC, 158BE]

The result is that for the purpose of s. 158BD a satisfaction note is *sine qua non* and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person u/s. 158BC of the Act; (b) along with the assessment proceedings u/s. 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s. 158BC of the Act of the searched person. Where satisfaction was not recorded at all matter was set aside to decide the issue.

CIT v. Calcutta Knitwears (2014)362 ITR 673/ 101 DTR 217223 Taxman 446/267 CTR 105(SC)

12. S.164: Representative assessee-Charge of tax – Discretionary trust or specific trust – Beneficiaries unknown – Settlor having executed the deeds giving discretion to the Trustees to disburse benefits among the beneficiaries and the trsutees having retained the income and not disbursed the same among the beneficiaries, the trusts continued to be 'discretionary trust' in the relevant assessment years and the value of the assets cannot be assessed on the estate of the deceased settlor. [Wealth-tax Act, 1957 S. 21(3)]

The ex-Ruler of Gondal Shri Vikramsinhji executed three deeds of settlements (trust deeds) in the USA & UK. These trusts were created for the benefit of (a) the Settlor, (b) the children and remoter issue for the time being in existence of the Settlor and (c) any person for the time being in existence who is the wife or widow of the Settlor or the wife or widow or husband or widower of any of them, the children and remoter issue of the Settlor. During his life time, the settlor, Shri Vikramsinhji, was including the whole of the income arising from these trusts in his returns of income. The said income was also included in the two returns filed by his son Jyotendrasinhiji for the A.Y. 1970-71. Thereafter, the assessee took the stand that the income from these trusts is not includible in his income. Jyotendrasinhiji also took the stand that inclusion of the said income in the returns submitted by his father for the A.Y.s 1964-65 to 1969-70 and by himself for the assessment year 1970-71 was under a mistake. Clause 3 of the deeds of settlement executed in U.K. leaves at the discretion of the trustees to disburse benefits to the beneficiaries. The endorsement made in the returns, as noted above, shows that income was retained by the trustees and not disbursed. The Tribunal while considering clause 3(2) and Clause 4 of the U.K. Trust Deeds observed that if the trusts were really intended to be discretionary, the trustees had a duty cast on them to ascertain the relative needs and personal circumstances of all the beneficiaries and to allocate the income of the trusts, among them from time-to-time, according to the objects

of the trusts, however, the telltale facts bring out the intention of the settlor to treat the trust property as his own. The settlor and after his death his son have been showing the income of foreign trusts in the returns of income filed from time-to-time. Had the trust deeds been really understood by the trustees and the beneficiaries as discretionary by virtue of the operation of clause 3, one would have expected the state of affairs to have been different. Consequently, the Tribunal held that due to failure on the part of the Maharaja to appoint discretion exercisers as per clause 3(2), clause 4 has become operative and the U.K. trusts have to be held to be specific trusts. The High Court did not agree with the Tribunal's view and held that on interpretation of the relevant clauses of the deeds of settlement executed in U.K., character of the trusts was discretionary and not specific. On appeal by the department to the Supreme Court HELD dismissing the appeal:

A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour. Having regard to the above legal position about the discretionary trust which is also applied by by this Court in the earlier judgment and the fact that the income has been retained and not disbursed to the beneficiaries, the view taken by the High Court cannot be said to be legally flawed. Merely because the Settlor and after his death, his son did not exercise their power to appoint the discretion exercisers, the character of the subject trusts does not get altered. The two U.K. trusts continued to be 'discretionary trust' for the subject assessment years. The High Court has taken a correct view that the value of the assets cannot be assessed on the estate of the deceased Settlor (Snell's Principles of Equity, 28th Edition, Page 138 followed) (A.Y. 1984-85 to 1991-92, 1970-1971 to 1976-77)

CWT v. Estate of Late HMM Vikramsinghji of Gondal(2014) 268 CTR 232/103 DTR 211/363 TTR 679(SC)

13. S. 234D: Interest on excess refund – Explanation 2 – section is applicable to all the assessments completed after 1.6.2004. [Explanation 2]

Assessment was completed before 1.6.2003. The court held that Explanation 2 to Section 234D clarifies that section is applicable only in respect of assessments completed after 1.6.2003. (AY. 1998-99)

CIT v. Reliance Energy Ltd. (2014) 220 Taxman 89 (Mag.)(SC)

14. S.244: Refunds – Interest on when no claim is made – Matter remanded. [S,214, 243(1)(b)]

High Court allowed the claim of assessee relying upon the order in *Sandvik Asia Ltd v. CIT (2006) 280 ITR 643 (SC)* for interest on delayed payment of amount refunded by revenue which was wrongly withheld, order passed was set aside and the matter was remanded back for disposal afresh in light of observations made by Supreme Court in *CIT v. Flouro Chemicals (2013) 358 ITR 291 (SC)(CAP NO 3507 OF 2014 dt 26-02-2014)*

CIT v. Gujarat Fluro Chemicals (2014) 222 Taxman 233 (Mag.)(SC)

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

The assessee made an application u/s. 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without deduction of tax at source. The AO passed an order directing the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s. 244A on the said interest by relying on Circular Nos 769 dated 06.08.1998 and 790 dated 20.4.2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court HELD dismissing the appeal:

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

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

(iii) The said interest has to be calculated from the date of payment of such tax. (A.Y. 1997-98)

UOI v. Tata Chemicals Ltd (2014) 267 CTR 89/101 DTR 193/ 222 Taxman 225(Mag)/363 TTR 658(SC)

DIT v. Reliance Infocom Ltd (2014) 267 CTR 89/ 101 DTR 193/363 TTR 658(SC)

DIT v.Set Satellite (Singapore)Pte Ltd(2014) 267 CTR 89/101 DTR 193(SC)

16. S.260A: Appeal – High Court – Substantial question of law – Binding nature of finding nature of fact – Question involves legal effect of proven facts or documents – Question of law arise.

The Apex Court while considering the substantial question of law question observed

that, normanlly, a finding of a fact decided by the last finding authority is final and ought not to be lightly interfered with by the High Court in an appeal. The Appellate Courts, however, ought to be cautious while weeding out such questions and should the question in examination involve examination of finding of fact, excautela abundanti the Appellate Courts would require to examine whether the question invoves merely a finding of fact or the legal effect of such proven facts or documents in appeal. While the former would be a question of fact which may or may not be interfered with , the latter is necessarily a question of law would require consideration. Often questions of law and fact are intricately entwined, sometimes to the extent of blurring the domains in which they ought to be considered and therefore, require cautious consideration. A question where the legal effect of proven facts is intrinsically in appeal has to be differentiated from a question where afinding of a fact is only assoiled.

CIT v. Dawoodi Bohra Jamat(2014) 364 ITR 31/102DTR 361/222 Taxman 228(Mag.)(SC)

17. S. 276CC: Offences and prosecution – Firm – Partner-Failure to furnish return of income – Prosecution for failure to file ROI can be initiated during the pendency of assessment proceedings. The statement in the individual returns of the partners that the firm has not filed a ROI as its' accounts are not finalised does not absolve the firm of prosecution for non-filing of ROI – Onus to prove circumstances – Prosecution proceedings were allowed to be continued and directed the Criminal Court to complete the trial within four months of receipt of the judgment [S. 139(1), 142,144, 148, 278E]

The assesse firm had two partners i.e. Ms. J. Jayalaitha and Mrs. N. Sashikala. Firm did not file its returns for the A.Ys. 1991-92 and 1992-93. Following the survey conducted in respect of the firm on August 25, 1992 a notice under section 148 was served on the firm, thereafter notice under section 142(1)(ii) was l also served. AO made best judgment assessment on the firm and demanded tax and interest. For the assessment year 1993-94 also no return was filed and best judgment assessment was made. Department issued show cause notice for prosecution against the firm and two partners and filed compliant before the Chief Metropolitan Magistrate against the firm and two partners for the wilful and deliberate failure to file returns of income for the A.Ys.1991-92 and 1992-93 offences punishable under section 276CC and also for the A.Y. 1993-94. The firm and two partners filed discharge application before Chief Metropolitan Magistrate which was dismissed. The revision petition before the High Court was also dismissed. On appeal to Supreme Court the court held that the assessee failed to file ROI within due date prescribed u/s. 139(1) or within time allowed in notices u/s. 142 and 148. Further opportunity to file return in prescribed time was also not availed of. Thus, the onus was on assessee to prove circumstances which prevented it from filing returns. Held, a case for wilful failure and offence was made out. Also, held that prosecution need not await culmination of assessment proceedings and that best judgment assessments made would not nullify liability of assessee to file return. Order of High Court was confirmed and appeal of assessee was dismissed. Court directed the Chief Metropolitan Court to complete the trail within four months from the date of receipt of judgment. (AYs. 1991-92, 1992-93, 1993-94)

Sasi Enterprises v. ACIT (2014) 361 ITR 163/ 98 DTR 329/ 222 Taxman 78/265 CTR 225 (SC)

DIRECT TAXES

High Courts
Research Team

108. S. 2(22)(e) : Deemed dividend – Share application money cannot be treated as loan or deposit – Not assessable as deemed dividend

When the Tribunal gave a finding that the amount received by the assessee-company was share application money, the sum could not be treated as loan or deposit. Furthermore, share application money was retained for some months and shares were allotted in following year. Therefore, sec. 2(22)(e) was not applicable. (A.Y. 2008-09)

CIT .v. Alpex Exports P. Ltd. (2014) 361 ITR 297 (Delhi) (HC)

109. S. 2(22)(e) : Deemed dividend-Does not apply to a non-shareholder

The Tribunal held that s. 2(22)(e) did not apply to the assessee as it was not a shareholder of the entity which lent advances to the assessee. It was held that the addition could be considered in the hands of the shareholder. The Tribunal followed *ACIT v. Bhaumik Colour Pvt. Ltd (2009) 313 ITR (AT) 146 (Mum)(SB)* which has been approved in *CIT v. Universal Medicare Pvt. Ltd. (2010) 324 ITR 263 (Bom).* The Revenue claimed that Universal Medicare was per incuriam and not good law and that an addition u/s 2(22)(e) could be made even in the case of an entity which is not a shareholder. HELD by the High Court dismissing the appeal:

(i) We have perused the provision carefully and equally the judgment in the case of Universal Medicare and the view following the same rendered by several High Courts. We are of the opinion that there is no merit in the contentions of the Revenue that Universal Medicare was either erroneously decided or that the view taken in Universal Medicare requires reconsideration. In that regard, we must not brush aside the binding precedent or the judgment of a co-ordinate bench simply because some of the arguments canvassed before us were either not canvassed or if canvassed were not considered. The binding precedent can be ignored only if it is per incuriam. Such is not the stand before us. All that is urged is several facets and which emerge from a reading of section namely Section 2(22) together with its sub-clauses have not been noticed by the Division Bench while deciding Universal's case. We are unable to agree with the Revenue in this behalf;

(ii) We do not see how with this legal position and the status of the shareholder recognized in law can be ignored while interpreting Section 2(22) (e) of the I. T. Act. Precisely, this is what has been done by this Court in the judgment rendered in the case of Universal Medicare. It is not necessary for us to make a detailed reference to the order of the Special Bench of the Tribunal in the case of Bhaumik Colour Pvt. Ltd. Suffice it to hold that the view taken by this Court in the case of M/s. Universal Medicare does not require any reconsideration. We are not in agreement with Shri Gupta that the definition does not contemplate or does not stipulate any requirement of assessee being a shareholder of the assessee like the one in the present case. The view taken in the present case that the recipient/ assessee was not a shareholder, thus is in consonance with the legal position noted by us hereinabove. We are of the further view that this Court merely restated this principle and which remains unaltered throughout from the case of *Rameshwarlal Sanwarmal v. CIT 122 ITR 1 (SC). (ITA No. 114 of 2012, dt. 04/07/2014.)*

CIT .v. Impact Containers Pvt. Ltd. (HC)(Bom.), www.itatonline.org.

110. S. 4 : Charge of income-tax-Tax Planning–Sales of shares to one of the group companies-Set off of loss against long-term capital gains was allowed.

The assessee had purchased shares of Hindustan Development Corporation Ltd. from two sellers, one of them was a scam tainted company. The assessee sold the shares at a loss of ₹ 4,50,04,414 to one of its group companies. The aforesaid loss was sought to be set off against the long term capital gains earned by the assessee company. The AO disallowed the claim of setting off. On appeal, the CIT(A) held that the purchase of the shares was genuine, but the sale was a colourable transaction considering the fact that the assessee purchased the same scrip after sometime and the sale to the group company was financed by the assessee himself. He therefore upheld the order of the AO. On second appeal, the Tribunal had given the findings of fact that the transaction of purchase and sale was supported by contract notes and bills. Both the sale and purchase took place at the prevalent market rate and payments were made by account payee cheques. These transactions were duly confirmed not only by the brokers, but also by the Inspector appointed by the AO. Furthermore, the alleged financing by the seller for purchase of the shares was an insignificant part of the total purchase price. The total purchase price was ₹ 18.99 crore, whereas the financing was restricted to ₹ 2.60 crore on interest on commercial rates. The Tribunal held that both the sale and purchase of shares were genuine transactions. The High Court held that suspicion, howsoever strong, it is not possible to record any finding of fact. As a matter of fact, suspicion can never take the place of proof. The finding arrived at by the Tribunal that both the sale and purchase were genuine transactions was not even alleged by the revenue to have not been based on evidence. Since the finding of the Tribunal was factually correct, the Tribunal had no option but to direct the AO to give the benefit of the losses suffered by the assessee, which he had disallowed. The appeal did not raise any question of law and was therefore not to be admitted. (AY. 1995-96)

CIT v. Lakshmangarh Estate & Trading Co. Ltd. (2014) 220 Taxman 122 (Mag.)(Cal.)(HC)

111. S. 5 : Scope of total income - Accrual of income –Builder and developer – Advances received from different parties – Advance receipt could not be taken as trading receipt of the year under consideration.

The assessee company was a builder and developer and received certain amount as advance from different parties. The AO added the said amount in the total income. The Tribunal deleted the addition on the ground that assessee being the developer, the profit will arise on the transfer of the title of property and any advances received cannot be treated as trading receipt of the year under consideration and the same was accepted in the earlier years by the revenue. On appeal the High Court affirmed the view of the Tribunal

CIT v. Shivalik Buildwell (P) Ltd. (2014) 220 Taxmann 3(Mag.)(Guj.) (HC)

112. S. 9(1)(vi) : Income deemed to accrue or arise in India –Royalty-Consideration paid for transfer of right to use software/computer programme in respect of copyright is 'royalty'.

The High Court following the decisions of the Karnataka High Court in the case of *CIT v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494* and *CIT v. Synopsis International Old Ltd. (2012) 28* taxmann.com 162 held that consideration paid by the Indian customers or end users to the assessee, a foreign supplier, for transfer of the right to use the software/computer programme in respect of the copyrights falls within the meaning of 'royalty'

as defined in section 9 (1) (vi) of the Act. (A.Y. 2002-03)

CIT v. Customer Asset India (P.) Ltd. (2014) 222 Taxmann 37 (Mag.)(Karn.)(HC)

113. S. 10A : Free Trade Zone–Set off of losses – Export Processing Zone unit-Brought forward losses of non export processing zone unit is not to be deduced or reduced from profit /income of export processing unit. [S.10B, 80A]

Brought forward losses of non-export processing zone unit cannot be deducted or reduced from profit/income of export processing zone unit. (AYs. 2002-03, 2003-04)

CIT .v. TEI Technologies Pvt. Ltd. (2014) 361 ITR 36 (Delhi) (HC)

114. S. 10B : Export Oriented Undertaking - Mistake in mentioning the section in the return for claiming the exemption – Exemption cannot be denied.[S. 80IB,251]

Assessee was eligible for exemption under section 10B and it had been found to be in order except that instead of mentioning exemption under section 10B, while e-filing return, it was wrongly on account of typographical error mentioned in section 80-IB, it could not be said to be such a mistake by which exemption could be disallowed outrightly. (A.Y. 2008-09)

CIT v. Rajasthan Fasteners (P.) Ltd. (2014)363 ITR 271 / 222 Taxman 100 (MAG)/ 266 CTR 401 (Raj) (HC)

115. S. 12AA : Procedure for Registration - Trust or institution – Charitable purpose-Registration cannot be refused on the ground that trust has not commenced its activities. [S.2(15, 11, 12]

Commissioner cannot refuse to register trust on the ground that trust has not commenced its activities.

CIT v. Kutchi Dasa Oswal Moto Pariwar Ambama Trust (2014) 362 ITR 194 (Guj.)(HC)

116. S. 13 : Denial of exemption – Trusts or institutions – Investment restrictions – Loans given in violations of section 13 not entitled to exemption – Entire income of trust cannot be denied exemption. [S.11, 263]

In case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5) that is liable to be taxed and that violation under section 13(1)(d) does not tantamount to denial of exemption under section 11 on total income of assessee-trust. Revisional order was held to be not valid. (AY.2000-01, 2001-02)

CIT v. Fr. Mullers Charitable Institutions (2014) 363 ITR 230 / (Karn)(HC)

117. S. 14A : Disallowance of expenditure – Exempt income – No disallowance of interest paid on borrowings if assessee's own funds and non-interest bearing funds exceeds investment in tax-free securities.

For A.Y. 2001-02 to 2005-06, the Tribunal deleted the disallowance made u/s 14A on the ground that as the assessee's own funds were more than its borrowed funds, the investments in tax-free securities had to be regarded as being made out of the own funds and no disallowance u/s 14A for the interest on the borrowed funds could be made. On appeal by the department to the High Court HELD dismissing the appeal:

In principle, if there are funds available, both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company if the interest-free funds were sufficient to meet the investment. On facts, the assessee's own funds and other non-interest bearing funds were more than the investment in the tax free securities. Consequently, the ITAT rightly held that there was no basis for deeming that the assessee had used borrowed funds for investment in tax free securities. (ITA No. 330 of 2012, dt. 23/07/2014.)

CIT v. HDFC Bank Ltd. (Bom.)(HC) www.itatonline.org

118. S. 14A : Disallowance of expenditure - Exempt income - Interest – No disallowance if assessee has sufficient funds and it has not used any borrowed funds for making investments

The assessee declared tax free interest on bonds as well as exempt dividend income. The AO observed that interest expenses to earn tax free income was not allowable and thereby made a disallowance of 1% of the interest expenditure u/s. 14A. The Tribunal deleted the disallowance.

On appeal by the department, the High Court observed that it was noted from records that the assessee was having shareholding funds to the extent of 2607.18 crores and the investment made by it was to the extent of Rs.195.10 crores. In other words, the assessee had sufficient funds for making the investments and it had not used the borrowed funds for such purpose. This aspect of huge surplus funds is not disputed by the revenue which earned it the interest on bonds and dividend income. The High Court further noted that with regard to disallowance of 1% of administrative expenses averred to have incurred on account of the earning of interest, there is nothing on record to indicate that there has been in fact any actual expenditure incurred by the assessee for earning tax free income of ₹ 14 crores. It also noted that out of the total amount of exempt income of ₹ 14 crores, the assessee could point out that 6.12 crores was earned by it from 'S' project which was under construction and for which no expenditure had been claimed and for the remaining income of ₹ 7.88 crores which consists of dividend and tax free interest, no part of expenditure appears to have been made towards the investment activity as emerging from the material. The total investment from the huge surplus is comparatively small and investment made was effortless, without any burden of administrative expenses. Accordingly, the High Court dismissing the departmental appeal held that in view of fact that no expenditure was incurred for earning exempted income and that being the question of fact, disallowance of 1% of interest expenditure artificially or on the basis of assumption rightly has not been sustained by the Tribunal. (AY. 2006-07)

CIT .v. Torrent Power Ltd. (2014) 363 TTR 474 / 222 Taxman 367 (Guj.)(HC)

119. S. 28(i) : Business income – sale of shops - suppressed sale price

The Assessee firm was a developer of shopping complexes. During the year, the assessee declaring certain income from sale of shops. The AO was of the view that the selling price of shops declared by the assessee was on lower side and thus, rejected the books of accounts and estimated total income at higher amount. The Tribunal noted that all shops sold by the assessee were registered with sub-registrar and sale deeds were executed for transactions in question. The Tribunal observed that the AO simply rejected the sale deeds and a higher sale consideration was adopted for the purpose of computing income without any reference made to the DVO. It further observed that the AO has not tried to inquire about the circle rates fixed by the Sub Registrar and not even called for or examined the sale deeds. The Tribunal held that the revenue failed to establish that the full consideration recorded by the assessee

firm was not the actual price for the transfer of shops and accordingly deleted the addition made. On further appeal by the revenue the High Court dismissed the appeal. (AY. 2005-06)

CIT .v. Shanti Enterprise (2014) 220 Taxman 170 (Mag.) (Guj.)(HC)

120. S. 32(1)(iia) : Depreciation– Additional depreciation allowed on setting up of wind electric generator to a chemical manufacturer.

The assessee was engaged in the business of manufacture and sale of various specialty chemicals and had claimed additional depreciation u/s. 32(1)(iia) on the cost incurred by it for installation of a Wind Electric Generator. The AO did not grant the said additional depreciation on the ground that the assessee was not in the business of generation and distribution of power. The CIT(A) following the decisions of the Madras High Court in the case of *CIT v. VTM Ltd. (2009) 319 ITR 336* and in case of *CIT v. Hi Tech Arai Ltd. (2010) 321 ITR 477* deleted the disallowance so made. The Tribunal confirmed the Order passed by the CIT(A).

The High Court dismissed the departmental appeal and held that the assessee was entitled to claim additional depreciation. The High Court observed that the Madras High Court had an occasion to consider the similar issue and it is held that while claiming the deduction under Section 32(1)(iia) setting up wind-mill has nothing to do with the power industry and what is required to be satisfied in order to claim additional depreciation is that the setting up of new machinery or plant should have been acquired and installed by an assessee, who was already engaged in the business of manufacture or production of any article or thing. (AY. 2007-08)

CIT v. Diamines & Chemicals Ltd. (2014) 222 Taxman 218 (Guj.)(HC)

121. S. 37(1) : Business Expenditure– Foreign Travel–Promotion of business.

Assessee was in the business of manufacturing and selling of tea. It claimed expenses in respect of foreign travel of its directors and executives for promotion of its business. AO disallowed one-third of the expenditure on the ground that there were already three non-resident director in looking after overseas business. High Court held that there is no need for the assessee to prove that the expenditure was necessary for the purpose of the business. Further, assessee had produced necessary vouchers and bills to prove the same. Thus, the High Court held that the expenditure was allowable. (A.Y. 2002-03)

CIT v. Williamson Tea (Assam) Ltd.(2014) 220 Taxmann 102 (Mag.)(Gau.)(HC)

122. S. 37(1) : Business expenditure– Ad hoc disallowance by the AO-Deletion was held to be justified.

Assessee claimed deduction of manufacturing and other expenses of ₹ 50.42 lakhs as business expenditure. Assessing Officer disallowed expenses of ₹ 5 lakhs for want of necessary details. Commissioner (Appeals) deleted impugned disallowance holding that assessee had filed audited accounts with regard to expenses claimed and in absence of any adverse comment by auditor no disallowance should be made. The Tribunal and the High Court confirmed the order. (A.Y. 1994-95)

CIT .v. Vallabh Glass Works Ltd. (2014) 220 Taxman 129 (Mag.)(Guj.)(HC)

123. S. 37(1) : Business Expenditure – Advertisement – Sponsorship of programmes – Held to be allowable.

Assessee was in the business of manufacturing and selling of tea. It claimed expenses in respect

of sponsorship of programmes. AO disallowed such expenditure. High Court held that it is for the assessee to decide where and in what manner publicity of the business is to be done. Accordingly, it allowed such expenditure incurred by the assessee. (A.Y. 2002-03)

CIT v. Williamson Tea (Assam) Ltd. (2014) 220 Taxmann 102 (Mag.)(Gau.)(HC)

124. S. 37(1) : Business expenditure – Payment made to workers on closure of business allowable as revenue expenditure.

The payment on account of gratuity, retrenchment compensation and leave encashment made to workers in connection with Voluntary Retirement Scheme on closure of business was allowable as revenue expenditure. (A.Y. 2000-01)

CIT v. Swan Mills (2014) 220 Taxmann 10 (Mag.) (Bom.)(HC)

125. S. 37(1) : Business expenditure- Expenditure on issue of shares under the employees stock option was allowable as revenue expenditure..

Assesee had debited a sum of ₹ 66.82 lakhs under the head of staff welfare expenditure incurred in respect of Employee stock option plan and on allowing the shares to the employees the difference in value was credited to the account of the company to be allowed as an expenditure. It was held that difference between the market value of the shares and the value at which the shares were allotted to the employees under Employees Stock Option plan as per SEBI guidelines was rightly allowed as an expenditure. (A.Y. 2000-2001)

ACIT v. PVP Ventures Ltd. (2014) 101 DTR 161 / (2012) 211 Taxmann 554 (Mad.)(HC)

126. S. 37(1) : Business expenditure - Repair and maintenance expenses by an assessee in business of running business centres is an ongoing process for such business – Allowable as revenue expenditure.

The assessee had deducted expenses on repairs and maintenance which the AO disallowed on the grounds that the same were capital in nature. The CIT (A) and the Tribunal deleted the disallowance.

The High Court dismissing the departmental appeal observed that the expenses were an on-going process for the type of business run by the assessee. The High Court further observed that the quantum of expense can never be a factor to conclude that the expenses are of a capital nature. Accordingly, the High Court held that the expenses incurred were not for bringing any new asset into existence hence allowable as revenue expenditure. (A.Y. 1999-2000)

CIT .v. DBS Corporate Services (P.) Ltd. (2014) 222 Taxmann 31 (Mag.) (Bom.)(HC)

127. S. 37(1) : Business expenditure – Free sample distribution expenses – Allowable even if there is no effective sale during the year.

The assessee-company was an export trading house and had distributed carpets and shawls as samples during the year The assessee claimed deduction on account of distribution of free samples. The AO disallowed the claim by holding that the free sample distribution expenses could be allowed as business expenditure provided the same were sales promotion expenses and there was sale. The CIT(A) and the Tribunal both deleted the disallowance.

The High Court dismissing the departmental appeal held that section 37 (1) nowhere provides that unless actual sales take place, the deduction would not be admissible. Further, the provision nowhere envisages that the expenditure would be admissible only where such expenditure results in earning of income. The High Court also observed that the samples distributed were

not extraneous to the business of the assessee and that the samples were given to the foreign agents in person during their business exploratory visit in India and the same would fall under the expenditure laid out or expended wholly and exclusively for the purpose of such business. (A.Y. 2004-05)

CIT v. Bazar Decor (India) (P.) Ltd. (2014) 222 Taxmann 328 (P&H)(HC)

128. S. 37(1) : Business expenditure - Expenditure incurred for aesthetic purpose or for having better working environment is not capital expenditure.

The High Court dismissing the departmental appeal held that that the expenditure incurred by the assessee for purchase of paintings to improve aesthetic and working environment cannot be treated as capital expenditure and hence the same was allowable as a business expenditure u/s. 37(1) (A.Y. 1986-87, 1987-88, 1992-93)

CIT v. Wipro Ltd. (2014) 222 Taxmann 181 (Karn.)(HC)

129. S. 37(1) : Business expenditure- Advertisement expenditure incurred in running of business cannot be disallowed merely because a part of expenditure resulted into some benefit to a third party.

The assessee treated brand building expenses, dealer loyalty expenses, etc. as deferred revenue expenditure. The AO noted that the assessee had entered into an agreement with Samsung Electronics Company Ltd. of Korea, which was the parent company under which a part of the expenditure inured for the benefit of the brand "Samsung" and therefore the expenditure could not be said to be wholly and exclusively incurred for the purpose of the assessee's business thereby disallowing the entire expenditure. The CIT (A) noted that since the assessee as well as the company in Korea benefited from the advertisements and hence allowed only 50% of the expenditure. On appeal, the Tribunal allowed the entire expenditure as a deduction.

The High Court dismissing the departmental appeal followed the decisions in the case of *Eastern Investment Ltd. v. CIT (1951) 20 ITR 1, CIT v. Royal Calcutta Turf Club (1961) 41 ITR 414 (SC)* and *CIT v. Chandulal Keshavlal & Co. (1960) 38 ITR 601 (SC)* and held that even if to some extent the expenditure endures a benefit to a third party it cannot in law defeat the effect of the finding as to the whole and exclusive nature of the purpose. (A.Y. 1997-1998)

CIT v. Samsung India Electronics Ltd. (2014) 222 Taxman 21 (Mag.)(Delhi)(HC)

130. S. 40(a)(i) : Amounts not deductible - Deduction at source – Outside India – Non-resident – Fees for technical services

The Assessing Officer disallowed claim for depreciation under section 40(a)(ia) of the Act on the ground that the payments made for technical know-how which had been capitalized, no tax deduction at source had been made thereon. The CIT(A) allowed the depreciation. The Tribunal held that the assessee had not claimed deduction for the amount paid, the provisions contained in section 40(a)(ia) were not attracted. The tax deducted in respect of the payment was made over to the Government in the subsequent year and, therefore, depreciation could not be deducted on the capital expenditure incurred by the assessee. The Tribunal confirmed the CIT(A). The High Court held that in the absence of any requirement of law for making deduction of tax, out of the expenditure on technical know-how which was capitalised, no amount was claimed as revenue expenditure and hence the deduction could not be disallowed under Section 40(a)(i) of the Act. (AY. 2003-04)

CIT v. Mark Auto Industries Ltd. (2014) 220 Taxman 75 (Mag.)(P&H)(HC)

131. S. 40(a)(ia) : Amount not deductible – Interest - Tax deducted at source deposited on or before due date specifies u/s 139(1). [S.139(1)]

The assessee deducted tax at source as required before 31st March, 2006 but deposited on 30th May, 2006. The revenue contended that deposit of the tax at source was beyond the prescribed time and therefore provisions of Section 40(a)(ia) will apply. The Tribunal ruled in favour of the assessee relying on the decision of H.S. Mohindra Traders 44 Sot 43 (Del)(URO) [later affirmed by the High Court]. The High Court in view of the decision of H.S. Mohindra Traders, dismissed the appeal of the revenue. (A.Y. 2006-07)

CIT v. Royal Builders (2014) 220 Taxman 108 (Guj.) (Mag.)(HC)

132. S. 40(a)(ia) - Amounts not deductible - Freight charges vis-à-vis loan and applicability of second proviso to s. 40(a)(ia). [S. 201(1)]

In this case amount of freight charges was shown as a loan till the scrutiny and therefore it was held that disallowance under s. 40(a)(ia) was sustainable. Benefit of second proviso to s. 40(a)(ia) r/w proviso to s. 201(1) was not attracted for asst. yr. 2007-08 since the same was introduced w.e.f. 1st April, 2013. (A.Y. 2007-08).

Prudential Logistics & Transports v. ITO (2014) 101 DTR 332 (Karn.)(HC)

133. S. 40(a)(ia) : Amounts not deductible – Tax deducted in March – Deposited in April-Deduction is allowable-Finance Act , 2008 with retrospective effect from April 1, 2005 and Finance Act, 2010.[S.139(1)]

Payment for expenditure was actually made and tax deducted therefrom in March and deposited in April. Held, deduction was allowable. Section 40(a)(ia) of the Income-tax Act, 1961, and the proviso thereto, as amended by the Finance Act, 2008, with retrospective effect from April 1, 2005, acknowledged that where tax was deductible and was deducted during the last month of the previous year but was paid before the due date specified under sub-section (1) of section 139, deduction shall be allowed in the year. (AY. 2007-08)

CIT v. Rajinder Kumar (2014) 362 ITR 241 (Delhi) (HC)

134. S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable –Discounts offered to sister concern

Assessee has sold a dictionary to its sister concern and had offered a discount of 3 per cent whereas it had offered a discount of 2.5 per cent to other wholesalers. Assessing Officer disallowed difference of 0.5 % u/s 40A(2). CIT(Appeals) allowed the appeal of assessee. On appeal by revenue to Tribunal, held that provisions of Section 40A(2)(a) of the Act would apply where any deduction is claimed towards excessive and unreasonable expenditure has been incurred by assessee but in this case neither any expenditure has been incurred nor any deduction has been claimed for the amount which has been charged less than that from other customers, thus provision would not apply. On further appeal to the High Court, view of Tribunal was affirmed. (A.Y. 2004-05)

CIT v. Bhargav Book Depot (2014) 220 Taxman 12 (Mag./(2013) 40 Taxmann.com 213 (All) (HC)

135. S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits – Purchase of land in auction.

The assessee had purchased a land for ₹ 3.5 crores in an open auction held by the High Court

of Judicature at Bombay. The payment of the amount was made by M/s. Zoom Developers Private Limited on behalf of the Assessee. The Assessing Officer made an addition of ₹ 70,00,000/- being 20% of the total payment of ₹ 3.5 crores by holding that the payment was made in cash as the details of payment were not available in the conveyance deed and no details of payment nor the copies of the relevant bank accounts were furnished. The CIT(A) deleted the disallowance holding that from the record that the entire payment of ₹ 3.5 crores was made through Pay Orders and the Drafts prepared from bank accounts of M/s. Zoom Developers Private Limited on behalf of the assessee and considering the fact that the auction was conducted by the High Court. The Tribunal affirmed the CIT (A) order. The High Court confirmed the Tribunal order.

CIT v. Magnificent Construction (P.) Ltd. (2014) 220 Taxmann 107 (Mag.)(MP)(HC)

136. S. 43(5) : Definitions of certain terms relevant to income from profits and gains of business or profession – Loss on sale of shares by stock broker on his own behalf being 'jobbing' is not a speculative loss. [S. 28(i)]

The assessee was a member of the Stock Exchange and was registered as Stock Broker and carried on the purchase and sale of shares and securities. The AO found that a sum of ₹ 8,53,030/- was debited as loss incurred in respect of transactions done by the assessee for himself on the floor of stock exchange with other brokers and considered it as speculation loss. The CIT(A) confirmed the Order of the AO. However, the Tribunal considering the claims of the assessee that the delivery had been effected at net basis as per the Stock Exchange guidelines held that the loss was not a speculation loss.

On appeal by the department, the High Court observed that the allegation that the transactions were settled without actual delivery is not fully established by the revenue. There being specific case of the assessee noted before the AO that loss of ₹ 8,53,030 was suffered on account of non-delivery base transaction, the above observation of the Tribunal cannot be approved. The High Court also observed that the Tribunal had given a finding that the details of each and every transaction were disclosed by the assessee which were part of the paper book and that no discrepancy in any of the transactions was pointed out by the AO nor the *bona fide* of the transactions were doubted and hence the transactions carried out by the assessee were part of the 'jobbing' within the meaning of proviso (c) to section 43(5). Accordingly, the High Court dismissing the departmental appeal held that the losses suffered by the assessee cannot be termed to be speculative loss by virtue of proviso (c) to section 43(5). (A.Y. 1998-99)

CIT v. Ram Kishan Gupta (2014) 222 Taxmann 164 / 361 ITR 387 (All.)(HC)

137. S. 43B : Deductions on actual payment - Employees contribution to Provident Fund & deduction is allowable if paid before due date for filing ROI. [S. 139(1)]

On a plain reading of the second proviso to s. 43B, it is clear that the assessees – employers were entitled to deductions only if the contribution to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act. However, because the second proviso created difficulties for the assessees – employers, an amendment was inserted *vide* Finance Act, 2003 with effect from 1st April, 2004 to delete the second proviso to s. 43B and to amend the first proviso to provide that the deduction would be allowed if the amount was paid on or before the due date for furnishing

the return of income u/s 139(1). Therefore, the amendments introduced by the Finance Act, 2003 put on par with the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee's Welfare Funds on the other. In *CIT v. Alom Extrusions Ltd (2009) 319 ITR 306 (SC)* it was held that the amendment to the s. 43B by the Finance Act, 2003 w.e.f. 01.04.2004 was retrospective in nature and would operate from 01.04.1988. Consequently, the ITAT rightly deleted the addition of ₹ 1.82 cr on account of delayed payment of Provident Fund of employees' contribution. Even otherwise, we fail to understand how this deduction could have been disallowed to the Assessee. Admittedly, the A.Y. in question is 2006-07. The second proviso to s. 43B was deleted w.e.f. 01.04.2004 and simultaneously the first proviso was also amended bringing about a uniformity in deductions claimed towards tax, duty, cess and fee on the one hand and contribution to the employees' provident fund, superannuation fund and other welfare funds on the other. These deductions being claimed in the return of income filed for AY 2006-07, the amendments to s. 43B which came into force w.e.f. 01.04.2004 clearly applied to the assessee's case.(ITA No. 399 of 2012, dt. 11/07/2014.) (AY. ?

CIT v. Hindustan Organice Chemicals Ltd. (Bom.) (HC) www.itatonline.org

138. S. 45 : Capital gains - Business income – Share dealing – Assessee was a salaried employee – Income derived from purchase and sale of share was held to be capital gain. [S. 28(i)]

The assessee a salaried person filed a return of income which included income from salary and receipt from trading of the share and long term capital gain. The AO held that the assessee was trading in shares and taxed the entire income as business income. On appeal the CIT(A) and Tribunal held that the assessee cannot be stated in the business of trading in shares. On further appeal by the revenue the High Court observed that the assessee sold small amount of shares under short term capital gains as against the bulk of the shares inviting long term capital gain and upheld the view of the Tribunal. (A.Y. 2006-07)

CIT v. Saurah Rameshchandra Lavti (2014) 220 Taxmann 14(Mag.) (Guj.)(HC)

139. S. 45 : Capital gains –Business income- Dealer in shares as broker, trader and investor – Shares were shown as capital balance in the return of income of previous year, sale of such shares would be long/ short term capital gain.[S. 28(i)]

The assessee was dealing in shares as broker, trader and investor and was registered with U.P. stock exchange. The assessee filed return of income showing total income from business, long term capital gains and short term capital gains. The AO held that the assessee was a share broker and the main business was purchase and sale of shares and had used the investment portfolio as a colourable device to avoid payment of tax. The CIT(A) and the Tribunal directed to show the amount as capital gains and not business income. On appeal by the revenue, the High Court held that the shares were shown as capital balance in return of previous years and on sale of such shares the sale proceed would be long/short term capital gain of the assessee and not the income from the business.(AY. 2006-07)

CIT v. Sunil Kumar Gupta (2014) 220 Taxman 14 (Mag.) (All.)(HC)

140. S. 45 : Capital gains - Business income – Investment in shares- Assessee was a salaried employee – Income derived from purchase and sale of share was held to be capital gain. [S.28(i)]

Assessee, a salaried employee, earned Short Term Capital Gain of ₹ 83,712/- and Long Term Capital Gain of ₹ 53,84,239/-. After considering relevant factors including the amount of shareholding of the assessee, the volume and the frequency of the purchase and sale of shares etc. held that it cannot be concluded that the assessee was a trader in share particularly in view of the fact that Short Term Capital Gains were very less as compared to the Long Term Capital Gains. (AY. 2006-07)

CIT v. Mitesh Nathulal Lavti. (2014) 220 Taxman 13 (Mag.)(Guj)(HC.)

141. S. 45 : Capital gains –Business income-Sale and purchase of shares – Maintaining two separate portfolio – Short term and long term gains out of investment account is assessable as capital gains and not as business income. [S.28(i)]

Held that the assessee's separate activities in shares were further supported and endorsed by the fact that separate dematerialised accounts, bank accounts were being maintained and separate trading and investment accounts were maintained in the books. Thus, the assessee was dealing in different activities of trading and investment. Assessment of short term and long term as capital gain was held to be justified. (A.Y. 2007-08)

CIT v. Avinash Jain (2014) 362 ITR 441/(2013) 214 Taxmann 260 (Delhi) (HC)

142. S. 45 : Capital gains - Time of transfer – Long term capital gains- When possession given of the immovable property on receiving part payment from the builder. [S.2(47(v),11(IA), Transfer of Property Act, 1882, S. 53A]

When the assessee by an agreement dated 14/4/2003 handed over the possession of the land to the builder and received part of the consideration and the builder was also given power of attorney to sell the portions of land, transfer has taken place in April, 2003 (AY.2004-05)

CIT v. Cochin Stock Exchanges Ltd (2014)363 ITR 382 (Ker.)(HC)

143. S. 48 : Capital gains – Cost of acquisition- Indexation – Capital asset inherited – originally acquired prior to 1.4.81 – base cost inflation index to be taken of FY 1981-92 i.e 100.

Assessee inherited property in A.Y. 07-08. This property was acquired in the year 1979. Held cost inflation index base year to be taken as 1981. Followed Bombay High Court in *CIT vs. Manjula J. Shah (355 ITR 474) (AY. 2007-08)*

CIT v. Nita Kamlesh Tanna (Smt.) (2014) 220 Taxmann 165 (Mag.)(Bom)(HC.)

144. S. 50C : Capital gains–Stamp Valuation–The deeming fiction created by Section 50C applicable only to seller and not buyer

The assessee made an investment in the land. The AO made addition on the difference in value of the land by treating same as unexplained investment. The Tribunal noted that Section 50C will apply to seller only and not the purchaser, thereby deleting the addition made. On appeal by the revenue the High Court held that Section 50C is a deeming fiction applicable only in case of seller and affirmed the view of the Tribunal.

CIT v. Sarjan Realities Ltd. (2014) 220 Taxmann 112 (Mag.) (Guj.)(HC)

145. S. 54 : Capital gains - Profit on sale of property used for residence - Two flats, even though acquired under different agreements & from

different sellers, are one residential unit if there is a common kitchen-Entitled exemption. [S.54F]

The department's argument that the law laid down by the Tribunal in *ITO v. Sushila M. Jhaveri (2007) 107 ITD 327 (Mum)(SB)* and confirmed by this Court in *CIT v. Raman Kumar Suri (Income Tax Appeal No.6962 of 2010, decided on 27.11. 2012)* on the availability of exemption u/s 54 is applicable only when the house purchased is a single unit and not where two flats, one acquired in the assessee's name and another jointly in the names of the assessee and his wife but under two distinct agreements and from different sellers have been taken into consideration is not acceptable. Though these flats were acquired under two distinct agreements and from different sellers, the map of the general layout plan as well as internal layout plan in regard to flat Nos.103 and 104 indicate that there is only one common kitchen for both the flats. The flats were constructed in such a way that adjacent units or flats can be combined into one. The admitted fact is that the flats were converted into one unit and for the purpose of residence of the assessee. Thus, though the acquisition of the flats may have been done independently but eventually they are a single unit and house for the purpose of residence. (ITA No. 2483 of 2011, dt. 10/06/2014.)

CIT v. Devedas Naik (Bom.)(HC), www.itatonline.org

146. S. 68 : Cash credits – Share application money – Addition was held to be not justified.

Assessee issued preferential warrants and received share application money as part of debt recovery process under scheme of compromise and arrangement with its lenders and shareholders. AO made addition as unexplained share application money. Held that the assessee furnished complete details of receipt of share application money with share application forms, names, addresses, PAN and other details of share applicants, identity of share applicants, genuineness of transaction and their creditworthiness was proved, and addition under section 68 was unjustified (A.Y. 2005-06)

CIT v. Shree Ram Multi Tech Ltd. (2014) 220 Taxman 76(Mag.) (Guj.)(HC)

147. S. 68 : Cash credits – Bogus purchases – Payment made by cheques – Sales accepted – Purchases cannot be held to be bogus.

The assessee had made certain purchases. On account of unverifiable purchases, the Assessing Officer made additions to the tune of ₹ 1.27 crores. He was of the opinion that none of the parties could be located and therefore, such purchases were held to be bogus. When it was challenged before the CIT(A), the CIT(A) was of the opinion that they could not be held bogus as the corresponding sales had been effected by the respondent in the next year. In subsequent year also and in the past, such purchases were made which were never questioned. When challenged before the Tribunal on the basis of the facts presented before us, it held that these purchases could not be held bogus. The High Court held that the issue is essentially based on facts. The Tribunal, having been satisfied by genuineness of the purchases as also specially considering the payments made through the cheques, was of the opinion that such addition could not be sustained. Issue, essentially and predominantly based on facts, requires no consideration as no question of law arises.

CIT v. Nangalia Fabrics P. Ltd. (2014) 220 Taxmann 17 (Mag.)(Guj)(HC.)

148. S. 68 : Cash credits – Sale consideration from sale of agricultural land – Deposited in to bank ₹ 1.20 crores-Deed recorded only ₹ 22.22 lakhs – Addition as undisclosed income was not justified – CBDT was directed to take action against AO.

The assessee sold his agricultural land and deposited sale consideration of ₹ 1.20 Crs in his bank account. However, the purchasers stated that they had purchased the land for ₹ 22.2 lakhs only. Sale deed also reflected sale value at ₹ 22.2 lakhs. The assessee produced witness to sale deed and the bank manager, who confirmed submission of the assessee and he had also produced the report of Tehsildar to justify valuation of the property. Assessee had also filed complaint before stamp valuing authority about deficiency in stamp duty in sale deed but sale consideration in sale deed was not adjudicated in favour of assessee. The Assessing Officer did not disbelieve the evidence that the amount was received by sale consideration. He, however, relying only on the report of the Stamp Valuing Authority, treated the amount to be undisclosed income of assessee. The CIT(A) dismissed the appeal. The Tribunal held that whatever the assessee had explained about the source of the deposit could not be doubted especially in absence of contrary material on record and deleted the addition. The High Court held that the assessee as an honest citizen not only made a complaint to the registering authority that the sale deed had been registered at a value much below the amount, which he has actually received, he deposited the entire amount in the bank and voluntarily filed return. There was no material whatsoever or any circumstance, which could have suggested that this amount was received by him from any other source. The deposition of witness of the sale deed, the bank manager and the evidence filed with regard to valuation of the property was more than sufficient to discharge the burden, which the Assessing Officer had unreasonably placed on the assessee. The Assessing Officer in disbelieving the evidence has not given any reasons whatsoever to discard the statement of the witnesses, deposit of the entire sale consideration in bank and the deposition of the bank manager. The High Court held that the Income Tax Officer did not act in *bona fide* manner. Overwhelming evidence led by him was discarded without giving any reasons at all. The assessment was framed only on the *ipse dixit* of the A.O., which gives reason to believe that he had exceeded his authority with some ill will or with ulterior motive. Therefore, HC directed the Registrar General of the Court to forward a copy of this judgment to the Chairman of the Central Board of Direct Taxes to cause an enquiry into the conduct and motives of Income Tax Officer, in framing the assessment and raising demand of income tax against the petitioner. (A.Y. 2008-09)

CIT v. Intezar Ali (2014) 99 DTR 201/220 Taxmann 72 (Mag.) (All.)(HC)

149. S. 68 : Cash credits-Account payee cheque-Bank statement-Assessed to tax-Burden discharged.

Once the amount was advanced by the creditors by account payee cheque from their respective bank accounts and the said creditors were being assessed to income tax, then capacity of the creditors and genuineness of the transactions stood proved and in the absence of any evidence to prove that money actually belonged to the assessee himself, addition under s. 68 was not sustainable. (AY. 2006-07)

CIT .v. Jai Kumar Bakliwal (2014) 101 DTR 377 / 224 Taxman 87 / 267 CTR 396 (Raj)(HC)

150. S. 68 : Cash credits – Firm-Partners-Capital introduced by partners - No material showing partners had no capacity to introduce such capital-The sums could not be taxed in the firm's hands

There was no material showing partners had no capacity to introduce capital in the firm. Also, assessment orders of partners showed capital introduced by partners represented their agricultural income. Held, the sum could not be assessed in the hands of the firm. (A.Y. 2007-08)

CIT v. Odedara Construction (2014) 362 ITR 338 (Guj.) (HC)

151. S. 69 : Unexplained investments – Purchasers not traceable – Profit element embedded in purchases

Assessee is engaged in the business of trading in finished fabrics. Assessing Officer disallowed the purchases on account that parties from whom purchases were made are not found at the addresses given. CIT(Appeals) confirmed the assessment order. Tribunal held that purchases were made from bogus parties, but the purchases themselves were not bogus as entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. Therefore, Tribunal held that additions should not be the entire amount, but the profit margin embedded on such purchases would be subjected to tax. On appeal by revenue to High Court, Tribunal's order was upheld. (A.Y. 2005 -06)

CIT v. Bholanath Poly Fab (P.) Ltd. (2013) 355 ITR 290 /40 Taxmann.com 494/(2014) 220 Taxmann 82 (Mag.)(Guj.) (HC)

152. S. 69: Unexplained investment – Search at place of third party showed that assessee had purchased plot by paying cash consideration – no evidence that those documents belonged to assessee – documents at best shows projected purchase consideration – Addition was deleted.

Certain documents were found during search at the place of third party which indicated that assessee purchase certain plot of land by paying cash consideration. AO made additions u/s 69. The Court held that there was no evidence that the documents belong to the assessee. Further, it was held that documents, at best, only showed projected consideration. Accordingly, it was held that the evidences could not be treated as conclusive evidence of money transaction and therefore, addition was deleted.

CIT v. Prem Prakash Nagpal (2014) 220 Taxmann 168 (Mag.)(Delhi)(HC.)

153. S. 69A : Unexplained money– Search – Angadia – Search on bus- Seized cash belonging to assessee – Adequate cash balance at Mumbai office of assessee on the date of search – Employee of the assessee explained that the cash belonged to the assessee- Addition was deleted.

Assessee was in the business of 'Angadia'. A search was carried on a bus belonging to some other person which carried cash belonging to the assessee. AO treated the same as unexplained money. High Court held that finding of fact was given by the Tribunal that assessee had sufficient cash balance on the day of the search at the Mumbai office and also the employee of the assessee carrying the cash explained that the cash belonged to the assessee. In such circumstances addition u/s. 69A was not warranted.

CIT v. Patel Natverlal Chinubhai & Co. (2014) 220 Taxmann 168 (Mag.)(Guj)(HC.)

154. S. 73 : Losses – Speculation business – Carry forward and set off – Gross total income mainly consists of income chargeable under head capital gains or income from other sources – Deeming fiction cannot be applicable – Loss cannot be treated as speculation loss.

Whether assessee was in business of advancing loans and earning interest is not to be concluded by one isolated instance. The gross total income of assessee mainly consisted of income chargeable under head "Capital gains" or "Income from other sources". Therefore, deeming fiction not applicable and loss cannot be treated as speculation loss. Appeal of revenue was dismissed. (A.Y. 2000-01)

CIT .v. Paranjay Mercantile Ltd. (2014) 361 ITR 462 (Guj) (HC)

155. S. 80HH : Profits and gains from hotel or industrial undertaking in backward areas– Non-submission of Audit Report in Form-10C along with Return of Income – Only a technical default- deduction allowable-Form was rectification proceedings-Deduction allowable. [S.154, Form no10C]

AO disallowed the deduction u/s 80HH by rectifying the assessment u/s 154, on the ground that Audit Report in Form-10C was not submitted along with the Return of Income. Audit Report in Form-10C was submitted by assesse during the rectification proceedings. High Court held that non submission of Audit Report in Form-10C was a mere technical default and assessee submitted the same during the rectification proceedings. Therefore, deduction allowable.

CIT v. A. W. Prod (2014) 220 Taxman 70 (Mag.)(All) (HC.)

156. S. 80HH : Newly established industrial undertakings – Back ward areas – Crushing of granite boulders into small pieces amounts to production [S.80J, 80IB]

Crushing of granite boulders for bringing out graded metal of various sizes, which are used in construction activities, amounts to production. Special deductions can be granted under more than one provision of the Act. Special deductions under Chapter VI-A can be granted under more than one provision.

CIT v. Panachayil Industries (2014) 363 ITR 261 (Ker.)(HC)

157. S. 80HHB : Projects outside India – Supply of material and labour by third party contractor – Assessee to supply designs, drawings and other technical inputs-Eligible deduction. [S.80HHBA]

The AO disallowed claim u/s 80HHB and 80HHBA of the assessee observing that merely giving consultancy or supervising the design of project or making work cost effective could not be said execution of any project. On appeal, the CIT(A) recorded finding that assessee was not merely providing consultancy services, but was also providing engineering services to projects namely, construction, supervision and other engineering services in execution of highway projects. He further found that there was combination of both the contractors - one, who supplied material and labour and the second, the assessee who rendered services in technical / consultancy / supervision field in completing the projects. The interdependence of both aspects was essential for the completion of project and one cannot stand without other. Both the physical as well as technical aspects of the project are equally important and one cannot be separated from the other. It was, therefore, impossible to say that assessee was not involved in executions of the entire project, both for the purpose of section 80HHB and for section 80HHBA. The Tribunal affirmed the order of the CIT(A). High Court upheld the decision of Tribunal. (A.Y. 2001-02)

CIT v. Intercontinental Consultants & Technocrats (P.) Ltd. (2014) 220 Taxman 28 (Mag.)(Delhi)(HC)

158. S. 80HHC : Export business – Audit report was filed during course of assessment proceedings – Eligible deduction. [Form no 10CCAC]

For the assessee claimed deduction under Section 80HHC of the Act to the tune of ₹ 39,86,538/-. However, a copy of the audit report in Form No.10CCAC was not filed along with the return. During the course of assessment proceedings, the assessee, along with his letter dated 19.12.2005, submitted the report in the prescribed Form No.10CCAC dated 23.05.2003 claiming deduction under Section 80HHC at ₹ 37,08,019.97. The AO declined to allow the

deduction as claimed by the assessee under Section 80HHC of the Act while holding that the requirement of furnishing the audit report in Form No.10CCAC along with the return was a mandatory one and, for having failed to fulfil this requirement, the assessee was not entitled to the claimed deduction. On appeal, the CIT(A) affirmed the decision of the AO. The Tribunal however, proceeded to grant the benefit to the assessee to the tune of the amount stated in the audit report i.e., a sum of ₹ 37,08,019.97. The High Court held that the expression "alongwith return of income" occurring in Sub-section (4) of Section 80HHC of the Income Tax Act, 1961 is directory in nature insofar it relates to the time for furnishing of the report of an accountant by the assessee in the prescribed form; and even if such a report in the prescribed form is not furnished along with the return of income, but is furnished during the course of assessment proceedings, it cannot be removed out of consideration only for the reason of the same having not been filed at the initial stage of filing of the return. (A.Y. 2003-04)

CIT .v. Godha Chemicals (P.) Ltd. (2014) 220 Taxman 31 (Mag.)(Raj.)(HC)

159. S. 80-IB : Industrial undertakings– Number of workers-Workers of another unit also required to be considered.

Assessing Officer denied the deduction u/s 80-IB on the basis that number of workers attending the factory and working in the manufacturing process were less than 10. Appellate authorities allowed claim of assessee holding that Assessing Officer had only considered workers engaged in one unit, whereas assessee was having another unit of same activity and, therefore, workers engaged in another unit was also required to be taken into consideration while computing total number of workers employed by assessee. On appeal by revenue the High Court affirmed the view of Tribunal.

CIT v. Areez P. Khambhata (2014) 220 Taxmann 34 (Mag.)/(2013) 40 Taxmann.com 23 (Guj.)(HC)

160. S. 80IB : Industrial undertakings– Transfer before expiry of exemption – Exemption is available to transferee for remaining period.

In case of sale of business by sale of building, plant and machinery before expiry of period of exemption, transferee is entitled to deduction for remaining period.

CIT v. WEP Peripherals Ltd.(2014) 362 ITR 508 (Karn)(HC)

161. S. 80IB(10) : Housing project – Building plans were approved after 01.10.1998 – Deduction allowable

High Court held that deduction u/s 80IB(10) will be allowed to the construction company when building plans were approved after 01.10.1998. The Court followed its own earlier years order. (A.Y. 1999-00, 2002-03, 2003-04)

CIT v. Ansal Housing and Construction Ltd. (2014) 220 Taxman 157 (Mag.)(2013) 40 Taxmann.com 305 (Delhi) (HC)

162. S. 80-IB(10) : Housing project – Amended provision of Section 80IB (10)(d) made effective from 1-04-2005 and is not applicable to projects approved before that date.

The Tribunal held that amended provision of section 80-IB(10)(d) having been made effective from 1-4-2005, was not applicable to assessee's housing project approved in year 2003 in view of the case of *Manan corpn. v. Asstt. CIT [2013] 214 Taxman 373 (Guj.)* and held that housing project having more than 2000 sq. ft. commercial construction was eligible for deduction. The High Court dismissed the appeal made by the revenue.

CIT v. Shreenathji Construction (2014) 220 Taxmann 154 (Mag.) (Guj.)(HC)

163. S. 80-IB(10) : Housing project-Developer-Project completed-Building permission was applied-Permission was rejected on technical grounds-Entitled to exemption.

The AO did not allow the deduction on the ground that the assessee was not a developer and the assessee did not complete the housing project within the statutory time frame. Tribunal held that construction was completed in 2006. Application for building use permission to the Municipality authorities was filed on February 15 , 2006, but was rejected on July 1, 2006.Several residential units were occupied without necessary permission. The assessee paid penalty and got such occupation certificate regularized. Tribunal allowed the deduction. On appeal by revenue the court held that assessee could not be denied the benefit of deduction on the ground that the assessee was not a developer. Under sub-clause(i) of clause(a) of section 80IB(10), since the assessee had got approval for the housing project from the local authority before April 1, 2004, it was required to complete the construction latest by March 31, 2008 .The assesswe had not only completed the construction two years before the final date but had applied for the building use permission. Such permission was not rejected on the ground that construction was not completed but on some other technical ground. Thus , granting the benefit of deduction could not be held to be illegal. Order of Tribunal was affirmed.

CIT v. Tarnetar Corporation (2014) 362 ITR 174 (Guj.)(HC)

164. S.92C : Transfer pricing-Reliability and Authenticity of the independent international organization and its publication of rate list accepted by the appellate authorities-Deletion of addition by Tribunal was held to be justified.

In course of transfer pricing proceedings, assessee presented two sets of prices claiming them to be comparable. One set of transactions relied on by assessee was supplied by Malaysian Palm Oil Board 'MPOB' and other quotations by one Oil World, an organization based in Germany. Assessee adopted average of two sets of prices and claimed that price variance between assessee's transaction and average of two sets of prices did not exceed 5 per cent and, therefore, no addition to arm's length price was necessary. TPO made addition to assessee's ALP by rejecting comparable price list of an independent international organization submitted by assessee without assigning any reasons therefore, impugned addition deleted.

CIT v. Adani Wilmar Ltd. (2014) 363 ITR 338/ 224 Taxmann 51(Guj)(HC)

165. S. 115JA : Book profit - Book profit cannot be increased on the ground that a part of the stock has been valued at cost price and not at market price.

The AO made addition of defective stock valued at market price while making computation under Section 115 JA on the ground that it was an unascertained liability. The CIT(A) and the Tribunal deleted the addition. On appeal, the High Court held that closing stock has to be valued at lower of the cost price or market price. This is not a liability in the books. Thus it cannot be considered to be contingent or unascertained liability. The book profit cannot be enhanced on the ground that the part of the closing stock has been valued at market price and not at cost price. (A.Y. 1999-2000)

CIT v. Samsung India Electronics Ltd. (2014) 220 Taxmann 158 (Mag.) (Delhi)(HC)

166. S. 115JB : Book profit –Calculations to be made with respect to adjusted

book profit and not with respect to income assessable under head 'Profits and gains of business and profession'

High Court held that for computing deduction under clause (iv) of section 115JB(2), calculations are to be made with respect to adjusted book profit and not with respect to income assessable under head 'profits and gains of business and profession'

CIT v. Aarvee Denims & Exports Ltd. (2014) 220 Taxmann 35 (Mag.)/ (2013) 40 Taxmann.com 85 (Guj.) (HC)

167. S. 119 : Instructions–Circular-Assessment-Circular prescribing the time limit of three months from date of filing of return is binding on the Assessing Officer-Notice issued beyond prescribed period was held to be invalid. [S. 143(2), 143(3)]

Return was filed by the assessee on 29-10-2004 and notice under section 143 (2) was issued on July, 14, 2005. Notice was not issued within the period of three months. Assessee contended that as the notice was issued beyond the limitation prescribed by the CBDT circular the assessment was bad in law. However the Tribunal held that the notice was issue within the prescribed period under section 143(2) hence the assessment was valid. On appeal by assessee the court held that the CBDT Circular Nos 9 and 10 prescribing time limit of three months from date of filing return for issuance of scrutiny notice is binding on income-tax authorities. Since the return was filed on 29-10-2004 and notice u/s. 143(2) in July 2005, the notice was not within a period of three months, and hence, not in legal exercise of jurisdiction. Order of Tribunal confirming the assessment was held to be not valid. Appeal of assesse was allowed. Court also made observation that when the department has set down a standard for itself, the department is bound by the standard and cannot act with discrimination. In case, it does that, the act of the Department is bound to be struck down under Article 14 of the Constitution.

Amal Kumar Ghosh .v. ACIT (2014) 361 ITR 458 (Cal) (HC)

168. S. 132 : Search and seizure–Validly – The warrant of authorization was issued merely on hypothecated grounds, which is not sustainable under the law.

Search and seizure proceedings were conducted in premises of a Government Officer on warrant issued by Director, Investigation. The satisfaction note was centered in respect of search conducted in premises of Dr. Yogi Raj Sharma about 9 months ago, from where a document had been found. During search, all documents, books and vouchers of assessee were taken away without verification. On writ, assessee challenged the issuance of warrant of authorization and contended that subsequent search and contended seizure proceedings were *mala fide* and out of prejudice. The High Court observed that the satisfaction note was in respect of three officers including assessee and the entire satisfaction note was centered in respect of the search conducted in the premises of Dr. Yogi and on the basis of a document it was recorded that petitioner had invested money in house and land property. The aforesaid money was received by him in respect of supply orders of medicines, medical equipments etc. The Court noted that the entire basis of recording satisfaction was the search conducted in the premises of Dr. Yogi. The said document does not bear the name of the petitioner, but on the basis of word 'ch', a conclusion had been recorded that it indicated the assessee. In absence of name, what evidence was there before the revenue to indicate that the word 'ch' indicated the petitioner, is not clear. The Court further observed that the search was carried out in the premises of Dr. Yogi in September 2007. At the relevant time, assessee was the Chief Health Secretary and this fact was within the knowledge

of the respondents, but there is no explanation why the search was conducted after a period of near about 9 months. The document was seized from the premises of Dr. Yogi, but until and unless there was corroborating evidence, the respondents could not have formed the basis of issuing warrant of authorization. If there was some material with the Department that the assessee had purchased some house or land property, then there could have been definite evidence in this regard, but for a period of 8 months no information was collected and all of a sudden the warrant of authorization was issued. From the perusal of panchnama prepared during seizure, it appears that no objectionable document or undisclosed property was found except those which were declared in the earlier return. There is no other evidence available on record that the document related to the petitioner and the word 'ch', of which correctness is disputed by the assessee, indicated him. The Court held that, in absence of any cogent reasons in the present matter, warrant of authorization could not have been issued. Issuance of warrant of authorization is a serious action and for this authorization officer should have recorded his satisfaction. Though normally Court does not look for the reasons of satisfaction, but in the present case it appears that the warrant of authorization was issued merely on hypothecated grounds, which is not sustainable under the law.

Rajesh Rajora v. UOI(2014) 220 Taxman 146 (Mag.) (MP)(HC)

169. S. 132 : Search and seizure – Authorization of search- No mention of assessees HUF- Addition was liable to be quashed.

A search was conducted at premises of assessee HUF and another HUF consisting of brothers and other relatives of assessee. Assessee challenged impugned search proceedings contending that warrant of authorization for impugned search was issued against 'KS', which belonged to other HUF and since assessee had no relation with 'KS', search proceedings initiated against assessee was invalid. Documents on record showed that before issuing warrant of authorization, department considered information which was available in respect of 'KS' and other associates and there was no mention of name of assessee. The Court held that merely because originally members of family of other group were engaged in electrical business of larger HUF and that assessee in its business of electrical goods was supplying goods to other group company, assessee could not be implicated. Further, issuance of authorization of search and seizure warrant without there being any information in possession about assessee and without recording satisfaction about not producing relevant books of account and other documents could not be sustained. Thus, in absence of compliance of requirement of section 132, authorization for search and seizure and consequent search and seizure in respect of assessee's properties was liable to be quashed.

Tejram Omprakash (HUF) v. DIT (2014) 220 Taxman 85 (Mag.)(MP)(HC)

170. S. 145 : Method of accounting – Valuation of securities- Loss on account of depreciation in value of securities held as stock is not notional & is allowable as a deduction

A method of accounting adopted by the taxpayer consistently and regularly cannot be discarded by the Departmental authorities on the view that he should have adopted a different method of keeping the accounts or on valuation. Financial institutions like bank, are expected to maintain accounts in terms of the RBI Act and its regulations. The form in which, accounts have to be maintained is prescribed under the aforesaid legislation. Therefore, the account had to be in conformity with the said requirements. The RBI Act or the Companies Act do not deal with the permissible deductions or exclusion under the Income Tax Act. For the purpose of the Income Tax Act, the method of valuation followed by the assessee was to value the investments at

cost or market value whichever was lower. The assessee was entitled to claim a deduction for the depreciation in the value of the securities held by it. The fact that the securities were not sold to a third party did not mean that the loss was notional. (ITA No 250 of 2012, dt. 10/07/2014.)

CIT v. HDFC Bank Ltd. (Bom)(HC) www.itatonline.org

171. S. 147: Reassessment –Notice and order on objections cannot be challenged in a Writ Petition.[S.148, Art 226]

The Court had to consider whether an order passed by the AO on the objections of an assessee can be assailed before the Court under Article 226 of the Constitution of India. HELD by the High Court in the negative:

(i) A challenge to an order passed on the objections of the assessee is in effect a challenge to a notice u/s 148 of the Act. Such an order passed by the AO is only at the stage of process of determination and not a determination by itself. The process of assessment is not required to be challenged before Court of law, as it is a still born child. Therefore, the assessee cannot have a legal right as there is no legal injury suffered by them at that stage. A Writ can be filed to the limited extent in cases where an assessment is sought to be reopened by an Officer who is not competent to do so or where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction i.e. cases where no adjudication is required on facts *(CIT v. Chhabil Dass Agarwal (2014) 1 SCC 603)* followed);

(ii) As held in *G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)*, once a notice u/s 148 is issued, the assessee has to file a return and can seek the reasons for issuing notice. The AO is bound to furnish the reasons within a reasonable time and the assessee is entitled to file objections over which the AO has to pass a speaking order. The Supreme Court adapted a novel method to make way for the statutory authorities to deal with the adjudication covering assessments. In other words, in clear terms, the Supreme Court has indicated that an assessee is not required to run to the Court before the passing of the assessment order by challenging a notice issued u/s 148. However, in order to provide an element of fairness in the process of adjudication and create an atmosphere of transparency, a mechanism, which was not found in the Statute was evolved by asking the AO to pass a reasoned order. It is only a part of the procedural law. Such an order is only a preliminary order, which can only be said to be an expansion of the reasons which are supposed to be assigned u/s 148(2) of the Act. It neither creates a right nor takes away the one accrued. It is not an adjudication in the strict sense of the term. It is only meant for the purpose of understanding the basis of the notice. Therefore, GKN Driveshafts has to be understood to mean that a pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226 of the Constitution of India, which in the process, takes away the right of the AO to proceed further. Therefore, the Order passed, as directed by the Supreme Court, cannot be termed as a substitute to the assessment order. To put it differently, it does not take away the power of the AO to decide the issue on the plea of the assessee or on a consideration of the records. It is to be remembered that the AO was directed to pass orders only on the objections given by the assessee. The further fact that such an order is required to be passed before proceeding with the assessment would make the said position clear. Furthermore, if the order on the objections can be entertained, then the Supreme Court would not have directed the appeals to be disposed

of by the appellate authority instead of setting them aside. This also indicates that the assessee could raise all the pleas including those considered against him by the AO while passing orders on his objections. Hence, such a preliminary order, which does not have a statutory flavour not deciding the dispute between the parties, cannot be challenged by invoking the extraordinary jurisdiction before us. The Supreme Court merely provided safeguards to the assessee at the pre-adjudicative stage. The decision has been given to make sure that the AO complies with s. 148(2) in letter and spirit. There is no certainty in the order passed by the AO. If the order passed is set aside, it would only mean the notice issued u/s 148 is liable to be interfered with. The object of the decision of the Supreme Court is not only to avoid interference by the Courts but not to give way for it. Any other interpretation would make the entire remedial mechanism provided under the Act as redundant.

(iii) *Calcutta Discount Co. Ltd v. ITO (1961) 41 ITR 191 (SC)* was rendered was much prior to the judgment in *G.K.N. Driveshafts (India)Ltd. v. ITO(2003) 259 ITR 19 (SC).* Further, the then fact situation at the time of rendering the said judgment is no longer in existence today.

(iv) The legislative intent is to allow the AO to go through the process of assessment. Even u/s 147, a Court of law cannot presume a lack of jurisdiction, when a fact in issue requires an adjudication. It has to be exercised in terms of sections 139, 143(2) and 143(3). Therefore, considering the scheme of the enactment, particularly, with reference to sections 147 to 153 of the Act, we are of the view that an order passed on the objections of the assessee over adjudicating facts is not open to challenge by way of filing a writ petition. (Write Appeal No. 347 to 349 of 2014, dt. 04.07.2014.)

Kalanithi Maran .v. JCIT (Mad)(HC),www.itatonline.org

172. S. 147 : Reassessment-Failure to disclose material facts-Bald statement that assessee has failed to make a full & true disclosure of material facts not sufficient. Details must be given as to which fact was not disclosed. [S. 148]

It is true that the reasons for initiating re-assessment proceedings do in fact state that there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment. However, merely making this bald assertion was not enough. In *Hindustan Lever Ltd. v. R.B. Wadkar (2004)268 ITR 332* it was held that the AO must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. On facts, there are no details given by the AO as to which fact or material was not disclosed by the Petitioner that led to it's income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the Petitioner to disclose fully and truly all material facts without giving any details thereof. This being the case, the impugned notice is bad in law and on this ground alone the Petitioner is entitled to succeed in this Writ Petition. (Writ Petition No. 2468 of 2011, dt. 12/06/2014.)

Bombay Stock Exchange v. DDIT (E) (Bom) (HC), www.itatonline.org

173. S. 147 : Reassessment – Housing project – Earlier year in favour of the assessee – Assessing Officer could not reopen assessment on merit on same ground in succeeding assessment year. [S.80IB(10)]

Assessee claimed deduction under section 80-IB(10) which was allowed by Assessing Officer. Assessing Officer reopened assessment beyond period of four years from end of relevant assessment year on ground that as per amendment inserted subsequently in section 80-IB(10) deduction claimed by assessee was not allowable. In assessee's own case for assessment year 2006-07 in tax appeal No. 1119 of 2011, High Court held that deduction allowed under section 80-IB could not be withdrawn on basis of amendment to section 80-IB introduced subsequently with prospective effect. Following same, Tribunal deleted disallowance made by Assessing Officer. Revenue contended that Tribunal had not dealt with aspect of reopening of proceedings. The Court held that non-dealing of Tribunal with legality of reassessment did not lead to raising any substantial question of law. Where issue was squarely covered in favour of assessee for preceding assessment year, Assessing Officer could not reopen assessment as same ground in succeeding assessment year (A.Y. 2007-08)

CIT v. Kalpatru Sthapatya (P.) Ltd. (2014) 220 Taxmann 157 (Mag.) (Guj.)(HC)

174. S. 158B : Block assessment – Undisclosed income – If the income is already disclosed in return of income or is available in books of account, then it does not fall in category of undisclosed income.

A search and seizure operation was conducted at the residential premises of the assessee and additions of four undisclosed income was made by the AO. The High court observed that the four undisclosed items on which addition was made was available in the balance sheet or books of account of the assessee and the search did not lead to unearthing of any income. It held that the AO merely had a change of opinion which was neither warranted in law nor could form the basis of invoking the provisions Chapter XIV-B of the Act. Reliance placed on the decision of *CIT v. Hotel Blue Moon (SC) (Block Period 01-04-1985 to 03-01-1996)*

CIT v. B. Satyanarayana (2014) 220 Taxman 86 (AP) (Mag.) / 356 ITR 323 (AP)(HC)

175. S. 158BC : Block assessment – Issue of notice under section 143(2) is mandatory- Cancellation of block assessment was held to be valid. [S. 143(2)]

The Tribunal directed the Commissioner (Appeals) to verify from the assessment record whether any notice u/s 143(2) had ever been issued and served before the limitation period prescribed and in case it was found that no notice u/s 143(2) had been served upon, he would cancel the assessments as illegal and bad in law. Held, specific directions were given to the Commissioner (Appeals) regarding the question whether such notice u/s 143(2) was issued or not. The Commissioner (Appeals) only followed the direction and when he found that no such notice was issued, he passed the consequential order. If the Revenue was aggrieved by the directions of the Tribunal it should have challenged the order of the Tribunal. Admittedly, this was not done. Therefore, there was a consequential order passed by the Commissioner (Appeals), which was in turn confirmed by the Tribunal. Appeal of revenue was dismissed.

CIT v. Pratapbhai K. Soni (2014) 361 ITR 201 (Guj) (HC)

176. S. 158BE : Block assessment - Time limit – Limitation Period for completion of assessment.

Search proceeding was challenged by the assessee before the High Court by filing writ petition. The assessment proceedings were stayed, *vide* interim order dated February 12, 2004. The interim order was vacated on August 26, 2009. Assessing Officer took the date of vacation of the

interim order to be the date, when it was received by him on November 9, 2009, and passed the assessment order on June 22, 2010. Tribunal held that limitation period for completing assessment would start from date when High Court vacated interim order and not from date when Assessing Officer received such vacation order. Therefore, the balance time available for framing assessment was upto 15.04.2010 and hence, assessment was barred by limitation. On appeal by revenue to High Court, Tribunal's order was upheld.

CIT v. Drs. X-Ray & Pathology Institute (P.) Ltd. (2013) 358 ITR 27/40 Taxmann.com 115/ (2014) 220 Taxman 88 (Mag.) (All.)(HC)

177. S. 158BD : Block Assessment – Recording of Satisfaction-Within two years. [S.158BE]

It was held that AO is bound to record the satisfaction within the meaning of S. 158BD within the two years time period stipulated in S. 158BE(1)

Raghav Bahl v. CIT (2014) 101 DTR 239 (Delhi)(HC)

178. S.158BFA : Penalty-Block assessment-Revised return-No provision for filing revised return – Additional undisclosed income in revised return – Penalty imposable. [S.158BC]

Return filed u/s. 158BC. Later, assessee disclosed additional undisclosed income. No provision for filing revised return u/s.158BC. Additional undisclosed income liable for penalty. (Block Period: 1/4/1989 to 29/10/98)

CIT v. Hitech Chemical P Ltd. (2014) 363 ITR 145 (Jharkhand)(HC)

179. S. 158BFA : Interest-Block assessment-Failure of the Department to furnish seized documents – Delay in filing block returns – Interest not to be levied.

Delay in filing the block returns was due to the delay on the part of the Department in furnishing necessary documents seized during the search. Delay in filing return not attributable to the assesee. Interest cannot be levied. (Block Period: 1/4/1989 to 28/1/2000)

CIT v. B. Nagendra Baliga(2014)363 ITR 410(Karn) (HC)

180. S. 195 : Deduction at source – Non-resident-Commission to agent-Circular-Later circular withdrawing the earlier circular operative only from the date of issue – Earlier circular did not oblige assessee to deduct TDS – Expenditure allowable. [S.9(1)(vii), 40(a)(i),119]

During the relevant year, circular in force not obliging assessee to deduct TDS on commission paid to non-resident agents. Circular issued later withdrawing the earlier circulars operative only from the date of issue. Commission paid to non-resident agents allowable as expenditure. (A.Y. 2008-09)

CIT v. Allied Exims (2014) 363 ITR 62 (All)(HC)

181. S. 195 : Deduction at source - Non resident - Agreement for procuring only orders does not involve any managerial services – Explanation to section 9(2) not applicable. [S. 9(1)(vii), 40(a)(i)]

Assessee appointed foreign agents for securing orders. Commission paid to agents disallowed on the ground that it is in violation of provisions of section 195 r.w.s. 9(1)(vii). Agreement was only for procuring orders which did not involve any managerial services. Explanation added to section 9(1)(vii) by Finance Act, 2010 with effect from 1-6-1976 was not applicable in view of fact that agents had their offices situated in foreign country and

they did not provide any managerial services to assessee. (A.Y. 2008-09)

CIT v. Model Exims (2014) 363 ITR 66 / 222 Taxmann 94 / 267 CTR 177 (All.)(HC)

182. S. 201 : Deduction at source - Failure to deduct or pay -Even if the statute does not lay down a time limit, proceedings must be completed within a limitation period. [S.153(1)(a), 201(IA)]

In the context of a GDR/ Euro issue by the assessee, the department claimed that the assessee ought to have deducted TDS u/s 195 on payment of fees to the fund managers etc. The Special Bench {Mahindra & Mahindra Ltd. v. Dy. CIT (2009)122 TTJ 577(Mum)(SB)} allowed the assessee's appeal inter alia on the ground that a time limit for initiation and completion of proceedings u/s 201 (1) & (1A) had to be read into the statute. On appeal by the department to the High Court HELD dismissing the appeal:

> S. 201 of the Act does not prescribe any limitation period for the assessee being declared as an assessee in default. If no period of limitation is prescribed, a statutory authority must exercise its jurisdiction within a reasonable period. What should be the reasonable period depends upon the nature of the statute, rights and liabilities thereunder and other relevant factors. Insofar as the Income Tax Act is concerned, s. 153(1)(a) prescribes the time limit for completing the assessment, which is two years from the end of the assessment year in which the income was first assessable. It is well known that the assessment year follows the previous year and, therefore, the time limit would be three years from the end of the financial year. This seems to be a reasonable period as accepted u/s 153 of the Act, though for completion of assessment proceedings. Even though the period of three years would be a reasonable period as prescribed by s. 153 of the Act for completion of proceedings, the Income Tax Appellate Tribunal has taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed. The rationale for this seems to be quite clear if there is a time limit for completing the assessment, then the time limit for initiating the proceedings must be the same, if not less. Nevertheless, the Tribunal has given a greater period for commencement or initiation of proceedings. ITA No. 3489 of 2009, dt. 03/07/2014)

DIT (IT) v. Mahindra & Mahindra Limited (2014) 365 ITR 560/106 DTR 337 (Bom.)(HC)

183. S. 226(3) : Collection and recovery – Modes of recovery – Public Provident Fund Account – Amount remaining in account would be immune from attachment for recovery of tax due. [Public Provident Fund Act,1968, S.9,10,Code of Civil Procedure Code,1908, S.60(1)]

As long as an amount remains invested in a public provident fund account of an individual, the amount would be immune from attachment for recovery of the tax dues. The situation may change as and when such amount is withdrawn and paid over to the subscriber, which is not the situation in the case of the present assessee. The clarification issued by the Central Board of Direct Taxes does not take into account the provisions of rule 10 of the Second Schedule to the 1961 Act and the provisions of section 60(1) of the Code of Civil Procedure. The clarification is contrary to such statutory provision. Thus, the action of the Tax Recovery Officer in first attaching and, thereafter, unilaterally withdrawing a sum of ₹ 9,05,000 from the public provident fund account of the assessee was liable to be quashed.

Dineschandra Bhailalbhai Gandhi v. TRO (2014) 362 ITR 380 (Guj.) (HC)

184. S. 246 : Appeal-Commissioner (Appeals)-Appealable orders– Order of AO granting refund along with interest is held to be appealable. [S. 244(1A)]

The AO based on the order of the CIT(A) granted the refund, but no order for payment of interest under section 244(1A) on refund amount was passed. Aggrieved by the order omitting to grant interest, the assessee preferred an appeal before the CIT(A). The CIT(A) dismissed the appeal holding that an appeal for claiming interest under section 244(1A) was not entertainable in a case where the order giving the appeal effect itself was not being challenged on any ground. Tribunal held that order of AO granting refund but not interest under s. 244(1A) is in fact an order under S.143(3) and appeal to CIT(A) was maintainable. (A.Y. 1986-1987)

CIT v. Biswanath Pasari (2014) 101 DTR 133 / 44 Taxmann.com 128 / 364 ITR 404 / 267 CTR 290 (Cal.) (HC)

185. S. 253 : Appellate Tribunal – Powers – Tribunal has no power to examine validity of search u/s 132 [S.132]

It was held that in an appeal preferred against the block assessment made in pursuance of the search conducted by the IT Department, the validity of the search cannot be gone into by the Tribunal as search and seizure is an administrative power and not a quasi-judicial power. (BP. 1-4-1995 to 23-8-1995)

ACIT v. P.N. Sanyal (2014) 101 DTR 385 / 45 taxmann.com 516 (All.)(HC)

186. S.254(2) : Appellate Tribunal-Rectification of mistake Apparent from the record – Limitation – Filing the application on last date of completion of four years – Held to be within period of limitation.

Where the assessee submits a Miscellaneous Application under s. 254(2), it is required to be made within a period of four years from the date of actual receipt of the order passed by the Tribunal. It was held that even if the application is submitted on the last day of completion of four years from the date of receipt of the order the same is required to be decided on merits and in such a situation the assessee is not required to give any explanation for the delay in filing the application for the period between the actual date of receipt of the order which is sought to be reviewed and the date on which the miscellaneous application is submitted. (A.Y. 1996-1997)

Peterplast Synthetics (P) Ltd. v. ACIT (2014) 101 DTR 83 / 364 ITR 16 (Guj.)(HC)

187. S. 254(2) : Appellate Tribunal– Refusal to rectify order –Appeal is not maintainable – Writ is maintainable. [S. 260A, Art.226]

Appeal to High Court is not maintainable from order refusing to rectify order. Held, writ petition against such order was maintainable. (A.Y. 1999-2000)

Madhav Marbles and Granites v. ITAT (2014) 362 ITR 647 (Raj) (HC)

188. S. 254(2A) : Appellate Tribunal– Stay – Reasons to be given-Order not stating even *prima facie* how demand of tax is arguable on merits – Assesse to deposit further 50 percent of tax if adjournment at instance of assesse.

The assessee a public charitable trust. It claimed exemption under section 11, alternatively it

claimed exemption in respect of its long term capital gains dividend income and income from mutual funds under section 10. However the AO did not accept the contention and assessed income at ₹ 714 crores. This was confirmed by CIT (A). Out of total demand of ₹ 300 croes, the assesse paid an amount of Rs 10 crores. Tribunal granted stay of the outstanding demand of tax of ₹ 290 crores under the first proviso to section 254(2A). Revenue filed writ petition against the order of Tribunal. Allowing the petition the Court stated that the order of stay must record briefly assessee's case, look at questions involved in appeal and amount required to be deposited considering issue in appeal. In the instant case, order did not state even prima facie how demand of tax is arguable on merits. Held, pending appeal, Assessee to deposit further 50% of demand of tax if adjournment was sought by it. (AY. 2010-11)

DIT (E) v. Jamshetji Tata Trust (2014) 362 ITR 357 (Bom)(HC)

189. S. 254(2A) : Appellate Tribunal– Stay-For a maximum of 365 days from date of initial order-No power to grant stay beyond outer limit stipulated in the statutory provision.

The Income –tax Appellate Tribunal is not an authority akin to a court but a special Tribunal with limited jurisdiction as indicated in the statutory provisions. Section 254 of the Income tax Act 1961 , deals with the manner of its functioning .The third proviso to section 254(2A) was inserted with effect from October 1, 2008. The third proviso merely indicates that the extension of stay order cannot be beyond a total number of 365 days but also indicates that even assuming an order of this nature had been passed , such an order of stay shall stand vacated after the expiry of the outer limit of 365 days. Held accordingly , that the Tribunal had committed a positive error in consciously extending the interim order of stay granted in the pending appeal beyond the period of 365 days, which is the outer limit stipulated in the statutory provision.

CIT v. Ecom Gill Coffee Trading P. Ltd. (2014) 362 ITR 204 (Karn.)(HC)

CIT v. B. Fouress P. Ltd. (2014) 362 ITR 204 (Karn.) (HC)

190. S. 260A : Appeal – High Court – Tribunal following its earlier view on same facts and same assessee – No substantial question of law.

The Tribunal has not deviated from its earlier order on facts and in respect of the same assessee. No substantial question of law arises.

CIT v. Deepak Fertilizers and Petrochemicals Corporation Ltd. (2014) 363 ITR 484(Bom.)(HC)

191. S. 260A : Appeal – High Court – Penalty – Concealment – Frivolous appeals by department results in harassment to assessee & wastage of judicial time. Department to pay costs of ₹ 3 Lakhs. Costs may be recovered from, disciplinary action taken against, concerned official. [S.271(1)(c)]

The Tribunal deleted the levy of penalty u/s 271(1)(c) by following the judgment of the Supreme Court in *CIT v. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC).* On appeal by the department to the High Court HELD dismissing the appeal:

(i) We are surprised if not shocked that such appeals are being brought before us and precious judicial time is being wasted that too by the Revenue. The least and minimum that is expected from the Revenue officers is to accept and abide by the Tribunal's findings in such matters and when they

are based on settled principles of law. If they are not deviating from such principles and are not perverse but consistent with the material on record, then, we do not find justification for filing of such appeals. We have found that merely expressing displeasure orally is not serving any purpose;

(ii) Time and again we have to deal with such Appeals. Merely because they are filed that they get listed on the Daily Admission Board. The Advocates filing them and routinely, so also those instructing them do not have authority to withdraw them. Consequently, they are pressed and argued resulting in a hearing, may be brief and an order of this Court dismissing them. Sometimes there are at least 35 such cases on our daily board. We do not understand why higher officials do not have the courage to take bold decisions particularly of not pursuing such matters up to this court or higher. Because the assessee is a leading Public Limited Company should not act as a deterrent for them to take a informed, rational decision and subserving larger Public Interest. A realization of this nature is a need of the hour as higher courts do not have to deal with Tax and Revenue matters only but all those involving life and liberty of citizens, their property rights, Rights of Children, Women and Senior Citizens. These rights are also precious and the legitimate expectations of such persons or groups of easy and expeditious justice also have to be fulfilled by the higher judiciary. The biggest litigant, namely, the State ought to be aware of the Pendency of Cases in High Courts of Bombay, Madras, Calcutta and Allahabad for example. If their policies particularly on litigations are not aimed at reducing frivolous and speculative litigations, then, the least that can be said is that the State has failed to act for public good and in Public Interest. The State is expected to act as a Model Litigant. It must set an example for the Public to follow and we hope that this order acts as a reminder for all concerned to at least now take remedial steps and measures. It is therefore that despite the persuasive skills of Mr. Sureshkumar, who fervently pleaded not to pass any order imposing costs, that we are constrained to impose costs;

(iii) The Revenue officers must realize that just like other powers an executive power conferred in them is in the nature of a Trust. They hold office as trustees of the public at large. They deal with public revenue and public money and that cannot be wasted in such frivolous litigation. We, therefore, dismiss these appeals with costs quantified at ₹ 1,00,000/each (for three appeals);

(iv) It would be open for the superior/ competent authority to recover the costs personally from the officer responsible and equally take disciplinary action against him if the power to decide about filing such appeals is abused or the decision making authority is utilized to harass innocent Assessees. Every case must be dealt with on its merit and no routine exercise ought to be undertaken merely because the Revenue impact is higher or the status or financial position of the Assessee is influential and strong. That cannot be the only yardstick or criteria.(ITA No. 424 of 2012, dt. 10/07/2014.)

CIT .v. Larson and Toubro Ltd. (Bom.)(HC) www.itatonline.org

192. S. 263 : Commissioner – Revision of order prejudicial to the interest of the revenue – Deduction u/s 80HHF – Profits and gains from export of Film Software –AO examined the matter in detail during the

assessment proceedings – Revision proceedings not valid u/s 263. [S. 80HHF,143(3)]

Assessee claimed deduction u/s 80HHF of profits and gains from export of Film Software. During the original assessment proceedings u/s 143(3) AO delved deep into the issue of allowability of the deduction and allowed the deduction to the assessee. Commissioner initiated revision proceedings u/s 263 on few grounds including, *inter alia*, that the rights of the material exported remained with the assessee, then how can it be termed as an export. Accordingly, the Commissioner set aside the assessment order after giving a finding that there was absence of proper enquiry. High Court held that AO during the assessment proceedings had examined the issue in great detail and was satisfied about the allowabilty of the deduction. Further, the Commissioner did not give any valid reason as to why the order was erroneous. Consequently, it held that, one of the conditions for invoking section 263 that order being erroneous being not fulfilled, Commissioner cannot set aside the order by invoking section 263. (A. Y. 2002-03)

CIT v. New Delhi Television Ltd. (2014) 220 Taxmann 43 (Mag.) (Delhi) (HC.)

193. S. 263 : Commissioner - Revision of orders prejudicial to revenue – Assessment Order cannot be said to be prejudicial to interest of revenue merely because discussion not made. [S.143(3)]

While passing assessment order u/s 143(3), Assessing Officer had taken into account all details but also disallowed some expenditure and made addition wherever same was required. CIT(Appeals) thereby invoked revisionary powers u/s 263 on account of lack of enquiry. Tribunal concluded that decision of Assessing Officer could not be prejudicial to interest of revenue simply because it did not make detailed discussion as Assessing Officer made enquiries on issue under consideration and assessee had given a detailed explanation by letter furnishing data. On appeal before High Court, dismissing the appeal, held that Assessing Officer has not only taken into account all the details, but also granted disallowance and addition wherever he found that the same are required to be given. It is not correct to say that the Assessing Officer did not consider all the details, as alleged. The findings of the learned Tribunal are in consonance with law and are correct.

CIT v. Anand Food Products (2014) 220 Taxman 40 (Mag.)/ (2013) 39 Taxmann.com 187 (AP) (HC)

194. S. 263 : Commissioner - Revision of orders prejudicial to revenue -Expenditure incurred in relation to exempt income-Order is not erroneous unless CIT holds how it is erroneous [S.14A]

During the assessment year 2006-07, assessee had earned dividend income of ₹ 24,12,482 through investments made out of borrowed funds. After netting interest paid on loan obtained against interest earned from deposits, assessee offered ₹ 94,47,712 as disallowance under section 14A. Assessing Officer had conducted inquiry and accepted disallowance which was surrendered by assessee. The CIT passed order u/s 263 and recorded that the assessing officer should have conducted further inquiries and correct disallowance should have been made under Section 14A read with Rule 8D. The Tribunal held that the Commissioner had not given or formed any opinion as to whether or not said disallowance was satisfactory or not, though Assessing Officer had applied his mind and accepted offer made by assessee. On further appeal the High Court held that the assessment order does not become erroneous because the assessing officer after verification accepts the

claim/disallowance. It will be erroneous if the Commissioner holds that the finding recorded by the assessing officer is incorrect or contrary to law. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Commissioner of Income-tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. An order is not erroneous, unless the Commissioner of Income-tax hold and records reasons why it is erroneous. Therefore the application and appeal was dismissed. (A. Y. 2006-07)

CIT v. Galileo India (P.) Ltd. (2014) 220 Taxman 115 (Mag.)(Delhi)(HC)

195. S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order must be erroneous and also prejudicial to revenue – Commissioner cannot invoke his revisional power to correct each and every mistakes committed by the AO [S. 11, 13]

In case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5) that is liable to be taxed and that violation under section 13(1)(d) does not tantamount to denial of exemption under section 11 on total income of assessee-trust. Revisional order held to be not valid. (A.Y. 2000-01, 2001-02)

CIT v. Fr. Mullers Charitable Institutions (2014) 363 ITR 230 (Karn.)(HC)

196. S. 269SS : Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Book entries - Bar in S. 269SS/ 269T does not apply to loans/ advances accepted/ repaid via journal entries- Limitation period for s. 271D penalty is as per s. 275(1)(c) & not 275(1)(a)[S. 271D, 275(1)(c), 275)(1)(a)]

PACL India Ltd purchased lands on behalf of assessee from several land owners. PACL made payments through demand drafts to the said land owners. The assessee showed the land in its books and the amount as being due to PACL. The AO passed an assessment order dated 30.12.2009 in which he held that the transaction amounted to a loan from PACL to the assessee which contravened s. 269SS/ 269T as it was not be 'account payee' cheque. A penalty order u/s 271D dated 10.03.2012 was passed for the said contravention. The said penalty was deleted on the ground that the penalty order was barred by limitation and also that s. 269SS did not apply to journal entries. On appeal by the department to the High Court HELD dismissing the appeal:

(i) Penalty u/s 269SS is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of s. 269SS is not related to the income that may be assessed or finally adjudicated. Accordingly, the time limit in s. 275(1)(a) would not be applicable. The time limit in s. 275(1)(c) is applicable.

(ii) On merits, no offence u/s 269SS is made out. S. 269SS applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The section is restricted to transactions involving acceptance of money and not intended to affect cases where a debt or a liability arises on account of book entries. The object of the section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to s. 269SS which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of accounts

by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of s. 269SS because passing such entries does not involve acceptance of any loan or deposit of money (ITA No. 232of 2014, dt. 21.05.2014.)

CIT v. Worldwide township Project Ltd.(Delhi) (HC) ,www.itatonline.org

197. S. 271(1)(c) : Penalty – Concealment – Disallowance made on account of curtailment of deduction under section 80-IB, duty drawback and dividend income from foreign companies was offered to tax by assessee voluntarily – No penalty.[S.80IB]

During assessment, deduction claimed under section 80-IB of the Act was curtailed, duty draw back was disallowed and dividend income from foreign companies was taxed. Thereby Penalty was levied. CIT(Appeals) and Tribunal deleted the penalty on the basis that amounts were offered to tax by the assessee on its own and not after detection on the part of the Assessing Officer. On appeal by revenue to High Court, Tribunal's order was upheld. (AY. 2001 – 02)

CIT v. Blue Star Ltd. (2013) 357 ITR 669/40 Taxmann.com 109 / (2014) 220 Taxman 91 (Mag.) (Bom.)(HC)

198. S. 271(1)(c) : Penalty – Concealment – Mere admission of Appeal by High Court on substantial question of law is sufficient to debar levy of concealment penalty.[S.260A]

In quantum proceedings, the Tribunal upheld the addition of three items of income. The assessee filed an appeal to the High Court which was admitted. The AO levied penalty u/s 271(1)(c) in respect of the said three items. The penalty was upheld by the CIT (A). The Tribunal deleted the penalty on the ground that when the High Court admits substantial question of law on an addition, it becomes apparent that the addition is certainly debatable. In such circumstances penalty cannot be levied u/s 271(1)(c). It held that the admission of substantial question of law by the High Court lends credence to the bona fides of the assessee in claiming deduction. It added that once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition of penalty. On appeal by the department to the High Court HELD dismissing the appeal:

This Appeal cannot be entertained as it does not raise any substantial question of law. The imposition of penalty was found not to be justified and the Appeal was allowed. As a proof that the penalty was debatable and arguable issue, the Tribunal referred to the order on Assessee's Appeal in Quantum proceedings and the substantial questions of law which have been framed therein. We have also perused that order dated 27.09.2010 admitting Income Tax Appeal No.2368 of 2009. In our view, there was no case made out for imposition of penalty and the same was rightly set aside.(ITA No. 415 of 2012, dt. 08/07/2014.)(AY.) _

CIT v. Nayan Builders and Development (Bom)(HC) www. itatonline.org

199. S. 271(1)(c) : Penalty–Concealment–Revised Return-Levy of penalty was held to be not valid.

It was held that mere fact that the assessee could not obtain confirmation letter of the outstanding entries from only five traders out of twenty in no manner can be said that in his return, he

mentioned inaccurate particulars and hence Penalty under s. 271(1)(c) was not leviable. (A.Y. 1991-92)

CIT v. Mathura Commercial Co. (2014) 101 DTR 371 / 45 taxmann.com 515 (All)(HC)

200. S. 271C : Penalty - Failure to deduct at source – Not deducted based on the order of Tribunal – Held to be reasonable cause.

At the relevant time, there was a Tribunal decision and in view whereof the assessee was under a bona fide belief that tax was not liable to be deducted on commission/trade discount. It was held that there being a reasonable cause, penalty was rightly deleted.

CIT v. G.M. (Telecom) BSNL (2014) 101 DTR 401 (All) (HC))

201. S. 273A : Penalty–Concealment-Waiver–Application for several years-View of Commissioner holding that waiver can be done for one year at one instance was held to be not valid-Matter was set aside where the assesse has shown that the taxes and interest were paid. [S.271(1)(c)]

The assessee, for the assessment years 1980-81 to 1988-89, filed returns belatedly in respect of income under the head "Income from house property". She preferred an application seeking waiver of penalty and interest for those years. The Commissioner opined that having regard to s.273A(3), the assessee was a persistent defaulter and, therefore, could not be granted the benefit of waiver sought for. He also proceeded on the footing that the assessee had neither paid tax nor made satisfactory arrangement for payment of tax. On a writ petition :

Held, allowing the petition, (i) that the question of the assessee having to pay the amounts of penalty and interest in the first instance in order to qualify for relief u/s 273A did not arise. If such a construction were to be given, the object of conferring discretion itself would be defeated. (ii) The language of s.273A(3) does not talk of one year but of one instance. The Commissioner proceeded on the assumption that the relief could be given once for one year was erroneous. (A.Y. 1980-81 to 1988-89)

Asha Pal Gulati .v. CBDT (2014) 361 ITR 73 (Delhi) (HC)

202. S. 281 : Certain transfers to be void–Recovery of tax- No power to declare transfer void–Only civil suit to lie-Revenue could not proceed with the auction sale of the properties under attachment to recover the dues of the defaulter.

Notices were issued to the tax defaulter during the years 1989 to 1994 for recovery of unpaid taxes. Such taxes were, however, not paid. In the meantime, the defaulter sold certain properties to various persons including the petitioners. Such sale deeds were executed in May 1995. It was only thereafter that the Department attached the property in question by issuing an order dated May 22, 1995. On November 8, 1995, the Tax Recovery Officer passed an order declaring the sale transactions as void. This order was passed without any notice to the petitioners. On a writ petition:

Held, allowing the petition that the Revenue could not proceed with the auction sale of the properties under attachment to recover the dues of the defaulter.

Karsanbhai Gandabhai Patel v. TRO (2014) 362 ITR 374 (Guj.)(HC)

DIRECT TAXES

Tribunals
Research Team

112. S. 6(1): Residence in India – Individual – Stay less than 182 days in India-Employed prior to leaving India should not affect its residential status–Salary income of assessee accrued or arose during employment in China was not taxable in India. [S.5]

Assessee contended that he was working in Whirlpool China and salary was accrued and arose in China only and that he was non-resident during the relevant financial year therefore, he was not liable to be taxed in India.Tribunal held that the assessee was not resident during the relevant period as he has left India for the purpose of employment outside India. His stay during the relevant financial year was less than 182 days in India. Therefore, his status was non-resident during the relevant financial year. He was already employed in the Whirlpool India prior to the leaving India for working with Whirlpool China shall not effect the residential status of the assessee. All this fact clearly shows that salary income of the assessee accrued and arose during the employment in China is not taxable in India. Where status of assessee was a non-resident, fact that assessee was already employed before leaving India should not affect his residential status. (A.Y. 2006-07).

ACIT v. Raj Jain (2014) 146 ITD 651 (2013) 38 taxmann.com 133 (Delhi) (Trib.)

113. S. 9(1)(i) : Income deemed to accrue or arise in India — Business connection – Permanent Establishment – Commission is taxable in India – DTAA-India-Finland [Article 5]

Assessee Finland company executed a contract with Nhava Sheva Port Trust (NSPT) for supply of tractors and trailers. It engaged an Indian company Usha Sales for rendering certain specific services in India. Assessee paid an agreed commission to Usha Sales. Assessee had PE in India in form of Usha Sales and that certain percentage of sale of trailers was also taxable in India. Assessee had not been able to convince fact that Usha Sales was not a PE of assessee and it was an independent branch by itself. Indian company should be treated as a PE, and not as an agent of independent status.(A.Y. 1989-90)

ADIT (IT) v. Oy Sisu AB (2014) 146 ITD 572 / (2013) 38 taxmann.com 81 (Mum.)(Trib.)

114. S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty - Fee received for "foreign exchange deal matching system services" constitutes "royalty" – DTAA-India-UK. [Article 12]

The Tribunal had to consider whether the consideration for services offered by the assessee of "foreign exchange deal matching system" was assessable as "royalty" under Article 12(3) of the India-USA DTAA. The "foreign exchange deal matching system" facilitates the Indian subscribers i.e. Banks to deal in the foreign exchange with the other counterparts who are ready for the transaction of purchase and sale of foreign currency. The role of the deal matching system is to provide a platform where both purchaser and seller find the respective match for the intended transaction of purchase and sale. HELD by the Tribunal:

The assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services including auto quote service. The assessee is also providing the equipment with pre-loaded software to its subscribers and network used for provision of the services. The assessee grants subscribers limited

licence of software to install and use at the site. The said licence can be sub-licenced by the subscriber. The subscriber/user can also view, manipulate and create the derived data from information for their individual use. Further the subscriber can store information, manipulate information for its use and also distribute or redistribute information and drive data to anyone to a limited extent so far as it is not done in a systematic manner. The subscribers are allowed to use the information and even to manipulate and drive the data to anyone for their individual use. Thus it is clear that it is subscribers who are using the information and system of the assessee for their commercial/business purposes. The information is made available by the assessee through its system and other equipments installed at the site of the subscriber to facilitate the connectivity with the assessee's system/router located in Geneva. The platform of transacting the purchase and sale is commercial equipment allowed to be used by clients/subscribers for commercial purposes. The nature of service rendered by the assessee includes the information concerning commercial use by the subscriber. Further the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. Also, the Indian subscribers have been granted a licence to use the software for their internal business, which can be sub-licenced by them. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which licence was granted by assessee. It is not a case of *simplicitor* payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the assessee under licence. Accordingly, by allowing the use of software and computer system to have access to the portal of the assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect constitutes royalty.) (ITA No. 6947/Mum/2012, dt. 18-7-2014.)(A.Y. 2009-10)

Reuters Transaction Services Ltd. v. DDIT (Mum) (Trib), www.itatonline.org

115. S. 10A : Free trade zone – Export turnover – Total turnover – Where any expenditure is to be reduced from export turnover, same is to be excluded from total turnover also

A.O. reduced the communication expenses from the export turnover for computation of the deduction u/s. 10A. CIT (Appeals) without appreciating the fact that the communication expenses were consisting of telephone charges, and internet charges which were incurred in normal course of business and not specifically for the purpose of delivery of software outside India, should have directed to be excluded from the export turnover for computing the deduction under section 10A.Tribunal held that if these communication expenses are to be excluded from the export turnover, then the same should also be excluded from the total turnover for computing the deduction u/s. 10A. (A.Y. 2005-06)

Intoto Software India (P.) Ltd. v. ACIT(2014) 146 ITD 360 / (2013) 35 taxmann.com 421 (Hyd.)(Trib.)

116. S. 28(i) : Business income – Lease equalization charges – Depreciation – Difference between annual lease charge of leased assets and depreciation allowed on said leased asset under Income-tax Act should be taken into consideration and not difference between annual lease charge and depreciation claimed by assessee in books of account as per Companies Act. [S.145]

The assessee, a non-banking financial company, engaged in leasing business. During the years under consideration, the assessee had entered into various transactions of finance lease and

after working out the lease equalisation in respect of each and every lease transactions as per the guidelines issued by the Institute of Chartered Accountants of India (ICAI). The lease equalisation so worked out was claimed by the assessee as deduction while computing its total income. AO disallowed the claim which was confirmed by CIT (A). Tribunal held that when the relevant transactions are treated as finance lease and the assessee is allowed depreciation after having found him the owner of the leased assets, the depreciation allowed as per the rates prescribed in the Income-tax Act could be more than the depreciation claimed by the assessee in its books of account at the rate prescribed under the Companies Act. Therefore necessary that while allowing deduction on account of lease equalisation charges for the purpose of computing total income under the Income-tax Act, the difference between the annual lease charge of the leased assets and depreciation allowed on the said leased asset under the Income-tax Act should be taken into consideration and not the difference between the annual lease charge and depreciation claimed by the assessee in the book of account as per the Companies Act. Matter was remanded for calculation. (A.Ys. 1994-95 to 1997-98)

Infrastructure Leasing & Financial Services Ltd. v. Dy. CIT (2014) 146 ITD 297 / (2013) 38 taxmann.com 40 (Mum.)(Trib.)

117. S. 28(i): Business loss – Foreign currency fluctuation loss – Foreign exchange forward contracts – Mercantile system of accounting – Allowable [S. 145]

The assessee entered into foreign exchange forward contracts with banks in order to hedge foreign currency fluctuation. It incurred a (net) foreign exchange loss as a result of 'marketing to market' the forward contracts. A.O. held that loss was not allowable as deduction in the year of incurrence. Tribunal held that the loss has been incurred for hedging of foreign currency fluctuation involved in sales invoices on the basis of forward contracts, which is a business decision to safeguard its interest. The loss has been incurred on the basis of scientific method in the ordinary course of business. The loss being based on a scientific method, on the basis of contractual liability with banks and on mercantile system has to be allowed to the assessee. It is a business loss incurred by the assessee on mercantile system which method is consistently followed by the assessee. Foreign currency fluctuation loss being based on scientific method, on basis of contractual liability with banks and on mercantile system had to be allowed (A.Y. 2008-09).

Bechtel India (P.) Ltd. v. ACIT (2014) 146 ITD 733 / (2013) 33 taxmann.com 213 (Delhi)(Trib.)

118. S. 36(1)(iii) : Interest on borrowed capital – Rate of interest – Disallowance of interest exceeding 18 per cent was held to be not justified

Assessee paid interest to creditors as well as trade parties up to 30 days at rate of 18 per cent and beyond 30 days at rate of 21 per cent and claimed deduction of same. A.O. disallowed interest exceeding that where payment was made within 30 days interest was paid at rate of 18 per cent and in other cases interest was paid at rate of 21 per cent. CIT (A) deleted the addition. Affirming the view of CIT (A) Tribunal held that the rate of interest chargeable for delayed payments are mentioned in the invoices itself. This clearly establishes payment policy of the assessee-company (A.Y. 2009-10)

ITO v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

119. S. 37(1): Business expenditure – Capital or revenue – Share issue expenses – Capital in nature [S. 35DD]

Expenditure incurred on account of issuance of share certificates cannot be considered as revenue expenditure. (A.Y. 2006-07)

Ricoh India Ltd. v. Dy. CIT (2014)146 ITD 798 / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

120. S. 37(1) : Business expenditure – Discount – Agency commission was held to be allowable

Assessee is engaged in business of manufacturing and trading of fabric. During year agency commission had been paid to local agents for their services provided for introducing to overseas parties, to whom it sold goods on principal to principal basis, (i) in invoices from gross amount of sales deduction up to 12.5 per cent had been given in name of commission, and (ii) in books after recording gross sales, deduction was separately recorded as overseas commission. A.O. accepted local commission paid, but disallowed overseas commission on ground that no services had been rendered by overseas agents. Overseas commission represented a discount given to purchasers and not a business commission. Tribunal held that A.O. wrongly disallowed the overseas commission without appreciating real nature of entries made in books of account. Appeal of revenue was dismissed (A.Y. 2009-10)

ITO v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh)(Trib.)

121. S. 37(1) : Business expenditure – Explanation – If the purpose of the expenditure is not an offence / prohibited by law, fact that prior approval of the Govt. was not obtained cannot be the basis of disallowance

The Explanation to s. 37(1) is a deeming provision and disallows expenditure incurred by an assessee for 'any purpose' which is either an offence or prohibited by law. The inquiry to determine the applicability or otherwise of the explanation is restricted to ascertaining the purpose of the expenditure. In simple words, the investigation should be carried out to see the object and consideration for the expenditure incurred. If the purpose of the expenditure is neither to commit an offence nor is prohibited by any law, then there can be no question of disallowance. It means that the offence or prohibition under law should be judged with the 'purpose' of the expenditure on a standalone basis divorced from the fulfilment or otherwise of the procedural formalities attached with and necessary for the incurring of such expenditure. To put it in simple words, if the expenditure is otherwise lawful and neither amounts to offence nor is prohibited by law, but the procedural provisions attached for incurring it are not complied with, no doubt irregularity will creep in, but such irregularity would not make the expenditure itself as unlawful so as to be brought within the scope of the Explanation. On facts, the payment of job work charges is not an offence or prohibited by law. The fact that there was no prior approval from the Central Government u/s. 297 of the Companies Act does not make the expenditure of job work charges disallowable. (ITA No. 844/Del/2013, A.Y. 2009-10, dated 26-6-2014.)

Jai Surgical Ltd. v. ACIT (Delhi)(Trib.), www.itatonline.org

122. S. 37(1) : Business expenditure-Foreign education expenditure of whole time director – Allowable as business expenditure

The assessee company debited foreign education expenditure and claimed as allowable expenditure. A.O. treated the said expenditure as personal nature and disallowed the said expenditure. On appeal the Tribunal held that the expenditure was incurred as per resolution passed by the company and as per the agreement he will work for two years after his return from USA. Tribunal held that expenditure incurred on foreign education of Mr. Goenka, the whole time director, under authority of a resolution passed pursuant to which an agreement between the as assessee and Mr. Goenka, is a business expenditure which is allowable. (ITA no. 3231/Ahd/2010 dated 13-9-2013)(A.Y. 2003-04)

Gujarat Carbon & Industries Ltd. v. ACIT (2014) July-BCAJ-P.32(Ahd.) (Trib.)

123. S. 40(a)(ii) : Amount not deductible – Business loss – Taxes – TDS receivable – Unrecovered TDS amount could not be allowed as business loss [S. 28(i)]

Assessee made a claim that certain parties made payments to the assessee after deduction of TDS, but failed to issue TDS certificates and hence the amount of TDS certificates not recovered should be allowed as deduction as business loss. Tribunal held that the amount represents TDS by the parties on behalf of the assessee, the same is in the nature of TDS receivable. It is settled position that tax payment is not a charge against but application of income. S. 40(a)(ii) clearly provides that any sum paid on account of taxes on the profits or gains of any business or profession, is not deductible. Unrecovered TDS amount could not be allowed as business loss. (A.Y. 2007-08)

Ricoh India Ltd. v. Dy. CIT(2014)146 ITD 798 / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

124. S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – AO has not given finding – Disallowance was not justified

Assessee – company purchased goods from a company 'P', which was specified u/s. 40A(2)(b). A.O. disallowed the ad hoc disallowance at the rate of 1%. Tribunal held that the A.O. has not given a finding that the payment made by the assessee is excessive or unreasonable having regard to the fair market value of the goods. Opinion has to be framed before invoking section 40A(2)(a) of the Act. Disallowance was held to be not justified (A.Y. 2009-10).

ITO v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

125. S. 45 : Capital gains – Business income – Share dealings – brought forward holding from preceding years – Assessable as capital gains [S. 28(i)]

Most of shares were from brought forward holding from preceding years which had been accepted as investment in earlier years and further assessee was maintaining separate account for investment as well as stock-in-trade of shares, sale proceeds of such shares were to be treated as capital gains and not business income (A.Y. 2008-09 & 2009-10).

Dy. CIT v. Emerging Securities (P.) Ltd. (2014) 146 ITD 736 / (2013) 39 taxmann.com 169 (Delhi)(Trib.)

126. S. 47A(4) : Capital gains – Withdrawal of exemption – Limited Liability Partnership – Giving of interest-free loans to partners of the LLP does not contravene proviso (c), though it contravenes proviso (f), to s. 47(xiiib) – Capital gains have to be computed on the book value of assets transferred & not on market value. [S.47(xiiib)]

A private limited company namely Aravali Polymers Pvt. Ltd was converted into a Limited Liability Partnership (LLP) u/s. 56 of the Companies Act and the assessee, Aravali Polymers LLP, came into existence. As per s. 58(4) of the Companies Act, the whole of the undertaking of the company stood transferred to and vested in the LLP and the company was deemed to be dissolved. One of the main assets in the company was shares of East India Hotels Ltd. The assessee also received Reserves and Surplus of ₹ 3 crore of the company. The assessee gave an amount of ₹ 50 crores as interest-free loan to the partners of the LLP in the same proportion as their shareholding in the company on the date of conversion. After the conversion of the company into the LLP, the said shares were sold. The resultant capital gains were offered to tax as long-term capital gains. The assessee claimed that the transfer of the assets by the company to

the LLP was exempt u/s 47(xiiib). The A.O. held that by giving interest-free loans to the partners in the same proportion as their shareholding in the company on the date of conversion, the assessee had contravened provisos (c) & (f) to s. 47(xiiib) and that the exemption granted by s. 47(xiiib) was not available. He held that u/s. 47A(4), the transfer of the said shares of EIH by the company to the LLP on conversion was assessable to tax on the basis of the market value of the shares on the date of conversion into the LLP. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD.

(i) Proviso (c) to s. 47 (xiiib) bars the shareholders of the company from receiving any consideration or benefit in any form or manner other than by way of a share in the profit and capital contribution in the LLP. This means that both the company and the LLP must exist for the shareholders of the company to receive any consideration. As, in the present case, the company does not exist after conversion, the question of a violation of proviso (c) to s. 47(xiiib) does not arise;

(ii) As regards proviso (f) to s. 47(xiiib), it bars payment either directly or indirectly to any partner out of the accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion. Here, the loans given by the assessee to its partners has been paid out of the Reserves and Surplus of the erstwhile Company. This is a clear violation of proviso (f) to s. 47(xiiib). The result is that exemption in s. 47(xiiib) is not available;

(iii) However, the A.O's action of invoking s. 47A(4) and of computing capital gains by adopting the market value of the shares on the date of conversion is not correct. S. 47A(4) applies to a case where the exemption u/s. 47(xiiib) is available and the conditions laid down in the proviso are not complied with. However, as in the present case, the A.Y. under appeal is the year on which the conversion took place and in that year itself, the conditions prescribed for the benefit of s. 47(xiiib) were not complied with and consequently the provisions of s. 47(xiiib) were not available to the assessee, s. 47A(4) is not attracted. Under s. 45, the market value of the asset transferred cannot be deemed to be the 'consideration'. As the shares were transferred at the book value, the capital gains have to be computed on the basis that the book value is the consideration received for the transfer by way of conversion. (ITA No. 718/Kol/2014, A. Y. 2011-2012, dated 27-06-2014)

Aravali Polymers LLP v. JCIT (Kol.)(Trib.), www.itatonline.org

127. S. 50 : Capital gains – Depreciable assets – Block of assets – Though gains on depreciable assets held for more than 3 years have to be treated as STCG u/s. 50, the gains have to be taxed at the rate applicable to a LTCG. [Ss. 2(11),112]

The assessee sold a flat at Khar for ₹ 35 lakhs. Since the flat was a business asset and had been shown as part of the block of assets, the assessee computed capital gains u/s. 50 at ₹ 12.52 lakhs after deducting the WDV of block of assets from the sale price. A.O. held that as the stamp value of the flats sold was ₹ 59 lakhs, s. 50C applied and the said value had to be substituted for the consideration received. The CIT(A) upheld the A.O's stand. Before the Tribunal, the assessee claimed that (i) s. 50C did not apply to depreciable assets and (ii) for the purpose of application of tax rate, the capital gain has to be assessed as long-term capital gain as the flat had been held for more than three years. HELD by the Tribunal:

The assessee's stand that s. 50C does not apply to depreciable assets is not acceptable in view of *ITO v. United Marine Academy(2011) 130 ITD 113(Mum) (SB)*. As regards the rate of tax, s. 50, which deems the capital gains as short-

term capital gain is only for the purposes of sections 48 and 49 which relate to computation of capital gain. The deeming provisions have to be restricted only to computation of capital gain and for the purpose of other provisions of the Act the capital gain has to be treated as long-term capital gain. Consequently, though for the purpose of computation of capital gain, the flat has to be treated as short-term capital gain u/s. 50, for the purpose of applicability of tax rate it has to be treated as long-term capital gain if held for more than three years. (ITA no. 4004/Mum/2011, A.Y. 2006-07, dated 17-07-2013)

Smita Conductors Ltd. v. DCIT (Mum.)(Trib.), www.itatonline.org

128. S. 92C : Transfer pricing – Arm's length price – Comparable – Small company – Cannot be compared with giant company engaged in development of various niche products

Assessee engaged in development of softwares for its associated enterprise (AE). TPO rejected some of comparable companies considered by assessee and adopted some other companies whose data was collected by resorting to provisions of s. 133(6). Assessee objected to comparables adopted by TPO. Tribunal held that since assessee was a small company, it cannot compared with giant company engaged in development of various niche products. Where A.O. noted functional dissimilarity between assessee and comparable company, same cannot be compared without making adjustment for dissimilarities. (A.Ys. 2005-06, 2007-08)

Intoto Software India (P.) Ltd. v. ACIT (2014) 146 ITD 360 / (2013) 35 taxmann.com 421 (Hyd.)(Trib.)

129. S.147 : Reassessment – Protective assessment – Retracted statement cannot form the basis of reopening – Protective assessment without substantive assessment is not permissible [S. 143(3)]

(i) The statement of Shri Subodh Gupta, CA. was recorded during the course of survey in his personal capacity. The statement was later retracted. A retracted statement recorded during survey cannot be a basis of assumption of jurisdiction u/s. 147 of the Act.

(ii) The AO has not made any specific allegations against the assessee. He intended to make a protective assessment on the assessee. However, while there can be a substantive assessment without any protective assessment, there cannot be a protective assessment/addition without a substantive assessment/addition. As no substantive assessment/addition was made in the hands of Subodh Gupta, the protective reassessment on the assessee is not permissible. (ITA No. 1502/Del/2013, dt. 27-06-2014.) (A.Y. 2004-05)

G.K. Consultants Limited v. ITO (Delhi)(Trib.) www.itatonline.org

130. S. 153A : Assessment – Search or requisition – Reassessment made without any incriminating material found during search action was held not valid [S. 132]

The return was processed under section 143(1) and the same had attained finality due to expiry of limitation period of 12 months from the end of the month in which the return was filed. Search operation was carried out on 14-08-2008 and no incriminating documents were found. In pursuance of notice u/s. 153A the assessee filed the return of income. The assessee could not produce the books of account and other details as the same were destroyed in the flood. A.O. completed the assessement under section 144 r.w.s 153A and estimated the net profit. In Appeal CIT(A) directed the A.O. to adopt the net profit at 0.14% as against 0.99% adopted by the A.O., however CIT(A) upheld the assessment proceedings u/s. 153A. Department has filed appeal against the deletion made by CIT(A) and the assessee has filed cross objection.

Allowing the cross objection of assessee the Tribunal held that reassessments made by the A.O. u/s. 153A without any incriminating material being found during the search action were not in accordance with law and the order was set aside. (ITA no 2141 to 2144 /Mum/2012 dt 20-02-2014 (A.Y. 2003-04)

ACIT v. Jayendra P. Jhaveri (2014) BCAJ-July-P.34 (Mum.)(Trib.)

131. S.154 : Rectification of mistake – Intimation – CPC hauled up for harassing assessee by imposing tax of 60% on LTCG & refusing to rectify – A.O. was directed to rectify the mistake in the intimation [S. 143(1)]

An intimation u/s. 143(1) was passed by the ACIT (CPC) in which the long-term capital gains were charged to tax at 60% instead of the applicable rate of 20%. The assessee filed an on-line rectification application. However, no order thereon was passed. Instead, the assessee was informed on telephonic enquiry that the application was rejected. The assessee filed an appeal to the CIT(A). The CIT(A) dismissed the appeal by raising hypothetical questions and going into irrelevant issues. On appeal by the assessee to the Tribunal HELD:

In the entire Income-tax Act, there is no provision charging a tax rate of 60% on long term capital gains. The Delhi High Court has issued remedial directions to improve hardships faced by taxpayers while processing the e-returns at CPC, Bangalore. The Court has discussed the background that in order to fasten the processing of returns, the revenue has introduced electronic filing of income-tax returns, TDS returns, e-tax payments and it operates Centralised Processing Centre (CPC) at Bangalore. This is manned by Higher Ranking Officers of Income Tax Department. The problem is faced by taxpayers, when demand is raised or refund reduced on account of either suomotu adjustment by the Income-tax Department and refund against tax demands or mismatch of TDS credit or any other adjustment or disallowance of claim made by taxpayer in the return and uploaded by the assessee in its e-returns. This is a general grievance among the taxpayers that the A.O.s do not adhere to the time limit specified for the disposal of rectification applications and taxpayers are invariably called upon to file duplicate application or new application. Further, no record or no receipt counters or registers for receipt of such applications are maintained. Thus, there is no record/register remained with the A.O. with details or particulars of rectification application made u/s. 154 of the Act as is evident from the present case. Similar directions were issued by the Delhi High Court in the case of its *Own Motion vs. CIT, WP(C) No. 2659/2012 dated 14-03-2013.* The Delhi High Court *vide* para 18 has issued dictum as under: "18. Each application under section 154 has to be disposed of and decided by a speaking order. This is the mandate of the Act. The order has to be communicated to the assessee and there is a relevant column to be filled in the register, which is now required to be maintained. The Board should issue specific directions to ensure that there is full compliance of the said requirements and directions by the Assessing Officers, Dak counters and Aayakar Sewa Kendras. This is the first mandamus or direction we have issued in the present judgment". As the facts in the present case are very clear that charging of long term capital gain can only be @ 20% in assessment year 2011-12 and not @ 60% as charged in intimation u/s. 143(1) of the Act by CPC, Bangalore which according to the provisions of the Income-tax Act is not legal. Hence, we quash the intimation and appeal of assessee is allowed. The jurisdictional A.O. is directed to amend the intimation issued by CPC, Bangalore, while giving appeal effect to this order. (ITA no. 1915/Kol/2012, A. Y. 2011-12, dated 25-06-2014.)

Mohan Kant Bansal v. ITO (Kol.)(Trib.), www.itatonline.org

132. S. 154 : Rectification of mistake apparent from record – Tax rebate – Securities transaction tax – If mistake is committed by assessee in ROI same cannot be rectified [S. 88E]

In the intimation, the income by the assessee was accepted but the credit for tax paid was allowed partly and the credit for the TDS claimed by the assessee was not allowed. The assessee filed a letter requesting to rectify the intimation by which demand was raised. The assessee furnished photo copies of advance tax challan with STT certificate and requested to give credit u/s. 88E(2). The A.O. rejected the letter stating that the rebate u/s. 88E(2) was to be allowed only in case where the same was claimed in the ROI and since the assessee had not claimed the same in ROI his claim could not be considered. On appeal Tribunal held that the mistake, if any, was in the return of income filed by the assessee. S. 154 cannot be utilised for rectifying the assessee's mistake in filling of the ROI. (A.Y. 2008-09)

Pawan Kumar Aggrawal v. ACIT (2014) 146 ITD 787 / (2013) 40 taxmann.com 489 (Delhi)(Trib.)

133. S. 158BFA : Block assessment – Penalty order passed on deceased person – Null and void [S. 292B]

The A.O. passed the penalty order u/s. 158BFA(2) in the name of the deceased assessee. He wrote the name of the deceased at the top of the penalty order. The son of the deceased was never impleaded as a legal heir of his father. It is well settled that no penalty can be legally imposed on the deceased person and the order imposing penalty on a deceased person shall be null and void. The legal heir was never impleaded or brought on record. The show cause notice for penalty was not issued, as legal heir of the deceased, and therefore, it cannot be said that non-mentioning of the name of the legal heir and writing of name of the deceased at the top of the penalty order is merely a clerical error. Where legal heirs of the deceased was brought on record and was impleaded in the proceedings as legal heir, and only mistake is in writing of the name of the deceased on the top of the order passed by the A.O., the same shall be simply a clerical error and shall have no adverse effect on the proceedings within section 292B of the Act. However, if the A.O. has failed to bring the legal heirs on record and the legal heirs has not been impleaded, it cannot be said that it is merely a clerical error to be saved by the provision of section 292B of the Act, and such an order passed on the dead person shall be null and void, and has to be quashed. The facts of the case leaves to only conclusion that the order imposing penalty was passed on the deceased, and therefore, is null and void, and the penalty on the dead person is not leviable (BP 1-4-1986 to 1-8-1996).

Chandrakant A. Gandhi v. ACIT (2014) 146 ITD 346 / (2013) 40 taxmann.com 432 (Ahd.)(Trib.)

134. S. 194A: Deduction at source – Interest other than interest on securities – Societies wholly funded by Government – Societies which are wholly funded by Government, would qualify for non-deduction of tax [Ss. 201, 201(IA)]

Assessee-bank did not deduct TDS from payments of interest under section 194A made to societies engaged in promotion of bio-technology and bio-business. It was held to be assessee-in-default u/s. 201(1) and interest was charged u/s. 201(1A). Societies were wholly financed by Central Government – as per Notification No. S.O. 3489, dated 22-10-1970, bank is not liable to deduct TDS on funds belonging to said societies. Assessee-bank could not be held as assessee-in-default. Societies which are wholly funded by Government would qualify for non-deduction of tax.

ITO v. State Bank of Patiala (2014) 146 ITD 497 / (2013) 35 taxmann.com 466 (Chand.)(Trib.)

135. S.194C : Deduction at source – Contractors/sub-contractors – Deduction to be made at the time of payment – Debiting the running account of a payee at the yearend cannot be said to be deduction of tax at source as contemplated – Disallowance was held to be justified [S. 40(a)(ia)]

The assessee paid certain amounts to contractor on three different dates, without deduction of tax at source. Assessee claimed that tax was deducted at source on 31-03-2006 i.e. last date of relevant accounting period by debiting the running account and the same was deposited with the Government before due date specified in sub-section 139(1)and therefore the impugned payments were not hit by section 40(a)(ia). However the A.O. disallowed the payment. CIT(A) allowed the claim of assessee. On appeal by revenue the Tribunal held that by debiting running account of payee on last date of accounting period could not be said to be deduction of tax at source as contemplated by section 194C. If tax is deducted at any other point of time than at the time when the amount exigible to deduction of tax at source is paid or is deducted out of any other sum than the sum out of which it is mandated to be deducted, such deduction of tax *per se* cannot be said to be at source. Deduction of tax at source, i.e., out of the amount payable in terms of s. 194C r.w.s 40(a)(ia), is one thing and debiting the running account of the payee on the last date of the accounting period is altogether a different thing. Debiting the running account of a payee cannot be said to be deduction of tax at source as contemplated by s. 194C r.w.s. 40(a)(ia). Appeal of revenue was allowed (A.Y. 2006-07).

ITO v. Bhoomi Construction (2014) 146 ITD 639 / (2013) 30 taxmann.com 335 (Rajkot)(Trib.)

136. S. 194C : Deduction of tax at source – Contractors/sub-contractors, payments to – Contracts for supply of bread and butter and supply of security personnel would be covered under provisions of section 194C and not under section 194J [Ss. 194J, 201(1), 201(IA)]

The assessee, a Medical College, had entered into contracts/agreements with various parties for supply of bread and butter and supply of security and personnel. The assessee made payments to the contractors and deducted the tax at source under section 194C. The A.O. held that the assessee had made payments to the contractors for technical services covered under section 194J and, therefore, it had made a short deduction of tax at source. He, therefore, treated the assessee as an assessee in default under section 201(1) and raised tax demand upon it. He also levied interest under section 201(1A) upon the assessee. Commissioner (Appeals) held that the contracts under discussion were covered under work or service contracts and the CBDT Circular No. 715, dated 8-8-1995 was clearly applicable to the instant case. Hence, there was no short deduction of tax at source. Tribunal confirmed the order of CIT(A).

ITO v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.) (Trib.)

137. S. 194H : Deduction of tax at source – Commission or brokerage – Mutual funds-Not covered by section 194H [S. 40(a)(ia)]

Tribunal held that sub-brokerage paid in connection with services rendered in course of buying and selling of units of mutual funds or in relation to transactions relating to mutual funds is not covered by provisions of section 194H. There is no doubt that Mutual Funds are categorised as securities. Therefore the ITAT held that sub-brokerage paid in connection with services rendered in course of buying and selling of units of mutual funds is not covered by provisions of s. 194H (A.Y. 2005-06 ,2007-08)

Dy. CIT v. S.J. Investment Agencies (P.) Ltd. (2014) 146 ITD 691 / (2013) 32 taxmann.com 97 (Mum.) (Trib.)

138. S. 194J : Deduction of tax at source – Fees for professional or technical services – Maintain operation theatre and surgical equipments, RO system, CT scan machine, MRI machine etc. – Require professional skill-Tax is deductible under section 194J [S. 9(1)(vii)]

Assessee, a medical College, entered into contracts with various parties to maintain operation theatre and surgical equipments, RO system, CT scan machine, MRI machine, medical equipments lift sterlisation and as well as to provide services of anti-termite treatment. All these services cannot be provided in routine and normal manner, but require technical expertise or professional skills and therefore, provisions of section 194J, would be attracted to these contracts. (A.Y. 2008-09, 2009-10)

ITO v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.) (Trib.)

139. S.194I : Deduction of tax at source – Rent-Lease premium– Premium was not paid under a lease but was paid as a price for obtaining lease, it preceded grant of lease and, therefore, by any stretch of imagination, it could not be equated with rent which was paid periodically – Payment for additional FSI area could not be equated to rent – Not liable to deduct TDS on both types of payment u/s. 194-I (S. 201]

Assessee took plot of land from MMRD and made payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI. A.O. held that the assessee was required to deduct TDS u/s. 194-I. The Tribunal held that, the premium is not paid under a lease but is paid as a price for obtaining the lease, hence it precedes the grant of lease, it cannot be equated with the rent which is paid periodically. The records show that the payment to MMRD is also for additional built up area and also for granting free of FSI area, such payment cannot be equated to rent. It is also seen that the MMRD in exercise of power u/s. 43 r.w. Sec. 37(1) of the Maharashtra Town Planning Act 1966, MRTP Act and other powers enabling the same has approved the proposal to modify regulation 4A(ii) and thereby increased the FSI of the entire 'G' Block of BKC. The Development Control Regulations for BKC specify the permissible FSI. Pursuant to such provisions, the assessee became entitled for additional FSI and has further Acquired/purchased the additional built up area for construction of additional area on the aforesaid plot. Thus the assessee has made payment to MMRD under Development Control for acquiring leasehold land and additional built up area. Payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI, are not liable to TDS liability under section 194-I. (A.Y. 2008-09)

ITO v. Wadhwa & Associates Realtors (P.) Ltd. (2014) 146 ITD 694 / (2013) 36 taxmann.com 526 (Mum.) (Trib.)

140. S. 194J : Deduction of tax at source – Fees for professional or technical services – Hospitals – Doctors – No employer and employee relation – Tax to be deducted as professional fees.[S.192]

Assessee, hospital under an agreement was availing services of doctors. Fixed their own OPD hours etc. and there was no control of hospital by way of direction to doctors on treatment of patients, there was no employer and employee relationship between hospital and professional doctors. Tax to be deducted u/s. 194J and not u/s. 192. (A.Ys. 2009-10, 2010-11)

Dy. CIT v. Ivy Health Life Sciences (P.) Ltd. (2014) 146 ITD 486 / (2013) 31 taxmann.com 236 (Chandigarh) (Trib.)

141. S.194J : Deduction at source-Technical service fee-Reimbursement of purchase price-DTAA-India-UK-Not liable to deduct tax at source [Article 13]

Sister concern made purchases of rough diamonds on behalf of assessee. Sister concern made payment

after deducting TDS @ 15 per cent as per Article 13. Assessee reimbursed expenses to sister concern, no element of margin or profit or value addition by sister concern. No TDS was required to be made u/s. 194J at time of payment by assessee to sister concern. (A.Ys. 2006-07 to 2008-09)

ITO v. Vishinda Diamonds (2014) 146 ITD 745 / (2013) 34 taxmann.com 163 (Mum.)(Trib.)

142. S. 201 : Deduction at source – Failure to deduct or pay – The payer is not liable for TDS default if the Dept does not show that the tax could not be recovered from the recipient [Ss. 194A, 201(IA)]

The assessee, a bank, was held liable u/s. 201(1) and 201(1A) r.w.s. 194 A for failure to withholding TDS on interest paid by it to customers on deposits placed by them with the assessee. The assessee claimed that it could not be treated as an assessee-in-default as no steps had been taken to determine whether the recipients of the interest had paid tax thereon. HELD by the Tribunal allowing the appeal:

(i) A short deduction of tax at source, by itself does not result in a legally sustainable demand u/s. 201(1) and u/s. 201(1A). As held in *Hindustan Coca Cola Beverages v. CIT(2007) 293 ITR 226*, taxes cannot be recovered once again from the assessee in a situation in which the recipient of income has paid due taxes on income embedded in the payments from which tax withholding requirements were not fully or partly, complied with. In *Jagran Prakashan v. DCIT 21 TM.com 489 (All)* it was held that the deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that the recipient has also failed to pay tax directly;

(ii) S. 201(1) seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient had a liability to pay the tax and he has not paid tax;

(iii) The onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Once all the details of the persons to whom payments have been made are on record, it is for the AO, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld;

(iv) As regards the levy of interest u/s. 201(1A), though the interest is compensatory in nature and is applicable whether or not the assessee was at fault, it is applicable for the period from the date on which tax was required to be deducted till the date when tax was eventually paid. In a case in which the recipient of income had no tax liability embedded in such payments, there will obviously be no question of delay in realization of taxes and s. 201(1A) will not come into play at all. (ITA No. 448 to 454/Agra/2011, A. Ys. 2001-02 to 2007-08, dated 20-06-2014).

Allahabad Bank v. ITO (Agra)(Trib.),www.itatonline.org

143. S. 206C : Collection of tax at source-Scrap – Molasses produced during course of manufacturing of sugar is by-product and does not fall within meaning of scrap – Not liable to deduct collection at source

Molasses produced during course of manufacturing of sugar is by-product and does not fall within

meaning of scrap as defined in Explanation (b) to section 206C. Assessee is not liable to deduct collect tax at source. (A.Ys. 2007-08 to 2010-11)

Nawanshahar Co-op. Sugar Mills Ltd. v. ITO (2014) 146 ITD 523 / (2013) 32 taxmann.com 279 (Asr.)(Trib.)

144. S. 209 : Advance tax -Proviso to sub-section (1) of section 209 is prospective in nature and cannot be applied retrospectively – Interest u/s. 234B is not leviable [S. 234B]

The language used in section 209(1) is regarding payment of advance tax in the financial year, therefore, the proviso is not attracted for the assessment year. The assessee was held to be not required to deposit any advance tax. In view of this fact, it was held that interest u/s. 234B is not leviable. Since the assessee is not liable for advance tax, therefore, cannot be charged interest for failure to pay advance tax. (A.Ys. 2005-06 and 2006-07)

Dy. DIT v. MGB Metro Group Buying HK Ltd. (2014) 146 ITD 343 / (2013) 29 taxmann.com 164 (Delhi)(Trib.)

145. S. 234B : Interest-Advance tax Proviso to sub-section (1) of s. 209 as inserted by Finance Act, 2012 is prospective in nature and cannot be applied retrospectively – Where assessee was not liable to deposit advance tax, no interest u/s. 234B could be charged [Ss. 133A, 202, 209]

A survey operation u/s. 133A was conducted at the business premises of the assessee. During survey, mainly computers were found, prints were collected therefrom, which were inventorised. The claim of the assessee of exemption u/s. 9(1)(i) was rejected and the assessee's income was computed as 15.29% markup on the total expenses incurred. Such working was claimed to be based on Rule 10B(1)(e) considering the transactional net margin method. Interest u/ss. 234A, 234B and 234C was also held to be leviable by the A.O. Commissioner (Appeal) following the decisions held that the interest u/s. 234B is not leviable. Revenue is in appeal before the Tribunal, the contention regarding amendment inserted by the Finance Act, 2012, is prospective in nature and not with retrospective effect. proviso was brought into operation w.e.f. 1.4.2012 whereas the A.Ys. involved are 2005-06 and 200607, therefore, said proviso is not retrospective in nature. S. 209(1) is regarding payment of advance tax in the financial year, the proviso is not attracted for the impugned assessment year assessee was not liable to deposit advance tax no interest under section 234B could be charged (A.Ys. 2005-06 and 2006-07).

Dy. DIT v. MGB Metro Group Buying HK Ltd. (2014) 146 ITD 343 / (2013) 29 taxmann.com 164 (Delhi)(Trib.)

146. S. 237: Refunds –Rejection of application –Matter was remanded to AO [Ss. 143(1), 154]

Where assessee's appeal against assessment order passed u/s. 143(3) for claiming refund, was rejected only on ground that its claim of refund had already been rejected in rectification application filed against assessment made u/s. 143(1) matter was remitted to A.O. in interest of justice (A.Y. 1999-2000)

Siel Ltd. v. ACIT (2014) 146 ITD 730 / (2013) 37 taxmann.com 231 (Delhi) (Trib.)

147. S. 251 : Commissioner (Appeals) – Powers – Appellate Authority has powers to give appropriate directions to A.O. only in regard to assessee before him and this power cannot relate to a third person, whose appeal is not pending before him [Ss. 69A,150]

While deciding the appeal the Appellate Authority may give appropriate directions to the A.O. either in regard to the assessee in appeal before him or otherwise. However, these directions cannot travel outside the assessment year to which the appeal relates. In the same way the directions cannot relate

to a third person, whose appeal is not pending before him. The policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage (A.Y. 2003-04).

Vijay Kumar Sardav. Dy. CIT (2014) 146 ITD 553 / (2013) 40 taxmann.com 113 (Mum)(Trib.)

148. S. 254(1) : Appellate Tribunal – Power – Additional grounds – Claim not made in the return – Claim which was not in the return can be made before appellate authorities [S. 143(3)]

Assessee company did not claim depreciation and other expenses in ROI but such claim was made in assessment proceedings. A.O. refused to admit such claim for deductions claimed through revised computation. The ITAT held that, A.O. cannot entertain a claim made otherwise than by way of revised return. The issue is limited to the power of the A.O. and does not impinge on the power of the ITAT u/s 254. The ITAT has set aside the impugned order and remit the matter to the file of the A.O. for question of deductibility in respect of such fresh claims as per law (A.Ys. 2006-07, 2007-08).

Ricoh India Ltd. v. Dy. CIT 146 ITD 798 / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

149. S. 254(1) : Appellate Tribunal – Additional evidence – Additional evidence filed by the revenue was admitted – [Rule 29 of the ITAT Rules, Rule 46A(4)]

The department filed an application under Rule 29 of the ITAT Rules requesting permission to produce before the Tribunal the "LinkedIn profiles" of the assessee's employees and a whistleblower petition filed in the High Court in support of the contention that the assessee had a permanent establishment in India. The assessee opposed the admission of the said evidence on various grounds. HELD by the Tribunal allowing production of the Linked In profiles but rejecting the whistleblower petition:

(i) S. 254(1) provides that the Tribunal may "pass such orders therein as it thinks fit". S. 255 (6) confers upon the Tribunal all the powers vested in it which are vested in the income-tax authorities with reference to s. 131. S. 131 confers powers regarding discovery, production of evidence etc. Rule 29 of the ITAT Rules empowers the Tribunal to admit additional evidence if it comes to the conclusion that a particular document would be necessary for consideration to enable it to pass orders or for any other substantial cause. The document can be brought to the notice of Tribunal by either party. The Tribunal is final fact finding body and, therefore, the powers have been conferred on it u/s. 131 and Rule 29 to enable it to record a factual finding after considering the entire evidence. At the time of admission of additional evidence the Tribunal is required to examine whether *prima facie* the evidence is relevant to the facts in issue or not. As per s. 3 of the Evidence Act, one fact is set to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of Evidence Act relating to the relevancy of facts. The fact in issue u/s. 3 of the Evidence Act means and includes any fact from which either by itself or in connection with other facts the existence/ non-existence nature or extent of any right, liability or possibility asserted or denied in any suit or proceedings necessarily follows. Section 5 of the Evidence Act deals with the relevancy of facts and provides that evidence may be given in any suit or proceeding of the acceptance or non-acceptance of every fact in issue and of such other facts as are herein declared to be relevant and of no others;

(ii) On the issue regarding existence of a PE, a factual finding is required to be recorded on the basis of evidence on record and, if the Tribunal considers that additional

evidence is relevant to the fact in issue, which is existence or not of PE, then in order to advance the cause of justice, the additional evidence should be admitted. In order to enable the Tribunal to decide disputes before it in a lawful, fair and judicious manner, it necessarily is required to look into and consider such and other material having a direct nexus and bearing on the subject matter of the appeal. Merely because the Linkedin profiles was available in public domain and was not referred to by the A.O. the department cannot be prevented from bringing that information on record so as to arrive at the correct factual finding on the issue regarding PE. This cannot be said to be a case of inordinate delay because the A.O. had drawn an adverse inference on account of non-furnishing of information by assessee and when assessee is trying to take mileage out of its conduct, the department is bringing on record additional evidence in the form of linkedin profile of employees to demonstrate that the conclusion drawn by department was fully justified. All the cases relied upon by the assessee & CIT(DR) are with reference to additional evidence brought before the Tribunal for the first time by assessee. But none of the cases deals with a situation where the assessee withholds some information from the department and then claims that information relevant to the facts in issue should not be admitted. The inordinate delay theory cannot be invoked in a case where cause of justice will be defeated rather than being sub-served;

(iii) Rule 46A(4) also gives wide powers to the CIT(A) to entertain fresh evidence for sub-serving the cause of justice. The assessee cannot be permitted to first scuttle the investigations/ inquiries by not furnishing the necessary information and then claim benefit out of the same. At the end of the day it is the determination of correct taxability of assessee, which should guide the proper course of action. There is no gain saying that pitted against the technicalities and cause of justice, cause of justice should prevail. It is true that either party cannot make out a new case by implanting additional evidence but where the additional evidence only supplements the information on the basis of which a factual finding is to be arrived at and not supplant the information, then the Tribunal can and should look into those details. It would be travesty of justice to ignore the additional evidence at admission stage only before arriving at a correct finding of fact. As a matter of fact assessee should have no complaints in getting the relevant information being brought on record from the appreciation of which correct factual finding can be arrived at. In the present case the LinkedIn profiles sought to be filed by the department has considerable bearing on the subject matter of appeal and therefore should be admitted by the Tribunal. The assessee will be free to rebut the information contained in the Linkedin profiles by bringing on record contrary facts to dislodge the claims made in the Linkedin profiles (ITA No. 671/ Del/2011, A.Y. 2001-02, dated 04-07-2014).

GE Energy Parts Inc v. ADIT (Delhi)(Trib.)www.itatonline.org

150. S. 254(2) : Appellate Tribunal-Rectification of mistake apparent from the record – Pendency of an appeal filed in the High Court u/s. 260A bars the hearing of a MA filed u/s. 254(2) even if the appeal is not admitted.

The assessee has moved an instant Miscellaneous Application (MA) against the order of the ITAT. At the time of hearing, the AR for the assessee-appellant informed that the assessee has filed an appeal u/s. 260A before the Hon'ble Bombay High Court, but is yet to be admitted. Since the appeal has been filed before the Hon'ble Bombay High Court, the judicial propriety does not allow the assessee to seek efficacious remedy simultaneously before two authorities and in particular where the

issue is seized by a higher judicial forum, even if pending admission. On this ground, the instant MA is rejected. (MA No. 194/Mum/2013, A. Y. 2007-08, dated 12-03-2014).

RW Promotions Pvt. Ltd v. ACIT (Mum.)(Trib.), www.itatonline.org

151. S. 263 : Commissioner – Revision of orders prejudicial to revenue – Detailed explanation was filed before the A.O.-Revision of order held to be not valid. [Ss. 143(3), 154]

Assessee filed several replies, as well as details, evidences before the A.O. A.O. passed order u/s. 143(3). Tribunal held that the order of A.O. could not be said to be erroneous insofar prejudicial to interest of revenue. When all discrepancies were pointed out in rectification application u/s. 154, Commissioner should have verified all facts and should not have forwarded rectification application to A. O. for verifying discrepancies pointed out by assesse. Commissioner was not justified in revising assessment order in proceedings u/s. 263. (A.Y. 2009-10)

Pyare Lal Jaiswal v. CIT (2014) 146 ITD 555 / (2014) 41 taxmann.com 278 (All.)(Trib.)

152. S. 269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Journal entries – Penalty cannot be levied if the transactions are bona fide & genuine – The time limit for penalty u/s. 271D & 271E is governed by ss. 275(1)(c) & not 275(1)(a) [Ss. 269T, 271D, 271E, 275(1)(c), 275(1)(a)]

The A.O. passed an assessment order dated 5-12-2011 in which he took the view that the act of the assessee of accepting and repaying loans and advances by way of journal entries was in contravention of ss. 269SS & 269T of the Act as the said transactions were "not by way of account-payee cheque or demand draft". The Addl CIT thereafter passed a penalty order dated 28-9-2012 by which he levied penalty u/ss. 271D and 271E for contravention of ss. 269SS & 269T. Before the Tribunal the assessee argued (i) that the said penalty order was beyond the limitation period set out in s. 275(1)(c) and (ii) that the passing of journal entries did not attract the prohibition in ss. 269SS & 269T. HELD by the Tribunal allowing the appeal:

(i) The time limit in s. 275(1)(a) covers those cases where the penalty proceedings are in respect of a default related to principal assessment for a particular assessment year and the penalty proceedings are required to be initiated in the course of that proceedings only. The time limit in s. 275(1)(c) applies to case where the penalty proceedings are independent and not directly linked to the assessment proceedings. The time limit for penalty u/s. 271D/ 271E for contravention of S. 269SS & 269T falls under s. 275(1)(c) (ii) The acceptance and repayment of loans vide journal entries attracts ss. 269SS & 269T as held in Triumph International 345 ITR 370 (Bom). However, in that case penalty u/s. 271E was deleted on the basis that there was "reasonable cause" u/s. 273B as the transactions were *bona fide* and genuine and did not involve unaccounted money. On facts, there is no finding by the A.O. that the transactions constitute unaccounted money or that they are not *bona fide* or not genuine. The assessee's explanation for the journal entries, viz. that they are Alternate mode of raising funds, assignment of receivables, squaring up transactions, operational efficiencies/MIS purpose, consolidation of family member debts, correction of errors, etc are commercial in nature and not non-business. Also, what is the point in issuing hundreds of account payee cheques/account payee bank drafts between sister concerns of the group, when transactions can be accounted in books using journal entries, which is also an accepted mode of accounting? Journal entries should

enjoy equal immunity on par with account payee cheques or bank drafts provided the transactions are for business purposes and do not involve unaccounted money and are genuine. In fact, such journal entries shall save large number of cheque books for the banks. There is consequently reasonable cause to delete the penalty. (ITA No. 476/Mum/2014, A. Y. 2009-10, dated 27-06-2014.)

Lodha Builders Pvt. Ltd. v. ACIT (Mum.)(Trib.), www.itatonline.org

153. S. 271(1)(c) : Penalty – Concealment – Explanation 5-Gift disclosed in the balance sheet – Amount disclosed in the return filed pursuance of notice u/s. 153C – levy of penalty was held to be not justified [Ss. 139, 153C]

The assessee received gifts of certain amounts from two persons; gifts were credited to the capital account of the assessee. In the original return filed u/s. 139, the assessee did not include amount of said gifts. Thereafter, search conducted on third party, proceedings u/s. 153C were initiated in case of assessee, return filed in response to notice issued u/s. 153C, the assessee included the amount of gifts. A.O. levied penalty u/s. 271(1(c) on the ground that assessee having not disclosed the impugned income in return of income filed u/s. 139(1), but had declared impugned income in return filed in response to notice issued u/s. 153C, was guilty of concealing income. Commissioner (Appeals) upheld levy of penalty.

Tribunal held that, Explanation 5 cannot be said that assessee was found to be owner of any money, bullion, jewellery or other valuable article or thing. What has been made basis is entry in the capital account of the assessee which was already part of the accounts maintained by the assessee. Therefore, even according to the provisions of Explanation 5, concealment penalty cannot be linked to the return filed by the assessee under section 139. (A.Y. 2002-03)

Vrajlal T. Gala (HUF) v. ACIT (2014) 146 ITD 742/(2013) 33 taxmann.com 620 (Mum)(Trib.)

154. S. 271(1)(c) : Penalty – Concealment – Surrender of income – Revised return – Bogus transaction – Capital gains – Levy of penalty was held to be justified.[S.68,148]

Assessee filed return of income declaring long term capital gain arising from sale of shares. On getting information of bogus transaction of shares, A.O. issued notice u/s. 148. Assessee surrendered income earned on sale of shares as income from undisclosed sources. A.O. taking a view that capital gain transactions in question were sham, made addition u/s. 68 and also levied penalty order u/s. 271(1)(c). Tribunal held that the assessee had intentionally and deliberately filed inaccurate particulars of his income in original return hence levy of penalty was confirmed (A.Y. 2002-03).

Dy. CIT v. Mukesh Kumar Agarwal (HUF) (2014) 146 ITD 562 / (2014) 41 taxmann.com 269 (Agra)(Trib.)

155. S. 271(1)(c) : Penalty – Concealment – Surrender of income – Revised return – Return accepted – Levy of penalty was not justified [S. 132]

In the course of search various documents were found and seized which indicated unaccounted sales. The assessee declared the unaccounted receipts in the revised return. Revised return was accepted by the A.O. and certain other additions were made on estimate basis. The A.O. levied the penalty. Tribunal held that levy of penalty on the basis of revised return was held to be not valid and other additions were on estimate basis hence penalty cannot be levied (A.Ys. 2001-02 , 2002-03 to 2004-05).

Poonam Marbale (P) Ltd. v. Dy.CIT (2014)62 SOT 137 (URO) (Jaipur) (Trib.)

156. S. 271(1)(c) : Penalty – Concealment – Debatable – Relief by CIT(A) on merits (though reversed by ITAT) means claim is debatable.

The assessee, a film actor, went to Jodhpur for shoot for a Hindi movie called "Ham Sath Sath Hain".

During his stay at Jodhpur, he was implicated in criminal proceedings on the allegation that he shot a black buck, an endangered specie. He was arrested by the local police and in order to get himself released, he had to engage lawyers. The criminal proceedings as a result of this case have continued thereafter and the assessee has been regularly incurring legal expenses to defend himself and obtain exemptions from the personal hearings from this case. He contended that if he had not defended himself in the criminal proceedings and asked for personal exemptions, it would have resulted in his absence from all the movies/projects undertaken by him causing loss of revenue to him as well as to the producers of his films. He contended that it was thus necessary for him to incur the legal expenses during the years under consideration to preserve and protect his profession and the said expenses therefore were claimed by the assessee as deduction. The CIT(A) accepted the stand of the assessee and allowed deduction for the legal expenses. However, the Tribunal reversed the decision of the CIT(A) and disallowed the claim. The A.O. levied penalty u/s. 271(1)(c) for furnishing inaccurate particulars of income. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

The fact that the claim of the assessee was accepted by the CIT(A) on merit clearly shows that the claim made by the assessee was based on a possible view of the matter. It also shows that the claim for deduction on account of legal expenses was a *bona fide* claim. In subsequent years, the assessee has capitalised similar legal expenses after having come to know about the disallowance made in the years under consideration. This show the *bona fides* of the assessee. All material particulars relevant to the claim were fully and truly furnished by the assessee and there is no allegation made by the A.O. in the penalty order that any inaccurate particulars were furnished by the assessee while making the claim on account of deduction of legal expenses. It is also not in dispute that the legal expenses claimed by the assessee were actually incurred by him and it is not the case of the Revenue at any stage that the expenses so claimed by the assessee were bogus. When no information given in the return is found to be in-correct or in accurate, the assessee cannot be held guilty of furnishing in accurate particulars of its income and unless the case is strictly covered by the provision, penalty cannot be imposed. Where there is no finding that the particulars furnished by the assessee in the return are in accurate or erroneous or false, there is no question of imposing penalty u/s. 271(1)(c) of the act merely because the claim of the assessee for deduction is disallowed in the quantum proceedings. (ITA No. 2559/Mum/2013, dated 30.07.2014.) (A.Y. 2003-04)

Salman Khan v. ACIT (Mum) (Trib), www.itatonline.org

157. S. 271B : Penalty – Failure to get accounts audited-Reasonable cause – Business income or capital gains – Sale of shares – Levy of penalty was held to be not justified [Ss. 10(38), 44AB]

The assessee declared income from sale of shares as long term capital gain and claimed exemption u/s. 10(38). A.O. held such income as business income instead of capital gain and imposed penalty u/s. 271B as the sale proceeds exceeded the monetary limit of ₹ 40 lakhs prescribed u/s. 44AB. Commissioner (Appeals) upheld penalty. On appeal Tribunal held that S. 273B provides that no penalty shall be imposable on the person for any failure referred to in the relevant penalty sections prescribed in section 273B, if the assessee proves that there was a reasonable cause for the said failure. S. 271B finds place u/s. 273B. It transpires that the imposition of penalty u/s. 271B on the failure to get the account audited or furnish the audit report before the prescribed period is not automatic. If a reasonable cause is shown for such a failure, then the penalty otherwise imposable u/s. 271B, shall be waived in terms of s. 273B. Levy of penalty was deleted (A.Y. 2006-07)

Bunkim Finance & Investments (P.) Ltd. v. ITO (2014) 146 ITD 796 / (2013) 33 taxmann.com 115 (Mum.) (Trib.)

DIRECT TAXES

Advance Rulings
Research Team

2. S.6(1): Residence in India –Non-resident – Individual–Period of stay – Resident and receipts taxable.

Assessee, an Indian citizen, employed outside India returned to India in financial year 2010-11 after resigning employment. His total stay in India in preceding four years was more than 365 days and total stay in India for financial year 2010-11 was 119 days. Held, he is resident in FY 2010-11 and receipts taxable. (AY. 2011-12)

Smita Anand (Mrs.) In re (2014) 362 ITR 38 (AAR)

3. S.9(1)(vi): Income deemed to accrue or arise in India – Deduction of tax at source – Production and distribution of television programmes – Shooting of film outside India – Services specially characterized as work under section 194C would not be taxable without a permanent establishment in India – Not liable to deduct tax at source under S. 195. [S. 194C,195]

The applicant was a resident company engaged in the business of producing and distributing television programs. For shooting a program outside India, the applicant engaged U, company incorporated in, and a tax resident of, Brazil, for providing line production services and for providing a line producer, local crew for providing stunt services, transport necessary for stunts for production of the show in Brazil. Under the agreement, U was responsible for arranging for crew and support personnel as may be requisitioned; props and other set production materials; safety, security and transportation; and filming and other equipment as may be requisitioned. The anchor and the participants of the show were engaged and paid separately by the broadcaster and were not the responsibility of U. Held, the services were specifically characterised as work for the purpose of s. 194C by the Explanation to that section. Therefore, the payments made by the applicant to the non-resident company specifically fell under the definition of work u/s 194C of the Act and would not be taxable without a permanent establishment in India. Consequently, the payment would not suffer withholding of tax u/s 195 of the Act.(AAR Nos. 1081 /1082 of 2011 dt 19-02-2014)

Endemol India P. Ltd. In re (No.4) (2014) 361 ITR 658/99 DTR 397/222 Taxman 67/266 CTR 142 (AAR)

4. S. 9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services – DTAA-India-Germany-Japan-USA-Netherland-Italy-Australia-China-France. [S.195, Art. 7]

Payments received or receivable by non-resident in connection with provision of services of technical and professional personnel to an Indian group company is taxable in India in view of Explanation 2 to sec. 9(1).

The incomes received by the applicants from the Indian company were taxable as business profits under article 7 of the Double Taxation Avoidance Agreement between India and the respective countries (except the applicant in the Cayman Islands with which there was no Agreement, and the applicant in Italy), whose income was to be taxed in accordance with the provisions of the Act. Applicants were subject to withholding of tax under section 195.

Booz and Company (Australia) P. Ltd. In re (2014) 362 ITR 134 (AAR)

5. S.9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services-Sales promotion services-Not taxable-DTAA-India – Sri Lanka. [S.90,Art.14]

The applicant appointed an individual resident of Sri Lanka as resident executive for promotion of sale in Sri Lanka of books published by the applicant. The applicant has paid certain remuneration to the resident executive by remitting it to her bank account in Sri Lanka . The applicant approached AAR for its ruling on the taxability of such remuneration. AAR held that payments for sales promotion services rendered by a Sri Lanka resident were not FTS under the Act and were also not taxable in terms of Article 14. (Dt 30-04-2014)

Oxford University Press In re (2014) 45 taxmann. com 282/364 ITR 251/268 CTR 393/103 DTR 225 (AAR)

6. S. 9(1)(vii):Income deemed to accrue or arise in India – Fees for technical services – Payment to a non-resident for production of programmes for broadcasting and telecasting not treated as 'fees for technical service' – DTAA-India-Singapore. [Art 12]

The applicant is a resident company engaged in the business of producing and distributing television programmes. It mainly produces reality shows and has also ventured into soap operas. For one of its productions, for the purpose of shooting the show outside India, the applicant engaged NAPL, a Singapore based Company, to procure the services of one CPH as an executive producer for the show. As per the terms of the agreement, NAPL was responsible for the overall production and also for handling business issues. The agreement also provided that NAPL will provide specialized services to aid in the production of programmes for which NAPL agreed to commission its representative to CPH who was an executive producer. As per the agreement the applicant was to pay a total consideration of US Dollar 49,000 to NAPL for their services for the show. The applicant sought advance ruling on whether the payments made by the applicant to NAPL, for services rendered are chargeable to tax in India as 'fees for technical services' ?

The Authority for Advance Ruling held that the services were rendered outside India and the non-resident company namely NAPL did not have any presence in India. There was no material to support that the technical knowledge, expertise, skill/know-how or process was made available to the applicant by enabling it to apply the technology independently. Thus, none of the conditions of the Article 12.4 of the India-Singapore Treaty were fulfilled. Therefore, the consideration paid for services rendered by NAPL to the applicant was not covered by fees for technical services in terms of Article 12.4 of the India-Singapore Tax Treaty.

Endemol India (P.) Ltd., In re (2014) 222 Taxman 59 (AAR)

7. S.195: Deduction at source – Non-resident – Film production services – Services rendered by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C & the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India & consequently, the said payments would not suffer withholding of tax u/s 195-DTAA-India-Brazil. [S.9(1)(i), 90, 194C, Art. 7,12]

The applicant was a resident company incorporated under the companies Act, 1956. It was engaged in the business of producing

& distributing television programmes. The assessee entered into an agreement with the Brazilian Country Utopia Films for availing line production services. For the purposes of shooting a programme / show outside India, it engaged a foreign company for receiving line production services under an agreement. The issue was whether line production services provided by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C &payments thereof were taxable or not . The court held that the services rendered by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C & the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India & consequently, the said payments would not suffer withholding of tax u/s 195.(AAR Nos. 1081/1082 of 2011 dt 19-2-, 2014)

Endemol India (P.) Ltd .v. (2014) 99 DTR 397/222 Taxman 67 /266 CTR 142/361 ITR 658 (AAR)

8. S.245N: Advance ruling– Undertaken or proposed to be undertaken – Subsidiary not set up-Application was held to be not maintainable as question posed did not fall under the purview of the Authority

Thenon-resident applicant was intending to invest in 100 per cent subsidiary company in India to be set up as a consortium by way of partnership with another Indian company. Ruling was sought on questions relating to allowability of deduction u/s 80-IA to the undertaking. Held, the 100 per cent subsidiary company must exist in reality and firm set up in order to make transaction or proposed transaction of applicant with Indian subsidiary. Thus, the questions posed were held not under purview of the Authority.(AAR No. 1242 of 2012 dt. 14-02-2014]

Trade Circle Enterprises LLC, In re (2014) 361 ITR 673 (AAR)

9. S.245R : Advance ruling – Application – Pending – Noticem – Return filed before filing application but notice issued after date of application – Application is maintainable. [S.139, 143(2)]

Assessee filed return of income prior to filing of application, but the notice under section 143(2) was issued after date of application. Application is maintainable. (AY. 2011-12)(AAR No. 1320 of 2011 dt. 14-2-2014)

LS Cable & System Ltd.,In re (2014) 362 ITR 18(AAR)

10. S.245R: Advance rulings – Application – Return filed but notice u/s.143(2) not issued-Application was not barred. [S. 139, 143(2)]

When return of income is filed before application for advance ruling but notice under s. 143(2) issued thereafter, question cannot be said to be already pending before income-tax authorities. Hence, advance ruling application is not barred. (AYs. 2010-11, 2011-12)

Aircom International Ltd. United Kingdom, In re (2014) 360 ITR 693/221 Taxman 110/264 CTR 499/97 DTR 414(AAR)

11. S.245R: Advance ruling– Jurisdiction – Return filed and notice u/s.143(2) issued – Application was barred. [S.139, 142(1), 143(2)]

When return of income and revised return are filed and notice under s. 143(2) issued, question can be said to be pending before income-tax authorities. Hence, advance ruling application is barred.(AY.2008-09)

J and P Coats Ltd. In Re (2014) 360 ITR 686/221 Taxman 106/ 264 CTR 494/97 DTR 409 (AAR)

INDIRECT TAXES

Sales Tax

D. H. Joshi

1. Appeal Before Tribunal

In a recent judgment, the Gujarat High Court under the GVAT Act, 2003, after noticing large number of case laws decided as under: -

(i) Tribunal in appeal entitled to go into merits where appeal challenging dismissal of first appeal for failure to make pre-deposit and on merits.

(ii) The dealer had failed to satisfy the court as to the genuineness of the sale transactions or purchases made from 'B' and 'M' by leading evidence or to prove on the basis of documents on record that there was movement of goods. Even the vendors 'B' and 'M' had also failed to prove their purchases and no goods were available with them which could have been sold to the dealers and in fact there was no physical movement of the goods. The onus to prove the genuineness of the purchase was on the dealer. The onus to prove the genuineness of the purchase of the vendor from whom the dealer made purchases was also on the dealer. The Assessing Officer and the Tribunal had rightly rejected the claim to input credit claimed u/s. 11 of the Act.

Madhav Steel Corporation v. State of Gujarat (2014) Tax Reporter Vol. 17 (7) 463; (2014) 72 VST 318 (Guj)

2. Attempt to evade tax

A. Jurisdiction: To check the quality of goods does not come under the jurisdiction of the barrier authority (Check-Post) under the Punjab VAT Act. They have to check whether documents accompanying the goods are proper and genuine. If the goods are of sub-standard type, then the purchaser could take objection and not the Departmental authorities.

Gurdita Mal Mohan Lal, Fazilk v. State of Punjab (2014) 48 PHT 345 (PVT)

B. Penalty cannot be imposed when there is no transaction of sale and no tax element of Punjab State is involved.

Supreme Industries Ltd. v. State of Punjab (2014) 48 PHT 379 (PVT)

C Documents accompanying the goods were not proper and genuine. The contravention of section 31(2) and Rules 54 and 56 of the Haryana VAT was clearly an attempt to evade tax.

Aerovision, Ambala City v. State of Haryana (2014) 48 PHT 382 (HTT)

D Mere jumping of the Information Collection Centre (ICC) does not amount to evasion of tax or an attempt to evade tax if the documents accompanying the goods were genuine, proper and complete in all respects as per provisions of section 51(2)(4) of the PVT Act, 2005.

Indo Swift Laboratories Ltd. v. State of Punjab (2014) 48 PHT 385 PVT.

3. Brand Name / Trademark – Clarification

Under the Kerala Sales Tax Act, Commissioner issued clarification in respect of rate of tax on "Pickle", clarified that if they are sold under brand name registered under Trade Marks Act, then the tax leviable at 12.5% and if sold without registered trade mark, they will attract tax at 4% under Entry No. 49 of 3rd Schedule. When the matter of dispute reached the High Court, the HC held that clarification was reasonable and no failure of principles of natural justice. As personal hearing was granted to the appellant, the appellant entitled to be tax at 4% as no registration taken for the 'pickle' sold.

Kilban Foods India Pvt. Ltd. v. Commissioner Commercial Taxes and Another (2014) 22 KTR 307 (Ker)

4. "Brand name holder" u/s. 5(2) of the Kerala GST Act, 1963

The Apex Court in its latest judgment held that 'Brand Name Holder' – Appellant being the Registered Brand owner entered into agreement with manufacturing company, who had the right to use the appellant's brand name. Assessment completed treating the appellant as Registered owner of the brand name. Held, it is proper. The legislature deems that sale by the brand name holder or trade mark holder shall be the 'first sale' within the State liable to tax. Appellant being the brand name holder who effected 'first sale' to the market within the State liable to pay tax u/s 5(2) of the Act. Tax if any, paid by the manufacturing company while effecting sale to the appellant could be claimed as refund u/s. 5(2) of the Act.

Cryptom Confectioneries Pvt. Ltd. v. State of Kerala (2014) 22 KTR 347 (SC)

5. "Business" u/s. 2(6) and "Sale" u/s. 2(29) of the Karnataka VAT Act, 2003

In this case, the dealer was running canteen as a welfare measure adopted and obliged under the Factory Act to supply food and non-alcoholic beverages to their employees at subsidised rates. The question was whether running of canteen falls under the definition of "business" and also "sale" for consideration received. The High Court held in the affirmative considering large number of court cases.

TVS Motors Co. Ltd. v. State of Karnataka 2014-15 (19) KCTJ 99.

6. Cash Security

In this case, the vehicle of the appellant was intercepted by the officials of the Dept. and the same was released against cash security of ₹ 7,775 as well as bank guarantee of the balance amount. No order was given to the appellant-dealer. Hence, the appellant approached to the Tribunal. The Tribunal held - In the absence of any demand created against the appellant, the taxation authorities had no jurisdiction to keep with them the cash security recovered from the appellant.

Sunil Enterprises v. State of Punjab (2014) 48 PHT 348 (PVT)

7. Clarification and Circulars issued by the Commissioner

A Under the Tamil Nadu VAT Act, 2006, a Writ Petition was filed by the dealer questioning whether the CCT has powers under the said Act to issue circulars and clarifications ? In this case, the writ petitioner contended that the A.O. has issued a Notice proposing to reverse the ITC on the purchases of capital goods used in the course of manufacturing activity based on the clarification issued by the CCT to him without authority would prejudice the minds of the assessing authorities, who are duty bound to apply their mind independently and passed orders. The petitioner contended that the definition of capital goods u/s 2(11) of the Act is very clear to cover the crane as the same is essential to lift the boilers. As against this, the Ld. Govt. Advocate contended that the cranes are neither vehicles nor machinery, they cannot be termed as capital goods falling under the definition of capital goods u/s 2(11) and, therefore, the clarification is in order and as per law. However, the High Court did not appreciate the argument of the Ld. Govt. Advocate and held that the Commissioner has no such authority allowing the writ petition.

Veesons Energy Systems (P) Ltd. v. CCT & ACCT 2014-15 (20) TNCTJ 61.

B Clarification held cannot be issued against an Order passed by the competent authority interpreting similar provision.

A.R. Plastics Pvt. Ltd. v. State of Haryana (2014) 48 PHT 350 (P&H)

INDIRECT TAXES

Service Tax

Sunil Moti Lala*

A] Classification of Service

Airport Services

1 The assessee was engaged in providing parking facility of cars / scooters at the airport. The department sought to tax them under the head Airport Services. The Hon'ble Delhi High Court held that the parking facility was specifically excluded from the definition of Renting of Immovable Property w.e.f. 1-6-2007, and therefore parking services regardless of wherever they were carried were to be excluded entirely and it was not open for department to argue that it falls within expression Airport service.

Mahesh Sunny Enterprises P. Ltd v. CST (2014) 34 STR 21 (Del.)

Business Auxiliary Services

2 The assessee was awarded contracts for the construction of roads by Maharashtra State Road Development Corporation, National Highway Authority of India, Government of Maharashtra and also Government of India. These contracts were on Build, Operate and Transfer (BOT) basis. The consideration for the services rendered under these contracts was allowed to be recovered by collection of toll charges for a fixed tenure and appropriating the same towards the costs incurred. The case of the department was that collection of toll charges by the assessee under these contracts comes within the purview of 'Business Auxiliary Services' and it sought to tax the same accordingly. The Hon'ble Mumbai Tribunal held that collection of toll charges for road users did not amount to rendering of Business Auxiliary Services.

IDAA Infrastructure Pvt. Ltd. v. CST (2014) 34 STR 87 (Tri.-Mumbai)

3 The assessee let out immovable property for running Café Coffee Day outlet under an agreement which is termed as Franchise Agreement. The department raised demand of tax under of the head Business Auxiliary Services. The Hon'ble Mumbai Tribunal held that the subject activities were not covered under Business Auxiliary Services since certain conditions were present in the agreement to ensure smooth functioning of outlet on daily basis and no role was played by assessee in the day-to-day running of outlet.

Shakeel Afzal Ladak v. CCE (2014) 34 STR 144 (Tri.-Mumbai)

4 The assessee recovered the expenses incurred by its Authorized Service Centre('ASC') for promoting sales of cars from the manufacturer. The Hon'ble Tribunal held that though the sale promotion activity undertaken by the ASC benefitted both ASC and the car manufacturer however to the extent ASC recovered expenses from the car manufacturer should be construed as providing sales promotion services to the car manufacturer. Accordingly, the recovered amount would be liable to service tax in the hands of ASC under Business Auxiliary Services.

Premier Motor Garage v. CCE [TS-242-Del-Tri-2013-ST]

5 The department sought to levy service tax on cancellation charges collected from end customers by the assessee, an air travel agent and also on the charges collected for arranging VISA. The assessee also adjusted excess service tax paid on cancelled air tickets against service tax liability on other bookings which was denied by department. The Hon'ble Tribunal held as under:

- Since cancellation charges were not collected from airlines but from the end customers, and no commission was received from the airlines on such receipts therefore, such cancellation charges would not be liable to service tax;

* Assisted by Sheetal Jain

- Excess service tax paid on cancelled air tickets can be adjusted against service tax liability on other bookings;
- The activity of arranging VISA was not covered under any of the sub-clauses of 'Business Auxiliary Services' and hence, not subjected to service tax levy.

Global Forex & Travels Ltd. v. CCE [TS-135-Tribunal-2014-ST]

6 The assessee was engaged in the activity of selling old cars belonging to the clients. The department sought to tax the difference between the purchase price and sale price of old cars as remuneration for providing services under business auxiliary service. The Hon'ble Tribunal observed that the assessee purchases the old cars from the owners by getting the delivery and paying the required price and subsequently sold the old cars. Thus the transaction amounted to purchase and sale of old vehicles in view of the decision of K G V Sunil Krishnan [2014-4-KCH-895]. It further held that refurbishing of vehicle, repair and other activities undertaken was a value addition by the assessee to get maximum return and hence, no service element was involved in the transaction liable to service tax.

Sai Services Station ltd. v. CCE & ST [TS-101-Tribunal-2014-ST]

Management Consultancy Service

7 The assessee was providing advisory services in relation to the finance sector. It was claimed by the assessee that the services did not fall within Management Consultancy Service and therefore, they were not liable to service tax. The Hon'ble Mumbai Tribunal held that the main function of the assessee was advisory in nature and executory function was incidental. It further held that the definition of Management Consultant was very wide and not restricted to any particular field of management and the order issued under section 37B of Central Excise Act, 1944 also clarified that services in relation to merger and acquisition were in nature of management.

HSBC Securities & Capital Markets (I) P. Ltd. v. CST [2014] 33 STR 530 (Tri.-Mumbai)

8 The assessee was registered under merchant banking service category and it discharged the service tax liability for activities undertaken for period 2001 onwards on private placement of shares not listed in any recognized stock exchange. The department sought to tax them under Management Consultancy Service for the period prior to 2001. The Hon'ble Mumbai Tribunal held that no advice or technical assistance relating to conceptualising, devising, development, modification, rectification or upgradation of working system of organisation were rendered and therefore, classification was without basis and not in accordance with law.

CLSA India Ltd. v. CST [2014] 34 STR 407 (Tri.-Mumbai)

Construction Services

9 The assessee, a sub-contractor claimed that, since the principal contractor had remitted the tax on entire consideration they were not liable to pay any service tax. The Hon'ble Delhi Tribunal held, that the provisions of Finance Act, 1994 clearly enjoin that, service tax is remittable (unless otherwise provided in Statute) by every taxable service provider at every stage of provision of a taxable service. Mere fact that taxable service was provided at various stages or by several agencies sequentially did not alter trajectory of legislative provisions. Neither Board Circular dated 6th June, 1997 nor one dated 7th October, 1998, had any legislative foundation or jural principle. There was no legal basis for the claim that, service tax remittance by principal contractors, extinguishes assessee's service tax liability. It observed that the assessee could hardly claim to have been misled by a Board Circular issued in respect of a wholly distinct service and drawing generic jural principles from such circulars. Thus the order of Commissioner (Appeals) confirming order of Adjudicating Authority did not warrant any interference.

Engineers India Technical Services v. CC&CE [2014] 34 STR 358 (Tri.-Del.)

10 Notification No.15/2004 dated 10/9/2004 allowed 67% abatement on construction services subject inter alia to the condition that no CENVAT credit on inputs and capital goods were taken. This notification which was in effect up to 28/2/2006 was rescinded by Notification No.1/2006 dated 1/3/2006 which allowed an abatement of 67% but subject to an additional condition that no CENVAT credit on input services was taken. The assessee in respect of a single construction contract claimed benefit of abatement up to 28/2/2006 and the benefit of CENVAT credit with effect from 1/3/2006 (without claiming abatement). The Hon'ble Delhi Tribunal held that in absence of any restriction that the benefit under Notification No.15/2004 dated 10/9/2004 had to be availed during the entire currency of the contract, the assessee's stand was correct.

CCE v. Prasad & Company [2014] 33 STR 665 (Tri.-Delhi)

Commercial Training and Coaching

11 The assessee, a vocational training institute, was rendering services to individuals who were desirous to perform in the entertainment industry. The department contended that assessee was not covered within the ambit of Notification No. 3/2010-ST and accordingly raised a demand on the assessee. The Hon'ble Mumbai Tribunal held that Notification No. 24/2004-ST exempted services provided by vocational training institute and Notification No. 3/2010-ST which altered the definition of vocational training institute could only have a prospective effect. It further held that it was impermissible for an authority conferred with the power to enforce provisions of the Act, to interpret the Act or exemption Notifications issued thereunder, by resorting to assumptions.

Actor Prepares v. CST, Mumbai [2014] 33 STR 546 (Tri.-Mumbai)

12 The assessee was providing two years course in Post Graduate Diploma in Management in the field of marketing, finance, human resource etc. it claimed that they were a vocational training institute and therefore were entitled for benefit under Notification No. 24/2004-ST. The Hon'ble Mumbai Tribunal held that the courses were academic in nature and were covering broad spectrum of subjects and contents which could not be called as vocational. It was held that benefit of Notification No. 24/2004-ST was not available to the assessee since the professional management courses cannot be considered as Vocational Course that imparts skill to enable the trainee to seek employment or self-employment after the said course.

Sadhana Educational & People Dev. Services Ltd. v. CCE [2014] 33 STR 575 (Tri.-Mumbai)

13 The assessee received incentives/ commission for using central Computer Reservation Systems ('CRS') software provided by another firm for booking of air tickets. It was held that the Department had not made any effort to establish that there was Service provider/ receiver relationship between the assessee and CRS developer. When such relationship was not there, there was no service involved between them. Moreover, the Department had also failed to prove that the amount received by the assessee was a consideration for the service provided to the CRS developers. The amount was given by the CRS developer to the assessee as a loyalty incentive for using their software for booking tickets. The assessee was only using the software and it could not be said that it promoted the business of firm that supplied them the software. Hence, activity of assessee could not be classified as Business Auxiliary Services.

In Re: International Travel House Pvt. Ltd. [2014] 33 STR 606

14 The assessee was engaged in imparting training in specified courses in fields of information technology and management and contended that the same was in the nature of education. The Hon'ble Mumbai Tribunal held that since the course conducted by the assessee imparted specific skills and training in specific areas the activities will come under the category of 'training or coaching'. Further, since every education results

in enhancement of skill and entails training or coaching there could not be a distinction between training and coaching & general education. Accordingly, the assessee was liable for service tax under the category of commercial training or coaching services.

I2IT Pvt. Ltd. v. CCE [2014] 34 S.T.R. 214 (Tri.-Mumbai)

15 The Hon'ble Delhi Tribunal held that to claim exemption in respect of material under Notification No.12/2003 it was not necessary that the invoice should indicate the value of goods separately. An assessee could put forth any evidence to prove value of goods sold to the service provider.

Mehta Plast Corporation v. CCE [2014] 34 S.T.R. 401(Tri.-Del.)

Club or association service

16 The Hon'ble Tribunal held that the activities undertaken by Federation of Indian Chamber of Commerce & Industry (FICCI) for its member, with an objective of common good of the Indian business was not liable to service tax under 'Club or Association services' on the basis of the following:

- The services provided by FICCI to its own members would be construed as provision for service to itself
- The activities undertaken were public services, which were specifically excluded from the definition of taxable services
- FICCI being a registered company in India falls under the exclusionary clause of the definition of 'Club or Association'

Federation of Indian Chamber of Commerce & Industry v. CST [TS-136-Del-2014-ST]

Consulting Engineer Services

17 The only point before the Hon'ble Delhi High Court was whether the definition of "consulting engineer" as appeared in Section 65(31) of Finance Act, 1994, as applicable to period, included "company" or not. It held that the expression "consulting engineer" as it appeared in Section 65(31) of the Finance Act at relevant time, did not include "private limited company or any other body corporate. Accordingly, the appeal was dismissed.

CCE&ST v. Simplex Infrastructure & Foundry Works 34 STR 191 (Del.)

18 The assessee obtained a patent for a new compact oil cooler which was allowed to be used by one V, for which he was entitled to receive royalty. The department was of the view that the assessee was liable to pay service tax on the royalty received along with interest thereon under "Consulting Engineer's Service" and accordingly, a notice was issued demanding service tax along with interest and also proposing to impose penalties. The Hon'ble Mumbai Tribunal held that the assessee was only a matriculate and did not hold any professional degree in engineering recognized by law, and hence was not liable to service tax under Consulting Engineers Service. It was further held that obtaining patent for new compact oil cooler and transfer of the right to use of the patent to its client for consideration of royalty payment was liable to service tax w.e.f. 10-9-2004 under Intellectual Property Right Service.

Amit Nagindas Vora v. CST [2014] 34 STR 391 (Tri.-Mumbai)

19 The department sought to tax supply of technical know-how consisting of patents, secret information relating to processes, permissions to use trade mark under Consulting Engineer Service. The Hon'ble Mumbai Tribunal held that the services were liable to tax under Intellectual Property Right ('IPR') Service and the period of dispute was before levy of service tax on IPR services and hence, demand was not sustainable in law.

Duraline Corporation v. CCE&C [2014] 34 STR 398 (Tri.-Mumbai)

Clearing and Forwarding agent

20 The assessee was rendering services in relation to receiving and warehousing of goods, receiving dispatches orders from M/s. Ford India Ltd., arranging dispatch of goods, maintaining records of incoming shipment and deliveries. The Hon'ble Mumbai Tribunal held that the fact that M/s. Ford owned the warehouse or place of activity, provided computer and software and also arranged for transport facilities, did not make any difference in so far as the nature of service, and the impugned services were liable to be held under 'Clearing and Forwarding Agent Services'. It was further held that, there was clear cut suppression of activities and wilful intention to evade tax as registration has been obtained belatedly, non-payment of service tax, non-filing of returns and disputing leviability of service tax.

Talera Logistics Pvt. Ltd. v. CCE [2014] 33 STR 514 (Tri.-Mumbai)

21 The assessee was engaged in the manufacture of M.S. ingots. In addition, they were also engaged in trading activities carried out on behalf of their client on commission basis. The department issued a show cause notice demanding service tax contending that the commission earned by the assessee from their clients was covered under the activity of Clearing & Forwarding Agency Services. The Hon'ble Tribunal held that mere trading on behalf of client and charging commission for same was not enough to be covered under Clearing & Forwarding Agency Service. To be covered under the same, activities had to be more than mere procurement of orders for clients on commission basis, viz. dispatch of goods as per direction of principal, maintaining record of receipt, dispatch of goods and stock available at warehouse and preparing facts on behalf of principal. It also held that the burden to prove was on the department as they have made allegations and failure on part of assessee to produce agreement copies could not result in confirmation of demand.

Kotdwar Steels (P) Ltd. v. CCE [2014] 34 STR 82 (Tri.-Del.)

22 The Hon'ble Mumbai Tribunal in this case held that the assessee's role was limited to procuring order and guaranteeing payments for goods sold and therefore services were not covered under Clearing & Forwarding Agency Service.

Hariram Packaging & Polymers v. CCE, Nagpur [2014] 34 STR 243 (Tri.-Mumbai)

23 The assessee was engaged in providing labour for loading and unloading of cement and thereafter arranging the dispatch of the cement as per the directions of M/s. Binani Cement. The Hon'ble Delhi Tribunal held that the assessee's activity was only of 'forwarding' and not 'clearing' and therefore, the same was not taxable under 'Clearing and Forwarding service' since the assessee did not perform both 'clearing' and 'forwarding' activities. For this view, it relied on the decision of the Hon'ble Punjab & Haryana High Court in the case of *CCE vs. Kuldip Medicines (2009) 14 S.T.R. 608 (P&H).*

Narottam & Company v. CCE [2014] 33 STR 472 (Tri.-Del.)

Erection, Commissioning and Installation Service

24 The assessee entered into a contract with M/s. IOCL for erection of tanks and pumps. The said tank and pump were supplied by M/s. IOCL. The service provider, discharged the Service Tax liability after claiming abatement of 67% in terms of Notification No. 1/2006 : MANU/CUST/0024/2006, dated 1-3-2006. The Hon'ble Delhi Tribunal relying on the larger bench decision in the case of Bhayana Builders Pvt. Ltd. [2013] 32 STR 49 held that value of free supplies could not be considered for computing 67% abatement.

CCE, Bhopal vs. Sonali India [2014] 34 STR 47 (Tri.-Del.)

Goods Transport Agency Services

25 The assessee claimed refund of tax paid by them on goods transport agency services availed from private trucks owners/operators on the ground that the private trucks owners/operators did not issue consignment notes to them. The

Hon'ble Bangalore Tribunal held that the refund was not admissible since the assessee would still be liable to pay service tax though the provider had defaulted on issuance of a consignment note. As regards the contention of the department that the assessee should have challenged its own assessment before filing the refund claim, it observed that the department was expecting the impossible since a person cannot challenge his own assessment and a question may arise before whom it may be challenged. Hence this ground of rejection of refund was held unsustainable.

Coromandel Agro Products & Oils Ltd. v. CCE [2014] 33 STR 660 (Tri.-Bang.)

Information Technology Software Service

26 The assessee, M/s. Tata Technologies Ltd. ('TTL'), was engaged in providing software design and development service to their clients in India and abroad. They had a branch office in Seoul, Korea ('TTL Korea'). They entered into a Tripartite agreement i.e. between TTL and TTL Korea on the one hand and M/s. Tata Daewoo Commercial Vehicle Co. Ltd. (TDCVL in short) for implementation and maintenance of SAP Software. These services were provided at the premises of TDCVL in Korea. The services consisted of two components, namely, onsite services to be provided by TTL Korea and offshore services to be provided by TTL. For payment of services rendered, the TDCVL agreed to pay a lump sum consulting fee payable in in 12 monthly installments and TTL Korea was authorized to raise 12 monthly tax invoices which consisted for onsite services and offshore services. TTL Korea discharged VAT/ GST liability at the time of supply of service. The department was of the view that M/s. TTL were liable to pay Service Tax on the entire amount received inasmuch as TTL Korea has rendered the services to TTL which is classifiable under the category of "Business Auxiliary Services". The Mumbai Hon'ble Tribunal held that the question of subjecting the same transaction to service tax in India did not arise. It further held that offshore services provided by the assessee to TDCVL amounted to export of service in terms of rule 3(2)(a) of Excise Service Rules, 2005.

Tata Technologies Ltd. v. CCE [2014] 34 STR 404 (Tri.-Mumbai)

Mandap Keeper Service

27 In consideration for an interest free deposit, the assessee hired / leased out premises. The Hon'ble Tribunal held that the leasing of premises was not covered within the definition of Mandap Keeper Service since the same was not been given for temporary occupation.

Acharya Jialal Vasant Sangeet Niketan v. CCE, Mumbai [2014] 33 STR 550 (Tri.-Mumbai)

Manpower Recruitment or Supply Agency Service

28 The assessee had challenged the levy of Service Tax on reverse charge basis in respect of certain employees working with it, who were earlier working in its foreign holding company or Group Company and had been assigned under the group's policy to work in the assessee company. The department treating the aforementioned arrangement as "supply of manpower" by the foreign holding company to the assessee, issued show-cause notice. The Hon'ble Mumbai Tribunal after going through the agreements, held that the global employees working under the assessee were working as their employees and having employee-employer relationship. It further held that there was no supply of manpower service rendered to the assessee by the foreign / holding company. The method of disbursement of salary cannot determine the nature of transaction.

Volkswagen India (Pvt.) Ltd. v. CCE, Pune-I [2014] 34 STR 135 (Tri.-Mumbai)

29 The Hon'ble Tribunal held that consideration for taxable service remitted including amount of remuneration of personnel deployed and provident fund payable to Provident Fund Authorities constitute gross amount charged for taxable service rendered.

Neelav Jaiswal & Brothers v. CCE, Allahabad [2014] 34 STR 225 (Tri.-Del.)

30 The assessee entered into agreements with contractors for providing manpower for harvesting and transportation of sugarcane and consideration was paid on sugarcane supplied on tonnage basis. The Hon'ble Mumbai Tribunal held that there was no element of manpower supply or recruitment to sugar factory, and therefore services could not be classified under the said category. Since sugarcane was an input for the sugar factory, the said services could be classified under Business Auxiliary Services as they were incidental or ancillary to procurement of inputs.

Bhogavati Janseva Trust v. CCE [2014] 34 STR 410 (Tri.-Mumbai)

31 The assessee provided employees to a third party to work under the administrative control of the third party. It was agreed that the third party would reimburse 75% of the salary cost of the employees to the assessee on monthly basis. The Hon'ble Tribunal observed that service tax is payable on the gross amount charged by the service provider, even if loss is incurred in provision of service. The Hon'ble Tribunal thus held that the activity of provision of employees by the assessee was liable to service tax under Manpower Recruitment or Supply Agency Service.

The Sanjivani (Takli) Sahakari Sakhar Karkhana Ltd. [TS-44-Tri-Mum-2014-ST]

Leased Circuit Services

32 The assessee filed an appeal against show cause notices issued by the department demanding Service Tax under reverse charge mechanism in terms of Section 66A of Act, for "Leased Circuit" / "Telecommunication service" received from Singapore. The Hon'ble Mumbai Tribunal held if a service was not specified under Section 65(105), no Service Tax liability would arise whether under Section 66 or 66A of Act. Only leased circuit services rendered by telegraph authority was taxable and since the foreign vendor was not such authority, question of levy of Service Tax from recipient of service under reverse charge basis did not arise. Accordingly, it quashed the show cause notice and further relied on the decision of Karvy Consultants Ltd. [2006] 1 STR 7 (AP) and CBEC Instructions F. No. 137/21/2011 dated 15-7-2011.

TCS E-Serve Ltd. v. CST, Mumbai [2014] (33) STR 641 (Tri.-Mum)

Management, Maintenance or Repair Service

33 The assessees were builder/developer of residential flats and commercial complexes. They would sell the residential flats to various customers over a period of time. After sale of all the flats, a Co-operative Housing Society was formed by the owners of the flats, thereafter the title of land etc. was passed on to the Flat Owners Co-operative Housing Society. The assessees were recovering a one-time maintenance deposit from each of the customers to whom they have sold the flats. The said amount was kept in a separate bank account as fixed deposit. From the interest earned on the said deposit, the assessees were expected to pay for various charges such as common electricity bill, water charges, security charges, etc. After the flat owners co-operative housing society was formed, whatever balance was left in the said bank account the same was handed over to the Flat Owners Cooperative Housing Society. Service Tax was demanded by the Revenue on the deposits made by various purchasers of the flats on the ground that the assessee was providing "Maintenance or Repair" service falling under Section 65(64) and Section 65(105)(zzg) of the Finance Act, 1994. The Hon'ble Tribunal held that payment was of behalf of various buyers to various authorities and service was provided on cost basis and debited to deposit account and the assessee acted as trustee or pure agent. Upon formation of co-operative society, deposit account would be shifted to Flat Owners Co-operative Society in terms of Maharashtra Ownership Flats Act, 1964 (MOFA, 1963) and therefore, the assessee had not provided any Maintenance or Repair Service.

Kumar Beheray Rathi v. CCE, Pune-III [2014] 34 STR 139 (Tri.-Mumbai)

34 The assessee was engaged in the repair / testing of transformers and replacement of LV / HV Leg coils, Transformer oil and other items supplied and claimed deduction for value of goods sold under Notification No. 12/2003-ST. The Hon'ble Delhi Tribunal allowed the benefit of the said notification since the total repair cost constituted total labour cost, cost of impugned replaced and supplied items and VAT paid on goods/materials.

CCE v. Shiv Engineering [2014] 34 STR 236 (Tri.-Del)

35 The assessee had entered into a rate contract with a manufacturer of transformer for repairing the damaged transformers in consideration of which it received payments. The Hon'ble Delhi Tribunal held that the activity would clearly be liable for service tax under the category of maintenance or repair services.

CCE v. Anand Transformers (P) Ltd. [2014] 33 STR 314 (Tri.- Del.)

36 The Hon'ble Mumbai Tribunal held that 'Runways' (i.e. a strip of land over which aircrafts land or take off) were 'roads' (which is a path or a way between two different places) and therefore maintenance or repair of runways was liable for service tax under the category of Management, Maintenance and Repair services since the exemption in respect of Management, Maintenance and Repair services of roads would not be applicable in the case of runways.

D. P. Jain & Co. Infrastructure Pvt. Ltd. v. CCE [2014] 33 STR 668 (Tri.-Mumbai)

Restaurant Services

37 The Hon'ble Bombay High Court held that service tax on restaurants was a distinct tax, which could not be equated with tax on sale or purchase of goods, hence Parliament was fully competent to impose a tax on service under Article 248 of Constitution of India read with Entry 97 of List I of VII Schedule and it could not be said to have encroached on power of State Legislature to impose tax on sale or purchase of goods under Entry 54 of List II.

Indian Hotels & Restaurant Association v. UOI [2014] 34 STR 522 (Bom.)

Security Services

38 The assessee were providing security services to bank building and were also responsible for safeguarding the building of the banks along with fixtures, fittings, equipments, cash, etc. it claimed benefit of Exemption Notification No. 56/98-ST. The Hon'ble Delhi Tribunal held that the benefit of Notification No. 56/98-ST was not available to the assessee since the services provided did not amount to providing security services in relation to safe deposit lockers or security of safe vaults.

CST v. Boparias Martial Security Services Pvt. Ltd. [2014] 34 STR 45 (Del.)

Storing and Warehousing services

39 In terms of the directions of the Government, the assessee maintained buffer stock of sugar. For this it received a subsidy from Government, which the Department sought to tax under Storage & Warehousing Service. The Hon'ble Mumbai Tribunal held that the subsidy received from Government was not on account of any services rendered but on account of loss of interest, cost of insurance etc. It further held that the assessee stored goods which were owned by them and one cannot provide service to themselves.

CCE v. Kumbhi Kasari SSK Ltd. [2014] 33 STR 539 (Tri.- Mumbai)

40 The assessee supplied vessels on charter hire basis wherein the primary object of hiring was transportation of crude from place of production to refineries. The Hon'ble Tribunal observed that assessee was not providing any security for goods nor was it loading, unloading, stacking or maintaining inventories. Further the mother vessels, apart from being used for transportation, they were used only as temporary storage space. Therefore, it was held that services could not be categorized under Storage & Warehousing Services. However,

they would fall under Supply of Tangible Goods Service and therefore was liable to service tax.

Shipping Corporation of India Ltd. v. CCE & ST, [2014] 33 STR 552 (Tri.-Mumbai)

Steamer Agent Service

41 The assessee collected excess amount when space was booked through steamer agent for other shipping line. The Hon'ble Chennai Tribunal observed that there was no evidence that services were rendered to a shipping line and payment received from shipping line were for the space booked by another agent and therefore it held that the demand under steamer agents service was not maintainable.

Marine Container Service (South) P. Ltd. v. CCE [2014] 34 STR 383 (Tri.-Chennai)

Technical Testing and Analysis Services

42 The Hon'ble Mumbai Tribunal held that technical testing and analysis of Information technology software, being specifically included in the ambit of Technical testing and analysis services with effect from 16/5/2008, was not liable for service tax prior to 16/5/2008 under the category of "Technical Testing and Analysis services."

CCE v. Aztecsoft Ltd, [2014] 33 STR 257 (Tri.-Mum.)

Tour Operator Service

43 The assessee engaged in providing buses to LG Electronics for dropping of staff. The Hon'ble Delhi Tribunal held that the assessee was covered under the definition of the Tour and consequently it would also falls under category of Tour operator activity. It was further held that Rent-a-Cab scheme operator means any person engaged in the business of Rent-a-Cab and it was not relevant whether any person who was engaged in business of Rent-a-Cab owns vehicle or gets the vehicles on hire. Thus the assessee was covered under definition of Rent-a-Cab Operator.

Friends Tour & Travels v. CCE, 2014 (33) STR 585 (Tri.-Del.)

44 The assessee provided transportation facility from one of its establishments to another establishment. This facility was not the main business of assessee, but was an ancillary to its main business of providing ropeway service. The Hon'ble High Court held that by providing facility of transportation, the assessee did not carry out tour operation. It facilitated journey of its clients from one place to other as was being done by passenger transporters while carrying out their transportation business and accordingly, the appeal of the department was dismissed.

CCE v. Usha Breco Ltd. [2014] 33 STR 619 (Uttarakhand)

45 The assessee supplied cabs for transportation of staff but challenged the demand on the ground that it did not own the cabs. The Hon'ble Mumbai Tribunal held that there was no stipulation either in Act or Rules requiring person to own cabs / vehicle and liability to service tax would arise so long as cabs are rented either owned or procured.

Transport Solution Group v. CCE, [2014] 33 STR 683 (Tri.-Mumbai)

Outdoor Caterer's Service

46 The Hon'ble High Court held that, supply of food, edibles and beverages to persons using canteen provided by NTPC and LANCO within their own establishment was liable to service tax under Outdoor Caterer Service. It was further held that the fact that the assessee may be paying VAT on sale of goods on supply of food and beverages, would not exclude them from liability of payment of Service Tax in respect of taxable service provided by the assessee as outdoor caterer. It was also held that in view of contrary judicial views, penalty could not be levied.

Indian Coffee Workers Co-op. Society Ltd. v. CCE&ST [2014] 34 STR 546 (All.)

Works Contract Service

47 The assessee entered into two contracts with M/s. Vadinar Power Company Limited and M/s. Essar Power Gujarat Limited. One of the

contracts was for supply of indigenous equipment and materials (supply contract) and the other one for the Construction/Erection/Installation of plant (construction contract). It was the case of the department that both the contracts entered into by the assessee and the service recipients are artificially bifurcated and were required to be considered as one. The Hon'ble Ahmedabad Tribunal observed that, as per the terms of the agreements, there were separate defects liability clause providing separately for defects in balance in plant and defects in working of facility by service provider and the ownership was transferred to service recipient on delivery by supplier at site. It held that, adjudicating authority could not go beyond the C.B.E. & C. Circular No. 150/1/2012, dated 8-2-2012 wherein it was clarified that for the works contract executed before 7-7-2009, free of cost supplies were not required to be added to the gross amount, for the purpose of payment of Service Tax. Further, there was no evidence conveying that both contracts are artificially bifurcated after introduction of explanation to Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Hence, value of supply contract not to be added to value of construction contract.

Essar Projects (India) Ltd. v. CCE [2014] 33 STR 696 (Tri.-Ahmd.)

48 The Hon'ble Supreme Court held that Building Contract was a specie of works contract and in performance of a contract for construction of buildings, goods (chattels) like cement, concrete, steel, bricks, etc. were intended to be incorporated in structure and even though they lost their identity as goods. Hence, they were liable to be taxed under Article 366(29A)(b) of Constitution of India. Taxing sale of goods element in works contract was permissible even after incorporation of goods provided tax was directed to value of goods at time of incorporation and did not purport to tax transfer of immovable property. The explanation introduced in MVAT Act, 2002 taxing building contract is constitutionally valid.

Larsen & Toubro Ltd. v. State of Karnataka [2014] 34 STR 481 (SC)

B] Valuation

49 The Notification No. 12/2003 dated 20/6/2003 exempted the value of goods and materials supplied to the client to the extent the same are supplied in rendering services on the condition of production of documentary proof indicating the value of goods and materials supplied. The Hon'ble Bombay High Court held that this condition did not in any manner mean that the goods have to necessarily be supplied by way of or under invoices and even if the assessee was able to show from the documents i.e. contract read with other documents including its R.A. Bills (Running Account Bills) and returns filed with the Sales Tax Authorities, the value of goods sold and supplied to the satisfaction of the authorities, it would be complying with the condition provided in Notification No. 12/2003 dated 20th June, 2003.

Space Age Associates v. Union of India [2014] 33 STR 372 (Bom.)

50 The Hon'ble Mumbai Tribunal held that reimbursement of out-of-pocket expenses incurred by an advertising agency was includible in the value of taxable services. The assessees were however in the instant case granted cum-tax benefit.

J. Walter Thompson vs. CCE, 2014(33) STR 525 (Tri.-Mum.)

C] CENVAT

51 The Hon'ble Gujarat High Court held that service tax paid on insurance of vehicles provided by the assessee for use by residents of the colony maintained for its workers was not admissible as Cenvat credit since such vehicles were not used for the purpose of the assessee's business.

CCE v. Ultratech Cement Ltd. [2014] 33 STR 501 (Guj)

52 The only point of dispute in this case was as to whether the assessee, a manufacturer of Iron Castings, was eligible for Cenvat credit of Service Tax paid on the insurance premium for insurance of company's vehicles which were being used by senior official of the company from commuting

from the residence to the factory and also for other work of the company. The Hon'ble Tribunal held that the same could not be called welfare activity and were to be treated as activity related to business.

DCM Engineering Products v. CCE & ST, [2014] 33 STR 522 (Tri.-Del)

53 The department sought to reverse the Cenvat credit availed on input services used for providing output service rendered to a SEZ unit / developer. The Hon'ble Mumbai Tribunal held that, in view of retrospective amendment to Cenvat Credit Rules 2004, the assessee was not required to reverse credit availed.

Tata Consulting Engineers Ltd. v. CST, Mumbai [2014] 33 STR 655 (Tri.-Mumbai)

54 The Hon'ble Delhi Tribunal held that there was no dispute that services were received by the assessee. It was also undisputed that the assessee had paid the service tax to the concerned service provider and also the fact that service tax was paid by service provider. Therefore, once service tax element has come to treasury, there is no bar to grant Cenvat credit pertaining to service availed without dispute of use in manufacture.

Sterling Tools Ltd. v. CCE, Delhi-IV [2014] 34 STR 53 (Tri.-Del.)

55 The short issue involved in the appeal filed by the department was as to whether the assessee was entitled to Cenvat credit of Service Tax paid on housekeeping, nursery and Horticulture services availed by it. The Commissioner (Appeals) allowed the credit by following the decision of the Larger Bench of the Tribunal in the case of *Commissioner v. GTC Ltd (2008) (12) S.T.R. 468 (Tri.-LB))* by holding that both the services were integrally connected with the business activity of the assessee. He also observed that much importance was given in keeping environment of factory in proper form. The Hon'ble Delhi Tribunal held that there was no infirmity in view adopted by Commissioner (Appeals).

CCE v. Hero Honda Motors Ltd. [2014] 34 STR 54 (Tri.-Del)

56 The assessee claimed Cenvat credit of service tax paid on the basis of debit notes raised for service tax and value of service provided. The Hon'ble Ahmedabad Tribunal held that, as per Rule 9(2) of Cenvat Credit Rules, 2004 the documents should contain certain essential details for claiming Cenvat credit and the rule did not bar availment of credit on the basis of debit note. If the services on which credit has been taken received and accounted for, credit can be allowed.

CCE v. Shree Chalthan Vibhg Kand Udhyog Sahakari Mandli Ltd. [2014] 34 STR 65 (Tri.-Ahmd.)

57 The assessees were rendering taxable service such as Beauty Parlour Services, Health Club and Fitness Centre service, Internet Cafe, Dry Cleaning and Mandap Keeper Services. They were also rendering exempted / non-taxable services such as hotel accommodation, restaurant and bar services. They availed Cenvat credit of Service Tax paid on certain input services which were utilised both in respect of taxable services and exempted services as per Rule 6(5) of the Cenvat Credit Rules, 2004 ('CCR, 2004'). The department contended that, taking of credit and utilisation of credit are distinct and different and therefore allowing of credit in Rule 6(5) of CCR, 2004 to include only taking of credit and not utilisation. The Hon'ble Mumbai Tribunal held that the purpose and objective of CCR, 2004 was to allow manufacturers / service providers not only to take credit but also to utilise the same and that objective would not be achieved if utilisation of credit allowed was not permitted. There is no reason to interpret 'allow' in narrow and restrictive manner and defeating the object and purpose of the CCR, 2004.

CCE v. Asia Pacific Hotels Ltd. [2014] 34 STR 90 (Tri.-Mumbai)

58 The Hon'ble Delhi Tribunal allowed Cenvat credit of service tax paid on coal shed for storage as the same was constructed for storage of coal required for manufacture of finished goods.

Hi Tech Power & Steel Ltd. v. CCE, [2014] 34 STR 276 (Tri.-Del.)

59 The assessee claimed Cenvat credit on input services used in the manufacture of job worked goods. The department sought to deny the same. The Hon'ble Ahmedabad Tribunal held that the provisions of Rule 6(1) of Cenvat Credit Rules, 2004 could not be invoked for denying Cenvat credit on input services used by the assessee for manufacture of job worked goods under Notification No. 214/86-CE. The job work activity of assessee amounted to manufacture and not providing any service.

JBF Industries v. CCE&ST [2014] 34 STR 345 (Tri.-Ahmd.)

60 The department disallowed credit of service tax paid on GTA service used for transport of two wheelers and spares on the ground that, services of Authorised Service Station and Business Auxiliary Service provided by the assessee had no nexus with the remittance made for GTA Service. The Hon'ble Delhi Tribunal held that input service means any service used by provider of taxable service for providing output service. No precise arithmetic correlation was required between the input and the output service. Tax on GTA service was remitted for transport of two wheelers and spares and this was sufficient and proximate nexus for availing Cenvat credit on GTA service for utilising in output service provided.

Badrika Motors (P) Ltd. vs. CCE&ST [2014] 34 STR 349 (Tri.-Del.)

61 The assessee used Cenvat credit for payment of service tax liability on GTA service under RCM. The department denied the adjustment on the ground that, discharge by manufacturer of excisable goods as deemed service provider without providing actual service was not allowed. The Hon'ble Ahmedabad Tribunal held that credit availed for manufacturing activities could be used for payment of service tax on GTA service, even if input/input services/capital goods were not utilised for providing taxable service.

Panchmahal Steel Ltd. v. CCE&ST [2014] 34 STR 351 (Tri.-Ahm)

62 The assessee claimed Cenvat credit on the basis of Advice of Transfer Debit (ATD) supported by Xerox copies of original invoices. The Hon'ble Chennai Tribunal observed that existence of original invoices, its genuineness and used of goods at the sites was not disputed and after considering the commercial practice necessary for procuring the goods, it held that credit was not deniable for procedural lapse.

Bharat Sanchar Nigam Ltd. v. CCE [2014] 34 STR 378 (Tri.-Chennai)

63 The assessee claimed Cenvat credit of service tax paid on removal of non-excisable coal fly-ash emerging from Captive Power Plant. Electricity generated was consumed captively for manufacture of excisable goods. The Hon'ble Delhi Tribunal held that the captive power plant was unable to operate without removal of ash and such removal was connected with production of power, which in turn having nexus with manufacturing of final product. Therefore, Cenvat credit was admissible.

Ultra Tech Cement Ltd. v. CCE [2014] 34 STR 426 (Tri.-Del.)

64 The assessee while making payments to service providers, withheld part of the billed amount towards performance guarantee. It however took Cenvat credit of full amount of service tax shown on the invoices, while the balance amount was paid much later. The department while applying Rule 4(7) of Cenvat Credit Rule, 2004, disallowed proportionate amount of Cenvat credit to the extent input service payment was retained. The Commissioner (A) relying on Boards Circular No. 122/3/2010-ST dated 30-4-2010 allowed full Cenvat credit as service provider paid service tax on total billed amount including amount not received. The Tribunal held that, the rationale behind Rule 4(7) was to prevent situation where Cenvat credit was availed on the basis of invoice issued by service provider even when service tax not paid by him for reason of delay in receipt of

payment from service recipient. In the present case, Rule 4(7) was not applicable as service tax was paid by service provider on full value, even though part payment was withheld as per terms of contract.

CCE v. Hindustan Zinc Ltd. [2014] 34 STR 440 (Tri.-Del.)

65 The Hon'ble Mumbai Tribunal granted input service credit on the ground that the commission was paid to agent for selling finished goods having direct nexus with business activity.

Klipco Pvt. Ltd. v. CCE [2014] 34 STR 461 (Tri.-Mumbai)

66 The Hon'ble Chennai Tribunal held that accident and medical insurance premium of employees was in relation to manufacturing activity and within the broad definition of input service. However, accident and medical insurance premium for family members of employees did not have any direct nexus with manufacturing activity and therefore, did not qualify as input services. Penalty was deleted on the ground that the dispute was about interpretation of law and there was no mala fide intention on part of assessee.

Sundaram Brake Linings v. CCE [2014] 34 STR 583 (Tri.-Chennai)

67 The assessee, a manufacturer of cement, used clincker and fly ash for manufacturing cement. It availed Cenvat credit of excise duty paid on the inputs and capital goods and Service Tax paid on the input services as per the provisions of the Cenvat Credit Rules, 2004. The assessee purchased fly ash from NTPC's Thermal Power Plant which was located at about 30 km. from its cement plant. The fly ash was generated in the Thermal Power Plant continuously when the coal was burnt. The assessees had installed fly ash extraction plant at the Thermal Power Plant of NTPC which extracted and loaded the same in the bulk trucks by which they were transported to the Cement Plant. Cenvat credit in respect of the services of erection, installation and commissioning, repair and maintenance and insurance of the fly ash extraction plant was availed. The department denied the Cenvat credit on the ground that fly ash extracted by the assessee from the Power Plant was manufactured by them and since the fly ash was exempt from Central Excise duty, as per the provisions of Rule 6(1) of the Cenvat Credit Rules, 2004 the Cenvat credit was admissible. The Hon'ble Delhi Tribunal held that extraction of fly ash generated in Thermal Power Plant could not be said to be manufacture of fly ash by assessee. Hence Rule 6(1) of Cenvat Credit Rule, 2004 could not be applied and therefore, could not be denied credit of service tax on erection, installation & commissioning, repairing and maintenance and insurance of fly ash extraction plant.

Birla Corporation Ltd. v. CCE [2014] 34 STR 589 (Tri.-Del.)

68 The assessee being job worker undertaking re-packing, re-labelling of goods imported by Input Service Distributor ('ISD'), availed Cenvat credit of input service distributed by ISD not being manufacturer himself. The Hon'ble Mumbai Tribunal held that the manufacturer was the job worker undertaking processing of goods supplied by importer and service received by importer/distributor was not input services. The Hon'ble Tribunal further held that definition of ISD also implied office of manufacturer of final product and job worker were separate and independent legal entities not belonging to importer/distributor and not entitled to availment of Cenvat credit distributed by another legal entity as per provisions of Rule 2(m) r.w.s. 7 of Cenvat Credit Rules, 2004.

Sunbell Alloys Co. of India Ltd. v. CCE&C, [2014] 34 STR 597 (Tri.-Mumbai)

69 The assessee availed Cenvat credit of service tax paid on GTA service availed for bringing cement inside the mines for repair/renovation of cavities. The Hon'ble Delhi Tribunal allowed the credit on the ground that mines were to be treated as factory in view of decision of the Apex Court in case of Vikram Cement [2006] 197 ELT 145 (SC).

CCE v. Hindustan Zinc Ltd [2014] 34 STR 609 (Tri.-Del.)

70 The Hon'ble Bangalore Tribunal held that the assessee was not liable to reverse Cenvat credit on inputs written off on 31-3-2007 for Income Tax purposes as requirement for same was introduced for the first time w.e.f. 11-5-2007 by insertion of sub-rule 5(B) of Rule 3 of Cenvat Credit Rule, 2004. Pest Control and AMC for ST plant for sewage disposal, AMC for air conditioners for instrumentation room for testing of products, AMC for computer used for manifold purposes in connection with manufacture and clearance of products were input services and had nexus with manufacture/clearance of excisable goods. Since statutory liability under section 46 of Factories Act, 1948 did not exist in case where assessee did not have more than 250 employees/ workers during material period, assessee was not entitled to claim Cenvat credit of service tax paid on catering service.

ADC India Communications Ltd. v. CCE [2014] 34 STR 637 (Tri.-Bang.)

71 The Hon'ble Delhi Tribunal in the instant case held that Credit of service tax paid on commission agent services availed for procuring orders was eligible as input service.

Seksaria Biswan Sugar Factory Ltd. v. CCE [2014] 33 STR 292 (Tri.-Del.)

72 Goods Transport Agency ('GTA') services (for transportation of inputs) were used in manufacturing as well for resale (trading). The Hon'ble Ahmedabad Tribunal, relying on the decision in Orion Appliances Ltd. vs. CST (2010) 19 STR 205 (Tri.-Ahmd.,) held that a portion of CENVAT credit availed on the GTA services attributable to trading activity was not admissible

Gulf Oil Corpn. Ltd. v. CCE, [2014] 33 STR 298 (Tri.-Ahmd.)

73 The assessee manufactured, erected and installed machines for their clients providing a 6-8 months warranty. The Hon'ble Ahmedabad Tribunal held that repair services availed by the assessee for repairing the machines of its customers during the warranty period was an input service and credit of service tax paid on such services was admissible.

Zinser Textile Systems Pvt. Ltd. v. CCE [2014] 33 STR 301(Tri.-Ahmd.)

74 The assessee was under a statutory obligation under Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1953 to provide shelter and other facilities to its workers. CENVAT credit on various services used in relation to civil construction work of labour hutments, Kisan Shed or dismantling of old structures, etc. was held to be admissible by the Hon'ble Delhi Tribunal.

Bajaj Hindusthan Ltd. v. CCE (Meerut-I) [2014] 33 STR 305 (Tri.-Del.)

75 The assessee, a manufacturer of telecom and allied equipment, sold its shares invested in another telecom company and used Stock Broking services for the same. The Hon'ble Karnataka High Court held that the CENVAT credit of the service tax paid on stock broking services was not eligible since it did not relate to and form part of main business of company.

United Telecoms Ltd. v. CCE [2014] 33 STR 357 (Kar.)

76 The department had sought to deny credit of service tax paid by the assessee as recipient of services on warehousing services availed abroad. The Hon'ble Chennai Tribunal held that no service tax could be levied and collected on such services rendered and received abroad and since tax was not payable, the assessee merely had taken credit of what was not payable by them and accordingly the denial could not be justified.

Sundaram Clayton Ltd. v. CCE [2014] 33 STR 414(Tri.-Chennai)

77 The assessee, a manufacturer had paid service tax as a recipient of foreign commission agent services used for procuring export orders. The Hon'ble Mumbai Tribunal held that CENVAT credit of service tax paid on commission paid to overseas commission agents was admissible.

Century Rayon v. CCE [2014] 33 STR 427 (Tri.-Mum.)

78 The Hon'ble Ahmedabad Tribunal in the instant case held that CENVAT Credit of service tax paid on courier services used for sending samples to the customer or for correspondence between HO and factory was admissible.

Parle International v. CCE [2014] 33 STR 477(Tri.-Ahmd.)

D] Penalty

79 The assessee short paid the Service Tax under Goods Transport Agency services and adjusted the same from excess Service Tax paid, more than the amount specified in Rule 6(4B) of Service Tax Rules, 1994 and also failed to inform the jurisdictional Central Excise Officer (CEO). The Hon'ble Ahmedabad Tribunal held that, the extent of adjustment was permissible up to Rs. 1 lakh and intimation was required to be given to jurisdictional CEO, which was not done. Hence the order of First Appellate Authority was upheld. The penalty under section 76 was set aside by invoking section 80 as there was bona fide belief that entire service tax payable could be adjusted against excess service tax paid.

Rishi Shipping v. CCE, [2014] 33 STR 595 (Tri.-Ahmd)

80 The assessee paid service tax and interest before issuance of Show Cause Notice. The Hon'ble Kolkata Tribunal held that the Commissioner (Appeals) in his order had made a categorical finding that the elements of fraud, suppression, misstatement, etc. were not present. The department had not contested his findings by filing appeal. In view of these facts, the assessees' case was fully covered by the provisions of sub-section (3) of Section 73 of the Finance Act, 1994 and no penalty was attracted.

Sen Brothers v. CCE, Bolpur [2014] 33 STR 704 (Tri.-Kolkata)

81 The assessee had not paid the service tax due to certain financial crisis. The department sought to levy penalty under section 76 of Finance Act, 1994 for failure to pay service tax. The Hon'ble Delhi Tribunal deleted the penalty on the ground that there was no allegation of non-payment due to fraud or with intention to evade tax.

Ralson Carbon Black Ltd. v. CCE, [2014] 34 STR 227 (Tri.-Del.)

82 The Hon'ble Delhi Tribunal held that since service tax along with interest and penalty had been deposited by assessee, the proceedings were deemed to be concluded. Accordingly, in view of the Tribunal there was no requirement for imposition of separate penalties under sections 76 and 77.

CCE v. Sojatia Auto (P) Ltd. [2014] 34 STR 234 (Tri.-Del.)

83 The assessee had belatedly taken registration. It paid service tax and filed returns after being pointed out by the department but before the issue of show cause notice. It had also paid the late fees for filing returns in advance. The Hon'ble Ahmedabad Tribunal held that case was squarely covered under section 73(3) and therefore, penal provisions under section 78 could not be attracted.

Subin Telecom v. CCE [2014] 34 STR 389 (Tri.-Ahmd.)

84 The assessee had failed to pay service tax as a recipient of service under section 66A of the Act on the ground that the constitutional validity of said section was challenged before many courts. The Hon'ble Ahmedabad Tribunal held that the same could not be considered as a bona fide belief entertained by it and accordingly imposition of penalty was held to be justified.

Rikin Industries v. CST [2014] 34 STR 252 (Tri.-Ahmd.)

85 The assessee had misinterpreted the provisions and had not paid service tax on the repair services provided by it under a rate contract on the belief that only maintenance contract were liable for service tax under the category of Maintenance and Repair Services and there had been Tribunal decisions upholding such view. The Hon'ble Delhi Tribunal held that there was a reasonable cause as envisaged under section 80

and hence no penalty under section 76 or 78 was imposable.

CCE v. Anand Transformers (P) Ltd., [2014] 33 STR 314 (Tri.-Del.)

86 The assessee had not obtained service tax registration or made payment of service tax since it bona fide believed, based on its own interpretation, that it was covered under a particular exemption notification. The Hon'ble Delhi Tribunal held that the said conduct of assessee could not be treated as deliberate violation of the provisions of the Act and hence no penalty under section 78 was imposable. Further, in view of the above fact there being a reasonable cause under section 80, imposition of penalty under section 77 was also not warranted.

CCE v. JAS Enterprises [2014] 33 STR 340 (Tri.-Del.)

87 The assessee had paid service tax before the issuance of show cause notice. The Hon'ble Delhi Tribunal, relying upon the judgment of Auto World [2010 (18) STR 5(All)], deleted the penalty under section 76 and 78.

BAS Engineering Pvt. Ltd. v. CST, [2014] 33 STR 452 (Tri.-Del.)

88 Where the assessee was under a bona fide belief that the reimbursable expenses are not to be included in the assessable value, the Hon'ble Tribunal in view of the provisions of section 80 of the Finance Act, set aside the penalties levied.

J. Walter Thompson v. CCE, [2014] 33 STR 525 (Tri.-Mum.)

E] Others

Appeal

89 The Hon'ble Madras High Court held that as per Section 85(3) of the Finance Act, 1994 appeal had to be filed within three months from date of receipt of a copy of order. A further period of three months was available, under proviso to Section 85(3) of the Act, for condoning delay in filing of appeal. After the said period, there was no provision in the Act, or in the Rules framed thereunder, for condonation of delay in filing of appeal. Therefore, the petition of the assessee was dismissed.

JMJ Constructions v. ACCE, [2014] 33 STR 496 (Mad)

90 The assessee in this case became aware of the order when the recovery proceedings were initiated by range office. Thereafter he obtained a certified copy and filed an appeal within condonable period of three months after expiry of statutory time limit. The Hon'ble Mumbai Tribunal held that there was merit in assessee's contention and delay was ought to be condoned.

D.R. Meghe v. CCE [2014] 34 STR 396 (Tri.-Mumbai)

91 The Hon'ble Gujarat High Court held that an appeal could not be filed in the High Court by the Revenue if the amount involved was less than 10 lakhs in view of the C.B.E. & C. Circular No. F. No. 390/Misc./163/2010-JC dated 17/8/2011.

CCE v. Fine Care Bio Systems, [2014] 33 STR 237 (Guj.)

92 The Hon'ble Tribunal held that there was no provision for appeal to Tribunal against a revision order passed after 19/8/2009 by the Commissioner of Service Tax under Section 84 of the Finance Act, 1994.

Arjun Tours & Travels Pvt. Ltd. v. CST [2014] 33 STR 413 (Tri.)

93 The Hon'ble Chennai Tribunal held that though there was no period of limitation prescribed for filing application for restoration of Appeal, it should be filed within the maximum period of 3 months from the dismissal of appeal.

Bharati Airtel Ltd. v. CCE, [2014] 33 STR 524 (Tri.-Chennai)

Demand

94 The department issued a show cause notice seeking to levy service tax on the assessee's activity of laying of cables under the category of Repairs and Maintenance services without mentioning therein the description, scope and details of work undertaken by the assessee. The Hon'ble Tribunal

held that confirmation of demands, under such show cause notice was incorrect.

CCE v. Sanjeev Kumar Jain [2014] 33 STR 312 (Tri.-Del.)

Export of services

95 Before the Hon'ble Bangalore Tribunal, the assessee contended that the Notification No. 21/2003-ST which related to export of services implies reinstatement of the benefits of Notification No. 6/99-ST and therefore, was clarificatory and retrospective in nature. The Hon'ble Tribunal held that, the subject notification was issued as an independent notification granting benefit of exemption from service tax on taxable service for which consideration was received in convertible foreign exchange. It was not related to rescission of Notification No. 6/99-ST. Further during interregnum between recession and issue, no clarification was provided disclosing consistent policy in favour of provider of taxable service, and therefore, the appeal filed by the assessee was rejected.

Momentum Strategy Consultants P. Ltd. v. CST Bengaluru [2014] 34 STR 201 (Tri.-Bang.)

96 The Hon'ble Bangalore Tribunal held that the order in appeal limiting the refund claim under Notification No. 5/2006-ST subsequent to 14-3-2006 was not sustainable in view of Bombay High Court decision in case of WNS Global Service (P) Ltd. [2011] 22 STR 609 (Bom.). It further held that date on which consideration was received, whether in part or full or advance was the date to form basis for calculation of date of export.

Business Process Outsourcing (I) Pvt. Ltd. v. CC&ST [2014] 34 STR 364 (Tri.-Bang.)

97 The overseas branch of the assessee availed services from sub contractors located outside India for rendering services to overseas clients. The assessee allotted certain export earnings to overseas branch for the payments to subcontractors abroad. The Hon'ble Tribunal observed that overseas branch office and Indian head office were separate taxable persons for the purpose of reverse charge mechanism and held that since the services was not received outside India by overseas branches there would not be any service tax liability on the Indian head offices.

Infosys Ltd. v. CST [TS-64-Tribunal-2014-Bang]

98 The assessee provided advertising agency services to the foreign service recipients for advertisements displayed in India during the period 1/3/2003–19/11/2003. The Hon'ble Mumbai Tribunal held that the assessee was liable to pay service tax in absence of any exemption notification during the said period.

J. Walter Thompson v. CCE, [2014] 33 STR 525 (Tri.-Mum.)

Limitation

99 The Hon'ble Mumbai Tribunal held that mere failure to register with the department and pay service tax by itself could not amount to suppression unless the same was with an intent to evade payment of service tax.

I2IT Pvt. Ltd. vs. CCE [2014] 34 STR 214 (Tri.-Mumbai)

100 The Hon'ble Mumbai Tribunal held that where there were divergent views regarding taxability of reimbursable expenses, the extended period of limitation was not invokable.

J. Walter Thompson v. CCE, [2014] 33 STR 525 (Tri.-Mum.)

101 The department invoked the extended period of limitation for denying CENVAT credit on the grounds that the assessee had not shown availment and use of credit in respect of different input services. The Hon'ble Delhi Tribunal held that the extended period of limitation was not invokable since the assessee was not required to disclose the amount of credit availed in respect of different services in its return and the total CENVAT credit availed by it had been reflected in its returns. Hence in absence of any mala fide on part of the assessee, extended period of limitation could not be invoked.

Bajaj Hindusthan Ltd. v. CCE [2014] 33 STR 305 (Tri.-Del.)

Interest

102 The assessee had collected Rs. 2.59 Cores of Service Tax during the period 2010-2011 to 2013-2014 but had not deposited the said amount except Rs. 15 Lakhs. The assessee had in fact never filed any service tax returns and as such knowingly utilized the Government monies for his personal use. The assessee collected the amount of service tax before the arrest provisions under section 89 came into i.e. with effect from 10-5-2013 which was more than 50 lakhs and after that, less than this amount. The assessee was arrested on 22-1-2014 for not depositing service tax of 2.39 crores despite collecting it from customers. The Hon'ble Bombay High Court held that, the offence was continuing and hence entire outstanding amount to be deposited with Government had to be considered. Arrears as on 10-5-2013 had to be taken into account while calculating limit of 50 lakhs stipulated by section 89(1)(d) (ii). It further held that, as on 10-5-2013 and on arrest of assessee, there were huge outstanding liabilities and hence, it was not a case in which assessee could be released on bail especially when investigation was going on.

Kandra Rameshbabu Naidu v. Superintendent (AE) ST, [2014] 34 STR 16 (Bom.)

Refund

103 The Hon'ble Delhi Tribunal in the instant case held that section 11B was made applicable for refund claim under Rule 5 of Cenvat Credit Rule, 2004 as per condition no. 6 of Notification No. 5/2006-CE(NT). It thus held that in case of export of service, export was complete when foreign exchange was received in India and therefore the relevant date was date of receipt of foreign exchange.

Bechtel India Pvt. Ltd. v. CCE [2014] 34 STR 437 (Tri.-Del.)

104 The assessee filed a refund claim on 4-3-2009. After receiving deficiency memo, a complete refund claim in all respects was filed on 26-3-2009. The Hon'ble Mumbai Tribunal held that interest on refund commenced from three months after the date of removal of deficiency claim i.e. from 26-3-2009 till the date of receipt of refund.

State Bank of India v. CST [2014] 34 STR 579 (Tri.-Mumbai)

105 The assessee deposited service tax in respect of advance received, however the said services were ultimately not provided on account of cancellation of an agreement. The assessee refunded the entire advance received along with service tax. It claimed refund of service tax refunded from the department. The Hon'ble Delhi Tribunal held that denial of refund on the sole technical ground that same was not shown in Balance Sheet as receivable from the department could not be held to be just and fair. Irrespective of non-reflection of tax amount in balance sheet, the same was required to be refunded inasmuch as the same was not required to be paid by the assessee.

Radico Khaitan Ltd. v. CST [2014] 34 STR 586 (Tri.-Del.)

106 The assessee, a registered service provider, paid service tax on the finance charges collected from their customers during the period from July 2001 to August 2004 inadvertently. It claimed refund of the same under section 11B of Central Excise Act, 1944. The Adjudicating Authority allowed the claim, however in revisionary proceedings order passed that claim could only be partly allowed, as balance was barred by limitation. The said order was upheld by the Tribunal. On appeal, the Hon'ble Karnataka High Court held that by invocation of section 11B, the assessee chose the forum for claiming refund, when once the period of limitation was prescribed under the Act, the provisions of the General Law stand excluded. Amount of tax not having been paid under protest, any payment of which refund sought, same had to be done within 1 year of the date of payment. Since claim for refund was not made within the period prescribed under the Act, order of the Hon'ble Tribunal was in accordance with law.

MCI Leasing (P) Ltd. v. CCE, [2014] 33 STR 497 (Kar)

107 The assessee claimed refund of amount of service tax paid on amounts but not realised by them. The Hon'ble Bangalore Tribunal held that under service tax law, liability to pay service tax arose only when money consideration was received and there were no provisions for recovery of service tax if money consideration was not received. Further, it was held that since the amounts not received had been written off in books of accounts and a CA certificate was produced to that extent, the assessee was eligible for the refund.

CCE v. Tata Tele Services Ltd. [2014] 34 STR 43 (Tri.-Bang)

108 The Hon'ble Bangalore Tribunal held that in absence of any statutory provision in the CENVAT Credit Rules, 2004, requiring mandatory registration for claiming refund of unutilised CENVAT credit under Rule 5 of the said rules, denial of refund on account of nonregistration was incorrect.

CST v. Aviva Global Services (Bang.) P. Ltd [2014] 33 STR 270 (Tri.-Bang.)

109 The assessee had exported goods after 7/7/2009 but prior to issuance of Notification No. 17/2009 dated 7/7/2009 but had claimed refund of service tax paid on input services used in manufacture of exported goods within a period of 1 year from the date of export under the above notification. The Hon'ble Delhi Tribunal held that the refund claim was admissible although prior to 7/7/2009 as the time limit was 6 months

Soccer International Pvt. Ltd. v. CCE [2014] 33 STR 334 (Tri-Del.)

Remand

110 The Commissioner (Appeals) settled the substantive issue of refund claim and sent the matter back to the lower authority for re-quantification of amount of refund. On appeal, the Hon'ble Tribunal held that the order does not amount to remand as substantive issue was settled by the appellate authority itself.

CCE v. Outsource Partners Interational P. Ltd. [2014] 34 STR 399 (Tri.- Bang.)

111 The assessee in the present case had not disclosed the value of service and service tax in its invoice separately and had paid service tax on a cum-tax basis. Subsequently it filed a refund claim which was rejected on the grounds of unjust enrichment. On appeal to the Hon'ble Bangalore Tribunal, it was held that section12A and 12B of Central Excise Act were applicable to refund claims and accordingly by virtue of section12A the assessee was required to indicate the amount of service tax forming part of value of taxable service and in absence of same by virtue of section12B the assessee will be deemed to have passed full incidence of tax to the recipient. Hence denial of refund by the department was held to be correct.

Trade Vision India Pvt. Ltd. v. CST [2014] 34 STR 280 (Tri.-Bang.)

112 The assessee had during the course of adjudication paid the amount of duty demanded under protest through CENVAT credit. Subsequently, on appeal when the demand was dropped it claimed refund of the tax paid in cash since by then it had surrendered its registration. On the above facts the Hon'ble Delhi Tribunal held that under the scheme of CENVAT credit there was no provision for granting cash refund of accumulated CENVAT credit & hence denial of refund in cash was justified

Lavkush Textiles v. CCE [2014] 34 STR 313 (Tri.-Del.)

Show Cause Notice

113 The Hon'ble Karnataka High Court held that unless the imposition of service tax under a particular category of service was not proposed in the show cause notice, imposition under that head was not permissible.

CCE & C v. Mahakoshal Beverages Pvt. Ltd. [2014] 33 STR 616 (Kar)

Others

114 The Hon'ble Allahabad High Court in this case held that Rule 5A(2) enables conduct of special audit stipulated under section 72A of Finance Act, 1994. In case of private assessees, for the purpose

of audit, the material can be collected either by the officer authorized by the Commissioner or by the Auditor himself. However, audit would be performed only by the Chartered Accountant. It was the duty of the assessee to make available record stipulated in Rule 5A i.e. trial balance or its equivalent; and the Income-tax audit report, if any, under Section 142(2A) of the Income Tax Act, 1961, for the scrutiny of the officer or the Audit Party, as the case may be. The Hon'ble High Court held that there was no inconsistency in Rule 5A and Section 72A of the Finance Act, 1994. The said provision was not arbitrary. The manner for conducting the audit was as per the accounting standard provided by the Institute of Chartered Accountant of India. The audit report would be made available to the assessee, as per law.

ACL Education Centre (P) Ltd. v. UOI [2014] 33 STR 609 (All.)

115 The assessee were engaged in re-rubberisation of old, worn out rubberised rollers of various industries. The customers sent them their used rollers at random and re-rubberisation comprised removing the old rubber from spindle and replacing it with the fresh rubber compound coating. Investigations were taken by the officers of DGCEI. During the course of investigation various records/documents maintained by the assessees were examined by the officers of DGCEI and statements of various employees/Directors of the assessees were recorded to ascertain the facts whether re-rubberisation undertaken by the assessees on behalf of their customers was classifiable under the category of 'Management, Maintenance or Repair' Services or under the category of 'Business Auxiliary Services' as defined under the Finance Act. The Hon'ble Tribunal held that the activities of the assessees are equally classifiable under two services namely Business Auxiliary Service and Maintenance or Repair service. Since the service cannot be classified under clause 'a' and 'b' of Section 65A, clause 'c' of Section 65A is attracted according to which service is classifiable under the sub-clause of Clause (105) of Section 65 which comes first. Since Business Auxiliary Services came first, the said services were classifiable under Business Auxiliary Services.

Zenith Rollers Ltd. v. CCE, Noida [2014] 33 STR 678 (Tri.-Del.)

116 Relying on the judgment in the case of WNS Global Services (P) Ltd. [2008] 10 STR 273, the Hon'ble Chennai Tribunal held that in respect of refund under Notification No. 41/2007-ST, the amended provisions as applicable on the date of filing claims were to be applied.

Faizan Shoes Pvt. Ltd. v. CST [2014] 34 STR 205 (Tri.-Chennai)

117 The assessee defaulted to discharge the first installment due on or before 31 December 2013 under the Voluntary Compliance Encouragement Scheme. The Hon'ble Tribunal held that the option of payment of the first installment alongwith interest was available till 31 December 2013 and not 31 December 2014. Further in case of default the department could take recourse specified under the scheme but could not initiate prosecution on the assessee.

Parijat Vyappar Pvt. Ltd. & Anr. v. UOI [2014-VIL-107-CAL-ST]

118 The Hon'ble High Court observed that the Constitution of India under Article 366 (29A) does not indicate that the service portion is subsumed in the sale of food, rather it separates the sale of food and drinks from service and therefore, the Parliament was constitutionally competent to charge service tax on such service portion. It also held that no VAT to be charged on the service portion which has already been subjected to tax.

Hotel East Park& Anr. v. UOI & Ors. [TS-159-HC-2014-CHAT-ST]

119 The Hon'ble Tribunal relying on various judicial precedents held that once the fact that

amount of service tax has been deposited by the provider of Goods by Roads Services ('GTA'), has been accepted by the department, it could not be demanded separately from the recipient of GTA Services.

Umason Auto Compo Pvt. Ltd. v. CCE&C [2012-TIOL-126-CESTAT-MUM]

120 The Hon'ble Mumbai Tribunal held that in view of section 2(7) of Sales of Goods Act 1930, mutual funds were goods and accordingly, benefit of Notification No. 13/2003-ST was available to a commission agent of mutual funds. For this, it relied on the decision of the Hon'ble Andhra Pradesh High Court in the case of Karvy Securities Ltd. [2006] 2 STR 481 (AP).

CCE v. Christopher John Louzado [2014] 34 STR 395(Tri.-Mumbai)

121 The Hon'ble Mumbai Tribunal held that Notification No. 1/2006-ST was not stipulating any condition for non-availment of Cenvat credit to be satisfied uniformly in all cases without exception. In view thereof the assessee was rightly entitled to benefit under impugned notification for contracts where input credit not taken prior to 1-3-2006 and input/input service tax where credit on or after 1-3-2006. Further, the notification was not stipulating for uniform exercise of option to avail/ non-avail Cenvat credit for all contracts executed by assessee. It was also held that, discharge of service tax liability through accumulated Cenvat credit on nonabated portion of value was a totally different matter and there was no bar/restriction, so long as credit taken on inputs, capital goods or input services used in rendering service in contract.

Bharat Heavy Electricals Ltd. v. CCE [2014] 34 STR 430 (Tri.-Mumbai)

122 The Hon'ble Tribunal held that financial services provided by SBI Capital Market Ltd. in respect of techno-economic feasibility of rehabilitation and modalities of finance had nexus with manufacturing business covered by activities relating to business.

Jenson & Nicholson (India) Ltd. v. CCE, Noida [2014] 34 STR 596 (Tri.-Del.)

123 The Hon'ble High Court held that in terms of Voluntary Compliance Encouragement Scheme, the subject matter of declaration should not be pending adjudication for the period for which declaration is made under the scheme. It further held that pendency in relation to subject matter pertaining to the period prior to the subject period cannot be ground for rejecting the declaration made by the assessee.

Frankfinn Aviation Services Pvt. Ltd. v. VCES [2014-VIL-89-DEL-ST]

124 The assessee, an airlines company, received services from foreign based Computer Reservation System ('CRS') companies. The foreign based CRS companies facilitated sale of flight seats of the assessee through an online computer system. The CRS software accesses the assessee's database and display information of flight details, availability of seats on real time basis to the assessee and travel agent. The payment was made to CRS companies by the assessee. The Hon'ble Tribunal observed that the assessee not only transmitting data to CRS companies but also retrieving the data with regards booking/cancellation of air tickets and passenger details by accessing the computer system of CRS companies to generate passenger name record and passenger manifest. Therefore, such services are classifiable under Online information and database access or retrieval services. Accordingly it was held that the assessee is liable to pay service tax under reverse charge mechanism on the services received.

Jet Airways (I) Ltd. v. CST [2014-TIOL-473-CESTAT MUM)

ALLIED LAWS

Ajay R. Singh

1. Administrative Law – Government Action – Has to be defended on basis of order passed – Cannot improve its stand by filing affidavits

Government action has to be defended on basis of order passed Government cannot improve its stand by filing subsequent affidavits.

Dipak Babaria v. State of Gujarat & Ors. AIR 2014 SC 1792

2. Contract for sale of immovable property – Time whether essence of contract – Time fixed for payment of consideration

Time being of the essence for the sale deed to be executed has not to be confused with the time schedule under an agreement to sell, if before the execution of the sale deed a time is stipulated for further payments to be made. The time fixed for further part sale consideration to be paid, is reflective of the intention of the parties that it was of the essence of the contract that by the agreed fixed date a further amount would be paid.

Syed Aijaj Hasan v. Malik Mohammed Tahseen AIR 2014 Delhi 104

3. Interpretation of Statutes – Reading down of Statute – When permissible

Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the `reading down' doctrine can be summarised as follows.

Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the Courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality.

Classification or categorisation need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorisation are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action.

Dr. Subramanian Swamy & Ors v. Raju Thr. Member, Juvenile Justice Board & Anr. AIR 2014 SC 1649

4. Interpretation of Statute – External aids – Title of Act – Aid to understand general scope of Act

The title of a statute is no doubt an important part of an enactment and can be referred to for determining the general scope of the legislature. But the true nature of any such enactment has always to be determined not on the basis of the label given to it but on the basis of its substance.

Amarendra Kumar Nohapatra & Ors v. State of Orissa & Ors. AIR 2014 SC 1716

5. Rule of precedent – And rule of *per incuriam* – Essential to maintain consistency of rulings – Constitution of India Article 141

The discipline demanded by a precedent or the disqualification or diminution of a decision

on the application of the *per incuriam* rule is of great importance, since without it, certainty of law consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be *per incuriam* if any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgement of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of Supreme Court. The *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*.

Sundeep Kumar Bafna vs. State of Maharashtra & Anr. AIR 2014 SC 1745

6. Evidence – *Sabik* and *Halmaps* – Evidentiary value – Public document

Printed copies of Maps purchased from Govt. officers on payment of requisite fees constitutes public document though it did not contain certificate with seal and signature.

Biseswar Dandpat v. Saraswati Dei and AIR 2014 Orissa 97

7. Will – Execution of Will – Validity : Evidence Act. Sectin 68

The Registered Will signed before sub-Registrar by testatrix in presence of two attesting witnesses. One attesting witness examined and proved execution – contents of Will read by sub-Registrar before testatrix, educated lady, who showed agreement. Testatrix normal, well balanced and smiling at time of execution. She was not suffering from any mental depression of any kind. Beneficiaries took care of testatrix and helped her in medical treatment. Testatrix lived for about 4 years after execution when she could have changed her mind but she did not. Will executed by free will in sound disposing state of mind. Will held to be validly executed.

Mrs. Joyce Cynthia Prabhakar & Anr. AIR 2014 (NOC) 252 (All.)

8. Evidence – Unregistered Partition deed – Not stamped

A unregistered partition deed which is not properly stamped is not admissible in evidence under Ss. 17 and 49 of Registration Act. Document already held as inadmissible, seeking expert opinion to prove signature of executants, not necessary.

Amar Singh v. Bhojram Son of Hiraram adopted Son of Bhaiyalal AIR 2014 (NOC) 167 (Chh.)

FULL DAY NATIONAL SEMINAR on DIRECT & INDIRECT TAXES AT ANAND

All India Federation of Tax Practitioners (WZ) and The Anand VAT (Sales Tax) Bar Association along with All Gujarat Federation of Tax Consultants, The Gujarat Sales Tax Bar Association and Central Gujarat Chamber of Tax Consultants cordially invite you to "Full Day National Seminar" on Direct & Indirect Taxes, at the Elecon Hall, G.I.D.C., Vithal Udyognagar, Anand. The seminar is scheduled on 6th September, 2014 (Saturday) to enable all the professional brothers and corporate executives to attend.

PROGRAMME

Saturday 6th September 2014

10.00 AM to 10.30 AM	–	Registration & Breakfast
10.30 AM to 11.15 AM	–	Inauguration
11.15 AM to 11.20 AM	–	Break
11.20 AM to 12.25 PM	–	**Technical Session 1**
		Topic – Income Tax (Capital Gains) Section 50C
		Paper Writer – Mr. Jigar M. Patel, Advocate, Ahmedabad
		Chairman – Mr. Vipul Joshi, Advocate, Mumbai
12.30 PM to 1.30 PM	–	**Technical Session 2**
		Topic – Service Tax (Construction & Men Power Recruitments)
		Paper Writer – Mr. Shailesh Sheth Advocate, Mumbai
		Chairman – Mr. M.L. Patodi, Advocate, Kota
1.30 PM to 2.30 PM	–	Lunch Break
2.30 PM to 3.45 PM	–	**Technical Session 3**
		Topic – VAT Tax (Composition of Tax under VAT Act)
		Paper Writer – Mr. Uchit N. Sheth, Advocate, Ahmedabad
		Chairman – Mr. K. H. Kaji, Advocate, Ahmedabad
3.45 PM to 4.00 PM	–	Tea Break
4.00 PM to 5.30 PM	–	**Brains Trust** (As per the posers received from the members and in open forum)
		Income Tax – Mr. Upendra Bhatt, Advocate, Ahmedabad
		Service Tax – CA Amish Khandhar, Ahmedabad
		VAT Tax – Mr. Nayan Sheth, Advocate, Ahmedabad
		Chairman – Mr. K. H. Kaji, Advocate & CA. Ashwin C. Shah
5.30 PM to 6.30 PM	–	High - Tea
7.30 PM	–	Cultural Programme LOK DAYRO, Dr. Nirmaldan Gadhavi

For more details please visit aiftp website www.aiftponline.org or contact
Mr. Vipul B. Joshi, Chairman, AIFTP (WZ) Mobile No. 9820045569
Ajay Shah, Seminar Chairman, Mobile No.: 9426033929

Research Team


Aarti Sathe


Ajay R. Singh


Aliasger Rampurawala


Aasifa Khan


Beena Pillai


Dhanesh Bafna


Jitendra Singh


Kalpesh Turalkar


Ketan Ved


Neelam Jadhav


Nikhil Ranjan


Paras Savla


Preeti Shukla


Prem Chandra Tripathi


Rahul Hakani


Rahul Sarda


Sameer Dalal


Sanjukta Chowdhury


Sunil Moti Lala

Editorial Team


Arati Vissanji


D. H. Joshi


H. N. Motiwalla


Janak Vaghani


Keshav B. Bhujle


M. Subramaniam


Subhash Shetty